CHAIR'S UPDATE AND STATEMENT IN RELATION TO STATEMENTS FROM ACTION FOR MUCKAMORE, SOCIETY OF PARENTS AND FRIENDS OF MUCKAMORE REPRESENTED BY PHOENIX LAW

ISSUED ON 23 NOVEMBER 2022

Before we begin this session of evidence, I would like to clarify to all parties, and to the public, why we have had to change the schedule and the order in which we hear evidence. This is a Public Inquiry and there are a number of interested parties including all of the Core Participants (CPs) both as individuals and organisations and of course the wider public and the press. It is only right that all should be kept up to date with the Inquiry's progress.

Prior to the last hearing session, I stated publicly on a number of occasions that I hoped to finish the evidence about the patient experience by December of this year. During the last session I made it clear this was not now going to happen because we did not have all of the statements from witnesses from whom we hoped to hear. I also made it clear that the great majority of those statements not yet made related to witnesses who were members of Action for Muckamore (AfM) or the Society of Parents and Friends of Muckamore (SPFoM), who are all represented by Phoenix Law Solicitors.

Briefly, I will remind everyone of my previous announcements so that the chronology of how we have got to where we are can be understood.

On 14 December 2021, I published a written statement declaring that the first phase of the Inquiry would focus upon evidence from those with experience relating to the care of patients within Muckamore Abbey Hospital (MAH). I said that those potential witnesses would be approached by our statement takers as part of Phase One.

On the 6 June 2022, I said that we were starting with the patient experience, not only because we wanted to put the patient experience front and centre of this Inquiry, but because there was a good forensic reason for doing so. That was to build up a solid foundation of evidence before we heard from the big organisations responsible for running the hospital.

I also made clear at that stage, that we had only managed to obtain very few statements from AfM or from SPFoM but I was hoping for good cooperation between Phoenix Law and Cleaver Fulton Rankin (CFR) (who are the solicitors appointed as the independent statement takers at this stage of the Inquiry), to accelerate that process.

On 11 August this year, I published another written update on progress. Again, I restated the aspiration to complete the patient experience by the end of 2022.

I want to explain why that was my hope. First, any significant delay is a danger to any investigation or inquiry, and it does not assist those witnesses who want to give evidence to this Inquiry from those groups. Giving evidence can be a stressful process and it is not made easier by waiting, furthermore as time moves on, memories fade. Secondly, it is difficult to progress to hearing evidence from members of staff until we have a solid foundation of evidence from the patient experience. That is because some elements of the patient experience evidence will need to be put to members of staff and to others. I am sure that members of AfM and SPFM would want their experiences put to members of staff. Unless we receive that evidence that cannot be done.

Also, many people want things to change. There are still people living as patients in MAH, and in other similar facilities in Northern Ireland. Furthermore, there appear to be a number of issues around resettlement which is of particular importance given that a consultation has recently been announced into the possible closure of Muckamore Abbey Hospital. The sooner we complete the necessary part of the evidence the sooner the Panel can consider whether it is possible to make any early recommendations to the Department of Health and to others. Delay in the receipt of statements about the patient experience does not help that process.

On the 20 September 2022, I made another public announcement. Again, I asked for cooperation from everyone involved to move the Inquiry

forward. Specifically I addressed the issue of who was to take the witness statements. I made it clear that although I understood the inclination of solicitors wanting to take full instructions from clients, these are not adversarial proceedings, this is an Inquiry and so the normal rules of litigation do not apply, and this Inquiry should not be treated as litigation.

I reiterated once again that we were asking for immediate engagement with CFR.

I made it clear that apart from the witnesses from whom we were to hear in this current November session, none of whom are represented by Phoenix Law, we would not be able to hear any further evidence in relation to the patient experience. I said that the remainder of that phase of the evidence was going to have to be heard at a separate and later stage. I also stated that it would now have to come after we had heard from some of the large organisations about the regulatory framework, structures of organisations, policies and methods and governance.

What has been the issue? The individuals associated with AfM and SPFoM who are represented by Phoenix Law have refused to give statements to CFR. The stated reasons are twofold. The first is that they have said, albeit only recently, that they will only give their statements to Phoenix Law who represent them.

The second is that there is a suggested conflict of interest within CFR. I have considered this and neither I, nor counsel to the Inquiry who advises me, accept that there is any conflict of interest.

On 30 September 2022, I conducted an engagement session with Phoenix Law and some of their clients from AfM and SPFoM of whom 7 individuals attended along with five lawyers. The purpose was to try to explain the Inquiry's position and seek a way forward.

Following that session there has been correspondence with Phoenix Law and also with the CPs represented by them. It became clear that despite the Inquiry's views about there being no conflict within CFR a number of Phoenix Law clients were still unwilling to give statements to CFR. Phoenix Law themselves claimed that all of their clients wanted to give statements to them and to them only, although this had not been made clear at any earlier stage. I have refused that request and it is important that I explain some of the reasons. I understand that a number of their clients feel aggrieved and upset by that decision and I am sorry for that.

