Scottish Hospitals Inquiry
Witness Statement of
Michael Baxter ("Mike Baxter")
In response to s21 Notice dated 14 December 2022

14 February 2023

Preliminaries

1. I am Mike Baxter. This witness statement follows and, where appropriate, expands upon the evidence that I provided to the Inquiry within my witness statement dated 20 April 2022 and the oral evidence that I gave to the Inquiry on 16 May 2022.

2. In my earlier statement and oral evidence I endeavoured to provide the Inquiry with evidence, drawing upon my experience and knowledge, that would help the Inquiry understand the Scottish Government's (and the Scottish Government's Health and Social Care Directorates' ("SGHD")) role and responsibilities in relation to the design and delivery of large healthcare projects, including the Royal Hospital for Children Young People/Department for Clinical Neuroscience ("RHCYP/DCN")). I have been unable to answer, or meaningfully answer, a number of questions contained in the Inquiry's section 21 Notice, dated 14 December 2022, because some of these questions relate to matters that are not the responsibility of the Scottish Government. In the first instance, it may be helpful for me to restate (briefly) the Scottish Government's role and responsibilities in relation to the delivery of large health care projects as it pertains to the RHCYP/DCN.

3. Health is a devolved matter. SGHD are responsible for delivering health and social care in Scotland. Health Finance (now Health Finance, Corporate Governance and Value) is the directorate responsible for administering Scotland's capital healthcare budget: this includes approval, from a financial

perspective, of large healthcare projects. The responsibility for delivery of such projects lies with NHS health boards.

4. At paragraphs 10 to 50 of my earlier statement I explain the operation of the SGHD Capital Investment Group ("CIG"). As I explain in my earlier statement, business cases are reviewed by CIG at different stages of a project's lifetime to ensure, amongst other things, that health needs are appropriately met by the development proposed by the NHS board and that the development is affordable. This process is conducted in accordance with the Scottish Capital Investment Manual. CIG (and by extension) SGHD are not involved in the detail of the procurement, design and construction of the development. That is, primarily[1], a matter for the Health Board, drawing upon its own internal skills and experience and the professional (financial, legal and technical) advisers instructed by them.

5. As I explained in my earlier statement, my experience relevant to RHCYP relates to my engagement with the project as Deputy Director of the Capital Planning and Asset Management Directorate. Accordingly, whilst I have tried to be helpful in answering the questions posed to me in the Inquiry's section 21 Notice dated 14 December 2022, I cannot comment on matters outwith my knowledge and experience and would prefer not to speculate.

6. For completeness, I can also advise that I have also read paragraphs 7 to 42 of Alan Morrison's statement, dated 11 April 2022 and confirm that I agree with its content and the description of SGHD, the operation of CIG and the business case review process described therein.

7. In providing this statement, I have referred to the bundle entitled "Bundle of documents for the purpose of taking witness statements from Scottish Ministers witnesses commencing December 2022".

[1] The health board may engage NHS NSS bodies, such as HFS in this process as well as other public sector bodies/organisations such as the Scottish Futures Trust. These bodies are independent of, but accountable to, the Scottish Government.

ACTIVITY DATABASE AND CEL 19 (2010)

8. CEL 19 (2010) **(A37215536 – CEL 2010 – Letter to Chief Executives, 'A Policy on Design Assurance for NHSScotland 2010 Revision' (2) – 2 June 2010)**[2] required NHS Scotland bodies to comply with "A Policy on Design Quality for NHS Scotland" for new hospital projects ("the Policy on Design Quality"). Mandatory Requirement 7 of the Policy on Design Quality provides:-

> *All NHSScotland Bodies engaged in the procurement of both new-build and refurbishment of healthcare buildings must use and properly utilise the English Department of Health's Activity Data Base (ADB) as an appropriate tool for briefing, design and commissioning. [If deemed inappropriate for a particular project and an alternative tool or approach is used, the responsibility is placed upon the NHSScotland Body to demonstrate that the alternative is of equal quality and value in its application.]"*

9. If ADB is deemed inappropriate for a particular project, the Policy on Design Quality places a responsibility on the NHS Scotland Body (i.e., NHS Lothian ("NHSL") for the RHCYP/DCN) to demonstrate that an alternative tool that is adopted is of equal quality and value in its application. I would expect a derogation from a mandatory requirement contained in the Policy on Design Quality to be highlighted in the NHS Board's business case. The evidence I have provided at paragraphs 122 to 124 of my earlier statement, in relation to SHTMs, applies equally to mandatory requirement 7 of the Policy on Design Quality.

