DETERMINATION RELATING TO SECTION 21 AND SECTION 22 INQUIRIES ACT 2005 WITH REFERENCE TO PATIENT DOCUMENT REQUESTS MADE TO THE BHSCT

INTRODUCTION TO THE ISSUE

1. This is a public inquiry ordered to be instituted by the Minister for Health for Northern Ireland under section 1 of the Inquiries Act 2005 to look into the abuse of patients at Muckamore Abbey Hospital (the Hospital). The Hospital is under the management of Belfast Health and Social Care Trust (the Trust) which holds the great majority of the relevant patient notes.

2. The terms of reference require the Inquiry to look into all the circumstances and reasons, both direct and indirect, for any abuse which took place and to make recommendations to avoid such abuse happening again there or elsewhere in this jurisdiction.

3. In pursuance of its task, the Inquiry issued to the Trust a request to produce a series of patient notes. The Trust, which says it wishes to produce the requested notes, claims that the notices and directions issued by the Inquiry are insufficient to allow it to comply and it seeks to have proceedings issued in the High Court. In effect the Trust asks that I revoke the notice and concede that the Trust must seek the authority of the High Court.

4. Although I sit to hear evidence with a Panel, as Chair I am responsible for making all decisions as to the procedure and conduct of the Inquiry and for issuing any notices or directions in pursuance of the functions of the Inquiry. This determination is therefore made by me alone as Chair of the Inquiry.

BACKGROUND

5. The Inquiry started with opening statements on Monday 06 June 2022 and evidence was first heard on 28 June 2022. The first stage of evidence, between June and December last year, related to witnesses who were either patients or relatives and carers of patients at the Hospital. Some forty-seven witnesses gave evidence either orally or by way of their written statement being read.

6. The approach of the Inquiry to obtaining patient notes, which is a necessary part of the examination by the Inquiry, has been often stated publicly and in correspondence. By way of example in a statement issued on 23 November 2022, I said this –

> *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.*

7. Although in general terms the Inquiry has proceeded by way of inviting document providers and witnesses to cooperate voluntarily with the Inquiry, it was recognised that certain organisations would be assisted by a requirement to provide documentation by way of a notice under section 21 of the Inquiries Act 2005.

8. In Protocol No.1 (Protocol on the Production and Receipt of Documents) issued on 10 November 2021 it was stated that –

> *18. The Chair will exercise his powers under Section 21 to obtain relevant documents, where (for example) a request is refused, the response to a request is incomplete, there has been no response to a request by a stated deadline or a delay is requested which appears to the Chair not to be reasonable. Some DPs[1] may be facilitated in their production of documents by receipt of a Section 21 Notice, whether in general terms or in respect of certain documents or categories of document. Such DPs should alert the Solicitor to the Inquiry promptly.*

9. By letter dated 7 December 2021 the Trust wrote to the Inquiry in relation to the extensive documentation held by it. The author of the letter, the Acting Assistant Chief Legal Adviser, wrote:

> *"... the Belfast Trust anticipates that the Inquiry will appreciate that the Belfast Trust holds an extensive volume of highly sensitive and confidential material. Further, the Belfast Trust is bound by the terms of data protection legislation. In the circumstances the Chairman will understand when the Belfast Trust says it would prefer to receive a general section 21 notice requiring the Belfast Trust to produce to the Inquiry any material relevant to the Inquiry's terms of reference. This would then provide legal protection to the Belfast Trust to provide*

[1] Document Providers

material". "This observation should not be seen as any indication of a lack of co-operation on the part of the Belfast Trust, but rather to ensure that there is no impediment to the provision of material to the Inquiry."

10. In January 2022 I issued a notice to the Trust under section 21 which was amended on 10 February 2022. The notice directed the Trust to provide any documents under their custody and control relevant to the Inquiry's terms of reference on or before the date specified in any request to produce documents under Rule 9 of the Inquiry Rules 2006.

