LIE 10
LIE 16
HIM 12

POLICY IN CONFIDENCE

Mr Alcock
PS(SofS)

From: J C Dobson

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cc: Dr Smales
Mr Heppell
Mr Powell
Mr Kendall

HAEMOPHILIA/HIV LITIGATION

1 In preparation for the Secretary of State's meeting with the Chief Secretary, I attach supplementary briefing (flags A, B and C) on some points which arose during discussion with Treasury officials.

2 Following those discussions we have also been considering how any settlement would be presented. The Secretary of State may wish to consider the options at this stage.

3 The options appear to be either:-

3.1 to present any further payment as a continuation of the special help already made available to haemophiliacs through the Macfarlane Trusts.

3.2 Present it as recognition that however strong our legal case there is a finite risk of losing in Court.

4 In relation to 3.1 the arguments for and against are:-

For

- Ministers have given a public commitment to keep under review the help available through the Trusts. This provides a ready-made justification for any new payment;

- the earlier payments have been successfully ring fenced by arguing that HIV-infected haemophiliacs are doubly disadvantaged and therefore a genuinely "special case"; so increasing them would not in itself set a new precedent to be used by other groups injured as the result of NHS treatment;

- it may be politically advantageous at this time to say that the Government has reviewed the needs of haemophiliacs with HIV and is taking a more generous view

Against

- public may not believe that a further payment is anything other than an out of court settlement of the litigation;

- the Government could be criticised for not announcing a sufficiently large payment to the Macfarlane Trust in November 1989 to remove the need for the haemophiliacs to pursue their Court action;

- the total payment (about £50k a head on average) may become a benchmark to which any future "special cases" would aspire.

In relation to the the option at 3.2 the arguments are:-

For

- minimises the risk of undermining the Government's stance against the general principle of no fault compensation;

- linking the payment explicitly to the litigation may make it easier to insist that those accepting it must sign away their rights to litigate on the HIV issue.

Against

- however it is presented, there is still some risk that the settlement could set a precedent for other groups who have been injured by NHS treatment and provoke further litigation against the Department, Medicines Licensing Authority and CSM;

- an out of court settlement could be interpreted as some degree of acceptance of liability for negligence;

- any suggestion of fault could harm the credibility of the Department's professional advisors, the Licensing system and its advisory committees; Secretary of State should also be aware that our medical colleagues are very concerned about this option since it undermines the credibility of their professional advice.

- if we do not link the payment to the special circumstances of haemophiliacs with HIV it may be more difficult for DSS to defend disregarding it but not the payments made to victims of other tragedies.

Until the case is set down in writing it is often difficult to spot the snags in presenting a particular line, or to measure how convincing it will be. We have, therefore, prepared drafts (flag D) setting out the main arguments that would be put under both options 3.1 and 3.2. They may serve to give the Secretary of State some appreciation of the presentational merits and demerits of the options.

Further work would need to be done to prepare a Statement and there would need to be wider consultation within the Department and with Counsel. The Secretary of State will not wish to commit himself to one course or another but he may wish to discuss the issue with the Chief Secretary.

GRO-C

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LITIGATION COSTS - how robust is the estimate of £20m costs for all parties?

Our Counsel has told us that in the Opren litigation the plaintiffs' costs were something like £2 1/2 million. In that case a settlement was reached at an earlier stage than we have now reached in the HIV litigation.

Counsel would not consider it unreasonable if for the Government defendants, Health Authorities and Plaintiffs, there was a bill of £5 million per party. For the Central Blood Laboratories Authority we estimate the bill at £2-3 million.

The plaintiffs are now talking in terms of a trial lasting from six to ten months.

The fees for Counsel for each party might be as much as £800,000. In addition there would be the expert witnesses' fees.

LEGAL AID - would those who rejected a deal be able to continue the action with legal aid?

It would be a precondition of any deal that the plaintiffs' Counsel should advise his clients that the offer provided a reasonable basis for discontinuing the Court action. The plaintiffs' solicitors would be under an obligation to inform the Legal Aid Board of this advice should any of their clients wish to continue the action. It is inconceivable that the Board would wish to continue to fund an action against the advice of Counsel.

