Further additional written submission on behalf of the core participant clients represented by Thompsons Scotland (August 2023)

1. Remit of the Inquiry and the ambit of these submissions

1.1 The Inquiry has chosen to seek and lead further evidence on the subject of the government's response to the second interim report which was published on 5 April 2023. The Inquiry has permitted us to suggest lines of questioning for the witnesses who were called to give evidence in the week commencing 24th July 2023 and to make a response to the evidence which has been heard by way of this submission. We understand that the ambit of what we have been asked to make submissions on is understandably limited to the government's response to the second interim report, the evidence which has been gathered (by way of statement or documentary evidence) and elicited orally from the witnesses in this section and how we suggest that these matters and this evidence ought to be dealt with in the final report, which is due to be published later this year. We have limited our response accordingly. As ever, in preparing this submission we have attempted to continue to assist the Inquiry in how, from the perspective of our clients, we consider that the Inquiry can best fulfil its terms of reference, in particular, at this juncture, how we consider that it might best seek to take reasonable steps to ensure that the recommendations which it has made in the second interim report are presented in a way which allow them to be implemented fully and without further delay.

1.2 In doing so, we consider it necessary to make reference to and/ or build upon submissions which we have already made to the Inquiry, namely:

a) Our submission on non-financial recommendations dated 20 June 2022[1];
b) Our submission on interim compensation dated July 2022[2];
c) Our principal written submission dated 15 December 2022[3]; and

[1] SUBS0000011
[2] SUBS0000036
[3] SUBS0000064

d) Our closing statement to the Inquiry, dated 2 February 2023.

We have, of course, been careful to keep such reference to a minimum in order to lessen the chance of unnecessary duplication and for the assistance of the Inquiry.

1.3 We agree with the Inquiry that it is within its terms of reference for these matters to have been investigated. The basis upon which this investigation was, in our view, justified merits some further consideration, as this constitutes the basis of understanding why and to what extent the Inquiry should publish further analysis of the additional evidence which has been heard over this period.

1.4 In issuing the second interim report, the Inquiry was acting under a power accorded to it by section 24(3) of the Inquiries Act 2005. We consider that where Parliament has seen fit to accord a power to a public inquiry such as this to issue an interim report, which by its nature is a report which is issued during the course of the Inquiry's work and before it brings its work to a conclusion by the delivery of its final report in terms of section 24(3) of the 2005 Act, it must be a reasonable construction of the powers thereby accorded to the Inquiry that it should be able to use its usual investigatory powers to seek to understand how the report has been received by the government of the day to which it has been delivered and to understand the government's intentions with regard to the implementation of its recommendations. This power has been appropriately used in the current circumstances, in particular where the government consistently created a legitimate expectation on the part of both the Inquiry and the infected and affected core participants that a response to the compensation framework recommended in his report by Sir Robert Francis KC would be produced by government in short order after its publication in 2022. Indeed, the need for the Government to set out its response to the Sir Robert Francis KC report was frequently given as a reason for the delay in publishing the report. We note that the reasons for there being a second interim report were clearly set out within it.

In essence there was a pressing need for further delay to be avoided[4], which we refer to in this submission as the "principal aim" of the second interim report.

1.5 In addition, we consider that the Inquiry has acted properly in accordance with term of reference 9. Under that term of reference, the ability of the Inquiry to examine lack of candour on the part of government is not limited to lack of candour at any particular time. Therefore, the current investigation must seek to consider the actions or inaction of government insofar as they demonstrate a lack of candour as well.

1.6 Further, though it has not been possible to lead evidence to assess the extent of it, it is the case and the Inquiry can and should, in our submission, reasonably infer from a combination of the evidence which it has heard on the subject relating to the past and the evidence it was able to see in the hearing room in the week commencing 24th July 2023 that the intransigent response of the government has further seriously compounded the harms, in particular the psychological harms of the infected and affected community. The narrative of expectations being raised by government followed by legitimate hopes being dashed over decades was one which was clearly apparent from the evidence which the Inquiry heard. We have made extensive submissions on the subject already.[5] The Inquiry also heard cogent expert evidence from the psychosocial group about the actual and scientifically recognised harms of such responses on the part of government in communities such as the infected and affected. One can infer from that body of evidence that recent inaction on the part of government will have seriously compounded the harms further. Whereas the events of the contaminated blood scandal are often portrayed as historic, we have consistently argued in our prior submissions (and as was argued by witnesses like Lord Owen) that the scandal is one which is going on currently. We submit that the evidence of government intransigence towards the recommended financial solution serves to reinforce the argument that government inaction is current and that serious harms are being caused today, not

[4] See Inquiry's second interim report at page 15 et seq

[5] See our principal written submission (SUBS0000064 from page 1023)

just in the past. These are matters which merit clear explanation in the final report, in our view.

1.7 Therefore, we submit that the Inquiry, in fulfilment of its terms of reference insofar as they are connected to this period of time should address in its final report (a) the inadequacy of the government's response to the proposed compensation scheme, including the whole period from the commissioning of the Robert Francis study, through the inadequacy of the promised response to that and to his evidence, and the lack of any meaningful response to the second interim report right up to the present, (b) the harms which have been caused by that inadequate response, and (c) the government's lack of candour. In addition, we outline steps in this submission which we submit that the Inquiry should take in its final report to minimise the chances of further delay on the part of government which may further frustrate the principal aim of the second interim report.

1.8 Finally, we would wish to emphasise the importance of the need for matters to be progressed quickly in light of (a) the ever-advancing age and in many cases diminishing health of the infected and affected community and (b) the culpable delay in the government's response to the disaster. In publishing its second interim report, the Inquiry sought to fulfil its principal aim and included recommendation 18, on our reading of its second interim report, to emphasise the clear need for practical and meaningful progress on the delivery of compensation this year. This submission is intended to assist the Inquiry in considering what might be said in its final report to seek to offset the government's apparent rejection of the second part of recommendation 18, to the effect that the compensation scheme should be operational this year. A further interim report at this stage is unlikely to have any real effect, in particular in light of the intransigence of the government in response to the second one. In our submission, the government has failed to respect the Inquiry's primary objective in issuing its second report. Consistent government claims that it has acted "at pace" in response to the second interim report are inaccurate and misleading, given that the pace which was required was one which required to enable the primary objective to be met, in particular the requirement that the compensation framework would be in place this year. Given the government's position that it requires to await the final report, which by

definition means that it will not have achieved the primary aim by the time it is issued later this year, it has already, in effect, rejected the possibility of the primary aim being achieved. This is despite the fact that the legitimate expectations of the infected and affected community have been created by the government itself which has consistently accepted that time is of the essence, even before the publication of the second interim report.[6]

2. Analysis of the evidence

Intransigence of the government response

The claim that the government has worked "at pace" on the issue of compensation

2.1 The response of the government to the various recommendations it has received on the subject of compensation has, in fact, been very limited, on the evidence. Penny Mordaunt MP gave evidence to the Inquiry to the effect that she was aware when setting up the Sir Robert Francis compensation study that there was a clear distinction to be made between the support which people had received and the separate requirement that people receive compensation for the losses which they had suffered.[7] It was known at that time that compensation would require to be delivered separately from the support payments made via the existing schemes. That was hardly surprising, in our submission, given the context. In his previous evidence to the Inquiry, Jeremy Hunt MP stated as follows:

"And as someone who cared a lot of patient safety issues, I was able to, you know, commission a second Francis report after Mid Staffs, a report into Morecambe Bay, the Ockenden report into Shrewsbury and Telford, the Gosport report, and I was able to make progress in a number of other areas, but it was immensely frustrating that in this area, because the quantum of

[6] See, for example, response by Jeremy Quin MP to question by Florence Eshalomi MP on 15 December 2022
[7] IBI transcript for 24/07/23; pages 64 to 65 (Penny Mordaunt MP)

money involved was billions not hundreds of millions, and I just didn't have that at my disposal, progress was -- I think you could only describe it as painfully, painfully slow."[8]

"Q. Can you help us in understanding who made it clear to you that the Treasury would not support an inquiry?
A. This was conversations that I had with Treasury ministers, and also conversations that we've talked about with Number 10 as well, which, you know, operated as one with the Treasury throughout my entire time as Health Secretary, or certainly under David Cameron and George Osborne's time. So it was just made very clear to me the whole time that any funding for this would have to come from money received by the Department of Health.
Q. In terms, specifically, of the institution of an inquiry, did you push back against that? Before we get to 2017, did you make representations and try and challenge the line that was being given to you?
A. Well, basically, I knew -- and Number 10 and Number 11 knew -- that the public inquiry would be likely to recommend large sums of money, compensation, support for families, that would have to be funded centrally, not from the Department's budget and the NHS's budget. So that was why -- because of the independence of an inquiry, the power of an inquiry is that -- you know, as you are very well aware, the power of an inquiry is that it's very difficult in practice for a Government to reject any recommendations that are made by a public inquiry. It does it in enormous detail, as you're doing, and its recommendations have tremendous moral authority. So I think everyone understood that if there was a public inquiry and it made a recommendation of, you know, whatever the compensation was, that would have to be funded by the Treasury. And so, therefore, it was clear to me that Number 10 and the Treasury would not support a public inquiry. But I felt, as I've said to you before, that there was a very big injustice, so I was looking out, if you like, for when a moment might come that that position might change and it did come, and we're going to go on to talk about that" (pages 116 to 117)[9]

[8] IBI transcript for 27/07/22; pages 115 (Jeremy Hunt MP)
[9] IBI transcript for 27/07/22; pages 116 to 117 (Jeremy Hunt MP)

2.2 Thus, he accepted that there had been a failure on the part of government properly to institute an investigation into the circumstances of the infected blood scandal. The reason for that, as he stated, was that it had always been known within government that it would be likely that such an Inquiry would make a recommendation for compensation on a large scale. This, in our submission, is important context to the evidence which has recently been gathered by the Inquiry on the subject of the government's response to the second interim report. In light of the fact that the government reasonably anticipated that an extensive compensation scheme would be recommended (which had been the reason for the considerable delay on the part of the government before that time in instituting an inquiry in the first place), we submit that the government was under a clear moral obligation to make preparations for such a compensation scheme to minimise the chances of further delay. We submit that the government has repeatedly and culpably failed to do so.