11. It is worth noting that the section 21 notice required any issue over production of the documents to be raised promptly and the letter contained the following direction:

> *If you wish to make a claim under section 21(4) of the Inquiries Act 2005, that you are unable to comply with a request to produce documents to the Inquiry served pursuant to this notice, or that it is not reasonable in all the circumstances to require you to comply with a request to produce documents to the Inquiry served pursuant to this notice, you must submit any such claim in writing to the solicitor to the Inquiry, providing reasons for any such claim, within 14 days of receipt of a request to produce documents to the Inquiry served pursuant to this Notice*.

12. Since service of that notice the Trust has provided the Inquiry with unsolicited confidential material including patient specific material not covered by the notice. On 25 August 2022 the Inquiry wrote to the Trust requesting any policy, protocol, guideline or practice in respect of weighing and recording and monitoring the weight of patients. The request made clear that the Inquiry was not requesting, at that stage, specific records for individual patients. In response, the Trust, by letter dated 24 February 2023, provided by way of example, a summary of weight management relating to a specific patient whose notes (which were also provided) were used as an example of the material held by the Trust. The notes alone comprised 1,898 pages.

13. In relation to that correspondence the Inquiry wrote on 08 March 2023 reminding the Trust that the letter of 25 August 2022 specifically stated that the Inquiry was <u>not</u> at that stage seeking documentation relating to individual patients and the furnished material was not accordingly being provided to the Panel.

14. On 02 March 2023 the Solicitor to the Inquiry had however written to the Trust enclosing a document request (what was termed a patient document request or 'PDR') issued under Rule 9 of the Inquiry Rules. This request was for a selection of patient notes and documentation in pursuance of the Inquiry's policy of making targeted requests. This request was governed by the original section 21 notice referred to above and the target date for production of the requested material was 21 April 2023.

15. On 21 April 2023 the Trust wrote to the Inquiry indicating that they would write soon asking for clarification of certain matters that bear on what they described as 'the ability of the Trust to comply with the request' and asking for an extension of time. It has been a feature of correspondence with the Trust that despite the Inquiry setting time limits, the request for an extension comes on the very day the time limit expires. I mention in passing that, while recognising

that the Trust is currently having to meet a high administrative burden, I do not find that approach either courteous or helpful.

16. On 28 April 2023 the Solicitor to the Inquiry responded reminding the Trust that the Rule 9 request was issued in accordance with Rule 9 and section 21. The Inquiry required a substantive response to that letter by 05 May 2023.

17. On 05 May 2023 the Trust wrote to the Solicitor to the Inquiry raising for the first time (and well outside the time limit) an issue in relation to providing the notes under Section 21 of the Act and raising arguments under section 22. The letter stated that the Trust could not be required to produce or provide any document which it could not be required to provide if the proceedings of the Inquiry were civil proceedings in a court in Northern Ireland. The author suggested that in each case, the Trust would have to assess the patient's capacity to give consent and where appropriate seek consent or apply to the High Court for permission to provide the material to the Inquiry. The letter asked for the Inquiry's cooperation and support for a High Court application.

18. On 09 May 2023 the Solicitor to the Inquiry responded on my behalf and made it clear that the section 21 notice provided a clear and unequivocal basis for the production of the material and that the proposition that the Trust could not be required to produce the documents sought in civil proceedings was 'unsustainable'.

19. Further correspondence has passed between the parties, but it is sufficient to state that written submissions were received on 22 May 2023 seeking to justify the Trust's position and requesting an oral hearing so that further submissions could be made. Although I felt that this could have been fully dealt with in written submissions, I granted the request for an oral hearing. This is a public inquiry and in general terms the public and any interested party is entitled to know, not only about any evidence being given to the Inquiry but also any legal submissions being made which might affect the conduct of the Inquiry.

20. Accordingly, I listed an oral hearing for Thursday 01 June 2023 and heard submissions from Mr Aiken KC on behalf of the Trust and received brief submissions from Mr Doran KC Senior Counsel to the Inquiry.

