



OFFICIAL REPORT
AITHISG OIFIGEIL

Public Audit and Post-legislative Scrutiny Committee

Thursday 13 December 2018

Session 5



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PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE
29th Meeting 2018, Session 5

CONVENER

*Jenny Marra (North East Scotland) (Lab)

DEPUTY CONVENER

*Liam Kerr (North East Scotland) (Con)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)

*Bill Bowman (North East Scotland) (Con)

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

*Alex Neil (Airdrie and Shotts) (SNP)

*Anas Sarwar (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Crosbie (Audit Scotland)

Caroline Gardner (Auditor General for Scotland)

Leigh Johnston (Audit Scotland)

Fiona Mitchell-Knight (Audit Scotland)

CLERK TO THE COMMITTEE

Lucy Scharbert

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Public Audit and Post-legislative Scrutiny Committee

Thursday 13 December 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Jenny Marra): Good morning and welcome to the 29th meeting in 2018 of the Public Audit and Post-legislative Scrutiny Committee. I ask everybody in the public gallery to switch off their electronic devices or turn them to silent mode.

Agenda item 1 is a decision on taking business in private. Do members agree to take item 3 in private?

Members indicated agreement.

Section 22 Report

“The 2017/18 audit of NHS Tayside”

10:00

The Convener: Item 2 is the section 22 report, “The 2017/18 audit of NHS Tayside”. I welcome our witnesses from Audit Scotland: Caroline Gardner, the Auditor General for Scotland; Fiona Mitchell-Knight, audit director; Leigh Johnston, senior manager of performance and best value; and Bruce Crosbie, senior audit manager. I invite the Auditor General to make a brief opening statement.

Caroline Gardner (Auditor General for Scotland): This is the fourth consecutive report that I have provided to the Parliament on NHS Tayside, highlighting a series of significant concerns on financial, performance and governance issues. Today’s report sets out NHS Tayside’s worsening financial position and the increasing challenges that it faces in meeting its financial and performance targets. It provides an update on events over the past financial year, including the arrangements for the departure of the former chief executive.

The external auditor gave an unqualified opinion on the 2017-18 accounts, which means that the accounts provide a true and fair view of the board’s financial position and that there are no significant errors. However, she highlights several areas of concern.

For the past six years, the board has required brokerage from the Scottish Government to achieve financial balance. The board has a total of £45.9 million outstanding brokerage and further brokerage will be required. In June, the board approved a one-year financial plan for 2018-19, which identifies a potential deficit of £18.7 million for the year. The board’s financial position has been compounded by the mismanagement in previous years of e-health funding and endowment fund moneys.

In October, the Cabinet Secretary for Health and Sport announced that the Scottish Government will not seek repayment of brokerage that was accumulated up to 31 March 2019 by territorial national health service boards. Although that provides NHS Tayside with breathing space, it does not address the underlying financial challenges that the board faces.

In previous reports, I have highlighted NHS Tayside’s expensive operating model compared with those of other boards. It is a main factor in the financial challenges that the board has faced over the years. NHS Tayside recognises that, and its

transformation programme will be key to reducing the cost base.

By June 2018, there was still limited evidence of sustainable service redesign and transformation. The board achieved efficiency savings of £46.8 million in 2017-18, but only 36 per cent of those were recurring savings, and its net expenditure increased from previous years.

The new senior management team has reviewed NHS Tayside's approach to transformation, and it has developed plans through a combination of long-term strategic measures and short-term efficiencies. The independent assurance and advisory group, which was set up by the Scottish Government, was due to provide a progress report on NHS Tayside's transformation programme in November. I understand that the committee received the report overnight and will review it in due course.

Several senior staff have left the board over the past year, and an interim chief executive, an interim chair and a new director of finance took up post in 2018. The auditor reviewed arrangements relating to the former chief executive's departure and identified several errors in the process and a lack of good governance. The appointment of a new chief executive was announced on 28 November, and a recruitment exercise is under way to appoint a new chair before the end of the financial year.

NHS Tayside urgently needs to set out the detail of how it intends to achieve financial sustainability. In particular, it needs effective and stable leadership to drive forward its plans for transformation.

As always, we will do our best to answer the committee's questions.

The Convener: Thank you very much, Auditor General, and thank you for your report. Before I open questioning for the committee, I will make a couple of brief observations.

The first is on the assurance and advisory group report to which you referred. The committee received Sir Lewis Ritchie's third report, but only at 6 o'clock last night. That is not the first time that the Scottish Government has sent papers to the committee at the 11th hour. That does not give committee members or the team at Audit Scotland time to review the papers in any meaningful sense, and it is quite disrespectful of the Scottish Government to provide information to Parliament in that way. I hope that the Scottish Government takes note of that.

My second point is about the Office of the Scottish Charity Regulator statutory inquiry, which covers the issue of the transfer of money from the charitable endowment fund at NHS Tayside to

core funding. OSCR has a statutory responsibility to investigate what has gone on, and it was due to report on 30 November. We now understand that, after a bit of prompting, it may report in January. It has taken far too long—at least six months now—to come to any conclusions and to issue its first report. We eagerly await the report to see what it says.

Auditor General, my primary concern is, of course, the care of patients throughout Tayside. The figures that are provided at the end of your report show that NHS Tayside met only seven of the 20 Government targets or standards. Will you give your reaction to that, please?

Caroline Gardner: The leadership at NHS Tayside is very much focused on doing what it can to protect and, indeed, improve the quality of care for patients across Tayside. You are right. I have reported that performance declined in the year. I think that, in 2016-17, the board achieved nine of the national performance standards. In 2017-18, that figure reduced to seven—we set that out in an appendix.

It is worth noting that NHS Tayside is probably still slightly above the average for health boards across Scotland. In my national report in October, I reported that performance is declining nationally, so NHS Tayside is not alone in that respect.

