S.34/02-03

Scottish Public Services Ombudsman Act 2002

Report by the Scottish Public Services Ombudsman
of an investigation into a complaint against:
Lothian NHS Board (the Board)

Complaint as put by Mrs D

1. The account of the complaint provided by Mrs D was that she had suffered from arthritis to both knee joints for several years. She was placed on Lothian University Hospitals NHS Trust's (the Trust) waiting list for replacement knee joint surgery in early 2000. She underwent surgery to her right knee joint on 25 January 2001 at a private hospital. The treatment was funded by the National Health Service (NHS). Mrs D's general practitioner (GP) re-referred her to the Trust in July 2001 regarding her left knee. In August she received a letter from the Trust's operations manager (the Operations Manager), which informed her that due to staffing difficulties, the waiting time for a clinic appointment was rising to almost a year. Mrs D telephoned one of the Trust's bed managers and was told that the waiting time for surgery was ten months after seeing a consultant. On 31 October, Mrs D wrote to the Board and asked them to expedite treatment. She was willing to attend the private hospital and would pay the difference between the private charge and the cost for the operation under the NHS. Mrs D was seen by a consultant (the Consultant) on 22 November and was told that the waiting time for surgery was 16 months. Mrs D could wait no longer and her husband arranged a private referral to the private hospital the following day and surgery took place on 13 December. On 24 December, Mrs D wrote a letter to the Board and requested reimbursement of her costs. On 21 December, the Board's chief executive wrote to Mrs D and advised her that her place on the waiting list had been backdated to July 2001. It was anticipated surgery would take place by July 2002. Mrs D remained dissatisfied with the Board's further responses and requested an independent review on 22 April 2002, which the convener subsequently refused.

2. The complaints subject to investigation were that:

(a) there was an unreasonable delay by the Board in responding to Mrs D's letter of 31 October 2001;

(b) the decision to refuse Mrs D's request for reimbursement was taken without obtaining comments from Trust staff mentioned by Mrs D; and

(c) the convener exceeded her responsibilities by seeking to resolve the complaint through her own investigations.

Investigation

3. The statement of complaint for the Ombudsman's investigation was issued on 14 June 2002. The Board's comments were obtained, and relevant papers were examined. Interviews were conducted with Mrs D and Board staff. Evidence was also taken from the Operations Manager but her actions are not subject to investigation. I have not included in this report every detail investigated, but I am satisfied that no matter of significance has been overlooked.

Complaints (a) and (b) that there was a delay by the Board in responding to Mrs D's letter of 31 October and the decision to refuse the request for reimbursement was taken without obtaining comments from Trust staff

Mrs D's evidence

4. **Mrs D** said that the consultant at the private hospital (the Private Consultant) told her that she needed operations on both of her knees but the right knee was more severely damaged and that operation took place in January 2001. The left knee would need an operation at a later date but that would not be for at least six months which would give the right knee time to recover from the operation. Mrs D contacted her GP in July 2001 and the GP told her that she would send a letter to the Trust. In August 2001, Mrs D received a letter from the Operations Manager which advised her that due to a shortage of consultants, the waiting list for consultant appointments was rising towards a year therefore no appointments were being sent out meantime. Mrs D spoke to the Waiting List Manager at the Trust by telephone on 15 August and was told that the waiting list for surgery after seeing a consultant was ten months. This would have meant Mrs D's left knee operation might not have taken place until Spring 2003. Mrs D contacted her GP again and this resulted in an appointment with the Consultant which was scheduled for 22 November

2001. Mrs D wrote to the chief executive of the Board on 31 October 2001 to see if they could become involved and expedite her treatment. Mrs D received an acknowledgement from the Board dated 8 November 2001 and was told a full response would be sent as soon as possible.

