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Dear Charles

**SCOTTISH PROPOSALS TO COMPENSATE PEOPLE INFECTED WITH HEPATITIS C:
THE INTERPRETATION OF THE SOCIAL SECURITY RESERVATION IN THE
SCOTLAND ACT**

1. We have been instructed by the Department for Work and Pensions ("DWP") and the Scotland Office to seek the UK Law Officers' opinion as to whether proposals of the Scottish Executive to establish a scheme for the compensation of people infected with Hepatitis C by means of infected blood and blood products received from the NHS in Scotland would be outwith their devolved competence. The terms of this submission have been agreed with DWP.

2. In this submission –

“Executive” means the Scottish Executive;

“infected patients” means persons who contracted Hepatitis C as a result of receiving blood or blood products during treatment in the Scottish Health Service in the 1980s prior to introduction by the NHS of measures to screen blood or blood products or tissue for that virus;

“Section F1” means the reservation of Social Security schemes in Section F1 of Part II of Schedule 5 to the Scotland Act 1998.

Background

3. A Report from an Expert Group, presented to the Executive and published on 6 November 2002, recommended that compensation be paid to infected patients. It was recognised that, in law, the NHS has no legal liability to make reparation to infected patients because the existence of infection was at the relevant time either unknown or incapable of being detected in blood supplies.

4. The Minister for Health and Community Care in the Executive (Mr Chisholm) wrote to the Secretary of State for Work and Pensions on 5 November, indicating that he was minded to set up a compensation scheme, indicating that the legal advice within the Executive was that this was a matter within devolved competence and asking whether the UK Government agreed with this advice.

5. The Law Officers will appreciate that this is a very sensitive issue in Scotland. The Scottish Ministers are understood to be under considerable pressure in the Scottish Parliament to bring forward a compensation scheme. The matter is also sensitive in England and Wales as the Secretary of State for Health is not proposing a compensation scheme for patients who have contracted Hepatitis C from infected blood or blood products supplied by the NHS in England and Wales. If the Executive bring forward a scheme no doubt there will be increased pressure for compensation elsewhere.

6. The Executive produced a short paper that sets out 2 possible schemes for compensating people infected with Hepatitis C in the course of their treatment by the NHS in Scotland on a no-fault basis. This paper is set out at **Annex 1**. The first (“the lump sum scheme”) proposes a lump sum payment to all infected persons from a central discretionary trust. The second proposed scheme (“the ongoing payment scheme”) envisages monthly payments to infected persons.

7. Subsequent to this, the Scottish Minister for Health and Community Care wrote to the Secretary of State for Work and Pensions on 18 December indicating that the Executive would be willing to go forward on the basis only of the lump sum scheme and not the ongoing payment scheme. In this regard, we understood that the Executive had in mind a lump sum scheme limited to a single payment (the sum of £25,000 has been mentioned) to each living sufferer. We infer that this refers to

competence of the Parliament. Accordingly, the tests of legislative competence set out in section 29 of the Scotland Act are brought into play.

13. In this case the relevant provision appears to be section 29(2)(b); the issue is whether the proposed scheme would be outwith devolved competence as relating to reserved matters. In particular DWP are concerned that any scheme which the Executive might bring forward would be a Social Security Scheme within the meaning of the reservation at Section F1. In terms of section 29(3) of the Scotland Act the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to the *purpose* of the provision having regard (among other things) to its effect in all the circumstances.

14. The question of whether the social security reservation has come into play has of course arisen since July 1999 in other contexts and we can give the Law Officers further information on these if they should want that.

The Scottish Executive's view of devolved competence

15. It is understood that the Executive has approached the Scottish Law Officers and, having regard to their advice, considers that both the lump sum scheme and the ongoing payment scheme would be within the devolved competence of the Scottish Ministers. Their position is set out in a minute from S G Lindsay, a Divisional Solicitor in the Office of the Solicitor to the Scottish Executive of 2 December 2002. A copy of this is set out at **Annex 4**. They are of the view that a compensation scheme would be within the devolved competence of the Scottish Ministers for 2 main reasons.

16. First (see in particular paragraph 18), it is argued that the scheme is similar to the settlement of damages claims or actions against NHS bodies or the Scottish Ministers. That has universally been considered to be a devolved matter. They made the point that damages claims will, for example, be settled not only because they have clear merit but because they may (or conversely may not) have merit but the outcome is unknown until tested by a Court. In many case it will not be expedient to test such a case given its value or the unrecoverable costs associated with continuing to defend it.