The Convener: Some of the missed targets are particularly worrying—for example, the waiting times for mental health services for children. One of my colleagues will address that issue.

I turn your attention to the severance pay for the previous permanent chief executive of NHS Tayside. Your report details several anomalies in the severance pay arrangements. The stand-out one for me is the fact that the previous chief executive was paid for six months in lieu of notice rather than three months, which was the period in her contract. Is that payment legal? Is that correct?

Caroline Gardner: You are referring to paragraph 41 of my report onwards, where we tried to set out what happened in what was clearly quite a confused process.

It is important to start by saying that I concluded that the decision to negotiate a settlement with the chief executive to bring about her departure was reasonable. At that point, the board took appropriate legal advice about the options that were open to it and the risks of the process becoming quite protracted. I am content that the decision to negotiate a settlement was reasonable.

There was real confusion in the advice that was given to the acting chief executive and the acting chair about the notice period that was relevant to the former chief executive. Her contract clearly

stated that she was on three months' notice. The assistant chief executive and strategic director of workforce believed that other chief executives across Scotland were on six months' notice and that, in order to treat her fairly and with parity with other chief executives, six months should be applied. The process by which the contract was updated to reflect that did not meet good governance. It was not considered by the remuneration committee until November, and the assistant chief executive was not able to provide the auditor with evidence on why she believed that the contract period should be six months rather than three months. There is no doubt that there was confusion about that element of the settlement.

The Convener: You said that the interim chief executive was advised on the six-month period. Whom did that advice come from?

Caroline Gardner: My report identifies that the person who provided advice to the interim chief executive and the interim chair was the assistant chief executive and strategic director of workforce—that is the full title of one person—in NHS Tayside.

The Convener: The advice came from within NHS Tayside.

Caroline Gardner: Yes.

The Convener: Was the Government consulted on the matter at any point?

Caroline Gardner: Yes, NHS Tayside consulted both the Scottish Government's health and social care workforce directorate and the central legal office.

The Convener: They would have had a better overview of the three-month or six-month contractual settlement across Scotland than someone in NHS Tayside, because it is their job to have an overview. Were they not able to provide that information?

Caroline Gardner: Confusion arose between the contractual entitlement for the former chief executive at NHS Tayside and what was being negotiated as part of the settlement. In my report, I make the point that the business case that was submitted for approval to the Scottish Government did not make reference to the three-month notice period. There was confusion, which does not reflect good governance in the way that this was handled.

The Convener: You know as well as I do that, for a number of years, the finances of NHS Tayside have been of extreme concern not only to this committee and you, but especially to people in Tayside. People were shocked that the outgoing chief executive would be paid. It now transpires

from your report that the chief executive was paid more than the contractual entitlement.

On 7 August, I received a letter from John Brown, the chair of NHS Tayside, in which he states:

"All payments are legal and contractual entitlements and no additional payments have or will be made by NHS Tayside."

Given your report, is that an accurate statement?

Caroline Gardner: Right up to the point that the settlement was agreed, the contractual entitlement was three months' notice rather than six months' notice. As I said, the decision to negotiate a settlement was a reasonable one. What figure may have come out of that settlement separately from the notice period is an open question, but I have no doubt that the contractual period for the former chief executive was three months.

The Convener: Okay. Are you saying that the period of six months' payment in lieu of notice was not a contractual entitlement?

Caroline Gardner: The remuneration committee agreed a change to the chief executive's contract only retrospectively, in November.

The Convener: As of 7 August, that was not an accurate statement.

Caroline Gardner: That is right.

Alex Neil (Airdrie and Shotts) (SNP): Do you regard it as good practice to change the terms of a contract once a person has submitted their resignation?

Caroline Gardner: In this case, it was changed formally after the former chief executive had left the board. That happened at the end of July. I want to be clear: having concluded that negotiating a settlement was reasonable, I think that, given the balance of risks facing the board, to have agreed a settlement period of six months would not have been unreasonable, had there been a proper audit trail. That audit trail does not exist, and there was a confusion about why the notice period was increased to six months.

Alex Neil: Are there not two separate things here?

Caroline Gardner: There are.

Alex Neil: Neither in the private sector nor in the public sector, have I ever heard of a case in which a contract of employment is changed and the period of notice doubled once an employee has left that employment. That surely cannot be good practice.

Caroline Gardner: I think that I am agreeing with you, Mr Neil. The rationale for the contract

period being six months rather than three clearly does not stand up. That is not to say that there could not have been grounds for negotiating a settlement period of six months.

Alex Neil: You describe it as “confusion”. We are talking about the director of workforce, who is supposed to be the professional in relation to contracts of employment and so on. It is not just confusion; it is total incompetence to change the notice period in the contract and not even check. The reason she gave for doing that was that it would bring the contract into line—albeit after the chief executive had left the organisation—with those of other chief executives in the network of territorial boards. She clearly had not even checked whether that was factually correct. That is incompetence, not just confusion.

Caroline Gardner: As you would expect, Fiona Mitchell-Knight and her team, as the auditors, probed that deeply as part of their work. I will give you more background, if that would be useful. At the foot of page 13 of my report, we reference the extant circular, which dates back to 2006. It is clear that the notice periods for chief executives should be between three and six months and that any change requires to be authorised by the remuneration committee. The guidance is clear.

At some point, a draft circular was produced, to which the assistant chief executive and strategic director of workforce referred. It proposed changes to the approach, but it was never finalised or enacted. The assistant chief executive advised us that she understood that other chief executives of territorial health boards had a six-month notice period, so there was a danger that NHS Tayside’s board could be found to have discriminated against the former chief executive. As the report says, since then, we have discovered through audit work that three territorial health board chief executives have a three-month notice period.

There is confusion, whose source I cannot speculate on. You are right that I would expect to see good governance on a decision of such seriousness.