5. Mrs D saw the Consultant at his outpatient clinic on 22 November. The Consultant examined Mrs D and told her that she did require an operation on her left knee but it was not urgent and that she could wait up to 16 months for surgery. He told Mrs D that she had been placed on the waiting list for surgery from July 2001 which was the date when the GP re-referred her to the Trust. Mrs D asked the Consultant whether, if she had the operation performed on a private basis, the Trust would be willing to pay the NHS cost of the operation if she would pay the balance. The Consultant said he had never heard of that happening before. Mrs D thought that if a patient was willing to pay the difference in costs then the Board should be agreeable to that, as they would eventually have to find the money to pay for performing the operation under the NHS. Mrs D discussed the matter with her husband and family that evening. She had not yet received a response from the Board as to whether her operation could be brought forward. Mrs D and her family decided that due to the continuing deterioration in Mrs D's quality of life, they could wait no longer therefore Mr C telephoned the private hospital the following day and arrangements were made for Mrs D to have the operation performed privately on 13 December 2001.

6. While Mrs D was in the private hospital she found out that some of the other patients were being funded by the NHS. This prompted her to write to the Board for reimbursement of the private costs. Her letter crossed in the post with the Chief Executive's response dated 21 December in which it was stated that Mrs D's operation would take place no later than July 2002. Mrs D still felt the Board had a duty to reimburse her costs because if they had informed her at an earlier date that it was anticipated the operation would take place by July 2002 then she would have cancelled the operation at the private hospital.

<u>The Operations Manager's evidence</u>

7. The **Operations Manager** said that when the Board contacted her about Mrs D's enquiry about expediting her treatment, she obtained Mrs D's case

notes to help formulate her reply of 30 November 2001 to the Board. The time which she took to respond to the Board was determined by her workload at the time but her aim was to issue a response as soon as possible. The Operations Manager established that Mrs D's right knee operation took place in January 2001 as part of a waiting list initiative. The procedure at that time was for a proforma to be sent to a patient who was on the waiting list for an outpatient appointment, asking them whether they would be willing to see a consultant at a private hospital. The patient would return the tear-off to the Trust and if they were agreeable, then staff from the private hospital would telephone them and arrange an outpatient appointment with a consultant. At the appointment, arrangements would be made for surgery if it was required. During that period, the patient would have no further contact with the Trust. Once the operation had been performed, the private hospital would send the results to the patient's GP and the Trust.

8. The Operations Manager also spoke to the Waiting List Manager, about the Board's enquiry about waiting times. She did not think that she asked the Waiting List Manager if she could recall what she actually said to Mrs D. She thought that the Waiting List Manager usually receives numerous telephone calls from members of the public about waiting times and that she would not remember specific cases. The Operations Manager did not ask the Consultant for comments. She thought that it was possible that the Consultant could have stated that the waiting time for operations was 16 months. The Consultant has the longest waiting times of all the orthopaedic consultants. However, the Consultant's patients would receive a letter informing them that due to the length of his waiting list, it would be unlikely that they would receive surgery within 12 months. The letter would offer them the opportunity to transfer to another consultant with a shorter waiting list. The letter would indicate that should they decline the offer then they would receive their surgery as soon as possible. [Note: enquiries made during this investigation revealed that neither the Waiting List Manager or the Consultant could recall giving Mrs D information about waiting times].

9. The Operations Manager explained that patients were placed on the waiting list for surgery after seeing a consultant who would determine whether the operation would be classified as routine or urgent. However, if a patient's condition deteriorated while they were waiting for an appointment to see a

consultant or for an operation, then they could again contact their GP who would send a further letter to the consultant who would then review the patient's notes. It appeared that that was what happened in Mrs D's case. The initial referral was made by Mrs D's GP on 19 July 2001 and the appointment was classed as routine. The GP then sent a further letter to the Consultant on 28 September and as a result, Mrs D was given an appointment with the Consultant on 22 November. The Consultant classified the need for Mrs D's operation as routine. The Operations Manager acknowledged that a letter was sent out to patients, including Mrs D, in August 2001 which explained that due to recruitment difficulties with orthopaedic consultants, the Trust were not able to issue outpatient appointments at that time as the waiting list had risen to almost a year. However, it was noted that this had no effect on Mrs D as she saw the Consultant four months after the initial GP referral.

