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27 November 2023

Secretary of State for Health and Social Care  
Department of Health and Social Care  
39 Victoria Street  
London  
SW1H 0EU

For the attention of Sir Chris Wormald KCB,  
Permanent Secretary for the Department of Health

Copy to Government Legal Department  
102 Petty France  
Westminster  
London  
SW1H 9GL

By courier

Copy by e-mail to:  
permanent.secretary@dhsc.gov.uk,  
dhsc.publicenquiries@dhsc.gov.uk, and  
thetreasurysolicitor@governmentlegal.gov.uk

**LETTER BEFORE CLAIM**

**THIS LETTER REQUIRES YOUR URGENT ATTENTION**

Dear Secretary of State

**Proposed claim for judicial review – Philip Morris Limited v Secretary of State for Health and Social Care, regarding the Consultation on “Creating a smokefree generation and tackling youth vaping”**

**Introduction**

1. We act for Philip Morris Limited of 10 Hammersmith Grove, London, W6 7AP: the UK & Ireland affiliate of Philip Morris International: one of the world’s leading tobacco companies (“**Philip Morris**”). We write in respect of the ongoing consultation, entitled “*Creating a smokefree generation and tackling youth vaping*”,

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Secretary of State for Health and Social Care

27 November 2023  
Page 2

which was published on 12 October 2023, and updated on 20 October 2023 (the “**Consultation**”). As set out further below, the Consultation poses questions in three areas, in which it is suggested legislation is needed namely: (1) the creation of a ‘smokefree generation’; (2) tackling youth vaping; and (3) related issues of enforcement.

2. At the outset, we wish to make clear that Philip Morris supports the UK government’s ambition that the UK will be ‘Smokefree’ by 2030. The ambition is, moreover, achievable, in our client’s view, insofar as the UK embraces a range of less harmful alternatives to smoking. To that end, in recognition of the particular harm caused by combustible cigarettes, Philip Morris has proactively sought to develop a portfolio of non-combustible, smoke-free alternatives to smoking, each of which have significantly lower levels of harmful effects. As set out further below, these products include certain Heated Tobacco Products (“**HTP**”).
3. Our client nonetheless has significant concerns about various aspects of the Consultation. In particular, in addition to the serious procedural issues set out below, our client is concerned about the inclusion of less harmful alternatives to smoking, specifically including HTP, within the legislative regime that the Government is proposing to introduce here. For the reasons set out further below, the inclusion of such products in a legislative and regulatory framework that is principally directed at combustible products is liable to conflate the harms associated with smoking with much less harmful alternatives. Confusion of that kind can only serve to dissuade adult smokers from switching to smoke-free alternatives, and to impede the progress that has been made over the past decade in that respect, with the result that more people will continue to smoke combustible cigarettes.

#### **The relevant decision and proposed parties**

4. Subject to your response to this letter our client is proposing to challenge the Consultation on each of the three grounds set out below. This letter is a formal letter before claim, sent in accordance with the Pre-Action Protocol for Judicial Review. It sets out the factual and legal basis (as we presently understand it to be) on which any claim would be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute, and the basis for them, so that the issues in dispute can be identified and, if possible, narrowed.
5. We are aware that judicial review is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid need for recourse to the Court. If we do not receive a satisfactory response to this letter, within the reasonable time-period specified below, you should expect our client to make an application for judicial review, if needs be without further reference to you.
6. In accordance with the Pre-Action Protocol, we confirm the following details:
  - (1) Proposed claimant: Philip Morris Limited.
  - (2) Proposed defendant: Secretary of State for Health and Social Care.
  - (3) Proposed interested parties: N/A.
  - (4) Our reference: [REDACTED].
  - (5) The matter being challenged: the Decision, as described above.

