Urology Services Inquiry

Chair's Decision on Application for Core Participant Status

Decision on application by [redacted]

[1] The Inquiry is in receipt of an application by [redacted] (the applicant), who is the widow of [redacted], dated 10th February 2022, requesting that she be granted core participant status before the Inquiry. The application is for core participant status and legal representation at the Inquiry's / public expense.

[2] The Inquiry previously received a completed Questionnaire from [redacted] daughter, [redacted], dated 20th January 2022. I have carefully considered both in reaching this decision. The application and questionnaire were completed with the assistance of the applicant's legal representatives, O'Reilly Stewart, Solicitors.

[3] I am grateful to those legal representatives for their clear and thorough approach. I have considered all of the material which has been placed before me in support of the application. I wish to emphasize that I have taken into account and considered each of the points raised with me on behalf of the applicant even if I do not explicitly refer to all such matters in the decision which follows.

[4] The application for core participant status is based on the contention that the applicant played or may have played a direct and significant role in relation to the matters set out in the Terms of Reference of the Inquiry.

[5] It is obvious and I accept that the family of the late [redacted] have genuine and well-founded concerns about the care afforded to him while he was a patient of the Southern Health and Social Care Trust ("the Trust"). [redacted] treatment in the Trust was investigated as a Serious Adverse Incident, and I am conscious of the conclusions arrived at by that investigation. The family's concerns are set out in the questionnaire and are stated as:

i. How and in what circumstances did the Trust come to investigate the care afforded to [redacted] as ultimately reflected in the root cause analysis report dated 26th February 2021? What action did Mr Haynes take pursuant to the meeting on 14th July 2021?

ii. How did concerns arise in respect of Mr O'Brien within the Trust, when did it become aware of concerns and what action did it take as a consequence?

iii. It appears that [redacted] care was substandard in a number of important respects. His initial treatment should have been reversible ADT pending the results of staging scans. His treatment did not conform to the Northern Ireland Cancer Network urology cancer clinical guidelines (2016). Prescribing did not conform to NICAN "hormone therapy guidelines for prostate cancer 2016". He was managed with unlicensed anti-androgenic treatment. How, in the context of care managed by Multidisciplinary Meetings, was this possible?

iv. Taking into account the fact that care pathways were agreed at the Multidisciplinary Meeting, why were the said care plans not executed?

v. Why was the failure to execute the care plan identified at Multidisciplinary Meeting not identified and followed-up at subsequent meetings? Was there no system of audit or review of patients on a regular basis?

vi. Why did other members of the Multidisciplinary Team not pick up on failures in relation to management as time progressed?

vii. Why was [redacted] not referred to a Cancer Nurse Specialist or Keyworker to support his care?

viii. Why was this failure to refer the patient not identified at any point?

ix. Why was the deterioration in [redacted] symptoms not appreciated and reported to the Multidisciplinary Meeting?

x. Why did other members of the Multidisciplinary Team remain unaware of the failure by Mr O'Brien to follow the agreed care plan?

xi. Why were Multidisciplinary Team Meetings permitted to proceed when not quorate?

xii. The SAI notes that during the relevant timeframe, 11% of meetings had oncology presence due to a lack of resource at the Southern Health and Social Care Trust and a heavy clinical workload. Why was this failure to attend permitted to persist?

xiii. What effect did the failure of attendance by an Oncologist have in this particular case?

xiv. When Mr O'Brien elected to proceed by failing to follow the recommendations of the Multidisciplinary Meeting of 31st October 2019, why was this failure not identified and corrected?

xv. The patient was not informed of the failure to implement the management plan in this case. What measures were adopted by the Trust to ensure that the patient was aware of the outcome of the deliberations of the Multidisciplinary Team, and in particular the plan of care which had been recommended?

xvi. Did the course of treatment adopted by Mr O'Brien cause a deterioration or exacerbation in the patient's condition?

xvii. When it became apparent that disease had progressed by March 2020, resulting in a number of attendances during the course of that month at

the South West Acute Hospital, why did this not precipitate review at the Multidisciplinary Meeting?

xviii. [redacted] underwent a TURP at the Daisy Hill Hospital on 17th June 2020. Should this operation have been undertaken prior to further scanning to determine the staging of the disease? It would appear that by that point the opportunity for curative treatment had been lost. The family query the benefit to the patient at that time and consider it caused unnecessary suffering, hardship and distress.

