

**Options for a ministerial decision on Departmental Ownership of an Infected
Blood Compensation Scheme**

Summary

1. The Government commissioned the Infected Blood Inquiry ('the Inquiry') to examine the circumstances that led to individuals being given contaminated blood and blood products in the UK. DHSC (as policy lead) and the Cabinet Office (as Sponsor Department) are preparing to respond to the final report of the Inquiry, due in the autumn. However, on compensation Sir Brian Langstaff has made clear that his second interim report is his 'final word' on the issue. In his statement, the Minister for the Cabinet Office emphasised responding to the final report but stressed that it did not preclude earlier action and that all recommendations were being examined (this includes the proposal for a second interim payment to be made to those affected). The CO are considering the set up and administration of a compensation scheme for victims of infected blood. This follows the Second Interim Report published by Sir Brian Langstaff, Chair of the Inquiry on 5 April 2023, regarding the recommended framework for a compensation scheme.
2. The Minister for the Cabinet Office requested a paper to explore the options regarding the **departmental ownership of a compensation scheme for victims of infected blood**. We have outlined the advantages and barriers to the departmental ownership of a compensation scheme, as well as setting out who the Accounting Officer (AO) would need to be under each of the options.
3. **This paper sets out options to inform a Ministerial decision on departmental ownership.** The options outlines are as follows:
 - a. Department for Health and Social Care (paras 15-21);
 - b. Cabinet Office (paras 22-25);
 - c. Other government departments (paras 26-29);
 - d. Non-departmental (paras 30-32); and
 - e. Hybrid Approach (paras 33-40).

Context

4. During the 1970s and 1980s thousands of UK patients contracted HIV, hepatitis viruses, or both, from contaminated blood or blood products administered by the state. Following a number of legal challenges, pressure from campaign groups, and Parliamentarians, the then Prime Minister, Theresa May, announced a public inquiry into the matter on 11 July 2017. The Inquiry, chaired by Sir Brian Langstaff, was set up to examine the circumstances that led to individuals being given contaminated blood and blood products in the UK.
5. In 2021, the Government commissioned Sir Robert Francis KC to produce a study in anticipation of a recommendation from the Inquiry to set up a compensation scheme. Sir Robert delivered the study to the Government in March 2022 and the study was subsequently published in June 2022. Prompted by Sir Robert's report, Sir Brian published the first interim report of the Infected Blood Inquiry in July 2022, which included a recommendation for interim payments. In October 2022, the Government paid £100,000 in interim compensation payments to those infected individuals or their

bereaved partners already registered with existing support schemes. On 15 December, the Minister for the Cabinet Office made a statement to Parliament formally accepting the moral case for compensating victims of infected blood (Recommendation 1), and confirmed that work was ongoing in consideration of Sir Robert's other recommendations.

6. In April 2023, the Inquiry published its second interim report, with recommendations for a compensation framework. Sir Brian recommended that *"a compensation scheme should be set up now, and that it should begin work this year."* While Sir Robert's study proposed a scheme delivered locally in each of the four nations as this was the preference of the victims, Sir Brian recommended delivery by a central body alongside continued support from the existing Infected Blood Support Schemes (IBSS).
7. Following the publication of Sir Robert's Compensation Study, agreement was reached between DHSC and the CO, that Sir Robert's recommendations would be divided between the departments for delivery. DHSC has taken responsibility for developing policy regarding the eligibility criteria and scope of compensation, recommendations 1 - 3, 5 - 11 and 12 - 15. CO has taken responsibility for developing policy regarding recommendations relating to the administration and delivery of a compensation scheme, recommendations 4, 11, 16, 17, 18 and 19. Agreement has not yet been reached regarding the ownership of the recommendations laid out in Sir Brian's second interim report or of the ownership of delivering a compensation scheme and payments.

Accounting Officer

8. The appointment of the AO would follow the primary decision on departmental ownership. The AO would then be responsible to Parliament on resources and make final decisions on value for money of any chosen delivery mechanism.
9. Each organisation in central government must have an AO who is personally accountable to Parliament for managing the estimate for departmental spend. AO responsibility for the department's spend and its administration are inseparable as the AO requires enough control for accountability over spend to be meaningful. The Treasury appoints the permanent head of each central government department to be its AO.
10. In turn the principal AO of each department is typically responsible for appointing AOs of executive agencies; AOs for all other ALBs (including NDPBs); and at their discretion AOs for defined part(s) of the department's business.
11. The role of the AO is to scrutinise policy proposals to assess whether they measure up to the following standards:
 - Regularity;
 - Propriety;
 - Value for money; and
 - Feasibility.

