

Ms J Marra  
Convener  
Public Audit and Post-Legislative Scrutiny Committee

I S McDonald  
D W Carson

9 March 2019

By e-mail

Dear Ms Marra,

### **NHS Tayside – Tayside NHS Endowment Funds**

We write to advise the Committee of what we consider are several misunderstandings and misinterpretations that are apparent in the discussion in the 24 May 2018 meeting of the Committee. We also provide further background on certain issues to assist the Committee's further deliberations.

We have already issued a response to the relevant parts of the Grant Thornton report that affect us. That response should be read in conjunction with this letter.

We set out below the key items to draw to your attention.

1. Ms Robison repeatedly advised the Committee that brokerage would have been made available (pages 13/14). This is incorrect. At the time Scottish Government Health and Social Care Directorates (SGHSCD) restricted the brokerage to £2.85m based on the board's ability to fully repay in 2014/15 from proceeds of planned property sales. NHS Tayside was tasked to find a resolution for the remaining balance of the estimated £6.6m forecast year end deficit. At no stage was any offer of further brokerage made by SGHSCD.
2. Mr Neil was Health Secretary in 2013/14 and it is unfortunate that he did not correct Ms Robison's statements in the meeting.
3. You referred to the "constitution" of the Endowment Funds being suspended (page 3). We feel this gives the wrong impression of wholesale cancellation of the basic principles of the charity. Only one element of the Endowment Funds' Policy and Procedures (an internal administration document) was suspended and later deleted; that being the barrier to retrospective funding. The constitution and all other Policy and Procedures remained intact and were observed. It should be noted that some other NHS endowment funds, the National Guidance and the founding legislation do not have a retrospective funding barrier. You will note that the OSCR report states that the Trustees had the power to amend the Policy and Procedures.
4. You also stated that charitable money was used for core activities (page 3). This is incorrect – the projects funded were all non-core and met the criteria set out in the Endowment Fund Policy and Procedures and hence were legitimately funded. This is confirmed in the OSCR report.
5. Ms Robison stated that donations were not used to fund projects for which they were donated (page 3). This is incorrect. We point out that the large majority of funds used were in fact not donated, but arose from investment income and gains, and were unrestricted in nature, which the Trustees are legally entitled to spend as they saw fit. The restricted (i.e. donated) funds used were precisely for the purposes that the donors' intended. Again the

OSCR report confirms that the funds were used legitimately and found no fault in this regard.

6. Ms Robison stated that the issues were not reported to SGHSCD (page 4). This is incorrect – the NHS Tayside Director of Finance met with the SGHSCD Director of Finance and advised him of the deficit problem and the proposed use of endowment funds and SGHSCD confirmed they were satisfied with the approach subject to CLO guidance. In addition the use of endowment funds was clearly set out in the statutory accounts of both the Health Board and the Endowment Funds. We were therefore open and transparent about the process.
7. Ms Robison stated that the Grant Thornton report laid bare the conflict of interest implicit in the structure of Health Boards and associated endowment funds (page 4). We suggest that the issue was laid bare by OSCR in 2011, when in their annual report they identified the issue as a high priority, recommending that the majority of trustees be independent of Health Boards. This recommendation has not been enacted by Scottish Government to date.
8. Ms Robison referred to the Grant Thornton report regarding CLO advice, its transmission to trustees and the meeting of 24 January 2014 (page 4). It is unfortunate that those who have reviewed the process (Grant Thornton, OSCR) have not grasped or understood the reality - please refer to the response to the Grant Thornton report sent to Committee. Firstly, the 24 January meeting was strategic in that a proposal was put to trustees to hopefully find and fund projects that had been missed earlier in the year. This initially required the lifting of the retrospective funding barrier, to which trustees agreed. We agree with OSCR that the process was rushed, but this was necessary, as the lack of brokerage was advised late in the year and there was limited time to find projects and perform the governance processes required by the Policy and Procedures to obtain trustee approval. The risks and issues of the process were identified and there were a number of communications with CLO prior to and after the meeting, as well as scrutiny of legislation, extant guidance and other endowment funds, which dealt with all the issues. These culminated in final comprehensive advice passed to trustees on 1 April 2014, to which all trustees responded with their satisfaction and approval. Throughout, the CLO advice remained consistent, which was that trustees had wide-ranging powers and could do what they wished, provided it met the charitable objective. CLO initial comments about funding of the mobile theatres, innovation, etc. were all resolved satisfactorily. We point out that had SGHSCD made the required brokerage available the transactions could have been reversed up to the date of signing of the accounts in June 2014 and we would have gladly done so.
9. Ms Robison implied that OSCR should have been asked for advice (page 8). There is misunderstanding about OSCR's role; OSCR is not set up or empowered by its founding legislation to provide advice to charities. Its role is as a regulator.
10. Ms McLaughlin implied that SGHSCD was not informed about the financial position (page 8). Yet the Board Chief Executive and Director of Finance met with SGHSCD Director of Finance in January 2014 and fully explained the situation. Monthly meetings to discuss progress up to year end were held by SGHSCD and the board between February and May 2014. See 6 above.
11. Ms Robison stated that the use of endowments was not the only option left (page 14). NHS Tayside senior management felt that it was the only option left, having been told that the brokerage was limited to £2.85m. Full brokerage had been denied and any possible savings in non-patient facing areas had been exhausted after several years of efficiency savings. The remaining option was to make substantial cuts to patient services in the final quarter, which

