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Mr Davey/PS MS(H)

From: Mr Wilson MCA  
Date: 23 November 1989  
cc: Mr McKeon PS/SOS  
Dr Matters \*  
Dr K Jones MCA \*  
Mr Hagger MB1 \*  
Mrs Armstrong SolCS \*  
Mr Barton Aids \*  
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Mr Kendall FA2 \*  
Mr Pickles ISD \*  
Mr Powell SolB3 \*  
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(\* minute only)

#### HIV LITIGATION - PRELIMINARY ISSUES

1. There is a conference with Counsel on 29 November to discuss the preliminary legal issues to be raised in the HIV litigation. This conference has been called because there is a Court session on 5 December at which these issues will need to be identified and timetabled for later Court proceedings.

2. We need MS(H)'s decision before 29 November on some important outstanding points in this connection as set out below.

##### Duty of Care

3. Counsel has argued that in the HIV litigation (and in impending litigation against the Licensing Authority in respect of Valium) he should raise as a preliminary issue the question of duty of care. The argument would be that as a matter of law neither the Licensing Authority nor the Committee on Safety of Medicines (CSM) owes a duty of care to individuals and hence had no case to answer. MCA officials and finance colleagues would like this issue to be tested in both the HIV and Valium cases. Counsel has also proposed that the no duty of care argument should be made in respect of the Secretary of State's responsibilities under NHS legislation.

4. These issues were the subject of earlier submissions attached for ease of reference (dated 17, 19 and 26 October). The 26 October submission records Mr Mellor's initial view that he did not favour running the duty of care argument in the HIV case, but saw advantage in doing so in the Valium case. However, Counsel has advised that there would be difficulties in taking the point in one case but not the other.

##### Questions of Policy

5. Counsel has also proposed that, in respect of allegations which concern questions of policy (eg on priorities and resource allocation) for determination by the Secretary of State, he should argue, as a preliminary issue, that these should be struck out as non-justiciable leaving only allegations concerning other aspects of the Department's involvement, ie its administrative/operational functions, as issues to be tried in the main proceedings.

6. If these arguments on duty of care and policy questions were successful at the preliminary issues stage much of the case against the Secretary of State and all of the case against the Licensing Authority/CSM would collapse. This in turn could intensify pressure on the Government to provide financial help direct to HIV infected haemophiliacs as the prospects for any payments following a court action would be much reduced. On the other hand it might largely solve the problem of litigation continuing despite eg any topping up of the MacFarlane Trust funds.

7. MS(H) is asked to advise on whether:-

- a. the duty of care argument should be run in the HIV and Valium cases in respect of the Licensing Authority and CSM responsibilities under the Medicines Act. (MCA officials and Finance colleagues strongly support Counsel's contention that it should be; if it is not argued in these cases it will be very difficult to do so successfully in any later litigation);
- b. the duty of care argument should also be run in the HIV case in respect of the Secretary of State's responsibilities under NHS legislation (Counsel has put forward the alternative option here of not arguing no duty of care in respect of the S of S and relying instead on the case at (c) below);
- c. it should be argued that allegations concerning questions of policy should be struck out as non-justiciable. Not to argue this last point could have huge implications for Government generally if as a result it became accepted that questions of priorities and resource allocations could be challenged in the Courts.

8. This submission has been agreed by H91 in respect of matters not relating to the Licensing Authority/CSM.

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