IN THE MATTER OF EX GRATIA PAYMENTS FOR HEPATITIS C INFECTION

ADVICE

The advice sought

1. I am instructed to advise the Department of Health ("the Department") on the origin of its powers to establish a scheme for *ex gratia* payments to sufferers of Hepatitis C who have contracted the disease through infected blood products ("the proposed Scheme"). I am told that several thousand people in England have contracted long-term Hepatitis C infection following treatment with contaminated blood transfusions and blood products before donor screening and heat treatment were introduced.

2. It is proposed that those infected in this way should receive *ex gratia* payments similar to those which have been made to persons who contracted HIV infection through contaminated blood and tissue and derivative products in the late 1970s and early 1980s. Two trusts have been established to administer those payments ("the Trusts"):

   (1) the Macfarlane Trust, established in 1988, to make payments to or in respect of haemophiliacs who contracted HIV through contaminated blood etc..

   (2) the Eileen Trust, established in 1993, to make payments to or in respect of other persons who contracted HIV through contaminated blood etc..

   Both Trusts receive periodic payments from the Department to cover the *ex gratia* payments which they administer, and annual payments from the Department to cover their administrative costs.

3. I understand that one of the purposes of the schemes for *ex gratia* payments administered by the Trusts was to avert the possibility of litigation against the Department in relation to the selection of blood donors, processing and screening of blood, blood products or tissue and the level of provision of blood,

blood products or tissue. I have been sent a document entitled "Scheme of Payments for those Infected with HIV through Blood or Tissue Transfer" which governs the extension of the existing scheme for HIV-infected haemophiliacs to non-haemophiliacs (that is, the extension which gave rise to the Eileen Trust). It includes an undertaking not to pursue legal action which must be signed by or on behalf of a claimant under the scheme, and I assume that a similar undertaking would have been required of claimants to the Macfarlane Trust.

4. By contrast, my instructions suggest (§11) that there is no possibility of legal action by the individuals suffering from Hepatitis C who would claim under the proposed Scheme. I assume that this is because the infected blood or blood products were supplied many years ago, and that the time limits for claims have long since expired. I do not know, however, whether the possibility of litigation is so remote that no undertaking not to pursue legal action will be required of claimants.

5. A scheme similar to the one now contemplated by the Department is already in operation in Scotland. I am instructed that the Department had argued that the Scottish scheme was outside the competence of the Scottish executive because it amounted to social security, which is a reserved matter under ss. 29-30 and Sch. 5 of the Scotland Act 1998. However, the Law Officers disagreed, presumably on the basis that the scheme was a matter relating to health policy, which, with certain immaterial exceptions, is a devolved matter.

6. Now that the Department has decided to set up its own scheme for payments in respect of Hepatitis C, the issue arises as to whether the proposed Scheme would be a devolved matter so far as Wales is concerned. For the reasons set out below, I have concluded that the proposed Scheme would fall within the competence of the Welsh Assembly, on the principal ground that it is a matter incidental to the provision of medical services within s. 2(b) of the National Health Service Act 1977, and on the alternative ground that a power to provide funding for the proposed Scheme could be found in s. 64 of the Health and Public Services Act 1968.

The Welsh devolution scheme

7. The scheme of devolution under the Government of Wales Act 1998 is totally different from that which applies in Scotland. In Scotland, there has been a general transfer of functions, save in respect of reserved matters (s. 53 of the Scotland Act). This would include any relevant common law powers of the Crown, which are now exercisable by the Scottish Ministers. There is no equivalent provision in the Government of Wales Act. The Welsh Assembly has had transferred to it powers under specific statutes, and it has a general power to take ancillary action under s. 40 of the Government of Wales Act :

> The Assembly may do anything (including the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the exercise of any of its functions.

In this sense, the Welsh Assembly is equivalent to a local authority (see the analogous provision in s. 111 of the Local Government Act 1972),[1] whose powers are defined by statute and which does not have the general common law powers possessed by the Crown and exercised by ministers on behalf of the Crown.

