

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

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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.