

HEALTH COMMITTEE

Mr Andy Kerr MSP
Minister for Health and Community Care
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

10 August 2005

Dear

Hepatitis C: Scottish Haemophilia Forum Evidence Session

You will recall that the Health Committee agreed to take evidence at its meeting on 10 June from the Scottish Haemophilia Forum and yourself regarding the Forum's request for a public inquiry into how people became infected with hepatitis C as a result of NHS treatment.

However, on 9 June the legal advisers to the Forum, the law firm Thompsons, petitioned the Court of Session for a judicial review of the cases of four people who had died from hepatitis C, seeking to establish that the state is obliged to hold an inquiry under the European Convention of Human Rights.

This legal action raised the possibility that the whole issue might be regarded as sub judice and that the Committee would not be able to take evidence under the provisions of the Parliament's Standing Orders (Rule 7.5).

At its meeting on 10 May the Committee considered your letter to me in which you indicated that you had been advised that it would not be appropriate for you to attend the meeting in light of the petition lodged at the Court of Session, and a verbal report from myself indicating uncertainty as to the situation with regard to Standing Orders.

The Committee agreed to postpone its evidence-taking on the case for a public inquiry into infection with hepatitis C as a result of NHS treatment until the matter was clarified or settled.

Subsequently the Committee received the attached letter from Thompsons clarifying the situation from their perspective and giving some undertakings.

The Committee also sought guidance from the Parliament's Legal Services in regard to rule 7.5 of the Standing Orders. The view was that the letter from Thompsons was very helpful in that it clarified certain points and gave undertakings that assisted the Committee. The view was also that Rule 7.5 did not apply, particularly as the court proceedings are not yet 'live'.

I attach the guidance received for your information.

The Committee reconsidered the matter at its meeting on 21 June, and came to the view that, having clarified the legal situation, it would be possible for it to continue with the evidence session originally planned for 10 June.

The Committee agreed to write to inform you of the situation and to invite your view as to whether, in the light of this, you would be able to attend such an evidence session.

I would therefore ask you to consider the matter, and respond to me with your view. Any evidence session would of course be arranged well in advance to allow time for full preparation for all concerned.

Yours sincerely

Roseanna Cunningham MSP
Convener

Legal Advice:

The first thing to consider is whether or not Rule 7.5 applies - that is to say, are there active legal proceedings which might be referred to in hearing the representations that Mr. Maguire and his delegation wish to make to the Health Committee. It is now clear from Mr Maguire's letter that what Mr Maguire is seeking to establish by the Court proceedings is this - in "the circumstances of someone dying from Hepatitis C from infection under the care and treatment of the NHS, is the State is obliged to hold an Inquiry" by virtue of Article 2 of the European Convention of Human Rights. He emphasises in his letter that the "issue before the Courts is whether there should be an Inquiry." He goes on to say that "These Court proceedings are not an Inquiry." It is also now clear from his letter that a date for a hearing has not been set and so that in itself renders this case "inactive" for the purpose of the application of Rule 7.5.

However, it was not simply the question of whether or not the case was "active" or "inactive" that was an issue here. It was whether or not issues to be dealt with in the Court case and those which might be aired before the Committee were so intertwined as to have a prejudicial effect on the Court case when it did become active, given that it was then thought that it could become active virtually at any time. The indication in his letter is that it will be some time before a date for a hearing is set.

With regard to the proceedings before the Committee, Mr Maguire advises that "There would be no question of us canvassing before the Committee these cases (the four deaths which prompted the Court case) or the legal arguments in support of an Inquiry." What he says he wishes to air before the Committee is the view that persons who are infected with Hepatitis C and (he advises) have no legal right to an Inquiry, should be afforded an Inquiry for moral and public interest reasons. He sees the Scottish Parliament, and the Committee as a first step, as the proper forum for this view to be aired. I understand that he does not see any proceedings before the Committee as such an Inquiry, rather that they may be the part of the means to achieve that end.

To summarise - Rule 7.5 is not yet relevant, given that the proceedings are not yet active. It is not known when they will become active. That is in the control of Mr Maguire. Even if they become active, the question is whether or not the representations by Mr Maguire and any resulting discussion would "refer to any matter in which legal proceedings are active.....". The Court case is dealing with the alleged right to an Inquiry of someone who has died. It is on behalf of persons who are infected but still alive that Mr Maguire wishes to address the Committee and he agrees that those persons do not have the right to an Inquiry at present. Mr Maguire has given undertakings that there is no question of canvassing before the Committee the cases of the four persons who have died or the legal arguments in support of an Inquiry that will be the subject of the Court action.

The rationale behind the sub judice rule is to ensure that the proper discussion of public affairs does not prejudice court proceedings and thus damage the integrity of the judicial system. Given that purpose of the Court case is stated to be to seek to establish an obligation on the part of the State to hold an Inquiry and it would only be at a subsequent Inquiry that the facts and circumstances of the case would be looked at, then there would not seem to be, at this time, a legal impediment to hearing Mr Maguire's representations. However, the Committee might like to consider setting parameters within which his representations would be entertained, such as not referring to the cases of the four persons who have died, no reference to the Court case itself or the arguments to be out forward in it.