10:15

Alex Neil: Let us be clear. There are three documents. The 2006 document says that a notice period must be between three and six months—and the former chief executive’s contract was consistent with that, because it specified three months. A draft circular was then produced; everybody knew that it was a draft that had not been implemented or agreed and was not policy, but the assistant chief executive and strategic director of workforce ignored the fact that it was a draft. She did not even check her facts, which

were the basis of the decision. That is pure incompetence from a director of workforce.

Caroline Gardner: I cannot add to what is in my report. The facts as you described them are correct and are as we set them out in the report. There was a genuine and legitimate desire to bring the situation to a close, and there was poor governance that was not based on good advice about the provisions that governed the chief executive’s notice period.

Alex Neil: Is it time that we introduced sanctions for such poor governance? The poor taxpayers pick up the tab for that every time and are fed up to the back teeth with people on film-star salaries getting film-star severance payments, even when they appear not to be entitled to that on the basis of their contract.

Caroline Gardner: I entirely understand the frustration that you and the committee feel. The committee might wish to take up the question with the Government.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I have lost count of the number of times that we have talked about governance in the public sector. In colleges, national health service bodies and other public sector organisations, we constantly find problems with the quality of governance. Is there any sign of improvement? Is the issue being recognised and is something being done to improve quality and have better informed and better trained people on public sector boards?

Caroline Gardner: It is important to start by saying that, by definition, I tend to report to the committee instances where things have gone wrong. I audit 200 bodies across Scotland, and the committee does not hear about most of them, because things are being managed well.

The Government takes seriously the importance of good governance to making the best use of public money and engendering public confidence in how public money is spent. Moves have been made to improve the public appointments process, and the guidance on severance agreements has been tightened—the committee has heard previously that the Government now needs to approve such packages before they take effect.

In situations such as that in Tayside, when people are under pressure, things go wrong. My role is to report that to the committee; members might want to explore with the Government the action that it is taking to reduce the chances of such things happening in the future.

Colin Beattie: You were correct to say that the reports that come to us tend to be about bad news; the good news is forever hidden. However, consistent throughout the bad news that you bring

us are strong elements of problems with governance, which frequently exacerbate and sometimes cause the issues. Is there a pattern?

Caroline Gardner: Apart from things occasionally going wrong in bodies, the only pattern that I can draw to members' attention is that, when bodies or sectors are under particular pressure, things are more likely to go awry. As the committee knows, since taking up my role, I have reported on the growing financial pressures in the NHS and on my concern that bodies are taking short-term measures to address those pressures rather than addressing the underlying challenges. The focus is on meeting individual year-end targets rather than on whether a board is financially sustainable.

You mentioned further education colleges. There were particular risks at the time of reorganisation and reform in that sector, when we saw a number of things going wrong. It would be unfair to assume that the quality of governance is poor across public services, but we have reported on the risks that arise at periods of particular pressure or significant change, and we continue to look out for that through our audit work.

Colin Beattie: I turn to the situation at NHS Tayside, which the committee has been dealing with for several years. Periodically, we have been given assurances that things are starting to improve. From your report, that does not seem to be the case; progress has been poor. It alarms me that, in paragraph 4 on page 4, the report says of the new chief executive that

"after considering the governance framework and the assurance from the board's committees, he is not able to conclude that corporate governance was operating effectively in 2017/18",

which is the period up to when he took over. Is that really the case? Was there no substantive improvement in governance quality? If the new chief executive says that he is unable to say that governance is operating effectively, that is quite damning.

Caroline Gardner: It is important to be clear that the interim chief executive made that assessment shortly after he had arrived at the health board, which I think was in April 2018, as part of the normal process of completing the annual report and accounts for the board and the audit process reaching a conclusion on those.

We have seen some improvements in governance, which are referred to in the report. For example, financial reporting to the board is better than it has been in the past. We are not discounting the fact that significant work has gone into producing the transformation strategy, the quality improvement programme and the short-term efficiency measures that the board is relying

on. The wording in my report is quite careful; it says that, so far, there is little evidence of the sustainable change that is needed to bring the board into a financially sustainable position for the future.

Colin Beattie: As the convener has said, the NHS Tayside assurance and advisory group report came in very late in the proceedings and, frankly, I have not had an opportunity to go through it in depth. However, one thing that jumped out at me was that, on page 5, it says that in October the chairman presented a report to the board on an independent assessment of board governance. Have you had sight of that document?

Caroline Gardner: Fiona Mitchell-Knight and Bruce Crosbie, as the auditors to NHS Tayside, will have done, and I will ask them to talk you through their involvement so far.

Colin Beattie: Clearly, the committee might have an interest in seeing that document, too.

Fiona Mitchell-Knight (Audit Scotland): As part of the audit, we were provided with a copy of the report that went to the board in October. It summarised the governance issues that had been identified to date and laid out initial plans and improvement actions that the board intended to take in the future. Some of those have already been progressed—as the Auditor General said, the section 22 report mentions the improvements in financial reporting and in how the budgets have been based. It is obviously very early days. Since October, we have not seen the implications of those improvement actions, but we will look at that as part of this year's audit and we will report on it in next year's annual audit report.

Colin Beattie: It is clear that we are in the situation that we were in previously: we have a new team coming in with a new chair and a new chief executive. In paragraph 13 on page 5 of your report, you say:

"The board continues to face leadership challenges."

Will those challenges be addressed by putting in place a new chair and a new chief executive, or are there broader issues with the composition of the board and the skills and experience of its members?

Caroline Gardner: My starting point is that, as you say, we are still in a period of change. The newly appointed chief executive is due to take up his post early in 2019 and the Scottish Government is currently recruiting a new permanent chair to the board, so those two people are not yet in place and one has not yet been identified. I think that Fiona Mitchell-Knight would agree that there are signs of pressure on the leadership team at NHS Tayside, as you would expect in such a challenging situation and when

there has been as much instability and turnover as there has been.

