

266
Mr Tucker

Copy to: PS/Minister of State
PS/US of S
PS/HHD
PS/Chief Executive
Solicitor
Mr Mills
Mr Anderson
Director, InD
Mr R Henderson, Sols
Mr Young

HIV INFECTION: WHOLE BLOOD TRANSFUSION

Thank you for your minute of 29 April. The Secretary of State is inclined to let the Department of Health make the running on this awkward issue, and so has no particular desire to take over this correspondence.

GRO-C

J D GALLAGHER
PS/Secretary of State

1 May 1991

ICH00705.051

PS/Secretary of State

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Director, InD
Mr R Henderson, Sols
Mr Tucker
Mr Young, Special Adviser

HIV INFECTION: WHOLE BLOOD TRANSFUSION

Mr Forsyth has seen Mr Tucker's minute of 29 April 1991 and your minute of 1 May 1991 about whole blood transfusions. Mr Forsyth considers that this is an extremely serious matter and that the Government's position is indefensible. He has commented that we are in danger of losing a lot of good will carping over a small financial obligation; our refusal to release information on records leaves us particularly vulnerable. Mr Forsyth hopes we might try to change the Government's line on this matter.

GRO-C

IAN D KERNOHAN
PS/Minister of State
2 May 1991

NLA00402.051

Whole Blood Transfusions

Substitute Paragraphs for letter

"The Government made provision for compensation in relation to haemophiliac/HIV victims as a special case. It may be that other groups have not dissimilar claims for special treatment. However in order to be so treated those cases would require on their own to be differentiated from other groups of patients harmed as an unfortunate side effect of NHS treatment and who are not to be so treated.

In your letter you suggest that the Government's position is to the effect that those sustaining injury as an unfortunate side effect of NHS treatment must prove medical negligence in order to become entitled to compensation. The suggestion on your part is that individuals should be entitled to compensation without having to establish medical negligence. Successive governments have never been persuaded that a general scheme of no fault compensation of such a kind would be fairer than present arrangements. Since the announcement of the settlement offer for haemophiliacs a general scheme of no fault compensation for the NHS has been considered in the House and decisively rejected. The Government's view remains that such a scheme would be unworkable and unfair.

You will understand that it would not be right for me to make any comment on the circumstances of the individual cases to which you refer since these could be the subject of claims brought before the courts. However I can say that in relation to individual cases in respect of which claims have been intimated, each such claim will be considered on its own merits."

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Mr G Tucker
Room 161A
St Andrew's House

HIV INFECTION - WHOLE BLOOD TRANSFUSION

I refer to your draft PS note of 26 April in which you were looking for comments as soon as possible. It may be that I am too late. However I would suggest the following amendments to the draft submission:-

In paragraph 2 in line 14 delete from "both arguments" to the end of the paragraph and substitute the following:-

"We were not consulted on the terms of these earlier replies. We do not consider that either of the reasons advanced by the Department of Health has substance. In the first place in relation to the matter of causation, while it is the case that if any claim were to come to Court it would be for the pursuer to establish a cause or link between transfusion and infection, the difficulties for the pursuer in proving the cause or link would largely be occasioned by the reluctance of Government to allow the pursuer access to blood transfusion records. Without access to those records the pursuer could not identify the donor of the transfused blood. It would be relatively simple to establish whether blood transfused was likely to have been tainted if one knows the identity of the donor. To a substantial extent therefore difficulties in proving a causal connection arise from the refusal of Government to allow access to records. The Courts have already upheld a claim on behalf of the Secretary of State for Scotland that it is not in the public interest that such records should be released. That decision of the Courts was specifically in relation to an application for recovery of those records made by a petitioner infected with HIV allegedly as a result of a tainted blood transfusion.

In relation to the argument as to a stronger claim for haemophiliacs for compensation because of their underlying condition which prevented insurance or build up of savings we would not advise that this line of argument be persisted in. It necessarily implies some moral judgement on victims who have been infected through no fault of their own and proceeds on the underlying proposition that such victims ought reasonably to have foreseen the possibility of serious or terminal injury arising from relatively routine clinical procedures."

