STATEMENT OF ISSUES TO BE RAISED AT THE PRELIMINARY HEARING

BY COUNSEL REPRESENTING FORMER PATIENTS OF MR ELJAMEL AND THEIR PERSONAL REPRESENTATIVES (THE PATIENT GROUP)

We welcome this opportunity to submit brief written submissions in advance of the Preliminary Hearing. We also wish the opportunity to make oral submissions at the Preliminary Hearing. Our submissions are grouped under two chapters.

1. LACK OF CLARITY OVER PATIENT CENTRED AND TRAUMA INFORMED APPROACH

Both the Public Inquiry (PI) and the Independent Clinical Review (ICR) are committed to a trauma informed approach. The following statements have been made on behalf of the Scottish Government, the PI and the ICR.

On 7th September 2023 the Cabinet Secretary said:

> *"…a full public inquiry will not necessarily answer each former patient's clinical questions about their own circumstances.*
> *For that reason, I still consider that an independent case review of patients' individual clinical cases—where that is what individual patients want—remains necessary.* ***That will allow a person-centred and trauma-informed review of each patient's clinical case****, addressing their individual needs and circumstances and attempting to offer answers in a bespoke and personalised way that an inquiry will not offer."*

The Memorandum of Understanding between the ICR and PI states:
"Principle 11 **(f) Both processes require to undertake their work in a trauma-informed way."**

Para 91 (b) of Counsel to the Inquiry's Note reaffirms that a trauma informed approach is central to the work of the PI.

However, the patient group and we as their counsel are unclear as to how this patient centred and trauma informed approach will be implemented in practice.

We are concerned that;

A. The provision being made available to support the patient group through the ICR process is not sufficient to enable their legal team to provide the advice and advocacy necessary for them to participate in the ICR effectively
B. There is a complete absence of any provision of funded mental health support for patients to participate in the ICR process or the PI process

Having met with most of the patient group proper support from their legal team is necessary not only due to the cognitive impairments they suffer but also because of the re-traumatising impact that engagement with the ICR and the PI is causing. This will require access to funded mental health support for extremely vulnerable individuals, as has occurred in other public inquiries.

Most of the patient group have suffered serious mental health consequences following their engagement with Mr Eljamel and NHS Tayside. These include but are not limited to PTSD and suicidal ideation. The process of engagement in the ICR and the PI is re-traumatising patients who have been denied their voice as legitimate complainers for many years by both Mr Eljamel and NHS Tayside.

Paragraph 33 of Counsel to the Inquiry's Note acknowledges representations of concern that have been made in respect of the ICR and sets out how those concerns, e.g., incomplete medical records, will be resolved by reference to GP records. Whilst this section of the Note states that patient experience will be captured, we submit that the complexity of this process and most importantly the trauma resulting from patient engagement has not been properly recognised and is not provided for in the proposed model of patient support.

Para 33(i) suggests that patient consent will be required before documents emanating from the ICR will be placed in the public domain, however, it remains unclear what opportunity, if any, the patient group, with the assistance of their legal team, will have to comment on the accuracy of documentation informing the ICR or any documents/reports produced by the ICR.

Inadequate funding for legal support of the patient group in the ICR and the PI is undermining the aspiration for a patient centred and trauma informed approach. For example:

(i) It has been stipulated that all affected patients must be represented by one law firm, but their legal team is not being properly resourced to represent the patients and, in particular, in a trauma informed way.
(ii) Not only is the size of the legal team insufficient to properly engage with and represent more than 150 traumatised core participants, but there has also been an attempt to restrict the ability of the patient group's counsel to consult with them in a meaningful way.
(iii) There has been no attempt from either the PI or the ICR to identify the trauma impact of engagement with the inquiry or the review, nor has any provision of appropriate psychological support been identified and put in place to support patients.
(iv) There appears to be a lack of appreciation of the level of mistrust that patients now have since their treatment at the hands of Mr Eljamel and NHS Tayside.

Patients have been told that their medical records have been destroyed, causing further distress, and those who have obtained them often read entries that have been falsified or realise that relevant information is missing. The process of patients engaging with and accounting for their inaccurate or absent medical records (the methodology of which remains unclear) will be a source of great stress and trauma. For some patients cognitive impairment makes this task impossible without support. That support will not be possible without adequate funding.

Without proper patient engagement the legitimacy and purpose of both the ICR and the PI will be adversely affected. If both bodies wish to fulfil their commitment to a patient centred and trauma informed approach, this necessitate that patients are properly supported to engage with the ICR and the PI and are provided not only with the support and guidance of their legal team, but appropriate funded mental health support throughout both processes.

2. ISSUES IDENTIFIED BY COUNSEL TO THE INQUIRY IN HIS NOTE FOR THE PRELIMINARY HEARING

(a) The commencement and progress of the Inquiry

A provisional Timetable covering the duration of the Inquiry would be of great comfort and reassurance to the patient group and it would assist in programming preparation time and the availability of Counsel.

It is estimated that Section 2 hearings are provisionally scheduled to take place in Spring 2026. Are the Inquiry confident that the ICR process will be complete by then?

(b) Designation of Core participants

We concur in the invitation to NHS Tayside to consider addressing the issue of the extent of its representation of its former employees, both medical and administrative, including Mr Eljamel, and the Board's role in the provision of evidence by any such individuals to the Inquiry.

