

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

<by email>

26 September 2018

Dear Ms Marra

THE 2016/17 AUDIT OF NHS TAYSIDE

When I wrote to you on 31 May, I undertook to report more fully to the Committee by the end of September on OSCR's statutory inquiry into Tayside NHS Board Endowment Funds, and on our other work involving NHS charities.

Structure of NHS endowment charities

On the evidence of the work we have been carrying out so far, particularly the NHS Tayside Board Endowment Funds inquiry, we remain concerned about the structure of these charities and the conflict of interest to which it gives rise. I note that the Health and Sport Committee's recent report *The Governance of the NHS in Scotland – ensuring delivery of the best healthcare for Scotland* also makes recommendations on this issue. We have been considering with NHS Scotland colleagues the options for addressing these points but remain of the view that the structure put in place by the National Health Service (Scotland) Act 1978 gives rise to an inherent, unavoidable conflict of interest where the interests of both the NHS Board and the endowment charity are involved. In our view, changes to the 1978 Act are required to place this issue beyond doubt.

NHS Tayside inquiry

We continue to prioritise work on this inquiry, which remains focused on the following areas of concern:

Charities you can trust and that provide public benefit

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1. Whether or not the NHS Tayside Health Board ('Tayside Board') had the power within their own constitution and rules applicable at the time to amend the charity's Policy and Procedures on a temporary basis.
2. How the Tayside Board went about their decision making in the period January to May 2014 – did the board act in the interests of the charity and exercise the level of care and diligence required of a charity trustee? In particular, did the Tayside Board 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 Tayside Board understood and dealt appropriately with the conflict of interest between the charity and NHS Tayside involved in the decisions they were making.

Early in the inquiry we wrote to everyone who had been a member of the Tayside Board in January 2014 with a request for information about the charity. This request included specific questions around the events in January 2014 that led to the board's decision to temporarily suspend the relevant clause in the charity's Policy and Procedures which would normally preclude the charity from funding projects retrospectively.

Having considered these responses and the documentary evidence we sought meetings with all of the board members and other key participants to allow us to discuss in more detail the information they had provided. The aim of this is to help us understand the circumstances of the early 2014 decisions as fully as possible and to ensure fair process by allowing the individuals involved to provide their views. Individual meetings with the 2014 Tayside Board members and others involved have therefore been taking place over the summer and early autumn. These have necessarily taken some time, given the number of board members involved. However, this process is now almost complete.

The next stage of our inquiry will be to consider fully all the information we have gathered and reach our findings. This will include a careful consideration of whether or not there has been misconduct in the administration of the charity in terms of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) and, if so, whether it would be a proportionate use of our powers in the 2005 Act to take enforcement action against any of the individuals involved. As part of our findings, we will also consider whether there are issues that need to be addressed by the Tayside Board in respect of its procedures and policies and the way it operates. We anticipate that this next stage of our inquiry should be complete by the end of November. At the end of this inquiry we will publish an inquiry report setting out our findings, any action taken and any wider learning for charity trustees.

Work with other NHS endowment charities

My letter of 31 May also mentioned our consideration of the activities of other NHS endowment charities. In parallel with the NHS Tayside inquiry we have been continuing

to look at the activities and governance of the 15 other NHS endowment funds on the Scottish Charity Register, taking into account:

- the responses they supplied in response to correspondence from the Scottish Government in April
- a review of their annual reports and accounts for the period since 2014
- a review of records of board and subcommittee decision-making in all of the endowment and other information available to us.

We were looking to establish:

- Whether or not these charities were complying with the Charters or other rules adopted in response to the Guidelines promulgated by Scottish Government in 2013
- Whether or not they were complying with the operating and financial instructions adopted in response to that guidance
- How the sifting and decision process for making grants from endowment funds operates
- What, in general, is the standard of governance in these charities

The picture that has emerged from our analysis is generally positive and encouraging, and we hope this will help reassure existing and potential supporters of these charities. By and large, the NHS endowments charities in Scotland have appropriate charters, operating instructions, policies and terms of reference in place. Most have separate endowments subcommittees in place to review grant applications in detail and make recommendations to the board in line with clearly defined delegated authority limits. However, I should note that this was also the case in Tayside at the time of the decisions made in early 2014.

A number of the charities have guidance on allowable bids or score criteria for applications.

More importantly, the evidence is that compliance in practice with these governance structures, policies and procedures is generally good. There is evidence of a good level of structure and consistency in assessing applications for funding, and of appropriate challenge and information-seeking.

There are a few minor issues of departure from good practice on which we are engaging with individual charities.

However, there is one point that we would wish to bring to the Committee's attention, as it is relevant to some of the discussion at the Committee and elsewhere about the issues at NHS Tayside. This is the issue of whether or not endowment funds can be used to fund what might be considered to be 'core' NHS provision. The Guidance and Good practice issued by NHS Scotland in 2013 states that

It is considered good practice that the grant of endowment funds should not substitute for a core provision within the NHS Board's financial plans. Nor should endowment funds be used to cover a responsibility of the NHS Board that is a direct requirement of health and safety or employment law or a ministerial policy direction.

While the evidence available to us indicates that boards fully accept this in principle, it also suggests that applying the distinction in practice can raise questions that are genuinely difficult for boards to decide on. Examples are:

- Is spending from restricted funds on 'core' provision acceptable if it is in accordance with the wishes of the donor of a fund?
- Is use of endowment funds acceptable where only part of a project can be paid for from Exchequer funds?
- Is use of endowment funds acceptable to bring forward spending on 'core' provision where earlier benefit to patients would result?

That the expenditure in these examples advances health and therefore falls within the charities' purposes is not in question. Our interest is therefore in whether boards can fulfil their charity trustee duties under the 2005 Act in making these decisions in line with the Guidance and Good Practice. The evidence suggests that boards could either refuse or accept applications on the lines of these examples and still demonstrate that they were acting in the interests of the charity and with the appropriate level of care and diligence, and having regard to the 2013 Guidance and Good Practice. It is reasonable therefore to expect some inconsistency in the decisions that NHS endowment charities take on what constitutes eligible expenditure.

We have noted this issue to NHS Scotland Finance colleagues: there may be some scope to address it in new or revised guidance, but the 'core'/'non-core' distinction is likely to be a difficult concept to define fully for many cases boards will encounter.

I trust this update is of assistance to the Committee, and will ensure that, when our inquiry concludes, the inquiry report is made available to you at the earliest opportunity.

Yours sincerely



David Robb
CEO