

TO BE AWARE (+ discuss further at  
RESTRICTED - POLICY Thursday's stock take if  
necessary)

Sammy Sinclair PS/SofS

From: Charles Lister PH6.6

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### HEPATITIS C SCOTTISH COMPENSATION PROPOSALS

1. You asked for advice following Malcolm Chisholm's conversation with SofS yesterday.

#### Position in Scotland

2. On 30 October Scottish Cabinet considered a paper dealing with a recommendation from Scotland's Expert Group on Financial and Other Support. The Cabinet did not accept the recommendation as drafted but wanted to provide some form of financial support focused on those who are experiencing long-term illness and hardship. The Expert Group's report will be published tomorrow at 14.15. The Scottish Executive will not make a formal response but there will be a press release indicating that the Executive is exploring the possibility of some form of ongoing financial support. Malcolm Chisholm, as you know, will also be giving the same message tomorrow to the Scottish Parliament Health Committee.

3. The Scottish Executive have not yet decided what kind of financial support they want to provide, except that they envisage that it will be run by a charitable trust and provide either lump sum or, more likely, ongoing benefits that they would like to have disregarded for social security purposes. No decision has been taken on the global amount of money to be set aside for such a scheme.

4. I understand that the Scottish Cabinet is concerned to establish that any difficulties associated with disregarding payments for social security purposes can be overcome. Also that the UK government agrees that the establishment of a scheme to make ex gratia payments of this nature falls within devolved powers. I also understand that Malcolm Chisholm will be writing to Andrew Smith today to address these points.

## RESTRICTED - POLICY

5. A brief note on the implications for us if the Scots establish such a scheme is at Annex A.

### Devolution Issue

6. We have discussed the situation with the Devolution Unit in ODPM and with our own lawyers.

7. Health is devolved, with one or two exceptions that don't help us. However, social security is not devolved. Our lawyers have suggested that a scheme which makes payments to people incapacitated or suffering hardship through illness is arguably a social security, not a health, scheme. Therefore we could run the argument that the establishment of such a scheme does not fall within Scotland's devolved powers.

8. The social security schemes reservation is in Head Flin Schedule 5 to the Scotland Act 1998. That reservation applies to schemes supported from central or local funds which provide benefits (pensions, allowances, grants, loans or any other form of financial assistance) for persons who qualify, for example, by reason of disability, sickness, incapacity or injury. The reservation is not limited to statutory schemes.

9. I gather that the Scotland Act provides that disputes on questions relating to devolved powers should be decided by examining the principal purpose of the measure. As this is not about the legal liabilities of the health service – no such liabilities exist – there would seem to me to be a strong case for arguing that the principal purpose of a payment scheme is to relieve financial hardship and is therefore not health related.

10. SOL have stressed that this is not definitive advice and that, if SofS wants to use it, it would be best not to go into too much detail at this stage. However, we could certainly say that we also have doubts about whether such a scheme is within Scotland's devolved powers; that given this and the considerable implications of such a scheme for the rest of the UK, that Malcolm Chisholm should not go public until these issues have been resolved. Our lawyers could then take this issue up with their opposite numbers in DWP.

11. ODPM see this as more of a political issue than one that can be resolved through legal arguments. They have suggested that SofS go back either to Malcolm Chisholm's or to Jack McConnell, the Scottish First Minister or Andy Kerr, the Finance Minister to persuade them to resolve the outstanding issues before going public. I gather that there will be a Joint Consultative Committee meeting soon – although a date has not yet been fixed – and this might be the best forum for a debate. I am also told that there was a recent meeting between Jack McConnell, the DPM and the PM which was mostly about health issues. One of the by-products of the meeting was an understanding that officials would look at ways of exchanging policy information on health issues before decisions are made. This issue seems to be a case in point.

RESTRICTED - POLICY

12. As Malcolm Chisholm is also writing to Andrew Smith, SofS may also wish to speak to him.

**Conclusion**

13. In conclusion, our advice is that SofS raises his concerns with Jack McConnell and requests that the Scots do not go public with any indication that they are exploring a financial package until we have resolved whether Scotland has the devolved power to go alone and have thoroughly debated the immediate impact of any such scheme on the other UK countries and the wider implications for the handling of future compensation claims. He may wish to say in general terms that we think that this scheme might be caught by the reserved powers on social security in the Scotland Act 1988 and that we need to give lawyers time to advise on this issue.

14. If you wish I can provide a draft letter that can be copied more widely (eg to the DPM, Andrew Smith and other UK Health Ministers) but given the urgency SofS may wish to deal with this by phone first.

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## HEPATITIS C SCOTTISH COMPENSATION PROPOSALS

### Implications for England

1. We are currently under pressure to compensate haemophiliacs infected with hepatitis C through blood. Ministers have been resisting this for the past 7 years. A Scottish scheme would raise the temperature here and make resistance harder.
2. We estimate that there are around 8,000 people still living who were infected with the virus through blood and blood products. Roughly half of these already know they got the virus through blood. It's impossible to say how many of will be currently be experiencing serious illness or how long they are likely to live – the disease develops differently in different people over a period of up to 20-30 years. However, around 5,000 are likely to develop some kind of long-term symptoms and around 1,300 will develop cirrhosis of the liver over 20 years.
3. The Scots are using the Macfarlane Trust scheme for haemophiliacs with HIV as a guide to kind of payments that might be made. The average payment made by the Trust is currently £5,300 a year per person. Because the Scots haven't worked out the detail of their proposed scheme yet, and because we don't know how many people with hepatitis C have serious illness at any one time, it's impossible to come up with an annual cost for a payment scheme. But, at a rough guess, we could be talking about £5m-£10m a year over say 20 years.
4. In addition, there is the very real concern that such a scheme could open the flood gates to other claims. The Burton judgement in the High Court last year (which awarded damages to a group of people infected with hepatitis C through blood) established the precedent for strict product liability for anyone infected in future through blood or tissues. But there are other groups seeking currently compensation – eg RAGE (Radiotherapy Action Group) and Myodil Action Group (for alleged injury following use of Myodil, a diagnostic agent) - and there will doubtless be many more in future. Special cases have already been made for haemophiliacs with HIV, vaccine damage and vCJD. There must be a limit to the number of special cases that be introduced before we slip towards no fault compensation for any kind of health injury.