

THE SCOTTISH CHARITY REGULATOR (OSCR)

Inquiry Report made under Section 33 of the Charities and Trustee Investment (Scotland) Act 2005

Tayside NHS Board Endowment Funds (SC011042)

Executive summary

We opened our inquiry on 4 April 2018 when we became aware of press reports that in 2014 Tayside NHS Board Endowment Funds (the charity) had made retrospective grants of £2.7M to Tayside Health Board for projects which the health board had already paid for.

Tayside Health Board is responsible for commissioning NHS health care services for the residents in the geographical local government areas of Angus, Dundee and Perth and Kinross. Tayside Health Board is also the corporate trustee and the charity trustee of the charity.

We had three areas of interest:

1. Whether the charity trustee had the power within the charity's constitution and rules applicable at the time to amend the Policy and Procedures on a temporary basis to allow retrospective funding.
2. How the charity trustee went about its decision making in the period January to May 2014 – did it act in the interests of the charity and exercise the appropriate level of care and diligence? In particular, did it 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 the charity trustee understood and dealt appropriately with the conflict of interest between the charity and Tayside Health Board involved in the decisions.

As a result of our inquiry we have found the following:

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- Despite poor governance and decision making we are satisfied that charitable assets were only used for charitable purposes and the projects to which grants were awarded were advancing the health of the people of Tayside and therefore in pursuit of the charity's purposes
- In agreeing to consider the retrospective applications, the charity trustee was effectively acting to meet a deficit incurred by Tayside Health Board in its provision of NHS services: the charity trustee did not sufficiently recognise its duty to consider separately and distinctly the interests of the charity
- The charity trustee had the power to make a temporary variation to the charity's Policy and Procedures to allow consideration of retrospective funding applications
- The process by which this temporary variation was agreed was rushed to meet the needs of a third party (Tayside Health Board) and reflected poor governance practices
- The charity trustee's board members did not at the time of the key decision see legal advice provided to the charity
- Information provided to the charity trustee's board members about the charity's accountability to OSCR was inaccurate
- The legal advice the charity received came from the NHS in-house solicitors, it would have been good practice for the charity to have obtained independent legal advice to ensure it was acting, and seen to be acting, independently.

The failure of the charity trustee to act with the care and diligence that is reasonable to expect of a person who is managing the affairs of another person and to identify and deal appropriately with the conflict of interest between it and Tayside Health Board, amounted to mismanagement of the charity, which constitutes misconduct in terms of charity law.

We consider that the governance structure of the charity, with the Tayside Health Board being the corporate trustee and charity trustee of the charity, makes it difficult for a separation of interests to be appropriately managed and makes a failure to act in the interests of the charity more likely. The alignment of purposes of the charity and the Health Board make it difficult for a proper differentiation to be made.

We have made recommendations to the charity for its future governance and we are continuing to engage with the Scottish Government as to the governance structures of NHS endowments charities in general. This would require legislative change.

Reason for Inquiry

We opened an inquiry on 4 April 2018 when we became aware of reports in the national press that early in 2014, in response to a financial deficit in Tayside Health Board in its provision of NHS services, Tayside NHS Board Endowment Funds (known as the 'Tayside Health Fund') had paid £2.71M to Tayside Health Board in the form of retrospective payment for projects which the Health Board had already paid for. In order to make the retrospective payments, the charity was reported to have varied its Policy and Procedures.

On 14 May 2018 the Scottish Government informed us that the value of the retrospective payments should have been stated as £3.6M in the charity's 2013/14 accounts.

We opened our inquiry to determine whether there had been misconduct in the management and control of the charity in making the retrospective payments in 2014, in line with our statutory function of identifying and investigating apparent misconduct.

We had three areas of regulatory interest:

1. Whether the charity trustee had the power within the charity's constitution and rules applicable at the time to amend the Policy and Procedures on a temporary basis.
2. How the charity trustee went about its decision making in the period January to May 2014 – did it act in the interests of the charity and exercise the appropriate level of care and diligence? In particular, did it 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 the charity trustee understood and dealt appropriately with the conflict of interest between the charity and Tayside Health Board involved in the decisions.

