

# DÁIL ÉIREANN

---

## AN COMHCHOISTE UM SHLÁINTE

## JOINT COMMITTEE ON HEALTH

---

*Déardaoin, 12 Bealtaine 2022*

*Thursday, 12 May 2022*

---

Tháinig an Comhchoiste le chéile ag 4.30 p.m.

The Joint Committee met at 4.30 p.m.

---

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Colm Burke,	Lorraine Clifford-Lee,
David Cullinane,	Martin Conway,
Bernard J. Durkan,	Alice-Mary Higgins,*
Neasa Hourigan,	Annie Hoey,
John Lahart,	Mary Seery Kearney.*
Róisín Shortall,	
Bríd Smith.*	

\* In éagmais / In the absence of Deputy Gino Kenny and Senators Frances Black and Seán Kyne, respectively.

I láthair / In attendance: Deputies Catherine Connolly and Thomas Pringle and Senator Aisling Dolan.

Teachta / Deputy Seán Crowe sa Chathaoir / in the Chair.

## **New National Maternity Hospital: Discussion (Resumed)**

**Chairman:** We will commence the meeting. Deputy Bríd Smith will be deputising for Deputy Gino Kenny while Senators Higgins and Seery Kearney will be deputising for Senators Black and Kyne, respectively, today. The committee meeting will be split into two sessions. For the first three hours we will be meeting with Dr. Peter Boylan and Mr. Simon McGarr. All are very welcome to the meeting.

All members and witnesses are again reminded of the long-standing parliamentary practice that they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable or otherwise engage in speech that might be regarded as damaging to the good name of the person or entity. Therefore, if their statements are potentially defamatory with regard to an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative they comply with any such direction. This is the usual format of direction on privilege which we read out at the start of the meeting.

I call now on Dr. Boylan to make his opening remarks, please.

**Dr. Peter Boylan:** I thank the Chairman for the opportunity to attend the committee here today.

The Sisters of Charity's transfer to St. Vincent's Holdings, SVH, required them to apply for Vatican permission under the mandatory Canon Law procedure in Canon 1291 for "alienation". Vatican permission was conditional on the Sisters observing certain specified canon laws. The main objects of the St. Vincent's companies bind them to uphold the values and vision of Mother Mary Aikenhead and the directors and shareholders are committed to the values of Mother Mary Aikenhead. It is not credible that these values include the provision of services such as elective abortion that are directly contradictory to Catholic teaching. The concern about Catholic ethos is too acute to proceed unless and until there is full scrutiny of all correspondence between Ireland and Rome. I have appended note E to the opening statement supplied for a schedule of documents.

The plan is contrary to the recommendations of the 2019 report of the independent review group established to examine the role of voluntary organisations in public healthcare that the State should own the land on which the hospital is built and if this is not possible that "any capital investment by the State should only be provided subject to prior agreement on the services that will be delivered".

The Government should directly ask the new owners of St. Vincent's Holdings why they cannot gift, as the Sisters of Charity said they would in 2017, or sell the land to the State. Specifically, do the conditions set down by the Vatican preclude St. Vincent's Holdings from gifting or selling the land?

Prior agreement on the services must include a specified list of procedures including but not limited to abortion according to the 2018 Act, elective sterilisation, assisted fertility and gender realignment surgery and any procedure that becomes legal in the future. It is incorrect to suggest that the constitution of the national maternity hospital, NMH, would have to be revisited every time a new treatment or procedure becomes legally permissible.

The phrase "clinically appropriate" is a major red flag. Providing healthcare on the basis of this test removes autonomy from women and gives the sole decision-making capacity to

doctors. These words qualify access to services and enshrine justification for refusing legally permissible treatments.

I attach a letter sent on behalf of the Minister, Deputy Stephen Donnelly, which is a perfect example of “clinically required” in action and that phrase is interchangeable in medical practice with “clinically appropriate” in denying patients legally permissible services. In a reply to a parliamentary question to the Minister of Health, Deputy Stephen Donnelly, it was stated, “St. Vincent’s University Hospital has carried out sterilisation procedures when it is clinically required to do so ..., but not for the exclusive purpose of sterilisation.”

NMH clinicians who say terminations take place at St. Vincent’s must confirm if those are under the terms of the 2018 Act or for clinical indication to save a patient’s life. The Minister, Deputy Stephen Donnelly’s response to the parliamentary question confirms that fewer than five such terminations occurred before October 2021 and that routine terminations do not happen at St. Vincent’s.

The original plan to co-locate the NMH as an independent stand-alone hospital at Elm Park has been shredded. The NMH would be one of four hospitals owned by St. Vincent’s Healthcare Group, SVHG, which in turn is wholly owned by St. Vincent’s Holdings.

On 29 May 2017, the chair of the board of St. Vincent’s Healthcare Group, insisted, after the Sisters had announced their intention to depart, that the move of NMH to the SVHG site will proceed only on the basis of existing agreements that give ownership and control of the new hospital to SVHG. That intent has been achieved under the current proposals.

The existing National Maternity Hospital would cease to exist, but the mechanisms to do this have not yet commenced. The NMH governors have not yet been asked to vote for the dissolution of the 1903 charter, nor the required Act of the Oireachtas passed. NMH staff would be employed by an NMH designated activity company, DAC, whose board would have minority NMH representation and be subsidiary to SVHG. The master would be relegated to one clinical director of four in the group. SVHG would own 99 NMH DAC shares. The Minister of the day would have one share. The NMH would have none. St. Vincent’s would nominate one third of members of the NMH DAC board, as well as the chair of that board on a rotating basis every three out of nine years. There would only be three national maternity hospital directors, one of whom would be the master, as opposed to reporting to the board. For example, the CEO of the HSE is not a board member. There is no security against a future conservative Minister for Health appointing three conservative State directors. This is not independence. I should add that I think the golden share is more of a liability than an asset.

The HSE’s business case is undergoing review by the Department of Health as part of new rules to prevent a repeat of the huge overrun in the budget of the national children’s hospital. I am reliably informed that the HSE is unable to put a final figure on the cost but believes it is rising by more than €10 million every month. The Comptroller and Auditor General’s spending audit has not been completed. Delays to the project have been caused by St. Vincent’s withdrawing co-operation between 2014 and 2016, during which there were three mediation processes, of which the first two failed; delay in the Sisters of Charity completing the three stages of their alienation, that is, Canon Law application, civil law registration and HSE approval; and delay in producing the complicated legal documents which were released recently. There is also a risk associated with committing a flagship hospital to a catchment area of south County Dublin and the east coast for 299 years when the demographic evidence shows higher birth numbers in north and west Dublin and the surrounding counties.

In the last few years, there has been impressive investment in Holles Street, with a new labour suite, new neonatal intensive care unit, operating theatres, emergency room, foetal medicine unit and upgrading of post-natal wards. Patient satisfaction is at 95% and clinical outcomes are on a par with the best in the world. The current proposals are flawed. In view of deep public and political disquiet, more time is needed to get this project right.

**Mr. Simon McGarr:** I thank the committee for the invitation. I propose to look specifically at the network of papers released by the HSE approximately a week ago. I will not deal with the larger question of value for money and whether the State ought to make transfers. Rather, I would like to look at what would be the most positive outcome that could be obtained if the proposal, as currently put forward, were to go ahead. I will also look at whether any suggestions could be made which would deliver the outcome which everybody has been at one in seeking, namely, a modern, high-end maternity, neonatal and obstetric hospital that will deliver the services to the women, children and patients for the next 299 years, the period we have to deal with.

I will first address a question that has been the focus of considerable attention, that is, the ownership of the new maternity hospital building. I watched the discussions yesterday and the submissions on this matter. Unfortunately, I did not see all of them. One has to deal with clients as well. By the end of those discussions, there was a fairly clear position that the State is going to have a leasehold interest in the building and that the first scheduled definition of the lease sets out that any buildings erected or to be erected thereon and together with all additions alterations and improvements from time to time thereto or thereon will belong to the landlord, that is, the property which will be transferred by way of a lease - the leasehold interest. The HSE will have a leasehold interest but will never own it outright. The lease includes covenants which control the use of the property and the national maternity hospital company's constitution provides for the landlord to nominate three of its directors. This is a relationship between the leaseholder and the landlord, which is much more intimate and there is much more involvement by the landlord than one might see, for example, in a question of a ground rent or a similar situation.

The other issue I wish to address is the question of what uses the HSE can put this hospital to and how they are defined. The permitted use to which the HSE can put the new hospital is defined in the lease as follows: "In relation to the National Maternity Hospital Area [we will return to that shortly] as a public hospital primarily for the provision of all clinically appropriate and legally permissible healthcare services, including research, by a maternity, gynaecology, obstetrics and neonatal hospital, and a range of related health services in the community and any other public healthcare service or services". This creates a two-step test for any permitted use of the hospital. One should recognise that this is in the lease and therefore is a granting of a permission by the landlord to the tenant. It is a restriction, rather than an instruction. The restriction is that it can only be where the use is, first, clinically appropriate and, second, legally permissible. The first of those two tests, I will argue, is both unnecessary and problematic. It is perfectly correct to keep a legally permissible test and there is no ambiguity as to what that phrase means but unfortunately there is no definition of the phrase "clinically appropriate" within the lease to which one could turn to see what it is that was intended by the parties. There is, therefore, an ambiguity created.

On RTÉ's "Prime Time" earlier this week, Holles Street hospital's legal adviser, Ms Murphy, said she was originally very pleased at the insertion of the phrase "clinically appropriate" into the agreement document and then said, "We did not foresee that this would be taken and flipped." My argument is not for any one particular interpretation of the phrase "clinically

appropriate”. My argument is that there are multiple interpretations possible and it is the fact that those multiple interpretations are possible that creates the problem. This is an undefined term. Once you have an undefined or ambiguous term, it becomes a source not of constructive ambiguity as we might imagine from the political world - we are all familiar with that idea from the Good Friday Agreement - but, rather, the reason that terms in legal documents are so tightly defined is to ensure absolute clarity between all the parties. An area where there is an undefined term, the meaning of which is going to be discovered later, is an area where we can anticipate problems into the future between the parties.

Ambiguity results in unexpected, unwanted and sometimes even perverse-seeming interpretations being placed on disputed phrases. The Minister has said this phrase was introduced at the request of the HSE. It is my intention to be as constructive as possible throughout my submission and one of the things that I wish to say is that this is very good news. Were the phrase to be introduced by the counter-party, St. Vincent’s Healthcare Group, it is possible there might be difficulties in removing it. If the State realised this is going to cause a problem, it could cause a difficulty once you have constructed an agreement, where the other side has asked for something to be put in, it will cause difficulties if the counter-party asked for it to be taken out. Here, however, I am proposing that the State should deal with the question of ambiguity that has inadvertently been introduced by the State’s side. There should, therefore, be no difficulty in removing it without damaging the deal. I believe the State should do this. If the phrase is not removed, it should be defined by way of a list of controversial procedures which are presented as “including but not limited to”, that is to say, a non-exclusive and non-exhaustive list of potential procedures. This allows for the evolution of medical technology and medical processes in the future. It does not limit those processes but, at the same time, it distinctly and explicitly addresses all those areas where there may be concerns at the moment as to whether certain services will be available immediately and, perhaps much more importantly, in the future.

To address the constitution of the new national maternity hospital company, the new company which is going to run the fresh, new national maternity hospital sets out its principal object at section 3.1 of the constitution. It states that the principal object for which the company is established is “the promotion of health, in particular by the provision of all clinically appropriate and legally permissible healthcare services, including research, by a maternity, gynaecology, obstetrics and neonatal hospital, and a range of related health services in the community.” One can see that the constitution of the hospital has been drafted in such a way as to directly mirror the phraseology in the lease. This means the company’s officers are bound to perform only such activities that meet the two-step test, namely, clinically appropriate and legally permissible.

The Minister has a golden share where he can oblige directors to take action if they do not provide any and all legally permissible healthcare services. The “golden share” clause in section 5 of the constitution does not require that they be both legally permissible and clinically appropriate. The Minister’s golden share clause only requires that they be legally permissible. That is strong wording and a very valuable power to give to the Minister. It really moves the deal forward from the previous test included in the Mulvey agreement. Unfortunately, the Minister’s golden share may only be exercised in compliance with the two-step test set out in the principal object. The reason for this is that it forms part of the reserved powers of the national maternity hospital’s constitution. All of the reserved powers are explicitly stated to be “exclusively subsidiary and ancillary to the principal object”.

To step back from all of that, which is like trying to eat a bowl of spaghetti all in one go, what we have is a series of layers of duties that are to be performed by the hospital; a series of

requirements the hospital must meet in performing its principal object, its purpose; and a series of restrictions put on the hospital's usage by the lease. All of those restrictions include the test of clinical appropriateness and legal permissibility. Because the Minister's golden share is subsidiary and ancillary to the principal object, which is to say that it can only be exercised within that two-step framework, it has been placed too far down the stacked hierarchy of rights and obligations to be able to overrule a challenge to action based on any future interpretation of the phrase "clinically appropriate" in the principal object clause of the new national maternity hospital company's constitution.

I will deal with the matter of costs very briefly because, while it was the subject of discussion yesterday, I do not think it is the subject of controversy any more. The rent is set at €850,000 per year in the lease. There is a rent review every ten years. The rent is abated to €10 if the tenant follows conditions on the use of the premises. In the event the tenant does not follow the conditions placed upon the use of the premises, the abatement is lost and the rent returns to €850,000 a year. The tenant here will be the HSE and the new national maternity hospital. Those conditions include a requirement that the tenant not use the premises for any purpose that does not meet the test of clinical appropriateness. So, not only is there a principal object set out and a requirement in the permitted use clause of the lease that services must be clinically appropriate, but also built into the lease is a kind of penalty clause with regard to any activities that are not clinically appropriate, as interpreted by a future set of company directors.

I should stress again that all of this is going to go on for 299 years. That is the term of this hospital lease. There is a requirement under the lease that a hospital, whether the initial building or any future buildings that replace it, will provide services of this sort for the next 299 years. To give the committee a sense of what kind of scope that is, 299 years ago a Medici was being made a duke of Tuscany. I thank Wikipedia for its knowledge. That is a very long time ago and, given the enormous changes that have swept society just in Ireland in those 299 years, we can imagine that there will be even more sweeping changes over the next 299 years given the pace of technology. Despite this, we must consider whether there is sufficient security and certainty in these documents to ensure delivery of the services of that maternity hospital in the manner intended for that very long period. That means that the rules of the hospital, of the agreement and of the relationship between the hospital and the maternity hospital should be written down together and defined as tightly as possibly so that the agreement will not lead to ambiguity in the future.

**Chairman:** I am conscious that we are eating into the members' time.

**Mr. Simon McGarr:** I will roll through the last two points very quickly.

**Chairman:** I was going to suggest that we take the statement as read, if Mr. McGarr would like. If he would like to make some headline points, we can then get straight into the questions.

**Senator Lorraine Clifford-Lee:** I think it would be fair to let Mr. McGarr finish the points he was trying to make.

**Chairman:** Each witness is supposed to have a five-minute opening statement. I am just conscious that we are eating into members' time but it is up to the committee how to proceed.

**Deputy Colm Burke:** Mr. McGarr can deal with the issues in replies to questions.

**Deputy David Cullinane:** We should take it as read and move on.

**Mr. Simon McGarr:** I am very easy on this. The committee's time is much more important than whether I hear my own voice out loud.

**Chairman:** I do not want to cut Mr. McGarr off immediately. Perhaps he could give us some of the headlines regarding the rest of his statement. It will be on the record anyway as he has supplied a copy to the committee.

**Mr. Simon McGarr:** That is no problem at all. I believe there is a fix available for the primary problem. As was discussed yesterday, that primary problem is one of trust. Certainty builds trust. As regards the primary solutions that are available, the Minister acknowledged that for the St. Vincent's Healthcare Group to gift or sell to the State the land upon which the hospital will be built is the optimum solution. Until very recently, the owners of that land were bound by Vatican rules regarding the disposal of assets. Those rules tied their hands. The new owners are independent and not tied by those requirements and restrictions. It presents a chance for a fresh start on that question that there is a new and completely independent owner of the site that is not bound by Canon Law. It is worth returning to that question.

However, the key point that I want to stress is that, if the phrase "clinically appropriate" were to be deleted from the governing clauses of each of the documents and the descriptions of what may be provided for within the next 299 years, this would, in itself, provide enormous certainty. It would mean that everything that is legally permissible would be allowed to be delivered in this hospital. As the phrase "clinically appropriate" came from the State side, it appears that it is within the gift of the State to take that improving action. I am conscious of the Chair's time.

**Chairman:** I again apologise for cutting Mr. McGarr off. Senator Conway will lead us off. It is a ten-minute slot. We will try to get both the questions and the answers covered within the ten minutes. I am conscious that we have a full house today.

**Senator Martin Conway:** I thank our guests for coming. I know it was at short notice but it was important for us to have an engagement with them. I have been aware of the work of Dr. Boylan for many years and would like to acknowledge it. The women of Ireland very much appreciate what he has done over the years. Are all legally available services, including termination of pregnancy, being provided in Holles Street hospital at this moment in time?

**Dr. Peter Boylan:** Yes.

**Senator Martin Conway:** What is Dr. Boylan's response when practically all of the midwives in that hospital are in favour of building a new national maternity hospital and do not in any way feel they will be compromised or that the services they are providing at the moment will not be provided in that new national maternity hospital? In addition to that are the managers of the 19 maternity services around the country who have come together to support the proposal and the 52 clinicians who have also come out in favour of it. What I am trying to understand is why Dr. Boylan is at variance with such a groundswell of medical opinion that this is the right thing to do.

**Dr. Peter Boylan:** I support the move to the St. Vincent's campus. In its proper sense, co-location is an excellent idea. My problem is with the governance and ownership structure. I have a serious problem with the failure to carry out due diligence with regard to what we will call the Vatican papers, the exchanges between the Vatican and Dublin with regard to the permission the Sisters of Charity got. The doctors, midwives and so on at Holles Street hospital

will not be working for that hospital any more. They will be working for a private company that is a subsidiary of St. Vincent's Healthcare Group, which is owned by St. Vincent's Holdings.

**Senator Martin Conway:** It is important to put on the record that the chair of the board of Holles Street hospital is the Archbishop of Dublin.

**Mr. Peter Boylan:** He is indeed, but he takes no active part. In fact, he very much wishes to be off the board. He has never interfered, apart from calling me up when I was introducing female sterilisation in Holles Street. That did not work because it is a secular hospital with a secular board.

**Senator Martin Conway:** I suggest the same thing will happen in the new national maternity hospital.

**Mr. Peter Boylan:** That the archbishop would call somebody up.

**Senator Martin Conway:** No. The Sisters of Charity will have no active role, part or active engagement, high up or low down. They will just let the facility do what it is expected to do.

**Mr. Peter Boylan:** Sisters, priests and so on are well out of hospitals and have been for many years but what succeeds them are lay organisations. For example, the Edmund Rice Schools Trust in education, the Mater Hospital in Dublin, the Mercy University Hospital in Cork and so on, have all divested themselves of direct religious ownership but they maintain a Catholic ethos. They are quite open about it but we have not seen the Vatican papers, as I call them. I made the point that the doctors will not be working for Holles Street as it is at present. There will be a completely new corporate entity. That entity will be owned by St. Vincent's Holdings company, the directors, or in other words the shareholders, of which have committed to uphold the values and vision of Mother Mary Aikenhead and the Religious Sisters of Charity. We are being asked to believe those values include the provision of services such as abortion and the other services we talked about.

**Senator Martin Conway:** Mr. Boylan made a very important point that he has not seen - none of us have - the correspondence between the Vatican and St. Vincent's.

**Mr. Peter Boylan:** No, I have not. The only thing I have seen is the letter I appended to the papers, which is the reply from the Vatican that mentions permission being "for the reasons presented" in the application to the Vatican by the Sisters of Charity. The Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, which is the Vatican body that makes these decisions, studied the documentation submitted. We have not seen that either. It granted the request in conformity with the petition, which we have not seen. It also said, "The provisions relating to the validity and lawfulness of alienations", that is, the transfer of church property found in several canon laws, "are to be observed." In other words, there is Canon Law imposition on the validity of the transfer of the Sisters of Charity's property into St. Vincent's Holdings. We have not seen any of those papers and we need to.

