ASAPNHS
Action for a Safe and Accountable People's NHS

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Dear Mr Mundell

CASE FOR A PUBLIC INQUIRY 'PATIENT SAFETY IN SCOTLAND'
PUBLIC INQUIRIES ACT 2005

This is the case for a public inquiry into patient safety in Scotland. This relates to the Scottish government's refusal to implement UK-wide legislation to prevent large-scale harm in healthcare and related social care. The consequences of the Scottish government's illegal policy will, by Department of Health estimates, result in about 2,000 avoidable deaths a year, or five deaths for every day its policy is allowed to continue. There has been previous correspondence with your office in Edinburgh on this issue but the case has escalated in scale of harm and into fundamental failures of the Scottish government. Regrettably the officer in the Scotland Office handling the initial case did not seem to understand the law on patient safety or the seriousness of the issues. Each day's delay in getting action on the matters covered by this case will permit more avoidable deaths in Scottish healthcare and related social care. These failures in policy and decision-making costs lives. It is that blunt. The matters are urgent and the Scottish government's continuing disregard of the law is not tenable. **On 16 March 2016 the Scottish First Minister Nicola Sturgeon once again refused to implement the UK-wide legislation that would protect patients and prevent many avoidable deaths.**

1. Breakdown of Government

There has been further written evidence provided by the Scottish government and its joint Health and Social Care Directorate (HSCD) and NHS Scotland (under the DG/CEO Paul Gray) of their refusing to implement the binding legislation of the Health and Safety at Work etc Act 1974. This Act applies to patient safety and was used to prosecute at Mid-

Staffordshire NHS Foundation Trust and twice at Ayrshire and Arran NHS Board. The legislation requires effective precautions to be in place in advance of any harm occurring, and not wait until it does. Offences are on the failure to have precautions in place, not any harm that may or may not occur. There is also a legal requirement that compliance with the Act is regulated to ensure that precautions are in place. These basic points on safety law were lost on Scotland's current Lord Advocate, who will be standing down shortly. The Scottish government abolished the regulator of healthcare in 2010 leaving patients unprotected in Scotland. What should be the over-arching regulator of last resort, the Health and Safety Executive (HSE) refuses to fill the vacuum and act as Scotland's Care Quality Commission (England's healthcare regulator). Patients in Scotland, unlike the rest of the UK, have none of the legal protection that should be afforded by the UK government.

The escalation of the public inquiry matters involves even more serious underlying failings of the Scottish government. It is rejecting the rule of law, a basic requirement of government, its ministers, its civil servants, and of qualification of being in the EU and being a democracy (Copenhagen Criteria 1993). It has also rejected its responsibilities for the quality and legality of devolved matters of healthcare and justice. The Permanent Secretary to the Scottish government, Leslie Evans has supported Paul Gray (HSCD) and the Scottish government's policy of the disregard of the rule of law. The Civil Service in Scotland is fundamentally failing to discharge its responsibilities. There is in effect a breakdown of government in Scotland with its failure to protect the public, to fail to uphold the rule of law, or to govern. These matters are covered in the third update to the case for the inquiry – Update 3 and its summary both are **attached**.

2. Public Inquiry

Of all the matters that could justify an inquiry this should rate at the top. It relates to many avoidable deaths in healthcare and related social care. This is under the policy and organisation of the Scottish government's joint HSCD/NHS Scotland. The failure in patient safety and the law is a situation created and promoted by the Scottish government. It abolished the body that should have been the regulator of patient safety. This created a regulatory vacuum in what is the area of highest risk of any UK sector. This is public policy stood on its head. The Scottish government is still saying that it has 'robust regulation ', when the OECD (Organisation for Economic Co-Operation and Development) in February 2016 pointed out that it has 'none'. In failing in its own legal responsibilities on policy, organisation and management of healthcare it could readily be considered to be 'criminally negligent' (see Corporate Manslaughter and Corporate Homicide Act 2007 Schedule 1). However, with ministers having been repeatedly reminded over the last four years of their neglect of the law, it has become one of 'criminal intent'. The situation appears to be without precedent in modern times of a government

in the UK disregarding the law and with the consequences of there being thousands of avoidable deaths of its own people.

