



## Legal Secretariat to the Advocate General for Scotland

Alan G Williams Esq  
Office of the Solicitor to the Advocate General for Scotland  
Victoria Quay  
Edinburgh  
EH6 6QQ

Dover House  
Whitehall  
London SW1A 2AU

Telephone: 0207 270 6810  
Fax: 0207 270 6813

Charles.Mullin@ GRO-C

Your ref: YUA/021/041

19<sup>th</sup> June 2003

**Dear Alan,**

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

In summary, the Law Officers consider that the Scottish Executive's proposed scheme for payments to persons infected with Hepatitis C, as a result of treatment by the NHS in Scotland, would be within devolved competence. They consider that the proposed scheme is not a scheme for social security purposes, but rather has the purpose of addressing the fact that injury has been caused by an agency of the state (the NHS in Scotland) to particular individuals and of providing those persons with some level of compensation for that injury so caused. The Law Officers emphasise that this conclusion should be read solely in relation to the particular questions raised, but are concerned that a consistency of approach should also be adopted in relation to the application of the social security reservation in other contexts.

1. Thank you for your letter of 30<sup>th</sup> January, regarding the competence of the Scottish Executive's proposed scheme for payments to people infected with Hepatitis C, contracted through infected blood and blood products in the course of treatment by the NHS in Scotland. The Attorney General and the Advocate General for Scotland ("the Law Officers") were grateful for your instructions, presented on behalf of the Department for Work and Pensions and the Scotland Office. With the agreement of Stephen Braviner Roman, I write to convey the Law Officers' advice.

#### **Background**

##### **(i) *The Scheme proposed by the Scottish Executive***

2. The Scottish Executive have proposed a scheme for payments to be made to people who have been infected with Hepatitis C in the course of treatment by the NHS in Scotland. These payments are proposed by the Scottish Executive not in settlement of any legal liability, but on an *ex gratia*



INVESTOR IN PEOPLE

basis in recognition of the exposure these people have had to the Hepatitis C virus and its adverse effects, caused through treatment by the NHS in Scotland.

3. The Law Officers have noted the various schemes proposed by the Scottish Executive in correspondence with the Secretary of State for Work and Pensions. They understand, however, that the scheme the Scottish Executive outlined on 29<sup>th</sup> January to the Health Committee of the Scottish Parliament was as follows:

- Payment of a £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.

**(ii) The questions raised**

4. The questions, on which you sought the Law Officers' views, were:

(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 (i.e. a single payment of £20,000 to each living infected patient) would be within devolved competence; and,

(3) whether, in the event of the Scottish 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, or to refer the issue to the Judicial Committee of the Privy Council.

**(iii) The basis of devolved competence**

5. By virtue of section 53(1) of the Scotland Act, functions mentioned in sub-section (2) shall, so far as they are exercisable within devolved competence, be exercisable by the Scottish Ministers instead of by a Minister of the Crown. Section 54 in turn explains how references in the Scotland Act to "the exercise of a function being within or outside devolved competence" are to be read. In particular, section 54(3) provides:

"...it is outside devolved competence to exercise the function (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function (or, as the case may be, conferring it so as to be exercisable in that way) would be outside the legislative competence of the Parliament."

6. The tests for legislative competence are, of course, to be found in section 29 of the Scotland Act. The Law Officers confirm that in this instance the relevant provision is

section 29(2)(b), which is to the effect that a provision (in this case the exercise of a function) is outside competence so far as "it relates to reserved matters". Under section 29(3) whether a provision relates to reserved matters is to be determined "by reference to the purpose of the provision, having regard (among other things) to its effect in all circumstances."

7. Under paragraph 1 of Part II of Schedule 5 to the Scotland Act, it is provided that the matters to which any of the sections of that Part apply are reserved matters for the purposes of the Act.

8. In relation to the questions you have raised, the Law Officers have noted that Section F1 of Part II of Schedule 5 reserves, amongst other things:

"Schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits."

Section F1 provides the following interpretation:

"Benefits" includes pensions, allowances, grants, loans and other form of financial assistance.

Providing assistance for social security purposes to or in respect of individuals includes (among other things) providing assistance to or in respect of individuals –

(a) who qualify by reason of old age, survivorship, disability, sickness, incapacity, injury, unemployment, maternity or the care of children or others needing care,

(b) who qualify by reason of low income, or

(c) in relation to their housing costs or liabilities for local taxes."

Section F1 also reserves:

"The subject-matter of the Vaccine Damage Payment Scheme."

