

THE INFECTED BLOOD INQUIRY

SUBMISSIONS ON BEHALF OF THE CORE PARTICIPANTS REPRESENTED BY MILNERS SOLICITORS - AUGUST 2023

1. These submissions are made following the written and oral evidence given to the inquiry by (inter-alia) Penny Mordaunt, Jeremy Quinn, Rishi Sunak, and Jeremy Hunt, and further to the Chair's invitation in his determination of 19 July 2023.
2. There are two points which arise from the evidence heard during the course of the week of 24 July 2023, together with the written evidence taken from a wider group of witnesses in the run up to those hearings:
 - i) There is a tension between the oral evidence of Ms Mordaunt and that of Mr Sunak as to the government's legislative intention. We invite the Inquiry to take steps to understand and/or clarify that tension; and
 - ii) No witness, and particularly no witness who is a member of the Cabinet, was able to offer any reassurance, insight or detail as to whether or not the Government intends to accept the recommendations pertaining to compensation of the infected and affected, as set out in the Chair's second interim report and informed by Sir Robert Francis KC's compensation study. We invite the Chair to exercise his powers to continue scrutinising the Government's response to the Inquiry's findings and recommendations, beyond the delivery of his forthcoming report.

Mordaunt/Sunak

3. In her oral evidence on 24 July 2023, Ms Mordaunt said:

"...we are about to go into the fourth and final session of legislation. I know that's going to be a short session and there are carry-over bills. Whilst there are policy areas still to be resolved and not questions that I can answer on that, but what I can tell you is

*that in terms of this Government and this Prime Minister's priorities going into that fourth session, this is one of his priorities"*¹

4. The key aspect of this passage of Ms Mordaunt's evidence was the tying of the commitment to implement legislation connected to a compensation framework to a timeframe of the fourth and final session of legislation of the current Parliament.
5. As the Inquiry is aware, as the Leader of the House of Commons it is Ms Mordaunt's responsibility to organise and plan the timetable and passage of legislation through the House. Ms Mordaunt's oral evidence was carefully framed and, we suggest, must have been informed by information she had been provided with in that role.
6. Ms Mordaunt's answer was important for two reasons: (1) it is the only hint of a referenceable timeframe that has been given by any member of the Government; and (2) it gave apparent confirmation that compensation matters would be dealt with before the uncertainty of the impending general election (including purdah period and possible change of government) begins.
7. However, when asked about this in his oral evidence, Rishi Sunak was willing to confirm that resolving compensation matters was a priority for him but would not tie his comments to the legislative timeframe indicated by Ms Mordaunt. The following exchange took place:

"A. I can't speak to the composition of the King's speech on the fourth session of the legislation for obvious reasons. That is still something Government has to take a view on. I was talking more generally about this being a priority of mine. For all the reasons that I outlined previously in the session and the actions that the Government has taken since I have become Prime Minister, I hope would demonstrate that it is something that I take seriously, that we have prioritised and the seniority of the Cabinet level attention that it has had, from the MCO, and indeed my presence here today, and the work that has happened in Government and the acceptance of the moral case, are all demonstrations that this is a priority for me.

Q. There may be a disconnect then between what you are saying to us and what Ms Mordaunt has said to us. Ms Mordaunt obviously in her position as Leader of the House may be in a position to deal with matters of proposed legislative sessions that you are not. It is important that people are not left confused about what the position is. I'm not asking you, if you don't know the answer, to give us an answer today. Is this a matter that you can -- that further inquiries can be made just to confirm what the position is in that regard?

A. I can give you the position clearly now. Decisions on fourth session legislation have not been made. They are a matter, as per usual Government decision making through collective responsibility.

Q. So are you saying to us that Ms Mordaunt was wrong in what she said?

¹ Transcript 24 July 2023, 59/19-59/25

A. No -- again I can't speak for her but as you read her evidence to me, she said that this was a priority for me. Yes, it is a priority for me. That is completely consistent with me also saying that decisions on the fourth session legislation have not been made. I think those two things are entirely consistent.

Q. I'm not going to pursue that further now, but it may be a matter that the Inquiry might want to consider whether for its own purposes it needs further clarity in relation to that. But I do not think I can take that matter further with the Prime Minister given his answers."

8. In our submission, Counsel to the Inquiry was right to highlight that there is a clear disconnect between Ms Mordaunt's suggestion that compensation matters were a priority for the fourth legislative session, and Mr Sunak's assertion that no decisions had yet been taken on the King's Speech. Although we understand that it may be the case that no final decisions have been made as to the content of the King's Speech and the next legislative session, Ms Mordaunt's carefully-worded evidence indicated that preliminary considerations as to the timetable had been undertaken, or that discussions as to the timing of primary legislation had been had in the context of whether the government intends to create primary legislation for any compensation framework (on which a number of the witnesses gave evidence freely, and did not seek to suggest that those matters were off limits due to the principles of Collective Responsibility and safe space for government decision making).
9. In the circumstances, we submit that the Inquiry should issue a further, brief and targeted Rule 9 request to Ms Mordaunt which simply asks what informed her answer, noting that her evidence was given to the best of her knowledge and belief. We consider that this is likely to be as far as the Inquiry is able to go without receiving a response which would simply rely on Cabinet Collective Responsibility and Safe Space principles.

