

Witness Name: Andy Kerr

Statement No: WITN5753003

Exhibits: N/A

Dated: 28 July 2022

INFECTED BLOOD INQUIRY

WRITTEN STATEMENT OF ANDY KERR

I provide this statement in response to requests under Rule 9 of the Inquiry Rules 2006 dated 12 April 2022 and 5 July 2022.

I, Mr Andy Kerr, will say as follows: -

Section 1: Introduction

1. Please set out your name, address, date of birth and any relevant professional qualifications relevant to the duties you discharged while Minister for Health and Community Care (October 2004 - May 2007).

1. Andrew Palmer Kerr,

GRO-C

GRO-C 1962,

BA (Hons) Social Sciences

2. Please outline your employment history, including the various roles and responsibilities that you have held throughout your career, as well as the dates.

2. My working life began as an elected fulltime officer of the National Union of Students Scotland (Deputy President) from there I went on to work in local government as a Research and Development Officer with the responsibility of preparing in house services for competition, I then went on to work as a Quality Assurance consultant implementing ISO 9000 quality management systems, I returned to local government as a senior manager within a large Direct Labour Organisation.

3. I was then elected to the Scottish Parliament and served as the Convener of the Transport and Environment Committee from May 1999 until November 2001, whereupon I became the Minister for Finance and Public Services of the Scottish Executive until October 2004, whereupon I was appointed as the Minister for Health and Community Care until May 2007.

4. From September 2007 until May 2011, I was a Finance and Economy Spokesperson for the Scottish Labour Party in the Parliament. During this period, I studied for and graduated with an MBA in 2010.

5. Following my time in Parliament I became the Chief Executive Officer of a large social care provider, and I am now currently acting as an Executive Advisor in the Social Care sector.

6. My Ministerial roles were as follows:
 - a. Oct 2004 to May 2007 Minister for Health and Community Care, Scottish Executive

 - b. Nov 2001 to Oct 2004 Minister for Finance and Public Services, Scottish Executive

3. Please describe, in broad terms, your role and responsibilities as Minister for Health and Community Care and identify any particular responsibilities you had for matters relating to blood and blood products and for the provision of financial support for those infected as a result of treatment with blood or blood products.

7. The role was a wide one and covered matters such as NHS reform, NHS primary care, community care and acute services, the performance of the NHS, patient services and patient safety, GPs and primary care, dentistry, community pharmacy, community optometry, community audiology, mobile and tele healthcare, health improvement and protection, quality and improvement and the NHS estate.
8. The role encompassed the SNBTS, which was part of NHS National Services Scotland and accountable to the Scottish Ministers. I did not have day to day involvement with the SNBTS but undertook an annual review of NHS NSS.
9. I was also responsible for the Skipton Fund which was established on a UK wide basis with input from Scottish Ministers and civil servants.

4. Please identify by name the other ministers within the Scottish Government during your time in office as Minister for Health and Community Care and identify which minister or ministers had particular responsibility for matters relating to blood and blood products and for the provision of financial support for those infected as a result of treatment with blood or blood products.

10. During the period October 2004 - May 2007 the Scottish Government (then known as the Scottish Executive) was led by First Minister Jack McConnell (now Lord McConnell). I believe there were 11 other senior Ministers, including the Deputy First Minister who was first Jim Wallace (until 2005) and then Nicol Stephen. There were a number of deputy ministers.
11. Rhona Brankin was Deputy Minister for Health and Social Care from October 2004 to June 2005. Lewis MacDonald was Deputy Minister from June 2005 to 2007.

5. Please set out your membership, past or present, of any committees, associations, parties, societies or groups relevant to the Inquiry's Terms of Reference, including the dates of your membership and the nature of your involvement.

12. None.

6. Please confirm whether you have provided evidence to, or have been involved in, any other inquiries, investigations or criminal or civil litigation in relation to human immunodeficiency virus ("HIV") and/or hepatitis B virus ("HBV") and/or hepatitis C virus ("HCV") infections and/or variant Creutzfeldt-Jakob disease ("vCJD") in blood and/or blood products. Please provide details of your involvement and copies of any statements or reports which you provided.

13. No involvement.

Section 2: Those infected and affected by contaminated blood

7. What contact did you have with those either infected or affected by contaminated blood during your time as Minister for Health and Community Care? You may find [SCGV0000044_024] of assistance.

44-I do not have access to my diary as I am advised by the Scottish Government that this is unavailable. I know that a meeting was held on 1st February 2005 with the Scottish Haemophilia Group, I don't recall the detail of what was discussed. My recollection is that I had other contact with those who were infected or affected but I cannot recall precisely when or the nature of that contact.

8. What was your understanding of the needs of this community?

15. My understanding was that the community was seeking answers to what had happened to them and/or their loved ones, to find out how it had happened, whether there were mistakes made and for assurance that any mistakes

would not be repeated, an apology and recognition of what has happened and lastly, financial support where appropriate.

Section 3: Skipton Fund

9. What was your understanding as to the basis for setting the Skipton Fund payments at the level they were set? You may find [SCGV0000193_008] of assistance.

