DETERMINATION UNDER SECTION 21(4)

Re NOTICE TO MEDICAL DEFENCE UNION DATED 6 DECEMBER 2018

1. The Infected Blood Inquiry has Terms of Reference which were made by the Minister. He made a statement to Parliament on 2nd.July 2018 setting them out.

2. The Terms include examining "..to what extent people given infected blood or infected blood products were warned beforehand of the risk that they might thereby be exposed to infection…" (1(d)); "..the actions of Government…NHS bodies, the medical profession, and other organisations or individuals involved in decision making in relation to the use of blood and blood products…"(1(g)); "..the nature, adequacy and timeliness of the response of Government…the medical profession, …and other organisations (including the Haemophilia Society) to the use of infected blood or infected blood products to treat NHS patients" (5(a)); "..the adequacy of information provided to people who were infected and affected, including: (a) the nature, adequacy and timeliness of the information provided to those infected about their condition(s)" (7); ".. whether (a) there have been attempts to conceal details of what happened (whether by destroying documents or withholding information or failing to include accurate information in medical records or otherwise) and if so the extent to which those attempts were deliberate…(9); and "to identify…any individual responsibilities as well as organisational and systemic failures" (10).

3. In examining these questions amongst others the Inquiry has the power under the Inquiries Act 2005 to require information to be given to it, and to require the production of documents. The Act provides, inter alia, by section 21 as follows:

> *"**Powers of chairman to require production of evidence etc***
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> *(1)The chairman of an inquiry may by notice require a person to attend at a time and place stated in the notice—*
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> *(a)to give evidence;*

(b)to produce any documents in his custody or under his control that relate to a matter in question at the inquiry;

(c)to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

(2)The chairman may by notice require a person, within such period as appears to the inquiry panel to be reasonable—

(a)to provide evidence to the inquiry panel in the form of a written statement;

(b)to provide any documents in his custody or under his control that relate to a matter in question at the inquiry;

(c)to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

(3)A notice under subsection (1) or (2) must—

(a)explain the possible consequences of not complying with the notice;

(b)indicate what the recipient of the notice should do if he wishes to make a claim , within subsection (4).

(4)A claim by a person that—

(a)he is unable to comply with a notice under this section, or

(b)it is not reasonable in all the circumstances to require him to comply with such a notice,

is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground.

(5)In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), the chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information.

(6)For the purposes of this section a thing is under a person's control if it is in his possession or if he has a right to possession of it."

4. If a person fails without reasonable excuse to do anything he is required to do by a notice under section 21 he commits an offence (section 35(1)), for which proceedings may be instituted (only) by the Chairman of the Inquiry.

5. Subject to those provisions (and any other specific provision) the procedure and conduct of an Inquiry are to be such as the Chair may direct. This in my view gives a Chair a right (subject only to specific contrary provision) to do such as to extend time for compliance with an Order under section 21.

The Current Application

6. I have before me an application under section 21(4) made on behalf of the Medical Defence Union ("the MDU") in response to a notice served on the Society, which required it to provide all documents and information, howsoever held (whether in paper, electronic, video, audio, microfiche or whatsoever other form) by or on behalf of the MDU which consist of: (a) unredacted MDU medico-legal and dento-legal adviser notes made during or relating to telephone advice sessions conducted by medico-legal and dento-legal advisers, which might concern infected blood and infected blood products, (b) all electronically held, unredacted MDU medico-legal and dento-legal adviser notes made during, or in connection with telephone advice calls concerning infected blood and blood products, and (c) all Case files, including those in respect of regulatory, coronial and clinical negligence cases, which concerned infected blood or blood products held in scanned, unredacted, .pdf format or otherwise. The date for compliance with the notice is 31st. January 2019.

