



MEMORANDUM

IN-CONFIDENCE

To: Peter Hughes, State Services Commissioner

From: Andrew Royle, Chief Legal Officer

Date: 23 July 2018

Subject: Counties Manukau DHB Review: Acting Director-General of Health

1. On 27 June 2017, Jami-Lee Ross MP raised a series of concerns in Parliament relating to the management of a possible conflict of interest by the former acting Director-General of Health, Stephen McKernan QSO.
2. You have instructed me to undertake a review into those concerns and report to you.
3. A list of the people to whom I have spoken is set out in the Appendix.

Background

4. On behalf of the Ministry of Health (MoH), Beattie Varley Limited has undertaken a review of various decisions made at Counties Manukau District Health Board (CMDHB), relating to:
 - 4.1. the approval process, involvement of the Board and Ministry in capital decisions, and capital raising by sale and leaseback of medical equipment for the \$9.9 million building extension project to the Ko Awatea Building at Middlemore hospital;
 - 4.2. financial reporting for APAC conference run by CMDHB; and
 - 4.3. remuneration and benefit decisions relating to staff.
5. The Beattie Varley review commenced in September 2017. A draft report was provided to MoH in May 2018. Further work on the review will now require instruction from MoH.
6. Mr McKernan was the acting Director-General of Health between February and June 2018. As he is also a former Chief Executive of CMDHB (holding that role between 2002 and 2006).

Conclusions

7. The concerns raised by Mr Ross related to a potential conflict of interest held by Mr McKernan while he was the acting Director-General of Health between February and June 2018, and specifically whether the Minister of Health was appropriately advised on a potential conflict (if one existed).
8. I reviewed all available documents, including the documents tabled by Mr Ross in the House, and discussed the matter with the people central to the matter.
9. I have found nothing in the matter that causes me to be critical of Mr McKernan or of his handling of the matter while he was Director-General of Health. I find that:

- 9.1. Mr McKernan was not involved in any decision relating to the Beattie Varley work which could have benefited or impacted on him personally.
 - 9.2. While there was the potential for a conflict situation to have arisen during his tenure as acting Director-General of Health, that situation never manifested itself.
 - 9.3. Mr McKernan was not involved in setting the terms of reference (ToR) for the work underway by Beattie Varley, or in any decisions on the scale and nature of the work that was underway to investigate the concerns raised by CMDHB. These decisions were made prior to his arrival at MoH.
 - 9.4. Mr McKernan did not have any contact with Beattie Varley during his tenure as acting Director-General of Health. He has had no involvement in the content of the report.
 - 9.5. In addition, the only decisions that Mr McKernan made relating to the progress of this matter were to ensure that people that could be affected by it were properly advised and had an opportunity to comment.
 - 9.6. Mr McKernan did not receive the relevant Beattie Varley report until shortly before he departed from MoH, when he reviewed it in order to provide a handover briefing to the incoming Director-General of Health. That report does not name Mr McKernan or deal with any of his previous decisions. The decision that it was unnecessary to review those 2002-2006 decisions is Beattie Varley's decision.
10. I therefore do not see that he could be expected to have acted differently in management of this matter during his time as acting Director-General of Health (especially in terms of briefing the Minister).
 11. You have also asked me to form a view on what SSC knew when it appointed Mr McKernan as acting Director-General of Health in December 2017. From my inquiries, it is clear that the information provided to SSC in its engagement with the matter in mid-2017 was heavily focussed on decisions relating to funding Ko Awatea. The staff remuneration/benefit matters were first raised with SSC in May 2017 in the context of concerns over decisions made over the period 2014-2017. When explored in more detail at a subsequent meeting in June 2017, none of Mr McKernan's decisions were identified or raised. The original RIA audit reports were not provided. The Assistant Commissioner responsible for the relationship with MoH was not aware of the final scope of the ToR. Interviews with key participants have verified this position.
 12. The detailed reasons for these findings are set out in Part 1 of this report.
 13. While my focus has been on the handling of this matter at the MoH, for completeness I have also undertaken a review of the small number of decisions made by Mr McKernan, while he was Chief Executive of CMDHB between 2002 and 2006, that were part of the material that Mr Ross tabled in Parliament. As a result of my review, I have seen nothing of concern relating to Mr McKernan's actions between 2002 and 2006. That analysis is included in Part 2.

