Scottish Hospitals Inquiry
Witness Statement of
Susan Goldsmith

Introduction

1. My name is Susan Anne Goldsmith. I was previously employed by NHS Lothian as Director of Finance, but I am now retired.

2. I previously provided written statements to the Scottish Hospitals Inquiry (the Inquiry) for the purposes of the May 2022 and April 2023 Hearings relating to the Royal Hospital for Children and Young People and Department of Clinical Neurosciences (RNYCP / DCN) in Edinburgh. The statement for the May 2022 Hearing outlines my roles with NHS Lothian, qualifications, and employment history (**A41982670 – Witness Statement of Susan Goldsmith – Final April 2023 Hearing – Bundle 13, Volume 7, Page 1028**).

3. The Inquiry has asked me to provide another written statement, this time relating to the delay in the opening of the RHYCP/DCN. This statement seeks to provide that information to the best of my recollection.

The Decision to delay the Opening of the RHCYP/DCN

4. I was on annual leave the week when it became known to the NHS Lothian (NHSL) board that the ventilation in critical care could not achieve the number of air change rates recommended by SHTM 03-01 therefore it is my understanding that, after discussions between NHSL and Scottish Government, the decision to delay the opening of the hospital was taken by the Cabinet Secretary on Thursday 4th July 2019.

5. As far as I am aware, the shortfall in air change rates in the critical care department ventilation system was the only issue which led to the Cabinet Secretary taking that decision. Scottish Government and the then Cabinet

Secretary would be better placed to provide further detail on what considerations fed into their decision to delay the opening of the hospital.

The Executive Steering Group

6. On 8 July 2019, NHSL convened an Incident Management Team, which I initially chaired. An Incident Management Team is an additional internal management meeting to enable senior ownership of issues. The Incident Management Team was renamed and re-established as the Executive Steering Group (ESG) on 2 September 2019 with the last meeting held on 8 March 2021. The ESG was chaired by Professor Alex McMahon (NHSL`s Executive Director for Nursing, Midwifery and Allied Health Professionals) and membership included key Executive Directors being Tracey Gillies (Medical Director) and Tim Davison (Chief Executive) along with myself as Finance Director. The ESG meetings were held weekly on a Monday afternoon. In addition to the key Executive Directors, the membership of ESG was made up of NHSL executive management along with the Brian Currie (Project Director), Donald Inverarity (Lead Consultant Microbiologist) and Lindsay Guthrie (Lead Infection and Prevention Control Nurse). Mary Morgan (Senior Programme Director), who had been appointed by the Scottish Government, also attended after she was appointed in around September 2019. The ESG liaised with both internal and external advisers including Health Facilities Scotland (HFS) and our legal advisers when appropriate.

7. The function of the ESG was to provide a specific forum for NHSL executive management to consider all business relating to, responding to and addressing the delay to the RHYCP/DCN. This included technical, commercial and operational issues as I explain below. The ESG reported externally to the Scottish Government's Oversight Board and internally to the Finance and Resources Committee, Healthcare Governance Committee, both of which are committees of the NHSL board. The ESG did not report to the Cabinet Secretary, that role was for Scottish Government Oversight Board but as set out below the ESG provided a response on a wide range of issues associated with the delay for consideration by the Oversight Board.

8. I have been asked if I was the conduit through which the ESG reported to the Scottish Government's Oversight Board and the answer is no. Mary Morgan as Senior Programme Director prepared the reports for the Oversight Board and independently the Oversight Board then made recommendations to the Cabinet Secretary. My role was to inform the Oversight Board in relation to my specific area of knowledge, being commercial and financial issues, and as Executive director lead for the NHSL Board on the Project.

9. My background in being involved in the Project from more or less the beginning was essential to understanding the history of the Project. I had an awareness of the key players within IHSL, Multiplex and Bouygues, and I had an understanding of the contract and commercial issues that arose in addressing the rectification and enhancement works required. This involved meeting regularly with those individuals and with the Senior Programme Director, Project Director and Iain Graham (Director of Capital Planning), to understand how the ventilation might be rectified and which party might undertake the works required. There were different commercial issues for each party to consider so this was not straightforward. In addition to trying to resolve these commercial issues, I also had to ensure that members of the ESG were kept informed of any key issues/risks for the NHSL Board.

