

CHAPTER 5

COMPENSATION ARRANGEMENTS

5.1 During the inquiry, there were many calls for compensation to be paid to those people who contracted hepatitis C through blood transfusion. Some compensation has been paid by various parties to those who have acquired hepatitis C. However, this is limited to a specific group of hepatitis C sufferers.

5.2 This chapter looks at the compensation arrangements already in place, including the Commonwealth's involvement, the calls to extend the coverage of compensation payments and compensation schemes overseas.

Provision of compensation

5.3 Compensation schemes exist in the States and Territories for those people who have acquired hepatitis C through the blood supply. Arrangements vary between the States and Territories, and the parties to the settlements can also vary. The parties, variously, are: the Australian Red Cross Blood Service (ARCBS), the State and Territory Governments, and the claimants' solicitors. The Committee was unable to ascertain the exact details of each scheme. However, the following information concerning arrangements in the ACT was provided in the ACT Legislative Assembly in answers to a question on notice, dated 23 March and 21 April 1999, by the then ACT Minister for Health.¹

5.4 The compensation in the ACT is limited to persons infected between 1 January 1985 and February 1990.² The Minister stated that the decision regarding the time period and the need for financial assistance was based on the following considerations:

- in 1985, more information on non-A, non-B hepatitis and its relationship with blood transfusions was collected and blood banks in the US began using ALT testing to reduce the prevalence of hepatitis C in the donor pool;
- the Queensland Red Cross Blood Bank introduced screening and 'it is assumed that if the ACT Red Cross Blood Bank had introduced ALT testing at the same time as in Queensland, the risk of transmission of Hepatitis C may have been reduced'. Further, 'the failure of all Australian States, except Queensland, to introduce ALT testing for all blood donors may have created a situation where the Red Cross Blood Service in those states is legally liable to pay compensation'; and

1 ACT Legislative Assembly, *Hansard*, 23.3.99, pp.685-88; 21.4.99, pp.1077-78.

2 In additional information provided to the Committee by the ACT Government, the cut off date for compensation eligibility was stated as 20 May 1991. Additional Information, 28.5.04, p.1.

- where a person who is now hepatitis C positive was transfused with blood from a hepatitis C donor between 1985 and 1990, and where it is more probable than not that the blood transfusion was the source of the infection, the person is eligible for financial assistance. Financial assistance should be based on the impact that the disease has had on the person's health and life; and that the cost of litigation over hepatitis C transmitted by blood transfusion, both to the Government, Red Cross and litigants be minimised.³

5.5 In answer to a further question on notice, the then Minister stated:

- the details of the compensation scheme are confidential;
- the scheme will include proof of infection, effects of the disease on the lifestyle and earnings of the individual concerned and the establishment of a link between the disease and the receipt of transfused blood from a donor who subsequently tested positive to hepatitis C;
- the ARCBS is the primary 'owner' of the Scheme and will need to agree to each proposed settlement as will the (then) Commonwealth Department of Health and Family Services; and
- no compensation is to be paid to the spouse of a deceased person as any individual who is deceased as a result of hepatitis C is likely to have contracted the virus at least two decades ago and outside of the compensable period.

5.6 The Minister added that 'the Commonwealth has made it clear that it will only contribute to the settlement of claims on the following basis:

- evidence of the liability of the ARCBS;
- agreement of the Commonwealth to the settlement offered on each individual case; and
- entry into a settlement scheme with all litigants'.⁴

5.7 The Commonwealth Department of Health and Ageing (DoHA) stated that during 1997 and 1998, the Department wrote to all jurisdictions outlining the conditions under which the Commonwealth would contribute to hepatitis C compensation settlements. DoHA stated:

Any Australian Government funding of large scale legal costs or settlements was outside normal operational funding arrangements for the blood service and therefore not automatic. However, the Department agreed to pay 40%⁵ of any hepatitis C settlements and legal costs arising from settlements.⁵

3 ACT Legislative Assembly, *Hansard*, 23.3.99, pp.685-88.

4 ACT Legislative Assembly, *Hansard*, 21.4.99, pp.1077-78.

5 *Submission 54*, Supplementary Submission, 21.5.04, p.4 (DoHA).

