CONFIDENTIAL

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HIV/HAEMOPHILIA LITIGATION

In his minute of 9 November Mr Dobson promised further advice on the proposed scheme of compromise received from the plaintiffs. This note sets out our considered assessment of those provisions which present difficulty and for ease of reference a copy of the provisions is annexed.

Para 1 - The cost of £42 million is understated as this excludes the cost of medical negligence cases, legal costs, and cost of the concession on social security benefits and the cost of any subsequent claims to be met under the terms of para 6. Funding a settlement from Departmental resources would be difficult. It would be very difficult to fund the money from Departmental resources for payments to haemophiliacs and their families who are HIV positive or have contracted AIDS. In 1990-91 all Departmental budgets are fully committed. The provisional allocation for 1991-92 following the PES 90 settlement contains no provision for payments to haemophiliacs except for £2 million in CFS for payments under the arrangements agreed with the MacFarlane Trust to affected individuals who may come forward in that year. CFS is a small budget and it could not absorb payments to haemophiliacs well above the level already provided in the provisional allocation for 1991/92; and as Secretary of State already knows, there are also strong pressures on HCH and it would be unwise for pressures on health authorities to be seen to be increased by making these payments.

The plaintiffs propose that the payments should be made through the Macfarlane (special payments) Trust. However, this would not be possible within the terms of its deed. This limits payments to individuals to a maximum of £20,000 (already paid from the £24 million grant last year) and the range of beneficiaries is not wide enough to encompass all plaintiffs in the litigation. However, a new Special Payments Trust could be set up without too much difficulty.

Para 2 - we assume from the wording that the plaintiffs lawyers are satisfied that the Courts can be convinced the terms of settlement for minors are unreasonable. The settlement must be approved by the Courts on their behalf. However, there is no guarantee at this stage that the lawyers could convince other plaintiffs to accept. It will be a major sticking point if the proposals would not effectively end the litigation. This would require the vast majority - say all but 50 or so plaintiffs - to accept the deal.

Para 3 - we agree that the settlement will need to include all haemophiliacs, not just those who are suing (about 700 out of 1,200). W also need to consider what to do about infected intimates or people who would consider themselves to be in category G (see below), but who are not currently involved in the litigation. In equity these would have to be given the same amounts as those who are suing for damages. This adds an open-ended element to the amount at stake.

Para 4 - we have doubts about whether there is sufficient justification for a payment to category G plaintiffs. These are people who claim to be at risk of infection with HIV through association with the haemophiliac but are not yet infected. Many included in this category we do not accept are at risk of becoming infected. At least we would favour restricting this Category to sexual partners and exclude parents, siblings and others.

Para 6 - this adds to the uncertainty over the eventual cost of the settlement but the deal could be criticised on grounds of equity if no such provision were made. However, the existence of such a provision does in our view further weaken the justification for payments to category G if they are assured of a payment should they ever become infected. At some stage this point could be argued with the plaintiffs.

Para 7 - the question of state benefits is a matter for the Department of Social Security. However, we understand from officials it is unlikely that the concession already given to HIV infected haemophiliacs and their dependants in respect of the £20,000 payments from the Macfarlane (Special Payments) Trust would be withdrawn in respect of additional sums. Even if the additional sums were made outside of the Macfarlane Trust the concession on state benefits would still be available if these payments were again in recognition of the special circumstances of haemophiliacs. DSS officials think there could be difficulty in extending the concession beyond the haemophiliacs and their dependants eg to category G.

Para 8 - we think this should be resisted and all medical negligence claims should be settled at the same time as the action against the Department. The whole point of any agreement would be to end the HIV/haemophilia litigation in its entirety. We accept that the medical negligence cases will need special treatment, but negotiations on this should take place on parallel with those on the main settlement. The additional cost is likely to be of the order of £3m.

Para 9 - the plaintiffs are proposing that legal costs should be settled on the basis most favourable to them. We would wish to try to negotiate a more equitable basis akin to that used in most out of court settlements.

Para 10 The Court will need to approve any settlement for minors but these are normally in private. It is unclear why the plaintiffs wish to have a public hearing. We would wish to ensure that Counsel for both sides had an agreed line if the hearing was in open court.

Para 12 - we would wish to resist any such statement. It would suggest that haemophiliacs were not already getting the best treatment and might lead to open ended demands to all sorts of treatments regardless of cost and other demands on NHS monies.

Conclusion

It seems to us there are two main sticking points to the proposals as they stand which need to be cleared up before discussions on any other points should take place. We think it is essential that the plaintiffs give an assurance that any deal on the proposed lines would effectively end the litigation. This would require that no more than a small number of plaintiffs would resist - say up to 50 - and the money could be left on offer to them. If there were more there would be the risk that they could still campaign for a larger settlement.

The second point is that the medical negligence cases should be settled at the same time as action against the Department. Otherwise public criticism of the Department may still continue as the public are unlikely to differentiate between the responsibilities of the Department and those of the Health Authorities and their doctors.

If the Secretary of State is content, we would as a first step ask Counsel to seek reassurances from the plaintiffs on those two points. At this stage we would ask him to avoid giving any indication that the proposals are otherwise acceptable.

Finally, the overall cost proposed (£42m) seems to us on the high side, given the hidden 'extras'. Secretary of State may wish to take Counsel's advice on how far it might be possible to negotiate this figure down while still offering a setlement which the vast majority of plaintiffs could accept.

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