ARGUMENT

21. Section 21 of the Inquiries Act 2005 (The Act) provides a power to the Chair of a public inquiry to issue a notice directing any individual or organisation to deliver up to the Inquiry any material which is relevant to its terms of reference. It is for the Inquiry to make that determination and there are very few exceptions when the recipient of such a notice can refuse to comply. S21(4) provides that a claim by a person (a) that he is unable to comply with a notice or (b) that it is not reasonable in all the circumstances to require him to comply with a notice is to be determined by the Chair who can revoke or vary the notice.

22. Mr Aiken does not seek to argue that section 21(4)(b) is in play. Instead, he focuses his argument on section 21(4)(a) and section 22(1)(a). He suggests that the Trust is "unable" to comply as the section 21 notice does not provide sufficient legal authority for production of the material by reason of the application of section 22(1)(a).

23. Section 22 is headed 'Privileged Information etc.' and subsection (1) states that a person may not under section 21 be required to produce any evidence or document if:

    (a) he could not be required to do so if the proceedings of the Inquirywere civil proceedings in a court in the relevant part of the United Kingdom, or

    (b) the requirement would be incompatible with a retained EU obligation.

24. The principal authority upon which the Trust's argument is based is John O'Hara v The Belfast Health and Social Care Trust 2012 NIQB 75. This related to the public inquiry into hyponatraemia related deaths of children in Northern Ireland. It was not set up under the Inquiries Act 2005. Its statutory powers flowed from the Interpretation Act (Northern Ireland) 1954 which had a provision governing production of materials in different terms to the provisions in the Inquiries Act 2005. The exception to the power to require the production of documents under the Interpretation Act was drafted as follows (emphasis added):

> *"Nothing in this paragraph shall empower the person appointed to hold the inquiry to require any person to produce any book or document, or to answer any question, which he would be entitled, on the ground of privilege or otherwise to refuse to produce or answer if the inquiry were a proceeding in a court of law"*.

25. Under the Interpretation Act, the focus is on the recipient of the notice and the basis on which they would be entitled to refuse production is upon the basis that the material is 'privileged' or 'otherwise' which includes some other basis for refusal. Gillen J. (as he was) in that case determined that the provision of material in breach of Article 8 would come within the definition of 'otherwise'

and so a court order, over and above the order of the Chair of that inquiry, was required to allow the material to be produced.

26. Mr Aiken has also referred to a case arising from the Redfern Inquiry which examined the removal of tissue from the bodies of individuals who had worked in the nuclear industry at Sellafield. That Inquiry was not set up under the Inquiries Act 2005. In order to obtain medical records application was made to the Queen's Bench Division [2] where Foskett J. conducted an exercise of weighing the balance between the public interest in determining what had happened against the public interest in maintaining the confidentiality of medical records.

27. For reasons that I will come to, neither decision has been of much assistance to me, each is clearly and obviously distinguishable.

28. Mr Aiken also raises the argument that section 22 requires that a balancing exercise is conducted not by the Inquiry but by the High Court. The effect of his submission is that in every case where there was a duty of confidentiality in documents which a public inquiry wanted to see, the public inquiry would need to seek an order from the High Court which would conduct a balancing exercise on its behalf.

29. Finally, Mr Aiken sought to draw a distinction between what he described as 'confidential material' which he said fell into one category and 'documents in relation to which there was a duty of confidentiality' which he suggested fell into another. If such a distinction exists, of which I was unpersuaded, it is unnecessary to make it given the wording of Section 22.

30. I also received short and helpful submissions from Counsel to the Inquiry. The role of Counsel to the Inquiry on such occasions is to ensure that I am fully informed in relation to the relevant law on the topic under discussion and to advise me. It is merely advice, I do not have to follow it, the decision in all such cases is solely mine. I do not need to set out Mr Doran's submissions here, he takes the opposing view to Mr Aiken and sets out a number of propositions as to why he says Mr Aiken's submissions are flawed. In his view both the 'O'Hara' and the 'Redfern' cases can be clearly distinguished. Helpfully he drew my attention to the explanatory notes to the Act to which I will refer below.