Secretary of State for Health and Social Care

27 November 2023  
Page 3

- (6) Details of the Claimant's legal advisers: Reed Smith LLP of The Broadgate Tower, 20 Primrose Street, London EC2A 2RS. Because of the urgency of the matter, please ensure that all correspondence is sent by courier and by e-mail to [REDACTED] and [REDACTED]

### **The issues: relevant factual and legal background**

#### *The Khan Review and the Command Paper*

7. On 4 October 2023, following the Prime Minister's speech to the Conservative Party Conference on the same day, the Department for Health and Social Care published a command paper, entitled "*Stopping the start: our new plan to create a smokefree generation*" (the "**Command Paper**"). The Command Paper set out proposed action to protect future generations from the harms of smoking, including with a view to creating the first 'smokefree' generation. In that respect, the Command Paper proposed to bring forward legislation so that children turning 14 this year, or younger, would never be legally sold tobacco products (the "**Birthdate Restriction**").
8. As regards the product scope of the proposed Birthdate Restriction:
  - (1) The Command Paper noted that the current age of sale restriction is imposed under the Children and Young Persons Act 1933 (the "**1933 Act**"), which was said to cover "*all tobacco products, cigarette papers, waterpipe tobacco (such as shisha) and herbal smoking products*". Section 7 of the 1933 Act restricts the sale of "**tobacco or cigarette papers**" to persons under the age of 18 (s.7, emphasis added). Section 7(5) defines tobacco as including "*cigarettes, **any product containing tobacco** and intended for oral or nasal use and **smoking mixtures intended as a substitute for tobacco***", where the expression 'cigarettes' includes "*cut tobacco rolled up in paper, tobacco leaf, or other material in such form as to be capable of immediate use for smoking*". The Command Paper suggested that "*the new legislation will mirror the existing age of sale legislation*".
  - (2) The Command Paper noted that the Children and Young Persons (Protection from Tobacco) Act 1991 (the "**1991 Act**") would need to be amended, so that display statements reflected the new age restrictions. Section 4 of the 1991 Act presently provides that retailers must display a statement, recording that it is illegal to sell tobacco products to anyone under the age of 18 at every premises where tobacco is sold.
  - (3) The Command Paper also cited New Zealand as a case study. In January 2023, New Zealand became the first country in the world to introduce a Birthdate Restriction of the kind now proposed in the UK as part of the Smokefree 2025 Action Plan. Contrary to what is said in the Command Paper, however, the legislation in New Zealand did not introduce "*a restriction on the sale of **tobacco***" to persons born on or after 1 January 2009: the restriction was, instead, confined to the sale of "*smoked tobacco products*" (i.e. combustible tobacco products, such as cigarettes) and did not apply to other tobacco products such as HTP. Notably, in that respect, when the new legislation was introduced in New Zealand, the New Zealand Ministry of Health cited UK and EU legislation on tobacco products as precedents, stating as follow (emphasis added): "*The Ministry of Health considers that the existing requirements for tobacco products are not appropriate for products that are **not smoked** ... We propose to set **tailored requirements for vaping products and smokeless tobacco** that acknowledge the **relatively low risk** of these products when compared with **smoked tobacco***".

**products.** *The Government has publicly indicated its intention to follow the United Kingdom packaging requirements, which are based on the European Union Tobacco Products Directive*.<sup>1</sup>

9. The Command Paper followed the independent review into tobacco control policies, which was launched in 2022 and led by Dr Javed Khan OBE (the "**Khan Review**"). The Khan Review made a number of recommendations to support the government's target to be smokefree (i.e. to have a smoking prevalence of 5% or less) by 2030, including raising the age of sale from 18, by one year, every year, with a view to eventually prohibiting sale to a new generation.
10. In respect of HTPs, the Khan Review concluded that, of tobacco products, "*smoked tobacco is by far the most harmful*". While the Khan Review encouraged the active promotion of tobacco-free alternatives to smoking, it nonetheless encouraged the government to carry out "*further independent research into HTPs*", including by tracking the patterns of HTP use and population effects (pg. 42).
11. The Command Paper was accompanied by an Annex, entitled "*Annex 1: modelling assumptions*". The modelling assumptions sought to forecast changes in smoking prevalence over time. The modelling was said to focus on persons between the age of 14 and 30, and considered various scenarios based on different reductions in instigation rate (i.e. the rate at which people were taking up smoking).