LEGAL ADVICE ON LIKELIHOOD OF LOSING THE ACTION

1 We asked our Junior Counsel if he could quantify the risks involved in this litigation for the central defendants (based on the advices given recently by our Leading Counsel.

2 He stressed how difficult this was and how imprecise any figures must be. However, he has attempted to approach the problem by assessing the various contributory risks for the generality of cases on

(A) duty of care

(B) Wednesbury unreasonableness

(C) negligence (both in relation to failure to achieve self-sufficiency and in the alleged failure to take sufficient precautions once the AIDS threat appeared).

(D) and causation.

On the assumption that the Courts will be sympathetic to the plaintiffs' case, Counsel has not attempted to distinguish between the various categories of case although the risk will differ between them.

3 To succeed, the plaintiffs have to establish (A) and (D) and either (B) or (C). Counsel's overall view is that it would be prudent to assume a one-third chance of losing, although his estimates of the individual components (taken at fact value) imply a figure closer to one in six. It must be stressed that these are highly imprecise figures and that the apparent inconsistency should not be taken too seriously.

D

NOTES ON THE POSSIBLE PRESENTATION OF A SETTLEMENT

OPTION 1: Presenting the deal as more help in recognition of the special circumstances of haemophiliacs with HIV

1 Government has already recognised the very special circumstances of haemophiliacs with HIV through its payments totalling £34 million to the Macfarlane Trust.

2 We have always been committed to keeping that help under review. Our second payment announced in November 1989 showed our willingness to deliver on that commitment.

3 Government fully understands the concerns felt by the haemophiliacs with HIV that they and their families should have financial security.

4 Clearly the help already made available has not provided an adequate measure of reassurance. This seems to have been a major factor in prompting may haemophiliacs to pursue compensation through the Courts.

5 We recognise the harrowing effect such action must have on the haemophiliacs and their families. We believe that we have a strong case in law against the allegations of negligence. However we have always accepted that there is also a moral dimension to this case. It is not our wish that the haemophiliacs should feel that the only channel open to them to try to obtain peace of mind and financial security for their families is through the harrowing and uncertain processes of litigation. Government has, therefore, reviewed again the financial help available to the haemophiliacs. We propose to make available a further sum of [ ]. [This will include a small payment for those close relatives of haemophiliacs with HIV who have been involved in the litigation in recognition of the trauma caused by this.]

6 Since this additional sum will provide the measure of financial security the haemophiliacs were seeking for themselves and their families, they will be discontinuing the legal action and dropping all allegations of negligence against the defendants.

OPTION 2: Recognition of finite risk of losing Court action

1 Government has exceptionally provided special help for haemophiliacs with HIV and their families. This totals £34 million.

2 Full compensation however in this country has always had to be pursued through the litigation process. Many haemophiliacs decided on this course.

3 Government believes it has strong legal defence against the various allegations made by the plaintiffs. Believe that the decisions made and actions taken in past years when knowledge of the AIDS virus was in an early state were reasonable in the circumstances of those times.

4 However we must recognise the difficulty for the Courts at this remove and with the later knowledge to be able to appreciate fully the earlier uncertainties which formed the background to decisions and actions. While confident that we could do so, there must remain a finite risk that we would fail to get our points across in a sufficiently persuasive way to carry the day in Court.

5 Clearly very considerable sums of public money would be required to determine the legal issues in the Courts. There is also a considerable diversion of NHS manpower away from patient care not least for the haemophiliacs themselves. Moreover the haemophiliacs face a harrowing experience in Court and an uncertain outcome.

6 Given the uncertainties for both sides and unwanted consequences of the Court hearing, both sides have agreed it is preferable to settle the action now. Particularly as the financial help sought by the haemophiliacs had not been at issue in principle. We have, therefore, reached agreement on payment of [ ] to be distributed to the haemophiliacs (whether or not they were involved in the litigation) and other litigants. The plaintiffs will drop all allegations of negligence against the defendants.