Spending Power

12. Departments should ensure that both they and their ALBs have adequate legal cover for any specific actions they undertake. This legal cover can be obtained by establishing a spending power in primary legislation.
13. Given the expected scale of payments and timescales recommended by Sir Robert and Sir Brian, if adopted, the legislation would be needed to regularise the compensation

scheme (this could be done through new legislation, or by relying on existing health legislation, depending on the design of the scheme).

14. There is an option to deliver a compensation scheme via existing health legislation. A scheme established under s.2 and 28 of the NHS Act would allow for payments to be made through Special Health Authorities (SpHAs) on a devolved basis. This would require working with the devolved administrations who would manage the administration of the scheme in Scotland, Wales and Northern Ireland. A UK-wide compensation scheme would require new legislation to regularise payments.
15. In addition, the estimates process would need to be applied for the compensation scheme via an HMT money bill as it has not been included in any estimates to date, and implementing the compensation scheme would take spending beyond authorised limits.
16. Setting out the scheme in legislation would provide clarity and transparency, and adhere to recommendations set out by Sir Brian. We expect setting the compensation scheme out in statute would potentially reduce judicial review challenges and their success, should the scheme be considered fair, appropriate and adhered to.

Independence

17. Sir Robert and Sir Brian have recommended that the independence required for the compensation scheme can be granted through an ALB. However it is not clear how far a department responsible for the ALB would impact on the infected blood community's reception of the scheme if it is given independence.
18. ALBs are responsible to their sponsoring departments for their use of financial resources and performance and enjoy varying degrees of autonomy subject to their legal / administrative basis. The ability of an ALB to operate independently and the perception of independence are separate considerations that may not be sufficiently understood by stakeholders.
19. Legislation can set out the level of autonomy afforded to an ALB. The highest level of autonomy would be, as recommended by Sir Brian and Sir Francis, for the ALB report directly to Parliament, this could be set out in the legislative obligations of the ALB. Administrative functions, such as determining the AO, would then follow.

Options

Option a: Department for Health and Social Care

20. As a health-related matter, the DHSC holds responsibility for the infected blood policy area. DHSC and its predecessors held responsibility for blood and health related policy in the 1970s and 1980s when the issues emerged and, in recognition of this, are named as subject to particular scrutiny in the Inquiry's Terms of Reference.

Advantages of DHSC ownership

21. As lead on health policy, DHSC officials have the most relevant policy and analytical knowledge and expertise to set up a compensation framework. The delivery expertise for England sits entirely with English IBSS (EIBSS) which sits at arms-length in NHS Business Services Authority (NHS BSA). If the recommendations on independence from Sir Brian and Sir Robert's reports are set aside, DHSC is where policy related to infected blood (including a compensation scheme) would sit.

22. DHSC provides the existing support for victims of infected blood. The IBSS provides annual support payments to those infected and bereaved partners across the UK. These schemes are managed separately by the devolved administrations in Scotland, Wales and NI and were utilised to provide the interim compensation payments to those already registered as recipients of support. The existing structures could be expanded to host a more substantial compensation framework. The current IBSS delivery bodies have knowledge and established relationships with those receiving compensation, which could support a more expedient and efficient delivery of compensation. DHSC would still need significant additional resources if they were to establish and oversee such a body.
23. DHSC manages compensation paid by the NHS through SpHAs such as NHS Resolution and NHS BSA, and their devolved equivalents. Sections 2 and 28 of the NHS Act 2006 (in conjunction with sections 2, 7 and 8 of that Act) would allow for the DHSC Secretary of State to set up a new SpHA to administer a compensation framework or to amend the establishing statutory instruments of an existing SpHA and direct it to make compensation payments. It should be noted that this would not provide the basis for a UK-wide compensation scheme as health is a devolved matter, so work would still be required to ensure parity across the four nations.

Barriers to DHSC ownership

24. The strength of feeling in regard to the community's distrust of DHSC is not to be underestimated, it is likely that many/most of the infected blood community would find a compensation scheme administered by DHSC unacceptable. Sir Brian explicitly outlined this argument in the Second Interim Report, *"the scheme should not be administered directly or indirectly by the Department of Health and Social Care or its equivalent in any of the four nations of the UK."* DHSC Ministers do not think they should host an ALB.
25. It could be argued that the decision to set up a scheme within or sponsored by DHSC may contribute to significant numbers refusing to participate in the scheme from the community, undermining the Government's aim of issuing compensation. Depending on the generosity of the scheme this could lead to a significant increase in the numbers pursuing other legal options for compensation and additional cost to the Government. Consideration therefore must be given to the likelihood of success through litigation in these circumstances and the financial burden that could arise from this.
26. Between 1992 and 2017, various charities and payment schemes were partially funded by the differing UK Governments over the period – known as the "Alliance House Organisations". DHSC held responsibility for these schemes. A consultation was set up to review these schemes, which all offered different types of payments and had differing criteria, and a decision was made for the support schemes to be delivered through the IBSS. The infected blood community are likely to be highly critical of another scheme administered by DHSC, given the long-running history of support schemes which have not provided the compensation to the level recommended by the Inquiry.

