TYNWALD COMMISSIONER FOR ADMINISTRATION

STATEMENT OF REASONS FOR FAILURE TO INVESTIGATE A COMPLAINT

TCA 1824

Introduction

1. This is a statement, pursuant to section 14 of the Tynwald Commissioner for Administration Act 2011 ("the 2011 Act"), of my reasons for not completing the investigation of the complaint made by Mr K about delay by the Health IRB in investigating his complaint into the death of his partner, Mrs M. Since this case concerns a matter of general interest, I am laying this statement before Tynwald pursuant to section 21(5) of the 2011 Act and for that reason I am anonymising references to the Complainant and his late partner.

Background

2. In May 2014, Mrs M was seen at Noble's Hospital and diagnosed with a tumour on her nose. She was referred to the Royal Liverpool Hospital where, after further tests, she was diagnosed with Non-Hodgkin's T. Cell Lymphoma. She was given an initial course of chemotherapy which was continued at Noble's Hospital. She was also referred to Christies's Hospital for a PET scan which proved clear, but it was decided that she should have a course of radiotherapy which was carried out at Clatterbridge Hospital as an in-patient. She received 25 sessions over a 5-week period, prior to discharge on 22 May 2015.

3. At the time of her discharge from the Royal Liverpool Hospital, Mrs M was given a follow-up appointment for December 2015 to be seen by the visiting oncologist at Noble's. She also had an appointment to see another consultant in February 2015, which did not take place because the flight was cancelled. She then received a letter with a revised appointment for September 2015, some 7 months later.

4. In late June 2015, Mrs M discovered lumps on her legs. Her GP arranged for blood tests with the results being sent to the UK Consultant. She heard nothing further and became more concerned about her legs so in early August, she telephoned the Consultant's secretary at Clatterbridge and an appointment was arranged at Noble's Day Assessment Unit later in August as a result of which Mrs M was to have a CT scan and she was then to see the Consultant in September.

5. Unfortunately in late August, Mrs M had an accident at home, fracturing her left femur. She was operated on at Noble's, during which she was given a blood transfusion of non-irradiated blood, the Orthopaedic Department being, apparently, unaware of her other medical conditions. Whilst still an inpatient on the Orthopaedic Ward, she missed her arranged CT scan because the Radiology Department were not aware that she was an

inpatient and no porter was sent to collect her. She was scanned subsequently and was seen at the Consultant's clinic in mid-September but by his Assistant rather than the Consultant. He told her the scan showed no evidence of lymphoma and that degeneration of bone mass in her neck and shoulder was age related. He concluded that the lesions on Mrs M's legs were not connected to lymphoma but that the clinic would "keep an eye on them". Mrs M was then given an appointment for January 2016.

6. The condition of Mrs M's legs continued to deteriorate. She visited her GP who sent an email to the hospital for advice but received no response. Subsequent emails also provided no positive advice and Mrs M continued to deteriorate. She became unable to visit the surgery, relying on GP home visits and the support of Community Nurses. By January 2016 Mrs M was too ill to attend for her appointment with the visiting UK specialist. She was able to attend Noble's Hospital the following week, when she was again seen by the Assistant who arranged for an urgent biopsy. She also saw a dermatologist. A follow-up appointment was made for a month later. In the intervening period, Mrs M received an appointment letter to attend the Royal Liverpool Hospital. The day before that appointment Mr K had to take Mrs M to the emergency clinic at Noble's, where she was prescribed liquid morphine to enable her to travel to Liverpool the next day. She was admitted and died 18 days later.

7. Whilst accepting that the outcome may well have been inevitable, Mr K felt strongly that mistakes had been made and that opportunities had been missed between June 2015 and February 2016. With the support of Mrs M's two sons, both of whom were working abroad, he made a formal complaint to the Minister who forwarded it to the management team to investigate further. The complaint alleged that both the Consultant and his Assistant had been negligent in failing to "keep an eye on" Mrs M's condition and negligence by the Hospital in respect of repeated attempts by the General Practitioner to alert it to Mrs M's problems. As a result, Mr K and one of Mrs M's sons, who was on Island to deal with his late Mother's estate, were invited to a meeting in June 2016. The meeting failed to resolve the issues, but raised further anxieties set out in a letter written by Mrs M's son, because the Assistant had made a number of points in emails to the cancer lead Physician at Noble's (who attended the meeting) which were disputed. In particular, the Assistant stated that when he examined Mrs M in September 2015, there were "no abnormal physical signs" on her legs. Both Mr K and the son had been present at that consultation, and were adamant that the lumps had been discussed. Indeed, Mrs M had phoned the Consultant's secretary in August 2015 because of her concern about them. On 1 September 2016 Noble's Hospital wrote to Mr K answering questions which he had raised both at the meeting in June and in correspondence.

