

19 OCTOBER 2023

TO: MINISTER FOR THE CABINET OFFICE
FROM - INFECTED BLOOD RESPONSE TEAM
CLEARED BY - MARIA NYBERG

ACTION

INFECTED BLOOD INQUIRY RESPONSE: EXPERT ADVISERS

SUMMARY

1. This paper provides advice for establishing an advisory expert committee, which could be chaired by Sir Robert Francis. We have provided advice on the process we recommend you follow to make these appointments, and an update from SMG(7) on the steps DHSC have taken to quality assure their analysis.

RECOMMENDATION

We recommend that you (MCO):

- a. **Agree to establish an advisory expert committee via direct Ministerial appointment;**
- b. **Approach Sir Robert Francis with the Chancellor to consider the role of Chair of an expert committee.** We recommend that you approach Sir Robert Francis following a decision in principle on the broad approach to compensation.
- c. **Agree that officials make preparations to appoint expert advisers (identify expert advisers and draft a business case and terms of reference for the expert committee).**

TIMING

2. A readout is requested by Monday 23 October to progress policy development on the Infected Blood Inquiry response.

DISCUSSION

Requirement for expert advisers

3. The policy and cost analysis on infected blood compensation has now reached a stage where specialist clinical and legal expertise on personal injury/clinical negligence is required. There are limitations on the progress that can be made in developing potential awards / the rates of compensation, and therefore the cost analysis of different compensation options, without this expert advice.
4. We are proposing recruiting clinical experts and lawyers practising in the field of personal injury / clinical negligence law, to form an Expert Committee to advise HMG on policy development for infected blood ahead of the establishing a delivery body for the scheme. The advice from the committee would help to quality assure the existing

work that we have done to date, helping to define both the principles and the design of the compensation scheme. The committee would work alongside officials, complement any work already undertaken and inform the final compensation framework.

5. In Annex B we have provided advice on the make-up and role of the expert committee, with the aim of giving them some form of independence from HMG to defend any potential criticism on their objectiveness and to also bring them closer to SBL's recommendations. **The preferred option to host the expert advisers is to form an Expert Committee using the non-standard appointment route via direct appointment to recruit.** This is a non-statutory expert group, is not considered as an ALB and so would not be subject to the same level of review or scrutiny. Members, and the chair, can work on a voluntary basis, but expenses or fees can be paid in line with the non-standard appointment route, this will need to be negotiated in advance. The sponsor department would host and oversee their work.

Sir Brian Langstaff Recommendations / Independence

6. Sir Brian Langstaff's (SBL) second interim report recommends that an ALB is established, chaired by a high court judge who should appoint independent expert clinical and legal panels (see annex C). These panels would define infection stages; degrees of severity and set a framework of tariff-based compensation. The Chair (from advice of these panels) would have the autonomy to set the tariffs that could go beyond the common law awards.
7. We have established with you and HMT that HMG must hold accountability for the overall design of the scheme and tariff rates, in contrast to the recommendations of Sir Brian Langstaff. Although it would not have the independence of an ALB established by statute, and therefore does not comply with SBL's recommendation on how compensation awards should be set, having an expert committee established may help to demonstrate, at least to some extent, that the compensation scheme has been designed by those with some independence from HMG, which might enhance the credibility of the scheme with the infected blood community.
8. There is a risk that accepting recommendation 14 in full will not provide the Government with proper oversight of the potential fiscal spend incurred by the compensation scheme. We recommend that the expert committee is appointed with a chair who provides advice directly to you (MCO) for decision-making purposes, rather than taking independent decisions.
9. The role of Chair would be to consolidate expertise from the medical and legal experts and take a judgement on the final advice put to you (MCO). The Chair will report to the Minister the advice taken from the expert committee and make recommendations or provide advice on a regular basis.
10. **Do you agree that Recommendation 14 cannot be met in full as the Chair of the expert committee should report to you (MCO) rather than be the sole decision maker for the initial design of the scheme, with the Chair reporting advice from the board on a regular basis?**

Preferred Recruitment Route

11. The long list of recruitment routes are at Annex D. **The preferred route for appointment is the non-standard appointment route via direct appointment.** These are time-limited short-term posts (less than 18 months with potential to extend) and are senior appointments made by a Minister or senior officials either via direct appointment or competition. They fulfil an advisory function directly to Ministers beyond and complimenting advice provided by Civil Servants. They are considered independent, but established, resourced and supported by a sponsor department.
12. This route would typically take between 2-3 months but can be expedited where it is not possible to follow standard process due to time constraints. We would be able to onboard applicants at risk with minimum steps outlined at Annex D.
13. Recruiting a Chair first, who would then support in the recruitment of the remainder advisers would demonstrate further independence. Various approvals and development of business cases could begin in parallel to recruiting and onboarding the Chair, which would help expedite the overall recruitment process.