This Public Inquiry is running at the same time as the largest police investigation into vulnerable persons' abuse that has ever taken place in NI. Further, a number of individuals have already been charged with offences and criminal proceedings are ongoing. One possibility would have been for the Minister to delay this Inquiry until after the criminal trials were completed so as to avoid any suggestion that the Inquiry's processes might interfere with those trials or make them less fair than they ought to be. Had the Inquiry been delayed until the criminal investigation and trials were completed, this Inquiry is unlikely to have started for many years. Similarly, should it now be suspended it might not restart for a very long time if at all. In order to ensure the Inquiry does not interfere with the criminal investigation or criminal trials a Memorandum of Understanding (MoU) was entered into with PSNI and the Public Prosecution Service.

It is worth reminding everyone of just some of the terms of that document which is an agreement between the PSNI, the PPS and the Inquiry.

The terms of that MoU include the following stipulations –

(Para 16) The Chair of the Inquiry acknowledges the need to make every effort to ensure that the work of the Inquiry does not impede, impact adversely on or jeopardise in any way the PSNI investigation into abuse at the hospital and the prosecutions that result from that investigation.

(Para 18) The Chair, in accordance with section 17(1) of the Act, shall make every effort to ensure that the procedure and conduct of the Inquiry respects the integrity of the investigation and prosecutions while continuing to address its terms of reference.

(Para 19) In particular, the Inquiry will be conducted with due regard to the live nature of the investigation and any ongoing or prospective prosecutions (and the investigative and disclosure duties that arise in that context under the provisions specified), in accordance with the arrangements prescribed by this MOU.

(Para 20) The Chair shall where necessary adopt specific measures as the Inquiry proceeds to ensure protection of the integrity of the investigation and prosecutions.

I have required that all lawyers who are designated to take statements on behalf of the Inquiry are trained to do so. I have required all solicitors taking statements to be provided with specific vulnerable witness training. They have also received training to ensure that they understand both the Memorandum of Understanding and the disclosure duties applicable to

the prosecuting authority who are also signatories. The importance of using independent witness statement takers is that they act independently of the interests of any specific party, which a privately instructed firm cannot.

In my view, handing over the role of taking witness statements to a private firm representing those same witnesses, could risk compromising my duties under the MoU and a further significant legal challenge to the continuation of the Inquiry. Using an independent firm such as CFR employed by the Inquiry or using the Inquiry's own solicitors, the Inquiry is able to manage the process and ensure that the statement takers are properly trained and are compliant with the Inquiry's duties under the MoU. There is an element of independence in such a process which would be lost if the statement taking is relinquished to the firm representing the witnesses.

At the engagement sessions, which took place prior to the Inquiry commencing to hear evidence, I assured the attendees that the Inquiry would be careful not to interfere with the police investigation or the criminal process. It is important that our procedures are consistent with that assurance given by me personally.

We have to bear in mind that the police investigations are not yet completed, and some of the witnesses who give evidence to the Inquiry could also be relevant to the criminal proceedings. Indeed some of the witnesses from whom we have already heard have also made statements to the PSNI. Evidence may be revealed during the course of our process which could be of use to the police investigation and we are duty bound to bring such evidence to the PSNI's attention. Further, such evidence could trigger the disclosure requirements which govern the police and Public Prosecution Service.

There has already been one challenge to the continuation of this Inquiry which has been heard both in the High Court and in the Court of Appeal. The procedures adopted by the Inquiry came under scrutiny as part of the courts' consideration. The steps taken by the Inquiry were regarded as sufficient at that stage to preserve the integrity of the criminal trials.

My duties are far wider than those of an individual firm of solicitors tasked with representing a group of CPs and potential witnesses. I have to protect the integrity of this Inquiry. I have a duty to act fairly to all and to ensure the progress of the Inquiry. Later in the Inquiry, there may well be

other individuals who also want to make statements solely to their own solicitors, allowing that to happen now would set a precedent.

I have been asked in correspondence whether I will be allowing individual members of staff and others to make their statements to their own solicitors. Will they be treated differently to those represented by Phoenix Law? The answer is that my intention in relation to all individual members of staff accused of wrongdoing is that they will also be required to complete their statements either with CFR or the Inquiry's own team. Organisational statements of a formal nature fall into a different category and I want to retain some flexibility as to how those are taken but for individuals accused of bad behaviour the same rules will apply as I am applying to the Phoenix Law clients.

But, it would be very difficult to keep to that process for others if it has not been followed for this group and Phoenix Law. In my view it is important that the Inquiry, whilst being flexible, has some control over the process of statement taking from individuals and a degree of oversight throughout this inquiry. I will as far as I can treat everyone fairly.

