PS(PH)

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Copy: see end of submission
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ANDREW MARCH JUDICIAL REVIEW JUDGEMENT – NEW DECISION REQUIRED IN RESPONSE TO LORD ARCHER'S RECOMMENDATION 6(h)

Issue

1. On 2 June 2010, you responded to my submission of 26 May 2010 (attached at **Annex A** for ease of reference) agreeing not to appeal the Judgement of the Andrew March Judicial Review. This was about the decision taken by the previous Government in May 2009 in respect of recommendation 6(h) of the report of Lord Archer's independent inquiry into NHS supplied contaminated blood and blood products, about parity with the Republic of Ireland's (RoI) payments scheme.

2. The outcome of that Judgement was that the decision of former Ministers not to accept Lord Archer's recommendation 6(h) is quashed and you are now required to make a new decision about whether to accept that recommendation.

3. Recommendation 6 had a number of sub-parts relating to the structure and eligibility criteria of a direct financial relief scheme, but 6(h) was about parity with the scheme in the RoI:

> "We suggest that payments should be at least the equivalent of those payable under the Scheme which applies at any time in [the Republic of] Ireland."

4. You should note that following my last submission, we have had further advice from legal colleagues and Counsel to confirm that the new decision is required on recommendation 6(h) for both HIV and hepatitis C, and not just in relation to HIV as implied in the 26 May 2010 submission.

Timing

5. We suggest you do not decide on your preferred direction until you have held your meetings on 15, 20 and 22 July 2010 with campaigners, to hear their evidence. The three meetings are: with the haemophilia groups; with representatives from the Macfarlane and

Eileen Trusts (for HIV) and the Skipton Fund (for hepatitis C); and your joint meeting with Earl Howe, with Lord Morris of Manchester, President of the Haemophilia Society and sponsor of the Private Members Bill (PMB): the Contaminated Blood (Support for Infected and Bereaved Persons) Bill.

Recommendation

6. We recommend that recommendation 6(h) is rejected on the basis that it is unmeritorious, on grounds of both:
   (i) the factual difference between RoI & UK; and
   (ii) affordability;
   However, you will only wish to take a final decision once you have met with the campaigners and heard their evidence.

7. Whatever your decision, we recommend you agree to announce it via a WMS as soon as the House returns in September.

Background

8. Paras 8 to 14 of my previous submission at **Annex A** provide general background.

Why the UK's history is different to the Republic of Ireland

9. Infection with HIV and/or hepatitis C via contaminated blood and blood products occurred worldwide during the 1970s and 1980s before it became possible to detect these infections in blood donations, and is not restricted to the UK and RoI.

10. A chronology of events in both the RoI and UK are at **Annex B** – the RoI chronology has been agreed as factual with officials in the RoI. There were very specific events and failings that occurred in the RoI **that were unique to that country:**

- The Irish Expert Group report in 1995 identified two serious errors by the Irish blood service. These were: that the blood service failed to adhere to its own clear standards for donor selection; and a serious error in failure to act promptly upon the report from the Virology Department of Middlesex Hospital in London.
- The report of the statutory Finlay Tribunal in 1997 stated that there were major inadequacies in the blood services and Health Department's responses to the advice from the London experts in relation to appropriate action to the identified risk. The BTSB's failures were collectively referred to as **"wrongful acts"**. Over 100 women who received Anti-D product during pregnancy were

subsequently identified as donors of potentially infected blood.

The failings in the RoI were investigated and reported on by an expert group (1995) and by two statutory Tribunals of Inquiry (1997 and 2002).

11. No comparable findings or failings have been identified in the UK. The litigation brought by those infected with HIV was compromised in 1990/1991 (on the advice of their legal Counsel) without any finding of fault or liability being made against Health Authorities and the Blood Transfusion Service, and at a fraction of its potential value. The only successful legal challenge was in relation to hepatitis C in 2001 with a claim under the Consumer Protection Act, on account of the very strict liability on producers of defective products that cause injury. Details of relevant legal actions are at **Annex C.**

12. Although there has never been a full public inquiry in the UK, successive Governments have always maintained that the situation in the RoI is different from that in the UK, because of evidence of fault by the Irish Blood Transfusion Service (IBTS), and the Irish Government's realisation that, as a result, they were likely to lose any subsequent litigation. By setting up their compensation scheme to make awards based on compensatory principles of Irish civil law, payments are of a significant quantum and claimants could not get any more by taking their claim through the Courts. This has allowed the Irish Government to make these payments without having to admit liability. Campaigners in the UK use this to argue that the UK should likewise match the RoI quantum of payments without liability and purely on "compassionate grounds".

13. However, most other countries have introduced financial relief schemes for those affected – either with or without prior litigation or public inquiries. Details of some of those schemes are provided at **Annex D**. The RoI scheme is significantly different (more generous) from all these other schemes. The UK is comparable to its non-RoI peers in levels of payments for those with HIV and at the bottom end of levels of payments for Hep C. On "compassionate grounds", it is therefore hard to demonstrate why the UK should match the level of payments in the RoI when it is already broadly in line with the schemes of other developed countries.