16. My understanding was that an expert group under Lord Ross was established by the Scottish Executive and made recommendations to Ministers. It is also my recollection that subsequent discussions were held at cabinet level to agree the final details of the scheme. The report was published in March 2003, and the discussions will have taken place when I was the Finance Minister, a role I held from November 2001, I was subsequently Health Minister from October 2004 until May 2007.

9A. In your draft statement you state that, 'The report was published in March 2003, and the discussions will have taken place when I was the Finance Minister, a role I held from November 2001'. Please provide details on the discussions that took place within the finance team whilst you were Finance Minister in regard to the basis of setting the Ross Report payments and Skipton Fund payments at the levels they were set.

17. To my recollection the discussions were not substantial but were a normal response to any cabinet paper with financial implications. It was normal for the Department of Finance through the Finance Minister to comment on any cabinet paper with spending implications.

18. My task was to effectively steward public funds and I was in the position as Finance Minister to make comment on matters such as these. I expressed concerns regarding the scheme in terms of setting precedents, that we needed to obtain the agreement of the DWP, and I expressed the view that clear parameters need to be set and adhered to once agreement had been reached.

10. What role did you or to your knowledge, your officials, have in setting the policies and procedures of the Skipton Fund? You may find [DHSC6264733] of assistance.

19. To my understanding Scottish civil servants were tasked with and directly involved in working with their UK counterparts to establish the scheme and were reporting back to Ministers on progress and exchanges between Ministers in UK and devolved administrations took place on the generalities of the scheme. My direct involvement was to press for the establishment of the scheme which seemed to take too long and the appeals procedure, which was too narrow in terms of how appeals were conducted. As the letter referred to in the question records, I had raised these issues with John Reid when I met with him in March 2005. I also raised the issues on other occasions and specifically in correspondence with Patricia Hewitt, towards the end of 2005, as noted in the documents referred to in question 12.

11. The Inquiry understands that you were opposed to the amendments proposed by the Scottish National Party to the Smoking Health and Social Care (Scotland) Bill extending eligibility for the Skipton Fund to include to relatives and dependants of those who had died. Please explain why you were opposed to these amendments and whether they were incorporated into the Bill when it was passed. You may find [DHSC0006798_046], [DHSC0004185_018] and [DHSC0006888_044] of assistance.

20. The focus of the Scottish Executive as a whole, and my focus, was to provide support to alleviate suffering and hardship as best as possible and to support changes that would help those living with the condition. The Skipton Fund involved the making of ex gratia payments and, although in the view of Ministers, the Scottish Executive did not have legal liability to make those payments, it was acknowledged that there was a need to provide support and assistance.

21. The Scottish Executive (including me as Minister for Health and Social Care) believed that the amendments would undermine the Scotland led UK Skipton scheme, this could have resulted in Scotland losing the agreement that the

Skipton Fund payments would not be offset against benefit entitlement, and there was the chance that Scotland would have needed to opt out of the Skipton Fund and essentially start again; it would have required Scotland to set up a new fund with the commensurate delay and with no agreement that social security benefits would not be reduced for those in receipt of payments from the fund.

22. The amendments proposed by the SNP were not agreed by the Parliament but the concerns regarding those who had died since the announcement on 29th August 2003 and who may have had an expectation of support were addressed. The families of those who died between the announcement and the legislation, which established the scheme, coming into force were entitled to the payment their relative would have received during the interim period.

11A. In your draft statement you state that, ‘The Scottish Executive (including me as Minister for Health and Social Care) believed that the amendments would undermine the Scotland led UK Skipton scheme, this could have resulted in Scotland losing the agreement that the Skipton Fund payments would not be offset against benefit entitlement’. Please address the following:

What was the factual basis of your belief that amendments to the Smoking Health and Social Care (Scotland) Bill could have resulted in Scotland losing the agreement that the Skipton Fund payments would not be offset against benefit entitlement?

23. I cannot recollect a precise moment when this matter was raised with me, but it did begin to surface when there were discussions in the Health Committee and the Parliament about a wider scope for the scheme than the one agreed by the 4 nations. It was just an understanding that if we were to step outside the 4 nation agreed Skipton Fund then the derogation would no longer exist and would need to be sought, with no guarantees, for any new and different Scottish scheme.

24. [SCGV0001068_161] is a note sent to me on the 27th April 2005 regarding the appeals process and indicates that a separate process “could lead to

increased administration costs and a decrease in the quality of service provided to those seeking payments.

25. In my letter to the Secretary of State for Health, [DHSC0006798_046] dated 2nd June 2005, I described the amendments presented to the Health Committee of the Parliament “as a very unwelcome development which seriously risks undermining the existing UK Skipton scheme” and the “damaging impact these could have.”