7. On 15thJanuary 2019 John Mitchell of Weightmans LLP, who act as the legal representative of the MDU for the purposes of the Inquiry, sent a letter by email to the Inquiry noting that section 22 of the Inquiries Act 2005 provides materially as follows, under the sub-heading "Privileged information etc":

> *"(1) A person may not under section 21 be required to give, produce or provide any evidence or document if—*
>
> > *(a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or*
> >
> > *(b) the requirement would be incompatible with a EU obligation."*

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8. The letter argues that although in general members of the MDU are content to waive privilege, in some cases High Court orders protect a patient's confidentiality. Further, Article 8 of ECHR provides for a right to respect for private and family life which protects medical records and medical information generally, such that to require disclosure of such records is to

interfere with that right. Any interference with it must be "necessary" for one of the purposes specified in Article 8 paragraph 2. Third, legal advice provided to Weightmans LPP 9 years ago is to the effect that procedural safeguards are implicit in Article 8, requiring that prior to a decision to disclose private information, the individual potentially affected is generally entitled to be given notice and an opportunity to make representations.

9. In considering these submissions, it is necessary for me first to set out something of the history.

10. First, I am satisfied that the MDU has complied with the request falling under (b) in the Notice (see paragraph 6 above).

11. The search for documents relevant to the Terms of Reference searched around 350,000 notes made since 2000. It resulted in 13 documents of particular interest, which were forwarded to the Inquiry. Amongst them is one which appears to show that the Procurator Fiscal asked a doctor to make sure the doctor did not record a death (from Hepatitis C) as due to a transfusion, though the doctor thought it probably was, because the Procurator Fiscal would then have to investigate the death. This is a somewhat startling discovery, of direct relevance to the inquiry especially when considering whether there has been a cover-up of what occurred.

12. It is of course relatively easy to search an electronically searchable database. However, it did not cover the period prior to 2000. Notes of communications between the MDU and doctors before that date, so far as they have not been destroyed, are contained in 333 A4 notebooks, 38 folders and a further 620 pages of manuscript telephone adviser notes dating from approximately 1979 to 2000. These contain approximately 165,000 notes which may be relevant. The MDU points out that if notes which are probably relevant were made during that period with the same frequency as those made after 2000, there would be only 6 of such relevance. I note in passing that it is much more likely that notes made in the late 1970s and throughout the 1980s are of important relevance than notes made since 2000, because by the early 1990s steps had been taken which made it probable that there would be no further cases arising of Hepatitis C or HIV infection because of transfusion with blood or blood products.

13. The letter suggests that the vast majority of these records will be irrelevant, but that they may well contain material protected by Article 8, and in such cases there is no practical way of seeking the consent to disclosure of those who may be concerned. Further, it contends that the information in the 6 or so documents that might be of demonstrable relevance could be obtained from other sources (though the letter does not elaborate on these, and I would

observe that the very process of inquiry involves putting aside any prejudgment as to what documents actually contain – how can it be said the information is available from other sources when it is not known what that information is? The example of a record of the Procurator Fiscal allegedly seeking to influence the form in which a death was recorded illustrates this.)

Discussion and Conclusion

14. The application is made under 21(4). There are two limbs to that subsection. The second provides that it is a proper ground to vary or revoke a notice where it is not reasonable in all the circumstances to require compliance with it. Part of the relevant circumstances here relied on include the provision in section 22 that a person may not be required to produce or provide a document which he would not be required to provide in civil proceedings in a court in the relevant part of the UK. As to section 22, there is in my view an appropriate plea in respect of those materials in respect of which there is an extant High Court Order for anonymity, which can be observed by careful redaction. Otherwise, I do not see any objection which could be maintained in civil proceedings as a bar to production. Article 8 does not demand it (though an application of Article 8 may make it unreasonable to make the order, and I fully accept that Article 8 requires consideration under that head). LPP is not relied ón. No EU obligation prevents it (Article 8 is not an EU right in origin, but arises under the European Convention on Human Rights and Fundamental Freedoms. Section 6 of the Human Rights Act 1998 obliges public bodies not to act in a manner incompatible with it: the Inquiry, as a public body, may not do so. Only where Article 47 of the EU Charter, incorporated into English law following the Lisbon Treaty, applies does Article 8 have effect as an EU obligation, and hence come within section 22 directly. Article 47 applies, however, only if the particular right concerned falls within the scope of EU law generally, and it is difficult here to see that the question of disclosure does.) Accordingly, section 22 does not operate as a bar to production save in the limited class of case where there is an extant High Court Order providing for anonymity; in such cases I accept that it would be appropriate for the MDU to redact patient names and other patient-identifying material prior to disclosure.