**Senator Martin Conway:** Where did Mr. Boylan see what he quoted?

**Mr. Peter Boylan:** That is in the letter from the Vatican granting permission to the Sisters of Charity.

**Senator Martin Conway:** Okay.

**Mr. Peter Boylan:** It is appended to the documentation I have given to the committee.

**Senator Martin Conway:** Okay. I would like to dwell for a moment on the consequences of this not going ahead. Mr. Boylan has worked in this area all his life and dedicated his professional life to it. Clearly, he is a believer in co-location. If the Cabinet, for argument's sake, decided not to go ahead with this, I have no doubt he appreciates how many years the building of a new hospital will be set back. What is his solution to this problem?

**Mr. Peter Boylan:** I very much support the move of a properly co-located and truly independent national maternity hospital to be co-located with St. Vincent's. That is a good idea. I have always supported that and have never been against it. The solution is the Sisters of Charity and the new owners should - if the alienation has taken place according to Vatican stipulations - honour the commitment and gift the land to the people of Ireland or sell it to the State. We now have new owners who are the shareholders of St. Vincent's Holdings. They are three people and they can make that decision. The solution to this lies with the St. Vincent's shareholders. They are the ones who can solve this at the stroke of a pen.

**Senator Martin Conway:** We had a four-and-a-half-hour engagement yesterday with the Minister and his legal people. We were told that, for their own reasons, which include the fact that St. Vincent's is a campus with a number of healthcare facilities on it, and corridors in the new hospital will be interlinked and so on, they did not believe it was practical to gift it. It is not on the table. It will not happen. Since it is not happening, and the sisters are not prepared to gift or sell the land, and bearing those two dilemmas in mind, how then does Mr. Boylan propose we can proceed with this project? Where is the solution?

**Mr. Peter Boylan:** The question has to be asked why they will not honour their commitment to gift it to the people of Ireland and why they will not sell. Is it because they are not allowed to by the stipulations of the Vatican? We do not know the answer to that because we have not seen the papers.

**Senator Martin Conway:** Does Mr. Boylan accept that a 299-year lease is probably the longest lease that has ever been given to any entity in this country?

**Mr. Peter Boylan:** It probably is but I am not a specialist in property leases and so on.

**Senator Martin Conway:** I am not expecting Mr. Boylan to be.

**Mr. Peter Boylan:** I know. I will make the point, however, that the hospital will be owned by St. Vincent's. The Sisters of Charity are concerned about the loss of their voluntary status if they gift the land to the State or if the State buys it, but Tallaght hospital is a voluntary hospital on land not owned by Tallaght but on State land. That sort of arrangement is perfectly feasible. As I said, at a stroke of a pen, it would sort everything out.

**Senator Martin Conway:** I will go back to the point I made earlier, which is that is clearly not an option that is on the table. Everyone on this committee wants the State to buy the land. The ideal scenario is it would be a freehold and in State ownership for eternity, but that is not an option. I am trying to figure out from what Mr. Boylan is saying, with the two options of being able to purchase it and getting it as a gift off the table, how he proposes we can then proceed to building a hospital the women of Dublin and the women of Ireland badly need?

**Mr. Peter Boylan:** The Government should hold the cards. It is funding it. We have had various estimates ranging from €500 million to more than €1 billion. The cost is incalculable

at present.

**Senator Martin Conway:** It is not for sale. That is the problem.

**Mr. Peter Boylan:** The State holds the cards. It should push the current owners and say the State needs to own the land on which the hospital will be built-----

**Senator Martin Conway:** The Minister was before the committee yesterday. The land is not for sale. We cannot buy something that is not for sale. We cannot go down the compulsory purchase route because it would set the project back another ten years. I am again putting it to Mr. Boylan that it is not an option. Where is his solution since that is not an option?

**Mr. Peter Boylan:** We are a republic that is about 100 years old. It is time to stand up for ourselves as a people, face down the church and say we need that land.

**Deputy David Cullinane:** I welcome Mr. Boylan and Mr. McGarr. I will start with Mr. McGarr. To follow up on the last line of questioning, my colleague stated that the Sisters of Charity will not give the land to the State. Am I right in saying that at this point, as we sit here today, the Sisters of Charity have divested all interest in the land and, in fact, the landowners are now St. Vincent's Healthcare Group?

**Mr. Simon McGarr:** The landowners are St. Vincent's Healthcare Group. The owners of that group used to be the Sisters of Charity but they are not any more. The owners are now St. Vincent's Holdings, which is a separate charitable company that was set up to receive the ownership of St. Vincent's Healthcare Group. The consequence of that is-----

**Deputy David Cullinane:** Bear with me. The landlord in this case is St. Vincent's Healthcare Group, which is a subsidiary of St. Vincent's Holdings.

**Mr. Simon McGarr:** Yes.

**Deputy David Cullinane:** St. Vincent's Healthcare Group are the people we should be talking to because the landlord is not now the Sisters of Charity. If we are talking about ownership of the land and transfer of that land into public ownership, is it St. Vincent's Holdings and St Vincent's Healthcare Group we need to talk to?

**Mr. Simon McGarr:** Yes. There are no discussions worth having with the Sisters of Charity because they do not have any property on the St. Vincent's campus they are holding that is relevant to the discussion on the maternity hospital.

**Deputy David Cullinane:** Is it fair to say St. Vincent's Holdings CLG will be an umbrella group of a number of different hospitals? It will have a portfolio of hospitals, including St. Vincent's public, St. Vincent's private, St. Michael's and now this new company that will be established, which is the national maternity hospital designated activity company, DAC. Will it be an umbrella group of a number of different hospitals, including the national maternity hospital?

**Mr. Simon McGarr:** Yes. They will all be part of St. Vincent's Healthcare Group.

**Deputy David Cullinane:** They will not be owned by the State but by that group.

**Mr. Simon McGarr:** Correct.

**Deputy David Cullinane:** Okay. The question then is why. I ask Mr. Boylan to address my next question. Why will the St. Vincent's group, either the healthcare group itself or the

holdings company, not give the land to the State? If it is no longer about the Sisters of Charity and it is now about this group, why is it saying “No”? The Minister said today on the floor of the Dáil that he asked for the land to be transferred to the State and the answer was “No”.

**Dr. Peter Boylan:** It is hard to know. Until we have sight of the Vatican papers, we will have no clear idea. It could be that St. Vincent’s wants to hold on. Hospital groups are quite common now around the world. The Bon Secours, for example, have a large hospital group, which recently merged with the American counterpart. They have billions of turnover and so on. It may well be that St. Vincent’s wants keep itself as a group. I notice in the powers of the memorandum and articles and so on of the constitutions that it has the power to mortgage or merge with another like-minded charity. If the Deputy takes the model, for example, of the Bon Secours, it is a charitable organisation that has merged with a charity from the United States.

**Deputy David Cullinane:** Would it be more probable that it simply does not want the HSE hospital on that land and wants it to be an independent voluntary hospital?

**Dr. Peter Boylan:** I would say that is part of it. Certainly, one can understand that. I think it would be perfectly possible to maintain-----

**Deputy David Cullinane:** The vast majority of the funding for St. Vincent’s public hospital comes from the State. Is that correct?

**Dr. Peter Boylan:** Yes, that is absolutely right.

**Deputy David Cullinane:** The vast majority of funding for the existing National Maternity Hospital on Holles Street comes from the State.

**Dr. Peter Boylan:** That is correct.

**Deputy David Cullinane:** The money to build this new hospital, variously estimated at between €800 million and €1 billion, will come from the HSE.

**Dr. Peter Boylan:** That is right.

**Deputy David Cullinane:** Therefore, the HSE will be the funder but these guys are saying they do not want the HSE hospital on their site.

**Dr. Peter Boylan:** Yes. It is an anomaly in 2022 in a republic.

**Deputy David Cullinane:** I have another question for Mr. McGarr. We have to ask the hard questions of everybody - all witnesses - obviously. The HSE legal team yesterday told us that the constitution of the parent company or owner companies - we have three different companies and constitutions, different boards, different directors and so on - was irrelevant because the directors of the new national maternity hospital designated activity company, DAC, are mandated to only follow the direction of their own constitution. Would Mr. McGarr agree with that?

**Mr. Simon McGarr:** That is only true in a qualified way. When a company has a landlord - in this case, the new hospital company will have a landlord, which will be St. Vincent’s Healthcare Group - that landlord has certain powers under the lease. Obviously, what the landlord’s companies and constitutions say will be relevant for the ongoing operation of the hospital. In addition, that landlord company, St. Vincent’s Healthcare Group, will have the right to nominate three of the directors of the new company. They will, therefore, be taking those seats.

Although they will be operating under the constitution of the new national maternity hospital, they will have been appointed by the St. Vincent's Healthcare Group. In doing so, St. Vincent's Healthcare Group's officials will have to be acting in accordance with its constitution.

**Deputy David Cullinane:** There is a level of ambiguity, in Mr. McGarr's opinion.

**Mr. Simon McGarr:** The relationship between the two is such that you cannot simply say that what is in the constitutions of the holding company, and the healthcare group company below that is irrelevant. It is certainly not irrelevant.

**Deputy David Cullinane:** I have a question for both Dr. Boylan and Mr. McGarr. One of the issues here that is causing some concern and is contentious is the term "clinically appropriate". I will ask Dr. Boylan first. Is that something in his mind, as a clinician, that is ambiguous?

**Dr. Peter Boylan:** It is extremely ambiguous and it allows a doctor to take away autonomy and decision-making from a woman. It allows an interpretation of the law, if you like, in a particular circumstance. The most egregious example of that was pre-repeal with Ms P, the well-known case of the woman who was brain-dead and the doctors interpreted that it was clinically inappropriate to turn off the life support machines to allow her, effectively, to complete her death because she happened to be pregnant. That is one situation. A woman could, say, present herself for a termination at less than 12 weeks, which she is perfectly entitled to make a decision about herself, and the doctor might say he does not think it is clinically appropriate.

**Deputy David Cullinane:** From a legal perspective, would Mr. McGarr say there is a level of ambiguity?

**Mr. Simon McGarr:** I am afraid that because "clinically appropriate" is placed so high in the hierarchy of permitted uses in the hierarchy of the principal object of the company, it is the fulcrum upon which the entire set of agreements rests and, depending on its interpretation, these agreements could proceed exactly as the State parties have described their intention to be or they could proceed in a very different way. That ambiguity is not only present, but it goes to the very core of the interpretation of these agreements and how this hospital will operate into the future.

**Deputy David Cullinane:** I would imagine it is not that Mr. McGarr is calling into question the bona fides of the Minister or anybody else who works in Holles Street or the HSE. That is their interpretation. However, there is simply a difference of opinion and there are different views on what it means.

I will put this to Mr. McGarr. The Minister told us he will give us a letter of comfort. He will write to the health committee to give us his view of what that understanding will be. The fact that it will be on the record of the Oireachtas means it will have some legal standing. Is it true that if there was any court challenge on any of these issues, it would not be the Dáil Chamber or a surgical operating theatre that would adjudicate on that but a court?

**Mr. Simon McGarr:** There is a current and leading case from the Supreme Court in relation to the use of words used by the Oireachtas to try to convey meaning, as opposed to the actual text in relation to those things. That is *Crilly v. T and J Farrington Ltd.* It is a 2001 case, but it was recently endorsed by Mr. Justice MacMenamin in a case of 2022. Therefore, it is quite recently endorsed. I should read from *Statutory Interpretation in Ireland*, authored by David Dodd and Michael Cush. It states:

Ireland has the distinction of refusing to follow the modern trend [in other common law jurisdictions]. Following the Supreme Court decision in *Crilly*, the use of such material as an aid to interpretation of domestic enactments is impermissible. [There is a record] held that the disadvantages of using parliamentary history as an aid in interpretation do not merit a change in the exclusionary rule...

**Deputy David Cullinane:** Okay. However, my point is it would be courts that would make the-----

**Mr. Simon McGarr:** It would be the courts and, unfortunately, the letter of comfort, as forming part of the Oireachtas conveyance.

**Deputy David Cullinane:** I have one final question for Mr. McGarr because my time is up. Given that we have moved now from a 99-year to a 150-year to a 299-year lease and there is an options agreement within the legal framework that, under certain circumstances, allows for the HSE to force the sale of the land, clearly the door is open. They have somewhat opened the door to ownership. Is there any legal reason that St. Vincent's Healthcare Group or the holdings company cannot simply gift the land to the State?

**Mr. Simon McGarr:** No. It is entirely within the right of the owners to do so.

**Deputy John Lahart:** I will first address Mr. McGarr. His company was a finalist in the category of personal injury-medical negligence law firm of the year and it specialises in medical negligence, personal injury, probate and employment law.

Dr. Boylan and I share many objectives. He gave his very valuable time to the cross-party group that had concerns about this, of which I was a member. I thank him for giving his valuable time. We also share an interest in women's health and we were on the same side on the eighth amendment. I share the sentiments the Minister expressed yesterday in relation to the history of the treatment of Irish women in health terms, not just by the church but also the State, over the past 100 years or so. I have had concerns, as Dr. Boylan has, over the past year. I have been following this matter closely and Dr. Boylan made his time available to us and to me, personally, and I am grateful for that too.

I will go through some of Dr. Boylan's statements and start with Mary Aikenhead and how St. Vincent's companies being obliged to uphold the values of other Mary Aikenhead organisations. It is not to uphold the Catholic doctrine but the values of Mary Aikenhead, which are human dignity, compassion, justice, equality and advocacy. Nobody can argue with any of those. Poor Mary Aikenhead died in 1858. The church's formal position on abortion was established about 15 years later. I do not think Dr. Boylan can say it is not credible that she would envisage procedures such as termination or sterilisation. I do not think that we can credibly attribute what Mary Aikenhead would have thought on this. My view on that is as valid as Dr. Boylan's. He said that it is not credible that these values, including the provision of services such as elective abortion, are directly contradictory to Catholic teaching. The Vatican papers are like something out of "The Da Vinci Code". What vehicle does Dr. Boylan see the Vatican using to impose Catholic doctrine on a State-owned and State-run hospital, which has a constitution that insists not only that these services should be available but also that they must be available? How does he see it imposing this?

**Dr. Peter Boylan:** The operating company for the new hospital is the NMH DAC, which is a subsidiary eventually of St. Vincent's holding company. St. Vincent's holding company

was incorporated following Vatican permission to the Sisters of Charity. It is very clear that the Vatican was involved in determining what the holding company constitution-----

**Deputy John Lahart:** It is not clear to me.

**Dr. Peter Boylan:** If you read the communication from the Vatican-----

**Deputy John Lahart:** I did and I hope we have St. Vincent's here at some stage.

**Dr. Peter Boylan:** "Your Holiness, Permission to transfer-----

**Deputy John Lahart:** No. That is on the record. Dr. Boylan has supplied that. I am asking a straight question: what vehicle are they going to use? How is it going to happen that someone decides that a woman cannot receive a termination in the new national maternity hospital if it is located at St. Vincent's? Who makes that decision? Who makes that call and who issues the instruction?

**Dr. Peter Boylan:** The master of the national maternity hospital is the person who sets the clinical standards following agreement with the board. The master reports to the board and I see that in the current document he or she will be part of the board as well as reporting to the board.

**Deputy John Lahart:** The hospital has a constitution.

**Dr. Peter Boylan:** Yes-----

**Deputy John Lahart:** No, but the hospital has a constitution. Does Dr. Boylan accept that the hospital's constitution insists that all clinically appropriate - and we will come to that - and legally permissible services must be provided?

**Dr. Peter Boylan:** It is unlikely to do anything legally impermissible. I think that Mr. McGarr will come to that.

**Deputy John Lahart:** But does Dr. Boylan accept that?

**Dr. Peter Boylan:** It is in the constitution but perhaps I can cover the question the Deputy asked me about how it will be achieved. The board of the hospital is made up of three, three and three: three from the national maternity hospital DAC, one of whom is the master; three from St. Vincent's, whose directors are committed to upholding the vision and values of Mother Mary Aikenhead which -----

**Deputy John Lahart:** But not Catholic doctrine and there is a significant difference.

**Dr. Peter Boylan:** I think we can argue about this.

**Deputy John Lahart:** We know from yesterday that if it does not do this, the Minister can instruct it to do this. I know that one of the arguments is what would happen if there was a conservative Minister for Health. The fact of the matter is that the law of this land, thanks to people like Dr. Boylan, provides for the termination of pregnancy.

**Dr. Peter Boylan:** The master of the hospital is obliged to follow the instructions of the board in terms of implementing health policy within the hospital. I can assure the Deputy that that is the way it works.

**Deputy John Lahart:** The national maternity hospital is subject to a constitution, subject to ministerial direction and subject to the law of the land, not the Vatican.

**Dr. Peter Boylan:** No-----

**Deputy John Lahart:** I am going to move on. Dr. Boylan also said that the State should own the land on which the hospital is built. We accept that and agree with that. He said that if this is not possible, “any capital investment by the State should only be provided subject to prior agreement on the services that will be delivered.” We have secured that.

**Dr. Peter Boylan:** No, because you need to have a list, as I outlined in my opening statement, of procedures plus any procedure that becomes legal in the future.

**Deputy John Lahart:** This point came up-----

**Chairman:** The Deputy has asked a question. He should allow the witness to respond.

**Dr. Peter Boylan:** I thank the Chair. The national maternity hospital, it would appear, is agreeable to including a list in the constitution of the hospital. The former master, Dr. Declan Keane, said on the radio the other day that he would have no problem at all with the inclusion of the specific list as I outlined. I think it can be taken that the national maternity hospital is agreeable to that. We heard yesterday that the Minister was open to all suggestions. That would remove a significant degree of concern that many women in the country have, as well as people like myself.

**Deputy John Lahart:** In his opening remarks Dr. Boylan said that “NMH clinicians who say terminations take place at St. Vincent’s must confirm if those are under the terms of the 2018 Act”. They have confirmed that. They went as far as they could yesterday without breaching privacy and confidentiality. Does Dr. Boylan accept that?

**Dr. Peter Boylan:** I can assure the Deputy that I have a full understanding of patient confidentiality. It is possible to give relevant details in order to convince people that they are doing terminations. The ethical code of St. Vincent’s Hospital is clearly Catholic. It is or was run by the Sisters of Charity. There is no question that the ethical code in St. Vincent’s was Catholic, and we do not know if it still is because we have not seen any ethical code. There is a lot of documentation that we have not seen. I would like to see documentary evidence to back up statements that were made. In particular the State, the public and the women of Ireland need to see what I term the Vatican papers. Otherwise we cannot trust what has been said and what has been done. Yesterday we heard about the lack of trust surrounding the treatment of women in this country. Unfortunately we have learned the history of relations with the Vatican in terms of mental reservation, the way people were treated and so on. I think we need to be careful without seeing the papers.

**Deputy John Lahart:** When was the conversation that Dr. Boylan had with the archbishop?

**Dr. Peter Boylan:** It was in 1992, I think.

**Deputy John Lahart:** So it was 30 years ago.

**Dr. Peter Boylan:** The church thinks in centuries.

**Deputy John Lahart:** I am aware of that actually. I would be aware of that and probably more aware of it than most. When was Dr. Boylan master?

**Dr. Peter Boylan:** From 1991 to 1997, inclusive.

**Deputy John Lahart:** So that is 25 to 30 years ago.

**Dr. Peter Boylan:** That is correct.

**Deputy John Lahart:** Much has been-----

**Dr. Peter Boylan:** Catholic doctrine has not changed in that time.

**Deputy John Lahart:** Yes, but Dr. Boylan talked about the values of Mother Mary Aikenhead and not about Catholic doctrine. There is significant difference. I have no qualms about saying I would have come to this with the same queries as Dr. Boylan. I will return to where we began. He talked about red flags. I think a lot of those were answered yesterday. On women and women's voices, it is vital that they are heard. All we heard yesterday were women's voices, and powerful women's voices. The last three or four masters of Holles Street - obviously, the current one is a man - disagree with Dr. Boylan. Some 52 clinicians, of whom 18 are women, disagree as do the directors of midwifery in all 19 maternity units across the country, the senior midwives in the national maternity hospital. These are very powerful strong voices. What gives Dr. Boylan the belief that he has this right and everybody else has this wrong?

**Dr. Peter Boylan:** I share their aspirations for the new hospital. I would emphasise that. Where we differ is in the ownership and governance.

