Response to the consultation exercise with Sir Robert Francis KC regarding the UK Government's proposed Infected Blood Compensation Scheme ("IBCS") on behalf of Thompsons Solicitors Scotland

Introduction

1. Thompsons Solicitors Scotland welcome the opportunity to make a written response to the consultation exercise being conducted by Sir Robert Francis KC relating to the details of the IBCS. Given the tight deadline, it has not been possible for us to consult fully with all of our clients, however there are number of matters which we wished to highlight based on our knowledge of our clients' position having represented them for a number of years, and on the limited discussions that we have been able to have with clients within the timeframes that have been imposed.
2. Our understanding is that Sir Robert, as Interim Chair of the IBCS is being asked about the proposals made by the government as to the operation of the IBCS and seeks from him his views on the extent to which those proposals meet the recommendations made by the Chair of the Infected Blood Inquiry as to how the compensation scheme should operate which, in turn, accepted and incorporated elements of Sir Robert's own study on the matter, commissioned by the UK Government and in connection with which he gave evidence to the Inquiry. As the Victims and Prisoners Act obliges the Government to establish the compensation scheme within three months of Royal Assent, that is to say 24 August 2024 and Sir Robert intends to submit his report on the proposals to the Government by early July, our ability to respond has been limited by the time limit of 29 June 2024 set by Sir Robert.
3. Given that understanding, the purpose of this response is to assist Sir Robert with matters which we consider require to be addressed with the government, in particular relating to areas where the Government proposals do not seem to meet with the letter or the spirit of what was recommended as to compensation by the Inquiry. Given time constraints, the observations contained within this response do not go into the detail included in the submissions on compensation made on

behalf of clients represented by Thompsons Scotland to the Inquiry, which in our view, continue to contain valid observations as to the way in which the compensation scheme should operate. The details of those submissions can be found below.[1]

4. The 39-page paper produced to use in connection with this consultation exercise (referred to here as the "Proposals") forms the mainstay of our response to the Government's proposals. Given the invitation to do so, we have addressed matters arising from the document which seem most pressing to us, with particular emphasis on the matters raised in the consultation invitation document circulated by Sir Robert.

Supplementary Route

5. It should be made clear that the Supplementary Route is available to any applicant who wishes to take it and is not limited in any way (such as to those who have documentation to show that they were higher earners) and that payment of the Core Route tariff base assessment figure should be made to any applicant pursuing the Supplementary Route in the meantime, so as to minimise delay and disadvantage.

[1] SUBS0000011 - Initial submissions (not compensation) on behalf of Thompsons CPs - 20 Jun 2022.pdf [pdf]; SUBS0000036 - Submission on interim compensation dated July 2022; SUBS0000064 - Final written submissions on behalf of Thompsons CPs – 15 December 2022, in particular page 1215 et seq; and SUBS0000072 - Further additional written submission on behalf of the core participant clients represented by Thompsons Scotland - 25 Aug 2023.pdf [pdf] (government response to the second interim report)

Definition of eligibility – wider family/ friends and carers

6. At page 6 of the Proposals, it is stated that "The Compensation Framework Study and the Inquiry's Report recommended that compensation be provided to recognise the family and friends of infected persons whose physical and/or mental health has been impacted as a consequence of infected blood". The Proposals then go on to define those in this category as eligible based on having provided care to the infected person. This confuses and conflates two different types of claimants namely (a) wider family or friends who have suffered injury themselves and (b) those who have provided care. These are separate losses and ought to be compensated separately.
7. Further, at page 6, carers who will be eligible for compensation are defined as (a) those who have without reward or remuneration, provided personal care or support greater than would otherwise reasonably have been expected and (b) where the provision of care averaged at least 16.5 hours of care per week over a time period of at least 6 months. The additional requirement of hurdle (b) is arbitrary and unnecessary. We suggest that it should be removed.

Capacity in which estates can apply for compensation

8. At page 7 of the proposals, it is stated that:

"Where a person who would have been eligible to apply to the Scheme as an infected person has died, the personal representatives of the deceased infected person's estate may apply for compensation under the Scheme on behalf of the estate of the deceased infected person.
Where an affected person has died, their estate will not be eligible for compensation."