xix. When Dr Haynes indicated to the family that he would be raising a complaint relating to the care provided to [redacted], what steps were taken at that point?

xx. At that time, what concerns were known about Mr O'Brien's practice in relation to [redacted] and more generally?

xxi. Why did Mr O'Brien remain as the Treating Urologist after 15th July 2020?

xxii. Why did [redacted] continue under the care of Mr O'Brien in the last remaining weeks of his life, between July 2020 and August 2020, notwithstanding the concerns raised by the family with Mr Haynes and Mr Haynes advice to the family that something was not right and it would be looked at?

xxiii. Did the continued involvement of Mr O'Brien compromise [redacted] palliative care?

xxiv. Why did [redacted] have to rely on ED attendances, at the SWAH, to secure medical assistance and treatment from March 2020 onwards, rather than being cared for under the aegis of the Urology Department?

xxv. Why did Mr O'Brien have an opportunity to contact the family of the Deceased, in the aftermath of his death? It is the family's opinion that they were misled by Mr O'Brien in the course of that telephone call whilst they were in a vulnerable and emotional state.

xxvi. In correspondence directed to the GP by Mr O'Brien on 2nd July 2020, Mr O'Brien suggests that it appeared that [redacted] was suffering from a cognitive deficit. The family refute that assertion and consider that the suggestions made by Mr O'Brien amount to little more than "victim blaming". The family have serious concerns that the allegations made by Mr O'Brien were in some way attempting to "cover his tracks" relating to the substandard care.

xxvii. Why is it that the entire responsibility for the management of [redacted] care pathway was delegated to Mr O'Brien with no independent scrutiny or surveillance by any other person?

xxviii. Did [redacted] die as a consequence of the documented substandard care?

[6] A number of the issues raised above are pertinent to the considerations of this Inquiry and have already been identified through work that it has carried out to date. It is my intention to investigate and seek answers to the governance issues that have been highlighted by that work and outlined above.

[7] I refer to the Terms of Reference of this Inquiry. I am obliged to organize and direct the work of the Inquiry so that those terms are fully and comprehensively answered but not exceeded. The Inquiry cannot investigate the clinical practice of Mr Aidan O'Brien, since this would be to risk encroaching on aspects of the work of other bodies, including the GMC. Our remit is, in part, to examine the clinical aspects of cases which meet the threshold for a 'Serious Adverse Incident' but the work of the Inquiry will not be directed to any detailed assessment of the clinical shortcomings arising out of any particular patient's case. The Inquiry is not resourced for such work, and its terms of reference prevent it.

[8] Instead, as the Terms of Reference make clear, the focus for the examination of the clinical aspects of those cases will be to identify any failings in the systems of governance within and relating to the Trust's urology specialty which may have affected patient care and safety. This is a key aspect of the Inquiry's work. To that end, many of the governance issues raised by the applicant arising from the care which Patient 1 received while a patient of the Trust will help to inform our work, and they may well be replicated as key themes in the cases of other patients. Nonetheless, having regard to the Terms of Reference the Inquiry cannot and will not seek to answer the question which is likely to be of most importance to the family – *would the outcome for* Patient 1 *have been different if his treatment pathway had been different?*

[9] Having provided this clarity in relation to the work of the Inquiry in pursuit of its Terms of Reference, I will now explain the factors I have taken into account in determining whether it is necessary or proportionate to grant this application for core participant status. I have considered a number of factors.

[10] The Inquiry's procedural protocol states that I will have regard to rule 5 of the Inquiry Rules 2006 in determining who will be designated as a core participant and that my general approach will be to designate only those organisations or individuals who appear to the Inquiry to have been generally involved across, or have some knowledge of, all of the matters to be investigated by the Inquiry.[1]

[1] Paragraphs 14 and 15

[11] Applying what is stated in rule 5(2) of the 2006 Rules, I have considered whether [redacted] (and of course in this context her role/interest is synonymous with that of her deceased husband, [redacted]):

- Played or may have played a direct and significant role in relation to the matters to which the Inquiry relates
- Has a significant interest in an important aspect of the matters to which the Inquiry relates or
- May be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.