The Chair's Powers to Scrutinise the Government's Response to the Chair's Reports

10. Notwithstanding the role that Parliament plays in holding the executive to account – as relied upon by Jeremy Quinn MP when answering a question posed by the Chair² - the courts and our legal system also play an incredibly important role in scrutinising the actions and decisions of Government, and regularly tasked with doing so. This function is pivotal to the doctrine of the separation of powers.
11. In our submission, Parliament's intention in passing the Inquiries Act 2005 was to give the chair of a statutory inquiry the power to scrutinise the actions of Government in accordance with its terms of reference, and to do so in a flexible and more expansive way than is available to a court considering a judicial review challenge. Indeed, it could be argued that the primary purpose of the Act and of many inquiries, is to scrutinise the decisions and actions of the Executive.

² Transcript 25 July 2023, 89/1-89/25

12. Typically, an Inquiry's function in scrutinising the events which it was established to investigate is considered to have been completed upon the delivery of its report. However, in our submission that is a matter of coincidence rather than necessity, as demonstrated by the language of the Inquiries Act 2005 and the relevant context of the (non-statutory) Bichard Inquiry into child protection procedures following the murder of Jessica Chapman and Holly Wells.

13. On 14 June 2004, the Bichard Inquiry reported to the Home Secretary. The published report contained, in its opening pages, a letter from Sir Michael Bichard to the Home Secretary submitting his report. In that letter he said: which, for ease of reference, is cited in full below:

"...I am pleased to submit my report to you.

I am grateful for the assurance you have given me that the report will be quickly published.

I look forward to the Government's response to my findings and to the recommendations which I make. As you know, I aim to reconvene my Inquiry in six months' time to assess progress on those recommendations which the Government chooses to accept. I am confident, as I acknowledge in my report, of the spirit in which my recommendations will be received and taken forward."

14. Sir Michael was sent a progress report by the Government on 22 December 2004 and then provided an update report on 15 March 2005, in which he noted *"...the progress made to date owes a great deal to the effectiveness of the programme management arrangements that were put in place, and I believe that it is essential that these are maintained for at least the next 12 months. I am also clear that the fact that this public review was known to be taking place has concentrated minds..."*³

15. The accompanying press release is of particular interest, which said:

"...He asked for preparatory work on these schemes to be completed by Spring 2006 and suggested that the Home Secretary should commit to publishing reviews of progress in September this year and March 2006.

Sir Michael also said he hoped such reviews of inquiries would occur as a matter of course in the future."⁴

[emphasis added]

16. There are two important points to note:

³ The Bichard Inquiry: Final Report, Page iv

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https://webarchive.nationalarchives.gov.uk/ukgwa/20060926082923mp/http://www.bichardinquiry.org.uk/pdf/final_news_release.pdf

- i) Sir Michael's findings and recommendations were contained entirely within his June 2004 Report; his actions after June 2004 were concerned solely with the implementation of the recommendations which he had made; and
 - ii) Sir Michael's monitoring process ran concurrently with the passage of the Inquiries Act 2005 through Parliament – the Act had its first reading in the Lords on 25 November 2004, worked its way through the Commons in March 2005 and was given Royal Assent on 7 April 2005.
17. It is reasonable to expect that Sir Michael's approach to monitoring the Government's response to his findings and to the implementation of his recommendations, was in the minds of many Parliamentarians as the Act passed their scrutiny – indeed, in our submission, Sir Michael's approach is reflected in the wording of the Act.
18. Section 14(1)(a) of the Act provides:
- "For the purposes of this Act an inquiry comes to an end – on the date, after the delivery of the report of the inquiry, on which the chairman notifies the Minister that the inquiry has fulfilled its terms of reference..."*
- [emphasis added]
19. This language is pellucid: in the absence of confirmation from the Chair that the terms of reference have been fulfilled, an Inquiry will not end simply upon the delivery of the Chair's final report, which is a necessary but not sufficient condition of fulfilment of the terms of reference.
20. The potential for the fulfilment of the Inquiry's terms of reference to be outstanding beyond the Chair's final report is most likely in relation to the following terms:

Paragraph 5(a)

"To examine the nature, adequacy and timeliness of the response of Government (in particular the Department of Health), NHS bodies, other public bodies and officials, the medical profession, the UK Haemophilia Centre Doctors Organisation, the pharmaceutical industry and other organisations (including the Haemophilia Society), to the use of infected blood or infected blood products to treat NHS patients;"

Paragraph 8

"To consider the nature and the adequacy of the treatment, care and support (including financial assistance) provided to people who were infected and affected (including the bereaved)..."

Paragraph 8(g)

"a broad consideration of the extent to which support is and has been comparable with support for those similarly infected and affected in other countries, for example, Canada and EU nations, such as France and Ireland."