10. Following the review by HFS of all critical systems, decisions were taken at the Oversight Board to enhance other aspects of the building. These were also considered within the ESG and would subsequently form part of the Senior Programme Director's report to the Oversight Board. Inevitably, the decision of the Oversight Board to include additional enhancement works added to the extent and nature of the works required of IHSL and their supply chain and involved further commercial considerations, which I took forward with Mary Morgan (Senior Programme Director) and our internal team.

11. In summary, my role on the ESG was to provide wider Project context and history as the rectifications and enhancements were considered, but also as the Director of Finance, to have a leadership role in relation to commercial issues associated with the delay, rectification and enhancement works. I also had a

responsibility to ensure that the key issues and risks from this stage of the Project were reported to the Finance and Resources committee, in addition to the capital and revenue budgetary implications for both the Scottish Government and NHSL Board.

12. The ESG were initially considering the extent of the issues within RHYCP/DCN including reviewing reports prepared by NHS National Services Scotland (NSS) / HFS, and agreeing NHSL Board's response. The ESG also considered the wider operational consequences, both day to day issues but as this was during the pandemic many operational issues were significantly complicated by this. The ESG required to routinely consider how to respond to pandemic related guidance as it emerged and immediate operational pressures.

13. The ESG were also tasked with considering how to mitigate any patient and staff safety risks associated with continuing to operate out of the older facilities for longer than anticipated. This included the review, and recommendations on investment in these facilities and issues such as the management of medical equipment purchased for the new facility.

14. As proposals were developed to rectify the ventilation in critical care and enhance other aspects of the new facility, the ESG was required to consider key clinical issues particularly in relation to infection control, patient safety and operational effectiveness of the proposed changes. In addition, the ESG considered the legal and commercial issues associated with the changes.

Commercial Subgroup of the Oversight Board

15. The Oversight Board agreed to set up a separate commercial subgroup which first met on 15 October 2019 **(A34194259 - Oversight Board Papers – 30 October 2019 - Bundle 3, Page 380)**. The purpose of the group was to enable more detailed discussion and consideration of the key financial, legal and commercial issues that required to be resolved prior to the changes to the RHCYP/DCN being instructed by the NHSL Board. It was not possible to cover all these issues in the time available in the Oversight Board, and there was

concern by all members of the Oversight Board at some of the difficulties being experienced by IHSL in securing a supply chain to undertake the works. The terms of reference were agreed at the Oversight Board on 31 October 2019, with the subgroup membership being Christine McLaughlin (Chief Finance Officer, Scottish Government), Peter Reekie (Chief Executive, Scottish Futures Trust), Colin Sinclair (Chief Executive, NHS National Services Scotland), Mary Morgan (Senior Programme Director) and myself. I also was the chair of the commercial subgroup.

16. The terms of reference **(A41232145 – NHS Lothian RHCYP Oversight Board_ToR – Bundle 7, Volume 2, Page 352**) detail the main functions and remit of the group, which were:

"The Oversight Board Commercial Subgroup will report to the Oversight Board and provide advice and recommendations in the following areas:

- *To consider the short, medium and long-term legal and financial consequences of emerging solutions that may be employed to achieve the overall desired outcome and to develop and propose options for delivery of those solutions in the light of an assessment of risk and cost;*
- *To identify and consider the commercial implications of any legally binding agreements to be entered into by NHS Lothian, whether by way of amendment to the Project Agreement or as free-standing Settlement Agreements, letters of intent or other formal document to which NHS Lothian or other public sector party is a signatory; and*
- *To identify and consider any circumstances under which, over the entire contract period, the risk profile of the project may be altered, public sector liability increased or obligations altered, and recommend any actions to be taken to mitigate or remove increased risk to the public sector."* **(A41232145 – NHS Lothian RHCYP Oversight Board_ToR – Bundle 7, Volume 2, Page 354)**

17. The commercial subgroup reported to and advised the Oversight Board. It did not report to the Cabinet Secretary. That was for the Oversight Board. However, given that any contractual obligations and associated risks, as a result of the changes required to the RHCYP/DCN, would rest with NHSL Board the commercial subgroup also provided support to me in my role as Director of Finance. In my role, I also reported to the Finance and Resources Committee.

18. The group met as and when required depending on the development of the commercial discussions. However, given the iterative nature of the legal and commercial issues, on occasions calls were set up by myself and the Senior Programme Director with members of the group to ask for their input and views of key legal and commercial issues. In essence, the group formalised the relationship with Scottish Government, Scottish Futures Trust (SFT) and NHSL that in normal circumstances would have been utilised to ensure all parties were content with how the legal and commercial issues were being addressed.