I am interested in the level of support that the Government is able to provide to boards in such circumstances. It must make sure not only that support is available, but that it is joined up and focused on the right issues and on the longer term rather than on short-term measures. That is really needed to bring sustainability, given the overall pressures that face health and care in Scotland.

Colin Beattie: Is the level of Scottish Government support adequate or could the Government be doing other things?

Caroline Gardner: It is hard to draw an overall conclusion about that. Support is certainly in place; the assurance and advisory group is part of that. As the committee will know, consultancy support has been put in, which has been paid for by the Scottish Government. My concern is less about the volume of support and more about ensuring that it is focused on the right things and that it is joined up and consistent so that it will help people to tackle genuinely difficult circumstances on this board and others across Scotland.

Liam Kerr (North East Scotland) (Con): I want to pick up on the point about the former chief executive's pay-out. You spoke about a business case having been prepared. Can the committee see that business case?

Fiona Mitchell-Knight: I certainly have a copy of it. I do not know what the normal protocol is for the provision of such documents.

Caroline Gardner: I am sure that the committee can have a copy of it. You might want to request it from the board, but we have a copy if that would be a more direct or quicker way for you to get hold of it.

Liam Kerr: That would be very helpful.

Auditor General, you mentioned that legal advice was taken at some point in the process. When was competent legal advice first taken? Was it taken before the extension of the notice period?

Caroline Gardner: It was taken during the negotiation of the settlement agreement with the former chief executive. It was certainly taken before the remuneration committee confirmed the extension of the notice period, which did not happen until November 2018. I think that there was on-going engagement between the point at which it became clear that the former chief executive would have to leave, because her accountable officer status had been revoked, and the point of her departure in July 2018.

Liam Kerr: Before I explore the settlement agreement, I would like to find out from whom the

legal advice was taken. Was it internal to NHS Tayside? Was it from the Scottish Government?

Caroline Gardner: It was from the Scottish Government's central legal office.

Liam Kerr: Right. A settlement agreement was concluded. Have you seen that agreement?

Fiona Mitchell-Knight: Yes, we have a copy of that.

Liam Kerr: Excellent. Can you tell me about the payment, because I really do not understand it? I will explain the source of my confusion. It is possible that it was entirely a contractual payment in lieu of six months' notice, but I struggle with that, because it does not appear to have been ratified until November 2018, which would suggest that there was still a three-month notice period.

However, let us assume that there was a valid contract variation; I will come back and ask you about that in a second. Why would the former chief executive agree to that? By going from a three-month notice period to a six-month notice period, she would pay tax on the whole sum under the settlement agreement, whereas if she had said that she would stick with her three-month notice period and take a three-month payoff, she would not pay tax on the three-month payoff. Why would she have agreed to that?

Secondly, if she agreed to that, she would have signed away a 12 months' unfair dismissal rights payment for nothing. Why would she do that?

Caroline Gardner: That is exactly the source of the confusion that we are trying to convey to the committee.

First, we are talking about a negotiation rather than simply a payment in lieu of contractual notice. Secondly, the assistant chief executive and strategic director of workforce was concerned that the risks of an unfair dismissal claim would be heightened if the former chief executive's notice period was lower than it ought to have been, and lower than those of the chief executives of other territorial boards across Scotland. We now know that both of those were not the case, but that was part of the rationale that was put forward.

The reason for my concluding that the decision to negotiate a settlement was reasonable was that there were risks that the CLO had assessed that an unfair dismissal claim could be successful, which could have cost the board more than the payment that the parties came to. None of that removes the fact that there was confusion in the negotiation and in the business case that was then submitted to the Government for approval.

10:30

Liam Kerr: I understand and accept the point about the settlement. There is complete logic behind concluding it in that manner, but I want to press Fiona Mitchell-Knight on one point.

Have you seen the relevant clause in the settlement agreement? Does it say that it is a six months' notice payment or a three months' notice payment plus a three-month payoff?

Fiona Mitchell-Knight: I would need to refer to the settlement for the exact wording, but it does make specific reference to the notice period being six months. It says that, at that point in time, all parties agree that the notice period is six months.

Liam Kerr: I have two brief questions. The interim chief executive appears to have been heavily involved in the process. The interim chief executive is moving on to take up a new position shortly—I believe that he is to replace Paul Gray at NHS Scotland. Is that correct?

Caroline Gardner: My understanding is that Malcolm Wright has been appointed to act as director general for health and social care in the Scottish Government from 1 January for a period of 12 months.

Liam Kerr: On the board positions, you say in your report that there have been three changes. Will you give a bit more detail on the positions in which there have been changes?

Caroline Gardner: In my report, I state that three non-executive directors left the board during the year and have been replaced. More directly relevant to the issue that we are discussing, as you know, the former director of finance left in the spring of last year and is now being replaced on a permanent basis by the director of finance who is covering NHS Grampian and NHS Tayside. Malcolm Wright, who has been the interim chief executive since April, will move on. John Brown, the chair of Greater Glasgow and Clyde NHS Board, has been the interim chair of NHS Tayside since April and he will continue in that role until March 2019. The Government is in the process of appointing a new chair of NHS Tayside at the moment.

You asked a question about Malcolm Wright's involvement in the decision making. He was one of the people involved, but he was one of a number of players. He and the interim chair of NHS Tayside were advised by the assistant chief executive and strategic director of workforce, who was responsible for providing advice. There was also involvement and consultation with the Scottish Government's central legal office and the Scottish Government's health workforce directorate.

Liam Kerr: You have mentioned the assistant chief executive a number of times. Who is that person and where are they now?

Caroline Gardner: She is the assistant chief executive and strategic director of workforce for NHS Tayside and she is still in post. Fiona Mitchell-Knight will be able to confirm her name.

Fiona Mitchell-Knight: Her name is Dr Annie Ingram, and she is also director of workforce at NHS Grampian.

