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From: Gerard Hetherington

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Grateful for comments.

The submission of 14 June re  
additional funding for the  
Macfarlane and L. Ten Trusts is  
with you for a decision.

GRO-C

## SELF-SUFFICIENCY IN BLOOD PRODUCTS

### Issue

This note updates you on action taken since my submission of 26 May 06 [attached for ease of reference at **Annex A**] and provides advice on the issue of a Public Inquiry in relation to contaminated blood products and hepatitis C.

### Documents

#### a) Handling of documents returned by solicitors.

SOL have arranged for independent Counsel to list the recently returned documents and undertake an initial evaluation of their contents as set out in the letter of 8 June 06 from Ministers to Lord Jenkins. A report from Counsel is expected imminently.

#### b) Other documents, including those destroyed.

Following HIV and hepatitis C litigation procedures in the 1990s, we know that various papers were destroyed in error, following an internal audit of events surrounding this loss of papers. We have identified an additional member of staff who is expected to start work next week, to identify and analyse all the papers currently available, including the very large number recently released in Scotland. We anticipate that preparing a comprehensive inventory and report of all the papers may take up to six months (a recent similar, incomplete, exercise in Scotland took nine months).

### Demand for a Public Inquiry

There has been considerable pressure from haemophilia patient groups for a Public Inquiry. They are supported by Lord Morris and others in the House of

Lords. The Scottish Parliament Health Committee (SPHC) decided in April 06 to call for a full judicial Inquiry.

We have now received a copy of the response to the SPHC from the Scottish Minister for Health. This is attached at **Annex B**, and firmly rejects the call for an Inquiry.

The patient groups continue to press for higher levels of compensation and believe an inquiry could help to achieve this by demonstrating the Department was culpable.

The pros and cons of holding a Public Inquiry are set out below:

### **Pros**

- It would show a high level response to calls from affected parties and often the general public that the issue is being dealt with seriously.
- Interested parties and pressure groups view it as an appropriate and adequate response. It affords them the chance to submit evidence in the full glare of public scrutiny and to see the evidence of others. Experience suggests that the haemophilia groups are unlikely to be satisfied simply by offering increased payouts through the Skipton Fund set up in 2004 to provide ex gratia payments to hepatitis C sufferers.
- It ensures transparency.
- It minimises the risks of a Judicial review of whatever other action the Department might take and avoids the impression that would create of being dragged in to a "proper" investigation. If some sort of investigation is appropriate, this is the gold standard and is seen to be that.
- It is considered as independent and impartial if properly constituted and with satisfactory terms of reference.
- It (usually) diminishes calls for other scrutiny from MPs, the Press and interested Parties.
- If Article 2, the Right to Life, of the European Convention on Human Rights 2001 is thought to be engaged, then it is an appropriate and adequate response. It pre-empts any Court petition by families of the deceased and gives them a fair hearing. (Arguably this could be engaged as a number of haemophiliacs infected with hepatitis C may have died as a result of the infection, although further legal advice would be required in view of the time periods involved.)
- It creates a statutory framework under the Inquiries Act 2005 and the proceedings will follow the requirements of that Act, and thus will meet Parliament's standard of being comprehensive where issues of public concern are involved.

- It enables the Chair to compel witnesses to attend and for evidence to be provided.

### **Cons**

- A Public Inquiry under the Inquiries Act is an expensive, time consuming and labour intensive undertaking. Costs are difficult to assess in advance and fully control. Examples of the costs of past Inquiries include: Bloody Sunday - eight years so far at an estimated cost of over £120 million; Stephen Lawrence - two years, over £4million; BRI-3 years, over £14 million; Shipman over 4 years at a cost of £21 million; Alder Hey 14 months at a cost of £3.5million; Victoria Climbié 2 years at a cost of £3.8 million.
- It takes time to plan and set up and is not a quick response to the problem it examines.
- Public Inquiries often raise expectations for interested parties that cannot be met. They can be seen at the outset as the vehicle to provide all the answers and settle the worries of those concerned with the issues; they rarely manage to do this.
- It raises the profile of the problem it seeks to address significantly. It engages the Press and Public interest at the highest level. Parliament also becomes engaged as the establishment of the Inquiry has to be notified to Parliament, and a Report on its conclusions laid before Parliament
- It creates a perception that there is a national problem that needs to be addressed, and one that has not been, or cannot be, addressed by local action. The key period in relation to hepatitis C was the 1980's – there is not an ongoing issue. The Skipton Fund has already been established, in 2004, to make ex gratia payments to sufferers.
- It would set a precedent: DH is regularly being pressed to hold Public Inquiries, for example by Sarah Harman and Ann Alexander on issues which they regard as arising from dangerous and untoward incidents.
- If Article 2 of the Human Rights Act is not engaged in making the case for the Inquiry it is an overreaction not a proportionate response.
- It uses valuable resources in terms of workforce (those servicing the Inquiry and giving evidence) that is removed from normal duties.
- We do not consider the UK was negligent or at fault in its handling of the introduction of hepatitis C safety screening measures.
- Parallels between the UK experience and the position in Ireland, where a large compensation settlement was made, are not valid because there was

evidence of negligence by the Irish Blood Service (delayed introduction of the screening tests).

- DH did have the power to conduct an Inquiry such as in Ayling, Neale and Kerr/Haslam- which became known as a "modified form of private Inquiry". Such an Inquiry can still be established under section 2 of the 1977 NHS Act, but the Secretary of State can no longer delegate powers of compulsion to the Chair, as the Inquiries Act 2005 repealed section 84 of the 1977 Act that created those powers. This could be seen by interested parties as undermining the value.

- Early release of all the relevant papers (see Documents a) and b) above) under FoI could provide much of the information sought by interested parties.

On balance therefore, **we consider an inquiry to be disproportionate and not justified in the circumstances.** This is in line with the views of the Scottish Minister, and we will continue to keep in close touch with officials in the Devolved Administrations, including Scotland.

#### Other points

*This submission is  
with Gov at present.*

MS(PH) will be meeting the Chairman of the Macfarlane and Eileen Trusts (Peter Stevens) at his request to review the work of the Trust and to consider their proposal for further funding [Brian Bradley's submission of 14 June refers attached at **Annex C**]. The Trusts are DH funded registered charities set up to provide financial aid for haemophiliacs and others infected with HIV as a result of receiving contaminated blood products.

Although justification for an increase is not strong, one option would be to consider a partial uplift in their funding. Though this might be seen as going some way to offset pressure from haemophiliacs for any inquiry, it would not deal directly with the hepatitis C issue. Some of those haemophiliacs infected with HIV are also infected with hepatitis C and so would benefit from increased payouts by the Macfarlane Trust. However other haemophiliacs – the majority – do not have HIV infection and so would not benefit: indeed such an approach could increase pressure for more to be done in relation to hepatitis C payouts.

#### Recommendations

That Ministers

- Note action taken to date in relation to papers held;
- Note the pros and cons of holding an inquiry and resist calls for an inquiry.

A draft note for Ministers to send to SoS informing her of developments is attached at **Annex D**.