26. In my letter to the Convener of the Health Committee dated 6th June 2005, [DHSC0004185_018], I state that if we were to unilaterally change our approach that this “would raise issues as to the treatment of a Scottish scheme within the national security system.” In addition, I stated, “an important aspect of the practical working of the scheme is that payments are not taken into account for the purpose of assessing social security entitlement. This is achieved through regulations which are made by the UK government specifically for this purpose - included in the Social Security (Miscellaneous Amendments) (No 2) and (No 3) Regulations 2004. Social security is, of course, a reserved function. If significant changes are made to the Skipton Fund which in effect create a different scheme in Scotland, I would be concerned that the existing regulations would no longer apply, and there would be no guarantee that new regulations could be made to apply to Scotland only. This would have the potential to significantly disadvantage all claimants.”

Did the Department of Health express any views in regard to your belief that amendments to the Smoking Health and Social Care (Scotland) Bill could have resulted in Scotland losing the agreement that the Skipton Fund payments would not be offset against benefit entitlement. If so, please provide details.

27. No not to my knowledge and I do not recollect this being raised by UK Ministers at any meetings or in correspondence. In addition, I do not recollect any views being expressed to me by the Department of Health.

12. What steps did you take following the passing of the Smoking Health and Social Care (Scotland) Bill to inform the other UK Administrations about the outcome and seek parity? You may wish to consider [DHSC0041162_019], [DHSC6539091], [SCGV0000193_031], [SCGV0001090_121] [SCGV0001066_026], [SCGV0001090_123] and [DHSC6701644].

28. I corresponded on several occasions with Ministers of other UK administrations, as evidenced by the letters noted in the question and officials were in regular contact with their counterparts. I recommended the UK wide adoption of the amendment accepted by the Scottish Parliament for those who had passed away between the announcement of the scheme and the enactment of the scheme, this was subsequently adopted by the other administrations.

Section 4: Skipton Fund - Appeals Panel

13. In an email chain dated 20 October 2004 [DHSC0004510_060] Lindsay Blakemore states that “ Mr Kerr has seen your submission of 11 October regarding the above and has indicated that he is happy for Scottish interests on the appeals panel and the Skipton Funds Board of Directors should be secured through the HD Public Appointments Unit”. [Mr Stock’s submission of 11 October 2004 is at SCGV0001085_016].

Please describe the extent of your involvement in the recruiting or selecting of members to the Skipton Fund Appeals Panel. You may wish to consider [DHSC6700811] when providing your answer.

29. To the best of my recollection, I had no involvement in the direct recruitment or selection of members to the Skipton Fund Appeals Panel with the exception of trying to get the process undertaken more timeously and offering to support recruitment process more generally.

What input, if any, did you or your department have in designing the Skipton Appeal Panel processes and procedures and in particular the limitation on

holding oral hearings. You may find [DHSC6700811], [DHSC5427334], [SCGV0001066_085] and [DHSC0041159_177] of assistance.

30. To the best of my knowledge officials were involved, alongside UK counterparts, in the practical establishment of the scheme. Once the scheme was agreed the establishment and management of the scheme was an operational matter for civil servants, informed by legal advice on the process. I directly corresponded with the Secretary of State to express my concern at the time taken to establish the Fund and the fact that only written evidence would be considered at the appeal stage. I suggested that consideration should be given to allowing those who were making appeals to be heard as well as providing written evidence.

13A. In your draft statement, you state that, ‘I had no involvement in the direct recruitment or selection of members to the Skipton Fund Appeals Panel with the exception of trying to get the process undertaken more timeously and offering to support recruitment process more generally.’ Please provide details on how you “offered to support the recruitment process more generally” for the Skipton Fund Appeals Panel.

31. The offer of support related to advertising and promoting the recruitment process in Scotland and was primarily designed to get things moving regarding the establishment of the Appeals Panel. I was also keen to ensure Scottish candidates came forward.

Section 5: Calls for a public inquiry

14. Please outline how and by whom you were briefed on the issue of calls for a public inquiry when you first took office in October 2004.

32. I cannot recollect such a briefing on first taking office but that is not to say that it did not happen. I was aware (before taking office as Minister for Health and Social Care) of the calls for a public inquiry more generally and the position being adopted by the Scottish Executive including by previous Ministers.

15. A member of the public wrote to you on 7 October 2004 asking you to reconsider your stance that a public inquiry was unnecessary [DHSC0038529_074] and on 9 November 2004 your private secretary, Lindsey Blackmore, responded [HSOC0011118].

a. Please describe, to the best of your recollection, your exchange with the member of public at the 'old parliament building', referred to in the email. Did you call them a "troublemaker"? If so, why?

33. I have no recollection of such an exchange. I would not have expressed a view at that time to a member of the public and I do not know how an exchange could have taken place as described i.e., the outdoors and the hallway. I would certainly never have used the term "troublemaker."

b. Did you contribute to the response letter to the member of the public and if so, what were your contributions? Documents [DHSC0038529_072] and [DHSC5351264] may assist in answering this question.

34. To my recollection I did not.

c. [DHSC0038529_072] is an email exchange between UK Department of Health official Richard Gutowski and Scottish Health Department official Bob Stock. Mr Gutowski states: "We need to move together on this. I would not want you releasing papers we refused to for whatever reason." Please explain, to the best of your ability, why Scotland and the UK Department of Health liaised closely in respect of the issue of (i) providing documents to a member of the public and (ii) a public inquiry.

