

**THIRD MEETING WITH PHILIP DOLAN, CHAIR OF THE SCOTTISH HAEMOPHILIA FORUM AND COLLEAGUES TO DISCUSS ISSUES WITH REGARD TO THE COSGROVE PUBLIC INQUIRY INTO HEPATITIS C/HIV ACQUIRED INFECTION FROM NHS TREATMENT WITH BLOOD AND BLOOD PRODUCTS**

**HELD IN SCOTTISH GOVERNMENT, VICTORIA QUAY ON TUESDAY 22 JULY 2008**

**Present:**

**The Scottish Government**

Andrew Macleod  
Sylvia Shearer  
Mark Dorrian

Gillian Russell (SG solicitors)

**Haemophilia Representatives**

Philip Dolan

**GRO-A**

Frank Maguire (legal representative.)

**Apologies and note of the Meeting of 15 April 2008**

1. Apologies were received from Mr Chris James, Chief Executive, Haemophilia Society. The minute of the meeting of 15 April was re-circulated and was considered to be an accurate reflection of the meeting.

**Comments from Chris James**

2. As Mr James was not able to attend, Mr Dolan read out an email from Mr James with views on a number of Inquiry matters. The email stated:

- It is essential that the venue for the Inquiry has proper access for all people with disabilities, and that people are able to give evidence anonymously (as with the Inquiry in the Republic of Ireland).
- The Inquiry should cover vCJD and all other blood borne viruses and prions, as well as HIV and hepatitis C.
- The Inquiry should cover all issues surrounding the supply of blood and blood products in Scotland, including licensing arrangements, imports of blood products from the USA and blood donations from prisons and borstals in Scotland.
- The Inquiry should comprehensively cover issues relating to research and consent ethics.
- It is essential that the haemophilia community's costs will be fully funded. If not, an adversarial inquiry could actually be a real problem for us, since it would probably be much more expensive and we would struggle to afford the legal fees.

3. The content of the email was noted and Mr Macleod commented that these issues would be discussed as the meeting progressed. Mr Macleod proposed an agenda covering: the draft Terms of Reference, the letter from Mr Maguire regarding the determination and the proposed inclusion of CJD and all other blood borne viruses.

## **The Scope of the Inquiry**

4. Mr Maguire commented that he recognised that the Scottish Government was doing all it could but he felt that an Inquiry set up under Section 28(1)(a) of the Inquiries Act was confined to Scottish matters. Mr Maguire felt that issues would undoubtedly arise with the Department of Health and possibly the Department of Trade and Industry but witnesses could not be compelled to give evidence. He therefore considered that the Inquiry should be under Section 32(1) of the Inquiries Act – a Joint Inquiry. Mr Maguire went on to state that the State’s obligation went beyond the Scottish Government and encompassed the Westminster Government.

5. Ms Russell disagreed with Mr Maguire’s assertion. She considered that the Inquiry had the power to look at secondary issues. Ms Russell commented that this issue had been fully considered previously and that the Scottish Government was clear that an Inquiry under Section 28 of the Inquiries Act (a Scottish Inquiry) would be able to fully fulfil its remit.

6. Mr Maguire pointed out that Ministers and officials of the Crown could not be compelled to give evidence at a Scottish Inquiry. Ms Russell agreed that this was true but that it was speculative and premature to make the assertion that Ministers and officials of the Crown would not give evidence, if they were even called. Ms Russell added that, at the present stage in the process it was simply not known if Ministers and officials of the Crown would not give evidence voluntarily if called upon to do so by the Inquiry.

7. Mr Maguire commented that the Inquiry would be dealing with events at a time before devolution so it was common sense to expect that Ministers and officials of the Crown would be required to give evidence. Mr Macleod replied that it was for the Inquiry to decide if anyone would be called to give evidence and that a lot of key information would already be held in existing documents.

8. Mr Maguire went on to comment that no matter what the Terms of Reference of the Inquiry were, Lady Cosgrove was still bound by powers of the Inquiry. Ms Russell quoted the text of Section 28(2) of the Inquiries Act “The terms of reference of the inquiry must not require it to determine any fact or to make any recommendation that is not wholly or primarily concerned with a Scottish matter” and reaffirmed that the Inquiry did have the power to look at secondary issues provided those related to matters that were wholly or primarily Scottish matters. Ms Russell commented that it was imperative that those affected were able to explain their circumstances so there could be no obstacles to stop this from happening. Ms Russell emphasised that the Inquiry would be able to range into a range of matters related to the primary Scottish matters and that it had been understood from the outset of considerations for an Inquiry that such matters would arise.