The Scottish government should have learnt from a previous public inquiry in Scotland that into the Piper Alpha disaster of 1988. However instead the government goes and repeats the underlying errors and with even greater cost to life to the people of Scotland. Piper Alpha was responsible for 167 deaths, which is the equivalent of the consequences of about one month of the current Scottish government's policy in health and related social care.

Lord Cullen led the Piper Alpha inquiry. He found an absence of law on safety in the off-shore sector, basic safety errors, risk management well below that required for the high hazards and risks, an absence of safety regulation, and cultural isolation (from safety in land-based petro-chemicals and from other high hazard sectors). These well-known safety errors are all repeated in Scottish healthcare. The Piper Alpha public inquiry led to the 'solving' of safety on the rigs. What is needed is a 'Cullen' inquiry for patient safety in Scotland to deal with the five deaths a day, in effect to 'solve patient safety'.

The approach to patient safety in Scottish healthcare is decades behind what the law requires and the approaches taken by other high hazard sectors to which the Act and related legislation also applies. The lessons from other sectors are both directly applicable and come from what the law requires. The approaches in other high hazard sectors have a well-proven track record developed over four or five decades. All these high hazard UK sectors have without complacency 'solved safety'. The big difference is that in Scotland the rule of law is disregarded, this is government policy as promoted by ministers and Scottish civil servants. Here patient safety shuffles along with the poorest level of understanding of safety, and of what the law requires. The absence of any kind of checks on the performance of healthcare in Scotland means that the problems are generally kept well-hidden. There is no regulator in Scotland. There are not the independent scrutiny bodies in Scotland such as operate in the rest of the UK which were major factors in getting the inquiries into Mid-Staffordshire and Morecambe Bay. There is no formal means to identify major problems in Scottish healthcare. The Cabinet Secretaries for Health pretend that NHS Scotland's Healthcare Improvement Scotland (HIS) is a regulator of the NHS when it is no such thing. NHS Scotland is just 'marking its own homework' says the OECD. HIS does not even function as an internal quality assurance body, it fails to check healthcare against what the law requires. The Scottish government grossly misleads the people of Scotland on patient safety and its 'regulation'.

The previous inquiry documents dealt with the very large number of avoidable deaths in healthcare and the absence of the applicable law, but behind them has been uncovered the breakdown of the Scottish government and justice systems that should be protecting

the public. A member of ASAP-NHS had been involved in working on public inquiries in various sectors and is familiar with the criteria, the content, and the actions that arise out of them. In UK policy terms the cost of an inquiry could be recovered by its prevention of a week's worth of avoidable deaths (this is using the UK policy on VPF – Value of Preventing a Fatality). If there can be a public inquiry on the Edinburgh trams (0 deaths) then this should be an absolute certainty (thousands). Judged even by financial savings alone this current case vastly exceeds the issues of trams inquiry. By comparison the tram inquiry is trivial.

The failings on such a large number of avoidable deaths in Scotland involves the failings of many organisations. Whilst we appreciate that public inquiries can fail (e.g. Vale of Leven, and Penrose) many succeed (e.g. Piper Alpha and Mid-Staffordshire NHS). 'Patient Safety in Scotland' does need a full inquiry to investigate the roles and responsibilities of the many bodies that have been neglecting patient safety in Scotland and leading to us falling so far behind the rest of the UK and other comparators. An inquiry is also needed to determine the means to ensuring patient safety for the future for the people of Scotland. It will not happen without a public inquiry. Such an inquiry would be amongst the most important public inquiries held in the UK, and should be much more significant than those at Mid–Staffordshire or Morecambe Bay.