PART 1: THE BEATTIE VARLEY REVIEW AND MR MCKERNAN'S INVOLVEMENT

CMDHB Audit Process

14. In June 2017, the General Manager of Regional Internal Audit (RIA), providing the internal audit function for CMDHB, produced a report for Mark Darrow (Chair of the Audit Risk and Finance Committee, CMDHB) and copied to Dr Lester Levy (Chair, CMDHB).
15. As detailed in that report, the RIA investigations were initiated by a particular request for RIA to audit CMDHB's Ko Awatea programme, including its stage 2 expansion.
16. In the course of undertaking that Ko Awatea audit work, RIA identified further issues. The June 2017 report therefore dealt with 6 sets of issues, including remuneration and benefit payments to staff.
17. In addition to the final June 2017 report, there are background supporting documents for that audit work. One of these documents is a background working document entitled "*Salary and Allowance Validation – Confidential Legally Privileged*" dated 7 May 2017. This document was tabled by Mr Ross in Parliament on 4 July 2018, but not released¹.

Escalation of concerns by CMDHB

18. Due to concerns over the content of the audit reports, on 26 May 2017 Dr Levy approached the State Services Commission (SSC) to seek advice on next steps. Following discussions with the Commissioner's representative, Geoff Short, Assistant Commissioner, and a meeting of CMDHB, SSC, and the MoH on 8 June 2017, it was agreed that a separate external investigation, funded by MoH, would look into the matters. Beattie Varley has been contracted to do part of that work, with Deloitte and Michael Heron QC being instructed to complete other stages. The work to be done by Deloitte and Mr Heron QC would be informed by the enquiries made into specific transactions by Beattie Varley.
19. It is clear that the material put before the Commission at that time included concerns about:
 - the approvals for the Ko Awatea building at Middlemore Hospital, and whether specific Board approval was ever obtained (or whether the sale and leaseback deal to the value of "around \$9+ million" had been structured to avoid Board oversight);
 - a lack of national-level oversight of the arrangement (if \$10 million or more, capital programmes require assessment and scrutiny at a national level);
 - the remuneration and expenses paid to a particular staff member.
20. It is clear that none of Mr McKernan's decisions were identified or raised in the meeting on 8 June 2017. The original RIA audit reports were not provided. A note headed "Outline" which appears to be CMDHB speaking notes from that meeting only refers to decisions from 2007 onwards. Mr Short's file notes variously refer to payments "over the last 3 years" or, on some cases, approvals and payments made over a period of "about a decade". That "decade" covered the tenure of Geraint Martin as Chief Executive.
21. The RIA material (the RIA Audit Report of 2 June 2017, or the background working material) was not provided to SSC at that time. I have been advised that MoH did not receive it either.

¹ The General Manager of RIA, in my discussion with him, emphasised that the statements in this early working document were initial audit assumptions, not all of which flowed through into the final June 2017 report.

Terms of reference for the MoH-led review

22. MoH, in discussions with CMDHB, developed a Terms of Reference (ToR) for the review between June and August 2017. It does not appear that the ToR were formally finalised (in that the final version still carries a “draft” watermark). The final version identified for me dated 31 August 2017 is accompanied by an email saying that “*unless we receive further comments ... please take these as the final TOR for the review*”. The ToR referred to 3 aspects of the review, financial expenditure, financial management, and management culture. Beattie Varley was to lead the aspect relating to financial expenditure.
23. Relevantly:
 - 23.1. paragraph 7 of the ToR stated the “*[e]ach aspect will focus on the previous three financial years (2014-2015; 2015-2016; 2016-2017) but the reviewers may look at other time periods where the reviewers consider it relevant or necessary to the issues involved, and as specified below*”; and
 - 23.2. Paragraph 8 contained a set of areas of “*immediate focus within the three aspects*”, including “*remuneration and benefits of [a former staff member] ...*”.
24. The ToR enabled interviewing of any current or former CMDHB staff members.
25. While it is not structured in this way in the ToR, it is clear that the Ministry participants considered that these three “aspects” should be undertaken in a staged manner. In a briefing to the Minister of Health on 12 December 2018, MoH referred to “three potential stages” and, at paragraph 8, stated that the Stage 1 findings of Beattie Varley would be reviewed which would determine whether or not the other two stages would be undertaken.
26. Beattie Varley’s work was commissioned by MoH. The results of that work are included in the May 2018 draft report to MoH.