17. Second (see paragraphs 20-26), they rely on the separate reservation of the Vaccine Damage Payment Scheme in Section F1.

18. That is a scheme devised under the Vaccine Damage Payments Act 1979. It makes provision for the compensation of persons who suffer injury or damage as a result of the administration of a vaccine by the NHS. Section F1 does not reserve the Act itself but rather the reservation is of the scheme. Accordingly that scheme is reserved.

19. Their argument however is that in looking at the terms of the Vaccine Damage Payment Scheme it is far from clear why it has come to be separately reserved under Section F1. In most relevant respects it seems to mirror the form and content of the Executive's proposed scheme in relation to those infected by Hepatitis C by contaminated blood or blood products. Accordingly, given that the UK Parliament has separately reserved the Vaccine Damage Payment Scheme, the argument is that payments under such a scheme could not be caught by the other reservations at Section F1 (as otherwise the separate reservation of the scheme would have been unnecessary). Accordingly the first reservation at Section F1 should have a more limited interpretation. On that basis a compensation scheme for infected patients is not reserved by Section F1.

OSAG's View of devolved competence

20. The relevant reservation against which this matter falls to be considered is the reservation by Section F1. We are not aware of any other reservation which might be relevant to the scheme.

21. In terms of Section F1, schemes supported from central funds which provide assistance for social security purposes to or in respect of individuals by way of benefits are a reserved matter.

22. We have noted that the proposal might involve a discretionary trust but nothing would turn on that in relation to competence. Section F1 also reserves requiring persons to establish and administer schemes providing assistance for social security purposes to or in respect of individuals or to make payments in respect of such schemes and to keep records and supply information in connection with such schemes.

23. Accordingly, however the scheme were to be "arranged" these reservations at Section F1 are relevant.

each infected patient still alive who has contracted the virus from the infected blood or blood products.

8. A copy of the letters of 5 November and 18 December 2002 from Mr Chisholm are attached at **Annexes 2 and 3.**

9. On 29th January, Mr Chisholm appeared before the Health Committee of the Scottish Parliament and announced that the Executive now proposes to bring forward a scheme on the following basis:-

- payment of £20,000 lump sum to all infected patients who are still alive plus a further £25,000 to all who are already suffering liver failure.
- if an infected patient who is not suffering liver failure at present goes on to develop liver failure, in that event the patient would be paid an additional £25,000.
- an independent trust would be set up to make the payments. All payments would be made on an ex-gratia basis without any admission of fault.
- It is hoped that arrangements could be made so that the payments are fully disregarded for social security purposes.
- No payments are to be made to dependants of infected patients.

10. The Minister indicated that the legal competence of the Scottish Ministers to establish such a scheme is still under discussion with the UK Government and that no payments could be made until the legal position had been clarified.

Test of devolved competence under the Scotland Act 1998

11. The question whether the scheme is within the devolved competence of the Scottish Ministers depends upon the application of the test for devolved competence in section 54 of the Scotland Act which defines devolved competence.

12. By virtue of section 54(3), the Scottish Ministers cannot exercise a function so far as a provision of an Act of the Scottish Parliament conferring the function would be outside the legislative

24. The Instructions to Parliamentary Counsel for the Scotland Bill, in connection with a reservation in Section F1, and the subsequent exchanges between the instructing solicitors and Parliamentary Counsel, include the following:-

- Comments by the Bill Team Solicitors on draft clauses dated 11 December 1997, which state in relation to the vaccine damage reservation:-

“We have agreed with DSS that any reservation need should */sic/* refer only to the vaccine damage payment scheme rather than the 1979 Act in order to avoid restricting the competence of the Parliament to legislate, as a matter of Scots Private Law, in relation to reparation for personal injuries including those caused by vaccine damage;”

- A reply by Parliamentary Counsel to this dated 14 December 1997 which states:

“It does not seem apt to describe the subject matter of the Vaccine Damage Payments Act 1979, or of the scheme, as a social security purpose. Can’t we reserve the subject matter of the scheme?”