Evidence from Board staff

10. The Corporate Affairs Manager (the **Manager**) said that the letter dated 31 October 2001 from Mrs D was received at the Board on 8 November after being forwarded from the Primary Care NHS Trust. The letter was treated as a formal enquiry rather than a complaint and was passed to the Directorate of Healthcare Planning (DHP) for action. The plan was to provide Mrs D with positive information on when it was expected that she should receive her operation rather than just to send a response letter which would say that she would receive her operation at some time in the future. The Chief Executive had instructed that letters of enquiry should be addressed with as much information as possible. DHP staff contacted the Operations Manager to find out the position concerning Mrs D. Although there were no set timescales by which enquiries should receive a response, the Board took the view that it should not be in excess of that which would apply to a complaint, which was twenty working days.

11. The Manager was aware that Mrs D's letter had mentioned that she had received information from various Trust staff about waiting lists but the Board only sought information from the Operations Manager. The Manager believed that the Operations Manager had spoken to the Consultant but he was not sure if she had spoken to other Trust staff. The Board then received the response from the Operations Manager dated 30 November which said that Mrs D had

been seen by the Consultant and her place on the waiting list for surgery had been backdated to July 2001. However, the Operations Manager had not given any indication as to when it was anticipated that Mrs D would receive her operation. The Manager instructed DHP staff to make further enquiries. The fact that the Operations Manager had not initially provided information about a possible operation date meant that the Board could not issue a response to Mrs D at that time. Further enquiries revealed that it was expected that Mrs D's operation would take place within the national waiting time guarantee of 12 months which would mean by July 2002.

12. The Manager said that when Mrs D wrote to the Board on 24 December 2001 and told them that she had had the operation performed privately and was now claiming reimbursement, the views of the Director of Public Health were sought. The Manager was aware that the Director of Public Health had consulted with the Trust's Medical Director and it was decided that there were no grounds to reimburse Mrs D as she had chosen to have the operation performed on a private basis. The Manager thought it was important to seek the views of the Trust before a decision could be reached on the question of reimbursement in case there had been a justifiable reason for allowing the reimbursement.

13. The Manager did not think that the Board had failed Mrs D. It appeared that she had taken the decision to have the operation on a private basis rather than wait for the Board's response to her enquiry. The Board's policy (which I have seen) is that elective referrals to private facilities must be approved in advance. The Manager explained that in an effort to ensure that enquiries receive a response in line with the complaints timescales, a brought forward system has been introduced and he meets the Complaint Manager on a weekly basis to discuss outstanding items. If there was an indication that the timescales would not be met, a progress letter would be sent to the person making the enquiry giving them as much information as possible and informing them that a final response would follow as soon as possible.

14. The **Director of Public Health** said he was asked for his comments about Mrs D's request for reimbursement. He reviewed the papers and asked a colleague, to contact the Trust's Medical Director for comments. The Director of Public Health took the view that the Board had a policy that

referrals for private treatment had to be approved before the referral could be made and that unless there were exceptional circumstances then the claim for reimbursement should be refused. The Trust had provided information that Mrs D would have had her operation performed by July 2002 which was in accordance with the national waiting list guarantee and as such there would be no need to consider a private referral. The Director of Public Health thought that if the Board had allowed the reimbursement, it would have set a precedent. This could have resulted in other patients taking similar action by arranging private operations themselves and then requesting reimbursement from the Board. Such action would have financial implications and would affect the Board's budgets as there would be no way of knowing how many claims for reimbursement would be made during a set period. In addition, there was also an equity issue involved. Not all patients who require operations have the means or ability to pay for private operations themselves and would be in a position to wait for the Board to refund the costs. The Board has a duty to be fair to all patients regardless of their financial status.

15. The Director of Public Health did not think that even if Trust staff had provided incorrect information about waiting times, that it would have affected his decision to refuse to reimburse Mrs D's costs. He thought that it would be extremely difficult for Trust staff to provide accurate information to patients about waiting lists as lists change due to the numbers requiring operations and on clinical need. It also appeared that there was no clinical need for Mrs D to have her operation brought forward as the Consultant had classified her operation as routine. The Director of Public Health felt that Mrs D had acted prematurely by going ahead with the private operation before the Board had had a chance to answer her original enquiry. If Mrs D had been concerned about the information the Consultant had provided about waiting lists, she should have written to the Board and said she was contemplating private treatment and that she expected the Board to reimburse her costs. The Board would then have made further enquiries.