21. In our submission, for so long as the Inquiry remains in any way unclear as to the Government's final response to those infected and affected by infected blood/products, then the Inquiry is unable to fulfil its terms of reference because:

- i) Paragraph 5(a) speaks to the totality of Government's response to the use of infected blood/products and not to any single aspect such as the immediate steps taken to mitigate harm. For so long as the Inquiry is unable to examine the Government's final response to the issue, it remains unable to fulfil its terms of reference completely.
- ii) The nature and adequacy of the treatment, care and support (including financial assistance) referred to in Paragraph 8 of the terms of reference will inherently be informed by whether or not the Government accepts the Chair's recommendations on those issues.

It will be remembered that Matt Hancock MP, when giving evidence as Secretary of State for Health, said, "*...should the Inquiry's recommendations point to compensation, then of course we will pay compensation...*"⁵ In doing so, we suggest that Mr Hancock was conveying a message from Government that Paragraph 8 of the terms was not merely of retrospective effect but was an invitation to the Inquiry to make forward looking recommendations – an invitation that was taken up by the Chair in his First and Second Interim Reports.

In our submission, Paragraph 8 of the terms of reference cannot be adequately fulfilled until the Inquiry has had opportunity to consider Government's final response to issues of the provision of financial assistance and other forms of support.

- iii) Finally, Paragraph 8(g) of the terms of reference tasks the Inquiry with examining (both prospectively and retrospectively) the extent to which support is comparable with that provided in other nations (including Ireland).

It will be borne in mind that Ireland operates a compensation system which utilises a tribunal to assess the compensation to be paid to individual victims. As such, the word "support" as written in the terms should be construed widely and would, in our submission, include recompense in respect of the years for which financial support was not given, whether adequately or at all.

Again, the Inquiry is not in a position to compare the adequacy of the support/recompense/compensation provided in the UK with that provided in other countries in circumstances where it does not know what the compensation provisions will be in the United Kingdom or, indeed, whether there will be any at all.

⁵ Transcript 21 May 2021, 151/4-6

22. Turning to the evidence heard during the course of the week of 24 July 2023, our understanding was that the evidence session was called in order to elicit from Government, confirmation and comfort that the Inquiry's recommendations were being, and would be, acted upon. Sadly, no confirmation and little comfort was offered by Government. Indeed, the closest the infected and affected had to any confirmation was the nod to potential timescales as given by the Leader of the House of Commons, which the Prime Minister would not commit to in his oral evidence two days later.
23. The simple fact is that we do not know, and the Inquiry does not know, (1) whether there will be further provision from Government to compensate the infected and affected; (2) if there will be, what those provisions will be; and (3) how closely any further compensatory measures implemented will reflect the recommendations of the Chair in his Second Interim Report.
24. As such, and for the reasons already set out above, we consider that the Inquiry and the Chair are currently unable to fulfil the terms of reference. As such, we encourage the Chair to take the following steps:-
- a) Deliver the Inquiry's report, as planned, in Autumn of this year or as soon as possible. We use the term "report" as opposed to "final report" deliberately. The 2005 Act speaks of "reports" and "interim reports" but nowhere within that piece of legislation is the term "final report" used; indeed, it is possible to take the route adopted by other Inquiries of reporting in a modular fashion, rather than through one 'final' report. As such, the phrase "final report" is an unhelpful term which distracts from an Inquiry's primary purpose, which is to fulfil its terms of reference. We encourage the Chair to take similar care (as he undoubtedly would in any event) with the labelling of his forthcoming report.
 - b) In delivering his forthcoming report, we encourage the Chair to make clear, either by way of introductory remarks or by covering letter, that the report is his, and the Inquiry's, final word on all that has happened thus far though, nevertheless, he is unable to confirm, until he has seen the implemented response of Government, that the Inquiry's terms of reference have been fulfilled.
25. In our submission it is pivotal that the Chair does not give notification of the fulfilment of the Inquiry's terms of reference without a full consideration of the Government's provision to the infected and affected following the forthcoming report. To do so would risk fresh injustice of the kind that the Inquiry was tasked with investigating and scrutinising, as well as the perpetuation of the stark injustice which the infected and affected have suffered for decades, and continue to suffer with every passing day.
26. In our submission, the Inquiry's terms of reference cannot be satisfied by the vague platitudes which have been offered by Government thus far, namely that policy work is being carried out at pace but that no confirmation can be given in respect of the form and scope of support to be given to the infected and affected.

27. The retention of the powers granted to the Chair by the 2005 Act - particularly, those under Section 21 to compel further evidence – may also be required in order for the Chair to satisfy himself that paragraphs 5(a), 8 and 8(g) of the Inquiry's terms of reference are fulfilled.
28. Finally, as Sir Michael Bichard put it, minds will be concentrated when it comes to the implementation of the Chair's recommendations if Government knows that the Inquiry will continue to exercise oversight and scrutiny. Concentrated minds are, in our submission, precisely what is now required within Government.

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