

Jenny Marra MSP
Convener, Public Audit and Post-legislative Scrutiny Committee
Scottish Parliament

BY EMAIL

31 May 2018

Dear Ms Marra

THE 2016/17 AUDIT OF NHS TAYSIDE

In my letter to you of 3 May I said that I would be in a position by 31 May to give the Committee an interim report on OSCR's statutory inquiry into Tayside NHS Board Endowment Funds (SC 011042). In your letter of 16 May you asked for clarification of the timescale for our inquiry. We have also been following the recent evidence sessions and have been in contact with the Scottish Government Health Directorates. We are giving this work top priority and are keen to help restore public trust and confidence in NHS endowment charities.

It may be helpful to the Committee to set out the nature and focus of OSCR's inquiry, and how it differs from the work done by other bodies on the issues in NHS Tayside, such as the review Grant Thornton were asked to carry out.

We are carrying out our inquiry into this charity using our powers under section 28 of the Charities and Trustee Investment (Scotland) Act 2005. Where we find that as a result of such an inquiry that there has been misconduct in the administration of a charity or that it is necessary to act to protect the charity's assets, the 2005 Act gives us a number of enforcement powers, including suspending charity trustees or restricting the transactions a charity may enter. These powers are subject to an internal review procedure, appeal to the First Tier Tribunal and ultimately to the Court of Session. We may also apply to the Court of Session to impose more permanent measures such as disqualifying individuals from serving as charity trustees. In exercising these powers we must meet the civil standard of proof and have regard to the principles of natural justice.



I should stress that I mention these measures not in any way to indicate that we have reached a decision on whether there has been misconduct in the administration of this charity. Rather I wanted to set this out for the Committee by way of introduction to the nature of our inquiries and the standard of proof and due process required, since this dictates what we can say by way of timescales for the process.

We have completed the first phase of our inquiry, which involved analysis of the available information and a large amount of documentary evidence obtained from the charity. On the basis of that work we are focusing on the decision-making by the charity trustees of Tayside NHS Board Endowment Funds regarding retrospective funding requests in the period January to May 2014. The Grant Thornton review submitted to you on 22 May helpfully set out the timeline and some of the evidence relating to key meetings.

At this stage of our inquiry, we are looking specifically at the following areas of concern:

1. Whether or not the charity trustees had the power within their own constitution and rules applicable at the time to amend their Policy and Procedures on a temporary basis.
2. How the charity trustees went about their decision making in the period January to May 2014 – did they act in the interests of the charity and exercise the level of care and diligence required of charity trustees? In particular, did they take appropriate advice in respect of the decisions to amend the Policy and Procedures on a temporary basis and thereafter on funding the retrospective applications?
3. Whether or not the charity trustees understood and dealt appropriately with the conflict of interest between the charity and NHS Tayside involved in the decisions they were making.

The Committee should note, however, that the focus and scope of our inquiry may shift in the light of the evidence that we gather going forward.

We note the interest shown by the Committee at its hearings in the question of whether the particular items of expenditure approved by the charity trustees represented 'core' or 'non-core' expenditure. We understand the wide level of interest in this question and may offer some views on this, but we think it might be helpful to flag up at this point that the distinction between core and non-core expenditure in the NHS is not specifically a matter of charity law: rather the issue for us to consider is whether or not the charity trustees acted in the interests of the charity and exercised the appropriate level of care and diligence in their decision making from January to May 2014. Likewise, our interest in the internal and external audit processes of the charity will focus on the trustees' discharge of their trustee duties in respect of these processes.

Having reviewed the documentary evidence, we are now moving on to explore in depth the actions of the trustees, as a group and as individuals.

This is likely to involve interviewing and taking statements from a number of individuals, assessing the evidence, determining whether or not there has been misconduct, and if we do find misconduct deciding if and what enforcement action may be required. This is a large, complex inquiry, raising potentially serious regulatory compliance issues – we need to examine all the relevant evidence thoroughly, and to ensure that we respect the rights and positions of all parties.

Taking all of this into account, we would expect to be in a position to report more fully at the end of September 2018. I would stress that the inquiry may continue beyond that, depending on whether or not there is action to be taken. How fully we would be able to report would need to take into account the requirement not to prejudice any court or other enforcement action. We have considered the offer of further resources for this work made by the Scottish Government and will keep this under review as the inquiry progresses.

As I think the Committee is aware, I recently wrote to the NHS Scotland Chief Executive, Paul Gray, on 15 May, drawing his attention to the recommendation in our 2010-2011 Annual Report that there should be greater formal separation between health boards and endowment fund charities (see attached letter). We are arranging an early meeting to discuss these issues further.

Against this backdrop of concern about structural conflict of interest issues, we have also been reviewing evidence as to the activities of other NHS endowment funds on the Scottish Charity Register, taking into account the responses they supplied to the Scottish Government, a review of their annual reports and accounts, and other information available to us. On the basis of the information that we have been provided to date, there are no issues in other such charities that merit the opening of an inquiry by OSCR. We are seeking further information from a number of the charities on some points, but this is to inform our general view on the governance arrangements of the endowment funds and, at this stage, I do not foresee that it will result in inquiries being opened.

I trust this update is of assistance to the Committee.

Yours sincerely



David Robb
Chief Executive

Paul Gray
DG Health and Social Care and Chief Executive NHS Scotland
Scottish Government
St Andrews House
Regent Road
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EH1 3DG

15 May 2018

Dear Paul

NHS Endowment Funds

We have corresponded recently over our shared concerns about events in 2014 at Tayside NHS Board Endowment Funds (SC011042) – you are aware of our ongoing inquiry and we will continue to liaise with your colleagues on aspects of this work.

I am writing however about the wider position. Without prejudice to the outcome of the Tayside inquiry, you will be aware that one of the fundamental underlying problems is posed by the structural conflicts of interest deriving from the composition of NHS Boards in Scotland and the statutory requirement for all Board members to become ex-officio trustees of the associated NHS endowment charity. When we looked at this issue some years ago, we concluded that legislation was required to achieve a clearer separation between the two entities – our Annual Report and Accounts for 2010-11 contained a specific recommendation to Scottish Ministers about this (see Annex A). At the time, the Scottish Government's preference was to proceed by way of preparing guidance on this issue – the guidance issued on December 2013. From recent comments made by you and by various Scottish Ministers, it appears that you are now willing to consider a legislative solution – we would be very happy to work with the Scottish Government on the consideration of options for addressing this fundamental tension.

Yours sincerely



David Robb
Chief Executive



Extract from OSCR Annual Report and Accounts 2010-11:

Recommendations

3. NHS Endowment Trusts

We recommend that the provisions of the National Health Service (Scotland) Act 1978 are reviewed with a view to ensuring that at least a majority of charity trustees of the Endowment Funds are independent of the relevant Health Board.

The rationale for this recommendation is as follows: we have identified some governance challenges for NHS Endowment Funds, which are registered charities, where all of those acting as charity trustees of the fund also sit on the relevant Health Board and are appointed *ex officio*, i.e. by virtue of being appointed to the Health Board. We are concerned that this governance structure does not allow the charity trustees to demonstrate their independence of the Health Board and may make it difficult for them to act in the interest of the charity in decisions where the interest to the Health Board is also involved. This is one of the high risk areas identified and explored in the case study in our recent guidance for charity trustees, 'Who's in Charge'. Constitutional arrangements for all of these Endowment Trusts are set out in the current National Health Service (Scotland) Act 1978 and any change in governance would require an amendment to the legislation. An appropriate change would significantly mitigate the risk we have identified of a systemic conflict of interest for the charity trustees.