2.3 Given the fact that the evidence suggests that the broad content of the recommendations on compensation in the second interim report should reasonably have been anticipated by government some years ago, the funding of the compensation scheme will now have to be considered in a cost of living crisis. We submit that the Inquiry should indicate in its final report that this context means that the funding of the compensation scheme should not be prejudiced by the financial consequences of this delay, which would further undermine justice being delivered to the infected and affected. That the government intends to play this card to deny justice in this way is, in our submission, the clear inference from the leaked Financial Times' story on 10 May 2023 that the compensation scheme might cost £5-10bn[10] and the subsequent the Sunday Telegraph story on 2 July 2023.[11] Indeed, we submit that these are matters which should form the basis of criticism of the government by the Inquiry in its final report. The government has, in our submission, demonstrated a lack of respect for the Inquiry and its interim

[10] RLIT0002137
[11] RLIT0002136

recommendations as per the second interim report and, by extension, the infected and affected community across the country.

2.4 The clear weight of the evidence heard by the Inquiry on these matters was to the effect that the government had not been working "at pace" as it had claimed. In our submission, it was clear that little had been done until the second interim report was issued in April 2023, despite the contents of the Sir Robert Francis framework study, his detailed evidence on it to the Inquiry in summer 2022 and the fact that the first interim report had clearly supported the need for compensation, having recommended that compensation payments of an interim nature be made at that time. Jeremy Quin MP accepted in his oral evidence to this Inquiry that there was a need, following a review he had undertaken after the matter being raised in a Parliamentary debate on 24 November 2022, to "*increase senior attention, increase resources on the issue to ensure that we were going to meet what we aspired to do and the more we could say – to your earlier point about being open and transparent – that the more we could say earlier the better*"[12]. Despite this evidence about the apparent need to increase resources, it seems that Mr Quin had, prior to that debate, considered there to be sufficient resources allocated within Government to the compensation issue, notwithstanding the fact that, by that time, the Government had had the Sir Robert Francis report for over 9 months, and this Inquiry's first interim report for 3 months and made no public announcement on its position or on progress. This evidence demonstrates, in our view, that inadequate attention had been paid to the compensation mechanism prior to that point.

2.5 In our submission, it appears that the 'line to take' in the recent hearings merely replicates the 'line to take' that Michael Ellis MP used in his letter to the Chair of this Inquiry dated 21 March 2022, in which he stated, "*you will understand that work must be undertaken within Government to formalise our response, and I can confirm that work is already underway*". The similarities between the language in that letter to this Inquiry, and the witnesses who gave oral evidence in July 2023 is striking. We submit that, had the Government been working 'at pace' over the

[12] IBI transcript for 25 July 2023, page 22 (Jeremy Quin MP)

17 months since it received the Sir Robert Francis report, it would or should have been in a position to respond meaningfully to that report, as it purported to be planning to do over a year ago.

2.6 It should be borne in mind in the final report that the Sir Robert Francis study was commissioned by the government itself, against the background of a requirement for speed. Indeed, the need for consideration of compensation had been raised in Parliament in June 2019, as explored in evidence with Penny Mordaunt MP. She told the Inquiry that she was aware of the consideration of compensation for victims of the disaster shortly before her appointment as Paymaster General.[13] In her evidence to the Inquiry, she stated that, *"what I felt is that as much concurrent activity we could do would be a good thing, and that it – because I think everyone was aware of the time pressures and the financial hardship and other things that people were enduring. That's why I took a different approach, but it certainly wasn't an approach that was met with resistance"*[14]. That more than 3 years have passed since the issue was expressly sought to be addressed by the then Paymaster General, but with no public, tangible progress, we submit, is inconsistent with the evidence that the apparent change in approach was not met with resistance.

2.7 Ms Mordaunt told the Inquiry that one of the purposes of writing her first letter to the then Chancellor, now Prime Minister Rishi Sunak, on 13 July 2020[15] was *"making sure that all Government departments are aware of what is likely to need to happen and to prepare for that […] we ought to be doing right by people, and actually it was cost-effective to do right by people"*[16]. Ms Mordaunt and Mr Sunak both gave evidence that the latter, then Chancellor of the Exchequer, did not respond to the former's letter. We submit that if her arguments were not reaching the higher echelons of government decision making, the absence of any 'resistance' to Ms Mordaunt's proposals was of little relevance. What the proposal lacked was any positive engagement.

[13] IBI Transcript for 24 July 2023, page 6-7 (Penny Mordaunt MP)
[14] Ibid, page 11
[15] EIBS0000706
[16] IBI transcript for 24 July 2023, page 18 (Penny Mordaunt MP)

2.8 It is, in our submission, notable that, having received no response from the relevant minister, Ms Mordaunt considered it necessary to send a further letter to the then Chancellor. In her oral evidence to this Inquiry, Ms Mordaunt noted, specifically, that she *"wanted to shout loudly and [she really thought] Treasury engagement here was more about the ability of Government to prepare itself"*[17]. She went on to say that *"I very much felt that people had been waiting a very long time, they had been waiting a long time for this Inquiry, they had been waiting a long time to get their issues addressed, and there was a moral responsibility, this being our shift to do that"*. That evidence was in respect of Ms Mordaunt's follow up letter of 21 September 2020 to Mr Sunak[18]. In that letter, she wrote, *"I cannot stress enough the urgency of taking long overdue action on financial support and compensation"*. It is our submission that, almost 3 years later, such concerns regarding the urgency ring ever louder and ever more tragically. That Ms Mordaunt's letter only received a "holding response" does not suggest, we submit, that any real attention was being paid within Government to the pressing needs of the community.

2.9 The government committed that it would *"publish the Study and the Government response, in time for the inquiry and its core participants to consider them before Sir Robert gives evidence to the inquiry*" as set out by Michael Ellis MP on 15 March 2022[19] and 31 March 2022.[20] The context is again important, in our view. The government had put itself in a position whereby it ought (a) to have been ready to move quickly from the time that the Francis study was published and (b) to do so specifically in light of the acknowledged right and need for the infected and affected CPs to be able to understand not only the Francis report but also the government's response at the time of Sir Robert's evidence in July 2022. When publishing the framework report just over a month prior to Sir Robert Francis' oral evidence to this Inquiry (almost exactly 3 months after the Government had received it), Sir Michael Ellis stated that *"The study makes recommendations for a*

[17] IBI Transcript for 24 July 2023, page 22 (Penny Mordaunt MP)
[18] EIBS0000705
[19] RLIT0001137
[20] RLIT0002052

framework for compensation and redress for the victims of infected blood, which can be ready to implement upon the conclusion of the Infected Blood Inquiry, should the Inquiry's findings and recommendations require it […] it is most important that the government is able to reflect upon Sir Robert's evidence to the Inquiry in considering his study. There is a great deal of complexity to the issues that the study covers and a wide range of factors to be taken into account in considering Sir Robert's recommendations. This analysis cannot be completed hurriedly but officials across government are focussing on this so that the government can be ready to respond quickly to the Inquiry's recommendations, as was intended when the study was commissioned".[21] There was no practical response or indication of the government's position or intentions, as had been anticipated.

2.10 Even by the time of the planned final hearings in the Inquiry, the final submissions to the Inquiry of the DHSC were notably silent on the subject of compensation, despite the detailed evidence heard from Sir Robert Francis on the subject and the apparently close involvement that department has had throughout on the subject within government and the government's previous commitment to making its position on his report clear. In our submission, it was disingenuous of the government to have suggested that there was any justification for going back on its previous commitment to responding publicly to the Francis report. The delay is entirely unjustified, on the evidence. There was a complete lack of candour about the government's position, progress of intentions.