25. In relation to the Vaccine Damage Payment Scheme that is what Parliamentary Counsel did. We are not clear as to Parliamentary Counsel’s thinking as to why it was not apt to describe the subject matter of the Vaccine Damage Payment Scheme as a social security purpose.

Ongoing Payment Scheme

26. Although it now looks unlikely that the scheme would include ongoing payments, we would have regarded a scheme providing for such payments as a scheme supported from central funds for a social security purpose. The stated purpose in the Executive’s paper is that such payments would “provide financial assistance to individuals” and on that basis it seems to be on all fours with, for example, social security support provided by a disability allowance. In order to argue that such payments have a devolved purpose, the Executive points to the Vaccine Damages Payment Scheme. But in that regard, the wording of the first two reservations at Section F1 seems wide enough to catch such a scheme. Further, if it was to be argued that the reservation should be read more narrowly (construing Section F1 as a whole), that would still leave the question as to where to draw the line as to what is, and what is not, thereafter caught by the reservation. As there would seem to be

difficulties in identifying where the line should be drawn by a narrower interpretation, given the wording used in these reservations, we do wonder if a court, if presented with the Executive's argument based on the Vaccine Damage Payment Scheme, might accordingly still take a wider view of the reservation.

Lump Sum Scheme

27. Different arguments arise in relation to the Lump Sum Scheme although a proper analysis depends on how the scheme is framed in detail. The proposed scheme would appear to have 3 types of payment:-

(First type) - A single payment of £20,000 to each living infected patient;

(Second type) - A further payment of £25,000 if the infected patient is, at the time that the scheme is set up, suffering liver failure;

(Third type) - A further payment of £25,000 at the time when an infected patient, who is not at present suffering liver failure, starts to suffer such failure in the future.

28. The first type of payment would apply regardless of need and condition. It would apply regardless of the economic circumstances of the infected patient and would apply to all of them regardless of whether they are suffering any ill-effects. Accordingly, the purpose of the payment would be to make a lump sum payment to each infected patient who is still alive regardless of the current need, requirement or condition.

29. It seems to us that it can be argued that the first type of payment would not fall within the reservation in section F1. The purpose of such a payment might be considered as the compensation for an injury (that is, infecting the person's body with the virus) that has happened in the past but in circumstances where it is now irrelevant to the scheme what ongoing effect, if any, there is. This can be contrasted, for example, with industrial injuries benefit, where we understand from DWP the benefit will cease if the claimant recovers or is back in their job again. Accordingly, it might be thought that this is not what would normally be regarded as a scheme for social security purposes falling within Section F1. And, in this respect, it appears to us that it may be argued that it is implicit in Section F1 that the reservation of schemes supported from central or local funds which provide

assistance for social security purposes to or in respect of individuals by way of benefits requires that the scheme must have a social security purpose.

30. There are, of course, difficult general issues about the interpretation of the social security reservation and perhaps particularly as to how far the Courts would be willing, by virtue of the definition of "providing assistance for social security purposes" to accept that the reservation goes far beyond anything normally conceived of as a social security scheme. We have always thought that that is likely to be something the judges would have real difficulty with, particularly in the case of more extreme examples like that presently under discussion. It might also suggest that making personal injury payments (which are also about something which has happened in the past) are outwith devolved competence and that the Scottish Parliament could not amend the law of delict to provide for no fault liability.

31. But even if that is not so, and turning to the interpretation provisions in Section F1, in relation to the interpretation of the "providing assistance for social security purposes to or in respect of individuals", clearly paragraphs (b) (low income) and (c) (housing costs) can be disregarded. In terms of paragraph (a) it seems to us that the only possible term that could apply that interpretation provision to the present case would be "injury. It would seem the basis of qualification for the first type of payment would be because the individual had suffered injury (in the delictual sense) by contracting the Hepatitis C virus. Accordingly a person who merely carried the virus would not seem to us to be said to be suffering "disability", "sickness" or "incapacity".

32. Further, if "injury" is the relevant criterion for an assessment as to whether Section F1 applies, we could also see an argument that the individuals affected here fell outwith the reference to "injury" in the interpretation provision. In particular we could see an argument that the qualification criteria in paragraph (a) are looking at current need due, for example, to current unemployment, current sickness, old age and ongoing incapacity. If that is right, then the reference there to "injury" might be thought likely to fall to be interpreted, similarly, as a reference to current circumstances rather than to the mere historical fact of a past injury (a leg broken, and perfectly healed many years ago, for example). Accordingly, OSAG think it is far from clear that from the first type of payment in the proposed lump sum scheme would be outwith devolved competence.