[12] Despite what is asserted in the application before me, I do not consider that [redacted] has played a *'direct and significant role in relation to the matters to which the Inquiry relates'.* I want to be absolutely clear about what I mean by this. I do not doubt that the applicant's experiences, and that of her family and friends, have been significant. They have lost a cherished and much loved member of the family, in traumatic circumstances and this gives rise to many questions. However, as I have highlighted above, this Inquiry is not designed to answer all of those questions, important though they may be.

[13] Taking into account the Terms of Reference and the circumstances of [redacted] engagement with the Trust, I have come to the conclusion that she has not been generally involved across all of the matters which are to be investigated by the Inquiry. The role which she has played in the matters to which the Inquiry relates – and which I emphasize are primarily matters of governance relating to patient care and safety - has necessarily been indirect and not 'significant.' It is self-evident that concern for the experiences of patients and their families must be at the heart of the Inquiry's work, and the interest of the applicant in the work of the Inquiry is obvious and is valued by the Inquiry. But her role in matters relating to the Inquiry's work is of a materially different order to and is to be contrasted with that of the three current core participants who do very obviously fit into the categories referred to in rule 5(2).

[14] Furthermore, I foresee no circumstances in which this Inquiry could conceivably subject any patient/family to significant or explicit criticism. A patient could not be considered responsible for the actions of the medical professionals or governance systems that occasioned his/her treatment.

[15] Additionally, although it is not specifically part of the application before me, I have also considered whether [redacted] could be said, arguably, to have a significant interest in an important aspect of the matters to which the inquiry

relates. (Rule 5(2) (b)). As I have stated above and I repeat, I am entirely satisfied that she together with other patients and families will be significantly interested in the work of the Inquiry and the outcome of our investigations, including any recommendations we make that may improve patient safety.

[16] That however cannot be the determinative factor in my decision whether to grant core participant status and legal representation at public expense. There are of course other relevant factors to which I must necessarily have regard. Some of these have been expressly accepted by Personal Information redacted by USI in her application, but it is appropriate that I set out the matters which I consider most relevant to my decision:

- Section 17(3) of the Inquiries Act 2005 requires me, in reaching any decision relating to the procedure or the conduct of the Inquiry to act with fairness and to have regard to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).
- No-one is entitled to core participant status as of right.
- I have asked myself whether it is necessary for Personal Information redacted by USI to be a core participant in order to assist the Inquiry with its work. I am of the view is that it is not. Affording Personal Information redacted by USI the opportunity to complete a questionnaire and (in due course) to provide further evidence, whether in writing or orally or both, strikes me as a proportionate means of adding to the store of material that will help inform the Inquiry's findings and recommendations. In doing so I am satisfying part (d) of the Inquiry's terms of reference.
- The absence of core participant status will not detract from the value of Personal Information redacted by USI Personal Information redacted by USI evidence to the Inquiry, and evidence of a core participant will not be afforded greater weight simply because it comes from that source.
- I have been clear from the outset that I will not use my powers under the Inquiries Act to compel any patient or family member to speak to the Inquiry. This is a position wholly different from other witnesses who will receive Notices in the exercise of my power under Section 21 of the Act to provide the Inquiry with witness statements and/or documentation.
- For the purposes of fulfilling the Terms of Reference I am unlikely to make findings as to the treatment received by an individual patient, and indeed I consider that to do so would be out-with the Terms of Reference of the Inquiry. I may of course make reference to same when referring to how patients and families were impacted by that treatment.
- I have to have regard to my duty to be fair. If I grant core participant status to one patient/family, it is likely to be perceived as unfair were I not to grant the same status to other patients/families. If I designate Personal Information redacted by USI as

a core participant I would then have to invite all others in a position similar to hers to apply.