8. I therefore agree with my Instructing Solicitor (§6 of my Instructions) that the starting point for the analysis of whether the proposed Scheme trespasses on a devolved matter is the question of whether the power to establish the proposed Scheme derives from statute or from the common law. If the latter, then it is not a devolved matter; if the former, the issue then arises as to whether the statutory power in question is one which has been transferred to the Welsh Assembly.

9. I also assume, together with my Instructing Solicitor, that if a statutory power to perform a certain function has been created, and then devolved to Wales, it would supersede any common law powers of the Secretary of State to perform the same function (see the explanation of the relationship between common law and statutory powers in *R (Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, §§128-134). Therefore, if a power to establish the proposed Scheme has been devolved to Wales, it is not open to the Secretary of State to establish the proposed Scheme in relation to Wales under common law powers.

The National Health Service Act 1977

10. Subject to certain immaterial exceptions, the powers of the Secretary of State for Health under the National Health Service Act 1977 ("the 1977 Act") have been transferred to the Welsh Assembly, pursuant to Sch. 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672).

11. Section 1 of the 1977 Act provides for the general duty of the Secretary of State to promote a comprehensive health service:

> (1) It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement—
>
> > (a) in the physical and mental health of the people of those countries, and
> >
> > (b) in the prevention, diagnosis and treatment of illness
>
> and for that purpose to provide or secure the effective provision of services in accordance with this Act.
>
> (2) The services so provided shall be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.

12. Section 2, which is the crucial section for the purposes of this Advice, provides, so far as is material:

> Without prejudice to the Secretary of State's powers apart from this section, he has power—
>
> (a) to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act; and
>
> (b) to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

It can be seen that the Secretary of State has a statutory power to take ancillary action in relation to the NHS, which is similar to the general power

possessed by the Welsh Assembly and by local authorities.

13. Section 3 then sets in more detail the types of services which the Secretary of State may provide:

> (1) It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements—
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> > (a) hospital accommodation; other accommodation for the purpose of any service provided under this Act;
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> > (b) medical, dental, nursing and ambulance services;
> >
> > (c) such other facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service;
> >
> > (d) such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service;
> >
> > (e) such other services as are required for the diagnosis and treatment of illness.

14. The supply of blood and blood products would most probably fall within the duty of the Secretary of State under s. 3(1)(b) of the 1977 Act to provide "medical services".[2] Section 2(b) confers a power upon him to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of his duty to supply blood and blood products. The key question is whether the establishment of a scheme for *ex gratia* payments of compensation to people suffering harm as a result of the performance of that duty something which can be said to be calculated to facilitate, or conducive or incidental to its performance?

15. I understand that the Department would accept that a no-fault compensation scheme would fall within s. 2(b) if it was designed to settle claims arising out of the provision of treatment by health service bodies where there was a

potential legal liability to pay such claims (§11 of my Instructions). That seems to be me to be correct: it can fairly be said that a no-fault scheme, which is intended to settle potential claims and so avoid costly litigation in the future, is calculated to be conducive to the performance of the Secretary of State's duties *vis-à-vis* the NHS. The reasons justifying reform of the present system of tort claims for clinical negligence which are set out in the Department's July 2003 consultation paper entitled *Making Amends* could all be deployed in support of that argument. On that basis, I would also have assumed that the Department would argue that the Macfarlane and Eileen Trusts were established and are maintained pursuant to s. 2(b). I understand, however, that no firm conclusion has been reached on that point. I note also that the *Making Amends* proposals apply only to England, presumably on the basis that compensation for harm caused by the NHS is a s. 2 matter which is within the competence of the Welsh Assembly.

16. Those instructing me argue, however, that a no-fault scheme cannot be said to be (a) calculated to facilitate, or (b) conducive or (c) incidental to, the duty to promote a national health service where it is not designed to avert legal claims. As to (a), whether a scheme is calculated to facilitate the performance of a duty is an issue which – subject to considerations of rationality - turns on the state of mind of the authority in question and is not susceptible to objective interpretation. If the Department does not take the view that the proposed Scheme will facilitate the provision of medical services, or some other duty, that is the end of the matter.