**Deputy Róisín Shortall:** I welcome Dr. Boylan and Mr. McGarr. I will pick up on Deputy Lahart's last point that everyone is in favour of this. Certain people are. I have to correct Deputy Lahart about that. A lot of people are not in favour of this because there are too many doubts about it. There is a lack of certainty and a lack of clarity. The Deputy mentioned the midwives' statement. I thought it was quite extraordinary given that nine of the 19 hospitals in the country, where presumably these midwives work, do not provide a full range of women's healthcare. I just wonder why they are not campaigning for services to be provided in their own hospitals.

The dual employment between Holles Street and St. Vincent's is something that a lot of people do not understand. I read recently that 40% of consultants in Holles Street have a joint contract with St. Vincent's. Dr. Boylan might confirm that.

**Dr. Peter Boylan:** Yes. Sometimes it is for what is known as admitting privileges. If I am on the staff in Holles Street and I am looking after a woman in St. Vincent's for whatever reason, then I have the right to go to see her there and my liability exposure is protected.

**Deputy Róisín Shortall:** I thank Dr. Boylan. There are existing strong links with St. Vincent's, so it cannot be regarded as totally objective.

An earlier speaker asked why the nuns will not sell the site, which is the key question. They promised they would gift the site. It makes sense that they would do so. The Government says it wants to own it fully. Why will the nuns not follow through on that promise? There is some indication in the lease agreement of the reason they will not sell it. Section 6.4 of the lease states that the landlord, St. Vincent's Healthcare Group, will be able to mortgage or charge its freehold interest in the land, without notice, to the maternity hospital 20 years post construction. It has to obtain written consent in the first 20 years. The control and influence on the board will be significant in that regard. It strikes me that this is essentially about land value and not so much the management of the campus. Can Mr. McGarr estimate the additional land value the

lease and the right to mortgage or charge what we are told is public property might add to St. Vincent's Holdings?

**Mr. Simon McGarr:** The Deputy will be glad to hear that I will not pretend to have any real estate knowledge of south County Dublin, perhaps unfortunately for me. I will say, however, that this is currently a site with some buildings upon it. There is to be an overlap. Some buildings currently on the site will be removed. I know the Minister identified some of those, for example, dermatology. Offices will be provided in the new building for the use of St. Vincent's Healthcare Group.

**Deputy Róisín Shortall:** Would Mr. McGarr hazard a guess about the increased value of St. Vincent's Holdings?

**Mr. Simon McGarr:** I would be very careful in trying to value land that I do not know anything about. We currently have a piece of land and the intention is to develop it to the value of between €500 million and €1 billion by building an additional facility on it. According to the lease, St. Vincent's Healthcare Group will have a landlord interest not only in the land that is there, but also in that entire development value.

**Deputy Róisín Shortall:** Those of us who have been involved in this issue for many years will recall when St. Vincent's mortgaged the public hospital in order to build the private hospital, without any approval. There was a row about that and there is a real danger of that happening again.

I return to the definition of "clinically appropriate". The Minister said today that he has no difficulty in setting out that definition. It is very odd that there is no definition in all of those legal documents, even though there are six pages of definitions in the lease agreement. The Minister said he will set that out in a note to us. What weight would that document have? I know Mr. McGarr started to address that with Deputy Cullinane. The Minister says his 100% guarantee would be sufficient. Is that the case?

**Mr. Simon McGarr:** The answer I gave to the Deputy's colleague earlier related to the weight that the courts will put on papers, including briefing papers, provided in the run-up to legislation being passed. This will be an agreement. It is an interpretation note by one party to the agreement. That is helpful to clarify what one party thought, but it is not the same as saying that this is what the agreement is intended to mean by all parties. If an agreement could be made by all the parties as to what that definition should be, that would be exceedingly helpful, and it would be even more helpful if it were put in the lease. If all the parties are *ad idem* and in agreement about the definition, this document is the place to put it.

**Deputy Róisín Shortall:** I put it to the Minister today that this could be done in a matter of minutes. I would like Mr. McGarr's opinion on that.

**Mr. Simon McGarr:** If there is no disagreement and everybody who is in this discussion understands exactly the same meaning of the term "clinically appropriate", there should be no difficulty in drawing up that definition and inserting it into the agreement.

**Deputy Róisín Shortall:** I think I recall Professor Higgins being on a radio programme with Mr. McGarr recently in which Mr. McGarr suggested there should be a clear definition in the documents. I believe Professor Higgins endorsed that view.

**Mr. Simon McGarr:** I do not think I have been on the radio with Professor Higgins, al-

though I will confess that I have been on the radio more often than I found comfortable in the last week. It is possible, therefore, that he did so at a time when I was not there. In the event that Professor Higgins has accepted that it would be a good idea to define it, that would mean that two of the three parties to this agreement had indicated they were happy to have that happen. If St. Vincent's Healthcare Group was happy to have that happen, then all three parties to the agreement would be happy and no delay would be caused by placing that definition in the lease.

**Deputy Róisín Shortall:** Earlier, Dr. Boylan said the golden share could be more of a liability than an asset. Will he explain his thinking on that?

**Dr. Peter Boylan:** We do not know who the Minister for Health will be in the future. An extremely conservative Minister could instruct the hospital not to do certain things as well as to do certain things. To me, it is ridiculous that a Minister for Health who has no medical training is the person who will decide on the medical treatment at a maternity hospital in the case of a dispute. To me, that is completely inappropriate.

**Deputy Róisín Shortall:** It strikes me that the idea of the Government proceeding to sign off on this on Tuesday is premature for many reasons. We have appealed to the Minister to hold off on that. I am aware that the business case process has not been complied with by the Department of Health. We were told yesterday that it is working on it. There is no agreement that there is a robust business case for this and that it would meet the bar set by the Department of Public Expenditure and Reform. Dr. Boylan said earlier that the National Maternity Hospital has not given its approval to this. Will he give us the timescale?

**Dr. Peter Boylan:** The governors of the National Maternity Hospital are to vote and agree when all of the legal documents and agreements with St. Vincent's have been made public and given to us as governors. I am one of many life governors. At the annual general meeting of the hospital, in response to a question I asked, the deputy chair assured us that we would have an opportunity to review all the papers and vote on whether we approved of what was proposed in the relationship between the National Maternity Hospital and St. Vincent's. That has not yet happened. I wrote to the deputy chair today to ask him when he intends to call an extraordinary general meeting so that we can make that decisions as governors. It requires the approval of the governors first.

**Deputy Róisín Shortall:** No date has been set for that.

**Dr. Peter Boylan:** There is no date.

**Deputy Róisín Shortall:** From that point of view, along with us urging the Minister to hold off to provide more time for scrutiny, other steps need to be taken too. It strikes me that there is no rush to deal with this next week or even in the next two weeks.

**Dr. Peter Boylan:** It would seem to be hasty to deal with it before all these things are sorted out.

**Deputy Róisín Shortall:** I thank Dr. Boylan.

**Deputy Bríd Smith:** I thank the witnesses for coming and providing those interesting introductions. On the question of the definition of "clinically appropriate", the Minister clearly said the HSE asked for it to be put in there. Why do the witnesses think that is?

**Dr. Peter Boylan:** I have no idea. Really, I do not know.

**Deputy Bríd Smith:** Dr. Boylan could not hazard a guess.

**Dr. Peter Boylan:** It may be that they feel only maternity and gynaecological stuff should take place in the hospital. The hospital is linked up by corridors. The theatres, in the design, are all on the same corridor. The numbers of deliveries in maternity hospitals vary from time to time. The numbers in Holles Street have gone down by 25% in recent years, while those in the Rotunda have gone up significantly. The numbers in 2020 were as low as they were in 1994. One could envisage a situation where there are empty rooms in the national maternity hospital and the theatres are not being used, say on a weekend when there are no routine gynaecological procedures. What is predictable is that St. Vincent's is overflowing with people on trolleys in the emergency room and the corridors. Adjoining that are empty rooms in the national maternity hospital. Then there is the board structure. There are three from St. Vincent's, as well as three ministerial appointees who will be under political pressure not to have overcrowding in St. Vincent's Hospital while there are empty rooms nearby in a hospital whose operating company is owned by St. Vincent's. One can easily see how there would be seepage from St. Vincent's into the national maternity hospital space. If that triggers the €850,000 per year or gives rise to conflict, the Minister is the person who will sort it out. I do not think any Minister for Health would say "No" and that St. Vincent's Hospital was to be kept overcrowded to the stage of severe patient safety issues-----

**Deputy Bríd Smith:** Could I interrupt you?

**Dr. Peter Boylan:** Yes.

**Deputy Bríd Smith:** Will the Chair let me come back in? I have to go out.

**Chairman:** No problem.

**Senator Annie Hoey:** Deputy Shortall asked about the golden share. Yesterday, my colleague, Deputy Duncan Smith, asked if this was a good model which the Minister would recommend. It seemed that he was like "Yeah, this seems to be a great idea, a Minister having a golden share." I am somewhat jokingly paraphrasing but he sort of said that this is a good model for a hospital and implied that it was a good model for other things. Do the witnesses agree it is a good model for a healthcare setting or, from a legal perspective, for the State going forward in relation to capital investment?

**Mr. Simon McGarr:** The golden share model has been created to deal with the specific circumstances of this deal. It was not in the original Mulvey plan and is one of the methods by which the State side has attempted to alleviate the concerns which were clear at the time the Mulvey report came out, when it was to be owned by the nuns. It was through the holding company, but the nuns were the ultimate owners of the building and hospital. The golden share was created to deal with that problem. I do not see that problem arising in many other sets of circumstances. I would be surprised if the same kind of solution was proposed for other HSE hospitals, for example. The golden share is intended to be able to tell the directors to provide for legally permissible services. That is what it says in section 5.3:

The Minister... hold[s] a share referred to as the Golden Share... provide[s] legal protection to the inviolability of the Reserved Powers in the manner provided for in this Constitution, to ensure... the obligations of the Directors as contained in [the] Constitution are complied with and to ensure that any maternity, gynaecological, obstetrics and/or neonatal

services which are lawfully available in the State shall be available in the New NMH.

The Minister probably read out the same phrase yesterday. It is a strong phrase to underpin the delivery of lawfully permitted services. It is not qualified by saying “lawfully permitted and clinically appropriate”. It is unqualified. Unfortunately, it is only in relation to the reserve powers and only goes so far as those powers are able to go. The reserve powers are subject to that clinically appropriate and lawfully permissible test. I am not advancing a particular interpretation as being accurate. I am advancing the position, which I think has been self-evident over the past week, that it is ambiguous. There are a number of interpretations that could be placed on it, depending on one’s point of view. That is in respect of now and of people with a shared set of life experiences and does not account for what might happen in ten, 15, 20 or 100 years’ time.

The suggestion by the Minister that it would be defined is good and important if it is to be left in but, at the moment, a good reason to leave it in has not been advanced. It is clear from the golden share that the Minister’s intention is to deliver all lawfully available services. He is not looking to have these things clinically appropriate and lawfully available. The HSE is the source of its imposition in the deal but it is within the gift of the State to decide not to go ahead with it. Rather than creating a problem by including a list of definitions which are non-exclusive and asking everybody whether this and that is okay, surely the correct response would be to remove the controversial clause, for which there is not the need that there is for the other definitions. The reason given is that it is needed to ensure only maternity hospital services are provided but the permitted use clause at the top of the constitution says it is for legally permissible healthcare services by a maternity, gynaecological, obstetrics and neonatal hospital. If the purpose of “clinically permissible” is to say it is for national maternity hospital usage, it is a redundancy and is saying the same thing twice. If it is a redundancy that puts the future interpretation of all the protections in the agreement at risk, the correct response is to take it out, as the preference, and, only as second best, to attempt to define it.

**Senator Annie Hoey:** Someone was on saying the fact “clinically appropriate” is missing is a drafting issue and they are now saying it was supposed to be there. That is interesting because we have yet to be given an updated version. We may be able to discuss that in the next session. That is a significant omission.

**Mr. Simon McGarr:** If it were to be introduced, it would fetter the Minister’s powers in the future.

**Senator Annie Hoey:** I will seek clarity in the next session on this. Dr. Boylan mentioned that Bon Secours had merged with an American charity and there is the potential for that to happen with this. Will he elaborate on that? I have been in private and public meetings and in all our discussions thus far, that has not been discussed. Therefore, we have not had an opportunity to question and allay fears around that.

**Dr. Peter Boylan:** The constitution states that the directors have the power to merge, mortgage, sell and so on. The example I picked was the Bon Secours, which has six or seven hospitals in Ireland. It has a huge Catholic-based healthcare organisation in the United States. In that country there are many Catholic healthcare organisations with many hospitals and they are always looking to expand, merge and acquire other healthcare organisations. St. Vincent’s Healthcare Group will have an adult hospital, a maternity hospital, a private hospital and St. Michael’s, perhaps, as an elective hospital. It is a valuable asset and if the directors have the power to merge, what is to say they will not merge with an American Catholic healthcare organisation? There are many of them and they are enormously wealthy. The constitutions do

not protect against that.

**Senator Annie Hoey:** We had a discussion last night, not in this committee but in a different meeting, where there was something put forward that they could only take out a mortgage against the future value of it, which would be at the end of the term, which is in 300 years' time. I was also somewhat confused. Perhaps Mr. McGarr can give a legal analysis. We were told that they cannot, really, in any way, manner or form, take out a mortgage against this particular building or site.

**Mr. Simon McGarr:** In general terms, a landlord interest - a freehold interest in land - is an interest. It can be charged. A tenant's interest in land can also be charged as well. It is not correct to say that no landlord's freehold interest can be subject to a mortgage. That is not the case.

The terms of the lease, as it is eventually agreed, will include clauses that deal with under what terms can a mortgage be placed upon it and under what circumstances could such a thing happen. If the Senator comes back to me in three minutes, I will tell her which term it is because I have to land on it in the lease. However, it is addressed always, within the landlord and the tenant, as part of the lease agreement.

**Deputy Róisín Shortall:** It is in clause 6.4, which I quoted earlier.

**Mr. Simon McGarr:** Yes, I beg Deputy Shortall's pardon.

**Deputy Róisín Shortall:** They are free to mortgage it after 20 years, and in the first 20 years with written consent. That is the Government timescale.

**Senator Annie Hoey:** There we go.

**Mr. Simon McGarr:** The Deputy spared me the search.

**Senator Annie Hoey:** It seems this is one of these ones where it seems to be pretty clear that they can in some circumstances, yet we were told explicitly that they cannot do that because of various legal this, that and the other. In the next session, it is a question I will be happy to ask again because I am not entirely clear on the answer on that.

It just seems that we had a great opportunity here to really put it up to private business, the church or whatever, and set forward a vision for a secular progressive Ireland with a flagship maternity hospital. It seems that we will not grab the bull by the horns on this one. That is a real shame. Women and women's healthcare have suffered long enough. I would love if the Government had the gumption to seize that bull by the horns. I will leave it at that for now, if that is okay.

**Chairman:** I thank Senator Hoey. We are all keeping to our time today. Deputy Bríd Smith has seven minutes left, if that is okay.

**Deputy Bríd Smith:** I am sorry about that. It was an awful fit of coughing there. It does not look good in this Covid era. I hope I have protected the committee.

**Chairman:** That is why we all put our masks on.

**Deputy Bríd Smith:** I know. Does Dr. Boylan know of any example of something similar to this anywhere else in the world where such a complex convoluted labyrinthine deal has been done to co-locate a hospital.

**Dr. Peter Boylan:** I do not. I also do not know of any hospital in the entire world which is owned by a successor organisation to a Catholic religious congregation. It is unique. To think that Dublin 4 will set the pattern for the world, that is the best part.

**Deputy Bríd Smith:** There is, however, a more serious question on which I need clarification. Mr. Stephen Dodd SC provided a briefing for Uplift. Dr. Boylan has probably seen it. In part of it, Mr. Dodd SC talks about what I am getting at here. The religious history, the mistrust and all of that that we have all spoken about is a big part of it but I am beginning to think that this is more about mammon than it is about God, that it is about money and it is about corporate interests. When Mr. Dodd SC states in his briefing to us that there is a clause in the lease, clause 7, that allows for the permitted use, he states the definition of “permitted use” is crucial. Clause 1 defines permitted use as “the National Maternity Hospital Area [being used as] a public hospital primarily for the provision of all clinically appropriate and legally permissible healthcare services”; it is there again in the title of it. It goes further on to say that part of the clause in the lease is “provided always that the Permitted Use does not preclude the provision of any private healthcare services relating to the above uses which are permitted or envisaged”. Is this a clause that doubles down on the State leasing the land on the question of private care in that hospital, even though it is built with public money? Does Dr. Boylan follow, or am I being too convoluted?

**Dr. Peter Boylan:** I do.

**Deputy Bríd Smith:** The reason I was interested in it was because of that statement yesterday from Professor Deirdre Madden and Dr. Sarah McLoughlin. They are really concerned about the independent review that was established by then Minister for Health, Deputy Harris, in 2018 and the outcome of that review that Dr. Catherine Day was involved in, which recommended in strong terms that it is far better for the State to own the land when there is collocation, and they recommend it very much. Obviously, that recommendation, that review that was ordered by the Government, is just wiped away and everything else is gone ahead with. It triggered with me that this is more about the corporate interest rather than anything else and they are doubling down everywhere on it. I would be grateful to Dr. Boylan for his comments.

**Dr. Peter Boylan:** There is space in the new design for private consulting rooms. Every room will be a single room and I am not sure what the allocation will be of private versus public rooms. I am not aware of what the division is.

**Deputy Bríd Smith:** Is it not in the design yet or in the maps?

**Dr. Peter Boylan:** If they are all single rooms, I do not know whether one area will be put aside for fee-paying patients, private patients insured, or whether they will be mixed in. I just do not know.

Certainly, on that independent review, Professor Deirdre Madden and Professor Jane Grimson were also very much involved in the review that was chaired by Dr. Catherine Day. They were absolutely clear, with their recommendation 6.3, that the land should be owned by the State. Indeed, both the Tánaiste, Deputy Varadkar, and the Taoiseach have stated in the Dáil that the hospital would be State-owned on State land, and that is actually not happening. As the Deputy says, that is accepted by Government, as I understand the recommendations of that report.

**Deputy Bríd Smith:** I thank Dr. Boylan and thank the Chair.

**Chairman:** I will move on to Deputy Colm Burke next.

**Deputy Colm Burke:** I thank the witnesses for making themselves available and for the contribution that they are making to this debate.

My colleague referred to Mr. Stephen Dodd SC's opinion. This is about the compulsory purchase issue. Mr. Dodd SC, in page 62 of his opinion, states:

Insofar as the State proposes to compulsorily acquire the lands, the appropriate legislation is under the Health Act 1947 which confers on the HSE the power to compulsorily acquire lands. However, significant issues relate to whether the procedure under Health Act 1947 is constitutional in affording sufficient independence in the process for confirming a CPO.

In other words, he is saying in this opinion that he has doubts that there are sufficient powers in the 1947 Health Act to allow the State to compulsorily purchase this land. Would Mr. McGarr agree with him?

**Mr. Simon McGarr:** I would be a very unwise person to decide to advance an opinion in disagreement with a senior counsel without having examined the basis of the opinion made.

**Deputy Colm Burke:** Is Mr. McGarr now saying that if Mr. Dodd SC is saying this in his opinion, Mr. McGarr is saying that the State, in real terms, is not in the driving seat in relation to compulsorily acquiring?

**Mr. Simon McGarr:** No. I do not advance any position on that whatsoever.

**Deputy Colm Burke:** What is Mr. McGarr's view? Does he think the State would succeed in a compulsory purchase of this land?

**Mr. Simon McGarr:** I have not advanced any opinion on the question of a compulsory purchase order.

**Deputy Colm Burke:** But Mr. McGarr is here giving a legal advice. One of the issues being put out is that we should not be taking a lease. This is something Mr. McGarr is saying, that we should not be taking a lease.

**Mr. Simon McGarr:** I think everybody at the committee has agreed that it would be preferable that this was not held on a leasehold basis.

**Deputy Colm Burke:** But if we cannot acquire by way of compulsory purchase the freehold interest, what is the next best option?

**Mr. Simon McGarr:** I will certainly answer that question. As I say, it would be preferable to acquire it on a freehold basis.

**Deputy Colm Burke:** Mr. McGarr should be clear now on this. Under this senior counsel opinion, he is saying that the State may not - I am not saying it would not - be able to acquire the lands under a compulsory purchase acquisition.

**Mr. Simon McGarr:** I have not advanced the proposition that the State should.

**Deputy Colm Burke:** Can I will move on to the issue about the lease because Mr. McGarr referred to it in his presentation about the first schedule?

