

Urgent! Are you content for an appeal to be lodged if the judge makes the UK Government part of the inquiry? I have asked the team to

MS(PH)

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work with comms to prepare handling if necessary.

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- ① Agree Appeal.
- ② Let SafS know.
- ③ What are consequences of losing appeal?
- ④ What are % chances of winning 50/50 or more?

GRO-C

✓ 18/11/08

CONTAMINATION OF BLOOD AND BLOOD PRODUCTS: LEGAL PROCEEDINGS ON SCOPE OF A PUBLIC INQUIRY IN SCOTLAND

Summary

1. This is to seek your approval to appeal, if necessary, against a possible legal decision in Scotland to require the Advocate General for Scotland to be a party to the Scottish public inquiry on the contamination of blood and blood products with hepatitis C. As the Advocate General is a UK Government Minister, this would effectively turn the inquiry into a joint inquiry by both the UK and Scottish Governments.

Recommendation

2. We strongly recommend lodging an appeal if this proves necessary.

Timing

3. **Urgent.** We need to instruct the Advocate General's solicitors as soon as possible, as we need to do so for the next court hearing. We do not know when that will be, but it could be very soon.

Background

4. As you know, there is to be a public inquiry in Scotland arising from the deaths of two patients infected by hepatitis C through contaminated blood products. (See our submission of 1 April and briefing on 22 April.)
5. Earlier this year, a judicial review in Scotland concluded that an inquiry into the two deaths had to be convened in order to meet the rights of those affected under Article 2 of the ECHR. The Scottish Government accepted this decision, as it had previously committed to holding some form of inquiry into the general issue of contamination of blood and blood products in the 1970s and 1980s. The Department has said it is

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willing to help with documentation (if this has not already been released under FOI) but not to appear as witnesses.

6. The proceedings of the judicial review were held open until the terms of the Scottish inquiry were agreed, in order to give the petitioners an opportunity to object if they appeared inadequate to meet the requirement under ECHR.
7. One of the successful petitioners last week entered a Minute of Amendment to their original petition, seeking to have the Advocate General for Scotland (a UK law officer and representative of the UK Government) added to the parties required to convene an inquiry. In general terms, it is argued the terms of the judgement cannot be met without UK Government involvement.

Need to instruct Scottish solicitors

8. The judge may decide not to allow the amendment at this stage, in which case the inquiry would continue on its previously-agreed basis, as an inquiry convened by the Scottish Government to consider Scottish issues.
9. However, in the event the judge decides to allow the amendment, effectively changing the original decision to one requiring a joint UK/Scottish Government inquiry, the solicitors acting for the Advocate General may have to seek leave to appeal immediately, or accept the decision.
10. We are advised there would be good grounds for appeal against a decision to allow the amendment:
 - i. Firstly, it is a breach of process to make a decision against the Advocate General when he was not a party to the original proceedings. We can argue this is a new petition and should be considered from the beginning.
 - ii. Second, we can argue that the case for the amendment is flawed, as it is not necessary to involve the UK Government for there to be an inquiry that would meet the issue in Scottish law.
 - iii. Third, we can restate our view that a UK inquiry is unnecessary, as it will add nothing to our knowledge of these events, and would be a waste of NHS resources. Other arguments are that there have been two litigations and settlements, a number of funds have been set up to provide *ex gratia* payments to those affected, and all relevant official documents are now in the public domain.

11. It is usual to seek Ministerial authorisation for an appeal and although the Advocate General for Scotland is himself a Minister, he will be acting of behalf of the Secretary of State for Health, and so he needs to know the views of DH Ministers. There is to be a videoconference between SOL and the Advocate General's lawyers very soon and it will be helpful to have a decision to assist lawyers in their contingency planning. We will need to instruct the Advocate General's solicitors whether to appeal.

Recommendation

12. We strongly recommend that you agree to appeal, if the judge's decision is to allow the amended petition.

Patrick Hennessy

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