The Office of the Auditor-General report

27. On 29 January 2018, the Office of the Auditor-General wrote to Minister Clark with its summary of Audit Results for the year ended 30 June 2017. This is a standard process.
28. That letter refers to the MoH-led independent external review processes underway. It is this letter that Mr Ross also referred to in Parliament on 27 June 2018.

Mr McKernan’s position as D-G

29. On 20 December 2017 Chai Chuah announced his resignation as Director-General of Health and the State Services Commissioner announced that Mr McKernan would be appointed in an acting capacity until a permanent appointment was made. Mr McKernan took up that acting role on 5 February 2018 and was in the role until Ashley Bloomfield took up his role on 8 June 2018.

What was Mr McKernan’s involvement with the Beattie Varley review?

30. It is worth first setting out the sequence of events for the review as advised to me by Beattie Varley and MoH:
 - 30.1. After settlement of the ToR and scope of the investigation in late August, Beattie Varley undertook a background assessment of relevant documents throughout September and October 2017. From the Ministry’s side, Mr Hundleby was responsible for the management of the process.
 - 30.2. As a result of the election and delays in obtaining MoH approval for the approach Beattie Varley were to take to interviewing, that approval was not received until

December and the interviewing did not commence until January 2017. Beattie Varley's interview work continued through to March 2018.

30.3. A draft "snapshot" report was provided by Beattie Varley on 28 March 2018 to Mr Hundleby. Mr Hundleby engaged with Beattie Varley over the content of the report. Mr McKernan did not ask for, and was not provided with, the report.

30.4. A further "snapshot" report was produced on 2 May 2018.

30.5. The May 2018 report provides the conclusions from the work undertaken to that point and indicates where further work might be undertaken².

31. The overall context of this matter is also important to set out at this point.

31.1. The original concerns raised, and in particular concerns raised in relation to the financial years 2014 to 2017, gave rise to concerns about significant financial irregularities, or at worst fraud. This is the reason that SSC and MoH were approached in the first place and why the ToR were drafted in the way that they were – contemplating a potentially broad reaching review involving multiple reviewers and focussing on those financial years, but with broad discretion to look to other years.

31.2. With respect to the remuneration matters that Beattie Varley has reviewed, Beattie Varley has reached the view that allegations of significant financial irregularity and/or fraud are not supported by their review. Further, Beattie Varley has advised me that further inquiries are unlikely to establish a different position.

31.3. In light of the Beattie Varley work, decisions on what subsequent work is required will now need to be made. There is no longer the same level of concern within the Ministry, which has had the benefit of participating in the Beattie Varley review, about significant financial irregularities or fraud. However, until such time as the Ministry makes and communicates those decisions about next steps, other people (such as Mr Darrow and Mr Rabindran) are still working from the original material and understandably continue to have concerns that the matter is significant and is not being progressed swiftly.

32. Turning to the specific matter of my review, Mr McKernan has advised that:

32.1. prior to him taking up the position at MoH in early February 2018, he was not aware that the Beattie Varley review was underway;

32.2. on first being briefed about the Beattie Varley review, he disclosed his former position at CMDHB and was advised that the focus of the Beattie Varley review related to the years from 2014 to 2017;

32.3. while he was acting Director-General of Health, he was not aware of the detail of the original RIA investigation work undertaken by CMDHB, or of the fact that the original RIA audit work included references to decisions that he had made between 2002 and 2005;

32.4. the matter was managed by Michael Hundleby, Director Critical Projects within the MoH, while Mr McKernan was there, with Mr McKernan having limited practical involvement with it.