31. I am grateful to both counsel for setting out their opposing arguments so clearly.

CONSIDERATION

32. I deal first with section 21(4)(b) which allows for the recipient of a section 21 notice to claim that compliance with such a notice would in the circumstances

[2] See Dr Lewis v Secretary of State for Health (defendant) and Michael Redfern QC (interested party) [2008] EWHC 2196 (QB).

be unreasonable. Such an application might be made for example where a request is made for documents, the relevance of which is said to be without the Terms of Reference, or the request is so wide as to be unduly burdensome, or in breach of Article 8, to which I will turn, as not being proportionate to the Inquiry's purpose.

33. As a public inquiry, this Inquiry is obliged to act in a manner compatible with Convention rights under the European Convention on Human Rights and under the Human Rights Act 1998. Article 8 ECHR, which protects the right of an individual to a private life, is a qualified right. Any interference with an individual's right to privacy must be in accordance with the law and it must be necessary in a democratic society in the interests of public safety, the protection of health or morals, or the protection of the rights and freedoms of others.

34. This is a public inquiry set up in order to investigate abuse at a large mental health and learning disability hospital and to make recommendations designed to prevent such abuse happening again at any similar establishment.

35. The request for patient notes has been made in a careful and proportionate manner, ensuring as far as possible within the confines of a public inquiry, the continued protection of the privacy of the patients to whom the requests are relevant. All patient names have been given a cipher and the only persons entitled to the key to that cipher are Core Participants to the Inquiry who have signed a confidentiality undertaking. I am satisfied that the request does not breach individual rights under Article 8. It is a proportionate and lawful request with careful measures taken to continue to protect people's identities which will continue during the Inquiry.

36. I would say in passing that if the Inquiry had adopted the stance advocated by some, including the Trust, of directing the production of all the patient notes for every patient who came within its purview, there might then have been a stronger argument that such a request was not proportionate to the Inquiry's purpose and might fall foul of Article 8 but that is not the approach the Inquiry has adopted.

37. The Trust has, correctly in my view, not sought to make any argument under section 21(4)(b).

38. Dealing very briefly with the other subsections to Sections 21 and 22, the reference in section 22(1)(b) to a 'retained EU obligation' is not a direct reference to the European Convention on Human Rights or any Article of that Convention relating to privacy. Section 22(1)(b) is not engaged, there is no argument that it is relevant and so I can put that to one side. Section 22(2) relates to material withheld on grounds of public interest immunity which is not relevant to the material required here. Section 22(2) is therefore not engaged.

39. I turn to the argument submitted by the Trust which is under section 21(4)(a) and section 22 (1)(a). Section 22 provides that a person may not, under section

21, be required to produce a document which he could not be required to produce if the proceedings of the Inquiry were civil proceedings in a court in the relevant part of the United Kingdom.

40. The central question, I might say the only question for these purposes, is whether the recipient of the section 21 notice 'could be required to produce the information or documentation covered by the notice, if the proceedings of the Inquiry were civil proceedings in a court'.

41. I note that there are two important differences between section 22 and the exception to the Interpretation Act provision, which gave rise to the issue in the case of O'Hara. Section 22 does not speak of a right of refusal nor is its ambit so wide. It focuses instead upon the power of the civil court to require that documents are produced.

42. The Inquiries Act 2005 was designed to give public inquiries powerful tools to ensure that the business of the inquiry could be properly and effectively conducted. The drafters used simple, direct and clear wording to invest those powers. References to cases decided by inquiries not held under the Act are of little assistance to the interpretation of that legislation.