9. We consider that this statement requires to be clarified as it is, on one view, misleading. Whereas the estate of a deceased infected person has no right to claim in its own right in that capacity, it should be made clear that, in accordance

with the provisions of the Inquiry's second interim report, estates do have the right to claim what the deceased would have been able to claim in life under the various heads for which a claim could have been made. In particular, clarification is needed as to the extent of the financial claim which can be made by the estate in that capacity. It appears clear that the objective of this recommendation is to enable the estate to claim for the loss suffered by the deceased infected person. Therefore, we suggest that heads of claim should clearly also cover an impact injury award for contemplated lost years which is akin to an award which could be recovered in a fatal claim under the Damages (Scotland) Act 2011, section 1 (1) and 1(2).

10. It is unclear why the rules require to define the right to financial loss of affected person based on dependency[2] when an estate is able to claim the full financial loss of a deceased individual. As the full financial loss of the deceased individual can be claimed by an estate (actual loss and lost years to normal healthy life expectancy), there is no need for a deduction to be made to reflect the expenditure that the infected person is assumed to have spent on themselves[3], as would be necessary in a loss of support or financial dependency claim. The financial claim of affected persons is based on their own loss – this aspect of the Proposals may require to be reviewed and clarity given as to whether this will need to be assessed in every case.
11. For the sake of clarity, reference should be made in the response to the need for Scots law to be respected in the drafting of the regulations, including that the estate in Scotland is represented by the deceased's executor or executrix. It should be made clear that the drafting of the regulations may require Sewel Convention issues to be considered so as not to affect the effectiveness of the regulations. Consideration will also have to be given to the impact of the proposals on existing Scottish legislation relating to the support schemes.

[2] Proposals page 17. See Inquiry second interim report at page 13(p) – "Because each affected person should have a claim in their own right for what they personally have lost and suffered, there is no need to treat them as if they were dependants of the deceased under the Fatal Accidents Act 1976." And from page 35 et seq

[3] ibid

Multiple claim awards

12. It is not clear why in a situation where a person can claim in multiple capacities such as sibling and parent why that person's ability to claim multiple awards would be restricted to injury impact awards. There should be no such restriction . Different types of awards should be available as an affected person who qualified in multiple capacities as they are likely to have suffered all different types of loss in multiple capacities beyond the losses compensated by the injury award, such as the social impact and autonomy awards.
13. It should be made clear that an infected person can claim as an affected person as well, for example in situations where a haemophiliac was infected but also suffered due to a sibling being infected by similar treatment.

The continued operation of the support schemes

14. The Proposals suggest that the support schemes will be abolished and that payments under the IBCS will eventually replace the awards under the support schemes. There are a number of features of this proposal to which we object.
15. First, the proposal contravenes the findings of the Inquiry in its second interim report. It stated at page 53 that:

    "Sir Robert recommended that the annual payments under the support schemes should be guaranteed for life, by legislation or secure government undertaking, and I agree."

16. Secondly, the schemes have been relied upon by members of the infected community as a means of providing security. Many applicants have built up good working relationship of trust with the SIBSS. The current arrangements, without

adequate provisions to deal with the transition will run the risk of (a) causing further harm to the removal of security (b) undermine the advantages of locality which the SIBSS offers and which the IBCS will not and (c) cause practical difficulties such as for mortgages (applicants have been able to secure letters of comfort about future payments under the support schemes which form the basis of their current mortgages or would form the basis of any remortgage). In his initial letter, Sir Robert emphasises that it was an important principle of securing and maintaining the trust of the infected and affected community. The current proposal to abolish the support schemes run the risk of undermining that from the outset.

17. Thirdly, the replacement of the support schemes as far as future payments are concerned does not provide any guarantee that an applicant will not receive less than he or she would receive, were the support schemes to continue. The SIBSS works on a self-assessment principle which was adopted as a result of a lengthy consultation and deliberation processes which led to the view that this was the most appropriate way for the support schemes to operate. The government proposals paper states that:

"Using the proposed severity bandings will also enable an objective assessment of a person's entitlement to compensation, meaning that compensation can be awarded through the Scheme in a fair and consistent manner".