We are publishing this report on the outcome of our inquiry in response to the public interest in the matter and to make our findings available to the wider charitable sector.

Background

Tayside Health Board is responsible for commissioning NHS health care services for the residents in the geographical local government areas of Angus, Dundee and Perth and Kinross.

Tayside NHS Board Endowment Funds (the charity) was granted charitable status with effect from 15 January 1975. Its charity number is SC011042.

NHS Boards hold and administer donated funds under the National Health Service (Scotland) Act 1978, as amended ('the 1978 Act'). In terms of this legislation, the Health Boards hold the funds on trust as a corporate trustee. Tayside Health Board is the corporate trustee of the charity.

There is no separate Trust Deed. The charity's governing document is the 1978 Act. This is the position for all NHS endowment funds in Scotland.

The purposes of the endowments are defined in the 1978 Act, which vests endowment funds on trust to the Health Board for the general purposes set out in section 1 of the Act.

General duty of Secretary of State.

(1) It shall continue to be the duty of the Secretary of State to promote in Scotland a comprehensive and integrated health service designed to secure—

- (a) improvement in the physical and mental health of the people of Scotland, and,*
- (b) the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the provisions of this Act.*

This means that Health Boards and endowment funds have the same purposes.

These fall within the charitable purpose 'the advancement of health' as set out in section 7(2)(d) of the Charities and Trustee Investment (Scotland) Act 2005. The charity has Terms of Reference and Policy and Procedures documents and in other respects has adopted Tayside Health Board's corporate governance documents. The Terms of Reference and Policy and Procedures in effect between September 2013 and October 2014 set out the charity's objectives and principal activities:

'Trustees have determined that:-

- 'i. Endowment Funds should not be used as a means of funding mainstream services

‘ii. Endowment Funds can be used to help pump-prime, pilot and validate the benefits of new models of care’

Section 16 of the Policy and Procedures in place between September 2013 and October 2014 also included the following statement:

‘Application to Endowment Advisory Group must be made within a timeframe which is sufficient to allow for approval being granted by Board of Trustees in advance of any order being placed or any employment being offered. Neither Endowment Advisory Group nor board of Trustees will consider retrospective applications.’

The term ‘mainstream services’ refers to Government funded services provided by the NHS. These services are also referred to as ‘core’ or ‘exchequer’ funded services.

The Trustee of Tayside NHS Board Endowment Funds

Tayside Health Board is the corporate trustee and charity trustee of the charity. In 2014 there were 21 members of Tayside Health Board, 16 Non Executive members and five Executive members. The Executive members were the Chief Executive and four Directors of Tayside Health Board. Since 2014, the Chairman and one Non-Executive board member have died.

Endowment Advisory Group

The charity has one advisory committee, the Endowment Advisory Group (EAG). Membership is a mix of Tayside Health Board members, Tayside Health Board staff and a public representative.

In 2014 the EAG’s role, acting in the interests of the charity, was to approve all applications for Endowment Funding within its delegated authority of £100,000. Above this level, it considered applications and if appropriate forwarded them to the Endowment Funds Board with a recommendation to approve.

Endowment Fund staff

In 2014 the Endowment Funds team was employed by Tayside Health Board. The then lead officer for the Endowment Funds was an Assistant Director of Finance who spent only a minority of his time on endowment funds work. There was also a small team of staff, most of whom were fully occupied with endowment funds work.

2013/14 statements of account

The charity's statement of account for the period to 31 March 2014 fully disclosed that the charity had varied its Policy and Procedures to allow retrospective approval of expenditure.

2013/14 was also the first year that Tayside Health Board consolidated the charity's accounts with its own accounts. The consolidated accounts for the year to 31 March 2014 contained a disclosure of the events that took place.