**Mr. Simon McGarr:** Yes.

**Deputy Colm Burke:** I am wonder if Mr. McGarr has the lease in front of him.

**Mr. Simon McGarr:** I do.

**Deputy Colm Burke:** Under the words “FIRST SCHEDULE”, there is, in brackets, “the Premises”.

**Mr. Simon McGarr:** Yes.

**Deputy Colm Burke:** Mr. McGarr is saying that, in fact, St. Vincent’s will own the premises?

**Mr. Simon McGarr:** That is what is being demised.

**Deputy Colm Burke:** But does Mr. McGarr understand the word “demise”? The word “demise” is, in other words, we are giving. Instead of transferring, we are demising. We are giving. The lease states that the agreement “HEREBY DEMISES unto the Tenant ALL THAT the Premises ...” The premises are the premises described in the first schedule.

**Mr. Simon McGarr:** That is correct.

**Deputy Colm Burke:** It goes on to state that is to apply for the term, which has already been defined as 299 years. In other words, St. Vincent’s does not own the premises. It has demised the premises and therefore the lessee, which is the NMH, will be the owners in real terms.

**Mr. Simon McGarr:** They have demised the leasehold interest as set out in the lease.

**Deputy Colm Burke:** Yes, but they also are fully in charge of the premises.

**Mr. Simon McGarr:** They are, insofar as the lease permits it. There are a number of restrictions in respect of its use.

**Deputy Colm Burke:** Let us go through the restrictions which are set out in paragraphs 4(a), 4(b), 4(c), 4(d), 4(e) and 4(f). Paragraph 4(a) refers to “the Tenant (or another State Authority with primary responsibility for the funding of Public Hospitals and the provision of public healthcare facilities)”. That is the covenant. The lands must be used for public healthcare facilities.

Paragraph 4(b) states “the Lease is not assigned without the consent of the Landlord”, which is a standard clause in a lease. Is that correct?

**Mr. Simon McGarr:** Yes. These are all restrictions.

**Deputy Colm Burke:** They are restrictions but these are standard in leases. Mr. McGarr is doing leasehold work all the time, including commercial leases.

**Mr. Simon McGarr:** To be clear, is the Deputy saying to me that there are no restrictions on the usage and that there is not a freehold?

**Deputy Colm Burke:** I am not. Mr. McGarr raised the issue of restrictions.

**Mr. Simon McGarr:** There are a number of perfectly standard restrictions. It is not to say there should not be restrictions in a lease. That would be normal. Rather, it is to ask what

would be the effect of the restrictions. Paragraph 4(c) stipulates that there shall be “no change to the Permitted Use without the consent of the Landlord”. I have not raised any concerns about paragraphs 4(a), 4(b), 4(d) or 4(e).

**Deputy Colm Burke:** The clause to which Mr. McGarr refers would be standard in any lease.

**Mr. Simon McGarr:** Its effect is determined by what the permitted use says.

**Deputy Colm Burke:** Mr. McGarr is dealing with commercial leases every day of the week.

**Mr. Simon McGarr:** I am not. I absolutely am not.

**Deputy Colm Burke:** Does Mr. McGarr not deal with commercial leases?

**Mr. Simon McGarr:** I do not deal with commercial leases every day of the week. I am looking at this as a person who is delivering his opinion.

**Deputy Colm Burke:** Does Mr. McGarr not have expertise in commercial leases?

**Mr. Simon McGarr:** I have experience in commercial leases. The Deputy asked whether I deal with them every day.

**Deputy Colm Burke:** No, the question I asked is whether Mr. McGarr has expertise in commercial leases.

**Mr. Simon McGarr:** I have sufficient expertise to read the black-and-white figures that are here in front of us.

**Deputy Colm Burke:** Has Mr. McGarr been involved in litigation about the interpretation of leases?

**Mr. Simon McGarr:** I have.

**Deputy Colm Burke:** A 299-year lease is being granted in this case. Paragraph 6.1 of the lease agreement states:

The Landlord hereby covenants with the Tenant [which is the NMH] that so long as the Tenant pays the rents and observes and performs the covenants and the conditions of this Lease the Tenant may hold and enjoy the Premises and the rights hereby granted peaceably during the Term without any unlawful interruption by the Landlord or any person lawfully claiming under or in trust for the Landlord.

In other words, the lease is quite clear that the tenant or the lessee has full control over the premises.

**Mr. Simon McGarr:** Insofar as the lease permits.

**Deputy Colm Burke:** Is the effect of the clause I have read out not that the landlord cannot disturb what the tenant is doing on the premises?

**Mr. Simon McGarr:** Yes, it says that, as long as the covenants and conditions of the lease are followed. It is only the covenants and conditions of the lease that are the restrictions that the lease applies.

**Deputy Colm Burke:** It is, therefore, a standard lease. It is no different from any other commercial lease that is given out in the commercial world.

**Mr. Simon McGarr:** The model of the lease is a standard lease insofar as it provides for covenants and restrictions. The nature of the restrictions are specific to this deal because the nature of the restrictions are defined by the permitted use clause, which is specific to this deal and no other.

**Deputy Colm Burke:** The freedom is in there for the lessee or tenant. In other words, the tenant will have full unfettered power to deal with the management of the premises and what goes on within the premises.

**Mr. Simon McGarr:** The tenant, which is the HSE, is putting in under licence the new national maternity hospital to perform functions.

**Deputy Colm Burke:** That is right. And the HSE-----

**Mr. Simon McGarr:** I am sorry. The restrictions upon the way the hospital can perform must fall within the “permitted use” clause of the lease. The permitted use clause of the lease defines how the hospital may act. Inside that permitted use clause is the phrase I have raised as a problem in this whole agreement, that is, that the hospital can only perform such actions as are “clinically appropriate and legally permissible”. That is unique to this set of circumstances. The phrase “clinically appropriate” is problematic. It is not about the fact that there is a quiet enjoyment clause within the landlord’s covenant or, indeed, that there are landlord’s covenants. It is that the nature of the covenant-----

**Deputy Colm Burke:** Does Mr. McGarr not accept that the licence which the HSE grants sets out clearly what the hospital will be required to deliver?

**Mr. Simon McGarr:** It will deliver clinically appropriate and legally permissible services.

**Deputy Colm Burke:** The HSE will not give it the licence unless it is prepared to deliver the service which is provided for under legislation in Ireland.

**Mr. Simon McGarr:** The Deputy will acknowledge that it is limited to clinically appropriate and legally permissible services.

**Deputy Colm Burke:** I will return to the issue of leases and landlords. Has Mr. McGarr come across a situation where a commercial lease is in place and the landlord has suddenly stepped in and told the tenant it cannot do the work it is doing in the premises because the landlord has a different interpretation of what is permitted?

**Mr. Simon McGarr:** I certainly have.

**Deputy Colm Burke:** It is quite clear in this case that as long as the tenant is providing healthcare services, maternity services, it is complying with the terms.

**Mr. Simon McGarr:** That is the case if the tenant is providing clinically appropriate and legally permissible services. That is the clause I believe is a problem.

**Deputy Colm Burke:** We are going around in circles on this issue. The licence is going to be granted by the HSE. The landlord is aware that a licence is going to be granted by the HSE. Therefore, the landlord will be aware of the licence that will be granted.

**Mr. Simon McGarr:** That licence will also acknowledge that the services will be as clinically appropriate and legally permissible.

**Deputy Colm Burke:** The licence specifically provides for the HSE, because it is under control of the Department of Health and the legislation clearly sets out what is involved in healthcare in this country, and, therefore, any licence granted by the HSE must be fully in compliance with the legislation.

**Mr. Simon McGarr:** Is it the Deputy's suggestion that the licence will take precedence over the lease?

**Deputy Colm Burke:** No. The licence that the NMH-----

**Mr. Simon McGarr:** Or that it would take precedence over the constitution of the new company?

**Deputy Colm Burke:** The NMH will have to comply with the terms of the licence.

**Mr. Simon McGarr:** The new national maternity hospital company cannot do anything outside its constitution.

**Deputy Colm Burke:** If it cannot comply with the terms of its licence, is it not then in difficulty?

**Mr. Simon McGarr:** The licence, the lease and the constitution all say that the relevant services will be clinically appropriate and legally permissible. Deputy Shortall referred to information that suggests there is to be a revision of the Minister's golden share such that it would also include an additional restriction so that instead of only looking for things that are lawfully permissible, the Minister could also only look for things that are clinically appropriate. I know Dr. Boylan has raised this question. That leaves the question to future Ministers for Health who would be in the position of having to determine what is clinically appropriate. That seems like a strange set of provisions to insert.

**Deputy Colm Burke:** Going back to the lease, does Mr. McGarr accept that they are going to be the owners and controllers?

**Mr. Simon McGarr:** It will have a proprietary interest which is a leasehold interest.

**Deputy Colm Burke:** That arrangement is accepted in the commercial market. If I were to tell Mr. McGarr that I was going to buy a building with a 299-year lease, would he advise me to buy it or not?

**Mr. Simon McGarr:** Would the Deputy like to define which building and under what terms?

**Deputy Colm Burke:** I am just asking Mr. McGarr a question.

**Mr. Simon McGarr:** It would depend on the terms.

**Deputy Colm Burke:** Is Mr. McGarr suggesting that a 299-year lease is not good title?

**Mr. Simon McGarr:** It depends on the terms of the title.

**Deputy Colm Burke:** This is a standard lease. It is a 299-year lease.

**Mr. Simon McGarr:** It is. It will provide the title the lease allows it to provide.

**Deputy Colm Burke:** It is a standard title.

**Chairman:** Deputy Colm Burke is over time.

**Deputy Colm Burke:** I am saying to Mr. McGarr that this is an acceptable lease in any commercial market.

**Mr. Simon McGarr:** Provided that the permitted use of the building meets the requirements and expectations of the State.

**Deputy Colm Burke:** That is clearly defined because that it is included in the licence.

**Chairman:** I have to cut the Deputy off. I call Senator Clifford-Lee.

**Senator Lorraine Clifford-Lee:** I thank our guests for coming here at such short notice. We appreciate their contributions. Following on from what Deputy Colm Burke was saying about good marketable title, could Mr. McGarr explain to the committee his interpretation of this?

**Mr. Simon McGarr:** In respect of this property?

**Senator Lorraine Clifford-Lee:** In general.

**Mr. Simon McGarr:** A good marketable title is one in respect of which the purchaser is able to demonstrate they have the right to sell the property and-or charge it if they are providing for a mortgage. It is one in respect of which the buyer, who will be separately represented by a solicitor, would ensure the title deeds, charges and requirements needed to prove good title exist — in other words, that the chain of ownership can be demonstrated and, if there is any hole in the change of ownership, that it can be remedied by, for example, long possession deep within the history of the property.

**Senator Lorraine Clifford-Lee:** What constitutes good marketable title is a freehold or leasehold property with an unexpired term of at least 70 years.

**Mr. Simon McGarr:** There are many properties that would have good marketable title. As with the one in question, you could have a property with a lease and ground rent. Famously, Guinness has a ground rent and a long lease of 9,000 years, although I think it might be more for marketing purposes than anything else that this is talked about. One can have an extremely long leasehold interest, and one can have a short leasehold interest, which is still marketable. It is not determined by the length of the lease. I ask that if I am to be questioned on land law, I be allowed to go out and get my copy of Wylie or that the questions address the lease before us.

**Senator Lorraine Clifford-Lee:** That is fine. I just wanted that clarification.

I want to move on to the CPO process. My colleague mentioned that there was a possibility that this would not be open to the CPO process. Could Mr. McGarr explain what should be done with the site now if he is not in favour of the Government going ahead with the leasehold?

**Mr. Simon McGarr:** Certainly. I thank the Senator for giving me the opportunity. As I said earlier, the preference, which is expressed by everybody at the committee and outside it, would be for the State to own the freehold and the land. The preference, if that cannot be done, is for the deal done to bring certainty in terms of the delivery of the services that are expected and that everybody agrees are expected to be delivered in this maternity hospital.

**Senator Lorraine Clifford-Lee:** How would that certainty be achieved?

**Mr. Simon McGarr:** I am suggesting that the primary method of doing that would be to delete the ambiguous phrase “clinically appropriate” from the documents.

**Senator Lorraine Clifford-Lee:** Would that satisfy Mr. McGarr?

**Mr. Simon McGarr:** I would be much more satisfied. One cannot be certain in the world but at least one would know that a known ambiguity would be dealt with. The two-word phrase “clinically appropriate”, which goes to the very heart of all the agreements, introduces ambiguity in every layer of this agreement and is within the gift of the State to remove. That is why it is important. I am of the opinion that, as Dr. Boylan has said, a good co-location project, and the co-location project that-----

**Senator Lorraine Clifford-Lee:** Mr. McGarr would be happy with the leasehold arrangement if the phrase were removed.

**Mr. Simon McGarr:** I would. Questions of value for money and secularisation would all be addressed in some area within the agreement once the uncertainty was removed by removing the phrase “clinically appropriate”.

**Senator Lorraine Clifford-Lee:** Is the only practical difference between having the freehold and leasehold that phrase within the documentation? If it were removed, it would be the equivalent of having a freehold-----

**Mr. Simon McGarr:** I do not think there is a problem with holding the leasehold if there are sufficient powers to ensure the delivery of good services. I believe that while it would be good-----

**Senator Lorraine Clifford-Lee:** Would Mr. McGarr accept that the delivery of good services is covered in the licence?

**Mr. Simon McGarr:** No. Unfortunately, it is bound by all the other usages of the phrase in all the levels of the agreement — the lease, the constitution of the new national maternity hospital and so on.

**Senator Lorraine Clifford-Lee:** Ultimately, however, Mr. McGarr is saying he is not opposed to the leasehold-----

**Mr. Simon McGarr:** No, I am not. On an ideological basis, it may not be good value for the State to spend money and gift it to a third party. From my point of view, my focus is on trying to provide some form of method by which there can be a greater chance of good quality services, the services everybody agrees are intended to be delivered, and to remove ambiguity that would get in the way of those services. It is not a value-for-money question, as far as I am concerned.

**Senator Lorraine Clifford-Lee:** Could I ask Mr. McGarr to speak about a phrase he used: “gift it to a third party”? Does he not accept that the existing National Maternity Hospital, at Holles Street, will in the deal be given to the State and that the State can then sell it or put it to another use? I refer to the National Maternity Hospital itself contributing something to the-----

**Mr. Simon McGarr:** But it is not the recipient of the building. Therefore, there is still a-----

**Senator Lorraine Clifford-Lee:** There is a *quid pro quo*. It is giving the building currently at Holles Street, which is on a very valuable site in Dublin city centre.

**Mr. Simon McGarr:** And St. Vincent's Healthcare Group is receiving a building.

**Senator Lorraine Clifford-Lee:** Yes, but to suggest the State is not getting something out of this as well-----

**Mr. Simon McGarr:** I am not suggesting that; I am specifically saying that matters of value for money are best left to the Comptroller and Auditor General. I do not attempt to try to impose my opinion on those, what the Senator might term ideological disputes in respect of what should be done with public property. My focus here is on trying to ensure the best outcome in respect of the clinical services being provided.

**Senator Lorraine Clifford-Lee:** I thank Mr. McGarr. I have a question for Dr. Boylan. Some years ago, he was in favour of compulsorily purchasing the Elm Park Golf & Sports Club and building tunnels to the Elm Park site. Would he still be in favour of that?

**Dr. Peter Boylan:** It was not a matter of tunnels. Many hospitals that are co-located have elevated corridors. You see them in many American cities.

**Senator Lorraine Clifford-Lee:** Bridges.

**Dr. Peter Boylan:** Yes. They cross from one side of the street to the other. Google has one at its buildings.

My understanding is that the Sisters of Charity own the land of Elm Park Golf & Sports Club.

**Senator Lorraine Clifford-Lee:** Is that still the option that Dr. Boylan favours?

**Dr. Peter Boylan:** If it would sort all this out, yes, because this is an unholy mess.

**Senator Lorraine Clifford-Lee:** Notwithstanding the obvious problems with the CPO process.

**Dr. Peter Boylan:** Of buying the land — in other words, a bit of the golf club — from the sisters-----

**Senator Lorraine Clifford-Lee:** Buying the land or going through the CPO process.

**Dr. Peter Boylan:** The sisters did say they were gifting lands worth €200 million plus to the people of Ireland. They have not honoured that commitment, which is a problem.

**Senator Lorraine Clifford-Lee:** But we just heard Mr. McGarr say the leasehold is actually a very good form of ownership. That is what actually has been given. Dr. Boylan is contradicting that.

**Dr. Peter Boylan:** No, not in the slightest. I do not understand any of that leasehold stuff; I am a doctor. I do understand medicine, the management of hospitals and clinical appropriateness.

**Senator Lorraine Clifford-Lee:** But Dr. Boylan has been commenting and offering his opinion on many other matters. That is why I was asking about-----

**Dr. Peter Boylan:** I think it would be wonderful if the sisters gave a patch of land from the golf club.

**Senator Lorraine Clifford-Lee:** Did Dr. Boylan follow our meeting yesterday?

**Dr. Peter Boylan:** I did, yes.

**Senator Lorraine Clifford-Lee:** Did he hear one of the clinicians state that having an adjacent site, not exactly entailing co-location, would entail a plan inferior to the one before us now?

**Dr. Peter Boylan:** A plot of adjacent land at the golf club would be as close as would be evident at many hospitals around the world. A reference was made to the Elm Park buildings, the ones down on the main Merrion Road, which are sometimes referred to as the McNamara buildings. When we almost owned those buildings or were close to having them given to us by the State, there was tremendous enthusiasm. It was considered to be absolutely clinically acceptable that we would site the hospital-----

**Senator Lorraine Clifford-Lee:** We are comparing physical co-location under this plan with having an adjacent site. Does Dr. Boylan accept — in the way his medical colleagues accepted yesterday, or proffered to us, even — that this would be an inferior plan?

**Dr. Peter Boylan:** With the problems that the current plan has generated, it would be better to have a land bridge between buildings. It does not have to be very long. That would truly mean the national maternity hospital would be separate, clinically independent and under separate governance, not with this ridiculous-----

**Senator Lorraine Clifford-Lee:** So, you would accept an inferior medical situation-----

**Dr. Peter Boylan:** No, absolutely not. Not if it is close.

**Senator Lorraine Clifford-Lee:** So Dr. Boylan does not agree with what his two colleagues said at the committee meeting yesterday.

**Dr. Peter Boylan:** It was not put to them that a patch of land from the golf club, with a land bridge, would be the alternative site. What was put to them was down on the Merrion Road, and certainly that would be inferior to what is proposed. What would be far superior would be a patch of land from the golf club given by the Religious Sisters of Charity-----

**Senator Lorraine Clifford-Lee:** We will have an opportunity to put that to the master of the National Maternity Hospital, Holles Street, later today so I will ask him that. I thank Dr. Boylan for his responses.

**Deputy Róisín Shortall:** Can I correct the record? I misspoke in referring to Professor Shane Higgins when I said he would like to see a list of the services included in the documents. It was Professor Declan Keane who was on that programme so I want to clarify that. He was clear when he said he would welcome the services being listed in the documents. I apologise for that.

**Chairman:** I will bring Senator Higgins in next and then we will take a comfort break at 6.30 p.m.

**Senator Alice-Mary Higgins:** I would like to return to the phrase “clinically appropriate”.

The nub of the term “permitted use” is that we have clinically appropriate and legally permissible services. I thank Mr. McGarr for highlighting the fact that the argument we have heard for “clinically appropriate” is that it would indicate that they should be services appropriate to a maternity hospital but that is, as Mr. McGarr said, already mentioned. We should use the following phrase: “all legally permissible healthcare services by a maternity, gynaecological, obstetrics and neonatal service” and remove the phrase “clinically appropriate”. That would remove a phrase that is undefined anywhere and Mr. McGarr might confirm if that is the case. That phrase is placed within the lease and within every other document and therefore all of the other matters would need to be interpreted by both the tenant and the landlord.

**Mr. Simon McGarr:** This phrase is placed at the top in all the hierarchies of definitions and that means all the other actions have to be interpreted in the light of that ground rule that either the hospital may only act in such a way in its “principal object” as is clinically appropriate and legally permissible, or in the alternative, that the only permitted use under the lease is one which is clinically appropriate or legally permissible.