² Beattie Varley has the view that further inquiries would provide a more complete picture in relation to some of the matters that they have investigated and, as such, they do not consider the report to be concluded. As a result, the report of May 2018 advised the Ministry that some participants had not been interviewed and sought further instructions in that regard. The need for further work, and who undertakes that work, in light of Beattie Varley's findings to date, will be a matter for discussion between MoH, CMDHB, and Beattie Varley. For my purposes, the critical point is that Beattie Varley considers is that a review of the period of Mr McKernan's 2002-2006 decisions is not required and, if undertaken, is unlikely to affect their conclusions.

33. From my discussions and document review, it is clear that:

- 33.1. Mr McKernan first became aware of the existence of the Beattie Varley investigation in February 2018 after taking up his acting role, either as result of seeing a weekly report update, discussion on progress in a standard weekly Minister's meeting, or in a briefing from Mr Short.
- 33.2. At the time of his meeting with Mr Short, Mr McKernan raised with Mr Short that he had been Chief Executive at CMDHB. Mr Short recalls advising him of his understanding that the focus of the inquiry was to be over the previous 3 years – relating to the decisions made during Geraint Martin's time as Chief Executive. (Mr Short was unaware of the point of nuance in relation to the remuneration matters, i.e. that while the focus was on 2014-2017 and on Mr Martin's decisions, Beattie Varley had the ability to look further back if they chose to do so). Mr McKernan's recollection was that SSC expected a focus on the substantive issues – to find out if "*there was a case to answer*".
- 33.3. As all decisions about how to progress the matter had been made prior to or during December 2017, there were no specific decisions to be made at the point it was raised with Mr McKernan.
- 33.4. Mr McKernan advised me that he developed concerns about the process adopted by MoH when Mr Martin contacted him directly about the matter on 9 March 2018, having been approached by media for comment. The Ministry's Chief Legal Advisor, Mr Knipe, replied to Mr Martin at that time, essentially declining a request for further information but advising on the progress of the matter and providing assurance that natural justice would be met if required. The letter states that further process steps beyond interviewing current CMDHB staff would only be taken "if warranted".
- 33.5. Mr Hundleby also recalled that, at some point after his initial briefing, Mr McKernan expressed concern to him about decisions made by the Ministry (i.e. to proceed with the investigation without advising former CMDHB staff members that they could be impacted). Mr McKernan appears to have taken the view that earlier decisions not to advise the former staff members about the review were wrong.
- 33.6. All of the people I spoke to thought that Mr McKernan's focus throughout was on ensuring natural justice, or at least ensuring that the various people implicated were not surprised when the matter became public.
- 33.7. When the 28 March report from Beattie Varley arrived, it was sent to Mr Hundleby. Mr McKernan did not read it. Lisa McPhail, Chief Advisor, MoH, advised that he could have been provided with it, but elected not to see it. He was briefed verbally about the report by Mr Hundleby. Mr McKernan's recollection of that briefing was that it was brief and focussed on Mr Hundleby's desire to ensure that the matter remain focussed "*on the substantive issues*" and only proceed further if "*there was a case to answer*". Mr McKernan said there was no discussion on the content of the draft report.
- 33.8. There was one comment in the 28 March Report that:

There is some anecdotal evidence that certain CEO's who preceded Mr Martin had also authorised the cashing up of leave by [the staff member]. We have not looked into that as yet, or whether it too breached policy. It would not surprise us if former CEO's (along with Mr Martin) believe such approvals fell within their delegated authority.