33. We would draw the Law Officers' attention to the second and third types of payment as referred to above. Both types of payment would have regard to current condition and could be said to

relat^o to sickness, although it is not apparent that the payment would reflect actual condition, incapacity or need. We would accept that the arguments that might be put forward in relation to the first type of payment are harder to apply in the case of the second and third types of payment since there is some indication that those payments refer to current circumstances.

DWP's View of devolved competence

34. DWP's view is that either a lump sum or an ongoing payment scheme (although the latter now seems unlikely) would fall within the sphere of reserved competence. They take this view both on the basis of the wording of the social security reservation and on the basis of a consideration of the purpose of the proposed schemes.

35. First, as regards the wording of the reservation and its application to both proposed schemes:-

- there is a payment made from central funds;
- the payments are benefits since the definition of "benefit" includes any form of financial assistance and hence can apply to the proposed payments;
- there is no limitation by reference to periodicity of payments - indeed the definition refers expressly to grants and loans (and DWP therefore see no distinction between a lump sum and periodical payments);
- the payments provide assistance for social security purposes as the definition of "providing assistance for social security purposes" covers providing assistance to individuals who qualify by reason of "disability", "sickness", "incapacity" or "injury".

36. DWP's view of the wording of Section F1 is that poverty is only one aspect of social security within the definition. Provided a social security scheme provides assistance by reason of one of the matters listed, there is no reason why it cannot be reserved simply because it applies to persons regardless of their means or condition. Moreover it is difficult to see how qualification for receipt of payments based on contamination with blood infected with hepatitis C is not within the words of the reservation. DWP see no reason why the word "injury" should be construed narrowly to refer only to injury in a delictual or tortious sense. It should be read as embracing anything which would be commonly regarded as an injury. Read together, with disability, sickness and incapacity, this part of the reservation seems designed to embrace the wide range of adverse physical conditions which could

be expected to be covered by a scheme for social security or protection, and would extend to persons who have received infected blood and contracted the hepatitis C virus. DWP takes the view that this part of the reservation does also extend to cover the first type of lump sum payment (referred to in paragraph 27 above) proposed by the Executive. If, at least in the majority of cases, there is no adverse effect on the individual, described in the proposals as a sufferer, it is difficult to understand a policy of making payments of substantial sums to them.

37. DWP consider section 29(3) of the Scotland Act to be of central importance and that it is necessary to consider the purpose of the Executive's proposals in deciding whether they relate to a reserved matter or not. As regards the (now unlikely) ongoing payments scheme and the three types of lump sum payments proposed, they take the view that in all these cases the purpose of the payment is the provision of financial assistance in respect of disability, sickness or injury. They cannot identify any purpose distinct from the purpose of the social security reservation. As regards OSAG's argument that the lump sum scheme (and in particular, the first type of payment proposed thereunder) is "compensation for an injury... that has happened in the past", DWP disagree with the way OSAG categorise this purpose. Industrial injuries benefit, for example, compensates for something that happened in the past, yet it is clearly a payment for a social security purpose that is covered by the reservation. They do not agree that, just because a disability or injury arises from a past event and benefit would normally be terminated in the event of complete restoration to health, payments in respect of the disability or injury cannot come within the scope of the social security reservation. They have concerns that a contrary interpretation would allow the Scottish Parliament to make provision for, say, an industrial injury scheme in parallel with but wider than the Westminster provisions in Part V of the Social Security Contributions and Benefits Act 1992 – provisions which are clearly reserved.

The case of the Vaccine Damage Payment Scheme

38. DWP does not agree with the position of the Executive that the purposes of the Vaccine Damage Payment ("VDP") Scheme and the proposed schemes would be more or less identical. The VDP Act is public health legislation, its purposes being more clearly seen as the protection of public health and support of vaccination policy. Statutory Instruments under the Act are classified as "Public Health" and the editors of Halsbury's Statutes include the Act in their volume on Public Health and Environmental Protection. Without the express reference to the scheme in Section F1 there would have been a compelling argument that, by operation of section 29(3), the VDP scheme's purpose was

public health and thus not reserved. These considerations do not appear to apply to the proposed payments in respect of Hepatitis C: they discern no apparent public health policy purpose. The use of infected blood in the course of treatment seems no different from any other act that causes injury or disease in respect of which public funds may be advanced by way of compensation or other financial assistance to help with the consequences.