Thus, the advantages of self-assessment will be lost unless a guarantee can be given that no payment will be less then would be received as a result of an individual's currently self-assessed severity rating under the support scheme. It should also be clear that were an individual to assess themselves as falling into a higher severity band in the future due to a deterioration in their condition that payments equivalent to what would have been made under the guaranteed SIBSS would be made at that point.

18. Further, the current proposal is that in working out whether the proposed payment under the IBCS would be less than would be received under the support scheme,

it is stated that the IBCS will take account of awards made to the applicant in ANY capacity.[4] This is inequitable and illogical. For the guarantee to be meaningful, it would be necessary for it to cover only the capacity in which an individual would otherwise have been entitled to a support scheme payment. For example, in the case of a widow, the scheme would require to guarantee that the widow will receive no less than the payment she would have received in her own right under the scheme and disregard any payment made under the scheme in other capacities, such as the beneficiary of a deceased's estate in receipt of compensation her deceased husband could have claimed in his own right.

19. In any event, we are of the view that the right to offset any payments to work out whether an individual will receive the same amount for the future or not should be restricted to consideration of payments made by way of compensation for future care and financial loss, which are the equivalent of the support payments which would have been made for the future under the support schemes. Those payments were for the support of the individual. Other payments such as payments made in different capacities or payments made as part of the injury award, the social impact award or the autonomy award are not the equivalent of payments which would have been made under the support schemes for the future and should be disregarded for the purposes of that calculation and the allocation of any top up required to meet what would have been paid under the support schemes.

20. In addition, the fact that the guarantee can be measured by set off against any sum paid via the IBCS is neither equitable nor does it accord with the Inquiry's recommendations. The proposed scheme would allow past compensation to be set off to lessen future payments below the level they would have been under the

[4] See Proposals page 18 – "Any top-up payment awarded will take into account other compensation payments that a person has received through the Scheme **in their own right and, if applicable, as an estate beneficiary"** and Proposals at page 19 – "In the event that the IBCA assesses that a person is entitled to less compensation through the Scheme than may have otherwise been paid to them through continued IBSS support payments, an additional top-up payment will be provided to bring the compensation they receive up to the level of the support payments. This will ensure that no one will receive less compensation through the Scheme than they may have otherwise expected to receive through payments under existing schemes. Any top-up payment awarded will take into account other compensation payments that a person has received through the Scheme, **either in their own right or as an estate beneficiary.**"

support schemes. Under present arrangements, for example, if an applicant had a past compensation claim, he or she would be able to continue to claim future support for the rest of his of her life. The present Proposals would mean that the past compensation (payable due to a recognised past loss and not reducible by reference to past support scheme payments) would be set off to lessen the calculation of what would have been received from the support schemes in future and for any top up, which would leave that applicant with less than they would otherwise have received past compensation being set off against notional future scheme payments. In accordance with the recommendations of the Inquiry, only future compensation payments should be offset against notional future support payments in the calculation of any top up. The proposals should be altered accordingly.

Evidence requirements

21. This was a matter which was raised by Sir Robert as part of the consultation process in relation to a number of the aspects of the operation of the IBCS. The second interim report is clear that legalistic notions of proof are to be avoided – we agree and take the view that this must be reflected in the regulations. We are unsure if this is a matter upon which legal advice was sought or provided by the expert group. In our principal submission to the Inquiry, we argued that the evidence available to the Inquiry justified the adoption of a presumption that factual statements made by an applicant are accurate.[5] This reflects the positive report given by Sir Robert about the operation of self-assessment within SIBSS, the effects of the passage of time on the availability of documentary evidence and the importance of applicants being believed in engaging them in the process.
22. We refer to the provisions of recommendation 3 which are based on Sir Robert's Compensation Study recommendation 4 which state that *"in general a presumption is applied that statements of fact made by an applicant are correct"*.

[5] From SUBS0000064_ 1248

This should be read as applying to all matters which form part of a claim made by an applicant.