#### The Consultation

12. Against that backdrop, on 12 October 2023, the Department of Health and Social Care published the Consultation. As set out above, the Consultation poses questions in three areas, in which it is suggested legislation is needed namely: (1) the creation of a 'smokefree generation'; (2) tackling youth vaping; and (3) related issues of enforcement.
13. In respect of (1) – the proposed Birthdate Restriction – like the Command Paper, the Consultation proposes to introduce legislation which will make it an offence to sell "*tobacco products*" to anyone born on or after 1 January 2009. Indeed, the Consultation states clearly on its face that the Government "**will bring forward legislation**" to that effect, to prevent children turning 14 this year from ever legally being sold "*tobacco products*". Consultees are invited to answer four specific questions, including – as 'Question 3' – "*Do you agree or disagree that all tobacco products, cigarette papers and herbal smoking products should be covered in the new legislation*"?
14. As regards the scope of that proposed legislation, the Consultation makes clear that "*all tobacco products, cigarette papers and herbal smoking products*" would be subject to the proposed age of sale legislation, and states expressly that this will include "*heated tobacco*". In contrast, vapes and nicotine replacement therapies are excluded from the scope of the proposed legislation "*because they do not contain tobacco and are often used as a quit aid for those who smoke*". Like the Command Paper, the Consultation Paper cites the New Zealand case study, as well as existing legislative provisions, in support of that position.
15. The Consultation purports to seek "*as much detail as possible under each of [its] themes*". Despite that, it is framed as a multiple choice exercise. In addition, while it is possible to provide "*additional information and evidence to support [answers] through free text boxes*", the boxes themselves only permit 300 word

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<sup>1</sup> See further, the public consultation document, entitled "*Smokefree Environments and Regulated Products Act 1990 Proposals for regulations*": [www.health.govt.nz/system/files/documents/publications/smokefree-environments-regulated-products-act-1990-proposals-regulations-public-consultation-document\\_21dec2020.pdf](http://www.health.govt.nz/system/files/documents/publications/smokefree-environments-regulated-products-act-1990-proposals-regulations-public-consultation-document_21dec2020.pdf)

responses. Notably, while it is suggested that any decision-making will only follow the receipt of consultation responses and a further review of the “*international evidence base*” (unidentified), the Consultation is clear that impact assessments will only be produced and published **after** decisions have been made. As matters stand, the Consultation is due to close at midnight on 6 December 2023: just 8 weeks after it first opened, and 6 weeks after it was amended in scope.

The proposed Claimant

16. Philip Morris Limited is the UK & Ireland subsidiary of Philip Morris International: a leading international tobacco company. For many years, the company’s clear and established position has been that the best option for any smoker is to quit, and for those that do not quit, to switch to a less harmful alternative. Philip Morris supports the UK Government’s aim of delivering a smoke-free future.
17. In line with the Government’s own position, and the Khan Review, our client’s position is that smoke-free alternatives have an important role to play as there are better alternatives for adult smokers than continued smoking. Philip Morris has therefore developed a portfolio of smoke-free, non-combustible products as better alternatives to cigarettes (where the absence of combustion results in significantly reduced exposure to toxic substances and hence can significantly reduce the harm from smoking).
18. Philip Morris’s smokeless portfolio includes heated tobacco products, which are not consumed via combustion and therefore do not generate smoke. A strong body of evidence suggests that those smokeless products are less harmful than smoking. For example, in relation to HTPs, and by way of outline only:
  - (1) In 2017, the UK Committee on Toxicity conducted a review of available evidence on two HTPs, one of which was Philip Morris’s IQOS, concluding that there was a “*likely reduction in risk for smokers switching to heat-not-burn tobacco products*” (i.e. HTPs).
  - (2) In 2018, Public Health England published a review of evidence on e-cigarettes and HTPs. In respect of the latter, its conclusion was that HTPs were “*likely to expose users and bystanders to lower levels of particulate matter and harmful and potentially harmful compounds*”. On that basis, it concluded that “*heated tobacco products may be considerably less harmful than tobacco cigarettes ...*”
  - (3) In July 2020<sup>2</sup> and March 2022<sup>3</sup> the U.S. Food and Drug Administration (the FDA) authorised the marketing of two IQOS variants in the US as Modified Risk Tobacco Product (the MRTP), with a reduced exposure claim. The FDA concluded that switching completely from cigarettes to IQOS significantly reduces your body’s exposure to harmful or potentially harmful chemicals and they determined that the issuance of the MRTP orders with reduced exposure claims would be “*appropriate to promote the public health and is expected to benefit the health of the population as a whole*”.
  - (4) Japan provides a helpful case study. In that respect, Japan, smoking reduced by -1 percentage point between 2013 and 2016. However, between 2016 and 2019, the Japanese smoking rate reduced by -5.2 percentage points, as almost three in every 10 Japanese smokers stopped smoking. This coincided with the national roll-out of heat-not-burn products (another name for HTPs). A study by researchers at the American Cancer Society, published in the British ‘Tobacco Control Journal’ concluded: “*Cigarette*