- 33.9. Mr Hundleby's view is that this comment was "*superfluous*", and at his initiative he sought to have it removed from the Beattie Varley report.
- 33.10. Beattie Varley advised that if the conclusions in respect of decisions made by Mr Martin with respect to remuneration had been negative, or concerning, then a comparison with the decisions of earlier chief executives might have been appropriate (to establish past practice, for example). As it happens, the Beattie Varley review did not establish anything significantly irregular in the decisions made (and certainly nothing fraudulent) and it was therefore content to have the comment in the March report deleted.
- 33.11. Mr McKernan was not involved in this conversation or decision.
- 33.12. Mr Hundleby believes he would have briefed Mr McKernan about the March report but probably verbally and along the lines of there being material in the report "*that is superfluous including going back to previous CEs*". Mr Hundleby also confirmed to me that he "*would not have said to Stephen that, 'they might look at your decisions'*".
- 33.13. Mr Hundleby advised that there was a strong desire in the Ministry to progress the matter expeditiously, and that Mr McKernan urged him on a number of occasions to keep the matter moving to conclusion. Mr Hundleby was also keen to move the matter along, and summed up his objective at this point as identifying whether "*there was a case to answer*" and, if so, to make sure that the review was concluded properly to answer any questions and provide the necessary assurances, without going unnecessarily far.
- 33.14. As noted above, the ToR put a strong focus on the years 2014-2017. In fact, the Beattie Varley review had considered at that point various other references to decisions of Mr Martin's from before 2014-17, including decisions from 2008 and 2011, and referenced correspondence from across that period to illustrate the conclusions that Beattie Varley drew in this area.
- 33.15. Ian Varley has confirmed that the judgment as to how far back to look was Beattie Varley's, and following their interviews (in particular an interview with Sam Bartrum, former General Manager of Human Resources at CMDHB) he remains of the view that it is not necessary to go back to look at the earlier decisions of Mr McKernan to reach the conclusions that are contained in their draft report.
- 33.16. For my purposes, I do not find there is any significance in Mr Hundleby's interactions with Beattie Varley over the draft report, or his briefings to Mr McKernan. There was nothing in this sequence of events that would have conflicted with the earlier advice Mr McKernan received that his CMDHB decisions were not "*in scope*". To the contrary, by this point it had become clear that those decisions would not be looked at, and Mr Hundleby and Beattie Varley were proceeding on that basis.
- 33.17. Dr Levy, when I spoke to him, confirmed that it was the recent decisions, particularly around Ko Awatea, that required attention. His recollection was that there were some "*minor administrative matters*" identified by RIA regarding Mr McKernan's earlier decisions, but these were never intended to be the focus of the concerns raised by CMDHB with SSC and MoH.
- 33.18. Mr Darrow and Mr Rabin dran took a different view of the intended breadth of the ToR, when I spoke to them. Mr Darrow particularly was of the view that the ToR had been deliberately drafted to ensure that Beattie Varley would look at the whole set of remuneration and benefit decisions for the period back to 1999, and

were only limited to 2014-2017 in respect of broader management culture. Mr Darrow drew my attention to the broader aspects of the original audit work, including the original May 2017 evaluation spreadsheet, and expressed concern to me that no one may have noticed or paid attention to these more historic issues.

- 33.19. I do not think that Mr Darrow should be concerned that Beattie Varley did not have access to the broader set of salary issues. Beattie Varley have all relevant material including the May 2017 working documents. They appear to have reviewed historic salary decisions, although not right back to 1999 as Mr Darrow would prefer. Beattie Varley exercised a judgment as to how far back to look.
- 33.20. Certainly Mr Darrow is right that the ToR changed between May to August 2017 to include the specific reference to reviewing the executive salary and benefit decisions. However, it also changed to bring a specific focus to the three financial years from 2014 to 2017. This occurred well in advance of Mr McKernan's arrival at MoH.
- 33.21. Mr McKernan advised that he saw the ToR for the Beattie Varley work in April 2018 and that it did not make it apparent to him that the work could be extended back to 2002-2006. It is worth noting that, by this point, Beattie Varley's decision not to look into the earlier decisions had already been made and they, and Mr Hundleby, were proceeding on that basis.
- 33.22. I note for completeness that Mr Rabindran advised me that he queried the progress of the report in a meeting in April with the Minister and Mr McKernan. Mr Rabindran expressed some surprise to me that his query in that meeting about the review's progress was not answered. Mr McKernan also has a strong recollection of that meeting and, while he recalls Mr Rabindran mentioning the review, recalls that Mr Rabindran made a statement that he was involved in the initiation of the review and said that he was unsure where it was up to. I can provide no further comment on this point, which may be nothing more than a misunderstanding. It does not appear relevant to my review.
- 33.23. Mr McKernan's most significant engagement with the Beattie Varley review appears to have been after the Ministry received the May 2018 draft report. Along with Mr Hundleby, he was of the view that "natural justice" should be provided to the people whose decisions had been under review. (As noted above, the matter had attracted media interest and he had been contacted by some of those people involved requesting copies of the report). Given that there was very little criticism of those people in the Beattie Varley report, an alternative view had been put forward in the Ministry that no "natural justice" steps were required. Mr McKernan and Mr Hundleby's view prevailed, and an opportunity was provided for those individuals to comment³.
- 33.24. Mr McKernan advised that he did, eventually, read the draft report in late June/early July, prior to his departure from the Ministry and in the context of providing a handover briefing to Dr Bloomfield as the incoming Director-General of Health.
- 33.25. My conclusions are set out above at paragraphs 9 to 11.