Recruiting a Chair

14. Sir Robert Francis is liked and respected by the community, and his compensation study was well received. Should Sir Robert Francis be appointed as Chair of the expert committee, he would add expertise, and credibility to the Government response. Sir Robert is engaged and interested in helping the Government develop our response, and he has previously agreed to provide independent transparent advice (as set out in your 15 December update to Parliament). However, there is a risk for him that involvement in the implementation, should it not be in line with what he and Sir Brian have recommended, damages his reputation within the infected blood community, and more widely. **We therefore recommend you test his position ahead of formally offering the role of Chair.**
15. We recognise that it would not be feasible to engage with Sir Robert Francis and external expert advisers until we have a broad direction on the overall compensation approach to both the infected and affected. **We recommend you do not approach Sir Robert Francis until you have had a further conversation with the Chancellor regarding the compensation approach.**¹

Next Steps

16. **We recommend that you agree for officials to provide further advice with recommendations on areas of specialty for each expert category and suggest names and organisations to approach, alongside draft terms of reference.** We are able to provide this for discussion on Tuesday 31 October.

¹ We have provided separate advice to you on 12 October 2023 - 'Infected Blood Compensation Approach: Initial Proposal To HMT'.

Annex A - SMG (7) action

Further quality assurance of the modelling methodology

1. At SMG (7) DHSC analysts were asked to consider what additional steps could be taken to quality assure the Infected Blood compensation options analysis. DHSC analysts have reviewed what additional steps could be taken, including the value of an additional independent review from an internal HMG group, and discussed the assurance process for the analysis to date with DHSC's Director of Analysis.
2. The conclusions of this review / discussion are that there is little value in a further review of the methodology or technical aspects of the modelling now given the quality assurance that has already been undertaken by the cross-government Technical Working Group (TWG) and discussed in previous SMGs. However, there may be value in a further detailed quality assurance once comments / challenge on the core assumptions from the TWG have been considered by DHSC analysts and the model updated.
3. DHSC analysts are working on updates to the modelling following comments from the TWG. Our initial conclusion is that amendments do not lead to material changes in the analysis of costs. However, model development will necessarily be an on-going process until policy decisions are made e.g. on scope and quantum of compensation awards.
4. While the TWG brought together expertise from across HMG, a key conclusion from the group was the need for specialist clinical and legal expertise to better inform / scrutinise the modelling assumptions.

Annex B- Team and High-level job description**Makeup and Role of the expert advisers**

5. We envisage the committee of expert advisers could potentially consist of:
- The Chair of the expert committee x1:** Responsible for and accountable to HMG for the advice produced by the experts.
 - Clinical experts x3:** Specialists in relevant infections to define the infections and degrees of severity.
 - Social Care experts x3:** Specialists in providing care for relevant infections to define the care needs.
 - Legal experts x3:** Specialists in clinical negligence or personal injury litigation to define and develop the tariffs and awards framework.
6. We envisage their work could be short-term and carried out within 6-12 months. The advisers will work closely with officials, reviewing existing material, providing advice on compensation tariffs based on infection severities, attend SMGs or other key meetings; and develop a tariff or assessment-based framework which could be presented to the Chair of the Scheme once created for consideration and adoption if approved.
7. In addition, the sponsor department may be required to provide a secretariat and oversight role. As part of the work programme, we've factored a targeted consultation with selected focus groups from the infected and affected community and stakeholders to test any outputs produced (see **Annex A**). SBL also recommended inclusion of the infected and affected community in the decision-making process, and their involvement may assist in demonstrating some independence from HMG during this work on the scheme.
8. Programme of work is provided in the table below:

