COMPENSATION FOR MEDICALLY ACQUIRED HIV AND AIDS

STATEMENT TO THE SOCIAL ISSUES COMMITTEE

PARLIAMENT OF NEW SOUTH WALES

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Michael Kirby*

This submission expresses personal views only. They are not views expressed as a judge or in any other official capacity. They are intended to be of assistance to the Committee. They are based on my knowledge of the issues raised by the terms of reference as a result of my membership of the Global Commission on AIDS of the World Health Organisation (WHO).[1]

2. I support the provision of financial assistance by the State to persons who have acquired HIV/AIDS from medical procedures (and their dependants) to the fullest extent that the community can afford. Such fellow citizens suffer greatly. Their predicament deserves the strongest possible support us all through the organs of government.

3. Such provision should however avoid unjustifiable discrimination between persons who have acquired

HIV/AIDS in other ways. One of the major problems presented by the advent of HIV/AIDS has been the resulting discrimination against patients with HIV/AIDS. The condition is a very serious, life-threatening illness. All patients with the illness are deserving of compassion and support. All of them are fellow human beings. Parliament which represents all the people of the State should avoid unjustifiable discrimination among people subject to its laws. It should especially avoid discrimination upon bases which Parliament has itself declared to be unlawful.[2] In the overwhelming majority of cases (at least of persons presenting with symptoms of the illness at this stage) HIV was acquired in ignorance of the modes of transmission. The typical incubation period within which HIV progresses to AIDS is 11 years. It is only 10 years (in June 1981) that the first report of the condition now known as HIV/AIDS appeared in a medical journal (*Journal of Morbidity and Mortality*). Knowledge of the condition and the virus by which HIV is transmitted came to be generally known some years later.

5. HIV/AIDS is a major problem of public health in this and in most countries. It will become a larger problem in the decade ahead as the persons now infected but symptom-free become ill.[3] They will suffer greatly. Their suffering (and that of their dependants) will impose heavy burdens on the community and its health care system. As well, increasingly large demands will be placed upon the community for expenditure to promote

prevention of the spread of the virus. In difficult economic circumstances, the resources available to the community for health and associated expenditures are and will be limited. It is essential that the scarce resources be expended efficiently and justly. This problem presents Parliament with a species of a familiar genus. The advent of high technology medical equipment has presented many such choices (eg provision of CT scanners to hospitals). Ultimately, such choices must be made by, or under the authority of Parliament. The choices are typically between competing good objectives. The guiding principle for the exercise of the choice must be efficiency and non-discrimination.

5. In some cases of medically acquired AIDS, the person infected (or that person's dependants) will be able to establish that the virus was acquired through the negligence of a hospital or other health care provider. In such cases the law will provide compensation. Typically, such compensation will be substantial. Some such cases have failed before State and Federal courts in Australia.[4] But many such cases have succeeded overseas.[5] At least one in Australia (Victoria) has been settled on terms providing for a substantial verdict. It can be expected that, as time passes (and thus it is more likely that the virus was acquired after knowledge of HIV/AIDS was common) most of such cases will succeed. If negligence is proved, the tortfeasor should be rendered liable in accordance with law as normally occurs.

6. If however a scheme of no fault liability is established for medically acquired HIV, Parliament must ask how it can justify such a development whilst denying no fault compensation to other accident victims. A proposal for a comprehensive form of accident compensation was made in 1974 by the Woodhouse Committee.[6] Its proposals have not been accepted. Choosing persons who have acquired HIV/AIDS through medical means but denying compensation to those who, without fault, are injured by other means will lead to a justifiable sense of grievance in the community.

7. If there is legal discrimination amongst patients with HIV in terms of compensation it will also create a justifiable sense of grievance amongst patients who acquired the virus by other means. It will reinforce feelings of alienation, rejection and shame.[7] These are feelings which inhibit the effective educational campaign against the spread of the virus. They also add additional burdens in the name of society upon those who are already ill or face a life-threatening condition. I do not believe that Parliament, acting justly, should be responsible for inflicting such a blow to fellow citizens already carrying a heavy burden.

8. In brief:

(a) Compensation to all patients with HIV/AIDS should be as substantial and generous as our community can afford. The provision of compensation should avoid discrimination;

(b) Substantial funds from consolidated revenue will in future be needed to promote education and prevention and to help all people who are infected. These inescapable demands should have priority of public funding;

(c) If those who acquired HIV/AIDS can prove negligence of a third party, they can resort to law for compensation in tort. This is a facility most patients do not enjoy;

(d) Care should be taken in creating special categories of no fault compensation. In solving one particular problem, Parliament thereby creates a justifiable sense of grievance amongst other citizens who suffer equally but must prove negligence in order to recover compensation;

(e) The Parliament of New South Wales has rendered unlawful discrimination on the grounds of physical disability and homosexuality. It would be a step backwards for Parliament now to depart from its own principles and enact or sanction discrimination in the compensation of patients with HIV/AIDS on such grounds; and

(f) Discriminatory compensation amongst people who are sick would reinforce stereotypes and inhibit the struggle to prevent the spread of HIV/AIDS.

9. The observance of moral principle and human rights matter most when they seem difficult to provide. WHO has constantly stressed the importance in the public health effort to prevent the spread of HIV/AIDS of avoiding discrimination amongst those infected. I support the position adopted by WHO.[8]

ENDNOTES

* Member of the Global Commission of AIDS of the World Health Organisation. Trustee of the AIDS Trust of Australia. Personal views only.

1. See M D Kirby, *GPA - Under New Management - A personal report on the Fourth Meeting of the Global Commission on AIDS*, mimeo, Sydney, August 1991.
2. The reference is to the *Anti-Discrimination Act* 1977, ss 49A, 492G.
3. See Kirby, n 1 above.
4. See eg *H v Royal Alexandra Hospital for Children*, Badgery-Parker J, unreported, 4 January 1990; *E v Red Cross Society* (1991) 99 ALR 601; 27 FCR 310. Cf D Hirsch, *From Clapham Station to the Bedroom - Tort Liability for the Transmission of HIV/AIDS* (1991) 2 *Oracle* 92 (Uni of Sydney Law Society).
5. See L O Gostin, *The AIDS Litigation Project - A National Review of Court and Human Rights Commission Decisions* Part 1, 263 *Journal Am Med Assn* 1961 (1990).
6. Australia, National Committee of Inquiry, *Compensation and Rehabilitation in Australia* AGPS, 1974.
7. M D Kirby, *AIDS- A New Realm of Bereavement* in papers for the Third International Conference on Grief and Bereavement, Sydney, July 1991, *mimeo* 1991.
8. See attached exchange of correspondence with the World Health Organisation (Dr Susan Holck) concerning WHO's position on this issue.