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<sup>2</sup> See further: [FDA Authorizes Marketing of IQOS Tobacco Heating System with ‘Reduced Exposure’ Information | FDA](#)

<sup>3</sup> See further: [Philip Morris Products S.A. Modified Risk Tobacco Product \(MRTP\) Applications | FDA](#)



*sales begin to substantially decline at the time of the introduction of IQOS [heat-not-burn system] in each of 11 Japanese regions (...) The introduction of IQOS likely reduced cigarette sales in Japan.*<sup>4</sup>

- (5) Philip Morris' own estimates are that approximately 19.7 million adults around the world have switched to their HTPs and stopped smoking.

### **Legal principles governing consultation**

19. Where a public body chooses to consult on a particular matter, it must do so fairly and must conduct a consultation that is legally adequate. Accordingly, irrespective of whether a public body was obliged to consult, where a consultation is embarked upon, it must be carried out properly: R v North and East Devon Health Authority ex p Coughlan [2001] QB 214, at [108].<sup>5</sup>
20. The relevant requirements of a proper conduct of a consultation are known as the 'Sedley requirements', taking their name from the submissions made in R v Brent London Council ex p Gunning (1985) 84 LGR 168, p.189. The Sedley requirements were summarised and endorsed by the Supreme Court in R (Moseley) v Haringey LBC [2014] 1 WLR 3947, at [25], and are set out below.
21. **First**, to be proper and legal, a consultation must be undertaken at a time when "*proposals are still at a formative stage*": Coughlan, *ibid*. A public body will not meet that requirement where it is clear that it has "*no intention of changing [its] mind*" (R (Stephenson) v Secretary of State for Housing, Communities and Local Government [2019] PTSR 2209, per Dove J at [58]) or where a "*central element*" of any proposal cannot be changed (R (Draper) v Lincolnshire City Council [2015] PTSR 769, at [17]-[18] and [27]). Similarly, a consultation conducted in several stages will not meet the first of the Sedley requirements when it does not permit comments on the impact assessment conducted: R (Parents for Legal Action Ltd) v Northumberland County Council [2006] ELR 397, at [36].
22. **Secondly**, the public body that is conducting the consultation exercise must "*put a consultee into a position properly to consider and respond to the consultation request*": R (Help Refugees Ltd) v Secretary of State for the Home Department [201] 4 WLR 168, per Hickinbottom LJ at [90]. What that means in practice is that "*consultees must be told enough – and in sufficiently clear terms – to enable them to make an intelligent response*": *ibid*. Consultees must therefore be given sufficient reasons for particular proposals to permit intelligent consideration and an intelligent response: Coughlan, per Lord Woolf MR at [108]. In R (Law Society) v Lord Chancellor [2019] 1 WLR 1649, the Court of Appeal recognised that relevant considerations in assessing whether a failure to provide information has rendered a consultation unfair include: (1) the nature and potential impact of the proposal; (2) the importance of the information; (3) whether there are good reasons for not disclosing the information; and (4) whether consultees are prejudiced by the non-disclosure. The duty can extend to the disclosure of alternatives considered but not