was wholly unacceptable. Finally, and as a truly last resort, investigation of how endowment funds might assist was proposed, provided it was legitimate.

12. You stated (pages 15/16) that “endowment funds were used to fund core spending”, quoting from the PWC report. As pointed out above, endowment funds were used to fund non-core expenditure. The PWC report actually says “to fund projects *outside of core* [i.e. non-core] activities”. It is apparent that the phrase in the PWC report was unfortunately misinterpreted. The endowment funds were used legitimately, as evidenced by the OSCR report and unqualified independent audit opinions.

There are some further pertinent items to bring to the Committee’s attention:

- A) The media has focussed on the IT expenditure that was approved by the Tayside Health Fund. We draw to your attention the capital budget situation for NHS Scotland at the time. There are two budgets set by SGHSCD annually; the Revenue Resource Limit (RRL) and the Capital Resource Limit (CRL). The two are separate and no transfers between budgets are permitted. During the years of austerity Scottish Government protected the RRL, providing annual increases. The CRL however was significantly reduced. In 2007/8 the CRL for Tayside was £42.5m. By 2013/14 it had been reduced by 67% to £14.2m, placing severe pressure on capital spend requirements. NHS Tayside was developing innovative IT applications that would see a step change in efficiency. However there was no CRL available to pay for the necessary computer hardware to run the applications. Since these were innovative projects at the leading edge of healthcare, the expenditure met the innovation criterion for funding from the Tayside Health Fund. The OSCR report confirms the propriety of the expenditure.
- B) The OSCR report judges that mis-management occurred, based on interpretation of Section 66 of the 2005 Act (see appendix 1). A Health Board and its associated endowment fund are inevitably conflicted due to the governance structure of shared directors/trustees. If the section were strictly observed it would mean that the Endowment Funds would be unable to function. If ignored, then the trustees could be accused of mis-conduct. The solution to this conundrum was recommended by OSCR to Scottish Government in 2011 (see section 7 above). Trustees are placed in difficult situations when making decisions and has led to reluctance to fund requests, which in turn has led to an accumulation of unspent NHS endowment funds, which now stand at over £250m nationally, money which should be spent on the advancement of health in Scotland.
- C) We are aware of several independent charities that provide what may be deemed core and non-core NHS services and have personal experience of their work and positive impact. These attract no criticism for spending funds on healthcare, yet NHS Endowment Funds appear to be heavily restricted in spending funds on precisely what they were established for and what donors want. There are strong arguments for making these endowment funds independent of Health Boards.

Lastly, we find it disappointing that there was little comment or discussion about the most important people in this issue – the patients. In the absence of sufficient brokerage these are the people that would have suffered had we been forced to make the cuts necessary. Through the process adopted, we were able to preserve health services in Tayside and remained at the time high achievers of targets set by Scottish Government.

We are confident that the trustees made the correct humanitarian decisions under the circumstances. We are satisfied that no patients died or were harmed unnecessarily through delays or cuts in treatments arising from the lack of brokerage funds from SGHSCD.

Yours sincerely,

Ian McDonald

David Carson

## APPENDIX 1

OSCR's definition of misconduct:

Misconduct (which includes mismanagement) means any action by charity trustees which may result in a significant loss or harm to the charity (and this includes failing to act). It arises where the general duties are not met and/or where charity trustees fail to comply with any direction, requirement, notice or duty imposed under the 2005 Act ([section 66\(2\) of the 2005 Act](#)).

The section of the Act:

### **66 Charity trustees: general duties**

- 1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
  - (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
  - (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
  - (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee—
    - (i) put the interests of the charity before those of the other person, or
    - (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.
- (2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.
- (3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.
- (4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.
- (5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—
  - (a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
  - (b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.