**Senator Alice-Mary Higgins:** That is not defined. The Minister’s golden share is inferior, as Mr. McGarr said, and does not have-----

**Mr. Simon McGarr:** The phraseology is that it is “subsidiary and ancillary” to that principal use.

**Senator Alice-Mary Higgins:** It strikes me that the removal of the term “clinically appropriate” would give immense clarity. I am not satisfied with the other aspects of the lease either but that would give significant clarity. I might ask Dr. Boylan about that phrase “clinically appropriate” as a phrase that is not defined and about how it is interpreted. Dr. Boylan had started on that point but he did not have a full opportunity to discuss how, for example, the master of the hospital will report to the board and how the board has a role in health policy. I would like it if Dr. Boylan would comment on that question of how “clinically appropriate” might be applied. For example, I know there was a suggestion of providing a list of different practices but “clinically appropriate” is not simply a matter of what services are available; it relates to when they might be made available. He gave the example that in St. Vincent’s University Hospital at present sterilisation procedures are given when they are clinically required in relation to another health issue, but not for the purpose of sterilisation itself. How might the potential input of a board in the interpretation of the phrase “clinically appropriate” and in its influence on a master pan out if it is not addressed or properly clarified?

**Dr. Peter Boylan:** From the point of view of the board, if the term “clinically appropriate” is not defined then it is open to the board to interpret what it means because the master reports to the board and the master is directed by the board when it comes to policy. That rarely causes any problems whatsoever. I had a problem when I was introducing sterilisation, though we sorted it out. As I said, the composition of the board has three separate groups of three nominees. The three from the St. Vincent’s Healthcare Group are committed to upholding the values and vision of Mother Mary Frances Aikenhead, which are undoubtedly Catholic. If you have a conservative Minister for Health who appoints three people who are conservative they may well define “clinically appropriate” in a way which restricts the access of women to healthcare that they are perfectly entitled to. The term “clinically appropriate” allows for a qualification or a jump that must be made in order for women to access care, which is legal but which may not be interpreted as clinically appropriate by the board, and you may well get a conservative master as well.

**Senator Alice-Mary Higgins:** Mr. McGarr might confirm that there are tests for both “clinically appropriate” and “legally permissible”. For example, if a service that was legally permissible was being interpreted as not being clinically appropriate it may not be available, given that both tests need to be met.

**Mr. Simon McGarr:** That is correct; it is not a case of one or the other. Both tests together are being referred to in all the references.

**Senator Alice-Mary Higgins:** I note that Professor Madden and Dr. Sarah McLoughlin, two of the women of the national maternity hospital, have specifically said in their statement that boards: “influence the culture, values, and ethics of the entity they govern, and this gives rise to legitimate concerns”. That would clear things up somewhat and would remove an ambiguous phrase from interpretation in that way.

I am also concerned about the value for money issue and the freedom of the State in this matter. I know it was mentioned that the National Maternity Hospital, Holles Street, building would be sold and that this might contribute to the building of the first hospital on this site, which will then be given to the St. Vincent’s Healthcare Group. We have heard that there is likely to be a 70-year lifespan for a hospital on this site. Mr. McGarr might clarify the following point. The rent is €850,000 per year and is only waived down to €10 per year on condition of the permitted use happening in a full and ongoing way. Is it the case that at the expiry of a hospital in 70 years’ time the State would be obliged to build a new hospital and maybe another four or five hospitals subsequent to that to ensure it continues in the permitted use? If it fails to do so, will it be subject to a return to market rent rates, which is currently €850,000 per year on the site?

**Mr. Simon McGarr:** A hospital building built today will not last 299 years but the lease allows for the premises to be solely used for the purpose of the usage in the lease, which is a hospital and a specific kind of hospital, namely a maternity hospital. There is a clause which allows for an interregnum for repairs or other works such as are required to ensure that the hospital can continue, which would be generally acknowledged to include such works as are needed to ensure that if the hospital is to be replaced, rebuilt or refurbished its closure would not be a breach of the lease. However, it is the case that the lease does not allow for any other purpose for the site. If another purpose were to start to be imposed on this building in the future it is open to the landlord to take action on that to ensure the use is returned to the permitted one.

**Senator Alice-Mary Higgins:** Similarly, if a building is not replaced the landlord would have the right of forfeiture but am I correct in saying that while the landlord can invoke forfeiture, there is no mechanism for the State to do likewise? Perhaps in 70 years’ time, a different generation of women might have concerns, and I speak as somebody who has not campaigned for as long as many others here but who first campaigned exactly 30 years for something like repeal. What would happen if there were such issues? On a practical level, it was mentioned that the demographics show us that the north and west of the city will be the likely centres of population in the future, and Dr. Boylan might comment on this point as well. There is no mechanism for the State to end or exit this lease or to exit this practice and it would be obliged to continue. Again, that would be publicly. We are talking about the State potentially building four hospitals in a row over the next 299 years, or five or six hospitals, with those costs. Are those really the relevant costs in this matter? Is it a 70-year life cycle plus market rent for another 229 years? Are those the scenarios?

**Mr. Simon McGarr:** The State does have an option and there are mirror options between

the State and the landlord where it could seek to buy out the freehold, but those only happen primarily in the event of the insolvency of the St. Vincent's Healthcare Group. It is not permitted for a change of national policy, for example. The Minister was in with the committee yesterday and I am aware that he was concerned about the trust the St. Vincent's Healthcare Group would have to have with regard to the State's intentions. I believe the paperwork is intended to ensure that once this deal is done, it is an irrevocable deal to deliver a national maternity hospital with obstetrics and gynaecological services, and that this is the nature of the usage this building will be put to, with the exception of the reserved landlord areas, the example given being dermatology, within the building. These are the restrictions put on it. To demise it, it is triggered only by insolvency, primarily.

**Senator Alice-Mary Higgins:** It moves then to a market rent if the permitted use is not continued annually.

**Chairman:** Dr. Boylan has indicated that he wants to come in.

**Senator Alice-Mary Higgins:** I know I am running out of time, but I might ask Dr. Boylan-----

**Chairman:** The Senator is running out of time I am afraid.

**Senator Alice-Mary Higgins:** -----to address two other points. Will he also address the question of the constitution of the national maternity Hospital DAC? As I understand it, this can be changed without any reference to a Minister or Oireachtas oversight, but simply by a change to the Charities Regulator. Will Dr. Boylan address that question and also the business case issue, as he highlighted earlier?

**Chairman:** The Senator is way over her time and is pushing the limit out here.

**Dr. Peter Boylan:** I could not really talk about the lease and changes to the licence and all of that. On the permitted use, I can say that if the permitted use is restricted to women's healthcare in general, as we have discussed, and if there is overflow from St. Vincent's into vacant rooms when there is overcrowding in St. Vincent's Hospital, as discussed with Deputy Bríd Smith earlier, then I am not sure whether or not that triggers the crossing of the barrier of permitted use and if it would fire the gun for the €850,000 per year rent. I do not know that but this would be a violation of the permitted use clause.

**Senator Alice-Mary Higgins:** Okay. I asked also about changes to the constitution of the NMH DAC.

**Dr. Peter Boylan:** My understanding is that this can be changed. NMH DAC will be owned by the St. Vincent's Healthcare Group and by St. Vincent's Holdings, ultimately. So if they have the power to change it then it can be changed.

**Chairman:** I propose a short break.

*Sitting suspended at 6.33 p.m. and resumed at 6.43 p.m.*

**Deputy Bernard J. Durkan:** I welcome our guests. We meet again. In previous meetings, we generally agreed. We might not necessarily agree on all aspects but I am one of the people who have concerns similar to those that have been expressed. I thank Dr. Boylan for his tremendous work in this field over many years. I recognise his knowledge in that area. Regarding permissible and legally available services, does Dr. Boylan envisage any particular service or

provision that might be sought that would be undesirable? Should there be any control? I am trying to tease out Dr. Boylan's concerns and other concerns about it.

**Dr. Peter Boylan:** There is a great risk with the corporate structure that has been constructed around the NMH DAC, particularly at board level and the relationship between the board and the master. The next master will be appointed by that board. There is risk associated with the construction of the board - the three, three and three. At some time in the future, a conservative Minister for Health might appoint three conservatives and the three members from St. Vincent's side are committed to upholding Catholic values basically. That is an inherent recipe for conflict with the board members from the NMH if they are of a mind to be liberal in the interpretation of women's reproductive rights.

**Deputy Bernard J. Durkan:** Who then would have the ultimate right to dissolve the board and to ensure that the whole purpose of the exercise was not skewed in a particular direction assuming that a conservative Minister had taken control?

**Dr. Peter Boylan:** The three members from St. Vincent's are appointed by St. Vincent's so it has the authority to appoint or dismiss. Regarding the three members appointed by the Minister for Health, if the Minister is conservative - nobody really, in a word.

**Deputy Bernard J. Durkan:** But if a number of directors or board members decided that they had a concern and that it was time to dissolve the structures because of the threat of conservatism taking over, is it not possible to do that under the existing provisions?

**Dr. Peter Boylan:** I do not know. Perhaps Mr. McGarr might come in on that point.

**Mr. Simon McGarr:** It is the case that in the end, a board can be dismissed by the shareholders of a company. In this case, there is an agreement for a three, three, three appointment. There are two sets of shareholders, namely, the 99% shareholding owned by St. Vincent's Healthcare Group and the 1% shareholding held by the Minister. The Minister has certain reserved powers to ensure the board delivers within what is "clinically appropriate and legally permissible", to use the current unfortunate wording. The current wording, in respect of the Minister's intent, is to ensure that all lawfully available services would be delivered.

**Deputy Bernard J. Durkan:** Could that be seen as recognising the need to continue providing the maternity and ancillary services that are required?

**Mr. Simon McGarr:** That is an interesting point because according to the constitution, the exercise of the Minister's share is at his or her sole discretion. It is at the sole discretion of the Minister to exercise it. I presume this does not mean that a future Minister would decide to exercise or not exercise but rather that it is at the sole discretion of the Minister.

**Deputy Bernard J. Durkan:** What is this lease called? Is it a reversionary lease with conditions? Is it a conditional lease?

**Mr. Simon McGarr:** This is a straightforward commercial lease. It is straightforward because it looks to do a long lease with covenants. As Deputy Colm Burke said, given the nature of the covenants and the promise of quiet enjoyment once the covenants are followed, those are all elements of a lease. The difference with this lease is-----

**Deputy Bernard J. Durkan:** Are there not leases where there is a particular term entitled in each case, for instance, the owners retaining an interest in the particular property? There

are many reasons where that can happen, including commercially. In any event, the issue has already been talked about-----

**Mr. Simon McGarr:** There are not really disputes between any of the parties here within this lease or agreement as to what the intent is going to be in public. There are no disputes between the parties about the intent of the delivery of services. Nobody has said “No, it is not for that purpose”. Everybody has agreed that this is for the delivery of maternity services. The difficulty-----

**Deputy Bernard J. Durkan:** And that any curtailment of-----

**Chairman:** Let Mr. McGarr answer.

**Mr. Simon McGarr:** The issue is not about what the parties to the lease today intend. I accept the bona fides of every single person involved in this project to deliver a high-quality modern maternity service. That is the shared interest.

**Deputy Bernard J. Durkan:** So what is wrong with it?

**Mr. Simon McGarr:** My problem is an ambiguity has been introduced into the interpretation of the lease that will sit there for 299 years. Over the course of 299 years that ambiguity may be interpreted in ways we can neither predict nor be assured of. I am not saying one particular interpretation is correct. I am saying it is ambiguous.

**Deputy Bernard J. Durkan:** Is Mr. McGarr is saying the lease is for 299 years without interruption or review?

**Mr. Simon McGarr:** I have not commented on that at all.

**Deputy Bernard J. Durkan:** No, but I am asking you.

**Mr. Simon McGarr:** The lease is for 299 years with rent reviews every ten years.

**Deputy Bernard J. Durkan:** Correct. In the course of those reviews what can happen or is likely to happen? What changes can take place, if any?

**Mr. Simon McGarr:** Typically, under a rent review there is an examination of the market rate prevalent at that time and there will be an agreement between the parties as to what is the proper rent to apply after that review is completed.

**Deputy Bernard J. Durkan:** Turning to Dr. Boylan, I assume it is recognised ongoing research must take place and that this will be permissible under the present proposals or are there dangers there might be restrictions in the event of a worst-case scenario?

**Dr. Peter Boylan:** Research is part and parcel of a third level, high-class hospital like Holes Street and what goes on in the hospital. There is a huge amount of research going on at the moment. Again, we do not know about the future. There are gene therapies coming down the road. There is a technique called clustered regularly interspaced short palindromic repeats, CRISPR, which will probably require IVF and the treatment of embryos prior to implantation into the mother. The church, apparently, has not taken a particular position on this so we are not sure what the ethical guidelines and codes around that will be, so there are risks associated with the structure at the moment.

Subcommittees will be formed and one of the subcommittees is an ethics committee. That

has the potential to cause problems when you look at the board structure because it is a sub-committee of the board so there will be board members on that committee. Again, we are at risk with the current structure that, if there are conservatives on that ethics committee from the board, that could create serious problems. Under the current structure, therefore, there are so many risks associated with this it is very hard to see how there will not be conflict, rows and reversions to the courts, perhaps, and back to the Minister, and who knows who the Minister will be. We have seen the problems in the US with *Roe v. Wade* being rolled back. Women's reproductive rights are under threat, under attack and there is pushback all over the world. This structure creates a risk in that respect.

**Deputy Bernard J. Durkan:** I agree there could be a certain similarity with the US because it has a constitution and we have a constitution as well, apart altogether from the hospital agreement and constitution. Will Dr. Boylan pick out a single issue or item that would safeguard against the issues he is concerned about and protect and preserve the full extent of the available and necessary services and research? This is where we go back to the interpretation of "necessary". I want to ask this question. Are there situations where a patient can present in any place, that is, a maternity hospital or anywhere else, where a proposal by the patient may not be acceptable medically or ethically, setting aside altogether all the religious parts of it? I can think of one or two.

**Dr. Peter Boylan:** There are but they would be quite rare. Somebody may turn up and say, "I want my left leg cut off, please", or something ridiculous like that. That obviously is-----

**Deputy Bernard J. Durkan:** I was thinking about female genital mutilation.

**Dr. Peter Boylan:** Yes. My understanding is that is now illegal in this country.

**Deputy Bernard J. Durkan:** I think so, but it goes on legally or illegally.

**Dr. Peter Boylan:** It does, yes.

**Chairman:** I ask the Deputy to finish his point.

**Deputy Bernard J. Durkan:** Can I have the question answered?

**Chairman:** Yes.

**Dr. Peter Boylan:** There are situations, yes, and that is an excellent example. That seems to happen in society but it is completely unacceptable. If a mother brought a child along and asked us to do a genital mutilation, that is illegal in the first place so the answer is "No".

**Deputy Catherine Connolly:** I thank the committee for allowing for this possibility. It is very important. I thank Dr. Boylan and Mr. McGarr. They have come in here and have done so in a very modest, moderate way to try to educate us. I appreciate that and all their effort on the ground. I have despaired at various stages of this, but that is for another day. I will try to clarify some aspects. I have read all the documents, with the help of my staff in my office. We have gone around in circles. I hope I will not go around in circles; I want to clarify a number of things. This is a leasehold. There is no ownership here. This does not belong to the State. This belongs to the landlord, notwithstanding that it is a 299-year lease. I refer to both the land and the hospital that is going to be built.

**Mr. Simon McGarr:** There is a proprietary interest-----

**Deputy Catherine Connolly:** I understand that but we do not own it.

**Mr. Simon McGarr:** -----and the landlord at all times is in the first schedule as St. Vincent's Healthcare Group.

**Deputy Catherine Connolly:** Yes. I have seen it described as just a technical thing. Whether it is or not I want to put a few little things to bed here. It is a leasehold interest, so the HSE or the State will neither own the site nor the hospital.

**Mr. Simon McGarr:** They will not.

**Deputy Catherine Connolly:** I thank Mr. McGarr. Moving to the use of the premises, in the context of things that have emerged - and I tried to listen as best I could to what happened yesterday and today - some of the premises will be used for private practice but we do not know how many rooms. Has that emerged?

**Dr. Peter Boylan:** That is correct, yes.

**Deputy Catherine Connolly:** It is correct. Is Dr. Boylan aware of whether that is private practice for the consultants who have both a public and a private contract or is it open to private medicine?

**Dr. Peter Boylan:** I imagine that, as in most hospitals, it would be for consultants who have public contracts and the right to private practice as well but not outside private consultants.

**Deputy Catherine Connolly:** Okay. I thank Dr. Boylan. Then there is the co-location. I find it a source of frustration we are continually given the background of the importance of the hospital. That goes without saying. We were first to bring a motion before the Dáil to seek implementation of the national maternity strategy, which was not being implemented, further to a HIQA report that was condemnatory insofar as HIQA can condemn anything. I do not need any background information, therefore, on how important this is.

What has happened to this co-location, which first came about as a result of an accountant's report back in 2008, Government policy in 2013 and four Ministers since? Is it still co-location or am I exaggerating by saying it is no longer co-location but the proposed new national maternity hospital is a wholly owned subsidiary of St. Vincent's Healthcare Group?

**Dr. Peter Boylan:** That is correct and the St. Vincent's documents, like the annual report and so on, make continual reference to clinical and corporate integration.

**Deputy Catherine Connolly:** Okay. The terminology around clinically permissible and legally permissible has been teased out so I am going to park that for a moment. Various things have been said about red herrings or misinformation. I have tried desperately to get all the information and make sense out of it, so I take issue with comments like that from various doctors, I might add, and various people. It is unacceptable. Let me look at this. The co-location is no longer co-location. The new national maternity hospital will be a wholly owned subsidiary of St. Vincent's Healthcare Group, which will be owned by St. Vincent's Holdings.

**Dr. Peter Boylan:** That is correct.

**Deputy Catherine Connolly:** It is correct. St. Vincent's Holdings is a new company to which the nuns gave their share and it is owned by three directors who are shareholders.

**Dr. Peter Boylan:** That is right, at the moment. Yes.

**Deputy Catherine Connolly:** Okay, and we know nothing about how, in what manner or what conditions were attached to the Religious Sisters of Charity divesting its ownership of whatever it has given over. We know nothing about that, do we?

**Dr. Peter Boylan:** We have seen no paperwork between Ireland and the Vatican apart from the letter of permission from the Vatican which contained-----

**Deputy Catherine Connolly:** That was a condition-----

**Dr. Peter Boylan:** It contains information in it which means there is other documentation and paperwork we have not seen.

**Deputy Catherine Connolly:** Okay. Thus, at some stage, and Dr. Boylan has mentioned it, the Religious Sisters of Charity said it was giving it as a gift.

**Dr. Peter Boylan:** That is right.

**Deputy Catherine Connolly:** That gift did not materialise-----

**Dr. Peter Boylan:** No.

**Deputy Catherine Connolly:** -----but what did materialise was a transfer that was confirmed just two or three weeks ago where Religious Sisters of Charity has finally given over its share to St. Vincent's Holdings at the top of the pyramid.

**Dr. Peter Boylan:** That is correct.

**Deputy Catherine Connolly:** We have no idea of the circumstances or conditions surrounding that gift, transfer or otherwise. Is that right?

**Dr. Peter Boylan:** That is correct.

**Deputy Catherine Connolly:** St. Vincent's Holdings would have been enriched immeasurably by that transfer of land.

**Dr. Peter Boylan:** I am sure its balance sheet would have increased by a huge amount. The conditions were such that the sisters had to observe certain canon laws in the permission granted. We have no knowledge of the instructions as to how they were to observe such laws, and we have not had sight of a shareholder agreement, which might also reveal some of these things. We really need to see all the paperwork between Ireland and the Vatican.

**Deputy Catherine Connolly:** At the time, thanks to Dr. Boylan and other people, we got some insight into which aspects of Canon Law had to be complied with to allow for the transfer of the nuns' possession over St. Vincent's Holdings, but we have no clarity on that.

**Dr. Peter Boylan:** That is correct. There was a lot of misinformation as to whether or not they needed permission. They needed permission, but that fact was denied by various parties.

**Deputy Catherine Connolly:** Dr. Boylan has already said it is important to get that documentation.

**Dr. Peter Boylan:** It is absolutely critical because we do not know what the sisters asked for or the reasons presented. We have not seen the documentation submitted to the Vatican, and we

have not seen any instructions as to how they are to obey Canon Law.