15. As to section 21(4) I have also to ask whether it is unreasonable on any other ground to require the MDU to comply with the notice.

16. The first argument here is that made under Article 8. The first question is whether there is potentially an interference with the rights of individuals to privacy. In many cases (for the purposes of this determination I am prepared to assume all) there may be. In that sense, therefore, Article 8 is “engaged”.

17. Article 8 is a qualified right. Any interference must be in accordance with the law (plainly this interference is, since the Inquiry is entitled by statute to require documents and could not function properly in the public interest unless it did). It must also be "necessary in a democratic society in the interests of…public safety….the protection of health or morals… or for the protection of the rights and freedom of others."

18. I have no doubt that the purposes of the Inquiry in seeking the information revealed by the documents comes within these heads. It is expressly set up in the public interest, and this Inquiry has potentially a significant role to play in ensuring public health and confidence in the democratic structures of the State. Is it, though, "necessary" for this purpose?

19. What is "necessary" involves striking a balance between the nature, extent and likely consequences of the interference on the one hand and the importance of the purpose to be achieved by the interference on the other. The interference will not be permissible if it is disproportionate to the latter.

20. I have no doubt that the proposed interference in the present circumstances is proportionate.

21. First, though it is important to recognise that individuals have a real interest in maintaining their privacy, I note that the documents which contain personal information have been held by the MDU for many years and if the information had been thought by the MDU to be of great sensitivity, such that its deliberate or inadvertent disclosure might cause real harm to an individual's rights, the MDU would surely have regularised the position before now – by obtaining patient consent, operating a destruction policy, carefully cataloguing the information, etcetera. The MDU is a responsible organisation. I see no present reason to differ from what, by inference, is its own assessment of the likely extent and consequences of disclosure.

22. Second, the intended extent of the disclosure is in the first place to the Inquiry alone. Any further disclosure is limited by the Inquiry's own statement of approach as to Anonymity and Redaction, published on the date the Inquiry was set up and in operation since. As to that: (a) with the exception of those documents which prove, on inspection, to contain matters of relevance, the documents will be disclosed no further; (b) in the event that the document is of such relevance, it will not be disclosed to any core participant unless that core participant has first agreed to be bound, and has signed a document to record the fact they have agreed to be bound, by a strict obligation of confidentiality; (c) in any event, the Inquiry has said it will redact the name, date of birth, other identifying dates, addresses and contact details, names or other means of identifying a person's family members, and events from a person's life which

may identify them from any disclosed document, and has the power to redact further where necessary. I also have the power, under section 19 of the Inquiries Act 2005 to make a restriction order imposing restrictions upon the use which documents or information may be put – in effect, the same powers as has the High Court in making a confidentiality order. It is open to the MDU, should it wish to do so, to apply for a restriction order (see paragraphs 26 and 27 of the Statement of Approach on Anonymity and Redaction), so that it may fully satisfy itself that any orders it sees as necessary are in place.

23. In short, the limited nature of the circulation of the majority of the documents, added to the protections conferred by the Inquiry's own processes, are such that in the case of those documents the interference with privacy is limited. In relation to the majority of the documents, it is highly unlikely that anyone other than the Inquiry will become aware of the identities of any of the patients concerned, or of the doctors who made contact with the help line. The consequences of disclosure are therefore slight. In the case of the minority of documents, as it is likely to be, which are of undoubted relevance, and which for that reason are disclosed, the protections offered by the policy of redaction is apt to ensure that the interference remains small and its consequences for the privacy of any individual patient concerned modest, and far from being disproportionate, especially (in the case of these few documents) given the relative importance of bringing them into the public domain. Take, again, as an example, that of the Procurator Fiscal mentioned above.

24. I accept that Article 8 includes procedural safeguards, without which an interference may not be regarded as "necessary". This does not make it unreasonable to require compliance with the Notice in this case, because in the event that a document is relevant, and it is proposed to disclose it, in a way which might identify the person concerned, the Inquiry's procedures already provide for notification of that person, with a right to make representations as to why there should not be such a disclosure.