- I have considered what effect my doing so might have on the Inquiry in terms of resources. The Inquiry is staffed by a small secretariat and legal team. The impact in terms of resources on the Inquiry would, to my mind, have a disproportionately adverse effect on our work and staff would be burdened with the task of providing voluminous materials to patients/families. This would in turn lead to a delay in concluding our work. If I were to take steps to restrict the material provided (as I am entitled to do), there would still be an undue burden placed on the Inquiry staff to determine what documents needed to be provided.
- I have considered whether it would be possible to award core participant status to [redacted], yet restrict her effective involvement to a particular stage of the Inquiry. Unlike other public inquiries of which I am aware, this Inquiry cannot readily divide its work into sections, stages or modules. Even if I were able to restrict attendance to some hearings, that would also add to the burden of the Inquiry's administration and legal teams in determining which hearings she would be required to attend. I consider that this is disproportionate and unnecessary.
- The physical space in the hearing chamber is limited. It cannot physically accommodate more than a handful of core participants. There are currently three core participants, but there are other public bodies and some individuals who could, potentially, be designated either as core participants or enhanced participatory witnesses. I acknowledge that with greater resources and/or the use of technology it would be possible to overcome this concern. Nevertheless, the physical limitations of the chamber is a factor, albeit a small factor, which I have to take into account in conducting an orderly and effective Inquiry.
- All evidence will either be live streamed and/or placed on the Inquiry website, together with relevant documentation (subject to defined limitations), and this will assist all patients and families and anyone interested in our work to form an understanding of the Inquiry's work and the issues under consideration. I recognize that these facilities are not intended as a substitute for core participation status, but I make the point that there is no need for anyone to be granted core participant status in order to follow Inquiry proceedings.
- The application is accompanied by an application for costs. I have been provided with documentary evidence as to [redacted] means and I am satisfied that, were I minded to designate her a core participant it would not be appropriate to refuse her funding at public expense on the basis of her modest income and capital.

- In her application I am invited to provide funds for a solicitor partner at £150 per hour, an assistant solicitor at £130 per hour and a junior counsel at £110 per hour. These sums are the maximum outlined in the Inquiry's costs protocol. While it is not possible to quantify what time would be generally required at this point, it is none the less possible to calculate some minimum costs to the Inquiry. If I were to allow funds for all three this would equate to £390 per hour, assuming a 35 hour week that amounts to £13,650 per week, If I were to allow for 25 weeks per year that is £341,250 per annum and even if I were to allow the same hours for 25 weeks for only assistant solicitor and junior counsel the figure per annum amounts to £210,000.
- The Inquiry is aware that approximately 70 patient cases have been identified by the Trust as meeting the threshold for a Serious Adverse Incident, and the clinical aspects of those cases are likely to be examined by the Inquiry pursuant to part (c) of the Terms of Reference. Even if only 30 of this number followed the applicant and made application for core participant status and applied for funding for a solicitor and counsel, the cost to the public purpose might be estimated at £6.3 million per annum. Such a sum is entirely unjustifiable where I consider that patients and families do not require to be legally represented before the Inquiry.
- I have considered the possibility of directing that patients and families be jointly represented. This Inquiry, unlike others, does not have recognizable patient pressure/support groups that would easily allow me to insist on joint representation. I have indicated that patients and families do not need legal representation to tell the Inquiry what happened but I have shown sensitivity and flexibility by indicating my willingness to pay for lawyers to help with questionnaires/statements if they feel they need such help and cannot pay themselves. Personal Information redacted by USI on behalf of Personal Information redacted by USI has had the benefit of legal representation in compiling the questionnaire. If I am asked to consider making funds available to pay for same retrospectively, I am willing to consider such an application.

[17] The case law is clear, that the chairpersons of public inquiries have a wide discretion in the area of procedures. The exercise of that discretion has been identified as being properly *"influenced by factors such as the nature of the Inquiry, speed, efficiency and cost subject to requirements of fair procedures and justice."*"[2]

[2] Gillen LJ in LPs Application [2014] NICA 67 quoting Lord Woolf in R v Lord Saville of Newdigate (ex parte A) [2000]1WLR 1855 at 1868

[18] I remain of the view that to grant core participant status to Personal Information redacted by USI is neither necessary nor proportionate and I am satisfied that this decision will not cause any material unfairness to her.

[19] I have considered whether the Inquiry would be assisted were I to designate Personal Information redacted by USI as an enhanced participatory witness. Many of the practical difficulties for the Inquiry in making her a core participant would still apply were I to designate her as an enhanced participatory witness. I intend to reserve that category of designation for some public bodies or individuals, separate to the organisations they represent/are employed by, who might be subject to significant or explicit criticism and who require greater access to witness statements and documentation in order to protect their interests before the Inquiry. As I have indicated I foresee no circumstances in which Personal Information redacted by USI would be subject to significant or explicit criticism by the Inquiry.

[20] Having considered the application in light of the above factors, I refuse same. Should I receive an application for the costs of helping Personal Information redacted by USI and her daughter complete the questionnaire and to draft a witness statement, and to accompany her to any hearing before the Inquiry I will give same due consideration.

Christine A Smith QC
17th February 2022