8. The complaint was then referred to the Executive Director for Health (Acute Care) who, by letter of 11 November, explained that, as Mrs M had been an in-patient in August 2015, she would have been thoroughly examined by the doctor who admitted her who would have recorded fully any findings and her records contained no reference to any lumps. If any lumps had been brought to the attention of the staff, whether or not they were

lymphoma-related, they would have been fully assessed and investigated. She accepted in her response that they were unable to resolve Mr K's concerns to his satisfaction and provided details to enable the complaint to be considered by the Independent Review Body pointing out that the complaint had to be escalated within 28 days so that the deadline was 9 December 2016. Mr K continued in correspondence with the Executive Director of Health (Acute Care) and also wrote to the Minister appointed after the General Election with suggestions for improving communications between the patient's GP and hospital staff and also between Noble's Hospital and hospitals in the UK to whom patients were referred. He remained dissatisfied with the explanations provided. I note that in one of his letters he stated:

> "I note your advice that I should seek an independent review, but frankly I see absolutely no purpose in it. As explained previously, I just wanted some acknowledgement that Noble's would examine all the aspects of [Mrs M's} care to ensure future patients would be treated better than she was."

However, in his later letter to the Minister dated 2 February he stated:

> "I have given very careful thought to the matter in hand and after receiving assurances from an unimpeachable source regarding the probity of the Independent Review Body (IRB) I have decided to put the case in their hands."

This he did by letter of the same date.

9. The IRB acknowledged the letter by return and 5 days later sent Mr K a leaflet setting out the function and procedures of the IRB. The leaflet made clear that it could not investigate if legal proceedings had been activated and that it could not make recommendations about compensation nor relating to staff disciplinary action. Finally, the letter confirmed that an IRB Convenor had been appointed to consider the complaint and he would determine how he wished to proceed. Less than 3 weeks later Mr K was asked to complete consent forms so that the hospital records could be released to the Convenor. The Convenor held two meetings with Mr K and Mrs M's son. The first meeting took place on 1 August 2017, 6 months after the IRB received the complaint. At that meeting the Convenor indicated that he was minded to arrange a formal Panel Hearing and request the attendance of 6 witnesses, including the Consultant and Assistant from the UK and the Executive Director (Acute Care). There was a further meeting on 29 September at which, according to Mr K, there was no suggestion that the Convenor was abandoning the idea of a Panel Hearing. On 11 January 2018 Mr K was informed that "[the Convenor] has completed the IRB investigation in respect of your complaint. His report will be signed off tomorrow and will be sent to you shortly after."

10. The report was sent to Mr K on 15 January 2018. It upheld Mr K's complaint in part. Specifically, the Convenor found that there had been a clear breakdown in communication within the Hospital itself with the CT scan appointment being missed because Radiology was unaware that she had become an inpatient; between the Hospital and the outside professionals brought in to provide specialist diagnosis and treatment

and apparent difficulties in basic electronic communication between the GP's surgery and the Hospital. The communication problems had caused delay. Where a clinic had to be cancelled there was an inevitable backlog as the patients from the cancelled clinic had to be fitted into other clinics.

11. However, the Convenor found no evidence of lack of professionalism or procedural care in respect of the treatment provided. Expressly, having examined the medical notes made in August 2015, he found no reference to lesions or lumps and the CT scan when it eventually took place revealed no evidence of them. He therefore did not uphold Mr K's complaint as to Mrs M's medical treatment. The Report provided no explanation as to why the Convenor had concluded that a Panel Hearing was unnecessary.

12. Mr K remained unhappy. He wrote to the Chief Minister. He wrote to the IRB recording his dissatisfaction on 9 February 2018. He received a substantive response from the Chair of the IRB on 14 March. He expressed concern and commented that the reasons for dissatisfaction had been clearly set out and that, on the surface, these seemed entirely reasonable. The Chair stated that he had requested to see the files as he would like to take a closer look before making too many comments. However, he urged Mr K to request a second Convenor to look at the case and expressed a willingness, as the Chair of the IRB, to re-investigate the case personally. He concluded with a promise that "no stone will be left unturned by a second review."