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<sup>4</sup> Stoklosa, M. et al., 2020. Effect of IQOS introduction on cigarette sales: Evidence of decline and replacement. *Tob. Control.* 29, 381–387. Effect of IQOS introduction on cigarette sales: evidence of decline and replacement | Tobacco Control (bmj.com)

<sup>5</sup> The circumstances in which a public body must consult were recently considered in the decision of R (Eveleigh) v Secretary of State for Work and Pensions [2023] 1 WLR 3599. In previous cases, the Courts have confirmed that "*irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted*": R (Help Refugees Ltd) v Secretary of State for the Home Department [2018] 4 WLR 168, per Hickinbottom LJ at [90].

pursued. In *R (Moseley)*, the Court concluded that a consultation was legally inadequate because of a failure to identify alternatives and the absence of any reasons for the preferred choice in the consultation.

23. **Thirdly**, consultees must be given adequate time to allow them to consider and respond to the proposals.
24. **Fourthly**, the product of any consultation must be conscientiously taken into account in finalising any statutory proposals.
25. The requirements for a fair and lawful consultation are a species of procedural fairness. In that respect, as the Supreme Court recognised in *Moseley*, per Lord Wilson at [24], the requirement for such fairness not only avoids injustice and furthers democratic accountability, but also increases the likelihood that the decision-maker obtains all the relevant information, thereby encouraging better decision-making. In assessing whether a consultation is fair, the Courts will ask whether the consultation is 'so unfair as to be unlawful': *R (Law Society) v Lord Chancellor*, *ibid*, at [68]. There is no additional rationality threshold and no requirement, for example, that something has gone "*radically wrong*": *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074, per Bean LJ at [69].
26. The Government has published its own consultation principles, reflecting the underlying position at common law. Relevantly, in the present case, they include the following principles:
  - (1) Principle B, which provides that public bodies should "*consult about policies or implementation plans when the development of the policies or plans is at a formative stage*".
  - (2) Principle C, which provides that public bodies should "*give enough information to ensure that those consulted understand the issues and can give informed responses*" and "*include validated impact assessments of the costs and benefits of the options being considered when possible*".
  - (3) Principle D, which states that "*Consultations are only part of a process of engagement*" and that the Government should "*consider whether informal iterative consultation is appropriate, using new digital tools and open, collaborative approaches*".
  - (4) Principle E, which makes clear that consultations should last for a proportionate amount of time. The Government's previous code of practice on consultations stated that "*consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible*".
  - (5) Principle H, which states that one should "*seek collective agreement before publishing a written consultation, particularly when consulting on new policy proposals*". Our client is not aware that any such "collective agreement" has taken place with regard to the Consultation.

### **Proposed grounds of challenge**

27. Measured against these principles, it is clear that the Consultation was both unfair and unlawful. We set out below the grounds upon which our client is presently proposing to challenge it. Our client nonetheless reserves the right to amend the grounds, or to add/remove grounds of challenge, based on your response and any further matters which come to light, and may do so without further recourse to you.

