

CD-18SEPT

Mrs Shirley-Quirk APS/SofS

From: J C Dobson
EHF1

Date: 18 September 1990

Copies: Mr Sands PS/MS(H)
Mrs Baldock PS/PS(L)
Mr Waterhouse PS/Perm Sec
Dr Smales PS/CMO
Mr Heppell PG
Dr Metters MED
Miss Pease EHF
Mr Wilson PHS
Dr Jones MCA
Dr Pickles MEDISD
Dr Rejman MEDISD
Dr Rotblat MCA
Mr Powell SOL
Miss Bendall SOL
Mr Stopes-Roe PHS4
Mr Kendall FA1
Mr Alder MCA
Mr Gutowski
Mr Barton AIDS Unit
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HAEMOPHILIACS : AIDS LITIGATION

1. This submission:
 - (i) conveys the advice of counsel and of the law officers on the handling of Ministers' recent decision to continue with the haemophiliac litigation,
 - (ii) informs Ministers of some recent developments.

Background

2. Mr Heppell's submission of 24 July invited Ministers to review their position on the litigation involving HIV-infected haemophiliacs, in the light of:

- i) a statement from the Judge, Mr Justice Ognall, inviting the parties to consider a compromise;
- ii) advice from Counsel; and

iii) a submission from the Regional Directors of Public Health.

The Secretary of State indicated that the Department should continue to fight the action, and asked officials for further advice on handling.

Draft response to the Judge

3. Counsel has advised that the response to the Judge's statement would be best conveyed in the form of a letter from a senior official to the Treasury Solicitor, which could then be passed to the Judge through Counsel and copied in confidence to the Plaintiffs' Counsel. This letter would:

- set out what the Government is already doing on an ex-gratia basis through the MacFarlane Trust in recognition of the very special circumstances of affected haemophiliacs and their families;
- make clear that the Secretary of State is not prepared to compromise the legal proceedings against the Central Defendants, without legal advice that it is proper to do so;
- stress the importance which the Government places on establishing the principles that its duty of care is to the general public (not to individuals) and that policy decisions should not be justiciable;
- point to the dangerous precedent which compromising the action could create in terms of yet more costly and time consuming claims.
- make clear that the Government intends to defend the action firmly and wishes to see a speedy conclusion to the litigation in the interests of all parties.

4. Simultaneously a letter to the Plaintiffs' solicitors would seek to persuade the Plaintiffs to restrict the number of scope of their wide ranging allegations to those areas where they consider they have any chance of success, and thus make possible an earlier conclusion to the

action without prejudicing the Plaintiffs' overall prospects. Counsel's advice is that the time is now right to say to the Plaintiffs that they cannot expect the Department to be prepared to bear without challenge the costs even of the more far-fetched allegations.

5. Drafts of the two letters, originally prepared by Counsel but amended to reflect Ministers' views more closely, are at A and B. The Solicitor General has been consulted and has indicated that he is content with the overall tone and content of the two letters; his detailed drafting suggestions have been incorporated. He is to meet officials and the Department's lawyers on Thursday (20 September); further briefing will be provided following the meeting, if needed.

Other Handling Issues

6. We have considered further the proposal from the RHA defendants to ask Mr Justice Ognall to step down from the case. Ministers had indicated that they would not wish to be seen to initiate such a step, but would be prepared to support it if the other defendants (RHAs and the CBLA) made the first move. The RHAs still believe that this would be a justifiable tactic but they are not prepared to initiate it unless all the defendants join in from the outset. There does not seem any way out of this impasse and we therefore suggest that the proposal should be dropped.

7. Although the judge's statement was given in Chambers its substance has already appeared in one paper and may be more widely leaked along with the Government's reply (see below). Although therefore we should not be seen to be actively drawing attention to the reply, it would be prudent to prepare defensive press briefing. If Ministers agree to the two draft letters we will set this in hand.

Recent Developments

8. The Court of Appeal has heard appeals by both sides against the ruling in the High Court on the Department's claim that certain classes of documents should be immune from disclosure in the litigation on the grounds of the public interest. This appeal will give a further indication of the likely outcome of the main trial. (In the course of

his judgement the High Court Judge, Mr Justice Rougier, said that he had absolutely no doubt that any claim by the Plaintiffs raised on a breach of statutory duty was doomed to failure.) The Appeal Court has reserved judgement and is to give its ruling on Thursday (20 September).

9. A letter has been received (copy at Flag C) from Pannone Napier, solicitors acting for the Plaintiffs, in which they invite a compromise and put a figure on it of £80 to £90 million and costs. The arguments put forward in the letter contain nothing which would lead us to review our advice to Ministers. Pannone Napier have indicated that they will circulate Mr Justice Ognall's statement to all the claimants and their individual Solicitors, together with any response from the Department; there is an implied threat that the correspondence will be more widely leaked. The letter to Treasury Solicitor at Flag A was drafted with this possibility in mind. The draft at Flag B includes a brief acknowledgement of the Pannone Napier letter and a brief summary of why Ministers are not prepared to compromise.

10. We have also had further discussions with the lead RHA Chairman (Mr Bruce Martin) and RGM (Mr Gerry Green) and their Solicitors. From informal soundings the RHA Solicitors believe that a compromise could be reached at a total cost of some £50-60m (including the £24m ex-gratia payment already made) and that the additional costs of a settlement at this stage are comparable to the costs to the tax-payer of fighting on, once all the costs of the defendants and of the legal aid fund are included. (This is in our view a fair calculation, if the haemophilia litigation is considered in isolation.) RGMs have recently discussed these developments and are persuaded that the best course would be to seek a settlement; they think that the haemophiliacs are a very special case and that the fears of setting an expensive precedent (see para 3 above) are grossly exaggerated.

11. It seems probable that RGMs have been influenced by the strongly-held views of Mr Martin, who is due to see Secretary of State on October 2 to press his case. If Ministers have any hesitation over their decision to fight on it would be sensible to try to bring forward the meeting with Mr Martin; the reply to the trial Judge's initiative cannot be delayed much longer (see below) and it would be that much more difficult to change course after the reply has gone.

Timing

12. Mr Justice Ognall's statement was made on 25 June, and the next hearing of the main action will be on 2nd October. We think it would be highly desirable for Ministers' decision to be communicated to the Judge at or before that hearing; any further delay would suggest indecision, and the Pannone Napier letter leaves little doubt that they would do all they could to exploit it. If the Court of Appeal judgement (para 8) goes badly against the Government's case we will put up further urgent advice.

Decision Required

13. Ministers are asked:

i) to consider whether the meeting with Mr Bruce Martin should be brought forward to allow for a final reconsideration of the basic stance (para 11); if not,

ii) to agree to the handling proposals set out above (paras 3-7), in particular to the draft letters at A and B and the advice not to seek Mr Justice Ognall's disqualification from the case.

In view of the timing issues referred to in para 12 a reply by Wednesday 26 September would be helpful.

GRO-C

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