43. The two authorities upon which Mr Aiken has relied to support his position have nothing to do with the Inquiries Act. One, Lewis v Secretary of State for Health and Michael Redfern QC [2008] EWHC 2196 (QB) related to a private inquiry and gives no assistance in relation to the interpretation of the Inquiries Act, the other, 'The O'Hara Case' was an inquiry which was invested with powers under the Interpretation Act (Northern Ireland) 1954. The wording of that provision was different in important respects from the wording in section 22 which is simpler, more concise and provides greater powers than had existed before.

44. The Trust has not been able to find a single authority which supports their submission under section 22 of the Inquiries Act 2005 which signals to me that this point, unsurprisingly in my view, has never found its way into case law since the promulgation of the Act.

45. There is some support for Mr Aiken's argument in one of the legal textbooks, Beer on Public Inquiries in Chapter 5.59 which elides principles of privilege with the principles of duties of confidence. That is commentary without the benefit of any common law support. It seems to me, with respect to the authors, that the commentary is erroneous and should not be followed. The authors of the alternative authoritative text book, 'The Practical Guide to Public Inquiries' by Mitchell, Jones and others appear to take a different view. In their short section on the interpretation of section 22 they discuss only the question of privilege and not confidentiality.

46. Finally, I have considered briefly the explanatory notes in relation to both section 21 and section 22. The note in relation to the use of section 21 uses the following example as to when it may be necessary to issue such a notice:

(ii) A person is willing to comply with an informal request, but is worried about the possible consequences of disclosure (for example, if disclosure were to break confidentiality agreements) and therefore asks the chairman to issue a formal notice.

47. In relation to section 22 the explanatory notes reveal this:

> Section 22(1) ensures that witnesses before inquiries will have the same privileges, in relation to requests for information, as witnesses in civil proceedings. In particular, this means that a witness will be able to refuse to provide evidence:
>
> (i) because it is covered by legal professional privilege;
> (ii) because it might incriminate him or his spouse or civil partner (by virtue of section 84 the Civil Partnerships Act 2004); or
> (iii) because it relates to what has taken place in Parliament.

48. Neither of these explanatory notes provides any support for the Trust's position.

49. At the end of the day, having read the relevant sections of the statute and the relevant authorities, gleaned what assistance I can from the textbooks and having listened to submissions, I must determine this application as to whether the original notice requires variation or quashing.

DETERMINATION

50. The position of the Trust seems to me to be unfounded and wrong in law. There is no common law support for it.

51. Section 21 of the Inquiries Act 2005 is specifically designed to give the Chair of a public inquiry the power to require individuals and organisations to hand over material relevant to the terms of reference of the Inquiry. The organisation or individual must hand the material over with the very limited exceptions provided for in section 22.

52. Section 22 ensures that a public inquiry has in this respect the same but no greater powers than those of the High Court. Thus, a public inquiry cannot direct the provision of material which the High Court could not. There are very limited categories of material that the High Court cannot insist on being provided, one category is material which is privileged, another is material which might incriminate the maker. This material does not fall into either of those two categories.

53. There may be other material that the High Court cannot order to be produced, but I am quite satisfied that section 22 has no applicability to confidential material such as patient notes which is what this application is all about. Section

22 should be interpreted as it is written. The High Court has power to require the production of such material and accordingly so does the Chair of a public inquiry.

54. Stepping back from the immediate argument I have also considered more generally whether the notice is compliant with Article 8. I am satisfied that for the reasons given above it is a proportionate and lawful request. I have again considered the public interest in the material being provided having regard to the likely importance of the material in the context of the inquiry's work. I am satisfied that it is in the public interest to require the material to be produced.

55. The section 21 notice therefore does not require amendment nor does the Rule 9 request.

56. The procedure to enforce a section 21 notice is by referral to the High Court under section 36 of the Act. Unless the Trust indicates its intention to comply with the order then I will issue such a referral.

Tom Kark KC
Chair MAHI
05 June 2023