13. Mr K responded on 27 March 2018 and accepted the offer of a review by the Chair. The Clerk of the IRB kept in contact with Mr K and on 30 July informed him that the Chair was still awaiting answers to a number of questions and that it was understood that the Hospital were taking steps to expedite the reply. On 16 August he was told that a reply had been received and that the Chair was reviewing the contents alongside all the other documentation relevant to the complaint. Mr K heard nothing further so wrote again to the IRB on 12 December expressing his feelings about the continued delay and suggesting that:

> "……the Independent Review Body is not fit for purpose. It is nothing more that a 'specious charade' and as I stated before, should be abandoned".

He stated further that

> "I will not be altering my stance regarding seeking financial retribution, that has never been my intention and in any case the Noble's Hospital Litigation Fund has suffered enough."

It is as well that Mr K was not contemplating litigation, because nearly 3 years had passed since Mrs M's death, so that he was almost out of time to bring any proceedings. Mr K eventually received the second Convenor's report on 27 December *2019,* by which time any claim would have been out of time.

Abortive investigation

14. It was against this background that Mr K with the assistance of his MHK contacted my predecessor, who interviewed Mr K accompanied by the MHK in December 2018. Following that meeting the then Tynwald Commissioner wrote to the Chief Executive of DHSC. As he explained in the letter dated 14 December, the complaint which had been made to the Tynwald Commissioner was not about medical issues but about delays and administrative failures which Mr K considered had characterised the IRB's handling of the matter. He asked the Chief Executive whether he agreed that this was an administrative or service failure. He accepted, as do I, that the IRB were best placed to consider specialist medical matters but concluded that although the IRB itself was outside the Commissioner's jurisdiction, its administration was provided and paid for by the Department and as such was within the Department's control. The Chief Executive responded on 11 January 2019 in which he stated: "Your reasoning seems appropriate to the circumstances of the case and therefore your jurisdiction would appear to cover it."

15. By the time of this response, my predecessor's period of office had expired, so any further investigation had to await the appointment of his successor. After I took up office in March 2019, I reviewed the papers and, having dealt with other outstanding matters, I invited Mr K to come and see me. This he did, again accompanied by his MHK, on 2 May 2019. He was able to provide me with the full chronology set out above and provided me with a file of his correspondence with DHSC and the IRB from whom he was still awaiting the 2nd Convenor's report despite a letter from the Clerk dated 9 January 2019 which stated that the Chair was "progressing the IRB report for your complaint and will complete it as soon as possible".

16. By this time, the Chief Executive who had agreed that the Commissioner could investigate had left the Department, so I entered into correspondence with the Interim Chief Executive. She responded on 23 May, having checked the position with the IRB. She explained that she understood that there had been delay in the Chair receiving data that he had requested which had delayed the completion of his review. He had confirmed that he was now in receipt of this information and was able to conclude his review and report. However, this was one of several cases which he was investigating, and he could not give a definitive date for the completion of the report.

17. I continued in my attempt to obtain information from the IRB by writing to the Department. By this means I learnt that there were no targets in respect of the completion of reports. They took however long it took. I also attempted to identify if there was undue delay in the hospitals in the UK responding. There seemed to be nothing in their contract with DHSC which dealt with response times generally, and it was, in any event, unlikely therefore that they would have included specific times for responses to the IRB. I was also told that Noble's Hospital had no record of when the Consultant visited or when only the Assistant ran the clinic. This led me to wonder how it was possible to manage the

contracts and, in particular, how payments were made without evidence of performance. I did, however, learn that between 2015 and 2018, 56 cases were referred to the IRB, 27 of which were referred in 2018. Only 4 of these had required a Panel Hearing and 31 had been resolved at 1st Convenor Review. 12 cases, including this one, had been referred for 2nd review. Prior to April 2015, there were 6 IRB members 3 of whom were Convenors. A 4th Convenor was then agreed, with the IRB Chair undertaking all the duties of a Panel Chair and also being available to advise other Convenors. With the increase in cases, DHSC agreed that all lay members should, on appointment, also become Convenors. From February 2019, there were 6 Convenors, one of whom was the Chair. All the Convenors undertook 1st and 2nd Reviews.

18. The IRB has provided comments on a draft of this Statement and furnished further clarification of those comments. IRB Chairs do not carry out investigations. Their role is to discharge the duties of Chair or Panel Chair and to provide support and advice to other Convenors. At the time which is the subject of this Complaint, three Convenors were appointed, one of whom was the Chair. The workload, complexity of cases, and changing membership was such that, exceptionally, the Chair, in addition to his other duties took on new cases and carried on investigations which had been started by retiring Convenors.