16. The **Chief Executive** said that he regretted the time taken by Board staff to answer the initial letter from Mrs D. However, he thought that good practice was to ensure that the response should contain sufficient information to address the concerns raised. From the point of view that the Board took six weeks to respond to the enquiry, they had in effect defaulted. The majority of

the time taken to formulate the Board's response was taken up by waiting for the Trust to provide information. The first response from the Operations Manager did not contain concise information about when Mrs D's operation could expect to take place. Further enquiries by Board staff led to information being received that the operation would take place 'around July 2002'. The Chief Executive was not prepared to issue a letter to Mrs D on that basis and further enquiries revealed that Mrs D should receive her operation 'no later than July 2002' in accordance with the national waiting time guarantee. The requests for the additional information meant that the response letter from the Board was not issued until 21 December. The Chief Executive felt that perhaps with the benefit of hindsight, a holding letter should have been issued to Mrs D informing her that her enquiry was still being pursued with the Trust.

17. The Chief Executive said that the original letter from Mrs D gave no indication that if there was to be a delay in the response then she would proceed with private treatment and expect the Board to reimburse her costs. He thought Mrs D had taken a step too far by proceeding with private treatment without waiting for the Board response. Had Mrs D made further contact with the Board after seeing the Consultant on 22 November, they would have addressed the issue urgently. It was important that the Board acted in accordance with their policy on elective referrals and that it would not be responsible stewardship if he had used taxpayers money to pay for private treatment. However, if there had been an indication from the Trust that Mrs D would not have received her operation within the 12 month waiting list guarantee, or that there was a clinical need why she should receive an earlier operation, then referral to a private facility would have been considered. The Chief Executive said that Mrs D did not complain to the Board about what Trust staff had told her about waiting times but had enquired if the Board could expedite her treatment. The Board made enquiries of the Operations Manager to obtain a definitive date for Mrs D's operation in order that the Board could provide Mrs D with a comprehensive response to her enquiry. The Chief Executive felt that the Board had endeavored to help Mrs D as much as possible.

Findings (a)

18. Mrs D wrote to the Board on 31 October 2001 to ask if they could become involved in expediting her operation. Mrs D was concerned about the

length of time she would have to wait for the operation based on the information which had been provided by Trust staff. Mrs D said that Trust staff had told her that due to a shortage of consultants, the waiting list for an appointment with a consultant was rising towards a year and the Waiting List Manager had said that the waiting times for surgery was ten months after seeing a consultant. This would have meant that her left knee operation might not have taken place until Spring 2003. The Board received Mrs D's letter on 8 November but it took until 21 December for the Board to issue a response to Mrs D. The reason for the delay was that the Board was attempting to obtain information from the Trust as to when Mrs D would receive her operation. It was only when the Chief Executive received information from the Trust that Mrs D would receive her operation by July 2002 that he was content that a response could be issued to Mrs D.

19. I have considered whether the action taken by the Board to enable them to respond to Mrs D's letter of 31 October was reasonable. Mrs D told the Board that she was concerned about the length of time it appeared that she would have to wait to see a consultant and for her knee operation and enquired whether they could expedite her treatment. I note that although Mrs D has said that Trust staff had informed her that she might have to wait up to a year to see a consultant, Mrs D actually saw the Consultant on 22 November which was only four months after the referral by her GP. On that basis, I feel that Mrs D should have treated the information which she received from Trust staff with a degree of caution and waited for the Board to respond to her letter. There are no statutory timescales that Boards have to meet in order to answer an enquiry. The Board take the view, which I believe to be entirely reasonable, that it should take no longer than the time allowed to respond to a complaint, which is 20 working days. Clearly, the Board did not meet their timescale on this occasion. Mrs D had asked the Board to expedite her treatment and her letter gave no indication that she was considering private treatment at that time and that she would expect the Board to reimburse her costs. I consider that it would have been good practice to send Mrs D an interim letter which would have informed her of the action taken to provide her with a response. Whilst an interim letter might not have provided Mrs D with a definite date by which she should have received her operation, it would have provided an assurance that her enquiry was still being actively addressed. It is to that limited extent that I uphold this aspect of the complaint. I am pleased

to note that the Board has now initiated a procedure whereby progress letters are issued when it appears that their timescales for responding to enquiries are not going to be met.