**Deputy Catherine Connolly:** The Government tells us not to worry about that because we now have St. Vincent's Holdings with a new constitution, St. Vincent's Healthcare Group with a new constitution, and the national maternity hospital designated activity company with a constitution and because those three constitutions set out that there should be no concern about religious influence because the organisations have now been made into secular organisations.

**Dr. Peter Boylan:** We are being asked to believe that the Vatican has approved the transfer of the sisters' assets into a holding company in order to facilitate the building of a maternity hospital in which procedures directly contradictory to Catholic Church law will take place. That is the problem.

**Deputy Catherine Connolly:** Let us take a different route in the few minutes I have left. The Religious Sisters of Charity could have decided to gift the site to the State.

**Dr. Peter Boylan:** They said they would.

**Deputy Catherine Connolly:** That did not happen.

**Dr. Peter Boylan:** That is correct.

**Deputy Catherine Connolly:** We do not know why it did not happen.

**Dr. Peter Boylan:** They probably were not let because they are-----

**Deputy Catherine Connolly:** That is one possible interpretation, or they might have come to some arrangement with St. Vincent's Holdings or St. Vincent's Healthcare Group. We do not know.

**Dr. Peter Boylan:** We do not.

**Deputy Catherine Connolly:** It is vital to know that.

**Dr. Peter Boylan:** Absolutely.

**Deputy Catherine Connolly:** Here we are now with a secular St. Vincent's Healthcare Group. Does Dr. Boylan know at what point it became secular?

**Dr. Peter Boylan:** I am not sure it is secular because we have not seen the correspondence between Ireland and the Vatican.

**Deputy Catherine Connolly:** It assures us in the documentation we all have that it is now secular. Well, I think one part of the documentation says it is evolving into a secular group, but lately we have heard it is a secular group. Dr. Boylan cannot help us as to when it became a secular group.

**Dr. Peter Boylan:** I am not sure it has become a secular group so I cannot throw any light-----

**Deputy Catherine Connolly:** What would Dr. Boylan need to see to-----

**Dr. Peter Boylan:** All the paperwork between Ireland and the Vatican relating to this.

**Deputy Catherine Connolly:** Going back to Mr. McGarr, I would be unhappy with a lease-

hold interest, notwithstanding the fact that it is a 299-year lease. Is that lease more beneficial to St. Vincent's Holdings and St. Vincent's Healthcare Group than it is to the State?

**Mr. Simon McGarr:** As I said, I am leaving aside the questions of money and value, which are not my focus. Rather, the focus is on the provision of the services. If the services are provided as intended, it is for the State to decide that this is a sufficiently good-value lease.

**Deputy Catherine Connolly:** What is the benefit to St. Vincent's Healthcare Group or St. Vincent's Holdings of having the whole leasehold?

**Mr. Simon McGarr:** The network of agreements delivers benefits to each one of the parties.

**Deputy Catherine Connolly:** The one reason put forward for St. Vincent's Healthcare Group that I read is that it wants to provide integrated care because of the interconnecting areas. Could that have been done by contract or by different legal documents? I am talking about full ownership being given over to the State and the various legal documents stating that there are interconnections.

**Mr. Simon McGarr:** In the lease there is a set of terms relating to shared areas. Those shared areas may be corridors or interpiercings between the two buildings. Those shared area agreements do not require a common ownership on both sides of the agreement. The same terms could be reached between independent parties. The example would be given that there is no requirement for St. James's Hospital to own the new co-located national children's hospital in order for the co-location to function on that campus.

**Deputy Catherine Connolly:** I am over time. I have just one last point for Dr. Boylan. He has mentioned it a good few times and it touched me. I am talking about the change in autonomy from the woman to the clinician if we go with what is deemed clinically appropriate. Dr. Boylan might conclude on that for me, with the Chairperson's permission. The change is that we are taking autonomy from the woman and putting it back totally into the hands of the clinician, whoever he or she may be.

**Dr. Peter Boylan:** It is particularly relevant in light of the repeal of the eighth amendment and the introduction of the 2018 Act, which allows for a woman to make a decision about her own healthcare independent of any doctor's opinion. The term "clinically appropriate" puts the authority back onto the doctor and removes autonomy from the woman.

**Senator Aisling Dolan:** I wish to follow up on some of the points that have been raised. May I ask our legal expert, Mr. McGarr, whether Holles Street is currently on a freehold lease?

**Mr. Simon McGarr:** It is not. It is on a long lease. I am told by Gavan Reilly, who seems very reliable in these matters, that the Earl of Pembroke is the current holder of the ground freehold in respect of Holles Street.

**Senator Aisling Dolan:** Is Holles Street owned by the State then?

**Mr. Simon McGarr:** It is not.

**Senator Aisling Dolan:** How many hospitals or medical facilities in the country are owned by the State?

**Mr. Simon McGarr:** That is information I do not have, I am afraid.

**Senator Aisling Dolan:** Can Mr. McGarr give an estimate?

**Mr. Simon McGarr:** The HSE hospitals are owned by the State. They are delivered directly by the State. Then there are a large number of voluntary hospitals.

**Senator Aisling Dolan:** Who owns the voluntary hospitals and the ground on which they stand?

**Mr. Simon McGarr:** A number of voluntary organisations own the voluntary hospitals. Some are on freeholds; some are on a leaseholds. As I said to the Senator's colleague, my objection is not to anything regarding the ownership of the property *per se*; my objection is to the fact that the lease, as it stands, creates a restriction as to how that leasehold property might be used in such a-----

**Senator Aisling Dolan:** I am sorry to interrupt Mr. McGarr but I wish to go back to my questions. Mr. McGarr said Holles Street is on a long-term lease. Is that correct?

**Mr. Simon McGarr:** That is what I am told in media reports.

**Senator Aisling Dolan:** Does that impact the types of operations currently conducted at Holles Street? Have the medical operations we are speaking about been impacted by the hospital's being on a long-term lease?

**Dr. Peter Boylan:** No. Holles Street, the National Maternity Hospital, as it stands, has a completely independent corporate structure which is not owned by any successor to a Catholic religious congregation.

**Senator Aisling Dolan:** As for the lease, though, the State does not own the site on which Holles Street currently stands.

**Dr. Peter Boylan:** Not at the moment.

**Senator Aisling Dolan:** Dr. Boylan was master at that hospital. Can operations be conducted at the hospital irrespective of the ownership of the ground on which the hospital stands?

**Dr. Peter Boylan:** Yes.

**Senator Aisling Dolan:** Operations can happen there irrespective of who owns the land. Is that correct?

**Dr. Peter Boylan:** They can in the National Maternity Hospital because of the corporate structure, which is not owned by a successor to a Catholic religious congregation.

**Senator Aisling Dolan:** The hospital is not owned by the State as such. It involves a long-term lease.

**Dr. Peter Boylan:** The hospital is owned in trust by up to 100 governors, although there are not 100 governors. I am one of them. I am the life governor. We own the hospital in trust. There is no financial advantage to us.

**Senator Aisling Dolan:** I understand. Will Mr. McGarr explain to me the difference between the long-term lease and the freehold lease for 299 years?

**Mr. Simon McGarr:** Certainly. Were a freehold to transfer, there would be no covenants

in respect of the permitted use of the hospital during that time. It would be owned by the State, to be used as the State saw fit. In addition, there would not be a reversion to the freeholder at the end of the lease and there would not be controls in respect of the covenants relating to the mortgaging and so on, which are agreed between the parties.

**Senator Aisling Dolan:** Mr. McGarr has just said that with a long-term lease, as opposed to a freehold lease, the hospital would be owned by the State. Is that correct? It was the question of freehold versus long-term lease.

**Mr. Simon McGarr:** Yes. If the State held it in freehold it would be able to use it for whatever purpose it wished. It would not be restricted by a lease.

**Senator Aisling Dolan:** Currently, the site at Holles Street is a long-term lease and it does not have an impact on the types of operation that can take place at the hospital.

**Mr. Simon McGarr:** That, of course, goes back to the exact terms of the lease. I do not believe the Holles Street lease, for example, involves the Earl of Pembroke appointing three of the directors and I do not believe it involves the kind of covenants and restrictions on permitted use in this lease. One is not the same as the other. Generally speaking, leasehold interests can be as restrictive or as unrestricted as agreed between the parties. A leasehold interest is not, in itself, objectionable. The reason a leasehold interest causes difficulty in this case - the difficulty I identify - is that there is a restriction on the permitted use, which, unfortunately, involves an ambiguity.

That restriction, I think, is not intended to cause problems. That is to say the drafters did not intend there to be an ambiguity; rather, it has been put in there but the consequences are that there is an ambiguity. An ambiguity in the permitted use of the lease results in a risk of some form of problem down the line with a future set of people who do not share the understanding there now.

**Senator Aisling Dolan:** Will Mr. McGarr clarify again the ambiguous term?

**Mr. Simon McGarr:** Certainly. There is a permitted use clause that states the hospital's activities must be both clinically appropriate and legally permissible. The term "clinically appropriate" is not defined. Even in circumstances where all the parties are in agreement as to what is the definition, unless that definition is reduced into writing and, I would say, placed inside the lease, we would be left with the difficulty that a future interpretation may not comply with what everybody has said they expect it to mean now.

**Senator Aisling Dolan:** Yes. Many clinical experts have spoken very clearly to the fact that the term "clinically appropriate" references solely maternity services in terms of the type of hospital.

**Dr. Peter Boylan:** That is a rather novel definition of "clinically appropriate".

**Senator Aisling Dolan:** We have heard this morning that over 400 clinicians have signed letters of support for the national maternity hospital. What is Dr. Boylan's opinion of those 400 clinicians who support the development of this hospital?

**Dr. Peter Boylan:** I support the development of this hospital. I do not support the current proposed corporate ownership and structure. It is fraught with risk. We are on the same page when we want the national maternity hospital to move to a modern hospital. There is an

enormous amount of work that has gone into it by the people at Holles Street and the HSE and so on. I support that but I am concerned about the risks associated with the current proposed governance and ownership structure. It is not true co-location, which was in the original plan. It is the risk involved with the current arrangement that concerns me. I fully support the move otherwise.

**Senator Aisling Dolan:** The compulsory purchase order, CPO, process for the land would be very challenging for many reasons, particularly because it is a charitable organisation that is transferring land to another charitable organisation. A CPO would not be possible in that scenario. What is Mr. McGarr's comment on that?

**Mr. Simon McGarr:** I am not advancing the proposition that there should be a CPO at all.

**Senator Aisling Dolan:** What is his suggestion then?

**Mr. Simon McGarr:** My suggestion is as set out in my opening statement. First, there is a new owner of St. Vincent's Healthcare Group. That owner has only taken ownership in the past couple of weeks. As far as we know - and we completely accept - the new owner is independent of and totally separate from the previous owners. It is ready to make a fully independent decision as to the disposition of the property.

**Senator Aisling Dolan:** The religious orders have indicated they have moved completely out of this-----

**Mr. Simon McGarr:** That is what I am saying. The religious orders have moved out. I am saying there is a brand new owner. A brand new owner gives an opportunity to look afresh at the question of a request as to whether the State may either purchase the site, or St. Vincent's Healthcare Group would be in a position to assist by gifting the site. As a secondary proposition, presuming that is not the case and the matter would go ahead on a leasehold basis, my suggestion relates to the lease.

I am not looking at a piece of paper or agreement where nothing can be saved. This lease is almost there. This lease has strong protections in respect of the golden share but, unfortunately, they are made subsidiary and ancillary to the definition of the primary object of the new maternity hospital. It is the case that this lease is almost there. My proposal is to delete the references to the ambiguous phrase of "clinically appropriate" and leave it be that the matter would stand as it states in the lease. These would be services to be delivered in a national maternity, obstetric, gynaecology and neonatal hospital. Everyone supports that. Only the services that are lawfully permissible should go ahead. That is my proposition as the second best option if the land cannot be owned freehold, which everyone else agrees would be preferable if it were possible. If it cannot, and there must be a leasehold, my preference would be that the leasehold would not include an ambiguous phrase that could possibly cause 299 years of litigation.

**Senator Aisling Dolan:** I admit I do not agree with that final conclusion. Maternity services for women in this country are so outdated. We had a tour of the hospital this morning and saw a 15-bed ward where women are sharing toilets. Any delay in services will have a major impact on the health outcomes of many women. Dr. Boylan knows this and has seen what goes on in the hospital. Is it possible the State can delay even a single day in delivering services for women in the country?

**Dr. Peter Boylan:** As I said, I fully support the move. It is interesting that patient satisfaction levels are running at 95% so the women going through the hospital seem to be happy with

the service they receive.

**Senator Aisling Dolan:** How is it possible they can be happy in a 15-bed ward sharing two toilets and there are curtains between the beds? Is Dr. Boylan stating women are happy with that?

**Dr. Peter Boylan:** I am quoting from the National Maternity Hospital 2020 report.

**Senator Aisling Dolan:** I am not asking Dr. Boylan to quote a report. I am asking his opinion.

**Dr. Peter Boylan:** It states that patient-----

**Senator Lorraine Clifford-Lee:** They are happy with the service and nobody is arguing the service provided by excellent clinicians, midwives and doctors-----

**Chairman:** Please, Senator.

**Dr. Peter Boylan:** If I could be allowed to answer the question, perhaps we would have a debate. I am quoting from the 2020 report of the National Maternity Hospital, which puts patient satisfaction at 95%. The clinical outcomes are on a par with the best in the world. There has been an extraordinary amount of investment in the hospital over the years.

**Senator Aisling Dolan:** That is down to the doctors-----

**Chairman:** Hold on. Allow the witness answer the question.

**Dr. Peter Boylan:** Was the Senator brought to the new foetal medical unit or the refurbished postnatal wards? What about the new neonatal intensive care unit or the MRI unit? It is the only maternity hospital in the whole country with an MRI unit. Was the Senator brought to all of those or was she just brought to the single ward that has more than-----

**Senator Aisling Dolan:** No, we were brought on a tour of the whole area. Can I ask Dr. Boylan-----

**Dr. Peter Boylan:** What did the Senator think of the really good facilities?

**Senator Aisling Dolan:** I might ask a question if that is okay.

**Chairman:** With respect, we do not have time to get into a question and answer session. I need to move back to members and I am trying to be as fair as possible.

**Senator Aisling Dolan:** Thank you.

**Chairman:** There is less than ten minutes left. Members do not need to ask questions.

**Deputy John Lahart:** I will make a few brief points. I have listened to Dr. Boylan and I know he demands great respect, particularly among women. Nonetheless, I cannot help but think he has pressed all the appropriate buttons in his contribution today that frighten people, particularly in the context of women's health and the hard-fought gains therein. He is frightening them over the independence of the hospital when there are particular clauses guaranteeing independence over budgetary, clinical and operational running of the hospital. They cannot be interfered with and are guaranteed in the constitution of the hospital. He knows that. Another element that disturbs me is the subliminal reference gesture to *Roe v. Wade*. Dr. Boylan did not

mention them by name. We are all very mindful of what has happened in the United States. The reference to a conservative Minister appointing a conservative board cannot apply here. We have a Constitution which is very clear on the role of the Minister. It states, “the executive power of the State shall, subject to the provisions of the Constitution, be exercised by or on the authority of the Government”. The right to termination is enshrined in the Constitution. No matter how conservative a Minister is, he or she simply cannot do that under our Constitution. Dr. Boylan knows that. This is what disappoints me most about his contribution. He has pressed buttons that he knows will frighten people. I have pointed out two of them and there are more. They are simply not based on fact.

**Dr. Peter Boylan:** Everything I have said in this forum is based on fact with documentary evidence. For example, the 95% satisfaction rate in the National Maternity hospital on which the Deputy passed no comment.

**Deputy John Lahart:** Satisfactory-----

**Dr. Peter Boylan:** I would like to answer the question. The Minister under the constitution of these companies has the right to appoint three members of the board of the new national maternity hospital. The board members from St. Vincent’s Healthcare Group nominated by St. Vincent’s Holdings are committed to upholding the values and vision of the Religious Sisters of Charity. Deputy Lahart may say they are not Catholic but I think that is hard to believe.

**Deputy John Lahart:** I did not say that.

**Dr. Peter Boylan:** In summary, we are asked to believe the Vatican has approved the creation of a company that will permit the building of a hospital in which procedures directly contradictory to Catholic ethical teaching will take place. We have not seen any of the paperwork between Ireland, by which I mean the Sisters of Charity and the archbishops, and the Vatican. We need to see this before there is any further progress. If we see them we may well be highly reassured. This may be unique in the world where the Vatican has said to go ahead and build a hospital, that it does not care what is done in it and to do terminations-----

**Deputy John Lahart:** Does Dr. Boylan accept-----

**Chairman:** Deputy Lahart has run out of time.

**Deputy Róisín Shortall:** I am disappointed with those comments. This has been a civil debate, as it was yesterday. Plenty of us could have severely criticised the Minister for coming in and essentially saying “trust me”. I am sorry but this is what parliamentary scrutiny is about. It is about digging down into the detail of a proposal and seeking answers. Until last Tuesday the Government was quite happy to nod through this proposal. It was only because of people such as Dr. Boylan, Mr. McGarr and many other people who have serious concerns about the proposal and general public outcry that the Government was forced into publishing the legal documents. We still do not have them all. We still do not have the critical document in respect of the application to the Vatican. This is essential. I suggest members would be remiss in their responsibilities as public representatives if they did not insist on us getting this documentation.

We like to operate on the basis of evidence and fact. We can only establish the facts when we have the legal documentation. We need adequate time to consider it. Essentially, the Minister agreed with this today. We asked him to request additional time from the Cabinet next Tuesday so we could properly interrogate all of the significant issues that we are all grappling with. This project will cost at least €800 million. We know very little about the detail of it.

12 May 2022

Everybody must admit there is huge ambiguity about what the legal documents entail and what they will mean for the future.

None of this proposal is in line with Sláintecare. A significant element of this is about the promotion of private healthcare, and not only private healthcare but private Catholic healthcare. There are ample examples of what is happening in this country and people should open their eyes. Publicly funded property in education and health and the trust funds-----

**Senator Lorraine Clifford-Lee:** Sorry, does Deputy Shortall have a question or she just-----

**Deputy Róisín Shortall:** I am making a point-----

**Chairman:** Senator Clifford-Lee please. This is not the first time members have taken advantage and made a statement.

**Deputy Róisín Shortall:** -----just as the Senator's colleague used his time to make highly derogatory points. Let us deal with this in a respectful and honest way. Let us keep minds open and carry out our duties properly and have adequate parliamentary scrutiny. We are only just getting to the point where we are reaching the detail of this and we have had a battle to get this detail. It is not over yet. Members should not consider supporting any proposal whereby this would be rubber stamped next Tuesday. We need more time.

**Deputy Colm Burke:** I want to come back to Mr. McGarr on the lease. He told Deputy Connolly the State will not own the building. This is incorrect. It is a 299-year lease. Is he saying that anyone with a leasehold title to a property does not own the property?

**Mr. Simon McGarr:** They do not own the full title.

**Deputy Colm Burke:** They do own the property. There is misinformation out there. The State will own the property for 299 years. Does Mr. McGarr accept this?

**Mr. Simon McGarr:** It owns a leasehold interest in the property.

**Deputy Colm Burke:** It owns a leasehold but it owns the property and the building.

**Mr. Simon McGarr:** It does not. It owns a leasehold interest in the building.

**Deputy Colm Burke:** Does Mr. McGarr understand the word "demise"?

**Mr. Simon McGarr:** I do.

**Deputy Colm Burke:** The word "demise" means the lease of the premises is given for 299 years and that premises is the State's to manage and run. I have quoted clause 6.1. Mr. McGarr is now saying the none of the people in the entire country who have leasehold title own their property.

**Deputy Róisín Shortall:** The Deputy has already got an answer to that question.

**Chairman:** Hold on.

**Deputy Colm Burke:** I am entitled to-----

**Chairman:** If this continues I will close the meeting.

**Deputy Colm Burke:** This person is saying the State will not own the building. That is incorrect and he knows it.

**Chairman:** I ask Deputy Burke to let the witness answer.

**Mr. Simon McGarr:** The State will own a leasehold interest in the building.

**Deputy Colm Burke:** Which is the building.

**Chairman:** Deputy Burke has asked a question and I ask him to let the witness answer.

**Mr. Simon McGarr:** The State will own a leasehold interest in the building. That leasehold interest will be set out in the lease. The owners of the building as the landlord is the St. Vincent's Healthcare Group.

