

Neil MacLeod

From: Leah Griffiths

Cc: Ailsa Wight  
William Connon  
Patrick Hennessy  
Paula Cohen

File

Date:

### **Black and Kennedy v Lord Advocate and Scottish Ministers**

1. This note seeks to provide the information you requested in your email dated 2<sup>nd</sup> October 2008 to assist you in briefing the Advocate General in advance of a further hearing in the above matter.
2. Answer to bullet point 1 (to be inserted)
3. Answer to bullet point 2 (to be inserted)
4. In relation to the question in bullet point 3 of the email of 2<sup>nd</sup> October, there has been no ministerial contact between Scotland and England in relation to the proposed Cosgrove Inquiry.
5. In relation to the question in bullet 5 (which feeds into our response to the question in bullet 4), the Department of Health would co-operate with any Scottish inquiry on this matter in a way similar to the way it has cooperated with the Inquiry set up by Lord Archer of Sandwell. The Department would provide any reasonable and appropriate assistance and would make all relevant information available. Indeed, the Department has already released all relevant documents which it holds relating to Hepatitis C infections from blood or blood products into the public domain (and these documents are available on the Department's website) **[DN is this correct?]**. Officials from the Department would be content to meet with the Inquiry team informally but would not appear before the Inquiry itself. There would be no value in any official appearing before the Inquiry because there would be no official who could give first hand evidence as to the events and policy around the time the Inquiry would be looking at- any such official would be reliant on looking at documents from the time in question which would already be available to the Inquiry. **[DN I thought it would be useful to explain why evidence from DH officials would not take the Inquiry any further but do let me know if you would prefer not to]**
6. The fact that all relevant documents held by the Department relating to Hepatitis C infections have been made publicly available (and that Departmental officials are not in a position to provide evidence which would add anything to the Inquiry's investigations) leads the Department to the conclusion that the Inquiry will not need to have powers of compulsion (in respect of the Department) in order to make it effective as it is required to be

in order to amount to an article 2 compliant investigation. The Department cannot comment further on the extent to which the proposed Cosgrove inquiry would be article 2 compliant as we do not have the requisite information to do so nor would it be appropriate for us to make such a judgement especially when the exact terms of reference of the inquiry are not set.

7. We would, however, say that from the information we have seen the appropriate order for the court to make in this case, if the proposed inquiry was held not to be article 2 complaint, would seem to be to order that the proposed inquiry become a Fatal Accidents Inquiry under the Fatal accidents and Sudden Deaths Inquiry (Scotland) Act 1976. It appears the FAI would deal with the petitioners' concerns about the effectiveness of the proposed inquiry and its compliance with article 2 (i.e. in relation to powers of compulsion and in allowing reserved matters to be within the inquiry's scope) and would thus constitute an effective remedy and just satisfaction in respect of the alleged breaches of the petitioners' Convention rights. Given that the action in this case was not brought against the Secretary of State for Health, we do not consider that it would be within the power of the court to make an order to the effect that the SofS for Health should set up a joint inquiry with the Scottish Ministers under sections 32 and 33 of the Inquiries Act 2005.
8. On bullet point 6, we consider that the UK Government needs to be kept fully informed of developments in this matter. On that basis, it may be helpful if the Advocate General was to appear/be represented in future hearings.
9. Katherine Marshall asked on 7<sup>th</sup> October what the Department's attitude would be to the suggestion of any joint inquiry with the Scottish Ministers under the Inquiries Act 2005. The Department's position remains that an Inquiry in England would be unnecessary and unjustified and the Department would not, therefore, wish to set up a joint Inquiries Act inquiry with the Scottish Ministers (the scope of which would then extend to England).
10. The Department's position is that a public inquiry in England would not add to current knowledge about how infections happened or the steps needed to deal with this kind of problem now or in the future. There are a number of factors which lead the Department to take this position. These include the time that has elapsed since the events which would be the subject of the inquiry took place; the fact that a full review of all the papers relating to Hepatitis C infections has been carried out and no evidence was found of any wrongdoing at the time by the government or the NHS; there has been significant previous litigation and settlements and funds have been established to make ex gratia payments to those infected with Hepatitis C or HIV through NHS treatment; all relevant official documents are now in the public domain; a review of documentation on blood safety 1970-1985, together with relevant documents, was published in May 2007; there has been an independent inquiry by Lord Archer of Sandwell into contaminated blood products and its consequences for the haemophilia community and others (which is due to report later this year **[DN is this right?]**); lessons to be learnt have been learnt and relevant measures have been put in place to prevent any recurrence of such events; and there is no new evidence showing any lack of good faith in policy and treatment. These factors mean that the high cost (and the consequent diversion of funds from health services) and time consuming nature of a public inquiry in England into these matters would be unjustified.

11. Please let us know if you require any further information from the Department.

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