Calculation of tariffs/ severity banding

General

23. We understand the basic premise which lies behind the creation of the tariffs that they cannot suit every case, as is reflected in the fact that applicants retain the right to seek bespoke quantification of their claims as per the Supplementary Route. However, we suggest to Sir Robert that there is a danger as presently set out in the government's proposals that the tariff scheme lacks the necessary level of sophistication. In essence, the severity bands are too crude as was the case with the Skipton fund. If this remains the case, we are of the view that this may lead to many more patients than would originally have been anticipated would require to do so seeking to have a bespoke assessment via the Supplementary Route. In essence, we suggest that a more sophisticated tariff scheme could be created, consistent with the Inquiry's recommendations and the evidence which it heard to meet the objective of maximising the number of claimants who would not feel the need to seek bespoke quantification.
24. As the current support schemes work on the basis of self- assessment and have been understood and updated to take account of developing understanding of the effects of infection, we see no basis for departing from them.

Measure of loss related to infection with HCV

25. In particular, the method of categorising the tariff which should be applied for HCV infection based on the extent of liver damage is too crude. Evidence heard by the Inquiry shows this. The original Skipton criteria were based on liver damage as the sole touchstone of loss. Governments across the UK later revised the terms of the

support schemes to reflect development sin understanding with the stage 1 and 2 categories being abandoned, self-assessment being adopted and the difference between severe stage 1 and stage 2 infection eventually being eradicated under the SIBSS. Without suitable refinement to take account of the non-liver associated sequelae (which are clearly documented and could be categorised in the evidence heard by the Inquiry) there is a significant danger that the loss associated with infection and its consequences will be incorrectly categorised.

26. In such circumstances the banding is inconsistent with the definition of:

(a) The Injury Impact award, which recognises (i) not only the physical but also the mental injury, emotional distress and injury to feelings (ii) injury due to not only to infection but also to treatments. Measuring loss by reference to liver damage alone does not take adequate account of these factors as part of loss or the cause of consequential losses, such as care, financial loss or services.

(b) The Social Impact award, which recognises social consequences of the infection including stigma and social isolation which are part of the loss or the cause of consequential loss but are not measurable by damage to the liver.

(c) The Autonomy award, which provides additional redress for the distress and suffering caused by the impact of the disease, including interference with family and private life (e.g. loss of opportunity to have children), and interferences in the autonomy and private life of the eligible applicant which are equally not causative per se of liver damage.

27. In any event, the tariffs should make specific reference to the effects of treatment, which in many cases was as damaging or more so than the infection itself.

28. If liver damage is the sole measure of the banding of the claim, these important aspect of the recognised harm and consequent loss are effectively ignored and a bespoke claim would require to be made.

29. In cases of death, it hard to see how the extent of grief or loss of society can accurately be measured by reference to the extent of liver damage which the deceased person suffered.

30. Connected to this is the illegitimate assumption based on expert evidence that from 2016, the ability to work (and one assumes the effect for the purposes of the injury impact and care awards as well) is likely to have been improved by the availability of new treatments (see page 15 of the proposals). Annex C suggests that this advice was received from medical and not employment experts. The assumption is based on a liver-focussed approach which takes little or no account of (a) the impact of non-liver related consequences of infection (see above) and (b) the likely impact of years of non-employment on employment prospects – one does not become able to obtain work simply because the viral level may have been diminished. The 2016 date is also questionable. Evidence heard by the Inquiry was that many patients reasonably refused treatment due to previous negative experience of earlier treatments. This must be revised and the assumption removed.

Injury awards, social impact award and autonomy award

31. The Proposals document provides no clear explanation as to how the tariffs for these awards have been arrived at. In places there are admissions that there are limited equivalents in awards made by courts to the heads of claim which the Inquiry has recommend should be paid. As the regulations may be challengeable by judicial review, Sir Robert should recommend that the reasoning behind these figures (as well as the medical advice which has been relied upon elsewhere in the Proposals and the care figures) should be published in full.
32. In any event, we submit that there is no suggestion that these figures contain any elements of interest for elements of the award relating to the past. The final recommendations should include the ability of the past element of an award to include interest at 4% per annum from the date of infection (which should in most cases be readily identifiable from records) and 8% per annum from the date of death, in accordance with the practice of the Scottish courts.[6]

[6] See commentary from page 1256 of our main submission to the Inquiry

33. As regards the impacts of campaigning, the Inquiry's second interim report at page 53 stated that:

"It has been submitted to me that the impact on individuals of their campaigning should be borne in mind. I agree this deserves to be taken into account. I leave it to the Chair of the scheme to determine how it is most appropriate within the categories of loss to recognise it, since it might easily be a factor in determining an appropriate award under any or all of the first three categories of loss"

Such an award is not recognised in the current tariffs. We recommend that in cases where individuals are able to describe involvement in campaigning, an uplift of 50% on the top rates on each of these three awards should be paid. This recognises to an extent, the fact that campaigners have borne the burden of others' infections over the years and, in that regard, are also affected persons under all three of the categories for which compensation is to be paid.