I would suggest a new paragraph 3 as follows:-

"3. Ministers should be aware that to date claims for damages have been received in relation to 3 individuals infected with HIV allegedly from infected blood. These claims are against the Secretary of State for Scotland. In one of those claims a medical report has already been produced indicating that evidence as to the blood transfusion exists to show that the blood transfused came from an individual now known to be an HIV positive homosexual. None of the cases referred to are yet the subject of Summonses."

I would suggest the following in place of paragraph 3:-

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"4. Messrs J & A Hastie wrote to Mrs Bottomley on 20 March to take issue with her response to Mr Galbraith. We have been consulted on this occasion on the proposed reply - copy attached. The proposed reply proceeds upon the same basis as the earlier letter referred to, and as set out above we do not consider that the reasons advanced in reply are tenable. Accordingly an alternative response has been prepared. This proceeds upon the basis that claims for parity of treatment between blood transfusion victims of HIV and haemophiliac HIV victims are to be rejected. We propose to offer this proposed response (copy attached) to Department of Health but it has raised the question in our minds whether the correspondence with Messrs Hastie should be transferred for a Scottish Office response since responsibility for health matters of Scottish patients falls to our Secretary of State. There is also evidence that there is increasing media interest in this matter. The Observer newspaper carried an article and a leader on 21 April and a further article in its issue of 26 April. The leader comment suggested that the claim by the Department of Health that there was a distinction between the cases of haemophiliacs and those infected through normal surgical procedures is "such patent nonsense as it is extraordinary that it should have been seriously put forward". The proposed response does not seek to differentiate between haemophiliacs and whole blood transfusion victims. Rather it suggests that the correct test for determining whether any group should be treated as a special case is as to whether or not they may be differentiated from the group of NHS patients as a whole.

5. As the current position of HM Government is that compensation in respect of whole blood transfusion HIV victims is to be resisted and that any change in that view would have UK implications, there would be consistency in the Department of Health continuing to take the lead in replying to Messrs Hastie on this correspondence. Department of Health are taking lead questions to an oral PQ in this topic from Lord Malloy for answer on 1 May and we are to provide Scottish background.

6. Subject to the views of Ministers,"

Finally, I note that your advice to Ministers is that Department of Health should deal with the correspondence. I think my advice must remain that Secretary of State for Scotland should deal with it, in particular taking into account that the cases in issue are the subject of Scottish claims.

GRO-C

~~RICHARD M HENDERSON~~
29 April 1991

Solicitor's Office
Room 2/46
NSAH
Ext: **GRO-C**

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GRO-C

W B
W Henderson

PS/Secretary of State

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In the case is no change
from previous draft

GRO-C

HIV INFECTION: WHOLE BLOOD TRANSFUSION

1. This minute is to inform Ministers of correspondence which the Department of Health has received at both Ministerial and Official level from a firm of Scottish solicitors representing people who are alleged to have contracted HIV/AIDS through whole blood transfusions and suggest that as the issue of compensation is a UK one we should not seek to take over responsibility at this time in responding to the Scottish firm of solicitors.

Background

2. Mr Brian Donald of Messrs J & A Hastie, Solicitors, Edinburgh wrote on 18 December to the Secretary of State for Health (copied to Mr S Galbraith) seeking compensation for those people who have contracted HIV/AIDS as a result of blood transfusions. Such compensation would be on a similar basis to the offer announced for haemophiliacs with HIV as a result of taking infected Factor VIII. The reply at official level followed the lines of a reply sent to Mr Sam Galbraith by Mrs Bottomley. It explained that there were no plans to extend the special financial help to haemophiliacs to those other patients who are alleged to have been infected through blood transfusions. In support of this the Department of Health has sought to differentiate between whole blood HIV and Factor VIII cases on the basis firstly that haemophiliacs had a stronger claim because of their underlying condition which prevented insurance or build-up of savings in order to provide for their dependents and secondly in relation to causation.