Phase	Description	Timescales	Location
Mobilisation	<ul style="list-style-type: none"> Onboarding & upskilling 	1 month	Sponsor Department
Phase 1	<ul style="list-style-type: none"> Reviewing existing policy, analytical material, quality assuring and providing expert advice/input 		Sponsor Department
Phase 2	<ul style="list-style-type: none"> Support in defining principles of the scheme Develop tariff/award framework/products 	1- 2 months	Sponsor Department
Phase 3	<ul style="list-style-type: none"> Targeted engagement on framework [TBC] 	2- 4 weeks	Sponsor Department

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Phase 4	<ul style="list-style-type: none"> Finalise framework/products 	1 month	Sponsor Department
Phase 5	<ul style="list-style-type: none"> Post implementation activity [TBC] 	TBC	Delivery Mechanism

Annex C – Inquiry Recommendations

Inquiry Recommendation 5: I recommend that infections eligible for compensation should be classified in the following manner: a) there should be defined categories for each type of eligible infection, and the stages through which it progresses, and for each category defined degrees of severity to which a range of possible awards for the impact of the disease can be applied; b) the stages and degrees of severity for each disease should be defined by an independent clinical expert advisory panel, by reference to clinical professional consensus; 94 c) the range of potential awards for the impact should be determined by an independent advisory panel of legal experts, taking account of but not limited by current practice in courts and tribunals across the UK

Inquiry Recommendation 8: I recommend that the Government should approve a scheme setting out a framework of tariff-based compensation for eligible infected and affected persons, at rates which broadly take account of but are not limited by current practice in courts and tribunals across the UK and sums payable in other UK compensation schemes, and allowing an assessed basis for defined financial losses. The rates of compensation should be based on the advice of the independent clinical and legal panels and set by the scheme.

Inquiry Recommendation 14: I recommend that an Arm's Length Body (ALB) should be set up to administer the compensation scheme, with guaranteed independence of judgement, chaired by a judge of High Court or Court of Session status as sole decision maker, transparent in its procedures so far as the law permits and accountable directly to Parliament for the expenditure of public funds and the fulfilment of its terms of reference. Appeals should be to a bespoke independent appeal body with a legal chair which will reconsider the decision of the scheme in any case appealed to it. The scheme should have procedures in accordance with the principles set out in this report and in particular which: a) have regard to the need of applicants for speed of provision, simplicity of process, accessibility, involvement, proactive support, fairness and efficiency; b) involve potentially eligible persons and their representatives amongst those in a small advisory board, and in the review and improvement of the scheme; and c) permit the hearing of applicants in person. d) should have access to the records held by or on behalf of any previous publicly funded support scheme (subject to any necessary consents by the data subjects), and take into account the reasoning of any appeal from the decisions it takes. **Inquiry Recommendation 15:** I recommend that the scheme should include provision of the following support services to be provided without charge to the applicant:

- a) an advice and advocacy service, supplemented where necessary by discretionary access to independent legal advice and representation, where necessary and within a pre-authorised budget, to assist and advise applicants;
- b) a financial, insurance and benefits advice and support service, to assist recipients in accessing financial and insurance services and obtaining any relevant benefits; and
- c) advice and referral to appropriate specialist services, signalling or certifying access to any special arrangements.

Inquiry Recommendation 16: I recommend that the compensation scheme should be delivered by one central body, appropriately resourced and staffed. Current support schemes should however continue to be provided as at present by schemes local to each nation.

Annex D: Recruitment and Hosting routes: Expert Advisers²

Option	Route	Description	Issues
A	Non-Standard Appointments route	<ul style="list-style-type: none"> A Non-Standard Appointment is a time-limited, senior appointment made by either a Minister or senior official. These roles are typically Czars, Champions and Ambassadors; Chairs of Taskforces, Reviews and Inquiries; or senior figures asked to lead a specific project or programme of work. It may also include some individuals appointed to support these senior people in their roles. They can be appointed by competition or a direct award (following CO guidelines) and are short-term posts (less than 18 months with potential to extend). They fulfil an advisory function directly to Ministers beyond and complimenting advice provided by Civil Servants. They are considered independent, but established, resourced and supported by a sponsor department. Recruitment using this method (direct or competed) would need to be agreed formally by No 10. All necessary due-diligence (background and social media checks) and ID verifications are conducted before appointment. Additional approval from HMT is needed if day rates exceed £575 or annual salary equivalent is £150k or more. This route would take between 2-3 months 	<ul style="list-style-type: none"> The advisers may not be considered wholly independent as they would be engaged by HMG, but this issue could be partially mitigated if the Chair of the expert advisers has a role in recruiting them. This route could attract a lot of scrutiny if direct awards. Any such challenge might only be successful if we cannot demonstrate that direct awards were made in line with the CO/HMG guidelines. Including detailed scope in job adverts if competing, could attract negative criticism and reveal government's direction of travel for compensation; but may not attract the right calibre of candidates if minimal information on job description is provided.