Ground 1: failure to give adequate information or reasons

28. The Consultation proceeds on the basis that HTP should be included within the scope of any legislation regarding the proposed Birthdate Restriction. While Philip Morris welcomes the Government's aim to create a smoke free future by 2030, no proper explanation or information is offered (in the Consultation, or the Command Paper) as to why HTP products are being treated in the same way as combustible tobacco products including traditional cigarettes.
29. Notably, the Consultation appears to proceed on the basis of the New Zealand case study. However, the New Zealand comparator is flawed *vis-à-vis* HTP, which were specifically excluded from the legislation enacted in that jurisdiction.
30. On the basis of the limited information provided in the Consultation Paper, therefore, and the Command Paper that preceded it, the elision of combustible tobacco products and HTP does not withstand scrutiny and/or is arbitrary and irrational. As set out above, there is a clear and growing body of evidence that suggests that HTP are significantly less harmful than combustible tobacco products, and that they can assist in encouraging current smokers to move to smokeless alternatives. The Consultation rightly recognises the varying degrees of harmfulness of different products by juxtaposing cigarettes and their alternatives. However, it proceeds inconsistently – and, crucially, without proper explanation – by including HTPs within the scope of the proposed legislation, where, in reality, they have a harm profile more akin to vapes, and like vapes provide a smokeless alternative to combustible tobacco. The available data does not suggest there is a youth access issue with HTP products, as there is for vaping, which is even more reason to differentiate it from combustible tobacco.
31. The Khan Review specifically invited the Government to carry out further work in this field. However, despite referring expressly to the Khan review, no explanation is offered as to whether that proposal has been considered and rejected and, if it has, the grounds for that rejection. In consequence, consultees are deprived of the opportunity to discuss the grounds of any such rejection, and the Government is deprived of the opportunity to consider what consultees might say on that topic.
32. Insofar as a policy choice has been made to include HTP in the scope of any new legislation, no information is provided in the Consultation (or the Command Paper) as to the reasons for that choice. As the Government has provided no information as to why it is of the view that HTP should fall within the scope of the Birthdate Restriction, consultees are denied sufficient, or any, substantive information to permit intelligent consideration of or response to this aspect of the Consultation. This is a fundamental flaw in the process, and the Consultation is, in consequence, both unfair and unlawful.

Ground 2: failure to permit a proper response

33. The Consultation is also procedurally unfair in various ways which, alone and together, further deprive consultees of the opportunity to provide a proper response. For example, despite purporting to seek detailed responses from consultees, each of the consultation questions is framed as a multiple choice question, which only permits an answer of 'agree', 'disagree' or 'don't know'. Although boxes are provided for free-text responses, these are limited to 300 words each.
34. Both the word limit on the free-text boxes and the decision to prevent the submission of additional information and evidence prevent consultees from responding properly and intelligently to the detailed, complex and significant policy proposals in the Consultation. In the case of our client, for example, it precludes Philip Morris from providing proper, detailed scientific information regarding the respective harm



levels of HTP as compared with combustible tobacco products. More generally, the issues raised in the Consultation are of considerable scientific and societal complexity, and clearly do not lend themselves to limited, pro forma answers of the kind that the Consultation permits. To so limit consultees' answers is not only unfair and unlawful, but is also not indicative of a serious and sincere consultation (as to which, see further ground 3 below).

35. In addition, the 8-week period provided for consultees to respond is clearly insufficient. Despite the obvious significance of the proposals now being put forward, and their potential ramifications for business across the UK, including in relation to their rights under Article 1 of Protocol 1 to the European Convention on Human Rights and the Human Rights Act 1998, the consultation period is shorter than the minimum 12-week period normally afforded by Government. No explanation has been offered as to why an expedited process of that kind where the issues raised – though of considerable importance – are neither novel nor immediately urgent.

#### Ground 3: pre-determination

36. Various aspects of the policy that is the subject of the Consultation appear to have been pre-determined. The most notable example is the Birthdate Restriction itself, where, as set out above, the Consultation clearly states that the Government “*will bring forward legislation*” bringing in that change. Similarly, while the Consultation, on its face, purports to ask consultees about the range of products that should be included in the scope of any new legislation, as set out above, the range of responses is limited by the multiple choice format adopted and the very limited scope for the provision of additional information.
37. The Consultation also states that “*impact assessments will be published*” only **after** “*decisions*” on proposed measures are made. It is clear – both from the face of the Consultation itself and the process adopted to date – that no impact assessments will therefore be published prior to the closing date of the Consultation and that consultees will not be permitted to comment on them. It is common, and common sense, to publish impact assessments in advance of or at the time of consultation. Otherwise, as here, consultees are denied sufficient information regarding the impacts, costs and benefits of the proposals to permit intelligent consideration and response.
38. These issues, whether assessed independently or together, strongly suggest that important aspects of the policy under Consultation have been pre-determined, in breach of the Sedley requirement for consultation at a formative stage. For that reason, the Consultation is, again, unfair and unlawful.