In short, if I allow, at this stage, statements to be made by these witnesses to their own solicitors then it will make it very difficult indeed to prevent others insisting on the same later in this process.

So, in short there are two central reasons for my decision -

First, in my view it would be wrong to concede to the wishes of those who want me to adopt a procedure which would mean that the Inquiry could risk not being compliant with its duties under the MoU by handing sole control of the witness statement taking process to a private firm representing those witnesses. In my view that could open the way to a further legal challenge to this Inquiry proceeding. Second, if I allow this now, it could be regarded as unfair to others if I do not allow them the same facility later in the Inquiry.

I have therefore, and I know it has caused much consternation, refused the request for Phoenix Law to take their own statements.

However, it is important for other parties as well as Phoenix Law's clients to know the accommodations that I have made to try to meet AfM and SPFM's wishes. It is very important in my view to receive the evidence from as many potential witnesses in these groups as possible. They are important witnesses from whom we want to hear, and they have every reason to want to give their accounts.

The Inquiry has written to Phoenix Law, who are for these purposes funded by the Inquiry, and they have been told that I am willing to allow a different procedure to be adopted in respect of their clients than has been adopted to date.

- Instead of giving statements to Cleaver Fulton Rankin the witnesses can give their statements to the Inquiry solicitor team itself.
- Prior to that, the witnesses can give instructions and take advice from Phoenix Law.
- They can if they wish provide those instructions to the Inquiry team who will draft a statement based upon those instructions.
- The witnesses can then attend the Inquiry to complete the drafting of the statement with a member of the inquiry team and with a representative of Phoenix Law to assist them if they wish.
- The draft statements can then be considered by the witness and amended with the assistance of Phoenix Law.
- Once that process is complete, the final statement is to be signed, and arrangements will be made for the witness to give evidence.
- If it transpires during this process that documents would be required by the Inquiry in order for the statement to be completed those documents can be requested.

I have thus allowed for Phoenix Law to be involved at every stage of the statement taking process.

On the question of documents, I have repeatedly said that if we wait for every document or note relating to every patient involved in this Inquiry, not only would the Inquiry be very significantly delayed but the Inquiry would be swamped with material, only a fraction of which may in fact be required by the Inquiry. There is a danger of losing sight of the wood for the trees. Some patients will have thousands of pages of notes and it would be easy to become overwhelmed with paperwork. My preferred course is to make targeted requests to the Trust and to other organisations once we have analysed the evidence received by the Inquiry.

It should also be remembered that the Inquiry can only invoke the Inquiry Rules to ask for documentation when that documentation is necessary for the Inquiry's purposes. The Inquiry cannot use its powers to obtain documentation for other purposes. However, I have also made this clear, that if during the course of taking a statement from a witness it does become clear that access to such documents is

necessary for the Inquiry's purpose then a request will be made for those documents by the Inquiry.

By making those alterations to the process which I have just described, which gives clients of Phoenix Law the full assistance of their lawyers throughout the statement making process, whilst retaining an element of oversight by the Inquiry, I have tried to encourage all those affiliated with AfM and SPFM to come forward to give their important accounts and to make that process as easy as possible for them. I can do no more.

I hope that the Inquiry can now move forward with full engagement and cooperation from the witnesses who wish to give evidence and who are affiliated to AfM or SPFoM and represented by Phoenix Law so that we can hear their evidence which we very much want to receive and I am sure they want to give.

On a separate point I want to address very briefly some comments that were made to the press on Monday which were inaccurate. They concerned an application which is taking place on Thursday relating to the status of five Core Participants all affiliated to Action for Muckamore.

It was said that I had removed five individuals' Core Participant status. I have not.

On 27 September the Solicitor to the Inquiry wrote to Phoenix Law to indicate to them that I was considering removing the Core Participant status of five individuals. The grounds would be that the brief summary of what they could tell the Inquiry indicated that their experience relating to MAH ended at least 9 years before the terms of reference for this Inquiry started which was December 1999. It is appropriate that the Core Participant status of any individual or organisation is kept under review. The inquiry is funding the legal representation of each of those individuals.

By email dated 28 September the Solicitor to the Inquiry indicated that I was willing to hear representations from counsel instructed by Phoenix Law as to why those five individuals should remain Core Participants. I set a time limit of 14 days for Phoenix Law to respond. In fact the response came some days outside the time limit set, but I have agreed nevertheless to hear counsel's arguments and that

hearing will take place on Thursday at the end of the evidence. I have not yet made a decision to remove anyone's CP status.

I will consider each of those Core Participants individually. I am waiting to hear argument on that issue as to how they meet the criteria to remain as Core Participants. After I have heard the submissions of counsel for Phoenix Law and after I have received, in open hearing, the advice of Sean Doran KC as counsel to the Inquiry as to the powers that I have, I will make a determination.

Tom Kark KC

Chair