Option b: Cabinet Office

27. The CO are the Sponsor department for a number of public inquiries, including the Infected Blood Inquiry. As Sponsor department, the CO has responsibility for providing updates on the Government's response to Parliament, but does not hold ownership for the policy response.

Advantages of Cabinet Office ownership

28. Both Sir Brian and Sir Robert have emphasised that independence is the key to establishing community trust in the scheme. Given Sir Brian's explicit recommendation that DHSC are not directly or indirectly involved in the development of a compensation scheme, the CO has been involved as a neutral body to provide distance and independence to the development of a compensation scheme. However, it should be noted that Sir Brian and Sir Robert have recommended that an ALB should administer the scheme, rather than the CO explicitly.

Barriers of Cabinet Office ownership

29. The CO has no responsibility or ownership over health-related policy. In practice, legislation and a memorandum of understanding would be required to allow CO to establish a compensation framework either directly or via a new ALB responsible to CO. It is unlikely that the in-house policy expertise would be able to be moved from DHSC into CO given the departmental historic knowledge DHSC currently holds. Therefore, initial cross-department work would be required to enable decision making on the scope and provisions of a compensation framework.
30. The CO currently has no capability or machinery for making payments to citizens and does not carry out this function for any other compensation scheme. There would need to be significant recruitment, upskilling and resource establishment in order to set up a compensation scheme of this size. The ambit of the department would need to be amended to include health compensation and this would need to be agreed by the Prime Minister, Cabinet Office Ministers and the Cabinet Secretary, and given formal legal expression through Parliament.

Option c: Ownership by other Government Departments

31. It would be possible to establish a compensation scheme in an alternate government department. The Ministry of Justice, the Department for Work and Pensions or HMRC may be considered appropriate bodies for this due to the existing functions they have to make payments, which could be expanded to host a compensation scheme of this scale. The compensation framework advocated by Sir Robert and Sir Brian is based on a judicial model. However, to assist in reaching the Government's objective to provide expedient compensation payments, it is recommended that a compensation scheme is hosted in a department with experience of the Inquiry's work. Examples include the Group Litigation Order Compensation scheme for Postmasters in the Department for Business and Trade (DBT), the Windrush Scheme in the Home Office and the Armed Forces Compensation Scheme in the Ministry of Defence. Even in legacy cases - such as coal mining subsidence and illness claims - the legacy department is the one with the continuing policy interest, in this case the Department for Energy and Net Zero.

Advantages to Other Government Departments ownership

32. The Ministry of Justice, HMRC and DWP are identified bodies that have established capability and mechanisms of making payments to citizens. In particular, HMRC and DWP have established relationships and records of the majority of citizens in the UK.

Any department that is not DHSC is more likely to meet Sir Brian's recommendations for independence as a neutral body.

Barriers to Other Government Departments ownership

33. DHSC is the only department to hold responsibility or ownership over health-related policy. No other department has the experience or expertise of health related policy which may create barriers, such as the requirements in the delivery of a compensation scheme.
34. There has not been prior engagement at Ministerial level with other departments. There is a risk that involving another government department at this point may create further delays in setting up a compensation scheme and starting to make payments. As noted for the CO, the ambit of the department would need to be amended to include health compensation.

Option d: Non-Departmental ownership

35. Sir Brian Langstaff has put forward a model for an ALB which is truly independent of government. A parliamentary body (e.g. the Independent Parliamentary Standards Authority) or a statutory office holder (e.g. the Commissioner for Public Appointments) could be established through legislation. This body would report directly to Parliament and not have departmental oversight, although Ministers would still be responsible for the system created e.g. to a Parliamentary Committee. The Parliamentary and Health Service Ombudsman (PHSO) may represent an analogy but has no power of redress.

Advantages to a Non-Departmental ownership

36. This option allows for full independence from government, with the body reporting directly to Parliament as recommended by Sir Robert and Sir Brian.

Barriers to a Non-Departmental ownership

37. A new body would require substantial recruitment and resourcing. The scheme would have no sponsor department to draw resources and expertise from and work would need to be undertaken at pace to ascertain the feasibility of setting up a compensation scheme of this level under an independent body. It would also mean several £ billions in expenditure being made outside of ministerial control. It would also beg the question as to which Minister would be answerable to Parliament for the body.