10. I am advised that a decision was taken by NHSL to use an Environmental Matrix instead of Room Data Sheets produced using ADB as a briefing tool for prospective tenderers. I cannot recall being made aware that NHSL had, prior to financial close ("FC"), or at any time during the business case review

[2] Bundle 1 Published Guidance, Item 6, p.553.

process, taken the decision to utilise an Environmental Matrix instead of Room Data Sheets produced using ADB as a briefing tool for prospective tenderers.

11. I cannot comment on how NHSL should have utilised ADB in the briefing of bidders, other than to say that the guidance on the use of ADB or an alternative tool or approach of equal quality and value in its application should have been followed per CEL 19 and the Policy on Design Quality. If NHSL had intended to depart from mandatory requirement 7 of the Policy on Design Quality this should have been included in their submissions to CIG as part of the business case review process.

12. I narrate how, during my tenure, the Scottish Ministers satisfied themselves that NHS bodies complied with CEL 19 during the procurement stage of a new build hospital project at para 140 of my witness statement **[A37723594 – Witness Statement of Mike Baxter dated 22 April 2022)**[3] as regards oversight. I am asked if I can add anything to this description. I don't think that I can.

13. I am asked whether, in other new build hospital projects, Environmental Matrices were used instead of room data sheets as a design and briefing tool. To my knowledge, and certainly during my relevant tenure[4], there was not another hospital construction project for which Environmental Matrices were used instead of room data sheets.

14. It is outwith my expertise to comment on the extent of the Environmental Matrix, whether an Environmental Matrix is of equal quality to room data sheets produced using the ADB or whether the concept of an Environmental Matrix pose any greater risks than the use of ADB; but the requirements of the Policy on Design Quality re use of ADB are clear. The responsibility sits with the NHS Scotland Body to demonstrate that any alternative to ADB is of equal

[3] Bundle 10 - Miscellaneous Volume 2 (of 2), item 15, p.
[4] Between the publication of CEL 19 (2010) in June 2010 and when I left my role as Deputy Director of Health Finance in December 2014.

quality and value in its application. In the event that a NHS board sought to derogate from mandatory requirement 7 of the Policy on Design Quality I would have expected this to be brought to CIG's attention during the business case review process. The evidence I have provided at paragraphs 123 and 124 of my earlier statement regarding "derogation process" applies equally to mandatory requirement 7 of the Policy on Design Quality as it does to SHTM.

15. Further, I am asked if the approach taken by NHSL [to use an Environmental Matrix rather than room data sheets produced by ADB] had been disclosed, without a derogation being agreed, would this have had any impact on business case approval? A derogation from the Policy on Design Quality would require the agreement of SGHD. I would not expect CIG to approve a business case presented to it that disclosed an unapproved derogation, albeit, as I state at paragraph 123 of my earlier statement I am only aware of one prior derogation request being made during my tenure and that related to single room policy.

16. I am asked to comment on whether the use [by NHSL] of an Environmental Matrix was a cause, or part of the cause, of the errors in the ventilation systems in critical care rooms in RHCYP. My understanding from material I have read subsequent to my relevant tenure is that the entry of incorrect data into the environmental matrix has been identified by others as the cause, or part of the cause, of the relevant ventilation errors. I was not aware of error(s) within the ventilation system in the design of critical care rooms in the RHCYP/DCN during my tenure. As I am not an expert in ADB or Environmental Matrices (both matters concerning design and construction at project level), I cannot comment in my own right on whether the decision to utilise the concept of an Environmental Matrix was the cause, or part of the cause. I would, accordingly, prefer not to speculate in relation thereto.