35. I was unaware of this exchange and would not support any restrictions on the release of information for reasons of liaison or moving together but I do understand why civil servants would keep in touch about such matters. It also strikes me that Mr Bob Stock did not sign up to, endorse or respond to the statement "We need to move together on this. I would not want you releasing papers we refused to for whatever reason."

36. That said I was not party to this exchange, but I was clear as a Scottish Minister that we would make our own decisions.

16. In reference to your letter to Euan Robinson MSP dated 11th November 2004 [MACK0002352_002], please explain why you considered that “there is nothing to be learned from a public inquiry that has not already been learned.” Please set out what investigation, analysis or enquiries were undertaken by you and/or your department before you reached that conclusion.

37. The letter restates the then position of Scottish Ministers. All of the reports and meetings my colleagues and I had on this matter led the Scottish Executive to this conclusion.

38. I always made it clear internally that if there came a time when we felt that the position being adopted was wrong then we should acknowledge that and move to a public inquiry, for example, if there was evidence that actions were wrong and/or covered up then then we should acknowledge that and move to a public inquiry.

39. Specifically, I would reference findings of the Scottish Executive Health Department Report of October 2000, Hepatitis C and the Heat Treatment of Blood Products for Haemophiliacs in the Mid 1990's [GGCL0000010], the position adopted by Susan Deacon MSP as set out in a letter to Mr Wright dated 24th October 2000 [WITN2287026], the evidence provided to the Health and Community Care Committee on the 14th March 2001 by the SNBTS [WITN2287027], the Report of the Expert Group on Financial and Other Support dated March 2003 and the briefing notes, advice, and letter responses I was provided with as Minister.

40. The matter was also subject to media reporting and parliamentary debates and questions.

41. The key factors for me were the advice and information I received in relation to the prevailing knowledge at the time i.e., the 1970s and 1980s. At the time

of the call for a public inquiry to which I had to respond, we were looking back several years to a time when – as I understood it – knowledge of blood borne viruses was much more limited, medical opinion was not in any way settled, there was no consensus at the time as to the health effects or risks associated and no way for effective screening to take place. I believed that the actions taken by people at that time reflected what was considered appropriate at that time. There was an evolution over time as knowledge and evidence grew.

42. The SEHD Report of October 2000 had examined the issue of the heat treatment of blood products and whether haemophiliacs might have been exposed to the risk of infection longer than they should have been. It found that there was no test that would have identified the presence of the virus and that heat treatment could have rendered the blood and blood products unusable. Ultimately, once a suitable treatment was identified it was implemented by SNBTS as soon as possible. There was no evidence of any policy of Haemophilia Centre Directors to deliberately mislead patients about the risk of hepatitis. This was a substantial report and was part of the package of information that informed my view that there was no evidence of fault.

17. Please consider the following documents: [HSOC0009030], [MACK0002334_001], [SCGV0000262_179] and [SCGV0000040_173].

a. Were you already aware of the documents referred to in the Sunday Herald newspaper article dated 23rd January 2005? If so, please explain when and how you came to be aware of the documents.

43. I was aware that further documents would be released under FoI as promised by the Scottish Executive previously and by myself.

44. I cannot recollect precisely how I became aware of the documents.

b. In your letter to Shona Robison dated 25th January 2005, by reference to paragraph 4, what criteria did you use to assess what constituted new evidence?

45. I based my conclusion upon briefings and advice from civil servants. I asked questions in relation to whether there was anything in the release of documents that changed the position, but I did not have the capacity to read the documents or indeed the medical expertise to fully comprehend their content.

18. On the 1st of February 2005, you attended a meeting with the Scottish Haemophilia Groups Forum. Document [SCGV0000044_024] is a briefing sent to you in advance of the meeting, providing lines to take, including those relating to a public inquiry. Did you agree, at that time, that the information contained in the Sunday Herald article did not constitute new evidence? If so, why? Did you ever cause any further investigation or re-consideration of the contents of the Scottish Executive Health Department Report of October 2000? If not, please explain why.

46. As far as I can recollect, I discussed the matter of new evidence with officials who advised that there was no new evidence that would lead to a reconsideration of the position being taken and I was content with the advice received and, on that basis, I did not seek any reconsideration of the October 2000 Report.

19. In your statement to this Inquiry [WITN5753002], you state: "The Scottish Government including myself always took the view that should new evidence arise then that should be considered and that remains my position today." (Para 4). Please expand upon what would, in your view, have constituted new evidence.

47. New evidence would have been something that would cause me to alter my view about NHS liability, provide a different explanation of the events or suggested that something new could be learned that would change things going forward. For example, if new evidence was presented which pointed to the fact that the NHS could have taken action earlier, that it could have known that the blood was contaminated and that the blood could have been tested for and the virus screened out earlier.

20. Documents [DHSC5363190] and [DHSC6264733] refer to a meeting you attended with the UK Secretary of State for Health on 23rd March 2005.

a. To the best of your recollection, please describe what discussion took place regarding calls for a public inquiry.