The Convener: Following on from Liam Kerr's questioning and what your report says, does this case throw up doubt about the quality of advice that is provided by the NHS central legal office?

Caroline Gardner: I would say not. We are comfortable that the advice that it provided to NHS Tayside was entirely reasonable, on the basis of the information that was provided to it.

The Convener: How, then, could NHS Tayside have made such a mess of the six-month/three-month notice period? Surely the lawyers should have picked that up and been quite strict with the board in their advice that doubling the payment was not the right thing to do?

Caroline Gardner: As my report says, the business case that was submitted to the Scottish Government for approval referred to a six-month notice period. Within the board, there was a misunderstanding, first that six months was standard, and secondly that the notice period could be increased as part of the negotiation around the settlement without remuneration committee approval. That was incorrect, as I say in my report. That element got lost within the wider negotiation about the former chief executive's departure.

The Convener: The legal advice was based on having a six-month notice period, which was NHS Tayside's mistake.

Caroline Gardner: The mistake concerned the formal status of the notice period and the connection between that and the six months' notice settlement that was finally agreed at the end of July.

The Convener: Should such severance payments be taken out of boards' hands and dealt with at the highest level?

Caroline Gardner: It is difficult to say that that would increase accountability. The new checks and balances that were introduced relatively recently to require the Government to sign off such payments are a useful safeguard. Arrangements depend on people in NHS boards and other public bodies providing and seeking good human resources and legal advice to make them work properly.

As I said, I struggle to understand the confusion that arose in NHS Tayside about the extent to which the chief executive's notice period was in line with the guidance and different from that of other chief executives. The board could not provide us with evidence to support its view, and it has not been difficult for us to identify the guidance and find that other chief executives of territorial health boards have a three-month notice period.

Liam Kerr: You say that the legal advice appears to have been sound, but there was a disconnect at the NHS Tayside end. An erroneous pension payment of £19,000-odd was made—it has now come to light that it should not have been made. I understand from paragraph 53 of your report that the central legal office has said that clawing back that £19,000 would breach the agreement, but the assistant chief executive and strategic director of workforce, whom we just talked about, takes a different view and will go ahead with seeking repayment of the £19,000-odd, against the legal people's advice that that would breach the agreement. Do you have any comment on the appropriateness of the assistant chief executive appearing to go against the central legal office's advice again?

Caroline Gardner: The £19,000 sum that you refer to was not a payment to the former chief executive but a contribution to the NHS pension scheme by NHS Tayside, as covered by the settlement agreement that was reached between the board and the former chief executive. It was based on an apparent misunderstanding of the regulations. Pension contributions relate to pensionable service, rather than payments, so a payment in lieu of notice cannot attract pension contributions.

I understand that the central legal office's advice was that the contribution was part of the settlement agreement, so it could not advise the board to reopen the agreement and reclaim the payment to the NHS pension scheme. The board's view differs—it thinks that, because the payment in lieu of notice does not represent pensionable service, the contribution to the scheme should not have been made. The former chief executive does not benefit from the contribution, so the position will be reconciled as part of the board's annual review of the overall amount that should have been paid to the pension scheme.

I do not think that I can clarify the matter further; it is another element of confusion in the decision.

Liam Kerr: To be clear, the legal advice is that clawing back the payment would breach the agreement, but the assistant chief executive takes a different view and will proceed on the basis of her view.

Caroline Gardner: That is what my report says and that is still our understanding. I cannot reconcile the two views any more than you can.

Alex Neil: I have two quick supplementaries. Who authorised the £19,000 payment to the pension fund? Was that done by the director of workforce?

Caroline Gardner: Before it was signed, the settlement agreement was agreed between the board and the Scottish Government, as required. I understand that it was based on advice that the assistant chief executive provided and that it went through the normal process of negotiation that takes place in such situations.

Alex Neil: I presume that you would have expected someone who was in charge of HR to know the rules on pension contributions.

Secondly, if this is to be pursued legally, will the legal costs of trying to recover the £19,000 from the pension fund possibly exceed £19,000?

Caroline Gardner: As I understand it, the board is not proposing to pursue it legally. Its position is that the contributions should never have been made to the pension scheme and that the former chief executive does not benefit from it. Therefore, it will recover the money as part of the normal end-year reconciliation, which makes sure that, for the year as a whole, the contributions that were made are at the right level for all the staff who are covered.

The Convener: Are we going to receive a copy of the business case?

Caroline Gardner: As I suggested, first, the committee might want to request it from NHS Tayside, but we have a copy if that is an easier way for you to receive it.

The Convener: Thank you—and the settlement agreement, too.

Caroline Gardner: Yes.

Anas Sarwar (Glasgow) (Lab): I will ask some questions about performance but, before I do that, I will repeat a question that I have asked before. In previous sessions, we have covered the fact that our public sector and, in particular, our NHS are governance and leadership heavy. You mentioned that the chair of NHS Greater Glasgow and Clyde is the interim chair of NHS Tayside, that someone is doing a shared workforce role in Grampian and Tayside, and that the previous chief executive was chief executive elsewhere and is now moving on to be chief executive of NHS Scotland. Are there too many chiefs?

Caroline Gardner: You asked that question last time and my answer was not straightforward. These are big difficult jobs, and this is a clear example of that. The job of transforming NHS

Tayside and making it clinically and financially sustainable for the future is a big job and, when the committee asked me questions about NHS Tayside at a session earlier this year, I expressed a concern that asking people—the chief executive, finance director and workforce director—to cover both NHS Tayside and NHS Grampian at that point was a big ask.

We need to have enough people of sufficient experience and calibre to do the jobs that we require. It is already difficult to recruit and retain enough of those people around Scotland, and we make it more difficult by adding additional bodies at different levels without considering the shape of the system as a whole.

Anas Sarwar: Was that a polite way of saying that there probably are too many big jobs and not enough people with sufficient abilities to do those jobs?