19. I was wondering how I could get further evidence about response times from the UK hospitals, conscious that actions taken relating to contractual and other commercial transactions were excluded matters which I cannot investigate[1], when I received another complaint about delay by the Health IRB in investigating complaints referred to it. This complaint related to dental services.

20. I began to investigate that complaint, following the same route I had taken with Mr K's complaint. At this time, the Interim Chief Executive with whom I had been dealing was on sick leave and a different Director responded on her behalf. She argued that the Health IRB was independent of the Department and outwith my jurisdiction. I responded pointing out the position taken by the Interim Chief Executive and previous Chief Executive. The Director sought advice from the Attorney General's Chambers. She subsequently waived legal privilege and provided this reply from Chambers:

> "This is really a complex question of which **[sic]** there is no definitive answer. My opinion having reviewed all of the relevant legislation and regulations is that the IRB is an independent body from the DHSC.
>
> …. In terms of the original question concerning whether you would take action against the IRB or the DHSC, my opinion is that the IRB is an independent body."

[1] Section 11(2)(i) of Tynwald Commissioner for Administration Act 2011

The lawyer asked the Director how much of a legal opinion she needed and offered to set out why he had reached this conclusion. Offered the opportunity, I told the Director that I thought the reasoning would be helpful.

20. The Director subsequently forwarded to me the formal advice she received. The lawyer founded his opinion on section 38 of the National Health Services Act 2001 and the National Health Service (Complaint) Regulations 2004. Regulation 2 of those Regulations required the Department to establish the "Independent Review Body" for the purposes of reviewing complaints under the Act and in accordance with the Regulations. The Regulations provided for the Body's membership and listed those not eligible to be members. There were regulations as to how the complaints were to be handled, but the Statutory Document was silent on the relationship between the Department and the IRB.

21. From his reading of the Regulations, the lawyer concluded that the IRB was a body independent of the Department.

> "I reach this conclusion because of the Regulations behind it and its intended purpose under those Regulations. The restrictions on its membership is also something which I believe [goes] to establishing its purpose as being independent of the DHSC."

This last sentence is a reference to regulation 3, which excludes as members (among others) employees of DHSC; a primary care provider or their employee; an independent provider of health services to the Department of their employee; or a person who has been a healthcare professional. Finally, the lawyer accepted that the IRB was funded by the DHSC but considered that this did not matter since the specific Regulations were designed to create independence from DHSC control.

22. I had hoped that the advice would have analysed the constitution and structure of the IRB. I have never doubted that the intention was to establish an independent body, but I am not convinced that the structure achieves that purpose. I have seen absolutely nothing to demonstrate that it actually has a separate legal identity. Whilst the lawyer expects that any legal action would be against the IRB rather than the Department, I cannot see how any such action could be sustained without establishing a separate legal identity.

23. I need to make clear that all the correspondence arose in a different case which I declined to investigate because, as my predecessor explained[2], a Department is obliged to follow the advice provided by the Attorney General's Chambers and in so doing cannot be guilty of maladministration. No-one has sought to prevent me concluding this investigation. There is provision in section 16 of the 2011 Act which would have enabled me to seek information directly from the IRB as "[another] person. who in the Commissioner's

[2] TCA 1818 - Statement

opinion is able to supply information or documents which are relevant to the investigation". I should make it clear that in recent correspondence the IRB has expressed regret that I did not seek evidence directly from it. However, once I knew that it was the view of the Attorney General's Chambers that the IRB was a separate entity from the Department, it was unrealistic to think that I could continue. That said, the chronology which the IRB has provided does show that the delays which occurred were attributable to the need for the IRB to obtain information and documents from UK hospitals and to review them. The Convenors are not engaged on IRB duties on a full-time basis. They fit investigations around other commitments. It is also pertinent to note that the three Convenors involved in this case are no longer members of the IRB.

24. Whether I have jurisdiction or not cannot depend on the view of the senior officers of the Department in a particular case of this type: either I have jurisdiction to investigate a complaint of this kind or I do not. If the Health IRB is not a part of the DHSC, as the advice from Chambers indicates, it is not separately identified in any way in Schedule 2 to the 2011 Act and I therefore cannot investigate a complaint against it.

25. It is of no comfort to Mr K, but I have concluded that all I can do is lay this as a section 14 statement. I do so, providing more factual information than is strictly necessary, in order to draw attention to a problem which it is not within my power to address. I have not reached any conclusion on the complaint itself, nor indeed the underlying policy questions which arise, as both issues are outside my jurisdiction.

Angela Main Thompson
Tynwald Commissioner for Administration
31 March 2021