

L15 10

Mr Davey PS/MS(H)

From: J C Dobson HS1

Date: 18 October 1989

cc: Mr Heppell* PG
Dr K Jones MCA
Dr Wood MB4
Miss Pease* HS
Mr Wilson MCA
Mr Hagger MB1
Mrs Armstrong SOL C5
Mr Powell* SOL C
Dr Pickles MED ISD
Mr A Barton AIDS Unit
Mr Kendal FB
Dr Rejman ID*
Mr Canavan MB1*

** with previous papers*

HIV, VALIUM/LIBRIUM LITIGATION

Mr Wilson's submission raises at paragraph 6 the question of extending the 'duty of care' argument to the position of Secretary of State under NHS legislation (as opposed to his responsibilities as the Licensing Authority). MS(H) may appreciate a little more detail on this aspect.

2. As we understand, in the absence of a written opinion from Treasury counsel, the argument that would be advanced is that in making policy for the NHS ministers are obliged by resource constraints to make choices between desirable objectives. This is an essentially political judgement in which the courts are traditionally reluctant to intervene. If, in ministers' view, a particular development for a particular group of patients (eg investment to increase UK capacity in blood products) is too expensive given competing pressures, ministers should not be held to have failed in their duty of care for that group of patients. Therefore there can be no general 'duty of care' to individual patients.

3. There are two potential difficulties with this in relation to the HIV litigation:

- i. it is not clear whether the argument extends to the competence with which policy objectives are pursued. For instance, if a policy decision is taken to introduce heat treatment for blood products as soon as possible, are the courts competent to determine whether this has in fact been done?
- ii. in political terms, ministers may see particular difficulty in using what might be regarded as a legal subterfuge to avoid detailed scrutiny of past decisions. Mr Hagger's draft submission covers this point at paragraph 8 but it seems to me to apply with particular force to the HIV/haemophiliac litigation.

4. Colleagues in SOL C will seek at tomorrow's consultation to ask Treasury Counsel whether he sees any prospect of running the "no duty of care" argument solely in respect of the Licencing Authority/CSM and not in respect of Secretary of State's NHS rsponsibilities; or whether if he uses it in one

context he will need to use it in both. It may be possible to leave this question open for the time being since merely raising the issue at next Monday's hearing does not necessarily commit counsel to deploying the argument when it comes to the preliminary issues hearing later in the year.

5. We suggest that

- i. MS(H) should allow Treasury Counsel to raise the "no duty of care" argument at Monday's hearing as a possible preliminary issue across the board, but that
- ii. HS1/SOL should seek further advice from counsel on the scope for deploying this argument solely in respect of the Licensing Authority/CSM.

GRO-C

J C DOBSON
Room 511
Eileen House
Ext **GRO-C**

SMD/A:315