Copies of the charity's accounts were submitted to OSCR and to the Scottish Government's Health and Social Care Directorates.

The charity's accounts were audited by independent auditors who provided an unqualified audit opinion. Similarly Tayside Health Board's audited consolidated accounts were also unqualified by a separate firm of auditors.

OSCR's policy is not to routinely examine every set of accounts received from charities, so this did not trigger any follow-up action from OSCR.

Findings

1. Whether the charity trustee had the power within the charity's constitution and rules applicable at the time to amend the Policy and Procedures on a temporary basis.

The charity's governing document is the 1978 Act. An amendment to that document would require legislative change. However the Policy and Procedures is an internal administrative document which the charity trustee has the power to amend. The charity trustee had amended the Policy and Procedures on a number of occasions previously.

Conclusion

We found that making the temporary variation was within the powers of board members.

2. How the charity trustee went about its decision making in the period January to May 2014 – did it act in the interests of the charity and exercise the appropriate level of care and diligence? In particular, did it 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?

In considering whether to make the temporary variation to its Policy and Procedures to allow it to consider retrospective funding applications the charity trustee had a duty to act in the interests of the charity and with the care and diligence that is reasonable to expect of a person who is managing the affairs of another person. In order to understand as fully as possible the decision making process, early in our inquiry we wrote to all surviving individuals who had been members of Tayside Health Board in January 2014 requesting information.

Having considered the responses and documentary evidence we sought meetings with board members and other key participants to discuss in more detail the information they had provided, most of which was based on personal recall of events and discussions that had occurred more than four years previously. We then considered fully all the information we had gathered.

In reaching our findings, we considered a number of elements in relation to this question.

The decision making process

16 January 2014

At the 16 January 2014 meeting of the NHS Tayside Finance and Resources Committee members received a verbal update that Tayside Health Board's overspend in its provision of NHS services at 31 December 2013 was £2.6M.

17 January 2014

Tayside Health Board received its final outcome figures for December 2013 showing the forecast deficit at 31 March 2014 had risen to £6.6M. This increase put at risk the Health Board's obligation to achieve breakeven. Tayside Health Board's Chairman, Chief Executive Officer and Director of Finance met to consider options for meeting the deficit, including retrospective use of Endowment Funds for non-core projects already funded by exchequer. They ordered an immediate review of 2013/14 projects to identify potentially suitable projects.

21 January 2014

Tayside Health Board's Director of Finance and Chief Executive as Accountable Officer attended a special meeting with Scottish Government to discuss the increased forecast deficit. The availability of 'brokerage', that is loan finance from central funds set against the following year's funding for Tayside Health Board, to assist them to achieve breakeven was discussed. We understand from Tayside Health Board's Director of Finance that Scottish Government offered up to £2.85M on the basis of forecast property sales by Tayside Health Board, leaving a shortfall of £3.7M to be financed by Tayside Health Board. Retrospective use of endowment funding was not discussed. There is no written record of this meeting.

That afternoon Tayside Health Board notified four Executive Directors and all Non-Executive board members who were also Tayside Health Board Standing Committee Chairs of a 'pre meeting' to take place on 23 January 2014.

22 January 2014

The Chairman called members to an extraordinary meeting of the charity on 24 January 2014.

One Non-Executive Board member queried the chair's power to call an extraordinary board meeting at two days' notice. A member of the Endowments team clarified that it was within the chair's powers to do so.

Late in the afternoon Tayside Health Board issued a paper for the 'pre meeting' to Tayside Health Board's Medical, Nursing and Finance Directors, the Chief Executive, the Chairs of all of Tayside Health Board's Standing Committees and the lead officer for the endowment funds. The four executive directors and the charity's lead officer had signed this paper, which set out Tayside Health Board's deficit, explained that following the meeting with Scottish Government on 21 January 2014 'only minimal central support' was available, and asked the Standing Committee Chairs to recommend to the charity a temporary variation in the charity's Policy and Procedures to allow retrospective applications to be considered. The central support referred to in the paper was brokerage.