(c) The Independent Clinical Review

We seek

- Clarity about its role
- Clarity about the methodology given the issue of missing, incomplete or falsified medical records.
- Clarity and assurances regarding the trauma informed approach to be adopted

- Assurances regarding advice and advocacy for patients to help them adequately complete the questionnaires

- Assurances about the independence of the ICR given that members of the patient group have received correspondence from the ICR within correspondence from NHS Tayside (this is also relevant to paragraph 90 of Counsel's note)

- Assurances that members of the patient group with the support of their legal representatives will be able to comment on the draft ICR Reports (see para 33 page 15 of counsel's note.)

- Elucidation as to the meaning and consequences of paragraphs 34 and 35 of Counsel's Note which appear incomplete.

(d) Approach to evidence and public hearings

With reference to paragraph 43 we would wish to have input to the selection of patients to give evidence.

We seek confirmation that provision for a representative to give evidence includes a nominated spokesperson in line with a trauma informed approach.

We note that the GMC will be called to give evidence. Will the HSE be called to give evidence given what it said in paragraphs 50 and 51?

We note that the List of Issues identifies that interactions, including bullying, by Mr Eljamel, will be addressed during evidence led at the Inquiry. How do the Inquiry anticipate capturing evidence of the interaction of Mr Eljamel with patients? How will the Inquiry capture evidence relating to the discharge of the duty of candour owed to patients by Mr Eljamel and his colleagues given the very significant evidence that we have from the patient group that this duty was repeatedly breached. Further, how will the Inquiry capture evidence of Mr Eljamel's misrepresentations to clients, failures to secure informed consent and other inappropriate behaviours. As the ICR questionnaire is not yet available it is not clear whether these are issues that they intend to seek to capture. It is submitted that issues such as informed consent and the evidence surrounding same will not be capable of capture in a questionnaire that a patient completes without support from their legal representatives.

It is also not clear what action the Inquiry intends to take, if any, should they uncover evidence that, in the absence of informed consent, a patient has suffered an assault. Will the ICR or the PI communicate this to patients? We submit that this is a matter that would be better managed by the patient group's legal representatives having a central role guiding and supporting patients providing evidence to the ICR.

Para 59 of Counsel's Note sets put the process whereby the Inquiry will recover patient's medical and complaint records. What system or process is in place to enable the Inquiry

and/or the ICR to ascertain the patient's acceptance or otherwise of the accuracy and completeness of these records?

(e) The Terms of Reference and List of Issues

We note that whilst the Terms of Reference are now fixed that the "List of Issues" is envisaged to be a live document which we look forward to assisting the Inquiry to expand as appropriate.

(f) Rule 8 Requests/ Section 21 notices

Many Core Participant patients were resident within NHS Fife and therefore received "after care" from NHS Fife. We suggest that Rule 8 and Section 21 Notices are served on NHS Fife to recover documents relevant to these patients.

(g) Disclosure of documents

We seek reassurance from the Inquiry that sufficient notice in advance of disclosure of documents will be provided to allow legal teams to make arrangements to provide proper consideration of said documents in advance of evidential hearings and the preparation of Rule 9 applications.

(h) Instruction of Expert Witnesses

We seek reassurance that no Expert Witnesses will have been or are employed by NHS Tayside or have worked alongside Mr Eljamel in the past.

(i) Communication and the Inquiry's trauma informed approach

As noted above at para (d), it is essential for a trauma informed approach that patients have access to full support from their legal representatives and have access to psychological/psychiatric support to minimise any re-traumatising as a consequence of participating in the public inquiry. It is also essential that those who are cognitively impaired or vulnerable have not only access to their legal representatives for support but also to a nominated supporter to assist them to participate in the ICR and the Inquiry.

(j) Protection of information

We are concerned at the lack of clarity over publication of patient records/information and ICR reports. The Memorandum of Understanding states:

> "23. In particular, the request for an applicant statement will make it clear to former patients of Mr Eljamel, or their relative/representative (as the case may be), that information included in the individual case reviews (including the information contained in any applicant statement and other documentation provided with it for consideration by the ICR) will be available to the Inquiry, but that such information **will not normally** be provided to the Inquiry for consideration and/or use (including publication) in the fulfilment of its Terms of

> Reference unless the patient, their relative or their representative has explicitly consented to this, and subject always to applicable data protection policies, restriction orders and provisions for anonymity, where claimed."

Counsel's Note states:

> "37. Entirely understandable concerns have been expressed to the Inquiry about its intentions with regard to the publication of material emanating from the ICR, which will ultimately become evidence in the Inquiry and hence be subject to the obligation of the Inquiry to publish it under section 18 of the 2005 Act. Before publishing an applicant statement, the neurosurgical report and any attached medical records, the patient in question will be given the right to apply to the Inquiry for anonymity before the applicant statement is disclosed to others or published. The process for this is set out below."

That process is set out at paragraph 94(a). It does not guarantee anonymity. This is a source of concern to many in the patient group who cannot understand why their identities should be revealed when such personal information is at stake. They are also concerned that even with anonymity publication of medical records etc. may reveal who they are unless there are significant redactions.

(k) Future hearings dates

Counsel representing the patient group will wish to make an Opening Statement at the forthcoming hearing.

(l) Next steps relating to the preliminary hearing

Following our meeting with the ICR we may have additional oral submissions to make.

Joanna Cherry KC
Clare Connelly, Advocate