48. I cannot recollect the discussion in any detail but my overriding concern at the time of the discussion was the administration of the Skipton Fund, the legal and administrative arrangements and the appeals procedure, issues which were being brought to my attention as Minister.

b. In your view, was the following statement accurate at this time: “there is therefore some pressure in Scotland for rapid progress and I suspect this is why Andrew Kerr raised this with you, at this stage.” Please explain your answer.

49. In my view the matter of “some pressure in Scotland for rapid progress” relates to the delay in setting up the fund, the legal and administrative arrangements and the appeals mechanism, in my opinion the statement is only accurate in this regard. It is not in my view about the issue of a public inquiry.

c. What was your view, at the time, of the reasons provided by the Secretary of State in his letter [DHSC6264733] not to hold a public inquiry?

50. I had come to my own conclusion on the matter of a public inquiry and the Secretary of State stated his position with which I concurred.

21. On 10th May 2005, you were due to appear before the Scottish Health Committee to answer questions on the issue of a public inquiry [SBTS0000362_021]. A briefing in advance of the appearance was provided to you [SCGV0000263_140] on 12th April 2004.

a. What was your view of whether the internal investigation commissioned by Susan Deacon “was not sufficiently independent” (p.2 paragraph 2)? Please explain your answer.

51. Whilst I can appreciate the view being expressed, I was content with the report and its findings. The report set out a clear methodology for evidence gathering and then drew upon that evidence to provide the group's view. The report references the documents used and the papers were made available for viewing with some exceptions due to patient confidentiality.

b. Did you meet with an official from the Department of Health (UK) as suggested in paragraph 7? If so, please outline, to the best of your recollection, what discussion took place.

52. My recollection is that I did not, such a meeting would have not been relevant to the position of the Scottish Executive. I cannot confirm as my diary is not available.

c. In reference to the list of 'Weaknesses/Threats' of holding a public inquiry, provided at p. 10, what were the main reasons for your decision not to hold an inquiry and why?

53. I always made it clear to officials that if we felt that the position being adopted on the matter of a public inquiry was wrong then we should acknowledge that and move to a public inquiry, for example, if there was evidence that actions were wrong and covered up then then we should acknowledge that and move to a public inquiry.

54. The list of weaknesses and strengths set out in the note were not my key considerations.

55. Specifically, I would reference the findings of the Scottish Executive Health Department Report October 2000 Report, the position adopted by Susan Deacon MSP as set out in a letter to Mr Wright dated 24th October 2000, the evidence provided to the Health and Community Care Committee on the 14th of March 2002 by the SNBTS, the Report of the Expert Group on Financial and Other Support dated March 2003 and the briefing notes, advice, and letter responses I was provided with as Minister.

56. The key factors for me were the advice and information I received in relation to the prevailing knowledge at the time i.e., the 1970s and 1980s. At the time of the call for a public inquiry to which I had to respond, we were looking back several years to a time when knowledge of blood borne viruses was much more limited, medical opinion was not in any way settled, there was no consensus as to the health effects or risks associated with the condition and no way for effective screening to take place and I believed that the actions taken by people at that time reflected what was considered appropriate at that time.

57. The SEHD report of October 2000 had examined the issue of the heat treatment of blood products and whether haemophiliacs might have been exposed to the risk of infection longer than they should have been.

58. In terms of the strengths these were matters which needed to be balanced. Spending public funds to reduce the number of FOIs or PQs is not an appropriate consideration, calling an inquiry just to give an impression of transparency is not an appropriate consideration.

59. Similarly, many of the weaknesses are not in my view appropriate considerations either, such as the impact on the Bill, the reserved and UK dimensions, the impact on the UK Government, and the financial considerations.

60. In summary the strengths and weaknesses set out in the document were not my primary considerations in reaching my decision on the matter of a public inquiry.

d. Please explain why you withdrew from appearing before the Health Committee on 10th May 2005. Documents [SCGV0000263_065] and [SCGV0000263_020] may assist.

61. On the basis that there was an ongoing judicial review process and that I would be limited in what I could say, and I had concerns that I might inadvertently impact the judicial review process, which I wanted to avoid.

22. Following a further invitation from the Health Committee to give evidence before it on the issue of a public inquiry, you were provided with an additional briefing dated 22 August 2005 [SCGV0000263_020]. On page 2, paragraph 5 it states that there were documents that contained “some sensitive issues, particularly relating to the introduction of testing which do not reflect well on the Government of the 1980s as there are arguments presented on the grounds of cost [...] despite pleas from SNBTS [Scottish National Blood Transfusion Service] to introduce tests as a moral obligation to patient safety”. It was stated that these would “provide the [Haemophilia] Society with just cause to call anew for a public inquiry”.

a. Did you have sight of these documents? If so, please provide further detail as to what was contained within these documents, specifically what arguments were presented.

62. I did not have sight of this briefing as verified by exhibit [SCGV0000263_021] which is a copy of document [SCGV0000263_020] with a handwritten annotation “draft not sent”. The advice I did receive is exhibit [SCGV0000263_010].

b. At the time, did you think the documents should or should not have been disclosed? Were they eventually disclosed?