Findings (b)

20. Mrs D wrote to the Board on 24 December seeking reimbursement of the costs which she had incurred by paying for her operation privately. The main reason that she said that she opted to have the operation performed privately was that on 22 November, the Consultant had told her that there was a 16 month waiting list for operations. However, while she was in the private hospital, there were other patients having operations which were being funded by the NHS. Then Mrs D received the letter from the Chief Executive dated 21 December, and he told her that she would receive her operation by July 2002. This was at variance with the information which Mrs D says the Consultant had provided and had Mrs D known that her operation would take place by July 2002, then she would have cancelled the private operation. Mrs D believed that prior to reaching a final decision about reimbursement, Board staff should have contacted the Trust staff who gave her incorrect information about how long she would have had to wait for her operation. The Manager has explained that the Board's policy is that elective referrals to private facilities have to be approved in advance. The Board sought comments from the Operations Manager about when Mrs D could expect to receive her operation. The Director of Public Health did not think that even if Trust staff had provided incorrect information, that it would have affected the decision not to reimburse Mrs D's costs. He also explained the implications for the Board if they were to pay for patients who had decided to have operations carried out on a private basis and expect the Board to reimburse their costs.

21. I take the view that the Board took appropriate action before reaching a decision on whether to reimburse Mrs D her costs. The Board had made enquiries to establish whether there was a clinical need for Mrs D's operation to be brought forward. I note that the Board did not seek comments directly from the Waiting List Manager or the Consultant but it would be reasonable for them to expect that the Operations Manager would make further enquiries if she felt it was appropriate. However, it should be noted that the Board have no responsibility for the comments made by Trust staff and in any event, the Board's decision would not have been affected by what Trust staff told Mrs D

about waiting times. I do not see any evidence of maladministration in respect of action taken by the Board which led to the decision not to reimburse Mrs D's costs and therefore I do not uphold this aspect of the complaint.

Complaint (c) that the convener sought to resolve the complaint

National Guidance

22. Guidance on dealing with complaints issued by the Scottish Executive Health Department in May 1999 includes;

- The role of the convener is crucial in deciding whether there should be an independent review. It also provides complainants with an independent and informed view on whether any more can be done to resolve their complaint. The convener must decide whether to: refer the complaint back for further local resolution; or set up a panel to consider the complaint; or to take no further action. It is not the convener's role to seek a view on the merits or otherwise of the complaint or to investigate it. (2.4)

- The convener is also responsible for ensuring that the complaint is dealt with impartially. (2.7)

- In considering the request for an independent review, the convener must not investigate or attempt to resolve the complaint on his/her own or try to defend either those complained against or the complainant. (2.8)

- The reasons for any decision to refuse a panel, or to refer back to local resolution, should be clearly stated. (2.12)

Documentary evidence

23. The Convener wrote to Mrs D on 16 May 2002 refusing the independent review. She wrote:

> '… I am writing to inform you that I have decided not to establish a panel, nor are there any grounds for the reimbursement for your operation at [the private hospital]…

'My reason for this decision is that you were well aware, because of your previous surgery, of the fact that admission to [the private hospital] has to be with prior approval and therefore expenses cannot be reimbursed retrospectively. You made the decision to go to [the private hospital] for your second knee operation before the complaints procedure could adequately answer the issues raised in your initial letter. By this course of action you therefore set the complaints procedure aside.

'...

'If the date for your second operation could not be met within the time limit set by the Scottish Executive, then consideration would have been given by the Orthopaedic department for you to go to [the private hospital], as was the case for your first operation. This is a decision which has to be taken by the medical staff and not by the patient. We therefore endorse the decision taken by [the Director of Public Health] and [the Trust's Medical Director] ...'.