14. The cost of the Irish scheme to December 2008, excluding legal costs, was €767m (approximately £760m). This is against Ireland's total

population of approx 4m people compared to the UK's approx 61m. We have previously estimated £3bn to £3.5bn as a UK estimate of implementing the RoI scheme based on an estimated average per person of £750k multiplied by the estimated number of eligible infected people in the UK (between 4,000 and 5,000 people), but the RoI scheme also pays out to dependants and carers, therefore this is an underestimate. As you will be aware from discussions on the Spending Review this is completely unaffordable and would require unprecedented changes to NHS funding, going beyond the already high efficiency savings, to provide this level of compensation.

Previous response and view of the Judgement

15. In responding to Lord Archer's report, the previous Government was mindful of the very delicate situation in the RoI – it in part brought down a previous Irish Government and the former Minister for Health and Children's Services, Brian Cowen, is now the Taoiseach [Prime Minister]. As such, the policy here has never been to overtly refer to the historical failings in the RoI. However, in so doing, it has given the (wrong) impression that adequate consideration was not given to Lord Archer's recommendation 6(h).

16. In the view of the Court, the previous Government was erroneous in its approach to recommendation 6(h) because of statements made by UK Ministers, and officials on behalf of UK Ministers, which linked the RoI decision to pay significant compensation in light of findings of fault with the IBTS.

17. Mr Cowan himself wrote a personal article in the *Irish Times* in 1997, when he was then Minister for Health and Children's Services, which makes clear that the Irish Government knew of the faults in the Irish Blood Transfusion Service in March/April 1995 – before the Irish Government's decision to make significantly higher payments to those affected. This article is at **Annex E**.

18. Even though we have accepted the Judicial Review Judgement, the chronological facts leading up to the creation of the RoI schemes indicate a clear link between the timing of the move away from the original ex-gratia scheme (similar to our Macfarlane Trust) to the current compensation scheme occurring *after* the initial relevant finding findings of fault with the IBTS.

19. Officials in the RoI have been extremely helpful in providing a wealth of information about their situation. NOT RELEVANT

NOT RELEVANT Ireland NOT RELEVANT

NOT RELEVANT

NOT RELEVANT remain content for us to state, for example in PQs and correspondence, that the information provided has been agreed by officials in the Irish Department of Health and Children's Services.

20. Rejection of recommendation 6(h) will not be welcomed by the campaigners, but we consider it is the right response because the situation in Ireland was different to the UK and in addition, we cannot afford the same levels of payment as the significantly more generous Irish scheme.

Timing of announcement

21. Earl Howe announced the Government's decision not to appeal the Judgement on 2 June 2010 during an oral PQ in the House of Lords. We recommend you announce the new decision to Parliament, with a press statement issued simultaneously. We suggest this is done via a written ministerial statement (WMS), following your meetings in the coming weeks with campaigners and others.

22. DH Legal Services advise that we should ideally publish our new response to recommendation 6(h) within three months of new Ministers being appointed, but this can be slightly extend this to 6 September 2010, when the House returns. They advise that it will be important to use that to set out very clearly and comprehensively how the position in the UK differs from the RoI (paras 9 to 14).

23. As you are not due to meet the Trust Chairmen and campaigners until 15 and 20 July 2010 respectively, and Lord Morris until 22 July 2010, you may be criticised for not giving adequate consideration to any evidence they provide if you announce your decision before recess as it would be very close to your meetings. You may also be criticised by Parliamentary colleagues for giving inadequate opportunity for effective scrutiny if you make an announcement so close to recess. We therefore suggest you aim to make your announcement via a WMS as soon as the House returns in September. This will also enable officials to undertake any detailed work associated with the decision during recess.

24. You may wish to inform the attendees at your meetings that an announcement will not be made until Parliament returns in September, as you are likely to be pressed on timing.

Other considerations

25. Although it is not directly linked to the new response to recommendation 6(h), you do need to consider the previous Government's commitment to review the Skipton Fund (for hepatitis C). This was initially scheduled for 2014, but this was brought forward to this year and announced via a WMS (attached at **Annex F**).

26. Work has not yet started on this due to the election, but we will need your decision as to whether this proceeds. Legal advice is that there is an expectation that this will happen and that the previous Government's decision will stand unless you rescind or alter it. A separate submission will follow about this before recess.

27. We have already had PQs and correspondence asking for confirmation that this review will continue and you are likely to be asked about it when you meet with campaigners. In which case, you can say you are considering the position. You may wish to announce your intentions on the review alongside your response to recommendation 6(h) in September.

Conclusion

28. You are asked to note the position and agree to:

- make a new decision on recommendation 6(h) following your meetings with the campaigners and others;
- announce this via a WMS when the House returns in September.

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