19. The group, or more often some members of the group, liaised with both internal and external advisers, IHSL, Bouygues, and then subsequently Imtech (the contractor which ultimately completed the rectification and enhancement works – see paragraph 24 below). The purpose of these meetings and discussions was to secure a supply chain for the rectification and enhancement works that did not compromise the key principles of the Project Agreement (PA) that NHSL had entered into with IHSL, as far as this was possible. Also, where possible to use the change mechanism set out within the PA to agree and instruct changes required to the building.

20. My role within the commercial subgroup was to provide a leadership role and knowledge of the commercial and legal aspects of the project to date, and to ensure that as the NHSL Board was the contractual authority the NHSL Board's contractual position was protected as far as possible.

21. Over this period there were multiple issues addressed by the commercial subgroup, but in essence the group provided input to the options for securing a

supply chain for the works considering the contractual terms of the Project Agreement with IHSL. And secondly the group considered, and provided, input to the principles of the legal and commercial agreement secured with IHSL through Supplemental Agreement 2 (SA2) **(A32469196 - Project Agreement Supplementary Agreement (No. 2) - 5 August 2020 - Bundle 3, Page 1204**). The detail of both these aspects was worked through with NHSL's legal advisers and the Senior Programme Director with me and NHSL's Project team.

NHS Lothian Board Updates

22. As Director of Finance, I provided updates to the Finance and Resources Committee between July 2019 and 21 April 2021 (apart from 26 February 2020 when I gave my apologies), and to the NHSL Board, in both public and private (when there were commercially sensitive matters involved) between August 2019 and April meetings 2021 (apart from 2 February 2021 when I gave my apologies). This included presenting reports by NSS, KPMG, Grant Thornton and internal audit. I also provided progress updates on the remedial and upgrading works. As party to the Project Agreement, NHSL continued to play a full part in this process and had overall accountability for the Project. Additionally, because of the remedial and upgrade works, SA2 had to be agreed and entered into and in order to do so NHSL's governance arrangements in relation to approval of financial and contract arrangements as detailed in the Standing Financial Instructions were followed.

Supplemental Agreement 2 (SA2)

23. The securing of SA2 was the mechanism to deliver the ventilation and fire enhancement works in Critical Care. SA2 was based upon a Board Notice of Change under the Project Agreement. NHSL was able to raise a Board Notice of Change (i.e. a change to the Works or Services) at any point during the Project Term. Board Notices of Change were a means for NHSL to introduce changes for which IHSL would be paid. SA2 was entered into on 5th August 2020, i.e. during the Operational Term not the Construction Phase.

24. IHSL had to engage a contractor to undertake the ventilation works required under SA2. As I understand it, Multiplex refused to engage with IHSL in relation to the ventilation works. IHSL were also unable to secure Bouygues, the Facilities Management (FM) provider, to undertake the ventilation works. As far as I'm aware, the decision by Bouygues not to get involved with the ventilation works was entirely for commercial reasons and related to their obligations to maintain the ventilation system for a further 23 years and reliance on warranties from Multiplex, which they considered would be at risk if they undertook the ventilation works. As a consequence, IHSL contracted directly with another contractor, Imtech Engineering Services Central Limited (Imtech), to carry out the ventilation works.

25. The securing of SA2 was undoubtedly complicated and took time. This was because we had to resolve each potential commercial solution with IHSL sequentially as different approaches to how the rectification works would be delivered, and by whom, were assessed. In particular, the inability to secure Bouygues to undertake the works required a different contractual arrangement for IHSL with Imtech. The consequences of this took time to work through and IHSL determined that there were additional risks for them, e.g. a different contractor to manage on site; and how that contractor would fit with the FM provider and their warranties. The senior lenders were also interested on the impact an appointment of the new contractor would have on IHSL's risk profile. Working through these types of additional risks resulted in further legal and commercial discussions with the NHSL Board. However, in the early stages of determining the commercial means to deliver the works there was still a significant amount of work being undertaken to determine the nature of the works to be delivered, so the issues were running in parallel for some time. For example the fire enhancement works **(A34194278 - Oversight Board Papers for 19 December - Bundle 3, Page 533)** (including those in critical care) were not signed off by the Oversight Board until December 2019. Nonetheless, determining the commercial means to deliver the ventilation works and other enhancements did add to the timeline for the phased opening of the hospital.