39. Although the point has not been made so far, DWP agree that the Executive might argue that a compensation scheme arises out of the operation of the (devolved) Scottish NHS and its purpose is concerned with maintaining and supporting public confidence in the Scottish NHS. However, there is really no parallel as persons requiring a blood transfusion for medical reasons will generally have no choice, regardless of their faith in the system, unlike those making the decision whether to have their child immunised against infectious diseases in the public interest as well as those of the child.

40. The Law Officers may be interested to note that the background to the decision to reserve the VDP Scheme is apparently that it was done in order to avoid having to set up an independent decision-making and appeal system for the small number of Scottish VDP cases. The alternative to this would have been to make the (then) Department of Social Security's unified tribunal structure into a cross-border public body, a body that would have been answerable both to Westminster and Edinburgh. This was not acceptable to UK Ministers as it would have given Scottish Ministers powers to make appointments to the unified appeal tribunals and, in addition, enabled the Scottish Parliament to amend tribunal functions.

41. The DWP do not believe that the hypothetical example of personal injury payments takes the argument further. A provision by the Scottish Parliament amending the law of delict would, like any other provision, be tested against the purpose condition in section 29(3). But the purpose of the hepatitis payments cannot in any way be said to be of this law reform nature.

Handling

42. If the Executive proceeds with a scheme, we have considered what the UK Government could seek to do about that in the event there were concerns about competence, and as a matter of policy it was decided that a challenge was appropriate.

43. It seems the only relevant sanction would be to try to challenge this in the courts. No one other than the UK Government is likely to want to challenge this. In terms of Schedule 6 to the Scotland Act, paragraph 1 defines a devolution issue as including amongst others, at subparagraph (c), whether the purported or proposed exercise of a function by a member of the Executive is, or would be, within devolved competence. We would submit that is likely to be the issue here. In terms of paragraph 4 of Schedule 6, the Advocate General is empowered to institute proceedings for the determination of a devolution issue. So, accordingly, she could raise proceedings in the Court of Session in Scotland to seek a court ruling as to whether or not any scheme the Executive proposes would be within devolved competence. Given the Executive is part of the Crown, however, it would not be possible in Scotland to seek an interdict in those proceedings, were the Scottish Ministers to commence paying out money under such a scheme.

44. Accordingly, it seems that the preferable route to any challenge would be pursuant to paragraphs 34 and 35 of Schedule 6. This allows, amongst others, a UK Law Officer, to refer a matter direct to the Judicial Committee of the Privy Council (paragraph 34). In that event, in terms of paragraph 35, notification could then be given to the Executive the effect of which would be to prevent the Executive from exercising the function (such as by making any payments to victims) pending the determination of the matter by the Judicial Committee.

45. Clearly, either would be a very sensitive and controversial step to take and we understand that before taking such a step the Law Officers would require to consider the sensitivities and implications with their Ministerial colleagues and any challenge would require to be cleared by CNR.

Questions For the Law Officers

46. The views of the UK Law Officers are sought on the following questions:

- (1) whether it would be within the devolved competence of Scottish Ministers to establish and operate a scheme for the payment of compensation (whether in the form of periodical or lump sum payment) to persons whether in Scotland or elsewhere who contracted Hepatitis C as a result of receiving blood or blood products from the NHS in Scotland;

(2) if the answer to question 1 is no, whether nevertheless a narrow scheme so far as making provision only for the first type of payment described at paragraph 27 above would be within devolved competence;

(3) whether, in the event of the Executive bringing forward a scheme which would, in the view of the Law Officers, be outwith competence they would consider it appropriate either to raise proceedings in the Court of Session (see paragraph 43 above) or to refer the issue to the Judicial Committee of the Privy Council (see paragraph 44 above).

(4) have the Law Officers anything to add?

47. I am copying this letter and its attachments to David Brummell, LSLO, Hugh Macdiarmid, OSAG, John Catlin, DWP, Gerald McHugh, Scotland Office and Samantha Latty-Dennison, ODPM.

Yours sincerely

GRO-C

ALAN G WILLIAMS