

Mr Godfrey
HSLA

PRODUCTION AND SALE OF SURPLUS BLOOD FRACTIONS

- for sale
1. I have considered, as requested by Mr Finsberg, the powers available to the Secretary of State, acting through the Blood Products Laboratory, deliberately to over-produce products derived from blood plasma. I agree with the advice Mrs Stockton has given you that section 61(2) of the National Health Service Act 1977 (re-enacting on consolidation a power originally conferred by section 32(1) of the Health Services and Public Health Act 1968) provides - subject to the requirements mentioned in paragraphs 8 and 9 below - the necessary legal authority.
 2. Section 61(1) gives power to sell, give away or otherwise dispose of any goods of which production or manufacture by the Secretary of State is involved in the provision of services under the NHS Act. This allows any surplus to be disposed of in any of those ways but it might not, without more, be considered to authorise the deliberate creation of a surplus for such disposal.
 3. The possible gap is filled by section 61(2) which (with the safeguard of Parliamentary control implied by the necessity for regulations - see paragraph 8 below) permits overproduction in order to create a surplus for disposal.
 4. The only possible objection to what is proposed might arise from the fact that section 61(2) authorises "supply" of the deliberately overproduced goods otherwise than by way of the provision of NHS services but does not actually specify that that "supply" may take any of the forms indicated in section 61(1). As the general principle is that charges must be statutorily authorised it might conceivably be argued that a surplus deliberately created could be disposed of only without charge.
 5. In my view such an objection would rest upon a misunderstanding of the scheme of the Act, in which section 61(2) is subordinate to, and must be read in the context provided by, section 61(1).
 6. Section 61(1) must be read as requiring that the goods disposed of should be of a kind produced for the provision of NHS services, not that the individual items disposed of should have been actually used for those purposes. As applied, for example, to bandages (if the Secretary of State decided to produce them himself for NHS use) it would be absurd to suppose that Parliament intended that he might dispose only of those that had been actually used in the hospitals and not of stocks that might be found to be surplus to NHS requirements. It would be equally absurd and contrary to accepted notions of public economy to interpret these provisions as permitting surpluses arising accidentally to be sold but those deliberately produced for disposal outside the NHS only to be given away without charge.

7. Therefore the statutory powers cover -
- a. the deliberate over-production of goods of a kind produced or manufactured for NHS purposes, so as to create a surplus for disposal;
 - b. disposing, by way of sale, gift or otherwise, of surplus stocks of such goods, whether the surplus has arisen accidentally or as a by-product of the manufacture of other goods or has been deliberately produced for that purpose.
8. These powers are conferred only subject to safeguards (referred to in your minute of 30 December). The first is that the deliberate overproduction of surpluses for disposal is limited to goods of a kind specified in regulations. Parliamentary control over the necessary statutory instruments can ensure, for example, that there is not unfair State competition with private industry.
9. The second safeguard is that under section 62 the Secretary of State must be satisfied that the disposal of surpluses outside the NHS will not to a significant extent interfere with the performance of his duty to provide NHS accommodation or services or disadvantage actual or intending NHS patients at health service hospitals.
10. If those safeguards are observed there is therefore no legal objection to what is proposed.

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