17. I am asked to comment on the role of "Design Champion" per CEL 19. The responsibilities of "Design Champion" are set out in CEL 19, as are the responsibilities of NHS Boards in relation thereto. My expectation was that NHS Boards should put in place appropriate arrangements to ensure

compliance with those requirements. Such arrangements include the mandatory requirement for a Design Action Plan which was required to be submitted annually with the Board's Property and Asset Management Strategy (PAMS), which were reviewed by Health Facilities Scotland on behalf of the Scottish Government.

TIMESCALES

18. I am told that the Inquiry has heard from other witnesses that Scottish Futures Trust ("SFT") were instrumental in deciding on timescales for the procurement exercise; in particular when FC should take place. I am asked whether this accords with my understanding. I am aware SFT were involved in agreeing the procurement approach with NHSL. The details of those discussions are a matter, however, for SFT and NHSL. As I left the Scottish Government in December 2014 I cannot comment on the timing of FC or how that was determined.

19. I am told that the Inquiry has heard from another witness that SFT were concerned that FC should be achieved before the results of the 2014 Scottish Independence referendum to ensure that Project financing was not adversely impacted by the potential financial turmoil of a "Yes" vote. In general terms, this accords with my recollection of matters albeit, I would not use the word "turmoil". I say this accords with my understanding because I can recall issues being discussed by SFT, NHSL and within the Scottish Government, regarding the pricing and availability of debt (and associated government credit rating that would influence that) as well as currency risk, but cannot recall the detail of those discussions. RHCYP/DCN, as an NPD project, involved both public and private finance. Events that might impact the availability or cost of such finance, such as the outcome of the 2014 referendum are likely to have been of concern or interest to those involved in delivery of the project (both in the private and public sectors). SFT may be best placed to answer this question.

20. I have been referred to (**A33328073 – NHS Lothian, 'Action Notes RHSC & DCN Project Working Group' – 2 June 2011)**[5] which is a record of a meeting that took place in June 2011 involving NHSL and their advisers (including SFT). Under the heading *"Competitive dialogue process – developed programme"* it is stated: *"Confirmed that allocating 1 full day of dialogue for each bidder during each dialogue cycle was the preferred option. PH/DK/DC to consider how ISOS and ISDS should be handled. Initial thoughts are that these interim phases should be high level review of activity and direction rather than full evaluation given that bidders will also submit a draft final tender as part of the procurement process. This will be reviewed at the next workstream meeting.*"

21. I am asked for my observation in relation to the shortening of timeframes during NHSL's tendering process. I was not in attendance at this meeting so can only make general observations. In relation to the timeframes agreed at the meeting I observe that NHSL, having had the benefit of input from SFT and technical advisors, who had experience in such matters, agreed the timetable. I would, therefore, have expected SFT and such technical advisors to have provided advice to the NHSL Board in order to ensure that the evaluation process was robust and transparent.

22. I am asked whether CIG were made aware of the shortening of timeframes. I cannot recall any detail on the CIG's awareness or otherwise of the decision to shorten timeframes in 2011 or at any point prior to FC. However, as I observe above, if CIG were made aware (via the KSR process discussed below), comfort would have been taken that at the relevant time NHSL were making decisions with the input and the assistance of SFT and their other technical advisors.

23. I am also asked about the evaluation of design proposals during, I think, the different stages of NHSL's tendering process. I do not recall whether a full

[5] Bundle 2 Reference Design and Invitation to Participate in Dialogue (ITPD) Documents, Item 5, p.171.

evaluation of design proposals was conducted at each stage of the tender process. Such evaluation would be a matter for NHSL (if it took place).

24. I am told that the Inquiry has evidence before it that the time allocated for the competitive dialogue phase was reduced and then subsequently extended. I cannot comment on the detailed assumptions underpinning the original timetable adopted by NHSL or the extension to that timetable, but I assume, given the subsequent extension, there were either issues with the submissions from bidders or points of clarification that required additional time for further engagement.