Mrs D's evidence

24. **Mrs D** said she felt that the letter from the Convener refusing the independent review had gone into some detail on the reasons for not establishing a panel and this led her to believe that the Convener had investigated the complaint. The letter was full of inaccuracies. For example, the Convener had said that Mrs D had been well aware, because of her previous surgery, that admission to the private hospital as a NHS patient had to be with prior approval. Mrs D understood that the previous surgery had been funded by the NHS but she had no knowledge of the criteria required for the referral. Mrs D's contact with the Trust about the previous surgery consisted of one telephone call asking whether she was prepared to have the operation performed at the private hospital. She did not have any knowledge of the procedures which the Trust had to follow in making the referral to the private hospital or that prior approval was required before the referral could be made. The Convener's letter also said that Mrs D had put the complaints procedure aside when she made the decision to attend the private hospital before the complaints procedure could adequately answer the issues which she had raised in her letter of 31 October 2001. Mrs D did not accept the

Convener's reasoning as she had not been informed at that time about the complaints procedure in correspondence from the Board.

The Convener's evidence

25. The **Convener** said that she knew that it was not her role to investigate a complaint or defend either the complainant or the Board. She explained that where she had taken the decision that an independent review would not add anything to the complaint then she had a duty to provide the complainant with an explanation. In Mrs D's case, the Convener and the lay chair were of the opinion that the complaint had been addressed by the response from the Board. In effect, the Convener was in agreement with the action taken by the Board and that was why she told Mrs D that she endorsed the decision taken by the Director of Public Health and the Trust's Medical Director. With hindsight, the Convener could see her use of the word 'endorse' could have led Mrs D to think that she was defending the Board staff. That was not her intention and perhaps that part should have been omitted from her letter.

26. The Convener also thought that as Mrs D had had her first operation performed under NHS contract at the private hospital then she would have been aware that prior approval from the Board was required. This was confirmed to an extent by a letter from Mrs D's GP to the Consultant dated 28 September 2001, in which the GP said that she had explained the politics and financial restrictions upon the orthopaedic service to Mrs D. The Convener also attempted to explain that by having the operation performed privately, Mrs D had in effect put the NHS complaints procedure aside. She did not mean to infer that Mrs D had knowingly put the NHS complaints procedure aside. Again, with hindsight, the Convener felt she should have considered the wording of her letter more carefully.

Findings (c)

27. Mrs D gained the impression from the Convener's letter that she had investigated the complaint. This was due in part to the Convener's inaccurate comments that Mrs D had been aware that the Board had to give prior approval before a referral of a NHS patient could be made to a private hospital. Mrs D was also concerned about the Convener's comments that by going ahead with the private operation, Mrs D had set the complaints

procedure aside. The Convener has said that she was attempting to provide Mrs D with explanations as to why she did not feel that an independent review was appropriate . She understood that the wording of her letter could have led Mrs D to believe that she was defending Board staff and that she had made an assumption based on the GP's letter in the clinical records that Mrs D was aware that the Board had to give prior approval to a NHS referral to a private hospital.

28. The guidance at paragraph 22 is clear that it is not the convener's role to seek a view on the merits or otherwise of the complaint or to investigate it. The convener should act impartially and not defend either of the parties involved. However, the convener has a duty to ensure that the reasons for her decision should be clearly stated. I am satisfied that the Convener did not investigate Mrs D's complaint but I am concerned about the wording of the Convener's letter. It was inappropriate for the Convener to mention in her letter that she endorsed the Director Of Public Health's decision not to reimburse the costs as this could give the impression that the Convener was not impartial. It was also inappropriate to make an assumption that Mrs D was aware of the Board's policy on referrals to private hospitals based on the letter from Mrs D's GP to the Consultant. That letter said that the GP had explained the politics and financial restrictions facing the orthopaedic service to Mrs D. There is nothing in that letter to indicate that the GP explained the Board's policy on elective referrals to private facilities. Accordingly, it is to the extent of the failings which have been identified that I uphold this aspect of this complaint.

Conclusion

29. I have set out my findings in paragraphs 18-21,27 and 28. The Board have asked me to convey to Mrs D - as I do through this report - an apology for the shortcomings which have been identified. I hope that this report clarifies certain issues for Mrs D.

Graham Pettie
Senior Investigating Officer
duly authorised in accordance with
paragraph 11 of Schedule 1 to the
Scottish Public Services Ombudsman Act 2002

November 2002