2.11 By the time of the evidence heard in July 2023, there were repeated references to matters being moved on (or not) by ministers' predecessors. We submit that there were repeated attempts on the part of some of those giving evidence to avoid answering questions regarding matters that they considered not to be 'on their watch'. Yet, equally, those giving evidence sought apparently to claim credit for matters that crystallised on their watch, notwithstanding the fact that they were not involved in that decision making. The most striking example of this, perhaps, was the Prime Minister's evidence regarding his involvement in interim payments.

[21] Statement by Michael Ellis MP to House of Commons, 7 June 2022

Mr Sunak stated that *"I can only speak to the Government that I'm responsible for, which, as you highlighted at the beginning, has only been for the last eight months or so, so many of the things earlier in that chronology the Government might have done but I – I am sure you will take evidence from other people – ultimately that was not my responsibility at the time, so it was not something I was directly involved in or can answer to".* In his very next sentence, he went on to say, *"What I can tell you is what's happened under my Government whilst I have been Prime Minister, and since that's happened, days afterwards interim payments were made to around four and a half thousand people"* [22]. Mr Sunak was not in Government when the decision to make interim payments was taken, yet he appeared to seek credit for those payments happening to be made under his watch.

The government's motivation in commissioning the Sir Robert Francis study

2.12 Further, in our submission, the commissioning of the Sir Robert Francis report was itself demonstrative of a lack of candour on the part of government towards the infected and affected. Penny Mordaunt MP gave evidence to the effect that the Francis consultation was motivated by the inevitability of the government requiring to pay substantial compensation and the impetus to get the mechanics in place so as to avoid further delay. On the face of it, the elements she concentrated on in her evidence about the Francis study seem to represent a genuine attempt to move matters forward. That she got no response to her correspondence with the then Chancellor (now Prime Minister) on the subject, despite the clear indication of the major financial implications does tend to show an ongoing intransigence toward the subject within the Treasury or the government more generally, in our view.[23] However, we submit that the clear inference from the evidence was that her explanation this was only part of the

[22] IBI transcript for 26/07/23; page 19 (Rishi Sunak MP)

[23] See WITN5665005 and EIBS0000705 which are the letters dated 13 July 2020 and 21 September 2020 from the Rt Hon Penny Mordaunt MP in her role as Paymaster General

story. Sir Robert was asked in his terms of reference to look at the rationale for compensation as well as the mechanics. His term of reference 1 was:

"To consider the rationale for compensation as a matter of general principle and in relation to any particular classes of compensation, recognising that it is not for the Study to pre-empt the determination by the Infected Blood Inquiry as to what, if any, rationale is supported by the evidence it has received"

In addition, in her evidence to the Inquiry about the circumstances in which she set up the Francis study, Penny Mordaunt referred to the need for the study to "be aware of the need to demonstrate a duty of care to the infected and affected".[24] The task set out in term of reference one was, in our submission, an impossible one. It was inevitable that in asking Sir Robert to look at the rationale for compensation that his work would impinge upon the territory of the Inquiry. It was, in fact, clearly indicative that part of the purpose of the report was to seek to usurp the function of the Inquiry, for fear that in light of the vast amounts of evidence it had heard in support of the strong moral case for full compensation (and indeed more) would lead (as it has done) to the Inquiry recommending a generous compensation scheme. In our submission, it was part of the government's motivation to attempt to obtain a counterpoint to the Inquiry's final report. It seems hard to understand why the Francis report was thought by the government to have been necessary (valuable though it turned out to be), when it was clear that the Inquiry had the power to and would consider the matter of compensation as part of its terms of reference and (as Jeremy Hunt MP stated in his previous evidence, as set out above) this outcome had always been within the reasonable contemplation of the government. If there was any doubt on the matter, in seeking submissions on non-financial recommendations from core participants to be submitted in summer 2022, the Chair of the Inquiry made clear that he anticipated that he would receive submissions (and hence give

[24] Witness statement of Penny Mordaunt @ WITN7701001 at para 19

consideration to) the issue of compensation himself.[25] Presumably, this assumption on the part of the Inquiry that it would receive submissions on compensation was clear from the start of the Inquiry, given that campaign groups had publicly campaigned for a compensation scheme for some years. Equally, it seems safe to assume that the Inquiry had thus been aware that it would require to engage with those submissions and address the issue of compensation since its inception and could have made its expectation in that regard clear at any time. Those on whose behalf this submission has been prepared understand, however, that there was no consultation with the Inquiry about the Sir Robert Francis study. In our view, this supports the contention that the government wished to set up a process separate from the Inquiry as a potential contradictor to it conclusions. If it truly thought that its work was a necessary compliment to the Inquiry's work, it could have consulted with the Inquiry about the extent to which that would have been useful. Our understanding is that it did not. Ms Mordaunt, in her evidence to this Inquiry, stated that *"the establishment of the compensation framework itself was quite a complicated thing to do, because what we needed to think through was how that would square with the Inquiry. I have already stated why I felt very strongly that we needed to do concurrent activity. It was always a possibility the Inquiry might want interim payments to be made to people. It was – but what we needed was there to be both pieces of work having a reference to each other whilst being independent, and there was certainly quite a bit of discussion at official level between how the compensation study would interact with this Inquiry, could one make reference to another during the course of their work, and so forth".*[26] It is, in our submission, striking, that, there appears to have been no suggestion of any consideration of the involvement of this Inquiry in that process. In fact, that Sir Robert and the Inquiry Chair are in broad agreement as to both the need for and the mechanics of the compensation scheme stands, in our view, as a clear indication that the overwhelming weight of the evidence support it.

[25] See revised "Statement of approach – submissions at the end of the oral evidence" issued by the Inquiry Chair on 18 March 2022, paragraph 4(a)
[26] IBI transcript, 24 July 2023, at page 31-32 (Penny Mordaunt MP)

2.13 In particular, in this context, there appears to us to have been no good reason why the government could not have reached a position in principle with elements of the scheme, either after the publication of the Francis report or after his oral evidence or certainly after the publication of the second interim report, even if the details may have required more time to finalise. Ms Mordaunt acknowledged, in her oral evidence to this Inquiry, that the outcome of Sir Robert Francis' report would be to provide potential options or choices for the Government, with a view to those choices being made in advance of the Inquiry's final report.[27] In continuing to stick to the line that the government needed to see the final report before it could make any announcement on its position on any aspect of the recommended compensation scheme, the government must logically have rejected the finding of the second interim report embodied in the second part of recommendation 18.

2.14 In addition, we submit that the current acceptance of part of recommendation 1 of the Sir Robert Francis report, as adopted by the Inquiry in its interim reports, to the effect that the government bore a moral responsibility for the occurrence of the disaster and to pay compensation, though far from insignificant and a welcome advancement of the previously accepted position, really commits the government to nothing in real terms (other than by implication the interim payments made in implement of the first interim report). In its second interim report, the Inquiry recognised that a detailed analysis of the wrongs which were done by the State would require to wait until the publication of the final report.[28] The government has, in effect, seized on this, despite the clear imperative for the government not to wait for the final report, the second interim report being a sufficient basis to allow the compensation framework to be set up. The government has sought to portray the acceptance of the moral case in December 2022 as a materially significant step forward, which it was not.

[27] ibid, page 40-41

[28] See Inquiry's second interim report at page 2

2.15 This position taken by the government has been taken despite the detail in the second interim report. Contrary to what the government's line at the hearings was, the detail of that report is helpful in seeking to spell out with some degree of clarity what the compensation scheme should look like and why. In addition, much of that detail was already available in the Francis study of 2022. Instead, the government has sought to portray the detail as rendering their task all the more arduous. We submit that this position is a disingenuous one. Further, the government has sought at the same time to portray the publication of the second interim report as extremely helpful (with which we wholeheartedly agree) but also to seek to rely on differences between its conclusions and those of the Sir Robert Francis framework study to create a false picture of complexity, the details of which it has failed to spell out. In fact, if anything, in our submission, the second interim report seeks to remove elements of complexity. For example, it deliberately considers the compensation scheme separately from the existing support schemes on the basis that the rationale for each is conceptually different, unlike the approach taken by Sir Robert. It deliberately seeks to simplify and synthesise the heads of claim available to the infected and affected by removing the bereavement awards, which Sir Robert recommended. It removes the potential complexities involved in the transmission of affected claims. In our submission, the evidence heard by the Inquiry shows clearly that the line taken by the government in this regard is merely an excuse for inactivity, despite the primary aim of the second interim report. The government could have taken the opportunity to use the hearings held by the Inquiry relating to the Robert Francis framework study and the latest hearings as an opportunity to seek to understand the basis of its moral culpability and the reasons why the Inquiry considered the compensation scheme and the urgency of it to be the only appropriate solution to discharge the resultant moral responsibility. To have done so would have offended no principles of collective responsibility or public interest privilege. These hearings could have been used as a consultative exercise with a body set up to investigate the detail of the disaster and make recommendations about it which might assist with the formulation of policy. The evidential hearings could have been used by

the government as a means of setting out the difficulties which it was experiencing in the spirit of trying to have the Inquiry assist. It chose not to take that course.