Option e: Hybrid Approach

38. As a compromise, HMG could look to a hybrid model that would be acceptable to the infected and affected, with the sufficient probity to accord with Managing Public Money and Accounting Officer rules. There are a number of ways in which this could be carried out, but for the purposes of this paper, the simplest option would be as follows:
 - a. CO to be responsible for taking the required legislation through Parliament and to set up the structure and terms of reference of the compensation scheme.

- b. A DHSC ALB and AO to oversee delivery as the department most closely aligned to the policy.
39. This approach would require CO's short-term involvement and close working with DHSC policy teams to develop the provisions of a compensation scheme, with DHSC delivering the administration of the scheme; maintaining the long-term responsibilities of operationalising; and delivering compensation payments, either through the department or as sponsor of an ALB.
 40. The responsible AO would sit in the department delivering the scheme with oversight of a departmental scheme or as sponsor of an ALB.

Advantages of hybrid approach

41. This approach would provide the compensation scheme development some independence from DHSC, whilst leaving the option to retain the policy in the long-term within the most relevant department/DHSC to health policy and patient care.
42. If the decision is made to introduce legislation, it is likely that a DHSC lead would likely increase Parliamentary scrutiny as this would directly oppose the recommendations set out by Sir Robert and Sir Brian. The CO leading on the initial stages of setting up the legislation and compensation framework may ease parliamentary handling and assist in a more expedited bill passage.

Barriers to the hybrid approach

43. It is unconventional for government departments to legislate for other departments' policy areas. Similarly, it would be unusual for a department to operate a process that would create a contingent liability elsewhere in government. This would require close cross-Whitehall working and agreement to deliver in practice, particularly given the policy expertise and experience that sits within DHSC.
44. Should legislation passed by the CO be delivered by DHSC, it is expected that this would still not fulfil Sir Brian's recommendation that DHSC are neither "*directly or indirectly*" involved in the administration of the compensation scheme. Therefore, it is likely that the hybrid approach would still receive negative scrutiny from the community.

Precedents

45. We have not identified a precedent for one government department having ownership of a compensation scheme related to another department's policy area.
46. *The Windrush Compensation Scheme* provides compensation to those who suffered as a result of not being able to show a right to live in the UK. The scheme is delivered entirely within the Home Office.
47. The scheme has been criticised for its lack of independence, and the Home Affairs Select Committee found that the "*design and operation of this scheme contained the same bureaucratic insensitivities that led to the Windrush scandal in the first place*" and expressed deep concern that delays and difficulties in the compensation scheme have compounded the injustices faced by members of the Windrush generation.

48. A recent publication from the Human Rights Watch also criticised the lack of independence of the scheme, and recommended that an independent compensation scheme is required:

“Claimants seeking compensation under the scheme have to apply to the Home Office, but they said they do not feel that they would get a fair hearing there, as it is the agency responsible for the injustices. Claimants and lawyers expressed concern that many eligible claimants do not come forward because of that dynamic or because they are afraid of dealing with the same government department that deported members of the Windrush generation.”

49. Sir Robert’s report provides an overview of the Windrush Compensation Scheme, emphasising that it provides both lessons to be learnt and *“pitfalls to be avoided”*, primarily criticising the lack of trust with the Home Office as the administrative body.
50. *The Group Litigation Order Compensation* is an ex-gratia claims based scheme for postmasters in the GLO group who were subject to the Horizon delivered through the DBT. This scheme sets an example of a compensation scheme which is administered separately from the body responsible for the compensation (in this case, the Post Office). The mirrors schemes set up in the Post Office, recognising that this group of claimants required particular distance from the responsible body due to historic distrust. This decision has been viewed positively by the community. However, BEIS (now DBT) is the sponsor department of the Post Office and thus the policy is not entirely removed from departmental expertise.
51. The Ministry of Defence administers schemes relating to compensation for Armed Forces. The MOD receives independent advice from the Veterans and Pensions Advisory Committee. However the schemes have received some criticism for lack of independence. The *Armed Forces Compensation Scheme* is set out in legislation to provide transparency on the scheme.
52. It is common for government departments to maintain ownership of policy areas following an inquiry or instances resulting in negative public perception. This is true of the Department for Communities, who hold the responsibility for setting out new policy on building safety following the Grenfell fire and the Coal Authority, an ALB sponsored by BEIS which manages the effects of past coal mining, including subsidence damage claims which are not the responsibility of licensed coal mine operators.

Next Steps

53. **The next step would be to secure Ministerial-level consensus on one of the above options.**
54. Once we have a consensus among interested Ministers on the question of departmental ownership (as covered in this paper), DHSC officials will continue the analysis on the scope and cost of compensation. Further advice will be provided to ascertain the scope and requirement of legislation, including the timeline for bringing this forward and how this will interact with the timing of Sir Brian’s final report and any announcement ahead of this time. Formal collective agreement will be sought ahead of the introduction of legislation.