3. We were not consulted on the terms of these earlier replies. We do not consider that either of the reasons advanced by the Department of Health has substance. In the first place in relation to the matter of causation, while it is the case that if any claim were to come to Court it would be for the pursuer to establish a cause or link between transfusion and infection, the difficulties for the pursuer in proving the cause or link would largely be occasioned by the reluctance of Government to allow the pursuer access to blood transfusion records. Without access to those records the pursuer could not identify the donor of the transfused blood. It would be relatively simple to establish whether blood transfused was likely to have been tainted if one knows the identity of the donor. To a substantial extent therefore difficulties in proving a causal connection arise from the refusal of Government to allow access to records. The Courts have already upheld a claim on behalf of the Secretary of State for Scotland that it is not in the public interest that

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such records should be released. That decision of the Courts was specifically in relation to an application for recovery of those records made by a petitioner infected with HIV allegedly as a result of a tainted blood transfusion.

4. In relation to the argument as to a stronger claim for haemophiliacs for compensation because of their underlying condition which prevented insurance or build up of savings we would not advise that this line of argument be persisted in. It necessarily implies some moral judgement on victims who have been infected through no fault of their own and proceeds on the underlying proposition that such victims ought reasonably to have foreseen the possibility of serious or terminal injury arising from relatively routine clinical procedures.

5. Ministers should be aware that to date claims for damages have been received in relation to 3 individuals infected with HIV allegedly from infected blood. These claims are against the Secretary of State for Scotland. In one of those claims a medical report has already been produced indicating that evidence as to the blood transfusion exists to show that the blood transfused came from an individual now known to be an HIV positive homosexual. None of the cases referred to are yet the subject of Summonses.

6. Messrs J & A Hastie wrote to Mrs Bottomley on 20 March to take issue with her response to Mr Galbraith. We have been consulted on this occasion on the proposed reply - copy attached at Annex A. The proposed reply proceeds upon the same basis as the earlier letter referred to, and as set out above we do not consider that the reasons advanced in reply are tenable. Accordingly an alternative response has been prepared. This proceeds upon the basis that claims for parity of treatment between blood transfusion victims of HIV and haemophiliac HIV victims are to be rejected. We propose to offer this proposed response (copy attached at Annex B) to Department of Health but it has raised the question in our minds whether the correspondence with Messrs Hastie should be transferred for a Scottish Office response since responsibility for health matters of Scottish patients falls to our Secretary of State. There is also evidence that there is increasing media interest in this matter. The Observer newspaper carried an article and a leader on 21 April and a further article in its issue of 26 April. The leader comment suggested that the claim by the Department of Health that there was a distinction between the cases of haemophiliacs and those infected through normal surgical procedures is "such patent nonsense as it is extraordinary that it should have been seriously put forward". The proposed response does not seek to differentiate between haemophiliacs and whole blood transfusion victims. Rather it suggests that the correct test for determining whether any group should be treated as a special case is as to whether or not they may be differentiated from the group of NHS patients as a whole.

7. As the current position of HM Government is that compensation in respect of whole blood transfusion HIV victims is to be resisted and that any change in that view would have UK implications, there would be consistency in the Department of Health continuing to take the lead in replying to Messrs Hastie on this correspondence. Department of Health are taking the lead in responding to an oral PQ on this topic from Lord Malloy for answer on 1 May. However the advice from our legal advisers is that Secretary of State for Scotland should deal with the correspondence from Messrs Hastie in particular taking into account that

the cases in issue are the subject of Scottish claims. We consider that this runs the risk of drawing the criticism on the Scottish Office. We should be glad to know whether Ministers would wish us to take over the correspondence and reply direct on the lines of a suitably amended version of the draft as at Annex B.

GRO-C

G W TUCKER
29 April 1991

ME 3
Room 161A
SAH
Ext GRO-C

JSH00426.041

ANNEX A

POH 2/ 1666/ 105

Brian G Donald Esq
J&A Hastie, Solicitors
43 York Place
Edinburgh EH1 3HT

Thank you for your letter of 20 March 1991 about compensation for blood transfusion recipients who have contracted the AIDS virus.

Firstly, let me say that I have the greatest sympathy for those who have become HIV positive after receiving blood transfusions. I have no less sympathy for the blood transfusion recipients than for the haemophiliacs who have been infected with the AIDS virus.

The Government has always recognised the wholly exceptional case of the haemophiliacs, who were already seriously disadvantaged by a hereditary disorder which affected their employment prospects, insurance and mortgage status. They had little opportunity to insure their lives or their mortgages, or to build up savings in order to provide for their dependants. These difficulties have been compounded by the onset of HIV. Also, the hereditary nature of haemophilia can, and in some cases does, mean that more than one member of the family may be affected. This combination of circumstances does not generally apply to those who have become infected with HIV through blood transfusions.