2.16 The government has taken this position despite the fact that it was acknowledged on its behalf that:

"I'm very conscious of the suffering of those who have been infected and affected, huge wrongs have been done, and the more that we can - the sooner this can be resolved and the sooner that a Government response can be made the better".[29]

It was also acknowledged, in the context of the urgency inherent in the principal aim of the second interim report that:

"The sheer weight of loss is extraordinary, it is ongoing, it is a scandal that shouldn't have happened, and the time - I recognise that this is not just over weeks or months; it has been decades for which people have been waiting for redress."[30]

The result, in our submission, is that the harms inflicted on the infected and affected community have been unnecessarily compounded further. It is imperative, in our submission, that the final report now set out in detail the precise nature of the extensive and indeed unprecedented moral failings on the part of the State (as set out in detail in our principal submission) but also why these unique failings merit the creation of the compensation scheme which it has recommended (see, in particular the commentary in our principal submission on the Robert Francis principles and why, in our submission, they are clearly rooted in the evidence of the moral culpability and the need for a clear commensurate solution[31]).

2.17 The government has shown itself, in our submission, to be willing to evade the moral responsibility which the Inquiry has so clearly found that it has. We submit that the Inquiry must spell out in detail the precise basis in the evidence for its

[29] IBI transcript for 25/07/23; page 9 (Jeremy Quin MP)
[30] IBI transcript for 25/07/23; page 25 (Jeremy Quin MP)
[31] See our principal written submission (SUBS0000064 from page 1222)

final conclusions to minimise the risk that this will continue to be the position after the final report is published.

The likely number of claimants in the proposed scheme

2.18 It was a line consistently advanced by government that there would be likely to be a large number of claimants in the recommended compensation scheme which would mean that the scheme would be both complex and expensive. The Inquiry led evidence about leaks to the press which purported to emanate from government officials about the possible cost of the scheme (see above). Evidence was given on behalf of the government about the use of the statistical reports available to the Inquiry as a means of estimating the numbers of claimants and hence the potential overall cost of the compensation scheme. This is an area in which the Inquiry should provide some guidance to the government in its final report, based on the evidence which it had heard about why its apparent approach to the complexity of this issue is misguided. The aim of this would be to try to assist the government in understanding the likely scale of the scheme and help meet the primary objective of the second interim report.

2.19 In our submission, it would be inaccurate to use the statistical analysis contained within the expert reports as to the number of infections caused by the disaster as a basis of estimating the likely cost of the compensation scheme. It is true that report has recommended that payments be made to a number of new categories of potential claimants who have not previously been entitled to support payments from the existing support schemes. Despite this, a more realistic starting point for this assessment should, in fact, be those who have claimed on the schemes who have been entitled to support and interim compensation payments in terms of the recommendations of the first interim report. In fact, the number of claimants on the schemes is not even an accurate starting point, in our submission. It should be borne in mind that the rationale behind Sir Robert Francis's recommendation 14 and, by extension the recommendations made in the first interim report was that by that interim payment, it was anticipated by Sir Robert that many claims would be discharged. Thus, such claimants would make no further claim on the scheme,

reducing the number of infected or widowed claimants who would further claim on the compensation scheme from the total who have already claimed on the support schemes.

2.20 Further, the number of infections giving rise to claims on the compensation scheme should be able to be calculated with a degree of confidence. Though we have advocated that more should be done to try to locate potential infections which should qualify for support of compensation, the experience of the Penrose short life working group which sought to implement the one recommendation of the Penrose Inquiry was (as we have submitted previously) that it was difficult, even in the aftermath of that Inquiry some years ago, to find qualifying infections. It is thus likely that few new HCV infections will transpire and probably no new HIV infections. Given the paucity of Inquiry CPs who are HBV only sufferers, the number of claimants in that group is likely to be low. The number of estate claims may well be able to be deduced reliably from those who claimed from the Skipton Fund and/ or the Macfarlane trust, in particular in the case of children but also other claimants who have since died without leaving widows able to claim on the current support schemes.

2.21 It is, of course, self-evident that the admission of the affected groups to the compensation scheme who have hitherto not been entitled to support will increase the number of claimants. Indeed, that is reflective of the fact that the infected blood scandal was, in our submission, a uniquely broad-reaching disaster, with impact felt far beyond that experienced by those who were infected. However, at this stage, precision in these estimates is not required for a policy to be adopted in support of the recommended scheme. All that is required is a reasonable analysis of the likely scale of the number of claimants to provide a basis for an estimation of the size of the scheme to provide a ballpark guide as to its scale. When the Irish scheme was commenced, it did not appear to be necessary for the government to undertake a precise analysis of who much it would cost or how many claimants there would be for a conclusion to be reached that it was the right thing to do. It provides compensation based on civil law principles.

2.22 The result of this analysis, based on evidence available to the Inquiry is that the government's argument based on the scale and complexity of the assessment of

the numbers of likely claimants on the scheme is a part of its misguided approach to the matter.[32]

3. Conclusions/ Solutions

Ongoing harms

3.1 The inevitable further harm which has been caused by the government's intransigent response the study by Sir Robert Francis, his evidence to the Inquiry and the second interim report of the Inquiry must be recognised in the final report, as must its lack of candour in providing accurate information to the infected and affected communities as to how they intend to make good on the accepted moral responsibility to compensate the infected and affected. The final report should spell this out clearly, in particular the compounding effects of the government's intransigence and its lack of candour in failing to provide details of (a) the principles of the second interim report which it accepts in terms of the extent of its moral responsibility and consequent obligation to provide redress and (b) the precise steps which had been taken by government to construct a compensation mechanism in the period since the commissioning of the Sir Robert Francis report and at every stage since. The government's clear rejection of the primary aim of the second interim report and the clear instruction given by recommendation 18 should be recorded in the final report. It is, in our submission, the clear inference to be taken from the evidence which has been heard that the government has treated the Inquiry and the infected and affected community with contempt, deliberately hiding behind the need to consider the detailed mechanics of the proposed compensation scheme to avoid being candid about their real objective – to find a way to avoid paying sums as recommended by the second interim report.

3.2 We submit that the culpable delay of government over this period must be characterised as unjustified, both per se but also in light of the history of similar

[32] See, for example, witness statement of the Prime Minister @ WITN7712001 at para 4 where he says that 'I understand that work is underway across government…I am aware of the complexities ofpreparing an adequate compensation scheme, including the likely need for primary legislation"

delay over decades which the government must know will have had further detrimental effects on the infected and affected community. We submit that the tariffs to be fixed, either by the Chair or the legal panels (see below) should make specific provision for further damages to be paid to reflect the culpable delays over this period. It has been a consistent theme of the evidence heard by the Inquiry that government delay and obfuscation has been designed to limit its financial obligations in discharge of its moral responsibilities, in particular as a result potential claimants dying or otherwise not pursuing legitimate claims. We submit that the conduct of the government over this period should increase and not decrease its moral liability to make reparation and that all of this critical narrative should find a place in the final report. Given that the extra expense of compensation for these the additional harms, the cost of the Inquiry's entirely justified investigation into these matters and the administrative costs of the matters having to be consistently raised and debated in Parliament could all have been avoided, we would invite the Chair to criticise the responsible ministers in his final report for this entirely unnecessary waste of public money.

Financial compensation scheme

Points of material clarification

3.3 If the government's position on the need for detailed work on the recommended compensation framework is to be accepted, problems and difficulties must exist in the way in which the government understands of what the scheme should look like, despite the detail contained in the second interim report. In our proposed questions for the Inquiry's consideration, we sought to have the Inquiry investigate with the oral witnesses what these difficulties were. However, the broad position taken by those witnesses in their statements and at the hearings was to the effect that due to a combination of collective ministerial responsibility and public interest privilege, coupled with the fact that no policy about the contents of the second interim report had yet been arrived at, they could not reveal the nature of the ongoing complexities or issues were which were causing

the delay in allowing the government to provide a meaningful response. The government did not take the opportunity which the Sir Robert Francis framework study (an initiative of its own creation) created to allow the Inquiry look at government response to the prospect of a compensation framework, to analyse it (as had been intended originally) and assist and facilitate the government response, in particular in light of the Inquiry's obligation to look at harms, government response and candour. In his evidence to this Inquiry, Jeremy Quin MP accepted that, had the Government published their response to Sir Robert Francis' compensation framework study would have enabled the Inquiry's work to be informed by the Government's thinking, and would have allowed the Government's response to be scrutinised by the Inquiry[33]. The Government chose not to do so, for reasons which, in our submission, have not been properly explained.