23 January 2014

The 'pre-meeting', attended by some Executive Directors and Non-Executive board members who were Tayside Health Board Standing Committee Chairs, took place. This 'pre meeting' was the first time any Non-Executive board members were made aware of the increased forecast deficit.

The Standing Committee Chairs agreed the recommendation to the charity to temporarily vary the charity's Policy and Procedures to allow retrospective applications to be considered. However, during our inquiry a number of them expressed their discomfort to us at the fact that the purpose of this recommendation was to assist Tayside Health Board to breakeven. The strength of one Chair's discomfort is evident in an email sent that evening to another Chair.

Standing Committee Chairs had never previously been asked to make a recommendation to the charity.

There is no written record of the 'pre meeting'.

24 January 2014

The extraordinary meeting of the charity took place. Prior to the meeting, a Standing Committee Chair approached the Chairman and Director of Finance about the proposal to temporarily vary the Policy and Procedures to allow retrospective applications to be considered and was told that somebody in the organisation was contacting OSCR and Central Legal Office (CLO) to make sure that assurances could be given at the meeting in the afternoon. Another Standing Committee Chair emailed other board members to advise they were

unable to attend the meeting and to raise that they thought it ‘...would be useful to get guidance on any legal/regulator risks and guidance’.

From the minute of the extraordinary meeting, Tayside Health Board in its role as charity trustee appears to have been presented with the choice of either using Endowment Funds to assist Tayside Health Board to break even or in effect condoning a ‘massive cuts package’ to NHS services in Tayside. The charity trustee agreed the temporary variation in the Policy and Procedures that would allow retrospective applications to be considered.

4 February 2014

The Endowment Advisory Group (EAG) approved four retrospective applications within its delegated authority and passed four applications above that to the Endowment Funds Board with a recommendation to approve.

20 February 2014

The Endowment Funds Board approved the four retrospective applications passed to it by the EAG.

The legal advice provided to the charity trustee’s board members

During the morning of 24 January 2014, a member of the Endowment Funds team requested urgent legal advice from CLO on the proposed temporary variation and retrospective projects. CLO provided the advice less than two hours before the extraordinary meeting of the charity. Board members were not shown a copy of this advice.

On 19 February 2014, the day before the charity met to consider the retrospective applications, a member of the Endowment Funds team urgently requested advice from CLO on OSCR’s investigating powers and sanctions if the charity was found to have approved inappropriate expenditure. CLO responded the same day. The minute of the meeting of 20 February 2014 makes no reference to this legal advice.

No written legal advice was provided to board members until 1 April 2014, well after the temporary variation had been made and retrospective payments agreed. This was the only written advice board members received in respect of the retrospection.

Contact made with OSCR

The minute of the extraordinary board meeting of 24 January 2014 refers to the endowments funds team having 'conducted work around OSCR...' in relation to the proposed temporary variation 'to ensure there were no conflicts'. Many board members were under the impression from the discussion at the meeting that OSCR had been contacted and had raised no objections to the proposal.

It is unclear from the minute what work in respect of OSCR was actually carried out and the recollections of the Endowment Fund team members whom we interviewed conflicted. OSCR has no record of any contact from the charity during this period. However, it does not routinely record or make file notes of general telephone queries concerning charity administration. We are therefore unable to confirm whether or not the charity contacted OSCR.

The board's understanding of OSCR's role

The minute of the extraordinary board meeting of 24 January 2014 includes a reference that 'the Endowment Fund is not accountable to OSCR but the guidelines are observed'. Later in the minute one of the Non-Executive board members in a reference to OSCR notes the lead officer's 'assurance that we observe the guidelines, but are not constrained'.

From our meetings with the board members it appears the understanding of some board members in 2014 of OSCR's role in regulating the charity was confused, with some understanding that OSCR did regulate the charity and the understanding of others being that while the charity complied with OSCR guidelines, as a body constituted by statute its position was somewhat different. This confusion appears to stem from information provided at board members' inductions and internal Tayside Health Board events.