² This annex has been cleared by DHSC officials.

Onboarding (At Risk)

An at-risk appointment is one where BPSS checks are not in place on day 1. Home Office legal guidance states that as a minimum right to work checks must be completed for each appointee. **This process should only be used when it is not possible to follow the standard process due to time constraints.**

The following steps must be taken as a minimum in order to onboard at risk (relevant forms can be found at Annex B):

- **Due Diligence** - Due diligence should be carried out on the appointee – including background checks and searches of social media accounts. The public appointments can provide guidance on this. This should be done before advice to appoint it sent to the relevant ministers.
- **ID checks** - 3 forms of ID should be requested from the appointee and a video/face to face ID check should be completed by the policy lead. The baseline verification form will also need to be completed.
- Please send copies and the verification form to HROperations@dhsc.gov.uk. They will initiate BPSS checks which will take approximately 5 working days to complete.
- **Declarations of interest** - The policy lead should request a declaration of interest form is completed by the appointee, once this is returned it should be signed off by the SCS lead. Where relevant, mitigations should be agreed and recorded.
- **Payment** - If the Appointee is to be paid then committee fee forms should be completed at this stage and shared with payrollqueries@dhsc.gov.uk.
- **Letter of Engagement** - A letter of engagement should be shared using the standard template [here](#). This should be drafted by the policy team with input from HR and the Public Appointments team where needed. The appointee must sign and return the letter of engagement to the SCS policy lead before starting in post. This should be shared with HR operations and the specialist recruitment team for audit purposes.
- **Risk assessment** - Once the above actions have been completed the policy lead must gain approval from Shona Dunn (second permanent secretary) and Jenny Richardson (HR director) to bring the individual in at risk. To do this, policy leads should share the risk assessment form alongside the completed declaration of interest form and any supporting documents e.g verified ID checks and a CV confirming employment history. Once approval is received, policy leads can finalise the appointment with the following actions:
- **IT Kit** - Contact the IT service delivery team to arrange kit for the appointee
- **Announcement** - Announce the appointment. Where needed work with ministerial private offices to co-ordinate when the announcement will take place.

B	Procurement Professional services	<ul style="list-style-type: none"> • Legal experts could be procured through a professional services route either through open market or an existing Crown Commercial Service (CCS) Framework e.g. Legal Services Panel (LSP)' RM6179. The latter option has a panel of firms on the framework that have already been through a centrally run procurement process to get on the panel and can be appointed directly. 	<ul style="list-style-type: none"> • Experts may not be considered independent from HMG if procured under contract. • Including detailed scope in a tender could attract negative criticism and reveal
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		<p>Appointing via existing frameworks could be done relatively quickly once funding and other approvals have been achieved.</p> <ul style="list-style-type: none"> • There is also a CCS Framework for general clinical resource provided by agencies rather than specialists in the relevant infected blood infections. However, this is aimed more towards full-time delivery of services and may not fit well with the requirement in this instance, especially if some clinicians are still practicing frontline. Should the CCS framework prove unsuitable, further market engagement would be required to determine if another suitable route exists, and if so, a stand-alone procurement process or direct awards would be necessary. • Going out to tender via competition for either legal or clinical experts, would require some detail on the scope of requirements in order to attract competitive and quality bids. A procurement process through competition could take between 8-10 weeks minimum in comparison to direct awarding which could take a minimum 4 weeks. • Another commercial option could be to subcontract clinical expertise via the proposed legal contract, but we would need to ensure this is feasible under the terms of the framework. • Formal procurement is subject to regulations requiring publication of opportunities, and open, fair and transparent processes – this does not align well with a situation where specific experts are 	<p>government's direction of travel for compensation.</p> <ul style="list-style-type: none"> • If minimal detail is included this may not attract many quality bids. Direct awarding or a lack of detail in the procurement process could be open to successful legal challenge if non-compliantly used. • Using a procurement route, we would only likely obtain legal experts. Any sub-contracting or market engagements could risk leaks.
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		required and / or the Chair wishes to direct the recruitment of individuals.	
C	Standard recruitment	<ul style="list-style-type: none"> This route entails traditional advertising through Civil Service or NHS Jobs offering Secondments, Fixed Term Appointments or Temporary roles. It would either require an external advert, Expressions of Interests within Civil Service / NHS Departments as well as relying on existing networks. The successful applicants would be regarded as head count for the owning department. Office for Health Inequalities and Disparities (OHID) regularly offer short-term secondments and have a wide health network that we could tap into. Standard recruitment could take anywhere between 2-3 months. 	<ul style="list-style-type: none"> Under this route they would be considered as civil servants, are unlikely to be considered independent from HMG especially if they are recruited from existing civil servants. We may not be able to source the expertise required through this method. There is a risk therefore that time will be spent attempting to recruit through this method with no result.
Hosting the expert advisers			
I	Advisory Body or Expert Committee	<ol style="list-style-type: none"> This would be a non-statutory expert group, made up of external specialists, appointed by Ministers or officials, who provide independent advice to Ministers on key policy areas. The committee is not considered as an ALB, so are not subject to the same level of review or scrutiny and there is no time limit on the duration of these appointments (duration varies but is usually permanent). However, they are funded from within the sponsor department's budget and administered by civil servants. Since this arrangement is not in statute, it is quicker to establish (minimum 2-3 months for recruitment via the nonstandard appointment route). Members are employed on a voluntary basis 	<ol style="list-style-type: none"> The Committee/Body may still not be seen as wholly independent as it'll be attached to a sponsoring department of HMG but the chair of the expert advisers could support in recruitment of the experts. If these roles are voluntary, there may not be the same level of commitment or accountability as a paid employee, but this could be mitigated through robust vetting of candidates and a letter of engagement with clear terms of engagement.