63. My view was that we should release all documents possible under the FoI legislation. As to whether they were released I do not know but I note the recommendation from the legal team to release.

c. What was your understanding of why the documentation was considered to “place the Secretary of State for Health, Patricia Hewitt and colleagues in some difficulty?” (Paragraph 7).

64. As noted, I had not seen the note until it was provided to me by the Inquiry. From reading the note now, my understanding is that the UK Government had presented arguments against testing on the grounds of costs.

d. What was your understanding of why “Embarrassment and eventual claims for compensation could result from the release of this documentation.”

65. From reading the note now, and I have no recollection of seeing the note at the time, my understanding is that if there were delays to testing on the grounds of costs as opposed to clinical need, then this may present a liability issue.

e. Please outline what consideration you gave, if any, to the Scottish Health Committee conducting its own inquiry, as suggested at paragraph 12. Please provide the identity of the ‘Special Advisors’ referred to and their role in respect of public inquiry decision-making.

66. I did not see [SCGV0000263_020] and I cannot recall that matter being given consideration at that time. However, I was always aware of the possibility of a committee inquiry; I had previously been chair of the Transport and Environment Committee and had conducted such an investigation when I held that position. There were a variety of special advisors to me as Minister who would provide advice and work across the political spectrum. I recall Derek Munn and Jeanne Freeman being advisors and they would debate issues and give advice, but I cannot be sure what, if any, advice they gave me on this issue. In this regard exhibit [SCGV0000263_016] may be relevant. This exhibit is an email chain which contains comments from the officials assisting me. It is noted that they did not have authority to make recommendations to me in relation to an inquiry and so would not do so.

f. Did you immediately agree with the advice at p7 to decline the invitation to appear before the Health Committee, or did further discussions take place before a decision was made? Please explain your answer.

67. I did not contest the advice given by the legal team provided at paragraph 6 of the advice note to me [SCGV0000263_010] dated 24th August 2005 and no further discussions took place.

23. Document [DHSC0200103] is a submission from Department of Health (UK)'s William Connon to the Private Secretary of the Minister for Public Health, Caroline Flint, dated 8th December 2005, in which Scottish Executive representative Sylvia Shearer is copied in. At paragraph 4, Mr Connon states: "The Scottish Executive plan to release a significant volume of material which, they believe, will allow their Minister to say that he has met a commitment he made to Scottish representatives of the Haemophilia Society, when he appears before the Scottish Parliament's Health Committee in January 2006 to explain why he still does not wish to hold a public inquiry." Is this an accurate assessment of the position at that time? Did the Scottish Executive release documents in the hope that this would end calls for a public inquiry?

68. No this is not an accurate assessment of the position at that time; the documents were issued in an attempt to be as open as possible to those with concerns and were not a tactic to avoid an inquiry. I did not hold the view that the release of these documents would stop calls for an inquiry.

24. A parliamentary debate took place on 22nd December 2005 following a motion by Caroline Leckie MSP calling for a public inquiry [HSOC0001748]. Please explain why you were not present during this debate, and why the Executive's response was led by your deputy, Lewis Macdonald.

69. I am unable to access my diary as it cannot be provided to me so I cannot advise as to whether I was required to be elsewhere, but I would also state that it was practice to share debates in the Chamber amongst the Ministerial teams. The briefings and support provided to us would however have been identical.

25. During the debate, Ms Leckie stated: "The purpose of such an inquiry would be to achieve independent judgement, because the campaigners and sufferers—rather than the SSP—do not trust the judgments that were arrived

at in private. They want the confidence that would come from an independent judgement.” After the debate, was consideration given to the need for an independent inquiry? If so, what was your view of the issue?

70. My view was that evidence had been provided to me and placed in the public domain regarding the actions taken in the context of the knowledge of blood borne viruses at the time. I was conscious of the debate and lack of agreement at that point and took the view that a public inquiry many years later would not lead to any new conclusions because, in my view, the NHS and the SNBTS had acted on the best available information and science. It was also made clear to me by civil servants that corrective actions had been taken as and when the science was available.

26. The Health Committee convened again on 31st January 2006 to consider the case for a public inquiry [ARCH0002521].

a. During the meeting, Philip Dolan of the Scottish Haemophilia Forum, stated: “[Andy Kerr] seems to be ignoring the new evidence. His comments are an insult--they beggar belief. Are they his views or the views of his advisers?” (p.5). Please explain whether the views you expressed were your own and/or those of your advisers?

71. The civil service provided briefing and advice and I took the position that the advice was persuasive. I asked questions as to whether the new evidence would change the position on the call for a public inquiry. I had little option but to rely on that advice, the advice was from many sources which included special advisors. It is the case that I did not have the capacity (in terms of available time) to review all of the documents nor the capacity in terms of medical expertise to fully understand the content of the documents.

72. As to whose opinions I expressed, they are my opinions based upon the evidence and advice provided to me.

b. In your opening statement to the Committee, you conclude: “I do not believe that there was any deliberate intent to deceive patients. I believe that decisions

then, as now, were taken in the patients' best interests, based on the prevailing level of scientific knowledge that was available." Please explain how you arrived at this conclusion.