34. Delays caused by government intransigence over the years are not recognised in the injury impact award, both relating to the failure to recognise the scandal and its effects for decades but also in relation to the Government's failure to implement the recommendations of the Inquiry's second interim report despite the timing requirements imposed by the Inquiry, leading to the requirement for further evidence to be heard by the Inquiry in the summer of 2023. A further flat rate element should be added to all of the injury impact awards to reflect this.[7]

35. In light of the assessment of the severity bandings, which appear to contain little, if any, component allocated for psychological loss, we suggest that the tariffs for the injury impact awards should be reviewed taking account of judicial awards for psychological loss and related to the extent of the physical injury. A component should be added to each tariff accordingly to reflect this element which can be

[7] See Inquiry's second interim report at page 12(d) – "*Not only do the infections themselves and their consequences merit compensation, but so do the wrongs done by the way in which authority responded to what had happened"* and at page 14(r) *"The failures of response by authority can and should be recognised fully in the award for Loss of Autonomy as proposed by Sir Robert"*

assumed to have existed in every case, from acute infection upwards. Similarly, this should be added to the injury impact award for the affected.

36. The injury impact award should also include a sum for the impacts on individuals of concerns over having contracted vCJD as a result of their exposure to infected blood.

Autonomy award

37. The autonomy award takes no account as presently formulated of impacts beyond the impact on family life. The award bandings need to take provide for additional elements for (a) breaches of autonomy/ dignity/ personal choice and which should be universal as they were so widespread in evidence heard by the Inquiry and (b) involvement in medical research (which should be assumed for all haemophiliacs at a base level, with enhanced awards for haemophiliacs infected as children and those in the Edinburgh cohort, Trealors pupils and other proven cases of non-consensual research beyond those core categories).

The calculation of financial loss

38. The main aspect of the proposals with regard to financial loss with which we take issue relates to the periods during which it is assumed that individuals could have worked based on medical assumptions about the progression of disease. Such an approach underestimates the effect of non-liver related damage on employability, including mental effects, the effects of treatment and the types of loss which give rise to the social impact and autonomy awards. The severity bands adopted by the support schemes should be considered as more appropriate as they allow a more bespoke, subjective assessment of the actual effect of infection, treatment and their consequences. The current approach is likely to result in many patients seeking to have their cases assessed by the Supplementary Route as the measures of financial loss are too crude, as regards employability. A more nuanced banding system should be employed. For

example, chronically infected children should be assumed to have been incapable of full earning potential from a much earlier age (in our view from the age of 18) due to the likely heightened effects on them of the combination of losses on their developing bodies and minds as well as the inevitable loss of educational and social opportunities.

39. The proposals currently only provide clear calculations for notional financial awards counted backwards from the date of death and provide no means of calculating how the Core Route financial award will be reached in cases where the infected person is living. How will progression counting forwards as opposed to counting back from the date of death work? It is assumed that an award will move to a certain level as at the date of progression to a certain level of damage but it is far from clear if a patient has not reached the maximum annual award how future financial loss will be assumed based on prognosis. Will this be to the notional age of a healthy death? If so, this should be spelled out. Similar considerations apply for future care awards. If the future award is to match the award which would have been made by the support schemes, does every living patient whose self-assesses as a severe infection receive the full financial award plus 5% irrespective of diagnosis and prognosis?
40. The Proposals document contains no information about the availability of provisional awards of compensation. It is unclear how future awards will be assessed and the regulations must be clear on this matter. If an individual is placed in a certain band now, it is unclear how the possibility of deterioration into a worse band will be assessed. It is essential that applicants have a statutory right to return to the IBCS in the event of deterioration to be placed into a more severe banding, where applicable and to receive further awards of damages, or else they may be undercompensated.
41. The Proposals provide that "an award for future financial loss (i.e. years between death and healthy life expectancy age of the infected person) is paid to any affected dependants". [8] Further definition requires to be given to the family members who will be entitled to such a payment and how such a payment will be

[8] Proposals page 14

divided amongst them – see also our comments on the need for dependency to be part of the Scheme at all above. It is proposed that this should be made to the estate of the deceased and distributed as per the laws of succession applicable to the applicable law of the case.