3.4 The government's evidence was to the effect that the proposed scheme contained a number of complex and novel elements, such that the response to a combination of the Francis report and the second interim report required detailed and time-consuming analysis. We have submitted elsewhere that the evidence from the government's representatives did not support their contention that they were working at pace or that this was a reasonable position to take in the circumstances. However, in order to remove any possible impediment to further progress, we submit that the solution is for the Inquiry to seek provide them with clarification and further detail about its compensation proposals, to the extent that it appears that it would be helpful to do, in its final report. We make these submissions against a general acceptance that the government's position that the second interim report, read along with the Francis report does not constitute a perfectly clear and comprehensive basis upon which to seek to fulfil the primary aim is misguided. They did. We submit, however, that in order to achieve the principal aim of the Inquiry's second interim report, any further clarity which might reasonably be provided in the final report cannot possibly be of any harm.

[33] IBI transcript for 25 July 2023: page 5-7 (Jeremy Quin MP)

3.5 The areas in which we would suggest that this might usefully be done are, in our submission, as follows:

(a) We have already made detailed written submissions to the Inquiry about the need for clarity in its recommendations relating to the compensation scheme about the standard of proof which should be applied to applications for compensation. Much of the general tenor of what we have submitted in this regard appears to find favour in the second interim report. The second interim report is clear that legalistic notions of proof are to be avoided. In our principal submission, we argued that the evidence available to the Inquiry justified the adoption of a presumption that factual statements made by an applicant are accurate.[34] We respectfully suggest that the provisions of recommendation 3 which are based on Compensation Study recommendation 4 in this regard would benefit from minor clarification in the final report, in particular whether the statement to the effect that there will be *"in general a presumption is applied that statements of fact made by an applicant are correct"* in that recommendation applies to all matters which form part of a claim made by an applicant (which we contend and have contended that they should) or whether this sentence should be read as only applying to eligibility given the references to eligibility in the opening section of the recommendation. This is a matter of considerable importance to the operation of the compensation scheme, in our view. Our understanding is that this is not a matter which will be left to the medical and legal panels who will only be involved in the fixing of the tariffs. Further, in recommendation 8, the Chair has recommended that financial claims, unlike other claims should be dealt with on an "assessed basis". It may be unclear to the government what this means. We submit that some clarification may be of assistance in the final report which is consistent with the other principles in the second interim report, to the effect that this reference means an assessment of loss on an individualised basis to reflect the fact that financial losses will vary far more than other heads of loss which the Inquiry can be dealt with on the tariff basis. It should, in our submission and based on our understanding of the report, make clear, however, that

[34] See, in particular, submissions on assessment from SUBS0000064_ 1248

this imposes no higher standard of proof on the applicant and that the general presumption should also apply. This is because the same considerations which justify the application of the presumption for other heads of claim apply *mutatis mutandis* to financial claims, including the need for applicants to be believed for them to buy into the process, and the effects of the unjustified decades of delay on the provision of supporting evidence etc (as set out in detail in our principal submission).

(b) In addition, we respectfully suggest that there be some clarity as to the extent to which a claim can be made by the estate of an infected person, in particular the extent of the wage loss which can be claimed. As the second interim report does not recommend a financial bereavement award (as Sir Robert Francis had), which would be known in Scotland as a loss of support claim under the Damages (Scotland) Act 2011, it is slightly unclear as to what of a person's wage loss could be claimed by an estate. Would the financial claim extend to the wage loss which the infected person suffered in life or does it also cover the lost years and allow a claim for what the infected person would have earned but for the infection in the period after the actual death? We assume in these circumstances that the intention is the latter (as this would be the full extent of the loss attributable to the infection and there is no loss of support/ financial bereavement award to cover the element of this loss post the date of death). Further, we respectfully submit that some clarification of what is meant by the estate should be provided, in particular whether the estate claim can be made by an executor or similar person who would be entitled to make any claim on behalf of a deceased person and the nature of the legal entitlement to payment of the sums arising from a successful claim. The reason why this clarification may be beneficial is that though interim payments are based on an entitlement to an interim compensation payment which might have been made by a deceased person in life, the right to make such a claim and the distribution of the proceeds are defined by the report (as opposed to by operation of law) in recommendation 12. It is thus unclear whether an estate claim in the second interim report has a specific meaning attributed to it by the report or whether that would be defined by the operation of the legal rules applicable to estates in the part of the UK most closely associated with the claim.

(c) Further, the entitlement to an interim payment where an infected person died and left no partner but left both parents and children in terms of recommendation 12

seems slightly unclear, in our respectful submission. Is the intention in such a case that the payment should be made to the bereaved parents in preference to the bereaved children or that the payment be split equally amongst all of the bereaved parents and children?

(d) As things stand, it seems conceivable to us that the recommendations of the second interim report relating to exemplary damages may be causing some confusion. The report espouses the principle of parity but, in leaving such claims to the courts, claimants in Scotland would be deprived the right to pursue such claims as exemplary damages play no part in the law of Scotland.[35] Similarly, any pursuit of a claim in an English court seeking only exemplary damages may, in our view, be of questionable competence. We have already made submissions to the effect that the Inquiry is well placed to make recommendations to the effect that the compensation scheme should be able to make an exemplary award in certain cases, with broad guidance (based on the evidence it has heard) as to cases which would merit consideration for one. Given the potential that the current recommendation in this regard may be the source of some confusion and delay (and may continue to be) we would invite the Inquiry to re-consider its position in this regard in line with our existing written submission.

(e) As things stand, a significant burden has been placed on the legal panels in setting up the tariffs which will be applied by the scheme. We would welcome (and the government may benefit from) greater clarity in the final report on (a) the capacity in which the legal panel members with experience of the Inquiry and the evidence it has heard would be acting if appointed to the legal panel and also (b) the extent to which the legal panel might assist with the other elements of the way that the compensation scheme will work or the powers that the Chair of the scheme will have power to make certain provisions as to how the scheme will operate, within the ambit of the principles and objectives of the scheme set out by the Chair of the Inquiry in his reports (see below). Further, work of the panels will be significant and will take time, time which the government ought to have minimised by setting up them up by the time of the final report, in accordance with the primary aim of the second interim report. In our principal submission, we argued that the Chair of this Inquiry ought to be as

[35] See Inquiry's second interim report at page 47 and recommendation 7

prescriptive about the levels of payments which ought to be made for as many of the heads of claim which he recommended there should be as part of the compensation scheme in his final report as possible. The second interim report purports to be the Inquiry's final report on compensation. It is not prescriptive in this regard, leaving the work of fixing tariffs to the medical panel and, in particular, the legal panel. There are, however, suggestions made by the Chair in the second interim report, including that Scottish loss of society awards might be considered in setting the affected impact awards[36] and the provision of levels at which awards for injury to feelings have been made in employment cases.[37] In our submission, the delay which has been caused by the government means that the Inquiry ought to build on the work it has already done and revisit its approach in this regard. The Inquiry is uniquely placed to be able to understand the range of loss suffered by the infected and affected communities. We have provided a detailed submission on the levels at which many of the awards which would need to be made could be set. It is submitted that the provision of ranges of awards which the Inquiry considers ought to be made will (a) remove much of the uncertainty which the government claims exists about the nature and extent of the awards which are recommended should be made (b) provide greater certainty to the beneficiary community (c) provide a yardstick against which the government's response to the final report could be measured and (d) minimise further delay by making the job of the medical and legal panels more focussed. Thus, we invite the Inquiry to revisit and expand upon the guidance it has already given on the levels at which the tariffs should be fixed.

(f) In any event, we urge the Inquiry in its final report to provide greater clarity of the roles of the medical and legal panels in the way that the schemes will work as opposed to just the setting of tariffs, in order to try to offset the delay and maximise the experience gained by those involved in the Inquiry of matters which would otherwise take time to acquire.[38] In this regard, we respectfully submit that additional clarity to the precise intention of the second interim report could helpfully be added in the final report. At present it is not clear whether such individuals would be acting as

[36] See Inquiry's second interim report at page 46
[37] See Inquiry's second interim report at page 45 under reference to the Vento guidelines
[38] See Inquiry's second interim report at page 22

representatives of groups on whose behalf they have acted in the Inquiry or in an independent capacity. If they would be required to act in an independent capacity (which in our submission would not be necessary to achieve the aims of the second interim report in this regard) they would be likely to be precluded from doing so based on their previous professional roles. In addition, there are other operational aspects of the new scheme which would benefit from the input of such individuals. For example, rules relating to provisional awards would benefit from legal experience similar to that required of the legal panel members. In addition, we suggest that (given the differing rates applied across the UK) the legal panel should also be charged with fixing appropriate interest rates to be applied to past awards for the implementation of Inquiry recommendation 11. It should be provided explicitly that these should take account of interest awarded on similar awards in courts across the UK but also to take account of the particular circumstances of the disaster and the culpable delays by successive governments in failing to address the losses of the infected and affected. As is submitted below, medical panel members will be able to contribute on operational matters as well. It may be thought that these are matters which are to be reserved to the advisory board and ultimately the Chair of the scheme. If this is the case, it should be spelled out. In our view, these will be preliminary matters which will have to be dealt with quickly in order that the delay occasioned by the government's currently sluggish progress can be offset, to some extent at least. It would be beneficial (in our view) if the medical and legal panels could be given a specific advisory role there also.