26. I have been asked if there was an impasse between parties that resulted in a delay to the remedial works on the ventilation systems. I am not sure that we ever reached an impasse although the decision by Bouygues that it would not undertake the works on the ventilation in critical care was a significant factor in further delay to the rectification works.

27. I believe that delivering the rectification works was more challenging because of the non-profit distributing (NPD) model. This is due to the nature of an NPD contract which covers the contractual obligations of a special purpose vehicle (SPV) which carries limited financial risk, and flow through the building and FM contracts they hold with both a building contractor and an FM provider covering services over the life of the Project. The commercial consideration and risk profile across many parties is complex.

28. I have been asked to comment on the risk profile post SA2. SA2 was an amendment to the Project Agreement as allowed for within the Project Agreement. The change mechanism set out within the Project Agreement recognises that over a 25 year period contract changes will be required to the Facility and sets out the mechanisms for delivering those changes. NHSL raised High Value Change 107 for IHSL to carry out the ventilation works. SA2 was entered into by NHSL and IHSL which set out the obligations between the parties in relation to the ventilation works. The SA2 contract between IHSL and NHSL; the contract between IHSL and Imtech; and the contract between IHSL and Bouygues were all concluded in parallel on the same date. This did recognise the additional risks in connection with interface disputes between Imtech, Multiplex, and Bouygues, and some matters were excluded from the New Engineering Contract (NEC). But, in essence the delivery of the hospital didn't change for NHSL with NHSL paying for the building and Bouygues providing FM services.

Settlement Agreement and Supplemental Agreement 1

29. I have been asked to comment on Settlement Agreement and Supplemental Agreement 1 (SA1) (**A32469163 - Settlement Agreement and Supplemental Agreement relating to the Project Arrangement for the provision of RHSC and DCN between Lothian HB and IHS Lothian Ltd - 22 February 2019 - Bundle 4, Page 11)**. SA1 was the mechanism by which many of the issues that had arisen during the construction period were resolved. It included a technical schedule which listed various items, including what had been agreed in relation to ventilation in single rooms and multi-bedded rooms. In relation to multi-bedded rooms, my understanding prior to entering SA1 was that NHSL agreed to 14 of 20 multi-bedded rooms to have balanced pressure. Janice MacKenzie (Project Clinical Director) had undertaken a risk assessment with input from clinical staff and infection control, and the reasoning for requiring balanced pressure in multi-bedded rooms was that we wanted to be able to cohort patients with the same infection in the same room. I was not aware specifically that, in relation to critical care, a requirement for balanced pressure was a derogation from guidance, which required 10 Air Changes per Hour (ACH) and positive pressure. The focus was very much on pressure rather than air changes.

30. In relation to single bed rooms, I remember discussions focussed on a derogation from guidance from 6ACH to 4ACH, and that we were content to agree to that on the basis that it would be 4ACH mechanical and 2ACH natural ventilation. I cannot recall ever discussing this derogation in the context of critical care.

31. The pressure regime for the multi-bedded rooms had been the subject of dispute between IHSL and NHSL for some time and SA1 was an alternative resolution to a court action in that regard. SA1 also dealt with numerous other issues that had arisen during the construction period, including the derogation from 6ACH to 4ACH for single bedroom. It is important to be clear that by the time SA1 was signed, the ventilation system had already been installed and

signed off by the independent tester (Arcadis) and the technical schedule was intended to reflect the agreed position.

Commercial Context to SA1

32. I drafted a Board Position Paper for the Public Inquiry dated 14 October 2020 (**A32371311** - **Board Position Paper for Public Inquiry & Appendices - Bundle 13, Volume 3, Page 6**), the purpose of which was to provide NHSL Board's initial view of what had gone wrong with the Project. The Position Paper included a summary of the issues which arose during the construction period and provides the commercial context to SA1. In short, SA1 provided financial support for IHSL, who were facing financial distress, without which they may not have been able to complete the hospital. I have copied over paragraphs 6.8 – 6.15 from the Board Position Paper below and adopt them as part of my evidence because they did and do reflect my understanding and answer the questions I have been asked:

"*6.8 In January 2017, IHSL formally notified the Board that it would be unable to complete the facility by the contracted date of July 2017. At the same time, IHSL also indicated to the Board that Multiplex had suffered significant losses on the Project. Prior to this date, there had been no acknowledgment by IHSL that the facility was unlikely to be completed by the contracted date.*

6.9 Both parties engaged experts on ventilation in relation to the contractual obligations on the pressure regime for the multi-bedded rooms (and not air changes) and ultimately sought a legal opinion from Counsel on the matter. The Board was, reluctantly, on the brink of going to court for resolution when Multiplex indicated they wished to enter negotiations for a Settlement Agreement that would allow a solution to be found by mutual consent. A key consideration for the Board was the time, cost, and the uncertainty for delivery of the facility that would be created by such Court action. The parties agreed a set of principles that would underpin the Settlement Agreement that allowed Multiplex to progress with the

rectification of the pressure regime for the multi-bedded rooms while the detail of the agreement was negotiated.