## **Consideration**

9. A number of arguments were presented in your submission in support of or against the proposition that the Scottish Executive's proposed scheme was within devolved competence. The Law Officers have addressed these positions, when considering the questions which you have raised.

### **(a) Comparability with the Vaccine Damage Payment Scheme**

10. An argument taken by the Scottish Executive was that their proposed scheme was comparable to the Vaccine Damage Payment Scheme (the "VDP Scheme"). As the latter scheme was the subject of a separate reservation, it was contended that it and, therefore, the scheme proposed by the Scottish Executive could not have fallen within the social security reservation in Section F1 of Schedule 5 to the Scotland Act.

11. The Law Officers can see the force of that. However, they do not consider the separate reservation of the VDP Scheme to be conclusive to the issue on which their advice is sought.



They note that there is some uncertainty as to the exact reasons for its separate reservation. They also consider there is much force in the argument that the VDP scheme performs a public health purpose, in the support of vaccination policy, where vaccination might otherwise be avoided. There would seem to be no such prospective public health purpose in the proposed Hepatitis C Scheme. Given this, and the centrality of purpose to the determination of whether a matter is within competence, the Law Officers do not consider the analogy with the VDP Scheme to be of assistance.

**(b) *Methods of payment of the proposed compensation***

12. The Law Officers agree with DWP that whether a payment is a lump sum, or a periodical payment, should not of itself determine whether it has a purpose which relates to the reserved matter of social security schemes. The schemes falling within the reservation in Section F1 clearly include any form of financial assistance for a social security purpose, including both lump sum grants as well as continuing payments.

13. Conversely, the Law Officers observe that, outwith the context of social security benefits, payments of damages under the Scots law of delict are not necessarily restricted to lump sum payments. The Law Officers are of the view that it is the purpose of any scheme under which any payments are to be made, rather than the mode of payment under a scheme, which will determine whether the scheme falls within the social security reservation or not.

14. In this instance, the Law Officers are also of the view that even if a discretionary trust were to be used as a vehicle for payments under the Scottish Executive's scheme, that of itself would not affect the purpose for which the payments were being made.

**(c) *The reservation of social security schemes***

15. The Law Officers agree with DWP that the scheme proposed by the Scottish Executive does have some of the characteristics of a social security scheme. In particular, the proposals would involve payment from central funds to individuals who qualify for that payment by reason of injury (adopting a wide interpretation of that word). But the Law Officers are of the opinion that the fact that the characteristics of the definition of social security purposes in section F1 are present, although it is a strong indicator as to the purpose of the provision, does not of itself answer the question whether the proposed scheme would have a social security purpose. The Law Officers consider that a literal approach can take one only so far and that, ultimately, as in respect of the relevance of any other reservation under Schedule 5, the purpose test of section 29(3) of the Scotland Act requires to be applied in assessing whether a measure would relate to a reserved matter or otherwise.

16. In this instance, the Law Officers consider that sufficient additional factors exist to indicate that what has been proposed by the Scottish Executive differs in purpose from a scheme for financial assistance for social security purposes. The Scottish Executive scheme has the stated purpose of providing compensation to a particular class of individuals who have suffered injury through a particular source. These people are to qualify for payment not on the basis of being sufferers of Hepatitis C, but rather where it can be shown that they have been infected by that virus and this has been caused by NHS treatment in Scotland, an agency of the State for which the Scottish Executive is responsible. That infection, so caused, is proposed to be treated as an injury for which compensation should be paid, on a no-fault basis,. It is understood that the concept and function of compensation in this context would be broader than that of damages, the latter being more calculated to respond to the degree of loss sustained in any particular instance.



17. It follows that the Law Officers are of the view that it would be within the competence of the Scottish Parliament to legislate for a scheme for payments to compensate persons who have been injured by infection with Hepatitis C in the course of treatment by the NHS in Scotland. Any legislation to that effect would not represent a major law reform, such as the institution of a system of no-fault compensation in the law of delict, but that does not affect the competence of the matter. Accordingly, applying the provisions of sections 53(1) and 54(3) of the Scotland Act, the Law Officers are of the view that it would also be within the devolved competence of the Scottish Ministers to implement, by executive means, a scheme to pay compensation to the category of persons injured by Hepatitis C infection through treatment by the NHS in Scotland.

18. In stating the above, the Law Officers recognise that there is a stateable argument to the contrary. But for the reasons given above, the Law Officers consider that the better view would be that the proposed scheme should be regarded as being within devolved competence.