The 40 per cent contribution was not always provided. For example, in cases where a NSW Country Blood Bank was the service provider, the Commonwealth only contributes 20 per cent of the settlement. The basis on which the Commonwealth agreed to contribute a 40 per cent share was:

- the Australian Government funded 40 per cent of the general operating costs of the Australian Red Cross Society's blood transfusion service under cost-sharing arrangements between the Australian Government and the States and Territories during the period covered by the compensation schemes; and
- the fact that the Australian Government contributed 40 per cent of AIDS settlement costs under similar conditions.⁶

5.8 The Department also stated that it agreed to pay the contribution provided the following conditions were met:

- each claim was settled only after full assessment of its particular forensic risk;
- the State/Territory agreed to pay 60 per cent of the net cost;
- the Commonwealth was consulted and agreed in advance to any settlement;
- the Commonwealth contribution to legal costs and any damages payable as a result of a court decision, out-of-court agreement or settlement scheme was net of any contribution due or liable under a commercial or government insurance arrangement; and
- where a case proceeds to court, the Commonwealth's contribution was contingent on the Commonwealth having been consulted and agreeing in-principle to participate, at the time proceedings were initiated by a plaintiff.

5.9 DoHA pointed out that the Commonwealth is not a party to either the settlements or the settlement documents, including the confidentiality documents required by other parties. However, DoHA stated that its records 'indicate that between 1997 and 30 April 2004 the Australian Government has paid \$6,999,882 for hepatitis C compensation settlements, including associated legal and administration costs'. The Commonwealth's contributions have been generally paid directly to the State and Territory health departments. The exceptions to this are: New South Wales, where the payment has been made to an insurance company and Victoria where a law firm has been paid.⁷

5.10 It was noted that the Commonwealth was 'not running the services but we were making a contribution from the national level'.⁸ When the States and Territories entered into compensation arrangements, it was agreed that the Commonwealth would contribute to these arrangements to the same extent as it had contributed to funding of

6 *Submission 54*, Supplementary Submission, 21.5.04, p.5 (DoHA).

7 *Submission 54*, Supplementary Submission, 21.5.04, p.1 (DoHA).

8 *Committee Hansard* 1.4.04, p.27 (DoHA).

services.⁹ Each jurisdiction provides details of their settlement arrangements to the Department. There was no settlement scheme set up in Queensland.¹⁰

5.11 The Queensland Government informed the Committee that in 1985 Queensland Cabinet decided that Queensland would not introduce legislation for the purpose of limiting liability in respect to the transmission of HIV through the transfusion of blood. The Government stated that:

The condition was that the ARCBS–Queensland would carry out all prescribed tests and that, in the event of any litigation against the ARCBS relating to the transfusion of HIV, the Queensland Government would accept the legal costs as part of the costs of operating the blood transfusion service. In September 1985, that decision was extended to include "other blood transmitted diseases".

5.12 The Government indicated that Queensland Health's most recent agreements with ARCBS–Queensland state that Queensland will honour its previous commitment to cover any liability. In conclusion, the Queensland Government stated that 'there is no evidence of any claim for compensation for transfusion-related hepatitis C being made against the Queensland ARCBS and therefore against the liability coverage provided by the Queensland Government'.¹¹

5.13 The New South Wales Government stated that it indemnified the ARCBS for claims made against it in respect of those who have contracted hepatitis C from a transfusion of a fresh blood product. Where appropriate, claims have been settled in accordance with legal merit, and on a 'without admission of liability' basis. New South Wales also reported that such claims are handled within that State's self-insurance arrangements, and not by the ARCBS.¹²

Responses to compensation arrangements

5.14 Witnesses expressed concerns about aspects of the present compensation arrangements. Of particular concern were the confidentiality requirements and the criteria restricting payments to those who received transfusions between 1986 and 1990. For example, the Tainted Blood Product Action Group (TBPAG) argued that if the ARCBS 'had done no wrong', it was not reasonable for those receiving compensation to sign secrecy agreements. The TBPAG added:

9 *Committee Hansard* 1.4.04, pp.27, 37 (DoHA).

10 *Submission 54*, Supplementary Submission, 21.5.04, p.4 (DoHA).

11 Queensland Government, Additional Information, 10.5.04, p.1.

12 New South Wales Government, Additional Information, 28.5.04, p.2.

16 *Committee Hansard* 6.4.04, pp.23, 32-33 (TBPAG).