³ This process was undertaken by the Ministry and the results have not yet been provided to Beattie Varley.

PART 2: ANALYSIS OF THE 2002 - 2005 CMDHB DECISIONS

34. In this part of the report I set out, for completeness, an assessment of the decisions of Mr McKernan between 2002 and 2005 that have been the subject of the internal CMDHB audit attention. At this stage, it does not appear that these decisions have been subject to examination by Beattie Varley, for the reasons set out above.

The original matters identified by RIA that are relevant to Mr McKernan

35. The relevant issues identified by RIA were that:

- 35.1. salary decisions for the staff member (including those between 2002-2005) did not meet internal policy requiring "2-up" approval i.e. they required Board approval;
- 35.2. no evidence of the decision to "cash up" of leave of the staff member in 2004;
- 35.3. the leave "cashed up" in 2004 was not actually deducted from the relevant staff member's leave balance at the time (meaning that there has been, in effect, an overpayment to the staff member); and
- 35.4. "cashing up" of annual leave balances was required to be exceptional in accordance with CMDHB policy⁴.

36. For completeness, during my review a further matter became apparent that had not been identified by RIA in the June 2017 report. Part of a payment made to the staff member in 2005 appears to include the "cashing up" of an education leave entitlement of 5 days, which was not noted in the June 2017 RIA report. For completeness I will deal with this as well.

37. Other issues are dealt with in the Beattie Varley review and fall outside the timeframe I am considering. Mr McKernan did not take part in any of these CMDHB decisions. These are issues relating to:

- 37.1. the approval process, involvement of the Board and Ministry in capital decisions, and capital raising by sale and leaseback of medical equipment for the \$9.9 million building extension project to the Ko Awatea Building at Middlemore hospital;
- 37.2. financial reporting for APAC conference run by CMDHB; and
- 37.3. other remuneration and benefit decisions relating to staff members (after Mr McKernan's tenure as Chief Executive).

"2-up" approval

38. I have reviewed an extract from the CMDHB policy regarding approval of annual salary, conditions or benefits. The policy is clear that authority for the payments for this staff member falls to the chief executive. The relevant part of the policy (which sets out delegations for all staff levels) is subject to a "note" which states "*setting or changing an employee's salary, conditions or benefits requires approval from a manager at least two levels up from the employee*".

39. I am not able to provide a definitive view of the effect of this policy, when applied to decisions by the chief executive, and I do not see it as necessary to do so. Clearly it is

⁴ I have included this last issue, based on the preliminary findings in the RIA May 2017 background material, and for completeness. It is worth noting that, unlike the "2-up" issue, the June 2017 RIA report does not expressly raise an issue about whether or not either of the 2004 and 2005 leave "cash-up" payments were "exceptional" and therefore within policy.

doubtful that the Board could be considered a "manager" as anticipated by the policy. Practical questions arise as to whether such Board approval would be provided by a full board resolution, by a subcommittee or by the Board Chair under Board delegation.