17. As to (b), I also agree that if there is no possibility of legal liability, that will tend against the argument that a no-fault scheme is *conducive to* the performance of a duty. However:

(1) It could be said that the establishment of a no-fault scheme is likely to have the effect of promoting public confidence and trust in the NHS, whether or not there is a possibility of legal liability in a particular case. That may be sufficient to make the establishment of such a scheme "conducive to" the performance of the Secretary of State's duties. The *Making Amends* consultation paper suggests that one of the reasons for

reform of the present tort-based system for compensation, including the introduction of a no-fault scheme, is that it is "costly .. in public confidence" (p. 13). The implicit suggestion is that a no-fault scheme would command greater public confidence.

(2) Even if there is no possibility of legal liability, however, a no fault scheme can have the beneficial effect of reducing the likelihood of ill-founded claims which, despite their lack of intrinsic merit, may be costly to deal with.

18. As to (c), whilst this is to some extent a matter of impression, my view is that the establishment of a compensation scheme for people who have suffered harm by virtue of the performance of a statutory duty is a matter which is incidental to that duty. It is, in my view, difficult to view the remedying of harm caused by an act as logically separate from that act even to the extent that it cannot be regarded as incidental to it.

19. There are, moreover, good policy reasons against any such distinction being drawn, as it might prevent public bodies from putting right matters which went wrong in the course of its performance of their statutory duties. Take, for example, a case where a van delivering blood products is involved in a collision with another vehicle, whose driver was at fault, resulting in the spillage of blood products. Could it be said that the Secretary of State had no statutory power to assist in the clean-up following the accident, but had to fall back on his common law powers? In my view, the courts would be likely to hold that the clean-up operation was incidental to the delivery of the blood (and notwithstanding that the Secretary of State may be under no legal obligation to assist). A factor tending against a narrow construction of the term "incidental" would be that, if it were adopted, a statutory body without common law powers would have no power at all to act in those circumstances.

20. A further instructive example is that of a local authority, charged with a statutory duty to administer housing benefit, which delays or makes mistakes in the processing of a claim. If the authority wished to write to apologise to the claimant and make a small *ex gratia* payment in respect of the inconvenience caused, something which is not expressly contemplated in the

legislation, it would have to rely upon s. 111 of the Local Government Act 1972. It surely could not be said that the authority had no power to apologise and make an *ex gratia* payment because that was not "incidental" to the performance of the duty to administer housing benefit. There is, in my view, no difference in substance between that situation, and what is proposed in the present case.

21. I have considered the large body of case-law on the meaning of the term "incidental to" as it is used in s. 111 of the Local Government Act 1972, and in the doctrine of implied powers in company law, and have found no obvious reason why my *prima facie* view should be rejected. Much of that case-law is fact-specific, turning on the particular act, and the particular statutory power to which the act was said to be incidental, and cannot be directly applied to the current issue. I can say, however, that the argument that the proposed Scheme would be incidental to the Secretary of State's duty to provide medical services does not fall foul of any general limitation upon the scope of the word "incidental". I have considered in particular the ruling of the House of Lords in *R v Richmond-upon-Thames ex parte McCarthy & Stone* [1992] 2 AC 48 to the effect that an act is not authorised by s. 111 if it is incidental to an act which was itself authorised by s. 111. That is, a s. 111 act must be incidental to a statutory power or duty, not incidental to the incidental. Here, the establishment of the proposed Scheme would, in my view, be incidental to the express statutory duty to provide medical services and not incidental to the incidental.

22. I must therefore consider whether the absence of clear or potential legal liability to pay compensation for harm is a pivotal factor which must result in the proposed Scheme being not incidental to the Secretary of State's statutory duties. I should say, first, that the strength of the argument that the proposed Scheme is "incidental" lies in the fact that the harm sought to be remedied has been caused in the course of the performance of a statutory duty. Whether or not the Secretary of State is legally liable to compensate for that harm is not, on the face of it, a matter which negates or undermines that basic fact.