25. I am not in a position to comment upon whether the timescales were adequate, shorter or longer than other projects of a similar scale – I would expect the particular facts and circumstances of each individual project to be taken into account in determining what was reasonable in any given circumstances.

26. I have been referred to the document "Capital Investment Group - Draft Business Case Checklist - IA OBC [Outline Business Case] FBC [Full Business Case] - For Discussion - December 2011" **(A36382816 - Capital Investment Group Draft Business Case Checklist, IA OBC FBC For Discussion - December 2011)[6].** The Inquiry highlights the following extract from this document (quoting fully) "[Has] *the NDAP's [NHS Scotland Design Assessment Process] response about the design assessment process been taken into consideration?"*. The Inquiry observes that NDAP was not required for the RHCYP/DCN project due to transitional arrangements in place. I am asked whether CIG took into consideration any alternative or equivalent design assessment.

27. I describe CIG's approach to "design assurance" in relation to RHCYP/DCN at paragraphs 101 to 110 of my earlier statement. I expanded upon this section of my earlier statement during my oral evidence to the Inquiry. I do not

[6] Bundle 10 Miscellaneous Volume 1 (of 2), Item 14, p.111.

consider that I can usefully add, in this statement, to the written and oral evidence I have already provided.

28. I have been referred to a minute of a Project Steering Board meeting on 29 November 2013 **(A32676816 – Project Steering Board Action Notes – 29 November 2013)**[7] where it was agreed that the dialogue phase of NHSL's tender process should close and the Invitation to Submit Final Tender should be issued on the conclusion of the Key Stage Review ("KSR"). According to the minutes, after discussion of a number of points to do with outstanding bidder's concerns and land issues. My attention is drawn to the undernoted passage.

> *"SG [Susan Goldsmith] asked the Steering Board to confirm their support for closing dialogue as planned on 6 December. PR [Peter Reekie] noted that while the points discussed were outstanding, he saw no reason for them not to be completed in the next week to achieve Close of Dialogue. BC [Brian Currie] summarised the position that the team had reached, with three affordable bids for designs that met the Board's requirements. The team were to be congratulated on this achievement, and SG asked BC to pass on her thanks to the wider project team."*

29. The Inquiry has observed that SGHD was not represented at this meeting, given my apologies. I would, however, have been sent a copy of the minutes of the meeting. Albeit, I cannot, at this time (some 9 years later), recall receiving this minute. For completeness, I add that my role on the Project Steering Board was that of "observer" as opposed to "decision maker". It would not have been appropriate for me to act as a decision maker on the Project Steering Board standing my role as the Chair of CIG.

30. I have been asked to provide my understanding of the "*outstanding issues"* referenced by Susan Goldsmith. Unfortunately, I cannot add anything to the narrative contained in **(A32676816 – Project Steering Board Action Notes –**

[7] Bundle 8 Scoring & Correspondence Regarding Issues, Item 1, p.5

29 November 2013)[8]. The points that Peter Reekie has discussed as outstanding appear to relate to NHSL's tender process which is not something SGHD has direct involvement in. Further, it would appear that whatever is being discussed is under control. In those circumstances, I would not have expected escalation of the outstanding issues to SGHD, which accords with my recollection that none of these issues were escalated to me at Scottish Government.

31. I am also asked for my understanding of the issues flagged on the section of Bundle Item 13 headed "Risk Register" [**A32676816 - Project Steering Board Action Notes 29 November 2013]**[9]. Unfortunately, and standing the passage of time since I have considered this minute, I cannot add any understanding that might usefully assist the Inquiry beyond what is contained in the minute itself.

32. I have been asked to comment on whether, notwithstanding the outstanding issues noted above by reference to **[A32676816 – Project Steering Board Action Notes – 29 November 2013]**[10] it was appropriate for NHSL to conclude the dialogue phase of its tender process. It is a matter for the Project Steering Board to take a view, in light of the analysis presented to it, as to whether it deemed it appropriate to conclude the dialogue phase (albeit, I would also have expected the KSR undertaken by SFT prior to close of dialogue to provide independent assurance). It is clear from the terms of **[A32676816 – Project Steering Board Action Notes – 29 November 2013]**[11] that the Project Steering Board were so satisfied.

