# Written evidence from Thompsons Solicitors (STI0011)

Thompsons Solicitors Scotland are leading experts in the field of Public Inquiries. Since the introduction of the Inquiries Act 2005, there have been seven Public Inquiries held in Scotland and we have served as Recognised Legal Representative in five of them:

- The Stockline /ICL Joint Public Inquiry (commenced 2004)
- The Penrose Inquiry (infected blood products causing Hepatitis C and HIV) (commenced 2009)
- The Vale of Leven Hospital Public Inquiry (C-difficile) (commenced 2009)
- The Scottish Hospitals Inquiry (ongoing – Queen Elizabeth University Hospital, Glasgow and Royal Hospital for Children and Young People, Edinburgh)] (commenced 2020)
- Scottish Covid 19 Inquiry (commenced in 2022)

Thompsons Solicitors Scotland are also Recognised Legal Representatives in the UK wide Infected Blood Inquiry, which commenced in 2018.

Based on our experience as highlighted above, we consider that certain issues with the current system at the following stages:

- Deciding to set up an Inquiry
- The absolute power of the Chair after the setting up date
- The Rules do not provide a sufficient guarantee or a sufficient meaningful involvement for CPs (particularly victim CPs)
- The lack of robust process to challenge a Government that ignores recommendations

<u>Deciding to set up an Inquiry</u>

The relevant Minister must set up the Inquiry. Given the separation of powers principle, the court cannot decide that there should be an Inquiry. The 2014 House of Lords recommendations agree. They however also say:

"that ministers should give reasons to Parliament for a decision not to hold an inquiry particularly in the following circumstances: when invited to hold an inquiry by IPCC, Ofsted, the Information Commissioner, Parliamentary Commissioners for Administration and Health, the Commission for Local Administration, or a body of similar standing; and when an investigation by a regulatory body has been widely criticised"

We consider that this does not go far enough. As things stand the groups that shout the loudest or shout the best [best media campaign or best

political connections] can succeed in having an Inquiry called where others do not. There should be a more open and accessible process. We have in mind as a model the Public Petitions Committee at the Scottish Parliament - a jewel in accessibility crown of Holyrood. Thus, in addition to current levers that victims can pull to call for a Public Inquiry, each parliament should have a Public Inquiry Committee to whom groups can present petitions and evidence that they say justifies/demands the calling of a Public Inquiry. If the Committee recommend a Public Inquiry the minister must make a statement in Parliament and take questions responding to the recommendation.

<u>The absolute power of the Chair after the setting up date</u>

We know this only too well from our experience. The only 'oversight' to a Chair's decisions are:

- The Terms of Reference (which ironically the Chair has pretty much absolute discretion in interpreting)
- Judicial Review where 'the bar' for successful challenge is impossibly high ('Wednesbury unreasonableness')

There is a benefit to this power especially where the Inquiry should, without fear or favour, scrutinise the powers that be which is good for victims. But it can also leave victims procedurally disempowered and disenfranchised and with no recourse for finding themselves in that position. Such disempowerment could relate to (not) being granted core participant status in the first place, not being granted adequate funding at public expense as a core participant and not being able adequately take part in the Inquiry in terms of (the speed of) disclosure of documents and examining witnesses etc.

Too much unfettered power with no real oversight vests in one person - the Chair.

There should/must be a right of appeal on decisions such as those highlighted above following a judicial route. That would be directly to the Inner House of the Court of Session in Scotland and the equivalent appeal court in England. Decisions of the Chair should NOT be tested on Wednesbury Unreasonableness test. Instead, it should be a reassessment of the issue at hand based on two principles:

- The balance of fairness and
- Ensuring the meaningful involvement of victims and core participants [see more below]

<u>Chairing of Inquiries</u>

A number of Inquiries that we have been involved in have experienced delays when the Chair or a member of their family has become unwell. The risk of a sole Chair becoming ill is a real concern for victim core participants. For that reason, the default should be that there is a second Chair, which means that the Inquiry can continue if the Chair becomes unwell, without a lengthy delay.

The Rules do not provide a sufficient guarantee or a sufficient meaningful involvement for core participants (particularly victim core participants)

The Act and the Rules provide that a core participant has certain rights. They include the right to make an opening and closing statement, have access to disclosure and influence the questions asked of witnesses. The legislation does not however guarantee the minimum level as to how those rights should vest in core participants. We know from our experience that disclosure can come very late in the day and we know that counsel to the Inquiry can ignore the questions that core participants may want to ask of witnesses. The Rules should therefore direct, under a general principle of ensuring victims and core participants enjoy a meaningful involvement in the Inquiry, that from commencement of the Inquiry to Report:

- Core participants shall be given access to all relevant disclosure 3 months before any relevant oral hearings
- Core participants shall provide lines of questions to the Inquiry 2 months before the hearings
- Within 2 weeks of the receipt of the lines of questions, the Inquiry shall confirm which questions that they shall ask and which they shall not, with reasons
- Within 1 week, core participants may request a hearing before the Chair which will be heard within a further 1 week period
- The chair shall make a determination with reasons that the core participant may choose to appeal in terms of the basis set out above (balance of fairness and ensuring the full involvement of core participants)

The House of Lords 2014 recommendations recommends two quite significant changes to the Salmon principles. The above seems a fair balanced final position.

The lack of robust process to challenge a Government that ignores recommendations of an Inquiry

The current position and the view of the 2014 House of Lords recommendations is that the Chair should have no further involvement after they produce their report. Effectively, once the Report is delivered the issue is back into the hands of the politicians and no-one else. We can see why that view is attractive from a jurisprudential perspective and returning to the separation of powers point. However, the realpolitik underlying public inquiries is that the Government have potentially done something wrong and on the issue can no longer be allowed to mark their own homework such that both decency and public confidence in the institution of government demands the scrutiny on a (fiercely) independent member of the judiciary. The current approach (and that previously recommended by the House of Lords Committee) undermines that objective in the sense that ultimately the Government still mark their own homework and does so too easily.

Ultimately, the Chair can do no more, but the current system seems to be too much of a cliff edge. If the Government ignore the Chair of the Infected Blood Inquiry, Sir Brian Langstaff's, recommendations (in relation to compensation as contained in the second interim report of the Inquiry dated April 2023) he will be extremely unhappy but will be unable to do anything. We consider that the legislation should provide that 6 months after delivering their report the Chair may reconvene to consider (any lack) of implementation and to issue fresh Notices requiring the Government provide information. That could ultimately result in a further set of hearings on implementation and a further/supplementary Report by the Inquiry. At that stage, jurisprudence would demand that the matter was at an end but we consider that public expectations would agree that this final stage is fair, reasonable and indeed necessary.

21ST March 2024