9. Mr Maguire commented that previous experience would lead him to believe that the Department of Health would not voluntarily comply with the Inquiry. Mr Maguire considered that the fact that the Department of Health had already rejected an Inquiry under Section 32 (a Joint Inquiry) was further evidence of this. Mr Maguire proposed that the Scottish Government and Scottish Haemophilia Forum return to Lord Mackay to ensure that the interpretation of his decision had been correct and to ask him if he is content with a Scottish Inquiry or if a Joint Inquiry was required. Ms Russell repeated that she felt that Mr Maguire’s concerns were premature and speculative.

10. Mr Macleod pointed out that the Department of Health did not consider a Joint Inquiry necessary as they considered that they were in a different position to Scotland. Mr Macleod added that the Scottish Government was confident a Scottish Inquiry would be an effective Inquiry which would have the powers required to address the relevant issues.

11. Mr Dolan stated that the Scottish Haemophilia Forum wanted a full, detailed inquiry and that if there were issues that stopped this happening then they had to be resolved. Mr Dolan said that new, significant information had been received by the Archer Inquiry, and this was likely to mean a further delay in producing a report. It was possible that this report would have implications for the Cosgrove Inquiry, and for the position of Department of Health in relation to an Inquiry.

12. Mr Macleod commented that time was tight and that agreement on the final Terms of Reference was required as soon as possible to allow the Inquiry to get underway. Mr Maguire again underlined that he had no criticism for what the Scottish Government was trying to achieve. He would, however, propose to raise his concerns with Lord Mackay. Mr Maguire felt that that a positive statement from the Advocate General was required to clarify the position of the UK Government, and its willingness to cooperate in providing evidence to the Inquiry.

### **The Inquiry Team**

14. Mr Macleod stated that the Inquiry Team was being set up and that, in his opinion, it would be a strong team. They were Douglas Tullis and Louyse McConnell-Trevillion (Legal representation), Maria McCann (Secretary), and Diane Barr (Assistant Secretary). Counsel was also in the process of being appointed. The Inquiry Team would be based at the offices of the Legal Aid Board at 44 Drumsheugh Gardens in Edinburgh. The actual venue for the Inquiry itself had not yet been decided. Mr GRO-A felt that there would be merit in having the Inquiry take place in Glasgow.

15. Mr Macleod again emphasised that he would like to get the Terms of Reference agreed without delay so that the Inquiry could get underway. Ms Russell commented that although the Inquiry was not yet set up in terms of the Act that the Inquiry Team could begin to prepare for the inquiry, for example, by looking at publicly available information.

### **Terms of Reference**

16. Mr Maguire read out some proposed amendments to the Terms of Reference. (Please see ANNEX A) Mr Macleod said that the amendments would be considered in full but that, on first hearing, the Terms of Reference already encompassed most of the proposed amendments. Ms Shearer commented that the amendments provided a lot of explicit detail and specific actions which could narrow the scope of the Inquiry and may therefore be counterproductive as the Inquiry went forward.

17. Ms Russell pointed out that the Inquiry had no power to determine civil or criminal liability so individuals was concerned about what was meant by a reference to being “held to account” as per Mr Maguire’s proposed amendment. Mr Dolan commented that

accountability was very important to many individuals who had suffered.

18. Mr Dolan referred to the email of Mr Chris James – that the Inquiry should cover vCJD and all other blood borne viruses and prions, as well as HIV and hepatitis C. Mr Maguire stated, for the record, that his clients were accounted for within the current remit of the Inquiry. Mr Macleod considered that there would be great difficulty in adding vCJD and all other blood borne viruses and prions to the scope of the Inquiry. He explained that the Scottish Government commitment was to hold an Inquiry into Hepatitis C infections and that this had been extended to HIV as the circumstances and timing are related. However, Mr Macleod stated that extending the Inquiry in this way would significantly broaden its remit and warned that it may make the Inquiry unmanageable. Mr Dolan replied by saying that these issues needed to be tabled at this meeting as there were a number of people who would be strongly in favour of broadening the Inquiry in this way. Mr Macleod said that he would make the Cabinet Secretary aware of their concerns. Mr Maguire added that it was true that the Cabinet Secretary had not agreed to hold such a broad Inquiry and that HIV had been added to the original commitment.