25. The MDU separately seeks confirmation that (a) the review of material disclosed will be undertaken by identifiable persons employed by the Inquiry, (b) no use or disclosure will be made of material which is not relevant to the Inquiry and its Terms of Reference, (c) that disclosure of any relevant records identified will be made in the first place to the MDU who will be given 14 days to make representations (d) that only material relevant to the Inquiry and its Terms of Reference will be disclosed to core participants, and (e) that no disclosure will be made of any material where it would constitute a breach of Article 8.

26. It is surprising that the MDU thought there to be a need to ask for these confirmations, especially given the contents of the Statement of Approach on Anonymity and Redaction at paragraphs 25 – 27 which answers at least (c)

directly. Though a number of these lettered matters overlap, it is certainly the case that the Inquiry is obliged to work within, and not outside, the law. It has no intention of disclosing any material it does not consider relevant to its Terms of Reference, and it has no power under applicable Data Protection legislation to do so in any event. It is bound by section 6 of the HRA, and thus will not breach Article 8 – which it has no intention of doing, anyway. Review of the disclosed material will be undertaken by members of the Inquiry team (it will not be difficult to ascertain in retrospect who did what on what day) under the supervision of a Solicitor who is part of the legal team.

27. The MDU expresses concern about the risk of identifying individuals without their consent where medical case files are disclosed. In my view, this understandable concern is misplaced, broadly for the same reasons as those set out above in respect of telephone enquiry records. The Inquiry requires the unredacted case files, since the identities of the patients to which they relate may well be of importance to the Inquiry particularly where they link with other information available to it. However, it is bound to act in accordance with the legal principles set out above, and has stated publicly in its Statement of Approach how it will deal with issues of anonymity and redaction. It is not disproportionate, nor in breach of any applicable law, for the files to be produced as required by the notice.

28. There is one exception to this – that of the eight patients, to whom nine files relate, where there are already High Court orders in place providing for anonymity. In the slightly different case, where there is no order as such, but cogent evidence that the patient did not wish disclosure, the file concerned and the relevant evidence can be raised with the Inquiry for further decision. It seems likely to me that what was in contemplation in such as the one case specifically mentioned by the MDU was disclosure to the world in general, without the protections of anonymity or redaction, as opposed to disclosure to an Inquiry held in the public interest which has its own tight restrictions which are fully protective of any legitimate claim to confidentiality: but I am prepared to countenance further submissions if the MDU think in such a case it is appropriate to make them.

29. As to the confirmations sought, the answer is as above in the case of telephone records.

30. I am grateful for the degree of co-operation with the Inquiry which has been given by the MDU. It should have faith in the Inquiry's discharge of its own obligations, and in its observance of the procedures it has published as its intended ones, together with the additional protections which an application under section 19 of the Inquiries Act may give the MDU.

31. My conclusion is that the requirement to produce the records is within the powers of the Inquiry, is desirable, lawful and proportionate, and cannot be said to be unreasonable.

32. I decline to revoke or vary the Notice save to state that it applies to any case in which there is an extant order of the High Court for anonymity as set out in the next paragraph. I am also prepared to entertain submissions on a case-by-case basis where there is cogent material to suggest that a given patient was particularly concerned about any further disclosure of identity, and for the avoidance of doubt to confirm that the disclosure of copy medical records is not required. The date for compliance (save as to the nine files) remains 31st January 2019.

33. An initial draft of this determination was sent in advance of publication to Weightmans on behalf of the MDU. They helpfully identified a couple of factual points which needed further clarification or amendment, which I have made, without in any way changing the sense or thrust of the determination. The MDU has also volunteered that there is material in at least some of the nine files referred to above which would be of interest to the Inquiry. It sufficiently honours the requirements of the High Court orders providing for anonymity that in those cases production of the documents should be given only after the redaction of information within them which identifies the patient concerned in respect of whom the anonymity order has been made. Time needs to be allowed for these redactions to be made, though Weightmans ask only for a short period. In this respect, therefore, I vary the notice to provide for production of the documents contained in the nine files, appropriately redacted, on or before 5pm on Friday 15 February 2019. I am grateful to Weightmans and the MDU for their co-operative approach.

Sir Brian Langstaff

31 January 2019