19. In relation to the above conclusion, the Law Officers have, of course, considered only the narrow question of whether the Scottish Executive's scheme would be within the devolved competence of the Scottish Ministers. No doubt the Scottish Ministers would require to satisfy themselves that they had the requisite authority for expenditure under their proposed scheme. There is also the question whether any payments made under the proposed scheme would be disregarded for social security purposes under existing legal provisions. These are not, however, matters which have been addressed to or considered by the Law Officers.

#### **Answers to questions raised and additional comments**

20. The Law Officers response to your first question is in the affirmative. Accordingly, answers to your second and third questions are not required.

21. You did, however, invite the Law Officers also to add any further comment they might have and they do, indeed, have some further observations to make. In particular, the Law Officers appreciate the very proper concern expressed on behalf of DWP regarding whether any answer in this case might have implications for the interpretation of the social security reservation in other contexts. But the Law Officers wish to emphasise that the views they have expressed should be read solely in relation to the particular circumstances of the question raised. With reference to concerns expressed on behalf of DWP, the Law Officers would not wish their opinion to be read as inferring, for instance, that the Scottish Parliament had the competence to legislate for an industrial injury scheme of general application, to parallel that already provided by the UK Parliament for social security purposes.

22. At the same time, the Law Officers recognise that there will be a need to maintain a consistent and coherent approach to other payment schemes in the assessment of whether they fall within devolved or reserved competence. For instance, the Law Officers are aware that the schemes for the payment of those infected with the HIV virus through treatment by the NHS have been dealt with as schemes for social security purposes. It is understood that the trusts which operate those schemes have been paid entirely from funds from the UK Government, including in the period after devolution. Yet if the driving purpose behind these schemes has also been the provision of compensation to persons who have been injured through HIV infection caused by the NHS (ie not simply to sufferers of HIV), there may be nothing to distinguish that purpose from what is proposed by the Scottish Executive in relation to Hepatitis C. The Law Officers do not attempt to resolve this particular issue, but see that it raises questions of this kind. They observe that it might also be possible to distinguish such a scheme from that that applicable to those infected with variant



Creutzfeld-Jakob disease, if the basis of payment to such sufferers is simply infection with that illness, from whatever source. But the Law Officers express no view as to how such schemes should be regarded.

23. The Law Officers can see that there may be a whole range of topics giving rise to payment schemes which might literally fall within the terms of the social security reservation. But they recognise that there may also be some other factors present in a particular scheme to distinguish its purpose from that of social security. Ultimately, it may be a matter of judgment whether a purpose other than social security can properly be identified. That can be seen from the recent example of the Education (School Meals) (Scotland) Bill, where school meals might be seen to fall literally within the terms of the social security reservation, yet interested Departments would assert that the purpose of such provision relates to the devolved matters of education or health.

24. As another example, the Law Officers have lately taken note of the Ministerial correspondence relating to the Department of Health's proposals for limited no-fault compensation to be payable in respect of neurologically impaired babies, whose condition may be attributable to the NHS. No doubt it will have to be assessed whether that scheme would relate to a reserved purpose or otherwise. If a particular scheme is considered to be reserved, the Law Officers observe that that could have implications as to whether it is to be applied on a GB basis or otherwise.

25. Given the width and complexity of the social security reservation, the Law Officers consider that each issue of legislative or executive competence should be addressed by reference to its own circumstances and merits. The Law Officers are concerned, however, that a consistency of approach should be adopted to the range of issues which are likely to arise. They would be happy to be of further assistance in that regard in respect of any particular problem, when addressed in detail.

26. The Law Officers' advice relates to the proposals which so far have been made by the Scottish Executive. They are aware, however, that the Scottish Executive have yet to finalise their proposed scheme. No doubt the Scottish Executive will take into account the recommendations of the Report of the Expert Group on Financial Support on this matter, submitted in March 2003 by its Chairman, Lord Ross. Should it be assessed that the Scottish Executive's final proposals differ in substance from those previously made, the Law Officers advise that you should revert to them with any additional questions which arise.

27. A copy of this letter goes to David Brummell and Stephen Braviner Roman, LSLO; Hugh Macdiarmid, OSAG; John Catlin, DWP; Gerald McHugh, Department for Constitutional Affairs (Scotland Office); and, Samantha Latty-Dennison, ODPM.

***Yours sincerely,***

GRO-C

J C MULLIN



INVESTOR IN PEOPLE