3. Scottish Government

Irrespective of the public inquiry, the Scottish government needs to take urgent actions to protect public safety. The current approach and standards of safety in Scottish healthcare fail to meet any of the statutory essential safety requirements. These legally required actions were repeated in our letter to the Scottish First Minister (08 March 2016) **attached**. On 16 March 2016 Nicola Sturgeon replied and she again refused to act. This has been her position for the last four years since April 2012, the equivalent of 8,000 reasonably preventable premature or avoidable deaths. She has refused to recognise that there are a large number of avoidable deaths in healthcare, despite it being an internationally recognised major problem. Right from the start this means that there is zero chance of patient safety in Scotland being addressed as it should be. She refuses to recognise the law that applies to patient safety. She refuses to implement an effective plan for compliance in healthcare for Scotland. She refuses to recreate the independent regulator of healthcare to make sure that patients are protected as the law requires. These are all legally required and yet are rejected by a minister whose duty it is to uphold the law and comply with their own legal responsibilities. The First Minister has no alternative means of complying with the law on patient safety, everything that the law requires in the approach to it is missing in Scotland. The approach to patient safety and the law is about as bad as it can be for us in Scotland.

It is of course a condition of a government post holder – be it Scottish First Minister, Cabinet Secretary for Health or Justice, Lord Advocate, MSP, Permanent Secretary to the Scottish Government, or other civil servants that they uphold the law and comply with it (Holyrood Oath, Ministerial Code, Civil Service Code). Like the rule of law this fundamental requirement has been abandoned in Scotland. For those who are seeking election this May it is **a condition of them taking up their seat** that they agree to uphold the law - including that on patient safety. They **must therefore implement the Health and Safety at Work etc Act 1974 in full as it applies to patient safety** and related legislation, they must act to comply with the Human Rights Act 1998 on article 2 'right to life' as it applies to avoidable deaths, with the Scotland Act 1998 (as amended), and the NHS Scotland Act 1978. Compliance with the law is not meant to be discretionary despite the Scottish government ministers saying that it is.

The position of the Scottish First Minister, CS Health and Justice, the Scottish government and senior civil servants of disregarding binding UK legislation is not tenable. There needs to be a major overhaul to rectify the breakdown of the Scottish government. Whilst healthcare is our main concern the underlying problems have much wider application and need to be addressed.

4. Consequences

We appreciate that requests for public inquiries can be readily made, that they are usually resisted by governments, that inquiries can take a long time and may not be successful. In this case the evidence for an inquiry is very strong, generally prosecution grade, and the arguments against it very weak (see Update 2 which deals with this). The consequences of not holding an inquiry are extremely high. The consequences of not holding an inquiry fall into the category of being well beyond the UK government's policy on the tolerability of risk. Scottish healthcare and the absence of law works out at a level of risk about ten thousand times the level of risk considered tolerable. This means that by UK policy and law action definitely must be taken to deal with the issues. A ministerial refusal to address the matters of the inquiry could involve not just disregarding ministerial responsibilities of upholding UK law on the issue of the deaths, but also overturning what has been UK policy for the last twenty-eight years.

A main factor in the consideration of an inquiry is likely to be political. It seems that politics have been a major factor in why patient safety in Scotland fails to meet the statutory UK requirements. It seems to be politically unacceptable for the Scottish government to even recognise that there are a high number of avoidable deaths in Scottish healthcare and social care. That is an immediate block to getting patient safety properly addressed. In Scotland it seems that the only inquiries that have been initiated by the government over recent years have been ones where there is not a risk of significant criticism of its own

actions. ASAP-NHS has no political affiliation but we do have to deal with the political realities, and they are a major obstacle to patient safety in Scotland. The Mid-Staffordshire public inquires, or Morecambe Bay would not happen in Scotland, there is no one to initiate them, such as the healthcare regulator the CQC. The former Director General HSE Dame Judith Hackitt also refused to get involved. HSE was heavily criticised at the second Mid Staffordshire public inquiry. In May 2015 we did ask the Scottish First Minister if she would back the call for a public inquiry and she said that she would reply but we are still waiting. A public inquiry would show the failure to address patient safety in Scotland to the standard that the law requires. It would show the Scottish government as the major agent in the continuation of the problem and as an obstruction to future compliance with the law and the protection of patients.