(g) As to the role to be played by the legal panels on the current recommendations, it remains slightly unclear as to why and how the panels are to take account of the payments made by "other UK compensation schemes" as per recommendation 8. It may appear unclear what schemes the Chair had in mind or why these would be relevant to the fixing of the tariffs in the absence of any detailed commentary in the report about their comparability or application to the levels at which the tariffs would appropriately be set in the recommended infected blood compensation scheme.

(h) There is, in our view, a potential lack of clarity which might be addressed in the precise nature of the recommendation which the Inquiry seeks to make about those who have been infected with HBV and have gone on to suffered chronically from that disease.

At page 32 of the second interim report, it is stated that those in that category should qualify for support and interim compensation payments. It follows from their lack of current qualification for the support schemes that they also cannot access the psychological support services which the Inquiry has recognised as being of such importance elsewhere in the second interim report. These conclusions to not appear to be reflected in any of the final recommendations in the second interim report. As the focus of the government witnesses was rightly on the final recommendations as opposed to the body of the report, there is a considerable risk that this element of the Inquiry's findings has not been properly appreciated by government. We submit that this should be rectified in the final report.

(i) The Inquiry heard evidence about the extent to which recommendation 1 of the Sir Robert Francis study had (in the government's view) been accepted by the government. The Inquiry appears to have been under the impression that it had been accepted by the government in full.[39] This is not the case and requires to be rectified, in our submission. Jeremy Quin MP made a statement to the House of Commons on 15 December 2022 to the effect that:

"I wish to make it clear one critical answer to a recommendation posed by Sir Robert. In the first recommendation of his study, Sir Robert sets out that there is in his view a moral case for compensation to be paid. The Government accept that recommendation. There is a moral case for the payment of compensation"

The limitations of this statement are addressed elsewhere in this submission. However, for present purposes, we wish to point out that this apparent acceptance of recommendation 1 is merely a partial acceptance of the first recommendation which also states that "the infections eligible for compensation be reviewed on a regular basis in the light of developing knowledge".[40] We submit that this anomaly should be addressed in the final report. Furthermore, we have already made submissions that the Inquiry has adequate evidence available to it to the effect that there are cases of

[39] See Inquiry's second interim report at page 79
[40] See Inquiry's second interim report at page 79

CMV infection caused by exposure to blood or blood product which merit compensation and, for that matter, support payments. Thus, we invite the Inquiry to make clear that the government ought to accept recommendation 1 of the Sir Robert Francis study in its entirety (which it has not yet done) and that, in consequences of that ought to admit cases of chronic CMV infection to the support schemes and the compensation scheme as well, including the right to receive interim payments and payments to affected persons in that group as well.

(j) The Inquiry ought to make a further recommendation about the funding of the compensation scheme (and indeed the support schemes) going forward. We address this issue in more detail below.

The arms length body ("ALB")

3.6 One element of the second interim report on which the government did appear willing to comment was the creation of an arm's length body which was not answerable to Parliament through ministerial oversight of the scheme. The reasons why the body should operate the way which has been recommended, in particular the need for it to be independent of government are set out clearly in the second interim report.[41] In our submission, the evidence heard gave rise to a the distinct impression that the government seemed to consider the creation of the ALB as a significant impediment to progress in two regards, namely (a) the amount of time and effort which would be needed for a wholly new body to be created and (b) the efforts which would be required for that body to be answerable directly to Parliament, which (it was claimed) was an unusual and difficult thing to achieve in practice. The evidence heard by the Inquiry rather suggested that this and other technical elements of the proposals made in the second interim report could be played as a trump card whereby no progress could be expected until all elements of the proposed scheme, including this one, were fully finalised.

[41] See Inquiry's second interim report, page 21 et seq

3.7 It should be emphasised that those on whose behalf this submission is presented support the recommendations about the ALB and the need for it to be independent of government. This was the position taken in the principal submission and accords with the evidence and the views of Sir Robert Francis. However, as the evidence heard by the Inquiry showed, the political reality of the present position, including the priority which the government seems willing to give to this matter in the wider political context and the fact that there is a general election pending must give rise to the possibility that the passage of time and the claims of complexity associated with the formation of the ALB will prevent meaningful progress being made, in contravention of the primary aim of the second interim report.

3.8 In light of these apparent difficulties, we submit that the Inquiry should consider presenting in its final report alternative ways in which appropriate compensation can be delivered to the infected and affected, which remove or lessen some of the complexities which the government has identified with the currently recommended scheme. We note that the government has expressed concern about the overall cost of the combined compensation scheme and support schemes. Press reports explored during the hearings which purported at least to emanate from government officials were to this effect (see above). We do not fully understand why this is as, although we maintain our position that the support scheme payments should be viewed as a separate type of payment from compensation scheme payments (support as opposed to compensation), we consider the separation of these elements of the recommendations which we have urged the Inquiry to make may be considered by the government to be somewhat artificial. There are a number of reasons for this. In the first place, as the evidence from government has shown, the government will in reality need to consider the budgetary implications of the combined schemes – "the country only has the money that it has" as the Chancellor said in his evidence.[42] Secondly, as we have submitted in our principal submission, the support schemes, their operation and their limitations provide important evidence which support the submissions we

[42] IBI transcript for 27/07/23; page 36 (Jeremy Hunt MP)

have made about the way in which the compensation scheme should work in order best to meet its objectives. Thirdly, the Robert Francis report made recommendations about the need to bring the schemes into line with the way that the compensation scheme should operate.[43] Changes to the support schemes and to the amounts to be paid under them were an integral part of the recommendations which he made, both from a logical and technical point of view. In particular, uplifts to future payments to be made from the support schemes were designed to (a) make good a number of perceived lacunae in the current schemes, including in relations to discretionary payments and (b) offset future claims on the compensation scheme so as to minimise the number of potentially complex future claims which would need to be made within that system. Though element (b) is included within the scheme recommended by the second interim report, the rational link to the support schemes is not explicitly included in the narrative as to why this element of the compensation scheme should work in this way.

3.9 As the final report will, we presume, deal with all aspects of the evidence which the Inquiry has heard and make appropriate recommendations (including in relation to the past and future operation of the support schemes) we would invite the Inquiry to make it clear as to what changes to the support schemes it recommends be implemented. Our submission in that regard remains that the broad Robert Francis plan should be followed, as justified in our principal submission. This is commented on further below.

3.10 In our submission, the entirely reasonable separation of findings/ recommendations relating to the compensation scheme (covered in the second interim report) and the exiting support schemes (left broadly to the final report) may have given rise to the Inquiry not having explored fully the possibility of the compensation scheme being delivered through the existing support scheme mechanisms as the interim compensation payments recommended by the first interim report have been. Given the intransigent response of the government to

[43] See report by Sir Robert Francis about proposed uplifts to the existing financial schemes, in particular at para 2.53

the second interim report and the political reality to which it has given rise that the compensation scheme may not be set up in the current Parliament, we submit that the Inquiry may wish to consider in its final report exploring the alternative of using the existing schemes to deliver compensation. We would stress, however, that we support the cogent reasoning behind the Inquiry's current recommendation that compensation be delivered via the ALB which did not report to a minister but directly to Parliament. This reasoning was set out in April 2023, at a time when (we submit) the Inquiry was entitled to expect that such a body could realistically be set up by the time of the final report, against the background set out elsewhere in this submission and in accordance with the primary objective. Therefore, contemplating the possibility of compensation being delivered by the existing support schemes should, in our submission, only be contemplated and presented as an alternative, in light of the political reality to which government inactivity has given rise. We note that in recommendation 13(b) the Inquiry contemplates the possibility that the ongoing support payments could be made through the compensation scheme. This recommendation shows that the Inquiry is not averse to the concept of the compensation scheme and the support schemes being run administratively together, which is the alternative which we would suggest that the Inquiry recommending as alternative. Running both together on a regional basis would maintain the ongoing local benefits of the support schemes.

3.11 This alternative would have a number of potential advantages in the current predicament, derived primarily from the fact that the support schemes already exist. There would appear to be no reason in principle why the existing schemes could not be used as delivery mechanisms for the compensation scheme with additional framework being set up to meet the design of the compensation framework, as set out in the second interim report. It may be thought by the Inquiry (perhaps in light of receiving more evidence on the subject) that the delivery of compensation could be delivered via that route with an acceptable level of independence from government (which the current schemes attempt to some extent to achieve) but without the political or constitutional impediments which the government claims the setting up of the ALB would entail.

3.12 It is impossible for an assessment to be undertaken of the extent to which this alternative would in fact prove less legislatively cumbersome compared to the changes which would require to be made to allow compensation on a full scale to be delivered by the existing support schemes. This is because the government has refused to set out (a) the legislative issues which it envisages will be involved in the setting up the recommended ALB (b) the time they are likely to take and hence their achievability in the current Parliamentary cycle or (c) the steps which have been taken by the government to prepare for the compensation scheme and hence which would require still to be taken for it to be realised. It is likely to be the case that there would need to be legislative change in all four nations of the UK for compensation to be deliverable via the current schemes.