23. Further:

(1) there is no suggestion in the case-law that an act, such as the payment of compensation, is only "incidental" if it is or may be legally required of an authority for some other reason. Indeed, if an authority is subject to a legal obligation to pay money, or perform some other act, it will not need to look for *vires* to do that act in an implied powers provision like s. 2(b) or s. 111 of the 1972 Act.[3]

(2) the courts are unlikely to want to make the existence of *vires* dependent upon the determination of the issue of whether an authority is or may be under a legal liability: that would make life very difficult for authorities, who would have to reach a conclusion on what is really a matter of law for the courts, and can only be determined conclusively by the courts.

(3) Any determination by an authority of its actual or potential liability may have to be done in the abstract, in the sense that the judgment falls to be made in relation to large numbers of potential claims and/or without being in possession of all of the facts which would be before the court.

(4) If the test is potential liability, what level of risk of liability should be required? It is, after all, very difficult to say in any case that there is absolutely no possibility of a successful claim, given the ingenuity of lawyers, and the possibility for time limits to be extended.

(5) A test based on actual or potential liability would undermine the utility of having an *ex gratia* scheme: the fact of establishment of the scheme would mean that the authority believed that it was or could be legally liable to make the payments.

(6) It is difficult to see why as, a matter of policy, the courts would wish to restrict the freedom of authorities to establish *ex gratia* schemes to compensate for harm they have caused, and to encourage them to stick to the letter of their legal obligations. Policy therefore suggests that the existence of actual or potential legal liability should not be determinative of the issue of *vires* under s. 2(b), or, by analogy, s. 111 of the 1972 Act.

24. For those reasons, the existence or potential existence of legal liability to make

a payment of compensation is not, in my view, determinative of whether such a payment is "incidental to" the duty pursuant to which harm was caused. I therefore stand by my *prima facie* conclusion that the payment of compensation for harm caused in the performance of a statutory duty is incidental to that duty. On that basis, the Secretary of State's power to establish the proposed Scheme lies in s. 2 of the 1977 Act, and has been devolved to the Welsh Assembly.

Section 64 of the Health and Public Services Act 1968

25. An alternative statutory power which has been considered by my Instructing Solicitors is s. 64 of the Health and Public Services Act 1968 ("the 1968 Act"). Given my conclusions in relation to the 1977 Act, it is not strictly necessary to consider this section, but I do so for reasons of completeness. The operative provisions of s. 64 state:

> **64 Financial assistance by the Minister of Health and the Secretary of State to certain voluntary organisations**
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> (1) The Minister of Health may, upon such terms and subject to such conditions as he may, with the approval of the Treasury, determine, give to a voluntary organisation to which this section applies assistance by way of grant or by way of loan, or partly in the one way and partly in the other.
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> (2) This section applies to a voluntary organisation whose activities consist in, or include, the provision of a service similar to a relevant service, the promotion of the provision of a relevant service or a similar one, the publicising of a relevant service or a similar one or the giving of advice with respect to the manner in which a relevant service or a similar one can best be provided.

26. Under s. 64(3), "relevant service" means "a service which must or may, by virtue of the relevant enactments, be provided or the provision of which must or may, by virtue of those enactments, be secured by the [Secretary of State for Health]". The relevant enactments include the 1977 Act and Part III of the

National Assistance Act 1948. "Voluntary organisation" means "a body the activities of which are carried on otherwise than for profit, but does not include any public or local authority".

27. I understand that the administrative costs of the Macfarlane and Eileen Trusts are paid pursuant to s. 64 of the 1968 Act. My Instructions suggest (§9), and I agree, that the Trusts, and any similar trust set up to administer payments under the proposed Scheme fall within the definition of "voluntary organisation" in s. 64(3). Further, the activities of the Trusts consist in the provision of services: the administration of the compensation schemes – receiving and assessing claims, and arranging for the payment of compensation - does constitute a service provided by the Trusts to their beneficiaries and potential beneficiaries.