ITPD AND ISFT

33. Paragraph 2.5.3 of Volume 1 of the ITPD volume 1 **[A40236054 –ITPD Volume 1]**[12] states that standard form room data sheets had not been

[8] Bundle 8 Scoring & Correspondence Regarding Issues, Item 1, p.5
[9] Bundle 8 - Scoring & Correspondence Regarding Issues, Item 1, p.5
[10] Bundle 8 Scoring & Correspondence Regarding Issues, Item 1, p.5
[11] Bundle 8 Scoring & Correspondence Regarding Issues, Item 1, p.5
[12] Bundle 10 Miscellaneous Volume 2 (of 2), item 14

prepared at that early stage. Guidance Note 1 to the Environmental Matrix issued with the ITPD describes the document/ spreadsheet as an "easier reference tool to replace ADB RDS M&E Sheets". During the competitive dialogue phase, room data sheets were to be prepared by bidders for certain rooms with "*all remaining rooms*" required to have room data sheets completed before financial close.

34. I note that I attended a meeting of the Project Steering Board on 22 August 2014 **(A32676824 – Action notes RHSC and DCN Special Project Steering Board – 22 August 2014)**[13] where it was discussed that IHSL would not be able to produce 100% Room Data sheets before FC but that the process of prioritising what could be produced was being managed by NHSL. I cannot recall the detail of these discussions nor can I recall having received any advice on this matter.

35. I am asked for my views as to whether it is unusual to deviate from the requirements contained in ITPD or ISFT. SGHD is not involved in the detail of the tender process so I do not feel I have sufficient expertise or experience to comment. The Inquiry may wish to direct this question to SFT. As I note above, I cannot recall the detail of discussions related to the "100% Room Data Sheet" deviation.

36. For the same reasons I outline in the preceding paragraph, I do not feel I am qualified to comment on the implications of the decision to postpone creation of room data sheets; nor was I party to any discussions on this matter, to the best of my recollection (questions (4) - (6) of the Inquiry's section 21 Notice dated 14 December 2022)

37. I am asked to outline my recollection of relations between Project Co and NHSL in the run up to FC. I have no specific recollections of anything remarkable about the relations between Project Co and NHSL during the period from preferred bidder to FC.

[13] Bundle 8 Scoring & Correspondence Regarding Issues, Item 2, p.11.

AEDET AND HAI-SCRIBE

38. I have insufficient knowledge to comment on the AEDET and HAI-Scribe assessments. HFS or the NHS Board would be best placed to comment.

PROGRESS TO FC

39. Risk registers highlight a ventilation issue in relation to opening windows **(A36308801 – Design Risks to the Board to Financial Close)**[14] and a significantly higher quantity of reviewable design data than was envisaged **(A36308810 – Technical Risks to the Board at Financial Close – 31 January 2015)**[15].

40. I do not recognise the risk registers referred to above, but it has been nearly 10 years since they would have been produced. I would only have seen such documentation as part of Project Steering Board Papers.

41. I have no recollection of the issue in relation to opening windows having been raised with me at the relevant time. These would have been technical issues to be dealt with at project, rather than government, level.

42. It is highlighted to me that none of these issues appear on the Pre-FC KSR. I cannot comment as I had left my role in the Scottish Government in relation to this Project before Pre FC KSR was undertaken.

43. I am asked whether the issue of opening windows was suggestive that Project Co had a different interpretation to SHTM03-01 and whether I would consider that serious enough to warrant a reassessment of the project or impede progress to FC. I am not a technical expert and cannot comment on the issue of whether Project Co had a different interpretation to SHTM03-01 and whether that would have been serious enough to warrant a reassessment of

[14] Bundle 8 Scoring & Correspondence Regarding Issues, Item 21, p.84.
[15] Bundle 10 Miscellaneous Volume 1 (of 2), Item 12, p.84

the project or impede progress to FC. I would have expected the NHS Board and their technical advisors to have ensured compliance with SHTM and if necessary to seek advice from HFS. The evidence I provided in my earlier statement at paragraphs 121 to 124 regarding derogation from SHTM is relevant to the question posed by the Inquiry.