I am sure that there are very few who would disagree that the Government has been right to recognise the exceptional case of the haemophiliacs by making special provision, which we have done.

There would be difficulties in establishing causation in the case of blood transfusion recipients infected with HIV. In the case of haemophiliacs who are well known to their doctors through continuity of treatment, we can be fairly sure of the source of contamination where the patient has contracted HIV after treatment with large quantities of Factor VIII over a long period of time. At least in some cases of HIV infected blood transfusion recipients, it would be more difficult to confirm that as the source of infection and not some other cause.

We do not accept that those who have been infected as a result of blood transfusions have any stronger claim to compensation than other patients who may have been injured as a result medical accidents or as an unintended side effect of medical treatment. It has been argued that all those who are injured as a result of a medical accident should receive compensation from the state, whether or not anyone had been at fault. Successive Governments have never been persuaded that a general scheme of "no fault" compensation of this kind would be fairer than present arrangements. Since the announcement of the settlement offer for haemophiliacs, a general scheme of no fault compensation for the NHS has been considered in the House, and decisively rejected. Our view remains that such a scheme would be unworkable and unfair.

You will understand that it would not be right for me to make any comment on the circumstances of the individual cases to which you refer, since these could be the subject of claims brought before the courts.

VIRGINIA BOTTOMLEY

ANNEX B

POH 2/ 1666/ 105

Brian G Donald Esq
J&A Hastie, Solicitors
43 York Place
Edinburgh EH1 3HT

Thank you for your letter of 20 March 1991 about compensation for blood transfusion recipients who have contracted the AIDS virus.

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"The Government made provision for compensation in relation to haemophiliac/HIV victims as a special case. It is undoubtedly the case that other groups may have similar claims to special treatment. I can well recognise the strength of the arguments which you advance on behalf of your clients that they should be entitled to similar special treatment.

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4. In relation to the argument as to a stronger claim for haemophiliacs for compensation because of their underlying condition which prevented insurance or build up of savings we would not advise that this line of argument be persisted in. It necessarily implies some moral judgement on victims who have been infected through no fault of their own and proceeds on the underlying proposition that such victims ought reasonably to have foreseen the possibility of serious or terminal injury arising from relatively routine clinical procedures.

5. Ministers should be aware that to date claims for damages have been received in relation to 3 individuals infected with HIV allegedly from infected blood. These claims are against the Secretary of State for Scotland. In one of those claims a medical report has already been produced indicating that evidence as to the blood transfusion exists to show that the blood transfused came from an individual now known to be an HIV positive homosexual. None of the cases referred to are yet the subject of Summonses.

6. Messrs J & A Hastie wrote to Mrs Bottomley on 20 March to take issue with her response to Mr Galbraith. We have been consulted on this occasion on the proposed reply - copy attached at Annex A. The proposed reply proceeds upon the same basis as the earlier letter referred to, and as set out above we do not consider that the reasons advanced in reply are tenable. Accordingly an alternative response has been prepared. This proceeds upon the basis that claims for parity of treatment between blood transfusion victims of HIV and haemophiliac HIV victims are to be rejected. We propose to offer this proposed response (copy attached at Annex B) to Department of Health but it has raised the question in our minds whether the correspondence with Messrs Hastie should be transferred for a Scottish Office response since responsibility for health matters of Scottish patients falls to our Secretary of State. There is also evidence that there is increasing media interest in this matter. The Observer newspaper carried an article and a leader on 21 April and a further article in its issue of 26 April. The leader comment suggested that the claim by the Department of Health that there was a distinction between the cases of haemophiliacs and those infected through normal surgical procedures is "such patent nonsense as it is extraordinary that it should have been seriously put forward". The proposed response does not seek to differentiate between haemophiliacs and whole blood transfusion victims. Rather it suggests that the correct test for determining whether any group should be treated as a special case is as to whether or not they may be differentiated from the group of NHS patients as a whole.