Caroline Gardner: I reported in my NHS overview report in October that it is increasingly difficult to recruit and retain people to do the jobs that are required. That challenge is made more difficult by the fact that we now have not only 14 territorial health boards but 31 integration authorities, and we are adding additional levels of regional planning to the NHS at the same time as trying to integrate with social care. It is the complexity of the system that is the problem, rather than there being too many people doing the jobs.

Anas Sarwar: On performance, the convener covered the fact that 13 standards are being failed, nine of which are below average and five of which are worse than they were last year. Will you comment on the impact on patients of the issues in NHS Tayside? I will cover the specifics in a second.

Caroline Gardner: We all know that the quality of care that is provided by the NHS is the most important thing here. Although the national standards do not cover the whole health and care system and, therefore, run the risk of only giving us a partial view of what is going on, there is no doubt that they cover issues that are important to patients, such as waiting times in accident and emergency departments and the time from referral to treatment. Those are things that matter to people and which matter to all of us and our families.

Anas Sarwar: I have a couple of examples. For the 12-week treatment time guarantee, the target is 100 per cent and the Scottish average is 75 per cent. Last year, NHS Tayside achieved 81 per cent, but it is now at 71 per cent. That does not sound like a board that is getting its act together—it sounds like the opposite.

On the standard of patients waiting no more than 12 weeks for the first out-patient appointment, it is the same. The target is 95 per cent and the Scottish average is 75 per cent. NHS Tayside's performance last year was 86 per cent, but it has dropped to 71 per cent. Again, it does not feel like the board is getting to grips with the problem.

On cancer treatment, Tayside's performance is below the standard, below the Scottish average and worse than its performance last year. It is the same story for psychological therapy. It is all worse than last year. It does not look as though new governance and structures are making a tangible difference to patient care in Tayside.

10:45

Caroline Gardner: My report is clear that the board has slipped from achieving nine of the national standards to achieving seven this year. As Mr Sarwar says, that has an impact on patients. That is against a backdrop of declining performance against the standards for the NHS as a whole in 2017-18. It has always been clear that the change that is required to improve performance across NHS Tayside and put it on a more sustainable footing will take time. That is what the plans that the interim leadership team has put in place are trying to achieve.

As you highlight, my report says that there is little evidence yet of an impact on performance figures. We all hope that an impact will become evident in future. That depends on more detail in the underpinning plans and on effective and stable leadership to bring them about over a long period of time.

Anas Sarwar: We all know about the tragically high incidence of suicide, particularly in Dundee but also in Tayside as a whole. We know of the lost souls of Dundee group, which is campaigning to reduce the suicide rate and improve mental health services in Dundee. In the Parliament, we have already had a call for a review into mental health services in NHS Tayside, which the Parliament accepted. The statistics on psychological therapy and child and adolescent mental health service statistics in particular are stark. The standard is 90 per cent for CAMHS performance, and the Scottish average is 71 per cent. NHS Tayside's performance was relatively good a year ago but, over the past year, while we have been having the debate about mental health services in Dundee and Tayside, its performance has dropped to 41 per cent. Six out of 10 children are not getting treatment in time in mental health services in Tayside.

For psychological therapy in the round, over 40 per cent are not getting treatment in time, even

though Tayside has the highest suicide rate in Scotland, the UK and perhaps Europe. How can anyone justify that? Forgetting the severance pay and governance issues for a second, how can anyone in any leadership position at any level in Tayside or across the NHS in Scotland justify that performance?

Caroline Gardner: I have reported to this committee over a number of years on the challenges facing NHS Tayside, precisely because of my concern and the concern of my colleagues that the board's financial position is making it more and more difficult for it to provide health services to the people of Tayside, as it is there to do. I have no doubt about that.

In today's report, we have recorded some of the action that is under way to turn that around and said that, so far, there is little evidence that it is having an impact. We will continue to monitor the action that is taken, and the pressure that the NHS as a whole is under. My job is to bring the facts to the attention of the committee with as much context as we can, and we will continue to do that. It is important to give the leadership team time to bring forward and implement plans for change. The committee will be interested in what assurance it can take from Audit Scotland, the assurance advisory group and Government that that is happening.

I should clarify a point. You will recall that we briefed you recently on our report on child and adolescent mental health services. In relation to that particular standard, there was an issue with changes to services and the way in which information is recorded that had an effect on performance, over and above the pressures on the service itself. There is a factor that relates to the fall from 96 to 41 per cent in a single year that is not about service pressures, although that is not to say that there are no such pressures.

Anas Sarwar: But it is factually correct to say that, since the implementation of the new leadership team, performance against the standards has declined.

Caroline Gardner: That is not quite true. To be absolutely clear, the performance reported on is at 31 March. The new leadership team came in in April 2018 on an interim basis.

Anas Sarwar: Are the quarterly figures that are published showing an improvement?

Caroline Gardner: I do not know whether we can answer that for you at the moment, but we can come back to you on it.

Anas Sarwar: My final question is whether you put the performance down primarily to leadership and governance, to financial pressures or to workforce issues, such as gaps in the workforce,

or, as is most likely, to a balance between all three. If it is all three, where is the biggest challenge in order of priority?

Caroline Gardner: You are right; it is a balance of all three. I will ask Leigh Johnston to tell you a little bit more about what we know about the board's performance and the pressures on it.

Leigh Johnston (Audit Scotland): I repeat what the Auditor General has said. We recently reported that we see declining performance across many boards in Scotland, so NHS Tayside is not alone in that. It is a mixture of all three elements. We say so in our recent report "NHS in Scotland 2018", in which we cover the financial pressures along with workforce issues and rising demand.