Whilst there are the political considerations, it should not obstruct preventing the many avoidable deaths. Both of the Mid-Staffs inquiries (and Morecambe Bay) were called by governments (Labour, Conservative/Coalition) where it was very likely to be critical of them. In the case of Scottish patient safety, the issues are very much larger and should not be blocked by political self-interest, the issues of one of the biggest public safety issues and the breakdown of government (law and governance) are very much larger than the politics.

A public inquiry is the opportunity to find the main reasons behind the large number of avoidable deaths in Scotland. This is not about a few deaths or a particular hospital but about the systematic failings in the Scottish government, NHS Scotland, and across all NHS hospitals and healthcare from failing to implement and comply with the law. The announcement of an inquiry should in itself would be a driver to get immediate actions underway, and it would be the means to determine how the many problems identified in the case for the inquiry can be resolved. They are not going to be solved without an inquiry. Without the inquiry the deaths will continue unrecognised. They are hidden away by NHS Scotland hospitals, see the critical incident reports eventually forced out of NHS Boards obtained under FOI by the Scottish Information Commissioner, and the learning and the prevention will not happen (see the OECD report). Public safety will be neglected, the avoidable deaths continue, with other major harm, and wasted resources. The Scottish government will continue to undermine the law and the role of government.

For the UK government to not call the inquiry will permit the continuation of the 2,000 avoidable deaths a year in Scotland. That would be a desertion of the duty on reserved legislation, and to the people of Scotland on an unprecedented scale. In terms of impact, allowing the failures in public safety to continue in Scotland would greatly exceed the impact for Scottish people of other political and constitutional matters. The early introduction of the poll tax in Scotland a year before it was brought in for England and Wales may be remembered, but as a policy it did not result in a large number of deaths

in Scotland - but permitting the Scottish government's current absence of law on patient safety does. Whilst 'do nothing' can seem an easy attractive option, an issue like the current one will absolutely not go away, it cannot. The longer it is left unresolved the greater the impact will eventually be. The 'big hole' that the Scottish government created keeps getting bigger, and so does the resultant death toll. In considering politics, for the UK government the balance should be very much in favour of holding the inquiry. If it does not act it is likely to be dragged into being a major part of the problem. A failure to act could itself bring sanctions and other severe costs.

To allow the current situation to continue or get worse would allow part of the UK to fail to protect its people to the standard that the law requires. The rule of law would be lost with untold consequences for Scotland. Remarkably we in Scotland would be in the position of not being able to call ourselves a democracy. Here in Scotland there is no separation of powers between the government, the legislature and the judiciary; this is unconstitutional and a recipe for corruption. It has already resulted in the Lord Advocate blocking investigations of the statutory acts and omissions of the Scottish government. The Scottish First Minister even appoints the Chief Public Prosecutor, the Lord Advocate. Nor are the government and its ministers in effect any longer bound by their ministerial code or Holyrood Oath. They can no longer be relied to govern either on existing or their new powers. Likewise, the Civil Service in Scotland cannot be relied on to uphold the law or perform their roles. There are no effective checks on the executive. The credibility of the Scottish government and the Scottish Parliament would be shot. It needs to be reformed to become a functioning democratic constitutional government.