#### Action the defendant is invited to take

39. For the reasons above, the Consultation is unfair and unlawful. In order to remedy the legal errors identified in this letter, we request that the Secretary of State:
- (1) Amends the Consultation to fully remedy the inadequacies or deficiencies highlighted above, such that consultees are able to respond fully, adequately and intelligently to all points raised in this revised Consultation;
  - (2) Publishes its reasoning and all information / documents on which it relies for including HTP in the scope of the proposed legislation (if that position is maintained), such that consultees are able to respond fully, adequately and intelligently to any and all proposals relating to this issue (alternatively, if the Government is unable to substantiate its reasoning or on reflection comes to the view that this change is appropriate, removes HTP from the scope of the proposed legislation);

Secretary of State for Health and Social Care

27 November 2023  
Page 10

- (3) Confirms whether the Government is willing to consider alternative options to those proposed in the Consultation (and, if so, amends the Consultation appropriately);
- (4) Allows consultees adequate means and time in which to respond fully, adequately and intelligently to the points raised in any amended Consultation (including, in respect of HTP, a 12-week timescale for responses, which shall not commence until all relevant information requested has been publicly published by the Government), disclosure of the relevant material identified above and a removal of the 300 word limit on responses.

#### **Information or documents sought**

40. The Defendant's duty of candour applies at all stages of litigation, including before the grant of permission. The scope of the duty pre-permission was recently clarified by the High Court in *R (Police Superintendents' Association) v Police Remuneration Review Body* [2023] EWHC 1838 (Admin), where Fordham J (at [18]) held as follows: "*If documents matter, they should be provided. If they matter prior to or at the permission stage, that is when they should be provided. Not gists. Nor summaries. Not descriptions of contents or features of the document. Not selected quotations. Instead, the documents themselves. This is proper candid disclosure. It is not the supply of material whose request would constitute 'fishing'*".
41. In accordance with the duty of candour, we request the following documents / information:
  - (1) Copies of any submission made to Ministers regarding the scope of the proposed legislation that is the subject of the Consultation, and any attachments thereto;
  - (2) Copies of any other document recording the reasons for the inclusion of HTP within the scope of the proposed legislation;
  - (3) Any evidence, information or documents upon which the decision to include HTP within the scope of the proposed legislation was made.

#### **ADR Proposals**

42. We would welcome any proposals to engage on the substantive issues raised in this letter, so as to resolve or narrow the dispute. In particular, our client would welcome the opportunity to discuss, on an urgent basis, the potential removal of HTP from the scope of the proposed legislation arising from the Consultation. In that respect, we envisage that – even in the event of such discussions - our client may be required to issue proceedings on a protective basis, to avoid any issue of limitation. Insofar as there is genuine cooperation between the parties, however, our client would be prepared to entertain the possibility of a stay of any such proceedings to permit further progress.

#### **Address and proposed date for reply**

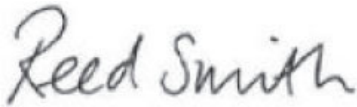
43. We consider this matter to be urgent, where the Consultation is ongoing. In particular, we are keen to ensure that these matters are resolved timeously and without undue or unnecessary disruption to the legislative timetable that the Government has proposed in respect of the matters arising out of the Consultation.

Secretary of State for Health and Social Care

27 November 2023  
Page 11

44. To that end, you are requested to respond by e-mail by no later than 6pm on 1 December 2023. As above, please ensure that any response to this letter, and any future correspondence, is addressed to Reed Smith LLP of The Broadgate Tower, 20 Primrose Street, London EC2A 2RS, using the reference [REDACTED], and copied to [REDACTED] and [REDACTED].

Yours faithfully,



**Reed Smith LLP**