19. Mr Dolan referred again to Mr James's email and, in particular, whether the supply of the contaminated blood would be investigated and whether the issue of what had happened in France would be addressed. Ms Shearer commented that supply was encompassed within the present Terms of Reference. She indicated, that, as far as she was aware, what had happened in France was likely to be outwith the scope and nature of this Inquiry as the circumstances were different but that this would be a matter for the Inquiry.

20. Mr Macleod concluded this part of the discussions by saying that both the Cabinet Secretary and Lady Cosgrove would be made aware of all the issues raised at the meeting. Mr Macleod also recognised that there were a number of sensitivities and anxieties surrounding the Inquiry and that issues such as the anonymity of witnesses were already being considered by Lady Cosgrove.

### **Legal Representation and Costs**

21. Mr Macleod referred to a recent letter from Mr Maguire setting out his estimate of costs. Mr Macleod commented that both the McKie and Stockline Inquiries had Section 40 determinations on the level of legal fees payable but went on to say that legal representation and the composition of legal teams were a matter for Lady Cosgrove to decide.

22. Mr Maguire stated that the parameters of the other Inquiries were very different, that there was hardly any comparison to be drawn and that no similar Inquiry had ever been carried out before in Scotland. Mr Maguire felt that the hourly rate of £150 was too low. Mr Macleod stated that this was the rate of payment considered to be reasonable. Ms Russell also felt it was a reasonable bearing in mind other comparables such as the rates payable for Legal Aid costs. Mr Maguire did not agree. He pointed out that this rate was the equivalent rate for a Senior Assistant Solicitor or an Assistant Solicitor and that the rate was therefore excluding him from the Inquiry. Mr Maguire considered that the other Inquiries did not require the same level of expertise and were not as complex.

23. Mr Maguire queried the restriction to 40 hours of representation per week and commented that it could result in him not being able to provide proper representation for his



clients. Mr Macleod replied by saying that the 40-hour restriction was per person, and could be exceeded in certain circumstances at the discretion of the Inquiry, and stated he would confirm this understanding with Scottish Government colleagues. Mr Maguire commented that he accepted that an inquisitorial Inquiry needed to restrict resources but that the Inquiry would lose important assistance if legal representation were removed.

24. Mr **GRO-A** commented that those who had suffered deserved full representation and that the last thing the Inquiry needed was allegations of whitewash half way through the process of setting it up. Mr **GRO-A** went on to say that not providing adequate funding was against the spirit of what the Inquiry was trying to achieve.

25. Mr Dolan quoted the Cabinet Secretary's announcement of the Inquiry to Parliament of 23 April 2008 where it was stated that "the people affected and their families deserve nothing less than answers to those questions.". Mr Dolan asked if legal representatives for other potential parties to the Inquiry – for example, the blood transfusion service and the Scottish Government, got paid at the same rate. Mr Macleod restated that Lady Cosgrove would take a view on the legal representation needed and that Scottish Government officials were making all efforts to provide the necessary framework in the wider context of existing similar costs.

26. Mr Dolan made a general query about costs for witnesses. Ms Russell replied that the Inquiry would make it clear what costs would be covered once it is up and running. Mr **GRO-A** asked what power the Inquiry would have to increase its £3m budget. Mr Macleod replied that the £3m was not the calculated budgetary limit for the Inquiry but rather a figure developed for public expenditure budgeting purposes as, as yet, there were no firm, estimated costs.

## **Deaths**

27. Mr Macleod referred back to the Terms of Reference and stated that it would be preferable if all deaths to be investigated were included in the initial Terms of Reference although Mr Macleod acknowledged that the Terms of Reference could be amended as the Inquiry progressed. To this end, Mr Macleod asked if there was a process which needed to be considered and Mr Maguire agreed to carry out a review of systems to see if any further deaths need to be added. Mr Maguire confirmed that he understood at least one further death was likely to be added and that further cases were being considered by Crown Office. Mr Maguire commented that after getting confirmation from Crown Council that a death could be added to the Inquiry, that he must then seek the view of relatives of the deceased.