We have to console a lot of the members who have been compensated – and we are talking about only a few – because they also have to sign secrecy or confidentiality agreements in exchange for the cash. It is made clear that if they talk about the terms of the settlement or the scheme then they will be pursued by the Red Cross and other parties for that money.¹⁶

Another witness submitted:

As to confidentiality clauses I feel that they are not right and are an infringement of people's right to speak out. No one should be threatened with legal action for discussing their personal affairs and it seems to me that these are just bullying tactics being employed by the ARC to cover up its mistakes.¹⁷

5.15 The ARCBS in responding to concerns about litigation stated:

...the ARCBS fully recognises the importance of transparency in all its activities. The question of litigation is therefore difficult and frustrating for us, due to the constraints of the legal process in Australia.

It is on the public record – in our annual report – that there are legal proceedings in relation to hepatitis C. The society has denied liability in all these proceedings. Financial exposure to claims relating to events prior to 30 June 2000 are subject to commercial and government indemnities and are dealt with under a variety of arrangements. We are unable to comment on the specific situation or outcome of any individual case. There are sometimes confidentiality issues when litigation is resolved and, as you would understand, confidentiality clauses are standard practice in legal agreements.

5.16 The ARCBS went on to state that 'given the issues canvassed by this inquiry regarding discrimination, confidentiality agreements can also act to the benefit of plaintiffs'.¹⁸

5.17 In relation to confidentiality clauses, DoHA stated 'in no State or Territory is the Australian Government a party to either the settlements or the settlement documents, including the confidentiality documents required by other parties'.¹⁹

5.18 Many witnesses considered the financial compensation provided through current arrangements to be inequitable and that all people who have acquired hepatitis C through blood or blood products should receive compensation without regard to the time the infection occurred.

5.19 The TBPAG also questioned the grounds on which compensation has been paid. It argued that compensation could be paid either because of legal liability or on

17 *Submission* 8, p.3.

18 *Committee Hansard* 7.4.04, pp.39-40 (ARCBS).

19 *Submission* 54, p.10 (DoHA).

humanitarian grounds. If compensation has been made on humanitarian grounds, it should be offered to all victims of tainted blood, not just those who contracted the virus in a certain time period.²⁰

5.20 The Haemophilia Foundation Australia (HFA) pointed to the particular difficulties for haemophiliacs in gaining compensation. HFA noted that people who receive blood transfusions often had a single medical episode and were exposed to the blood of less than five people. The transfused blood can be dated and traced back to specific donors. In contrast, people with haemophilia are treated with products from pooled donations of many people. Those with severe haemophilia may be treated up to three times a week. As a result, they cannot establish a point at which transmission occurred so that compensation for negligence claims can be made.²¹

5.21 The HFA noted that people with haemophilia were infected at the same time as those who received blood transfusions and because of the use of products from pooled donors they were more at risk of infection. The HFA commented:

It is unfair that those who were infected with hepatitis C from large pools have no redress when they were in fact at greater risk. The requirement of proof that a donation caused an infection is flawed. Common sense dictates that people with haemophilia became infected in the same way as those who did so through a blood transfusion.²²

5.22 The HFA went on to argue that as government had recognised the 'moral case' for financial assistance for those infected with HIV, those infected with hepatitis C should be similarly offered assistance:

People with haemophilia have an increased viral load, often more than one genotype, and a high proportion are known to develop liver disease. There is no way to compensate for the loss of a life or a life of a loved one, but surely there is evidence for a financial assistance package in recognition of the community's moral responsibility to people with haemophilia who have been infected by hepatitis C through the blood supply.²³

5.23 The HFA recommended that each person with haemophilia infected with hepatitis C should receive a single payment in acknowledgement of the medical, social and economic impact on his or her life. All healthcare and medical treatment should be provided free of charge to all haemophiliacs infected with hepatitis C. Further, payments should be made available if and when each person's illness progresses, to assist with meeting the additional costs and to ensure financial assistance to relatives who provide care, or suffer hardship, because of the disease.²⁴

20 *Committee Hansard* 6.4.04, p.23 (TBPAG).

21 *Submission 82*, p.30; *Committee Hansard* 5.4.04, p.12 (HFA).

22 *Submission 82*, p.30 (HFA).

23 *Submission 82*, p.32 (HFA).

24 *Submission 82*, pp.31, 37-38 (HFA).