40. By statute, the Crown entity is itself a legal entity and employs staff. The Board is its governing body and may make all decisions. There is no statutory bar against the Board participating in individual employee decisions. However, there also needs to be a careful and clear distinction made between governance of the organisation and its management, and a traditional arrangement would be that the Board only manages the chief executive directly. Therefore, if the Board were to be involved in staff salary or benefit decisions (other than as relate to the chief executive), I would expect to see a very explicit policy setting out how that would occur. While I have not reviewed all of the CMDHB policy set, it does not appear that an explicit role was created for the Board in this way. The chief executive appears to have made the relevant decisions, and this is not in my experience unusual.
41. Mr McKernan's clear view is that it was never CMDHB or Board policy during his time at CMDHB that "2-up" was required. Mr McKernan is of the view that the Board should not be involved in such management matters. In practice, while he considered that salary decisions were his to make in respect of his senior executives, he would as a matter of practice consult the Board chair about the decisions he was planning to make in order to get the Board's perspective on executive performance. This would include a detailed discussion about each executive member and the proposed decisions about remuneration changes and any at risk payments.
42. On balance, I do not find anything to be critical of Mr McKernan or subsequent chief executives for assuming, or not questioning, their ability to make 2nd-tier salary and benefit decisions without specific reference to the Board.
43. The issue of "2-up" approval is also canvassed in the draft Beattie Varley report I have reviewed, which also concludes that a view that "2-up" approval is not required for positions that report direct to the chief executive is available.

Lack of evidence of authorisation on file and failure to deduct from the leave balance

44. Mr McKernan advised that he had, in very limited circumstances, approved the cashing up of leave. He did so in accordance with CMDHB policy.
45. If there had been any processing error while he was CE, it is not a matter with which Mr McKernan would have had personal involvement.
46. In this case, CMDHB should complete its review to see whether there has been an incorrect payment made and, if possible, recover the money from the former staff member. It is reasonable to expect that any such error would have been identified by CMDHB at the time of departure of the staff member and dealt with in any final pay.

Other financial decisions

47. The remaining issues are whether or not Mr McKernan should have approved annual leave and education benefit "cashing up" during 2002 to 2005.
48. As set out in the RIA report, the relevant leave policy stated:

Whilst Counties Manukau Health does not support the principle of cashing up leave, it may be appropriate in extraordinary circumstances. Arrangements of this nature must ...

- *Leave the employee's current year's period of entitlement intact ...;*
- *Be approved by the General Manager of the Service.*⁵

49. For subsequent years (2008 to 2010), the RIA report identified that the decisions to cash up leave took the leave balances under the 20-day annual entitlement. (That concern was not raised about the decisions of Mr McKernan to cash up leave in 2004 and 2005).
50. As noted above, if the leave balance was not deducted in 2004 leading to an overpayment in subsequent years, CMDHB should consider its recovery. Otherwise, salary decisions about specific staff members are matters to be judged by the chief executive at the time.
51. As noted above, Mr McKernan recalls cashing up some leave for a small number of staff members. He recalls that those decisions were able to be made pursuant to policies in place at the time. Specifically in relation to the education benefit, he recalls that he "inherited" the employment contracts that included those contracts. He was not in favour of them and he moved to remove them as the contracts were renegotiated or people left and were replaced. However, he recalls on at least one occasion making a payment in lieu of the education benefit, and that payment was consistent with policy.
52. I do not think it appropriate to second guess Mr McKernan's decision as to whether or not cashing up leave and/or an education benefit in 2004 and 2005 were warranted. This appears to be a decision that was within his authority at the time, and for which he was best placed to exercise that judgment in 2004 and 2005.

⁵ NB The reference here to the General Manager is unclear. Subject to the "2-up" discussion above, it is clear that Mr McKernan as Chief Executive had authority to approve changes to salary, conditions or benefits

Appendix

Discussion with:

Stephen McKernan, former acting Director-General of Health

Ashley Bloomfield, Director-General of Health

Phil Knipe, Chief Legal Advisor, MoH

Lisa McPhail, Chief Advisor, MoH

Michael Hundleby, Director Critical Projects, MoH

Mark Darrow, former CMDHB Board member and Audit Committee Chair

Rabin Rabindran, former CMDHB Board member

Geoff Short, Assistant Commissioner, SSC

Ramon Manzano, General Manager, Regional Internal Audit

Ian Varley, Director, Beattie Varley

Lester Levy, Former CMDHB Board Chair