3.13 In the context of the Scottish scheme, the SIBSS is enabled by the legislation which was put in place to allow payments to be made under the Skipton Fund, namely those to be found in section 28 of the Smoking, Health and Social Care (Scotland) Act 2005. There would, in our view, require to be legislative changes for the compensation scheme to be able to be delivered via the SIBSS. For example, it would be likely to be necessary for the categories of eligible claimant to be widened, for example to include payments being made to those who have contracted HBV as well as HCV, which would be an innovation of the compensation scheme when compared to the support schemes. However, as is explored in more detail below, as HBV is to be included as an infection which will lead to eligibility to support, legislative changes to the 2005 Act are likely to be necessary as a result of the second interim report anyway. In our submission, it is, however, worthy of note that the legislative changes to the section 28 of the 2005 Act to enable compensation payments to be made via the support schemes in addition to support payments would not be as extensive as one might imagine. The result, we submit, is that those legislative changes may be able to be effected significantly more easily and thus quickly than legislation which would be required to underpin the currently recommended scheme administered via the ALB. This is because the provisions of the existing section 28 leave the details of the scheme to be fixed by the Scottish Ministers (in practice via the Scottish Infected Blood Support Scheme 2017, as amended from time to time) and also define payments which came be

made under the scheme deliberately widely. Unlike the HCV element of SIBBS which is funded by the Scottish Government, the HIV component is funded by the UK Government. This is part of the legacy of the preceding HIV financial support schemes (Macfarlane Trust and Eileen Trust) which pre-dated devolution and were managed and funded solely by the UK Government Department of Health. The control of the HIV component of SIBSS rests with the Scottish Government. The 2017 Scheme contains provisions relating to those payments in much the same way as the HCV payments. The power to make provisions in respect of the HCV payments only derived from the provisions of section 28 of the 2005 Act. SIBSS was able to be created and operated by a combination of the provisions of section 28 and the 2017 Scheme. It includes the power to make payments in respect of HIV. Thus, in our submission, the general power under section 28 could be used by the Scottish Ministers to extend SIBSS to make compensation payments in respect of these conditions as well.

3.14 Thus, the precise mechanics of the compensation could be introduced via alterations to the 2017 Scheme by the Scottish Ministers, with relatively little legislative amendment being required. By way of example, the legislation enables the Scottish Ministers to make payments to certain classes of people. Those payments are not confined to support payments and are more widely defined.[44] They would, in our submission, include compensation payments – which is why, we understand, the interim compensation payments could competently be paid through the support schemes without amending legislation. Further, it was contemplated at the time when the 2005 Act was passed that it might in future be the case that payments of some nature might be necessary in accordance with evolving political will. Thus, section 28 enables the Scottish Ministers to make provision for payments (widely defined) to be made to affected people, including spouses, civil partners and cohabitants but also any other category of dependant as defined by the Ministers as per the contemplated scheme.[45] Though the power to make payments to the affected beyond widows was never exercised in

[44] Smoking, Health and Social Care (Scotland) Act 2005, section 28 (1)
[45] Smoking, Health and Social Care (Scotland) Act 2005, section 28 (1)(c) and (2A)

accordance with the provisions of the 2017 Scheme, the power existed and exists for such payments to be authorised by amendment to it as opposed to the legislation.

3.15 It might be argued that the changes to the legislation in all four nations would be cumbersome also, given that it would involve changing four sets of legislation as opposed to enacting one Westminster Act. We have argued that the changes made in the four nations to the existing legislation might be considered by the Inquiry to be less cumbersome, not more so. The Inquiry has heard significant evidence about the complexities which were discussed between the UK Government and the devolved administrations (predominantly the Scottish Executive) around the time of the creation of the Skipton Fund which arose from the Ross report in Scotland, arising from the controversy as to whether the payments being contemplated at that that time fell within the powers reserved to Westminster or whether they had been devolved. That controversy centred around whether the payments were in the nature of support (on one view at least relating to social security and hence reserved) or compensation (on one view at least relating to health and hence devolved). Given that the payments recommended by the second interim report are compensation (in contradistinction to the existing support payments made by the schemes), it seems likely that there would be classified as health payments and thus their introduction will require legislation of the Scottish Parliament as health remains a devolved matter (or at least the legislative consent of the Scottish Parliament in accordance with the Sewel Convention).

3.16 Equally, the extent to which the independence requirements as set out in the second interim report could be respected by this alternative would require to be weighed in the balance. The Chair has made a forceful argument in the second interim report as to why an ALB which reports directly to Parliament and not via ministers would be the appropriate body. The SIBSS is controlled by the Scottish Ministers (as the evidence heard by the Inquiry from Mairi Gougeon and Sam Baker has made clear) and is accountable to Parliament through the normal

ministerial route.[46] Evidence heard by the Inquiry about the involvement of the DHSC on the SMG was based on their experience of and control over the EIBSS. The support schemes are thus not, in that regard, bodies which are directly comparable to the contemplated ALB. However, the political circumstances of the position have changed since the second interim report in light of the government's intransigence and delay. They should also be taken into account. It may be that the Chair considers that the appointment of an independent Chair and advisory body to be set up as part of a Scottish compensation scheme which could (we argue) be established by the Scottish Ministers by way of amendment to the 2017 Scheme (with minor legislative change to section 28 of the 2005 Act) is adequate protection of the independence of the new scheme. In Scotland, a degree of operational independence is achieved by the fact that the Ministers do not operate the scheme directly. In accordance with the power given to them under section 28(4)(d) and (e), the Scheme provides for SIBBS to be managed by the Common Services Agency.[47] Though far from perfect, the infected and affected community are used to this system. They have been generally tolerant of the SIBSS which (the Inquiry has heard) has a number of positive qualities. The accountability of the SIBSS to Parliament via the Scottish Ministers is not a feature which attracted a large amount of criticism in the evidence.

3.17 This alternative route would result in there being four compensation schemes to sit alongside the four support schemes. Again, the Chair has made cogent arguments for why a single body rooted primarily in the considerations of consistency and efficiency. These, in our submission, could be re-assessed in light of the political reality of the current position. In this regard, we reiterate the contention in our principal submission to the effect that there would be advantages to local delivery of the compensation scheme. Though the Chair has expressed the view that an ongoing relationship between an applicant and the compensation scheme would be unlikely, and that that function could be provided by the support schemes, which are to continue, some claims (in particular those

[46] Smoking, Health and Social Care (Scotland) Act 2005, section 28(4)(5)
[47] Scottish Infected Blood Support Scheme 2017, paragraph 19

which involve a financial element which will require individual assessment) may take some time to settle and so local delivery would be of benefit. In cases where a provisional award were made, the possibility of the need to return to the scheme would arise. Such cases would also benefit from local delivery. As we have always contended, the principle of parity of compensation payments must be a fundamental objective of the compensation scheme. The Chair has opined that the delivery of the compensation scheme via a single ALB would promote consistency in decision making. While this is no doubt true, such consistency might also be adequately achieved in the normal judicial fashion by (a) the rules of each compensation scheme being developed as part of the same process, in parallel and (b) the familiar system of judicial precedent being developed. In addition, it might well be argued that the co-existence of the scheme and a local compensation mechanism could be practically beneficial, given that the compensation scheme will require to access material submitted as part of support claims. This would be an advantage of a locally delivered compensation scheme.

3.18 The CPs on whose behalf this submission is drafted would wish to be clear that they agree with the ALB delivery mechanism and the principles upon which it is based. They wish the alternative to be considered in light of the political reality created by the UK Government. If the alternative delivery route were to add to the cost of the compensation scheme, this would be a matter which the Thompsons clients would consider to have been the result of the UK government's failure to progress the implementation of the second interim report. Ultimately, their position would be that any such additional cost had resulted from the lack of diligence on the part of the UK government to secure the primary objective of the second interim report.

3.19 If this alternative is deemed worthy of inclusion of the final report, we submit that one point of clarity should be made in it, namely the need for ring-fenced funding to be made available by the UK Government for the compensation element of the new schemes, as opposed to that being taken from the devolved health or other budgetary allocations. In his evidence, the minister with responsibility for the IBI, Jeremy Quin MP, confirmed the unique responsibility of the UK government for

the tragedy and the need for compensation.[48] This appears to have been used a basis for the devolved administrations not playing a very prominent role in the discussions which have taken place to this point. As ever, no detail of those was provided in the evidence from the government but the very limited number and the reluctance to provide any detail are indicative. That position is consistent, in our submission, with the evidence previously heard by the Inquiry to the effect that decisions around changes to the schemes based inter alia on the need for parity were taken without consultation with the devolved administrations. Broadly, however, we agree that there needs to be clarity in the final report around how any compensation scheme will be funded. In his evidence the Chancellor refused even to be drawn on the perfectly reasonable hypothetical question as to what budget money for the recommended compensations scheme would come from, if the government adopted a policy in support of it.[49] The fact that he did not answer that question leads to the reasonable inference that that is a question which is open and not prescribed by pre-existing budgetary rules or conventions. If it had been, he would and could have said so. Therefore, in these circumstances, we reiterate our previous submission to the effect that the Inquiry should recommend that the funding for the recommended UK compensation scheme should be the UK Government and not the budgets of the devolved administrations. We note that in its second interim report, the Inquiry stated that the *"Much of what gave rise to the wrongs suffered occurred at a time when there was no separate Government in each of the four home nations, so those wrongs justify payment by the UK Government in principle".*[50] We submit that funding of the compensation scheme by the UK government should be made into formal recommendation of the Inquiry in order to make it clear that this finding is part of the Inquiry's vision for the scheme.