The source of the legal advice the charity received

All the advice the charity received was from Central Legal Office, which provides advice to health boards across Scotland including Tayside Health Board.

In 2011, following a review of Lothian Health Board Endowment Funds (Scottish charity number SC007342), OSCR published its 'Who's in Charge: Control and Independence in Scottish Charities' guidance. This guidance included a case study of Lothian Health Board Endowment Funds, as an example of a charity whose board is identical to that of a linked body. The case study included the steps we asked the charity to take to show its independence. One of these steps was to 'Make practical arrangements to show the public that it is acting autonomously, for example by taking its own

independent legal advice...'. This step was also highlighted in a letter sent in 2012 from OSCR's Chief Executive to all Health Board Chairmen, including Tayside Health Board. We have been unable to establish whether this letter was circulated to members of Tayside Health Board.

Conclusion

Taking all of the factors above into consideration, we found that the decision making process was rushed and reflects poor practice. The charity trustee made a major variation to the charity's Policy and Procedures at very short notice in the knowledge that the reason for doing so was to assist Tayside Health Board's financial position. In doing so, the charity trustee failed to act with the care and diligence that is reasonable to expect of a person who is managing the affairs of another person.

We have not been able to establish the reason why the Standing Committee Chairs, who had not previously made any recommendations to the Endowment Funds Board, were asked to make a recommendation to it at this time.

It is not clear from the minute of the extraordinary meeting of the Endowment Funds Board on 24 January 2014 how much of the legal advice received that morning was relayed to board members. The charity trustee's board members did not have sight of a copy of the written legal advice. In considering making a major amendment at short notice, it would be good practice for the charity trustee's board members to be provided with a copy of legal advice to assist decision making.

The only legal advice the charity trustee saw was not issued until some time after the temporary variation in the Policy and Procedures had been made and the retrospective payments agreed.

The legal advice the charity sought was from CLO, which also advises Tayside Health Board in its provision of NHS services. It would have been good practice for the charity to have obtained independent legal advice to ensure it was acting, and seen to be acting, independently.

While making the temporary variation was in the powers of the charity trustee, the basis of the assurance that, in terms of the proposed temporary variation, there were no conflicts with OSCR is not clear and we have been unable to establish if the charity contacted OSCR for guidance.

The charity trustee's board members' understanding of OSCR's role as regulator of the charity appears to have been confused.

The reputational damage to the charity that ensued when these issues were publicised in 2018 was foreseen and recorded in the minute of the extraordinary meeting (and in the advice from the CLO). This recognition should have triggered a full consideration of the risks by the charity trustee with board members having a full understanding of the position and of the advice provided.

3. Whether the charity trustee understood and dealt appropriately with the conflict of interest between the charity and Tayside Health Board involved in the decisions.

While Tayside Health Board was under pressure to address its deficit, this pressure did not apply to Tayside Health Board in its role as trustee of the charity. Its duty, as charity trustee, was to act in the interests of the charity, in line with its purposes and with the care and diligence that is reasonable to expect of a person who is managing the affairs of another person.

Individual Non-Executive board members recorded misgivings at the 24 January 2014 meeting and in emails at the time about the appropriateness of endowment funds being used to meet the financial obligations of the Health Board.

Our 2011 *Who's in Charge* guidance emphasised that endowment funds charities should be able to demonstrate that, in a situation of conflict like this one, the charity makes decisions on the use of its funds on the basis of the charity's own interests and not the needs of the other body (the Health Board).

A number of board members have put forward the view that, in authorising retrospective consideration of funding for projects already met by Tayside Health Board, they were acting to protect the people of Tayside from the consequences of a deficit that would result in harmful cuts to health services, and therefore acting in furtherance of the charity's purposes. However, while it would be reasonable to assume some level of cuts in such a scenario, we have not found evidence that the consequences of such a course of action were presented or considered in any detail by the charity trustee.