**Deputy Colm Burke:** The building is owned by the leasehold owners. No one can interfere with that lease while they are paying and complying with the conditions in the lease.

**Mr. Simon McGarr:** They certainly are in occupation but it is unusual in Ireland to have an argument made that being a lessor and renter of property and having a leasehold interest is the same thing as owning the freehold interest in the property. There is a difference between the two. The difference is set out in the terms of individual leases. Not all leases are the same and not all leases have the same covenants.

**Deputy Colm Burke:** It is accepted that leasehold title is good title.

**Mr. Simon McGarr:** Absolutely it is good title. It is a leasehold title.

**Deputy Colm Burke:** It is accepted that such people occupy the premises and own the premises.

**Mr. Simon McGarr:** They own the leasehold in the premises.

**Deputy Colm Burke:** They own the premises they occupy.

**Chairman:** I appreciate the witnesses coming before the committee and giving their time. It has been a comprehensive discussion. I apologise if I did not intervene quickly enough on behalf of the witnesses. There were some insinuations about their credibility on issues and I should have intervened more quickly. I appreciate their time. They have added to the debate. The meeting has certainly aired some issues that people are concerned about.

*Sitting suspended at 7.30 p.m. and resumed at 7.38 p.m.*

**Chairman:** We will now resume. Deputy Bríd Smith will be deputising for Deputy Gino Kenny, while Senators Higgins and Seery Kearney will be deputising for Senators Black and Kyne, respectively, today.

For the next hour we will meet with Professor Shane Higgins, Master of the National Maternity Hospital; Dr. Jenny Walsh; Alice Murphy, solicitor; and Mr. Ronan Gavin. They are all very welcome.

On privilege, all members and witnesses are again reminded of the long-standing parliamentary practice that they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable, or otherwise engage in speech

that might be regarded as damaging to the good name of a person or entity. Therefore, if their statements are potentially defamatory with regard to an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative they comply with any such direction.

I call on Professor Higgins to make his opening remarks.

**Professor Shane Higgins:** I thank the Chairman. I wish him, the Deputies and Senators a good evening and I thank them for the opportunity to meet with them to discuss this vital national healthcare project that has already been delayed for far too long.

As a practising clinician and Master of the National Maternity Hospital, I am proud to work in a hospital that has led the way in ensuring women can avail of all their legal rights.

Although the debate has focused on the right to access gender affirming surgery, tubal ligation, termination of pregnancy and artificial reproductive techniques, we should not forget that last year we delivered 7,855 babies to 7,694 mothers. We had 79,750 attendances in our antenatal clinics and 10,000 attendances in our gynaecology outpatients, all in the cramped, inadequate, antiquated, unfit for purpose buildings in Holles Street. It has been difficult to hear claims both in the media and in this room that our fervent support for the proposed move to Elm Park is some kind of surrender to the church. Legitimate concerns are welcome and deserve every consideration but we must also deal in facts, and I am alarmed by the combination of emotive misinformation and misunderstanding that prevails. Just because the contracts underpinning the new hospital appear complex, that does not indicate the church stealing influence over women's reproductive choices through clever contractual stealth. I appreciate members of this committee are holding these hearings in an effort to bring clarity to the issues and I hope that this evening, along with my colleagues, we can allay some of the fears that exist.

Having spent much time listening to the debate over the past week, I believe four key points remain. The first is the clinical imperative. Although the undisputed need for relocation has been stated many times, lest we forget in the maelstrom of irrelevancies, I will continue to remind members that we want to provide advanced level care in an appropriate setting where women and their babies can be afforded the dignity and privacy they deserve. This can only be provided in a new purpose-built maternity, gynaecology and neonatal hospital. For anybody to describe the current location as fit for purpose or to argue the definition of a Nightingale ward, where 14 patients are separated by curtains, with very limited toilet and shower facilities, it is clear that he or she has not been in the hospital for some time and cannot have the best interest of our patients at heart. Women should have single en suite rooms for antenatal, labour and postnatal stays, unless otherwise indicated. Current investment reflects a Band-Aid approach to a gaping wound.

The second point for mention is ethos. The NMH, as a public voluntary hospital, has no constraints on the procedures it offers patients, and I can say with absolute certainty this will continue when we relocate. The hospital will remain a clinically independent, publicly funded, self-governed organisation with a board composed of nine directors, each with a fiduciary duty to the National Maternity Hospital and a shareholder split, with the most important share - the golden share - belonging to the Minister for Health of the day.

It would a sad day if the unambiguously supportive views of 52 senior consultants in a letter to the Taoiseach last February were to be drowned out in the public debate by relentless claims that services offered at the new hospital will be curtailed by religious ethos.

The third point relates to ownership. There is another misplaced fear that, as owner of the freehold, St Vincent's will have control over the operations of the new national maternity hospital. I had a conversation recently with an expert in property law, who is removed from the project, who stated a 300-year leasehold conveys effective ownership or freehold equivalent and is an ownership form used across both the city and country for campus developments where there is mixed use or ownership. The expert gave me a number of examples, including IDA parks, colleges, Dublin Airport, the Central Bank at Dublin Landings, Capital Dock and Connolly Quarter. Many of these developments have been funded by the State. The National Maternity Hospital, along with many other hospitals, is an example of leasehold.

The final point relates to trust. Why should women and their families trust instruments of the State such as politicians, the religious or the health service, having been let down so appallingly in the past? Why should they listen to a male master of the National Maternity Hospital tell them that all will be well? They should not just believe me. They should listen to the women who were powerful advocates for women's right to choice, such as Mary Higgins, Mary Brosnan, and the many other clinicians who signed the letter we recently sent from the National Maternity Hospital to the Taoiseach. They should listen to the 400 plus clinicians who signed a letter to the Taoiseach from all hospitals, who work in all specialties, general practice and public health from around the country - and even a colleague of mine who is based in London - who have written to support the proposed move to St. Vincent's.

Currently, approximately 84% of trainees in obstetrics and gynaecology in this country are young women, including my daughter. All those asked have indicated their support for the project. These will be the future of our speciality, many of them consultants in the NMH at Elm Park, service users themselves of the new facility, many of them advocates in the repeal campaign, who recently wrote a letter from the Junior Obstetrics & Gynaecological Society, JOGS, of the Institute of Obstetricians & Gynaecologists, supporting the project and the move and stating they had no concerns about it. I and my medical colleagues and those in midwifery and nursing in the NMH would not sign up to a proposal that was not going to 100% guarantee the new hospital's integrity and independence. The reality of failure, due to doubts which need no longer exist, is to turn your back on the urgent needs of Irish women, girls and their children whom my colleagues and I have the privilege of caring for. I look forward to answering the questions of members as fully and completely as possible.

**Chairman:** I thank Professor Higgins very much. This is when the messy part happens - the questions and answers. We are giving a four-minute slot to each questioner, which includes time for the answers. The witnesses should bear that in mind when giving their replies.

**Deputy Colm Burke:** I thank Professor Higgins very much for his presentation here this evening, and all the witnesses for making their time available and for their contribution to progressing this project. I know that they are all very busy. We heard earlier from Mr. Simon McGarr, a solicitor, who outlined that under the 299-year lease the buildings will not belong to the State but to the St. Vincent's Hospital Group. One of the reasons he says that is due to the use of the term "permitted use". He says there are restrictions on what can be done within the hospital because of that clause in the lease. I would like clarification about ownership of the building and what level of restrictions will be on the new NMH when it takes up occupation of the building on its completion.

**Professor Shane Higgins:** I am going to hand the question over to Ms Murphy.

**Ms Alice Murphy:** The question is if the building belongs to the St. Vincent's Healthcare

Group. As everybody probably knows at this point, St. Vincent's Healthcare Group is named in the lease document as the landlord. The solicitor, Mr. Simon McGarr, has pointed to a schedule to the lease which says that the land here and all the buildings that are erected on it belong to St. Vincent's Healthcare Group. The schedule does indeed say that. The lease then goes on to say that the landlord gives away the land and the buildings for a period of 299 years. Whether or not you regard this as ownership would appear to be a matter of perspective. Some disagree that a 299-year lease is ownership. I disagree with them. It was referred to earlier that a minimum period of 70 years is required to be legally considered as ownership. We have here 299 years. In particular in relation to the building, for the entire relevant life of the building, it will be in the ownership of the HSE under this lease. I am absolutely happy and confident in saying to the committee that the building will belong to the HSE.

**Deputy Colm Burke:** What about the issue of permitted use?

**Ms Alice Murphy:** The permitted use is healthcare. It is to be used as a hospital. Again, I understand the perspective of the other solicitor is that this is a restriction. We would call it a user. Most leases would have a clause that says what the building is to be used for. This permitted use clause is clear that the building is to be used as a hospital. From my perspective, I do not regard that as a restriction or in any way as a worry. Yes, it is there that the use is as a hospital.

**Deputy Colm Burke:** Every other legal practitioner would accept a leasehold title of 299 years as good title to acquire.

**Ms Alice Murphy:** Yes.

**Deputy David Cullinane:** I have a few questions for Professor Higgins. I welcome all the witnesses. We had some very lengthy discussions with the Minister for Health today in the Dáil Chamber. I asked him if he, as the Minister for Health, asked the St. Vincent's Healthcare Group if it would gift the land to the State. He said he did, and it said no. He said it was not for turning when it comes to the issue of the ownership of the land. If it is not for turning on that issue, it is because it is not gifting the land to the State, so the State does not own the land. This is not just about ownership; it is about the company structure. It is about whether it is a HSE hospital or whether it is a voluntary hospital, because that is the issue. From Professor Higgins's perspective, could he see a situation where the St. Vincent's Healthcare Group would ever allow a HSE hospital to be built on its land?

**Professor Shane Higgins:** I know some of my colleagues might want to get in on this as well-----

**Deputy David Cullinane:** I am asking Professor Higgins.

**Professor Shane Higgins:** I will start the answer. I cannot answer for St. Vincent's Healthcare Group. I will give the answer to the Deputy from the National Maternity Hospital perspective. We never sought to move to St. Vincent's as a State-owned, HSE hospital. We have been a voluntary hospital on the site since 1894. We can talk about the buildings. The newest building will be 100 years old. It is therefore time to move. I will speak about what the voluntary hospitals offer and what we offer. We can look at element of women's health in this country, such as the termination of pregnancy. On 7 January 2019, which was a week after I became master, we held our first clinic. The voluntary hospitals have the capacity to adapt and move much quicker than the HSE hospitals. There was never a conversation with the National Maternity Hospital, either with my predecessor, with the board, with myself, or with anybody else involved in the

project, about moving to St. Vincent's as a HSE hospital. It is just not on our radar.

**Deputy David Cullinane:** That is what I wanted to get to, because I do not believe that Professor Higgins, or any clinician at the hospital has raised any flag to the church. Professor Higgins mentioned that those who raised questions about ownership are raising questions that are based on misplaced fear.

**Professor Shane Higgins:** Correct.

**Deputy David Cullinane:** However, that is not my perspective, because I am not fearful about that issue. We have to accept the HSE will be the funder of the hospital and the taxpayer will sign a cheque for up to €1 billion and given, as was said earlier, that Sláintecare has committed us to public health, public hospitals and public money, it should be a HSE hospital. Professor Higgins is saying that from his perspective, the current board of the National Maternity Hospital would prefer that it would be a voluntary hospital as opposed to a HSE hospital. At least, that is Professor Higgins's opinion. That is the point I am making, which arises from everything I have heard. I would dearly like to hear from the St. Vincent's Healthcare Group and I hope that we do. It would be very remiss of us not to hear from the very people who are now the landowners and who now hold all of the cards. It strikes me that this is about control for this particular health group because it will be a health group with four hospitals as a portfolio, with three voluntary hospitals and one private hospital. That is what this is about. They do not want a HSE hospital. That is the only reason that they will not gift the land to the State. That is the only reason why we have ended up with a very convoluted, complicated, legal, contractual company arrangement.

**Professor Shane Higgins:** I would not agree with that, to be honest. First, we are a public hospital. I know that the word "private" has been bandied about. I know that the previous witnesses used the word "private" quite a lot. We are a public hospital. We are funded by the State. We have a very strict funding arrangement with the State through a service-level agreement, SLA. We have compliance statements every year that assure the State that we are providing the service for which we are being funded. There is no question about the model of care-----

**Deputy David Cullinane:** With respect, the term I used was "a HSE hospital".

**Professor Shane Higgins:** Yes.

**Deputy David Cullinane:** It is not a HSE hospital. Nor will the new hospital be a HSE hospital. My point is that the reason for that is that the St. Vincent's Healthcare Group does not want a HSE hospital on its land.

**Professor Shane Higgins:** I cannot answer on behalf of the St. Vincent's Healthcare Group. We did not want to move out there. It has never been on the table. The Government, either the Department of Health or the HSE, never put it to us that we would be moving out there as a HSE hospital-----

**Deputy David Cullinane:** But the Minister told us today that he did.

**Chairman:** Hold on.

**Professor Shane Higgins:** From the word go, as far as we were concerned, and in the development and the design, we have proposed this as a re-location. The Deputy will remember that it was first mentioned by the then Minister for Health, James Reilly. It was followed up on by

the then Minister for Health, Deputy Leo Varadkar, and then by the following Minister, Simon Harris. It was discussed as a voluntary hospital that would be relocating.

Another point is the transfer of the National Maternity Hospital to the State will take place when we move out there. That is a significant contribution to the overall cost of this hospital. That needs to be stated also.

**Chairman:** I have to move on to Deputy Lahart.

**Deputy John Lahart:** I will skip the preliminaries. I have other questions. I raise the point about the protection against merging with another healthcare group. The Bon Secours model was mentioned. Do the witnesses have any comment on that? In other words, the St. Vincent's Healthcare Group could merge with another foreign or domestic healthcare group. That would strand the NMH to some degree or would make it part of a property portfolio.

My second question is about how the geographical location would not meet future population demands. In other words, the hospital will be out in Donnybrook while the population is growing and birth rates are in different parts of the country.

The appointment of conservative directors by conservative Ministers essentially is dictating and influencing the future direction of the hospital.

There is also the issue of the seepage of patients from an overcrowded accident and emergency department in St. Vincent's University Hospital requiring bed space in the NMH.

**Ms Alice Murphy:** There are two legal questions there and I would be very happy to take them. I will pass to Professor Higgins on the medical question.

The Deputy raised a point about the protection against merger. I think the Deputy said that St. Vincent's could merge with another healthcare organisation. This raises a point which bears repeating, even though we have all discussed it. There is a conflation here of ownership and control. I believe that the Deputy's question derives from the fact that St. Vincent's Healthcare Group is the owner. However, St. Vincent's Healthcare Group is not in control of the new national maternity hospital company. It cannot therefore direct a merger. There is no mechanism for it to do that. We have all talked about the other hospitals in the St. Vincent's Healthcare Group, of which there are three. They are all housed in one company. The national maternity hospital in the St. Vincent's Healthcare Group is housed in a separate company, which is specifically designed to ensure that there is no outside interference, whether this is by way of merger with another hospital or by way of religious interference. There is no mechanism in the document or rulebook, which is the constitution of the new national maternity hospital. This new national maternity hospital company is a registered charity. It is bound by its own principal object, or the reason it exists, which is for the promotion of health and, in particular, for the provision of maternity and associated services.

**Deputy John Lahart:** Okay.

**Ms Alice Murphy:** That is my answer to the first question.

The Deputy's point about the appointment of conservative directors feeds into the same point. There has been a worry, which is legitimate - I do not want to suggest that any of the worries and concerns are anything other than legitimate - that three directors from St. Vincent's Healthcare Group, three directors from the National Maternity Hospital, Holles Street or three

directors from the State might decide to take this company in a different direction. It was stated earlier that the directors could change the constitution of the company. That was not an accurate statement. I feel the need to correct the record in that regard. In the rulebook or constitution of the new company there is a set of powers for the board. They are the board's directive. They say how this hospital is going to be run. They are only capable of being amended with the consent of the Charities Regulator, as was stated, but also with the unanimous consent of every single director, and of the Minister for Health. That statement is to correct the record.

My last legal point is in relation to the point about a conservative director who might take the company in a particular direction. Yes, boards of directors do influence culture in organisations, but boards of directors under the Companies Act and under the Charities Act have very clear obligations to act in the best interest of this company and to promote its charitable purpose. It is not possible for directors to go outside of the rulebook, which is the constitution. There are two sets of laws, the Companies Act and the Charities Act, imposed upon them to act with due skill and care, in the best interests of this company.

**Professor Shane Higgins:** I apologise to the Deputy that I only remember one of the questions. What was the second clinical question?

**Deputy John Lahart:** My questions were on the geographical location not meeting population demands and on the seepage from an overcrowded St. Vincent's University Hospital into the NMH.

**Professor Shane Higgins:** One of the previous witnesses was talking about a 25% drop in numbers. Yet, I think he quoted the numbers at the moment as being the same as they were in 1994. In fact, therefore, the numbers are still quite high. The numbers are approximately 7,500 babies to approximately 7,500 mothers. Our current location was never fit for purpose for those sorts of numbers. However, Deputy Lahart's question is valid. Numbers are one thing, but complexity of care is another. We are seeing an ever more complex cohort of patients now, when taking into account factors such as age, BMI, artificial reproductive techniques, medical and surgical comorbidities which now allow for patients to become pregnant where previously they might not have done.

Dr. Walsh is the director of foetal medicine. She can talk about the number or referrals that we get. We get a significant number of referrals for foetal medicines. These are labour intensive and expertise intensive. We get those referrals from all over the country. They are not just in our Ireland east catchment area. I will not go any further on that, because I think that Dr. Walsh might like to come in on that. Our benign gynaecological services are going up. Gynaecology always loses out. Maternity services cannot wait. Patients come in in labour and they deliver. Postponement and cancellation of gynaecological procedures happened an awful lot in the recent pandemic. We have significant waiting lists, particularly in some areas. A new hospital with increased bed numbers and facilities will allow us to develop our gynaecology service and provide appropriate gynaecology services to our patients.

**Dr. Jenny Walsh:** I agree. On the need piece, we have the capacity and demand to fill the campus in its current location. Over time, the Rotunda and the Coombe will also have increased service demands. Ultimately, co-location is a policy for all maternity hospitals. I do not think we have a concern that falling birth numbers or the geographical location of the hospital will affect demand; if anything, it will be the opposite. There will not be many women in Dublin who will be offered a single, en suite private room for all of their antenatal and postnatal stay who will not make that extra journey in a benign setting.

**Professor Shane Higgins:** May I answer the question about spilling over from the emergency?

**Chairman:** Professor Higgins will have to come in in response to one of the other members. Apologies. Deputy Shortall is next. I am trying to let everyone in and be fair to everyone.

**Deputy Róisín Shortall:** I have a few questions for Professor Higgins. We all recognise the outstanding work that is done in Holles Street. I had my children there and my grandson was born there. I have the height of regard for the hospital. The fact that 95% of patients express satisfaction with it is a tribute to the staff and to the fact it is an independent hospital established by charter and has 100 governors. Its status will change significantly under the new arrangement whereby it will go from being an independent hospital to a wholly-owned subsidiary of a bigger hospital. That is the governance arrangement. Is there concern about that?

On the term “clinically appropriate”, we are looking for a definition. The Minister has stated that he will provide one. We look for it to be written into all of the legal documents because those documents are littered with that ambiguous phrase. Professor Declan Keane said recently he would welcome a definition in the documents including a list of the services but not limited to those services. Would Professor Higgins welcome that? Is he looking for that definition?

This will need various approvals. We are not or should not be up against it next Tuesday. There are many other stages to go through, one of which is the approval of the governors. When does Professor Higgins expect to bring a proposal to his governors? What is the timescale in that regard?

The business case would look at birth rate and that kind of thing and whether it stacks up to have this move. What role has Holles Street had in the preparation of that business case, which, we note, has not been signed off?

**Professor Shane Higgins:** I will answer those questions but others here could also do so. Ms Murphy can take on the wholly owned subsidiary issue. It is not a wholly owned subsidiary. The Minister has a golden share. That is an important point. Ms Murphy might also talk to the governance of the hospital.

On “clinically appropriate”, there are three stakeholders in the creation of this suite of documents. I understand and appreciate the concern although it was never the intention of the words “clinically appropriate” to cause that level of concern. We have no issue with defining the term or, if the three parties agree, with its removal from the documents. I state that on behalf of the National Maternity Hospital.