5.24 However, the Australian Hepatitis Council (AHC) and the Hepatitis C Council of NSW stated that they did not support the view that a particular group of people with hepatitis C should receive ex-gratia payments. They pointed to groups including health care and other workers who have acquired hepatitis C through needle stick injuries, children who have acquired hepatitis C from their mothers and those who contracted the disease through contaminated tattooing or body piercing equipment who would not receive recompense. It was considered that 'support, management treatment services for people with hepatitis C should be improved – but these need to apply to all people with hepatitis C'.²⁵

5.25 The AHC also supported the comments of Professor McCaughan who had expressed concern that if financial recompense were to be paid to a particular group of people with post-transfusion hepatitis C, then:

this might endanger the overall funding available, within current limited health budgets, which would enable the health care response for the broader group of all people with hepatitis C to be improved. We share his concerns that were recompense to be paid that consideration should be given to ensuring it does not affect ongoing (or future) funding for the current overall hepatitis C response.²⁶

5.26 Some witnesses indicated that they believed that a greater amount of compensation should be offered with compensation for loss of earning, quality of life and to relieve the monetary stress on people living with hepatitis C. The HFA stated that such payments could be used both to target specific identified needs as well as to provide resources to allow infected individuals to regain some control over their lives.²⁷

5.27 Many witnesses pointed to arrangements in other countries where significant payments have been made. In some countries payments are made as the disease progresses to assist with meeting the additional costs incurred and to ensure financial assistance to relatives who provide care or suffer hardship because of the disease. The schemes most often cited are those from Ireland, Canada and the United Kingdom.²⁸

5.28 In Ireland, the Hepatitis C Compensation Tribunal deals with claims by those with hepatitis C caused by blood or blood components. A lump sum is paid in stages to take into account disease progression which may have occurred. Compensation is paid under a no-fault agreement, where there is no admission of liability by the National Blood Transfusion Service and claimants forgo their right to sue and are not

25 *Submission 81*, p.5 (Hepatitis C Council of NSW); see also *Committee Hansard* 1.4.04, p.13 (AHC).

26 *Submission 82*, Supplementary Submission, 31.5.04, p.4 (AHC); *Committee Hansard* 6.4.04, p.97 (Prof McCaughan).

27 *Submission 82*, p.31 (HFA).

28 The following information is based on *Submissions 75*, pp.19-24 (AHC); 82, pp.33-36 (HFA).

required to prove negligence. Each claim is assessed individually in front of the Tribunal with payouts based on:

- general damage including pain and suffering, diminished quality of life and the need to be on treatment;
- health care costs; and
- loss of earnings.

Free medical care is also provided for any condition for any person infected with hepatitis C through blood and blood products.

5.29 Approximately 12,000 people in Canada became infected with hepatitis C through blood products, most prior to 1989. Following the release of the Krever Report, Federal and Provincial Ministers for Health announced in early 1998 that compensation would be paid to all people who contracted hepatitis C through blood products between 1 January 1986 and 1 July 1990 irrespective of the status of their health.

5.30 Compensation is provided depending on the degree of illness. In addition payments are made for:

- loss of income;
- costs of treatment and medication not covered by insurance schemes in public and private health insurance plans;
- monthly payments for those undergoing treatment in recognition of the strains involved with hepatitis therapy;
- costs of care;
- out of pocket expenses;
- compensation for people with HIV/hepatitis C co-infection;
- compensation for dependants and family members upon death;
- funeral expenses; and
- compensation for dependents and family members for loss of support, loss of services, and loss of guidance, care and companionship.

Compensation is conditional on people dismissing any further legal proceedings. People must also declare they haven't used 'illegal intravenous' drugs.

5.31 In 2003, the United Kingdom Government announced that a compensation scheme would be established for people infected with hepatitis C through blood or blood products before September 1991. Lump sum payments of £20,000 are provided, with an additional £25,000 for people with advanced liver disease. People who have recovered from the disease and those whose medical files had been lost are also eligible for payments. People who contracted hepatitis C through someone infected

with the disease also qualify for payment. Payments are also available for the relatives of those who die from the time of the instigation of the scheme.

5.32 Witnesses also pointed to the arrangements that had been put in place to compensate those who had acquired HIV through blood transfusion. In early 1990 the Mark Fitzpatrick Trust was established as a discretionary trust by the Commonwealth to provide special financial assistance to people with medically acquired HIV infection and AIDS. This special assistance did not represent compensation. Beneficiaries of the Trust were required to meet specified eligibility criteria including that they had medically acquired HIV or were a dependent, parent or guardian of a person who had medically acquired HIV; or were a dependent, parent or guardian of a person who had died from an HIV related illness as a result of medically acquired HIV.

