

PS(PH)

From: Debby Webb
Cleared: Ailsa Wight

Copy: see end of submission
Date: 11 August 2010]

**CONTAMINATED BLOOD: NEW RESPONSE TO LORD
ARCHER'S RECOMMENDATION 6(h) AND REVIEW OF THE
SKIPTON FUND**

Issue

1. To agree the timing of the announcement of the new decision on the response to Lord Archer's recommendation 6(h), on parity with the compensation scheme in the Republic of Ireland (RoI), following your meetings with campaigners.
2. Alongside this, the note also considers handling of the campaigners' other demands and the expectation that there will be a review of the Skipton Fund (SKF).

Recommendation

3. That you reject recommendation 6(h) on the basis that it is unmeritorious, on grounds of both:
 - (i) the factual difference between the RoI & UK; and
 - (ii) affordability.
4. That you put the SKF review on hold while you consider evidence from the campaigners you met in July. We will provide further advice after recess, once we have received their written responses.

Timing

5. We recommend you announce both decisions via a Written Ministerial Statement (WMS) when the House returns in September and do not delay until the end of this year, as legal advice is that we should publish our decision in respect of the Judicial Review (JR) Judgement within three months.

Background – Lord Archer's recommendation 6(h)

6. My submission of 8 July 2010 (attached at **Annex A** for ease of reference) detailed the steps we need to take to respond to the Judgement of the Andrew March JR, which was handed down on 16 April 2010.

7. The outcome of that Judgement was that the decision of former Ministers not to accept Lord Archer's recommendation 6(h) (parity with the RoI's compensation scheme) is quashed and you are now required to make a new decision about whether to accept that recommendation. We suggested that you should not decide on your preferred direction until you had heard from campaigners at your meetings in July 2010, and that you should announce your decision via a WMS in September as soon as the House returns from recess.
8. We continue to recommend rejection of recommendation 6(h) for the principal reasons of the differences between the UK and RoI, and of affordability, as explained in the previous submission (see **Annex A**). Further, there was no new evidence from the recent meetings to change that position. This will not be welcomed by the campaigners, but we still consider it is the right response.

Background – Skipton Fund and other support

9. As part of the Government response to Lord Archer's report, the previous Government did not alter the structure of, or level of payments from, the SKF (the fund that makes ex-gratia payments to those infected with hepatitis C from contaminated blood and blood products). They agreed to review the Fund in 2014 (when it would have been in existence for ten years), and subsequently brought forward the review date to this year (see WMS at **Annex B**). Further information on the SKF is attached at **Annex C**.
10. Notwithstanding the formation of a new government, any announced decision stands unless and until revoked or revised. There is therefore an expectation that this review will happen and we could certainly be subject to challenge if we do not either start the review, or announce a different course of action. We will therefore need to decide whether to review the SKF and make an announcement accordingly.
11. No work has yet started on the SKF review due to the election. The previous Government did not publish terms of reference for the review, but did indicate that it would be independently chaired. Agreement was obtained from the Devolved Administrations as each of the DAs pay for their share of the scheme and any implications for changing the SKF would need to be agreed with them first.
12. You have agreed to consider information from the campaigners. We could find ourselves vulnerable to further legal challenge if we do not properly evaluate evidence to back up the rationality of any decision

and we will work with Finance, Legal, Treasury and DWP colleagues on options for providing further support to those affected, together with implications for the SKF review.

13. We therefore recommend that until you decide how you want to proceed following evidence gathering from your meetings with the campaigners, that you do not commence on the planned review of the SKF this year. We have asked for responses from the campaigners by 20 August 2010.

Legal advice on the timing of 6(h) response

14. At your recent meetings with campaigners, you said that you wanted longer to consider this issue and indicated you would look to resolve what you could "by the end of this year".
15. When the Court quashed the previous Government's decision as to recommendation 6(h), it did not set any time limit for a revised decision. However, any such decision needs to be made in a reasonable period of time. You will recall that the campaigners indicated they think the revised decision is due by 21 September 2010 – three months from the last date for leave to appeal.
16. Legal advice is that three months is an appropriate period to respond and we could be at risk of further legal challenge if we delay making our response to recommendation 6(h) until after September. While the four patient-group campaigners heard your intentions, Mr March, the JR applicant, was not one of them and he (or others) could challenge any perceived delay in addressing the Judgement.
17. We therefore strongly recommend that you publish your decision in respect of recommendation 6(h) in September. Alongside this, you might signal that you are reviewing evidence from the patient representatives and come to a view on any additional measures by the end of the year.

Funding issues

18. You have indicated you are keen to look at whether we can find any additional funding to make other payments to some of those infected via contaminated blood.
19. As you know, addressing any of the known SKF anomalies, and the other concerns of the campaigners, will cost significant sums of money (£millions), some of which could have a recurrent element.

20. Finance have advised that there may be a possibility of utilising 2010/11 potential underspend as a non-recurrent pressure with no implications for SR10. However, spending the money in-year will be challenging, as depending on what you want to fund, there may well be legal or Treasury considerations to overcome. A further submission will follow in the autumn taking into account evidence provided by the campaigners.
21. Finance colleagues have also warned that any such spend will probably require HM Treasury approval (before payment). The issue will be around the lump sum payment arrangements e.g. giving a sum of money to a "body" to settle claims as they arise would be a payment in advance, which would again require HMT approval and the key test there is VFM.

Coalition considerations

22. The Lib Dem election Manifesto committed to establish a working group involving patient groups to determine appropriate levels of financial assistance to those affected. This commitment was not contained in the coalition Programme for Government. Earl Howe responded to this point in an oral PQ on 2 June 2010:

"My Lords, I thank the noble Baroness for her kind remarks. We are in a coalition Government. Not every pledge in either the Conservative or the Liberal Democrat manifesto can be honoured. That is the nature of coalitions. In fact, the specific Liberal Democrat proposal which she referred to was not included in the programme for government which we published."

Conclusion

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

- make a new decision rejecting recommendation 6(h) following your meetings with the campaigners and others;
- postpone the intended SKF review pending your consideration of evidence from campaigners;
- announce both via a WMS when the House returns in September.

24. If you agree to 23. above, officials will

- work up potential options in conjunction with Finance and Legal colleagues to see what we can achieve with in-year, non-recurrent funding;

- draft both a WMS and letters for the DAs, to explain the reasons for the delay in proceeding with the SKF review; and that a later statement will be forthcoming about any additional assistance for those affected.

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