73. I arrived at this conclusion based upon the advice and briefings given to me and my scrutiny of that advice. It reflected what I considered to be the prevailing understanding at the time and a consideration of the actions taken, all of this is based upon the information provided to me as a Minister.

c. At Column 2530, p22, you state that the Scottish Executive investigation conducted in 2000 "was not contested. It was accepted." Please explain what you meant by this statement, and in particular, by whom was it accepted?

74. To the best of my knowledge at the time the report had been published and sent to the Committee and there were no concerns raised.

27. On 18th April 2006, the Health Committee voted in favour of a public inquiry [HSOC0002983]. Please explain why the Scottish Executive did not implement this recommendation.

75. The view of the Scottish Executive was that with the SEHD 2000 Report and the Lord Ross Expert Group and the work of the Committee itself in addition to the number of documents issued under FOI, the position remained that a look back of 20 to 30 years to a time when the medical understanding of the situation was not developed, there was a debate in the medical community about the unidentified virus and its potential impact, and no settled view of the precautions that should be taken, would not provide practical lessons that would help those who have suffered and improve how the NHS deals with such issues.

28. There is a handwritten note at the end of [HSOC0002983]. Whose handwriting is it? Was there any discussion with you about the point made in the note? If so please explain what the issues were in relation to (i) what documents had been found, (ii) who had "fixed the terms, made it narrow etc"

of the internal inquiry and (iii) who from the “medical establishment” was against a public inquiry and why this was a relevant consideration.

76. I do not know, and I can confirm that is not my handwriting.

77. There was no discussion, the first time I saw this note was when it was provided to me as part of this inquiry. I cannot recollect these matters being discussed with me, I don't know who Paul Giogrande is - I don't think I have heard that name before.

29. In your letter to Roseanna Cunningham, Convenor of the Health Committee [PRSE0000167] dated 16th June 2006, you set out your reasons for not holding a public inquiry.

a. Please outline what investigation, analysis or enquiries were undertaken by you and/or your department to reach these conclusions.

78. The view of the Scottish Executive was reached with reference to the SEHD 2000 Report, the report of the Lord Ross Expert Group and the work of the committee itself in addition to the documents issued under FOI. The position remained that a look back of 20 to 30 years to a time when the medical understanding of the situation was not developed, and when there was debate in the medical community about the unidentified virus and its potential impact and the precautions that should be taken, would not provide practical lessons that would help those who have suffered and improve how the NHS deals with such issues.

b. The Health Committee subsequently felt that your request to them to reverse their recommendation to hold an inquiry was inappropriate or even “insulting” [HSOC0023748_017]. Please provide your view on this.

79. I would not in any way wish to insult anyone or indeed a committee of the Parliament. What I sought to do was in writing, and without the heat of the committee, to set out my rationale to enable the committee to consider it.

30. Document [MACK0002523] refers to a meeting you attended with solicitor Frank Maguire of Thompsons Solicitors, in which Mr Maguire writes: “We also stated to him that he had missed one of the most important criteria for holding an Inquiry. It is that anyone who has been infected by Hepatitis C and in particular dies from it, they or their family needs to know what happened and how it happened. That is a requirement which is good in itself and is a question of justice. It is also irrespective of how bad conduct may or may not have been or lessons learned. Mr Kerr has no answer to this point and in fact does not seem to accept that this is a valid criterion for holding an Inquiry. That in my view is a reprehensible attitude for a Minister to take.” What is your view of Mr Maguire’s characterisation of your position?

80. It is unfortunate that he felt this way and all I can say is that on matters such as this I was receiving advice from civil servants, advisors and lawyers.

31. To what extent was your refusal to hold a public inquiry because you considered it to be a matter for Westminster, rather than the Scottish Executive?

81. This was not a consideration; my founding principle was and remains the benefit of such an inquiry as previously set out.

32. Following a judicial review of decisions made by the Lord Advocate and Scottish Ministers concerning failure to call inquiries, Lord Mackay concluded that Scottish Ministers’ actions in failing to hold a public inquiry were incompatible with the European Convention on Human Rights. What was your view of this decision? [HSOC0003656].

82. Although I would never wish to act in a fashion incompatible with the ECHR, I don’t consider myself qualified to determine whether or not I was. I was acting upon advice from senior civil servants including their view of the legal position.

33. In her statement to this Inquiry [WITN6648001], Shona Robison MSP states: “I believe that the Scottish Executive at the time were very slow to address issues and to get on the front foot. It appeared to be reacting to information

that emerged at the time rather than being proactive. I believe this left them looking less than transparent at times.” (Para 47). Do you accept or reject this criticism? Please explain why.

83. I do not accept this as an accurate assessment. These were very sensitive issues with real people and real impact, and, in my view, Ministers were at every stage seeking to do the right thing. My view was not fixed in any way but influenced by the advice I was receiving.

34. On reflection, and drawing on the totality of your experience as Minister for Health and Community Care, what is your present view on how the Scottish Executive handled the issue of calls for a public inquiry?