7. As the current position of HM Government is that compensation in respect of whole blood transfusion HIV victims is to be resisted and that any change in that view would have UK implications, there would be consistency in the Department of Health continuing to take the lead in replying to Messrs Hastie on this correspondence. Department of Health are taking the lead in responding to an oral PQ on this topic from Lord Malloy for answer on 1 May. However the advice from our legal advisers is that Secretary of State for Scotland should deal with the correspondence from Messrs Hastie in particular taking into account that

the cases in issue are the subject of Scottish claims. We consider that this runs the risk of drawing the criticism on the Scottish Office. We should be glad to know whether Ministers would wish us to take over the correspondence and reply direct on the lines of a suitably amended version of the draft as at Annex B.

GRO-C

G W TUCKER
29 April 1991

ME 3
Room 161A
SAH
Ext **GRO-C**

JSH00426.041

ANNEX A

POH 2/ 1666/ 105

Brian G Donald Esq
J&A Hastie, Solicitors
43 York Place
Edinburgh EH1 3HT

Thank you for your letter of 20 March 1991 about compensation for blood transfusion recipients who have contracted the AIDS virus.

Firstly, let me say that I have the greatest sympathy for those who have become HIV positive after receiving blood transfusions. I have no less sympathy for the blood transfusion recipients than for the haemophiliacs who have been infected with the AIDS virus.

The Government has always recognised the wholly exceptional case of the haemophiliacs, who were already seriously disadvantaged by a hereditary disorder which affected their employment prospects, insurance and mortgage status. They had little opportunity to insure their lives or their mortgages, or to build up savings in order to provide for their dependants. These difficulties have been compounded by the onset of HIV. Also, the hereditary nature of haemophilia can, and in some cases does, mean that more than one member of the family may be affected. This combination of circumstances does not generally apply to those who have become infected with HIV through blood transfusions.

I am sure that there are very few who would disagree that the Government has been right to recognise the exceptional case of the haemophiliacs by making special provision, which we have done.

There would be difficulties in establishing causation in the case of blood transfusion recipients infected with HIV. In the case of haemophiliacs who are well known to their doctors through continuity of treatment, we can be fairly sure of the source of contamination where the patient has contracted HIV after treatment with large quantities of Factor VIII over a long period of time. At least in some cases of HIV infected blood transfusion recipients, it would be more difficult to confirm that as the source of infection and not some other cause.

We do not accept that those who have been infected as a result of blood transfusions have any stronger claim to compensation than other patients who may have been injured as a result medical accidents or as an unintended side effect of medical treatment. It has been argued that all those who are injured as a result of a medical accident should receive compensation from the state, whether or not anyone had been at fault. Successive Governments have never been persuaded that a general scheme of "no fault" compensation of this kind would be fairer than present arrangements. Since the announcement of the settlement offer for haemophiliacs, a general scheme of no fault compensation for the NHS has been considered in the House, and decisively rejected. Our view remains that such a scheme would be unworkable and unfair.

You will understand that it would not be right for me to make any comment on the circumstances of the individual cases to which you refer, since these could be the subject of claims brought before the courts.

VIRGINIA BOTTOMLEY

ANNEX B

POH 2/ 1666/ 105

Brian G Donald Esq
J&A Hastie, Solicitors
43 York Place
Edinburgh EH1 3HT

Thank you for your letter of 20 March 1991 about compensation for blood transfusion recipients who have contracted the AIDS virus.

Firstly, let me say that I have the greatest sympathy for those who have become HIV positive after receiving blood transfusions. I have no less sympathy for the blood transfusion recipients than for the haemophiliacs who have been infected with the AIDS virus.

"The Government made provision for compensation in relation to haemophiliac/HIV victims as a special case. It is undoubtedly the case that other groups may have similar claims to special treatment. I can well recognise the strength of the arguments which you advance on behalf of your clients that they should be entitled to similar special treatment.

In your letter you suggest that the Government's position is to the effect that those sustaining injury as an unfortunate side effect of NHS treatment must prove medical negligence in order to become entitled to compensation. The suggestion on your part is that individuals should be entitled to compensation without having to establish medical negligence. Successive governments have never been persuaded that a general scheme of no fault compensation of such a kind would be fairer than present arrangements. Since the announcement of the settlement offer for haemophiliacs a general scheme of no fault compensation for the NHS has been considered in the House and decisively rejected. The Government's view remains that such a scheme would be unworkable and unfair.