42. It is not clear how lost employment years are to be calculated in death cases. Is it to be assumed that a deceased individual would have worked until normal retirement age at the full annual salary figure? This should be the case and should be clarified.
43. How are financial loss calculations to be done in the case of children who died and who did not work? We would suggest that this should be on the basis of the full annual salary figure plus 5% from the age of 18 to the notional age of retirement.
44. The proposition that additional documentation must be produced to be able to qualify for a higher ward via the Supplementary Route[9] should be altered or at least clarified. The current definition appears to presuppose that the only way this could be done would be by producing evidence of higher pre-infection earnings. There may be cases where this is not available but for legitimate reason such as where the applicant was denied entry to certain employment due to infection or its consequences. Such cases would ordinarily rely on circumstantial and expert evidence. The regulation should simply refer to "evidence" as opposed to "documentation" to avoid confusion. The standard of proof for any application by the Supplementary Route (whether for financial awards of otherwise) should be on the balance of probabilities but based on a presumption that the evidence is true and accurate, so as to avoid adversarial proceedings.
45. The assumptions as to deterioration and hence ability to work and requirement to receive care must be set out clearly. How they will be applied in non-fatal cases must be clearly set out, as must the assumptions which have been applied to what proportion of financial loss should be payable in each stage of the deterioration of an infected person. To suggest that a person would be able to work some of the time (and hence not receive full financial loss) for periods of

[9] Proposals page 16

infection appears to us to be unscientific. The assumptions about the rate of deterioration take inadequate account of the whole body effects of infection. The assumptions about the effects of historic treatments are significantly understated. As set out above, the assumptions about the likelihood of eradication of detriment by more recently available treatments are, in our view, considerably overstated. All of these factors, in our view, should gravitate towards chronically infected individuals receiving full net wage loss plus 5% for their full working lives.

46. Interest should be payable on past financial awards based on the assumptions as to when financial loss should be paid calculated at 8% from the date of the loss to the date of the assessment.[10]

Care awards

47. The Proposals contain no explanation of the time periods over which the different rates of care awards will be paid in Core Route cases and how they relate to the severity bands.[11] In any event, no figures other than illustrative ones have been provided.
48. Interest should be payable on past care awards based on the assumptions as to when care loss should be payable, calculated at 4% per annum during the period when the care was deemed to be provided and 8% from the end of the period of care to the date of the assessment.[12]

Conclusion

49. The Government has seen fit to issue numerous indicative figures for what typical applicants will receive via the Core Route.[13] Concerns around aspects of the proposals would perhaps be allayed if better explanations could be given as to

[10] See commentary from page 1256 of our main submission to the Inquiry
[11] Proposals pages 30-33
[12] See commentary from page 1256 of our main submission to the Inquiry
[13] See Proposals from page 21

how these indicative figures are arrived at. In order to assist with the concerns of the infected and affected, we would suggest that Sir Robert recommends that a more detailed explanation of how these figures are arrived at be provided in early course, given that the calculations must have been done for the figures to have been published.

50. Further, given the likelihood under the current proposals that many more applicants than had been intended are likely to require to avail themselves of the Supplementary Route due to the crudeness of the tariffs, it is likely that the administration of the IBCS will be more complex than had been intended. As such, we submit that it will be necessary for the right to funded legal representation for applicants to be included in the regulations.
51. Given that we raise in this written response a number of issues which, in our view, require further explanation on the part of government, we trust that Sir Robert will be able to obtain such explanations quickly in order that he can be fully satisfied that the Government's proposals have been fully thought through and justified, in accordance with the recommendations of the Inquiry.
52. We stand ready to participate in any further engagement which Sir Robert may require to assist in the process of ensuring that the Inquiry's recommendations as to compensation are implemented in full, whilst recognising the time constraints arising from the statutory timetable.

Thompsons Solicitors Scotland

28th June 2024