84. I cannot speak for the Scottish Executive, but I do believe that I and others acted on the information and advice available, and that appropriate scrutiny was undertaken.

85. I sincerely believe that if faced with the same situation again I would have done the same thing. In saying that I am also of the view that the easy thing would have been to accede to the call for a public inquiry, in making the decision, I had nobody to protect, not the Scottish Executive, the UK Government, the NHS or the SNBTS; the events in question all took place long before the Scottish Parliament came into existence.

86. A public inquiry would have been popular with my own political party, other political parties, the media and above all the infected and affected and their families but I remain convinced that it would have not have been the right thing to do.

87. At the end of the day, it was a judgment call based upon the advice I was receiving, the views of the campaigners, the committee and the Parliament and I had to take all of that into consideration and come to a conclusion.

Section 6: Protein Fractionation Centre

35. What was your involvement in the decisions and practices of the PFC while it was in operation?

88. I had no involvement in the decisions and practices of the PFC while it was in operation and my only involvement came when the issues began to arise, and the reports and recommendations were brought to my attention.

36. What role did you play in the decision to suspend manufacturing at the Protein Fractionation Centre (PFC) in January 2006? You may find [SCGV0001052_031] of assistance.

89. I have a background in quality assurance and for several years I was a qualified BSI Registered Assessor, and I was working as a professional in the field and therefore the deficiencies identified were serious in my opinion.

90. I was invited by officials to give my view on the briefing provided to me which set out some concerning quality assurance issues, I concurred with the advice and the subsequent decision to suspend production based upon the concerns being expressed by the MHRA.

37. What did you understand to be the cause of the suspension of manufacturing at this time?

91. As above, I have a background in quality assurance and for several years I was a qualified BSI Registered Assessor, and I was working as a professional in the field and therefore the deficiencies identified were serious in my opinion.

92. The rationale for the suspension of manufacturing was that the inspection had caused significant concern. It had raised several serious issues in relation to quality assurance. The SNBTS had acknowledged those deficiencies and had set out an action plan to address them. The problems were significant, they related to product defect reporting systems, validation of holding time for fractionation vessels between cleaning and use and other matters of significance.

38. What role did you play in the decision in June 2006 to close the PFC? Why was this decision taken? Do you recall the arguments for and against the closure? You may find documents [DHSC0041159_261] and [RLIT0001108] of assistance.

93. I was conscious of the serious nature of the decision for all parties involved, patients, staff at the PFC, the SNBTS and the NHS but I had to decide in good faith and to do what I considered to be the right thing to do. The timing of the decision in relation to wider issues was an uncomfortable fact but I could not allow that to detract from the decision-making process.

94. It was a ministerial decision taken by me based upon the advice given to me. The decision taken rested upon the briefings given to me. The finances of the plant had been substantially undermined because plasma had to be purchased and not taken from voluntary and cost-free donations due to vCJD. More fundamentally, other more advanced and higher quality product that provided better outcomes for patients and clinicians alike was available. It was a combination of the fact that a better product was available elsewhere and the significant investment required, which may or may not have provided a longer-term future, which led to the decision.

95. The following document excerpts show how the decision was reached:

- a. [SCGV0001025_032], 22 March 2006 - "the continuing operation of the PFC within the NHS on the present basis would incur significant capital and revenue costs and is not a sustainable option"
- b. [SCGV0001025_004] - "Our assessment is that for patient care, financial and business reasons continued operation of the plant within the NHS is not justified."

96. The plant is relatively outdated and requires investment of around £20 million if it was to continue in operation on a competitive basis.

97. A key implication is that there is now in effect an open market for the supply of blood plasma products to the NHS in Scotland. Previously SNBTS was the single supplier of all products. Having shown there are suitable and in some cases superior products available it would be difficult to return to the previous position.
98. PFC is no longer able to make use of blood plasma from donors in Scotland because of the risk of vCJD transmission through blood. Plasma for processing now has to be purchased from the US and Germany. The clinical and scientific advice I have is that there is no realistic prospect of returning to the use of the UK plasma in the near future.
99. A key role of the plant was to produce blood factor products for haemophiliacs and to enable national self-sufficiency in such products. However, the needs of haemophiliacs are now supplied through recombinant products rather than from plasma-based products. This has removed a significant area of business which has been hard to replace fully.
100. A key issue is that some PFC products in particular intravenous immunoglobins (IVIg) which is the largest volume product are not as technically advanced as the best commercial products. PFC IVIg is freeze dried. The latest available commercial products are liquid and more convenient to use. Most commercial products have an extra virus inactivation step which gives a greater margin of safety.”
101. Options were provided [SCGV0001025_032 and SCGV0001025_004] for and against closure and the ramifications of both, and the decision to close the plant was based upon that and other advice. In terms of keeping the plant open it was clear that the economic case, particularly the issue of scale of production, the time taken to develop product and the fact that there were secure and sustainable sources available did not in my view make the case for the retention of the plant and was not an appropriate way forward.

WITN5753003

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed  **GRO-C**

Dated 28 July 2022