

PS/Secretary of State

Copy to: PS/Minister of State  
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PS/HHD  
PS/Chief Executive  
Solicitor  
Mr Mills  
Mr Anderson  
Director, InD  
Mr R Henderson, Sols  
Mr Young, Special Adviser

#### **HIV INFECTION: WHOLE BLOOD TRANSFUSION**

1. This minute is to inform Ministers of correspondence which the Department of Health has received at both Ministerial and Official level from a firm of Scottish solicitors representing people who are alleged to have contracted HIV/AIDS through whole blood transfusions and suggest that as the issue of compensation is a UK one we should not seek to take over responsibility at this time in responding to the Scottish firm of solicitors.

#### Background

2. Mr Brian Donald of Messrs J & A Hastie, Solicitors, Edinburgh wrote on 18 December to the Secretary of State for Health (copied to Mr S Galbraith) seeking compensation for those people who have contracted HIV/AIDS as a result of blood transfusions. Such compensation would be on a similar basis to the offer announced for haemophiliacs with HIV as a result of taking infected Factor VIII. The reply at official level followed the lines of a reply sent to Mr Sam Galbraith by Mrs Bottomley. It explained that there were no plans to extend the special financial help to haemophiliacs to those other patients who are alleged to have been infected through blood transfusions. In support of this the Department of Health has sought to differentiate between whole blood HIV and Factor VIII cases on the basis firstly that haemophiliacs had a stronger claim because of their underlying condition which prevented insurance or build-up of savings in order to provide for their dependents and secondly in relation to causation.

3. We were not consulted on the terms of these earlier replies. We do not consider that either of the reasons advanced by the Department of Health has substance. In the first place in relation to the matter of causation, while it is the case that if any claim were to come to Court it would be for the pursuer to establish a cause or link between transfusion and infection, the difficulties for the pursuer in proving the cause or link would largely be occasioned by the reluctance of Government to allow the pursuer access to blood transfusion records. Without access to those records the pursuer could not identify the donor of the transfused blood. It would be relatively simple to establish whether blood transfused was likely to have been tainted if one knows the identity of the donor. To a substantial extent therefore difficulties in proving a causal connection arise from the refusal of Government to allow access to records. The Courts have already upheld a claim on behalf of the Secretary of State for Scotland that it is not in the public interest that

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such records should be released. That decision of the Courts was specifically in relation to an application for recovery of those records made by a petitioner infected with HIV allegedly as a result of a tainted blood transfusion.

4. In relation to the argument as to a stronger claim for haemophiliacs for compensation because of their underlying condition which prevented insurance or build up of savings we would not advise that this line of argument be persisted in. It necessarily implies some moral judgement on victims who have been infected through no fault of their own and proceeds on the underlying proposition that such victims ought reasonably to have foreseen the possibility of serious or terminal injury arising from relatively routine clinical procedures.

5. Ministers should be aware that to date claims for damages have been received in relation to 3 individuals infected with HIV allegedly from infected blood. These claims are against the Secretary of State for Scotland. In one of those claims a medical report has already been produced indicating that evidence as to the blood transfusion exists to show that the blood transfused came from an individual now known to be an HIV positive homosexual. None of the cases referred to are yet the subject of Summonses.

6. Messrs J & A Hastie wrote to Mrs Bottomley on 20 March to take issue with her response to Mr Galbraith. We have been consulted on this occasion on the proposed reply - copy attached at Annex A. The proposed reply proceeds upon the same basis as the earlier letter referred to, and as set out above we do not consider that the reasons advanced in reply are tenable. Accordingly an alternative response has been prepared. This proceeds upon the basis that claims for parity of treatment between blood transfusion victims of HIV and haemophiliac HIV victims are to be rejected. We propose to offer this proposed response (copy attached at Annex B) to Department of Health but it has raised the question in our minds whether the correspondence with Messrs Hastie should be transferred for a Scottish Office response since responsibility for health matters of Scottish patients falls to our Secretary of State. There is also evidence that there is increasing media interest in this matter. The Observer newspaper carried an article and a leader on 21 April and a further article in its issue of 26 April. The leader comment suggested that the claim by the Department of Health that there was a distinction between the cases of haemophiliacs and those infected through normal surgical procedures is "such patent nonsense as it is extraordinary that it should have been seriously put forward". The proposed response does not seek to differentiate between haemophiliacs and whole blood transfusion victims. Rather it suggests that the correct test for determining whether any group should be treated as a special case is as to whether or not they may be differentiated from the group of NHS patients as a whole.

7. As the current position of HM Government is that compensation in respect of whole blood transfusion HIV victims is to be resisted and that any change in that view would have UK implications, there would be consistency in the Department of Health continuing to take the lead in replying to Messrs Hastie on this correspondence. Department of Health are taking the lead in responding to an oral PQ on this topic from Lord Malloy for answer on 1 May. However the advice from our legal advisers is that Secretary of State for Scotland should deal with the correspondence from Messrs Hastie in particular taking into account that

the cases in issue are the subject of Scottish claims. We consider that this runs the risk of drawing the criticism on the Scottish Office. We should be glad to know whether Ministers would wish us to take over the correspondence and reply direct on the lines of a suitably amended version of the draft as at Annex B.

GRO-C

G W TUCKER  
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