**Deputy Róisín Shortall:** Is that just removal or would Professor Higgins welcome a definition?

**Professor Shane Higgins:** For the purpose of moving this exercise on, I would welcome a definition if that is what is decided. If it is decided to remove the term, I will work with that also. The governors have been constantly briefed and are in full support of the project. As recently as two weeks ago, we had a meeting with all the governors. Those who attended had a presentation from Ms Murphy.

**Deputy Róisín Shortall:** What is the timescale for signing off?

**Professor Shane Higgins:** There is not a timescale for signing off but they are being kept

informed all the time.

**Deputy Róisín Shortall:** Professor Higgins must have some idea at what point you intend signing off on this. It is a necessary approval, is it not?

**Chairman:** The Deputy is asking a lot of questions. We are running out of time.

**Ms Alice Murphy:** I will give a quick answer on the characterisation of St. Vincent's as the only owner-shareholder of the new national maternity hospital company. That company has two shareholders: one is St. Vincent's and the other is the Minister for Health. St. Vincent's has 99 shares and the Minister has one golden share. If I had my time again as a legal drafter, I might have given the Minister 100,000 golden shares. The legal effect would not change, however. There is a perception it is 99 versus one but that is not borne out in the documents. What matters is not the number of shares one holds, but the powers attached to the shares. The ordinary shares have very few powers. I understand that for the layperson ownership means control but I spoke already about conflating ownership with control.

**Deputy Róisín Shortall:** Is the golden share subject to the double test of permitted use and "clinically appropriate"?

**Ms Alice Murphy:** The golden share has a function, and that is-----

**Deputy Róisín Shortall:** But it is subject to those two tests being met.

**Ms Alice Murphy:** It is not subject to anything. It has a function, and that is to protect the inviolability of the reserved powers which are the independents of this body. That is what the golden share does.

**Deputy Róisín Shortall:** Is Ms Murphy saying those two tests have nothing to do with the golden share?

**Chairman:** I call Deputy Bríd Smith.

**Deputy Bríd Smith:** I am alarmed by Professor Higgins' tone in suggesting we are being over the top, emotive and trying to make out that the church will come in and steal the entire agenda. He has got it wrong. I was a young woman in the early 1980s. I had an abortion at that time and had to go to Liverpool for it. I campaigned against the eighth amendment as a young woman and then lived through the years that saw the darkest of things done to women, from what happened in the Kerry babies case to Savita Halappanavar. That runs deep because of what is at the base of it. I do not know if Professor Higgins has read Emily O'Reilly's wonderful book *Masterminds of the Right* in which she traces succinctly the shadowy forces that brought in that referendum and, later, the Maastricht protocol, which stopped abortion coming into our country. They did not wear habits and were not traipsing around corridors with veils on them; they were top officials linked to organisations like Opus Dei and the Knights of St. Columbanus. They were deeply embedded in the health service and the Civil Service and they saw to it that Ireland maintained an extraordinary conservative agenda in relation to women's reproductive rights. We have broken from that but people like me, though probably not so much the younger generation who did not live through it, have a bitter taste in our mouths. We want to see a national maternity hospital fully owned and run by the State.

I dispute what has been said about it being owned according to the lease. It is not my dispute. It can be seen in the St. Vincent's fact sheet. I have read the details into the record of

the Dáil. It disputes what has been said. It asks who owns the land the new national maternity hospital will be built on and it states: “The land is owned by St. Vincent’s Healthcare Group.” Who will run the hospital? The hospital will be run as part of St. Vincent’s Healthcare Group. We have spent the week teasing out these questions. We have got some clarity on some things but not on many more.

I am delighted to hear Professor Higgins say he would welcome the introduction of a definition into those documents in respect of the worrying clause relating to “clinically appropriate”. We worry about that. Who says whether it is appropriate that somebody has sterilisation or an abortion? Who says it is appropriate how they have their baby? If it is not the woman and she does not have a say, then who is telling her what to do with her body? I hope Professor Higgins accepts that as bona fide. I think the world of St. Vincent’s and of these doctors. I met Dr. Walsh the other night in the RTÉ studio. I have nothing against the witnesses. This is not personal, but they have to understand where it stems from. It is totally legitimate.

**Professor Shane Higgins:** I apologise. The reference to emotive misunderstandings did not apply to anyone in this room. In recent weeks, however, terms like “the nuns”, “public juridic body” and “private” have been used to try to convey that some shadowy figures are involved. Now that the narrative has moved away from the nuns because the nuns have divested their interest in St. Vincent’s, it is not a topic of conversation anymore. Now we are moving to terms like “private practice”. I want to correct that because the public has a right to factual, accurate truths in this debate, and it is a very important debate. I am aware, as I said in my speech, of the hurt that has been caused to women and their families for decades in this country, but I am representing a group of people, clinicians, nurses, midwives, doctors and administrative staff, who dedicate their lives to the provision of all services that are legally permissible within the State. Those are the same clinicians who wrote to the Taoiseach and who advocated on behalf of women’s rights during the repeal campaign and many other situations. They are being portrayed as people who will decide what is appropriate or not. They provide everything. The hospital we work in provides everything. It happens to be a voluntary hospital and, as has been stated several times, the hospitals that are not providing a full termination of pregnancy service, for example, are all State-run, State-owned, State-funded hospitals. A week after the introduction of the legislation we were providing the service across all streams of the legislation. I am defending my colleagues.

**Deputy Bríd Smith:** Okay, I accept that. However, I believe Professor Higgins should also defend the women of Ireland who come into his wards every day. The women of Ireland have concerns-----

**Professor Shane Higgins:** Absolutely.

**Deputy Bríd Smith:** -----and I am representing my constituents. That is what we are doing here.

**Professor Shane Higgins:** I fully-----

**Deputy Bríd Smith:** In the corridors yesterday, the Minister told me that for most of the HSE hospitals that are not providing abortion the reason is funding - the HSE and proper funding. That is what the Minister told me.

**Chairman:** I have to move on. I call Senator Conway.

**Senator Martin Conway:** I know Professor Higgins understands the hurt that has been

caused to the women of Ireland over the years, but can he also understand why they are deeply cynical about this arrangement and why the opinion poll at the weekend showed that nearly two thirds of people are cynical and have questions about it? Does he understand that we are here to voice their concerns? We all are here to achieve the one objective, which is a state-of-the-art national maternity hospital, which should have happened decades ago. I want to give Professor Higgins the opportunity to confirm that he understands why people are cynical.

**Professor Shane Higgins:** Absolutely, and that is why we are here and have engaged as much as we have been able to do over the last week. It is to try to correct some of the factual inaccuracies so that whatever picture is being given to citizens and to women is factually accurate. I agree that this debate is valuable, worthwhile and important. In fact, it is vital so that these misunderstandings can be clarified. I acknowledge the hurt that exists.

**Senator Martin Conway:** That is good, and I welcome that fact. I was going to raise it but Deputy Bríd Smith raised it before me, because I considered some of the language in Professor Higgins's opening statement quite emotive. I do not think it was helpful, but he has clarified it and acknowledged it. That is very welcome.

Professor Higgins also said in the opening statement that he had spoken to a legal practitioner who is an expert on property. Will he elaborate a little more on that? If the individual could be identified, it would be a great help. That type of expertise would be useful.

**Professor Shane Higgins:** I would not be able to identify the person without the person's permission.

**Chairman:** We cannot ask to identify that legal person.

**Senator Martin Conway:** It was in the opening statement and usually when one is making an opening statement to the Oireachtas one would identify or at least verify the sources.

**Chairman:** We speak at the start of every meeting about identifying people.

**Senator Martin Conway:** I do not need a lecture on that, Chairman. I understand that. I am just saying that it is a pity we could not get more information on that because it would have been useful. That type of expertise is very helpful in terms of giving clarity to the public, so perhaps that person might be able to speak publicly over the weekend. It would be useful.

Turning to Ms Murphy, the master has said that he would welcome more definition in the constitution on the meaning of "clinically appropriate". We discussed the definition of "clinically appropriate" with the Minister for hours yesterday. Stuff was read into the record and the Minister is going to provide further clarity. Would Ms Murphy agree that it would be useful if it was more explicitly defined in the constitution of the hospital?

**Ms Alice Murphy:** I will give the Senator my honest view on this. When we were drafting the document and we included that the services that would be provided were all clinically appropriate and legally permissible healthcare services, I felt it was a two-step test and a positive statement that all clinically appropriate and legally permissible healthcare services would be delivered. I did not expect the debate which ensued. In light of that debate, as Professor Higgins has mentioned, where the three parties agree to a definition or to removal, I am absolutely satisfied with that. However, my role is adviser, not decision-maker.

**Senator Martin Conway:** Ms Murphy is here as a witness and she has an expertise. If

there was a more explicit definition of “clinically appropriate”, people would rest a lot better. Is it possible or can we have further definition on that? It appears to be an issue for many people. Obviously, when there is a debate on things there can be an unintended development, and this is the unintended development. It was obvious to the layperson that this was going to be an issue. I believe that a more explicit definition would be useful.

**Chairman:** Senator Hoey is next.

**Senator Annie Hoey:** I wish to raise two matters. In the previous session the mortgage and being able to borrow against the asset came up again. Ms Murphy spoke to us at length in a meeting last night about explaining the differences in that regard and how it can and cannot borrow against it. Will she explain that again because it arose in the previous session, where it was thought that it would be able to use the buildings as an asset to borrow against? People have a concern about that.

The other matter is if she can explain clause 6.5. Will she clarify whether the right of first refusal is gone after 30 years? Does that mean the HSE would no longer have the first right of refusal after 30 years but it does have it in the first 20 years?

**Ms Alice Murphy:** I will answer the Senator in reverse order as that is the clearest. We missed a portion of the earlier session because we were in transit, so if I am not in the right domain the Senator is free to correct me.

The right of first refusal clause in the lease means that, and this is a very unlikely scenario but we have included it for absolute clarity and to protect the State, if St. Vincent’s proposed to dispose of the land and wanted to transfer its freehold ownership to a third party it convenants, which means it promises or undertakes, to offer the HSE the first refusal. St. Vincent’s deciding to exit healthcare is extremely unlikely territory, but we wanted to have all bases covered. If that event occurs the option agreement is triggered, and the content of the option agreement is to allow the HSE the right to be the first person. Now, the HSE might say it does not want it either, but if the HSE wants to become the freehold owner it has the first refusal right.

The mortgage is slightly earlier at clause 6.4. There are two steps to this analysis. I do not think we got into this yesterday so the Senator is free to tell me if I am not in the right domain. The first question is: does the landlord have an ability to secure a mortgage over the site? The second question, and for me it is the much more pertinent question, is: what would that mean for the HSE, the tenant? There is an ability, a technical one, for the landlord to mortgage the site, but the landlord has no real interest so I do not believe it could or would ever practically occur, but the ability is there to mortgage the site. The mortgage, if there is one, can have no effect on the rights given to the HSE. The HSE’s right to own the building for the 299 years is a superior right and, effectively, would trump any right. Any mortgagor could only get an interest that would have no impact on this, which is why-----

**Senator Annie Hoey:** Yes, but it could get a mortgage to use it in whatever other way it saw fit.

*Deputy Bernard Durkan took the Chair.*

**Ms Alice Murphy:** If it was possible to not impact on anything here. The entire site is being fully used and therefore there would be no beneficial interest and no real benefit. While we are speaking about the freehold and the leasehold, Deputy Brid Smith said there was a distinction between the balance sheet of SVHG and what I said. The Deputy said the land was owned by

St. Vincent's and that the fact sheet states that. I wish to correct this. While the Deputy is right in saying the fact sheet refers to the land being "owned by SVHG", it then goes on to state that it will be, "leased to the State [...] for a period of 299 years". St. Vincent's Healthcare Group does own the land. We are all agreed on that point. Where we differ is that the organisation is giving it away for 299 years. The fact sheet then goes on to state, "The hospital building will be owned by the Irish State". Therefore, I would not wish to give the impression that there is a difference between us. What I am saying is entirely consistent with the St. Vincent's fact sheet.

**Vice Chairman:** We are out of time again. We must move on because we are very restricted in what we are doing and I am just interpreting the lines in front of me. I call Senator Clifford-Lee.

**Senator Lorraine Clifford-Lee:** I thank our guests for coming in. I direct my questions to Ms Murphy. People here have referred to her expertise. For the record, will she outline her position in Mason Hayes and Curran and her qualifications?

**Ms Alice Murphy:** For the purpose of evaluating my credentials, I am a partner at a law firm called Mason Hayes and Curran. Within the company, we have a charities group and my core expertise is in charity law and governance. I have a lot of healthcare clients. One is Holles Street hospital, but they include charities of all natures, and specifically the governance of those organisations.

**Senator Lorraine Clifford-Lee:** Would Ms Murphy classify these agreements as ones bound by Canon Law, as has been stated by previous witnesses?

**Ms Alice Murphy:** No, I would not. These agreements are governed by Irish law and only by Irish law. Canon Law does not have the force of law in Ireland. It has the status of the law of a foreign jurisdiction. We often use the example that if a community of French people came and set themselves up in the midlands of Ireland, they might internally bind themselves to the rules of French law, but that does not give it the force of law here. Canon Law governs the faith lives of communities of religious organisations in this country and throughout the world.

**Senator Lorraine Clifford-Lee:** These agreements have been referred to as being labyrinthine in nature and complex in structure. Would Ms Murphy class them in that way, from her experience of being a partner in a commercial law firm?

**Ms Alice Murphy:** In a commercial context, this is quite a straightforward deal. I must state as well, however, that I fully appreciate that for the public this is not a straightforward deal. The point I have come back to continually is that we have three contributors, or stakeholders, involved. The State is obtaining the delivery of public health services and it is giving the grant to fund the building. We also have St. Vincent's, which is giving away the site for 299 years so we can build the hospital. Then we have the National Maternity Hospital at Holles Street, which is giving its hospital. Therefore, because there are three stakeholders, we have put in place a suite of documentation to align all our interests and to ensure the health services can be effectively provided.

**Senator Lorraine Clifford-Lee:** In Ms Murphy's experience, they are not overly weighty or voluminous.

**Ms Alice Murphy:** No, they are not. They are standard documents for a transaction of this nature.

**Senator Lorraine Clifford-Lee:** Okay. My colleague, Deputy Lahart, had started touching on the notion proffered earlier that perhaps seepage from St. Vincent's Hospital, when there is spare bed capacity, could somehow trigger the €850,000 annual rent clause. In Ms Murphy's professional opinion, would that trigger it?

**Ms Alice Murphy:** If I could be permitted to offer an observation on the €850,000, and I do so because I know it has been a source of valid concern when people hear such a high figure mentioned, the rent in the lease is a nominal rent set at €10 a year. St. Vincent's Healthcare Group is a registered charity and because of that it has a legal obligation to get value for its asset, unless it is applying the asset to another charitable purpose. In plain language, what that means is that one charity can give to another charity something for free, if the other charity is doing something the same as the first, that is, the charitable delivery of healthcare. If the other body, however, decided to commercialise the asset, say by building an apartment block, then St. Vincent's could not allow that other party to build such an apartment block and make a great deal of money from doing so for free. Therefore, St. Vincent's and its advisers were quite right in saying it was a registered charity and that it had to show it was looking after the asset and only giving it for the €10 rent annually if the site is used to run a public maternity hospital. It was necessary to state that if that was not being done anymore, then it would be necessary to increase the rent to €850,000. That is to comply with charity law and, I believe, for no other reason.

**Senator Lorraine Clifford-Lee:** This provision is to ensure that the buildings on the site will be operated as a charity in future.

**Ms Alice Murphy:** Yes, as a national maternity hospital.

**Senator Lorraine Clifford-Lee:** Regarding the scenario proposed earlier, involving a situation where one hospital started taking in an overflow of patients, does Ms Murphy think that would trigger this clause?

**Ms Alice Murphy:** No. That is still public healthcare. The lease is confined to public healthcare.

**Senator Lorraine Clifford-Lee:** I thank Ms Murphy.

**Vice Chairman:** I call Senator Higgins.

**Senator Alice-Mary Higgins:** It would be good to just correct the record. Ms Murphy referred to the land being given to the State, but it is clearly not being given in the context mentioned. I wish to be clear about this point.

**Ms Alice Murphy:** The land is-----

**Senator Alice-Mary Higgins:** The rent is €850,000, which will be waived to €10 annually, as Ms Murphy has elaborated on.

**Ms Alice Murphy:** Yes.

**Senator Alice-Mary Higgins:** I wish to be clear on this aspect. Ms Murphy mentioned the fact of the hospital clause. Again, actually, nobody has disputed that as the permitted use. I refer to a maternity, gynaecological and obstetrical municipal hospital. The particular issue highlighted was the phrase "clinically appropriate". I would appreciate our guests commenting on this aspect, in respect of their preference regarding its removal or definition. If we

have a definition, then I am concerned that it will not simply be a matter of which services are provided, but of which services and when they are provided. I say that because it is one of the key concerns we have. For example, I refer to a situation where certain services may be theoretically available, but perhaps not practically available because of a particular policy or ethos or clinical direction. I would like to hear our guests' preferences in this regard. I refer to references to "all clinical" services and it being read that way by our guests. The fact that it was read this way is already a strong signal that there is an issue with this aspect. I refer to lawyers reading these documents and understanding them completely differently, as well as the legal line in the next few years.

Regarding any building, any hospital, on the premises, is it not the case that it will be the property of St. Vincent's holding group in 299 years? Is it also not the case, because we have this obligation, and it has been taken on, to continue to build a hospital - and Deputy Shortall asked about the business case in this context earlier - and therefore we are looking at a situation whereby there will be four or five successive maternity hospitals to be built on the site, with the accompanying costs from doing so? Is it not the case in that context that we would revert to a market rent of €850,000, perhaps in 70 years' time? It was mentioned that it was felt it would be time to move on in this context in 100 years. What happens then in 70 years' or 100 years' time if a new hospital wishes to move-----

**Vice Chairman:** I am sorry Senator, we have run right out of time. We are on the clock and we need to get some replies to those questions.

**Professor Shane Higgins:** I thank the Senator for her questions. Regarding the first point made about the clinical appropriateness, I think we have all acknowledged - we certainly have acknowledged - that over the course of the last week this has caused enormous concern, where we had not previously seen such concern in respect of our interpretation. Turning to whether this phrase is to be defined or if it is to be completely removed, if it is to be defined, then that must be a non-exhaustive list of clinically-appropriate procedures which will be offered to a patient in the timeliest of fashions. Timely will of course come into this, and we certainly would facilitate a definition stating that, as we currently do, we will provide all services in a timely fashion to our patients. We will be more than happy to engage in this regard. As I said at the start, though, there are three stakeholders involved in this suite of documents, so they would all have to be engaged in any such endeavour.

Moving to the buildings and hospitals, we have been on our current site for more than 100 years. The most modern buildings on the site will be 100 years old by the time we move. It is clearly acknowledged in healthcare now that a building has a lifespan of 50 years to 75 years.

**Senator Alice-Mary Higgins:** Are we therefore discussing four to five hospitals being built on this site over time?

**Professor Shane Higgins:** Yes, potentially we are. That will be a matter for Government policy and decision-making.

**Senator Alice-Mary Higgins:** As I understand it, the National Maternity Hospital has the option to sell and move on from its leasehold, but that may not be an option in this-----

**Vice Chairman:** I thank the Senator.

**Senator Alice-Mary Higgins:** I will just ask if the legal question I have asked-----

12 May 2022

**Vice Chairman:** I know. We are not supposed to be here now. We are on the clock.

**Senator Alice-Mary Higgins:** I was due in-----

**Vice Chairman:** I am sorry but I was given instructions to finish at 8.30 p.m. sharp.

**Senator Alice-Mary Higgins:** As I was skipped, I would just ask that the record be corrected in relation to a Canon Law comment that was made.

**Vice Chairman:** I accept all of that. I was listed to speak as well and I am not speaking, the Senator will be glad to know. I am sorry. One has to be fair to everybody. Making a rule and then breaking it at the same time, in the same sentence, is not going to happen here. I thank our witnesses for coming along. It has been a most informative debate, albeit a long drawn out one. It is up to people above my pay grade to make decisions on these things but the longer the debate goes on, the more information comes into the public arena which is all the better for people to be able to make a decision.

I thank the members of the committee for their attendance and dedication. I also thank the staff of the House for their extraordinary dedication.

The joint committee adjourned at 8.31 p.m. until 1.30 p.m. on Monday, 16 May 2022.