28. The next meeting to be arranged after 10 August and would consider all points raised at this meeting particularly finance and deaths to be added to the Terms of Reference.

29. Mr Macleod thanked all those present for attending and closed the meeting.

**Mark Dorrian**  
**SG Healthcare Policy & Strategy**  
**Patients & Quality - 3**

**July 2008**

## AMENDMENTS TO THE DRAFT TERMS OF REFERENCE

**N.B. Please note that the amendments have been highlighted in track changes. The footnotes explain Counsel's reasoning.**

1. To investigate the deaths of Reverend **GRO-A** and Mrs **GRO-A** including the circumstances in which each of them became infected with the Hepatitis C virus with a view to identifying: the reasonable precautions, if any, whereby their deaths, and the Hepatitis C infection which resulted in or contributed to their deaths, might have been avoided; the defects, if any, in any system of working which contributed to their deaths; the public officials and authorities who were responsible for the systems that were in place for the collection of blood donations and the use of the blood thus collected for blood transfusions and the preparation of blood products for clinical use and determining whether any of those public officials or authorities should be held to account;<sup>10</sup> and any other facts which are relevant to the circumstances of the deaths.<sup>11</sup>
2. To examine the circumstances in which NHS patients in Scotland became infected with Hepatitis C and HIV through blood and blood products, including whether and when patients were informed that they were infected:
3. To identify whether any steps could have been taken by the Scottish National Blood Transfusion Service (SNBTS) or by other individuals and public authorities to:
  - (a) prevent such infection (including secondary transmission) occurring; and
  - (b) to trace potential recipients of blood containing these viruses;
4. To examine the consequences for NHS patients in Scotland and their families of infection through blood and blood products with Hepatitis C and HIV, including the treatment offered.
5. To identify any lessons and implications for the future, and make recommendations.
6. To report as soon as practicable.<sup>12</sup>

---

<sup>10</sup> **GRO-A** v. *Lord Advocate*, 2008 SLT 195, OH per Lord Mackay at paragraph [92]:

“The deaths of Mrs. **GRO-A** and Mr. **GRO-A** have given rise to a number of issues, including:

- [i] determining when they became infected with the Hepatitis C virus,
- [ii] establishing the factual circumstances in which their treatment involved the use of blood and blood products contaminated with the Hepatitis C virus, and
- [iii] identifying the public officials and authorities who were responsible for the systems that were in place for the collection of blood donations and the use of the blood thus collected for blood transfusions and the preparation of blood products for clinical use.
- [iv] The issues that arise also include reaching a conclusion as to whether any of those public officials or authorities should be held to account.

<sup>11</sup> See **GRO-A** v. *Lord Advocate*, 2008 SLT 195, OH per Lord Mackay at paragraph [125]:

“There is no dispute that Mrs. **GRO-A** and Mr. **GRO-A** became infected with the Hepatitis C virus whilst they were under the care of the NHS in Scotland. Nor is there any dispute that such infection contributed to their deaths. Looked at in that narrow context it could be argued that there is nothing more to investigate. In my opinion, however, *any practical and effective investigations of the facts, of the nature required by Article 2, must be capable of addressing [i] when each Mrs. **GRO-A** and Mr.*

**GRO-A** *became infected with the Hepatitis C virus and [ii] whether any steps could have been taken by the SNBTS or by other individuals and public authorities involved in the NHS in Scotland that might have prevented such infection occurring.* To restrict any investigations so as to exclude such lines of enquiry would, in my opinion, be incompatible with the provisions of Article 2, whether the requirement for an effective investigation is considered to be part of the positive obligation on the State to establish a framework of legal protection or a separate procedural obligation to investigate any death in respect of which Article 2 has been engaged.”

<sup>12</sup> The privately funded independent public inquiry which was set up in 19 February 2007 under the chairmanship of a former Solicitor General, Lord Archer of Sandwell QC had the following terms of reference

- (i) “To investigate the circumstances surrounding the supply to patients of contaminated NHS blood and blood products
- (ii) its consequences for the haemophilia community and others afflicted; and
- (iii) further steps to address both their problems and needs and those of bereaved families.”