Interim payments to the estates of infections not yet recognised

[48] IBI transcript for 25/07/23; pages 62 to 63 (Jeremy Quin MP)
[49] IBI transcript for 27/07/23; pages 4 to 6 (Jeremy Hunt MP)
[50] See Inquiry's second interim report at page 41

3.20 We support the recommendation made by the Inquiry in its second interim report to the effect that further such interim payments should be made. It is consistent with a submission which we made as part of our written case in support of interim payments, although we argued also at that time that these payments could be justified on other bases as well.

3.21 In our submission, this is a matter which the government has failed properly to separate from the complexities which it claims it has had to deal with in connection with the setting up of the framework more generally. The way that these further interim payments have been justified in accordance with the rationale of the second interim report. In our submission, this is consistent with the principles which underpinned the Sir Robert Francis recommendation that the infected should receive such a payment and the recommendations of the first interim report that the infected and widows should. The policy to make £100,000 interim payments for each qualifying infection has already been accepted by the government – this was the basis upon which it made such payments to the infected and to widows in October 2022, arising from the acceptance of moral responsibility to do so. The rationale for the additional interim payments recommended by the second interim report requires no additional policy consideration. In particular, it does not require there to be any policy adopted that payments will be made to affected persons in their own right (as the second interim report recommends) as the payment is to estates where an infected person has not survived to receive a such a payment themselves and there happens to be no widow or widower able to receive the payment. The currently recommended payments are entirely justified in terms of equity and require no new policy to be adopted. Bereavement payments are already made when a registered infected person dies, which are not dissimilar to the currently recommended interim payments. We submit that this state of affairs and the government's clear misunderstanding of the fact that these payments can and should be made irrespective of the more general policy on should be set out by the Inquiry in its final report.

3.22 Those on whose behalf this submission is presented wish to make it clear that these payments are important. The failure to make them, in their reasonable view,

constitutes a denial of justice and recognition for those families where an infected person has died and there happens to be no widow or widower to receive the payment. There is no basis in equity or logic for that continued injustice, in our respectful submission.

Priority of claims

3.23 We have submitted elsewhere that the evidence presented by the government to the Inquiry about the lack of progress on setting up a compensation scheme is unnecessary and has compounded the already significant harms which have been suffered by the infected and affected, which the Inquiry has so clearly recognised in its second interim report. One of the consequences of this is that the primary aim (the need for speed to try to minimise continuing injustice) needs to be reinforced by other means, in our submission.

3.24 We note that the Inquiry's second interim report has largely left decisions relating to the way that the compensation scheme will operate, along with tariff related decisions to the Chair of the scheme (supported by the advisory board) and the medical and legal panels respectively. However, we note that in places the Inquiry has helpfully drawn on its experience of having heard all of the evidence to provide guidance as to how these functions might most justly be carried out in accordance with the principles which the Inquiry thinks should underpin the scheme. We note, in particular that the Inquiry has recommended that the compensation framework is to have powers to make interim payments once it has been set up.[51] This is most welcome. We also submit that it should be prescribed by the Inquiry in its final report that, in addition, to this the Chair of the scheme should put in place a mechanism for the prioritisation of claims of genuine need, both in respect of assessing interim and final compensation payments. This fact track procedure (the details of which could be left to the Chair of the scheme to devise and implement) would be designed to offset some of the negative effects of the government's failure to set up the scheme in accordance with the primary aim by the time of the

[51] See Inquiry's second interim report at page 17

final report and in light of the very real need (as recognised clearly both by Sir Robert Francis and the Chair of this Inquiry, in particular by rejecting aspects of the Irish compensation tribunal model) to allow those who would have claims on the compensation scheme to enable them to be handled as quickly as possible and with the objective of allowing them to settle their affairs and achieve some sense of justice before they die. It might usefully be made clear that advice from the medical panel could be taken on the medical issues which might inform how claims ought to be prioritised.

3.25 The lack of reasonable or effective government response to the primary aim of the second interim report, in our submission, gives rise to the need for the Inquiry to make further recommendations about the requirement for speed within the compensation scheme once it is set up, given that the interim ambitions of the report have not been implemented. The failures in that regard can, to an extent, be offset if the scheme itself has increased and specific powers to make its own interim awards. We would suggest that, in addition to the recommendations already made about there being a need for the compensation scheme to be able to make interim payments within its own structure once it has been set up that the achievement of the underlying aims and rationale for the second interim report being issued would be assisted by a clear statement in the final report that the compensation scheme should institute a process involving interim payments and prioritisation of claims whereby the claims of the most medically needy (whether infected or affected) can be dealt with first. Though the details of this can be left to the Chair of the scheme and the advisory board, the requirement that this be part of its work is an integral part of what lay behind the recommendations for there to be interim payments, namely the need to allow those nearing the end of their lives due to illness caused directly or indirectly by infection and/ or the years of delay in government response to be allowed to settle their affair and live out the remainder of their blighted lives with dignity and in some semblance of peace.

The financial support schemes

3.26 We note that there are limited references to the support schemes in the second interim report. On our reading of the report, references them have been kept to the minimum necessary to achieve the primary aim of the second interim report, namely the requirement that further interim compensation payments be made and also that the mechanics of the full compensation framework be put in place immediately and in any event by the anticipated date of the final report in autumn 2023. That is entirely understandable. However, now that the aims of the Inquiry have been ignored (or at least the government has not yet made sufficient information available for that to be judged), our clients wish to state in the strongest possible terms that there is a compelling need for the schemes to be addressed fully in the final report. We do not seek to reiterate here our detailed previous submission about the findings and recommendations which we feel require to be made to the support schemes, in particular SIBSS, in particular the submissions we made about changes to the support schemes which were proposed by Sir Robert Francis in his framework study and subsequent evidence.[52] Given that our principal written submission was intended to inform and influence the final report of the Inquiry, it sought to treat the changes which we argue are needed to the schemes alongside the need for a compensation scheme, as Sir Robert Francis had done. Our clients are keen to emphasise the need to ensure that the requirements for clear recommendations as to how the schemes should be improved and why they should not be affected by the fact of the second interim report which has been issued in the interim.

3.27 We maintain our original position as to the need for changes to the support schemes as well as the institution of a compensation scheme, for the reasons set out in our principal submission. Given the difficulties which have been experienced in securing progress on the part of the government with the latter, we would also urge the Inquiry as to the need for precision in its final report as to its recommendations for the future of both the support and compensation schemes and the reasons for that, as per our principal submission.

[52] See our principal written submission (SUBS0000064 from page 1297)

Link to the non-financial recommendations

3.28 In June 2022, we made submissions as to the non-financial recommendations which should be made by the Inquiry. These were reiterated and expended upon in our principal submission in December 2022. The most recent evidence gathered and heard by the Inquiry has some relevance, we submit, to some of those. In the first instance, we submitted that the Inquiry should recommend the setting up of a task force to oversee the implementation its recommendations[53] The experience of the second interim report and the government's response to it has shown that this task force is likely to be an essential part of the implementation of the tireless work done by the Inquiry. The government response, in our submission, reinforces the need for the task force to be set up as the Inquiry will cease to function at the time of the submission of its final report.

3.29 Secondly, we are of the view that evidence which has been heard in recent weeks must cast significant doubt on whether the current government intends to honour the recommendations in the second interim report with regard to compensation and even if it does, to what extent. In such circumstances, the only available route for financial redress would be via the courts. Even within the body of the second interim report, the possibility of redress to court action for those who wish a more bespoke assessment of their losses appears to be contemplated.[54] We wish to reiterate the importance of our previous submission about the justification for the Inquiry recommending that the otherwise applicable prescription and limitation rules be removed to allow such claims to proceed without that potential impediment.[55]

3.30 Thirdly, we have called in our principal submission for the Inquiry to recommend the extension of the duty of candour to government.[56] The evidence available to the Inquiry about the way that the government significantly reinforces the submissions which we have already made in that regard.

[53] See our principal written submission (SUBS0000064 from page 1164)
[54] See Inquiry's second interim report at page 18
[55] See our principal written submission (SUBS0000064 from page 1191)
[56] See our principal written submission (SUBS0000064 @ page 1199, para 18.5)

James T. Dawson KC

Heather Arlidge

25th August 2023