However, we should point out that, although some of NHS Tayside's standards have declined, in nine areas it does better than the Scottish average. Some of those are key areas, such as accident and emergency waiting times, antenatal care and hospital-associated infections. Mr Sarwar pointed out the cancer waiting times. On one of the targets—I think that it is the 31-day one—NHS Tayside is below average, but on the 62-day one it is above average. Those are some of the key areas in which we see decline in performance and other factors across Scotland.

Anas Sarwar: I have a final question, convener. The report says that NHS Tayside will require brokerage again. Do you expect that to be written off? Surely the fact that a health board does not have to be in budget in a single year as long as it is over a three-year period brings challenges. If we accept that NHS Tayside will require brokerage again, is its incompetence being favoured at the expense of patients and other health boards across Scotland?

Caroline Gardner: There is a lot in that question, so I will take it step by step and perhaps ask my colleagues to pick up on anything that I miss.

First, I will deal with the board's current financial position. The financial plan for 2018-19, which was agreed in June by the interim leadership team, forecast a potential deficit of £18.7 million this year. To that should be added the £3.6 million that is required to repay the endowment funds money going back to 2014-15. The board's latest financial projection, which was reported last Thursday, suggests that it is £3.8 million behind the £18.7 million. Taking all that together, the current forecast is a deficit of just over £26 million for 2018-19.

We understand that the board will require brokerage from the Government to cover that. I do not know what discussions are going on between the board and the Government about the difference between the originally planned position

and the latest forecast, but I am sure that they will be under way.

On the write-off of brokerage, the commitment made by the cabinet secretary was that territorial boards would have all the outstanding brokerage as at 31 March 2019 written off. I assume that, subject to any discussions, that will be the case for this year's brokerage requirement.

We do not yet know, in any detail, how the commitment about breaking even over a three-year period will work in practice or, indeed, whether it will apply to all health boards. We are waiting for more detail on that. It will obviously have an impact on NHS Tayside's financial position after the current financial year, which is another of the uncertainties that made me decide to bring the report to the committee today.

Anas Sarwar: I am sorry, convener. My final, final question—

The Convener: That is your third final question, Mr Sarwar.

Anas Sarwar: I am sorry; this will be my final question. Is there not a risk that health boards will say, "We are going to get this written off anyway, and we will get brokerage"? Are we not creating a pattern of rewarding bad behaviour, which will give us longer-term financial challenges for NHS Scotland?

Caroline Gardner: The existence of brokerage and some boards' reliance on it are concerns that I have been raising with the committee over the years in which I have been in this job. It focuses people on the year-end financial performance to the exclusion of wider clinical and financial sustainability. It raises the risk that boards that have poorer financial management benefit at the expense of those that take a longer-term or strategic view. If anything, the commitment to move to a three-year cycle—depending on the details of that—will improve that position rather than worsen it. We are also watching quite carefully what is happening in health boards across Scotland this year as we head up 31 March 2019, which is the point at which the cabinet secretary has said that all outstanding brokerage for territorial boards will be written off. We do not yet know what that will look like, but we are watching it closely.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): One of the purposes of the committee is to try to identify where performance is improving. It is not all gloom and doom and giving health boards or whoever a kicking when performance is bad. When there are examples of good performance, we should highlight them.

The performance table in the Auditor General's report shows that there are examples of good

performance for NHS Tayside. Leigh Johnston mentioned a few examples. Depending on how we read them, NHS Tayside is performing above the target—or above the Scottish average—on seven indicators, such as the four-hour accident and emergency response time. I understand that it has always had a good reputation on that and that it has always been pretty good on antenatal care, Clostridium difficile treatment, in vitro fertilisation waiting times, and 48-hour access to GP practice teams. What could explain the contrast between the good performance in a range of areas and the not-so-good or deteriorating performance in the other areas that are listed?

Caroline Gardner: We always try to be fair and balanced in our reporting, as the committee would expect. As Leigh Johnston said, NHS Tayside has, over the past few years, tended in general to perform above the Scottish average, measured against those standards. I suspect that that is related to some degree to its more expensive operating model. It has higher staffing costs than other NHS boards for delivering similar services, its prescribing costs are higher, and I think that its estate costs are higher. None of those things is necessarily directly related to higher standards of performance, but we can see a picture in which those two could hang together.

My understanding is that the interim leadership team has done a lot of work to really understand the way in which health services in Tayside are planned and provided and the relationship with costs. It is now turning that work into detailed action plans for making change. That seems to me to be a priority.

Willie Coffey: The NHS Tayside assurance and advisory group report that was mentioned at the start of the meeting came late. It is not alone as a paper that has come late to this and other committees and it is perhaps a wee bit unfair to single it out and say that we always get late material. I wonder, Auditor General, whether you have had the chance to—

The Convener: I am sorry to interrupt. I did not say that we always get late material; I said that this is not the first time that that has happened. It has happened three or four times. Please continue.

Willie Coffey: I am saying that we always get late material from a wide range of sources, convener. I have experienced that in this and in other committees. There is no set deadline for papers to appear for committees; they just seem to appear, and we take them. This report is no different.

I have had a look at the report in relation to workforce costs and prescribing costs, which you mention in your report, Auditor General. Those

costs are high, as you say. The assurance and advisory group report that we received last night, however, suggests that progress is being made in those two areas. On workforce costs, the report says that there has been “a marked improvement” on agency nursing costs, which have fallen about

“33% compared to the same period last year ... The figures for medical locums have also improved ... showing an 11% decrease against”

that quarter. There seems to be some progress on the workforce costs. Have you had a chance to look at that report, or will you come back to us at a future committee meeting to assess that progress?

Caroline Gardner: I am afraid that I have not had a chance to look at that report. I think that it was sent to the committee at 6 o'clock yesterday evening. It was copied to Audit Scotland but, unfortunately, that was to our general business support email inbox, and it was not identified until our administrative staff started work at 8.30 this morning, so I have not had a chance to look at it at all.