[The Government does not set its face against treating any cases as special cases. However in order to be so treated those cases would require on their own to be differentiated from other groups of patients harmed as an unfortunate side effect of NHS treatment and who are not to be so treated].

You will understand that it would not be right for me to make any comment in the circumstances of the individual cases to which you refer since these could be the subject of claims brought before the courts. However I can say that in relation to individual cases in respect of which claims have been intimated, each such claim will be considered on its own merits."

L^d It may be that other groups have not
submitted claims for special treatment. ~~However~~
~~possibly~~ to be treated . . .
In your letter.

2024

responsibilities. Additional powers are proposed to form or promote companies and partnerships singly and with others. In addition, it will have a catch-all power allowing it to do anything which is related to the discharge of its functions.

EMP00027.021

Richard

PS/Secretary of State

First draft attempt. I should be glad to have your comments as h.

Copy to: PS/Minister of State
PS/US of S
PS/HHD
PS/Chief Executive
Solicitor
Mr Mills
Mr Anderson
Director, InD
Mr R Henderson, Sols
Mr Young, Special Adviser

GRO-C

26/4

HIV INFECTION: WHOLE BLOOD TRANSFUSION

1. This minute is to inform Ministers of correspondence which the Department of Health has received at both Ministerial and Official level from a firm of Scottish solicitors representing people who are alleged to have contracted HIV/AIDS through whole blood transfusions and suggest that as the issue of compensation is a UK one we should not seek to take over responsibility at this time in responding to the Scottish firm of solicitors.

Background

2. Mr Brian Donald of Messrs J A Hastie, Solicitors, Edinburgh wrote on 18 December to the Secretary of State for Health (copied to Mr S Galbraith) seeking compensation for those people who have contracted HIV/AIDS as a result of blood transfusions similar to the offer announced for haemophiliacs with HIV as a result of taking infected Factor VIII. The reply at official level followed the lines of a reply sent to Mr Sam Galbraith by Mrs Bottomley. It explained that there were no plans to extend the special financial help to haemophiliacs to those other patients who are alleged to have been infected through blood transfusions. In support of this the Department of Health has sought to differentiate between whole blood HIV and Factor VIII cases on the basis firstly that haemophiliacs had a stronger claim because of their underlying condition which prevented insurance or build-up of savings in order to provide for their dependents and secondly in relation to causation. Both arguments are not considered to be strong legally and as Messrs J & A Hastie have intimated formal claims for compensation for a number of cases against the Secretary of State for Scotland. Solicitor's Office are concerned that such responses to Messrs Hastie may be hostages to fortune when cases come to Court. We were not consulted on the terms of these earlier replies.

3. Messrs Hastie wrote to Mrs Bottomley on 20 March to take issue with her response to Mr Galbraith and we have been consulted on this occasion on the proposed reply. Following advice from Solicitor's Office that the Department of Health reply was considered to be improper, an alternative response has been prepared. We propose to offer this (copy attached) to Department of Health but it has raised the question in our minds whether the correspondence with Messrs Hastie should be transferred for a Scottish Office response since responsibility for health matters of Scottish patients falls to our Secretary of State. There is also evidence that there is increasing media interest in this matter. The Observer

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newspaper carried an article and a leader on 21 April. The leader comment suggested that the claim by the Department of Health that there is a distinction between the cases of haemophiliacs and those infected through normal surgical procedures is "such patent nonsense as it is extraordinary that it should have been seriously put forward".

4. However as the current position of HM Government is that compensation in respect of whole blood transfusion HIV victims is to be assisted and that any change in that view would have UK implications, there would be consistency in the Department of Health continuing to take the lead in replying to Messrs Hastie on this correspondence. Department of Health are taking lead responding to an oral PQ on this topic from Lord Malloy for answer on 1 May and we are to provide Scottish background.

5. Subject to the views of Ministers, we shall not seek to take over responsibility for the reply to Messrs Hastie but will urge Department of Health to adopt the line proposed in our alternative draft.

G W TUCKER
26 April 1991

ME 3
Room 161A
SAH
Ext **GRO-C**

JSH00426.041

POH 2/ 1666/ 105

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may be

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