Conclusion

We consider that the charity trustee's decision to make the temporary variation to the Policy and Procedures did not reflect a sufficient degree of detachment from Tayside Health Board or recognise that the charity's

interests should be considered separately from those of Tayside Health Board.

We found that in making this decision the charity trustee failed to deal appropriately with the conflict of interest between Tayside Health Board and the charity. This conflict is inherent in the current structure of the charity, where Tayside Health Board is also the charity trustee. Any situation in which it arises it would require careful management and the risks identified and managed appropriately. We had already identified it in our *Who's in Charge* guidance and in correspondence with Health Boards and the charity did not recognise or act on it when the time came.

In respect of the decisions made on 4 and 20 February 2014 on whether or not to fund retrospective applications from NHS Tayside, the evidence is that, other than the retrospective aspect, these were considered in line with the charity's usual procedures and with due deliberation and challenge. We are also satisfied that charitable assets were only used for charitable purposes and the projects to which grants were awarded were advancing the health of the people of Tayside and therefore in pursuit of the charity's purposes.

We have considered whether the charity was here acting in contravention of the section in its Policy and Procedures which stated that it should not fund mainstream, that is core provision. The projects discussed on 4 and 20 February were ones which the Health Board had previously agreed to pay for under its core funding from Scottish Government. The argument that this in itself made them 'mainstream provision' has some weight. On the other hand, the charity took the view that the projects clearly fell within the charity's purposes.

However, in this regard evidence from our work with other endowments charities indicates that the distinction between mainstream and non-mainstream or core and non-core expenditure is not generally a particularly clear one, or easy to make in individual cases. Given the public interest in whether payments made by the charity are for core or non-core activities, it may be helpful for the NHS to issue further guidance about this.

Result of inquiry

Overall, we find that there was mismanagement in how the decision to suspend part of its Policies and Procedures was made. The failure of the charity trustee to act with the care and diligence that is reasonable to expect of a person who is managing the affairs of another person and to identify and deal appropriately with the conflict of interest was in our view mismanagement, and therefore misconduct in the administration of the charity, resulting in reputational damage to the charity.

When we have evidence of misconduct we have powers under the 2005 Act to apply to the Court of Session to disqualify charity trustees and those concerned in the management or control of a charity from acting as charity trustees in the future. In carrying out its functions OSCR must have regard to the principles of best regulatory practice. These include ensuring that any use of our powers is proportionate, accountable, consistent, transparent and targeted only where action is necessary.

Taking into account the current situation of the charity and changes in personnel since the decisions were made, we do not consider it necessary or proportionate to take formal enforcement action against the charity trustee or in respect of any individuals who were concerned in the management or control of the charity. It has been some time since the 2014 incident and we are now engaging with the charity to review its current Policy and Procedures to ensure risks are identified and mitigated as far as possible.

However, fundamentally we do consider that the current governance structure of NHS endowment charities in Scotland, where the Health Board is the corporate trustee of the charity, constitutes a risk to the ability of the charity trustee to act in the charity's interests where these conflict with those of the Health Board, and where there is significant financial pressure on the Health Board. As we pointed out in our 2011 guidance, changes to this structure will require the amendment of the National Health Service (Scotland) Act 1978. We intend to make recommendations to the charity. We are also writing to Scottish Ministers to suggest that the provisions of the 1978 Act are reviewed with a view to ensuring that at least a majority of those in management and control of the Endowment Funds are independent of the relevant Health Board, thereby resolving our concerns about governance.

Wider lessons for the charitable sector

- NHS endowments charities should have a conflict of interest policy to ensure the decision making process is independent, where both the Health Board and charity have an interest
- Clearer and fuller guidance for NHS endowments charities on core and non-core activities should be provided
- Where legal advice has been obtained regarding a matter of significance involving potential reputational or other consequences for the charity, trustees should have sight of it to enable them to consider fully all the potential risks and benefits to the charity prior to making a decision