I am pleased to hear that there has been progress, but that does not change my view that, when my report was being prepared, there was little evidence of the sustainable change that is needed.

Willie Coffey: I had some time to look at the assurance and advisory group report. There has also been moderate progress in the prescribing area, which has been highlighted as an area in which there has been excessive overspending in the past. The report says that

“to the end of March 2018 showed the delivery of £2.7m in efficiency savings from primary care prescribing”.

It says that that is a modest amount compared with the target of £3.5 million, but I hope that that shows members a trajectory of good performance in getting to grips with two of the key overspend areas that the board has faced.

Caroline Gardner: As you would expect, we will look at that report closely now that we have received it. We will triangulate it with what Fiona Mitchell-Knight and Bruce Crosbie see as part of their audit work during the year. It will be a key part of our reporting back to the committee next year.

Willie Coffey: Okay. Thank you very much.

11:00

Bill Bowman (North East Scotland) (Con): Going back to the chief executive's payment in lieu of notice, when did the Auditor General or Audit Scotland become aware of that as an issue? Did NHS Tayside bring it to you, or did you find it?

Caroline Gardner: The committee will recall that we gave evidence to you about the position in relation to 2016-17 earlier this year and events then moved on to the point when the former chief executive's accountable officer status was removed and negotiations opened. At that stage, we were aware of the negotiations and Fiona Mitchell-Knight and her team were keeping close to them. They then did the detailed audit work to look at the process and the factors that were taken into account. I will ask Fiona Mitchell-Knight to talk a bit more about the timing of that.

Fiona Mitchell-Knight: Immediately we became aware that the chief executive had formally departed from the board, we contacted the assistant chief executive and the director of finance and explained that we would be carrying out the audit work. We requested a range of information, which included the business case, the settlement agreement and a whole range of information that fed in to our conclusions. As part of the audit, we met with the assistant chief executive, the director of finance, the interim chief executive and the chair, and we also spoke to the Scottish Government representative who had signed off the business case, and to the central legal office.

Bill Bowman: When exactly would you say that you found that the payment in lieu of notice was an issue?

Fiona Mitchell-Knight: We concluded our work by the end of November. It was an on-going and lengthy process, as we had to speak to so many people.

Bill Bowman: So there was no way that you could have influenced the outcome of the negotiations.

Fiona Mitchell-Knight: No, the agreement had already been reached and the chief executive had already departed before we became aware of the issue.

Bill Bowman: You said that three non-executive directors had left the board, and that they were from the audit committee. Is the audit committee now fully staffed, with appropriately qualified individuals? When you discussed with the committee the payment in lieu of notice, how did they excuse themselves?

Fiona Mitchell-Knight: I will ask Bruce Crosbie to say whether the audit committee is fully staffed.

Bruce Crosbie (Audit Scotland): I understand that it is at full complement.

Fiona Mitchell-Knight: Yes. The audit committee has a full complement of non-executive directors. We cannot comment on how effectively that committee is operating. It is early days with the new directors. We will look at that in our

audits. We did not discuss the findings on the chief executive's departure with the audit committee. It is clear in the Scottish Government guidance that the ultimate responsibility for a settlement agreement lies with the accountable officer—the chief executive. We spoke to him as part of the process. As we have already discussed, there was a role for the remuneration committee over the increase in the notice period, but the remuneration committee was asked to discuss that only in November, as a result of the findings of our audit.

Bill Bowman: I find that slightly unusual. Would you not discuss an issue such as this with the audit committee?

Fiona Mitchell-Knight: After we have reported on issues, we would take them to the audit committee for discussion. This is the first time that the issue has been reported publicly, as our annual audit report was issued at the end of June as part of the sign-off of the accounts, and the issue came to light only after the chief executive's departure and our work in August. We would now expect the findings to be presented to the audit committee, and we will be involved in those discussions.

Bill Bowman: What would you expect that they might do with the information?

Fiona Mitchell-Knight: I would expect that they would apply an appropriate range of scrutiny and ask questions of the accountable officer in the board on the issues reported.

Bill Bowman: Would you have expected the chief executive to have raised an issue such as this with the audit committee when it came up?

Caroline Gardner: Fiona Mitchell-Knight has mentioned but has not stressed the fact that the errors were identified by her and her audit team in reviewing what had happened after the sign-off of the accounts at the end of June, leading up to the former chief executive's departure at the end of July.

The issue will be discussed with the audit committee as part of the closure of the 2018-19 audit accounts. It does raise questions about the way in which advice was provided and the extent to which the overall controls were operating effectively in the board during that period. I am not sure that that has entirely answered your question.

Bill Bowman: I think that it says that there is some sort of gap in the governance here.

Bruce Crosbie: I will add to that. The audit committee is receiving the section 22 report for consideration today, so I imagine that there will be quite a bit of scrutiny at its meeting today.

Bill Bowman: That will probably be an uncomfortable meeting.

The Convener: I will follow on from Bill Bowman's questions. The remuneration committee was asked, just last month, to approve retrospectively the change from three months to six months. Bill Bowman asked whether the new members of the board are on the audit committee. Is the remuneration committee a sub-committee of the audit committee? I am asking whether the same new personnel were asked to approve this retrospective contractual change.

Caroline Gardner: The remuneration committee of any board is a separate committee in its own right; it is not a sub-committee of the audit committee. I am not sure whether we can answer now about the overlap of membership between the two, but we can certainly provide that to this committee after the meeting.

The Convener: Could you provide that information? The point that I am trying to drive at is that we are concerned about governance. If we find ourselves with new members of the board who were asked in November to approve that contractual arrangement retrospectively, that would indicate a problem as well. It would be good to have information on the membership of the audit committee and the remuneration committee, just for clarity.

As members have no further questions for Audit Scotland on its NHS Tayside report, I thank our witnesses very much for their evidence. I now close the public part of the meeting and we will move into private session.

11:07

Meeting continued in private until 11:24.

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