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		with expenses paid where applicable. The sponsor department would host and oversee their work.	
II	Advisory Non-Departmental Public Body (ANDPBs)	<p>5. ANDPBs are non-statutory bodies that consist of external independent experts appointed by Ministers who operate on a voluntary basis (expenses can be claimed) to form boards or committees to advise ministers on key policy areas. They are considered as an ALB and are generally defined as being financed by government but act independently of it.</p> <p>6. They are supported by a secretariat from the sponsoring department, who also set the strategic direction. They could have underlying legislation but in the main they do not need legislation to be established. They must be active for at least 3 years according to Cabinet Office guidance and may be subject to Parliamentary scrutiny on the advice provided. If HMG is to comply with the Inquiry's recommendations on compensation, there is no guarantee that the ANDPB would be operating for 3 years (as the recommendation is that the Chair of the scheme appoints panels of clinical and legal experts to advise the Chair and the board of the scheme on compensation). An ANDPB could take between 9-12 months to establish, depending on whether legislation is required.</p> <p>7. The Armed Forces Compensation Scheme (AFCS) currently have an Advisory Non-Departmental Public Body (ANDPBs). This is an Independent Medical Expert Group (IMEG) who advise MoD Ministers and Veterans on the medical and scientific aspects of the scheme. The IMEG comprises of a Chair, x3 medical experts, x3 ex-service members, x1 ex-service charity representative, x1 observer (surgeon). This was set up following the 2011 Boyce review which recommended that a group of experts should be set</p>	<p>9. Establishing a new body would need to adhere to CO controls and Public Appointments Governance Code, and likely go against the ALB efficiency and reform programme.</p> <p>10. The ANDPB would need to be active for at least 3 years, the role of the expert advisers may change significantly once the initial work is completed.</p> <p>11. Consideration will need to be given on how the ANDPB would interact with the compensation scheme (e.g. the ALB), its chair and its expert panels once the compensation scheme is established in primary legislation.</p> <p>12. It is not possible to guarantee that the ANDPB expert advisers, set up before the scheme Chair is appointed and the scheme exists, would be active for 3 years (as required by CO guidance on the</p>

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		<p>up to advise MoD on matters relating to AFCS, including how the tariff-based amounts should be updated.</p> <p>8. The ANDPB is different to an Executive Non-Departmental Public Body (ENDPB). The ENDPB carry out administrative, commercial, executive or regulatory functions rather than act in an advisory capacity.</p>	<p>Classification of Public Bodies) or that the Chair would take them on.</p> <p>13. HMG may be criticised for not setting this up sooner but equally may be welcomed as HMG demonstrating progress towards compensation.</p>
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