Many other organisations involved in Scottish patient safety are shown to be failing (see the original case for the inquiry, PSIS). NHS Scotland's senior management are refusing to implement the law on patient safety. There is not the reliable data on healthcare performance, it is wholly in-house (HSCD/NHS Scotland). The data that is put out such as it is - is political and it is notoriously biased, it cannot command confidence in its accuracy. There is no independent regulator for safety or quality, no body with credibility to report on NHS Scotland's performance. The default regulator of last resort HSE is refusing to act. That means that HSE also fails in its own legal responsibility, that is a matter which is being referred to the sponsoring UK minister. Other bodies with statutory responsibilities on patient safety do not apply the binding HSWA law. The law has gone missing, and so with it patient protection. The Scottish Public Services Ombudsman (SPSO) completely disregards the main legislation governing the issues that it investigates. The COPFS and Police Scotland refuse to investigate many avoidable deaths in healthcare. When challenged they rely on the statements of the suspect, which is an unusual and perverse approach to serious criminal law investigations. No-one can be relied on to ensure patient safety and justice in Scotland.

There is a large amount of evidence to support the call for the inquiry. Compare the current case with that needed for other public inquiries; here the evidence is continually being produced by the Scottish government and NHS Scotland. The supporting documents to this inquiry are only a summary of the evidence. The ASAP-NHS investigation of the issues has been carried out as if a preliminary to criminal law proceedings. Much of the evidence is already prosecution- grade, and a wealth of such evidence is readily obtainable. A former Crown prosecutor specialising in the legislation points out that the evidence produced by both NHS Scotland and the Scottish government meets the criteria for the consideration of prosecutions by the standard of HSE's own statutory enforcement code (EMM). For the moment the priority is to get immediate actions to deliver patient safety by the Scottish Government followed by an inquiry.

It would be difficult to create a worse series of basic errors of government, justice and public safety. These far exceed any other matters that have been considered for a public inquiry in the UK. The current position in Scotland is wholly untenable and cannot be sanctioned.

5. Conclusion

The inquiries on Mid-Staffordshire and Morecambe Bay were about poor care, inadequate regulation, and they have lessons for all of the UK. 'Patient Safety in Scotland' is about the Scottish government's refusal to even recognise the avoidable deaths that are occurring. It is about the complete failure in approach of the Scottish government to patient safety or to comply with UK legislation to ensure patient safety to the standard that the law requires, and with all the severe consequences that it brings. It is about the absence of regulation and law. It is the systematic failure of the justice system and the breakdown of government. This is about as big as an inquiry can get. There does not seem to be an alternative practical means to solve the many problems and so ensure the safety of the public in Scotland.

This is about the failures of a government to protect its people. For a public inquiry it is of the greatest serious public concern (the criteria for an inquiry), much more than the cost overrun of the Edinburgh trams. A government failing to protect its people as the law requires may be the greatest offence.

The problem of avoidable deaths in healthcare and reserved legislation cannot be resolved in Scotland because it is blocked by the Scottish government and its justice system (Cabinet Secretary for Justice and the Lord Advocate). The Scottish position is a Catch 22 situation, so that patient safety and the law is unresolvable because of its denial of the rule of law.

The Scottish government has failed – it has not protected its people, it has rejected the rule of law, and it refuses to govern on health and justice regarding the reserved matter of patient safety. It has had the powers to rescue itself from this position but it has not, it has shown no intention of doing so. It fails the Copenhagen and EU tests, and the European Commission on Human Rights (ECHR) on 'right to life'. It is not protecting UK citizens as UK law requires. As this is the Scottish government's intransigent position it has to be the UK government acting on reserved UK law and the Constitution that acts to protect UK citizens. The current lack of protection of the public is not tolerable, it cannot continue.

We **attach** the Update 3 to the case for the public inquiry 'Patient Safety in Scotland' with its 5-page summary. For ease of reference we **attach** the original case of the inquiry, PSIS with its executive summary. Also Update 1 and Update 2, and the Ayrshire and Arran NHS Board Critical Incident Report ('40 suspicious deaths') which have still not been independently investigated.

A refusal by the UK government to hold a public inquiry into patient safety in Scotland will permit many more avoidable deaths to continue.

Given the scale of the issues and the complexity we would be please to meet and explain further.

Yours sincerely

Roger Livermore

On behalf of ASAP-NHS