28. The crucial question is whether those services are similar to services which could be provided or secured by the Secretary of State under one of the relevant enactments. My Instructing Solicitor suggests that the activities of the body administering the proposed Scheme ("the proposed services") would not be similar to any service provided under Part III of the National Assistance Act 1948, which generally excludes the payment of money by providing authorities. I agree with that. However, the proposed services would, in my view, be similar to services which could be provided or secured by the Secretary of State under s. 2(b) of the 1977 Act. For example, I have concluded above, in agreement with my Instructing Solicitor, that a compensation scheme which is designed to avoid litigation, such as that suggested in the *Making Amends* paper, would, in principle, be within the Secretary of State's powers under s. 2(b) of the 1977 Act.[4] The administration of one ex gratia compensation scheme would be similar to that of another notwithstanding that a purpose of one but not the other was to avert litigation or discharge legal liabilities.

29. Therefore, even on the assumption that my conclusions in relation to the 1977 Act are incorrect, so that the Secretary of State has no statutory power under s. 2(b) to establish the proposed Scheme, it can still be said that the proposed services are *similar to* services which the Secretary of State could provide or secure under the 1977 Act. Section 64 of the 1968 Act would, in those

circumstances, provide a statutory power to make grants to a trust or other organisation administering the proposed Scheme. (It would not, however, provide *vires* for the establishment at the behest of the Secretary of State of a new "voluntary organisation" for the purposes of administering the proposed Scheme; one of the existing Trusts would have to do that job, or else a new trust would have to be established in reliance upon common law powers).

30. If, on the other hand, my conclusions in relation to s. 2(b) of the 1977 Act are correct, so that it does provide *vires* for the proposed Scheme, a nice question arises as to whether s. 64 would apply as well: can the proposed services be said to be "similar to" services provided or secured by the Secretary of State under the 1977 Act if they are in fact services provided or secured by him under that Act. I would incline to the view that s. 64 does not apply in those circumstances, as its underlying intention appears to be to permit the payment of money to bodies operating outside the umbrella of the NHS, rather than those providing services on behalf of the NHS. If that is so, it follows that the legal basis for the funding of the administrative costs of the Macfarlane and Eileen Trusts is s. 2(b) of the 1977 Act, rather than s. 64 of the 1968 Act. Section 64 would only provide the basis for their funding if I am wrong about the scope of s. 2(b).

Other statutory powers

31. I have not identified any other statutory powers which might be of relevance in this context.

Conclusions

32. In summary, therefore, I have concluded:

(1) There is a statutory power to establish the proposed Scheme under s. 2(b) of the National Health Service Act 1977.

(2) If I am wrong about that, there is a statutory power to make payments to a voluntary organisation administering the proposed Scheme under s. 64

of the 1968 Act.

(3) Both of those statutory powers have been devolved to Wales. The proposed Scheme is, therefore, a devolved matter so far as Wales is concerned.

33. If I can be of any further assistance, my Instructing Solicitors should not hesitate to contact me. I shall be working at home over the next few weeks and can be contacted on GRO C (phone/fax) and by e-mail to coppel@ GRO C

JASON COPPEL

11 King's Bench Walk
Temple
London
EC4Y 7EQ

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[1] Section 111(1) of the Local Government Act 1972 provides that "... a local authority shall have power to do anything .. which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions".

[2] That part of the Secretary of State's duties under the 1977 Act is now discharged through the establishment of a special health authority, the National Blood Authority, whose functions include the collection and supply of blood and blood products: see Article 3 of the National Blood Authority (Establishment and Constitution) Order 1993 (SI 1993/585, as amended).

[3] Whilst I appreciate that, in the present case, the Secretary of State will have common law to establish the proposed Scheme if he does not have statutory power under s. 2(b) of the 1977 Act, my analysis proceeds on the basis that the words of s. 2(b) must be interpreted in the same way as the identical words in s. 111 of the Local Government Act 1972, and indeed in s. 40 of the Government of Wales Act 1998. The interpretation of s. 2(b) must therefore be judged in the light of the implications for statutory bodies not possessing common law powers under other implied powers provisions. (I have considered and rejected the argument that s. 2(b) should be interpreted differently precisely because the Secretary of State has additional common law powers in the background).

[4] I have reached that conclusion only "in principle". I have not investigated whether each and every aspect of the proposed NHS Redress Scheme could be effected under s. 2(b) and without the need for further primary legislation.