5.33 The Commonwealth provided original seed funding of \$13.2 million with a further grant of \$1 million in 1999. The Trust was wound up in May 2001. Beneficiaries of the Trust received annual payments during the life of the Trust, with a final payment on the death of a beneficiary to assist with funeral and associated expenses. In total 423 beneficiaries received payments of \$20.16 million.²⁹

5.34 The TBPAG recommended that Australia establish a compensation tribunal for recipients of Hepatitis C contaminated blood or blood products, where each claim could be heard and accessed individually.³⁰

5.35 However, not all witnesses sought compensation payments for their hepatitis C status. Rather, they saw coverage of health care costs as a priority. Given the chronic nature of the disease, health care costs can be high. One witness stated:

The victims of this virus need financial compensation, as considerable costs have been incurred, travelling to doctors, medications, and in the future our homes will have to be altered to accommodate our disabilities.³¹

It was suggested that people with hepatitis C acquired through blood transfusion should be provided with health care cards irrespective of their level of income. This would help overcome the substantial financial burden of medications and treatment.³²

National Managed Fund

5.36 The Commonwealth and the States and Territories have now established a fund to provide blood and blood products liability coverage for the Australian Red Cross Blood Service in Australia. The National Managed Fund replaces the previous State and Territory insurance arrangements and addresses problems the ARCBS had

29 *Submission 54*, Additional Information, 26.5.04, pp.1-2 (DoHA).

30 *Submission 79*, p.26 (TBPAG).

31 *Submission 21*, p.1.

32 See for example, *Submissions 7*, p.2; *10*, p.2.

experienced in obtaining commercial insurance in some States.³³ On the establishment of the fund on 1 July 2000, the ARCBS was indemnified for claims arising on or after that date.

5.37 The objectives of the National Managed Fund are to:

- provide the ARCBS with national, uniform, blood and blood products liability cover;
- identify and monitor liability risks; limit risk while balancing the requirement of an adequate blood supply;
- ensure national consistency in claims management; ensure accountability for risk management is devolved to those with control over risk; and
- provide a formal structure for monitoring risk management performance.

5.38 Under a Memorandum of Understanding (MoU) signed by the Commonwealth, States, Territories, and the ARCBS, the Commonwealth's responsibilities include contributing to the fund, the engagement of a fund manager and management of the contractual relationship with the fund manager. All parties to the MoU are to pay an annual contribution to the fund; this is intended to pay for any valid claims in respect of the ARCBS' defined blood-related activities and for the management of services (including claims management, risk management, reinsurance portfolio management, investment of fund monies and reporting and auditing). Under the MoU, the blood and blood products liability cover for the ARCBS remains in force until all parties agree to terminate the arrangements from an agreed date.³⁴

Conclusion

5.39 The Committee has carefully considered the calls to increase and extend the compensation arrangements for those who have acquired hepatitis C through blood or blood products. The Committee notes that the current compensation arrangements are available only to those who have met certain criteria including the restriction to infection received during the years 1986 to 1990. This time frame precludes many people who have become infected with hepatitis C through blood transfusion from compensation.

5.40 The Committee is also aware that the criteria precludes many people suffering from haemophilia from accessing the compensation arrangements as it is difficult for those using blood products manufactured from many pooled donations to identify accurately the product which transmitted the infection.

5.41 Witnesses cited the compensation arrangements available overseas as possible models for an Australian scheme. Arrangements in countries such as Ireland, Canada

33 Stephen, Sir N, *Review of the Australian Blood Banking and Plasma Product Sector*, Department of Health and Aged Care, Canberra, 2001, p.25.

34 Department of Health and Ageing, *Annual Report 2001-02*, p.165.

and the United Kingdom offer lump sum payments for people who have contracted hepatitis C through the blood supply. Some schemes offer additional payments for loss of earnings, cost of care and compensation to family.

5.42 The Committee is aware that some people infected with hepatitis C have chosen to pursue legal avenues for compensation. However, for many people with hepatitis C litigation is not always effective. It involves high costs, an adversarial environment, and outcomes are unpredictable.

5.43 The Committee considers that extending the current compensation arrangements is not in the best interests of those people who have acquired hepatitis C through blood and blood products. The Committee considers that the most effective way to assist this group of people with hepatitis C is to improve access to services, to improve education of medical personnel and to support research efforts to develop more effective treatments for hepatitis C.

5.44 The Committee considers that this is a practical, equitable and workable response to improve the long-term health outcomes of those people who have acquired hepatitis C through blood and blood products.