44. I am referred to **(A32676824 - Action notes RHSC and DCN Special Project Steering Board - 22 August 2014)**[16]**,** which is a minute of a meeting of the Special Project Steering Board that took place on 22 August 2014. I was in attendance at this meeting. I am asked if the Scottish Government were concerned by the issues that were being raised at this meeting. Clearly any matters impacting on the successful delivery of the project would have been of concern to the Scottish Government. I am recorded in the Minute of this meeting as seeking assurances on a range of matters. There was regular dialogue between NHSL and the Scottish Government and such matters would have been raised as part of those discussions.

45. During this time I had regular meetings with the then Director of Finance (John Matheson) and would have updated verbally on progress and any issues to inform any direct conversations between him and NHSL. I do not recall any further escalation of the matters discussed at the meeting of 22 August 2014 within SGHD or the wider Scottish Government.

46. I am asked if I would have expected the issues discussed at the meeting of 22 August 2014 to be included in a KSR. I would expect all relevant procurement/commercial matters relating to the progression of a project from one procurement stage to the next to be reflected in the KSR. The function of the KSR was to provide assurance re readiness (or not) to proceed to the next procurement stage. If such assurance could not be provided then the KSR should detail the reason(s) why not.

E. KEY STAGE REVIEWS

[16] Bundle 8 Scoring & Correspondence Regarding Issues, Item 2, p.11.

47. As I explain in the preceding paragraph, the purpose of KSRs is to provide assurance re readiness (or not) to proceed to the next procurement stage. The intended audience is the Project Sponsor /the Scottish Government/ SRO. I am asked if KSRs are "merely a tick box exercise". They are not and were not designed as such. The assessment contained within a KSR is based on evidence provided by the NHS Board and engagement between the Board (and its advisors) and SFT.

48. KSR's are undertaken at various "key stages" in the procurement process with the final one before Financial Close. The guidance in relation to KSR is found here https://www.scottishfuturestrust.org.uk/files/publications/Key_Stage_Reviews_-_Information_Note_to_Projects_20111212.pdf. The guidance will provide the Inquiry with information relevant to the questions raised at F.(2) (a) & (b) of its section 21 notice dated 14 December 2022.

49. The Inquiry is correct in understanding that SFT "holds the pen" on KSRs. NHSL would be expected to provide information to SFT, however, the report is owned and signed off by SFT. I would have expected engagement with the NHSL Board would have taken place to check for factual accuracy, but cannot confirm whether that occurred in this instance.

50. To the best of my recollection, I was not aware of any "tension" between SFT and NHSL in respect of the content of KSRs.

51. I have been referred to **(A33337163 – Pre-Preferred Bidder Apointment Key Stage Review – 28 February 2014)**[17] **(A33336933 – Pre-Financial Close Key Stage Review – 11 February 2015)**[18]**,** two KSRs in relation to RHCYP/DCN and I am asked if these documents are a fair and accurate reflection of the stages of the project to which they relate. I consider these

[17] Bundle 7 Key Parts of Mosaic's tender and marked up Environmental Matrix, Item 1, p.3.
[18] Bundle 9 Key Stage Review, Item 1, p.3

KSRs to be a reflection of SFT's assessment and them performing their role as set out in the funding conditions guidance issued by SGHD in relation to NPD projects.

FULL BUSINESS CASE

52. I am asked if it is usual for the Pre-FC KSR to be finalised before CIG's recommendation for approval of the Full Business Case. As this was the first major NPD health project, I cannot comment on whether it would be "usual" for a Pre-FC KSR to be finalised before CIG recommendation for approval of the Full Business Case. The KSR took place after I left post, so I cannot comment on the reasons why it was sequenced in this way in this instance.

STATEMENT OF TRUTH

51. I believe that the facts stated in this witness statement are true. I understand that this statement may form part of the evidence before the Inquiry and be published on the Inquiry's website.