6.10 Under the terms of the contract, IHSL would not begin to receive payment for the new facility until it was available to the Board. Therefore, at this time, IHSL had no income with which to service their debt obligations to their senior lenders. Under the terms of IHSL's contract with Multiplex, IHSL could seek damages from Multiplex to replace the lost income that would allow debt service payments to commence and avoid a default under the terms of the loans with their senior lenders. However, while the process of agreeing the Settlement Agreement was taking place, the Board became aware that, as well as the losses Multiplex was facing on the Project, they had not been paying damages to IHSL.

6.11 As a consequence, IHSL faced financial distress and insolvency. If IHSL became insolvent, they would be in default of the contract, which may have led to their termination, leaving the Board to then complete the facility or to find another party willing to take over the contract. However, prior to the Board being in a position to exercise any termination rights under the Project Agreement, the Board are obliged under the terms of a direct agreement with IHSL's senior lenders to give them prior notice of an intention to exercise the termination rights. Following the service of such a notice, Senior Lenders have extensive rights to step-in and seek to resolve the default. This scenario, or any alternative approach such as Court action, would have resulted in a timescale for completion of the facility that would have been completely unknown. Further, even if the Board were in a position to pursue termination under the terms of the project documents, the facility would only revert to NHS following agreement or determination of the applicable compensation payable to IHSL / Senior Lenders. The compensation would likely have been in excess of £150 million, a sum that would have had to be funded from the Scottish Government's capital programme. Avoiding this scenario became a key driver of the Settlement Agreement and the quantification of the settlement sum that it entailed.

6.12 Unfortunately, progress on site suffered a further severe setback in June 2018 when a major release of water occurred from what transpired to be a faulty crimped pipe joint. This further amplified the Board's concern over the quality of workmanship and lack of supervision by Multiplex.

6.13 For all parties, not least the Board, securing a negotiated Settlement Agreement was important to gain certainty on all aspects of the disputed items. Under the terms of the NPD contract, the Board and IHSL, once construction is complete, have a contractual relationship in the operational period for the facilities management and Life Cycle maintenance of the built hospital.

6.14 Prior to finalising the Settlement Agreement, the Project Team and the Board's technical advisers identified further issues that the Board considered to be non-compliances in relation to drainage, void detectors and heater batteries, all of which would require further remedial works. The Settlement Agreement ultimately covered 81 technical issues ranging in size and complexity. As noted, the key technical issues that could have had an impact on patient safety and care are summarised in Appendix 3. The Board can provide more information on the other technical issues as required by the Inquiry. To further preserve IHSL's financial stability, and to introduce a higher degree of certainty over completion timescale, the Board agreed that their own commissioning programme to facilitate commencement of clinical services would run concurrently with the remaining works.

6.15 The business case for a financial settlement to IHSL was agreed by the Scottish Government in February 2019. The Settlement Agreement was signed in February 2019, signifying formal completion of the facility and allowing the flow of payments from the Board to IHSL to commence. However, the agreed works to address the various outstanding issues would continue until June 2019, at which point it would be possible for the Board, its staff and patients to occupy the facility."

Governance re SA1

Finance & Resources Committee (F&R)

33. There was significant governance around SA1. I reported in to F&R and the NHSL Board throughout the negotiations as to the progress of SA1 and this is reflected in the minutes of the meetings. In respect of F&R, at paragraph 15.2 of the minutes of the meeting on 19 September 2018 **(A33887882 - Finance and Resources Committee Minutes 2005 – Present - Bundle 13, Volume 7, Page 1050)** it is recorded that I tabled a position paper on the proposed settlement agreement (SA1). The paper provided detail and an update on the current situation with the RHCYP/DCN project. There was discussion on the IHSL financial difficulties; the need for a finalised SA1 to move forward, the factors delaying the signing of this and the position of senior funders; residual technical issues with the key issue being around drainage systems; amendments to the business case; the leadership and competence around IHSL and the next steps to make progress. The Committee noted the current position with the project and gave its absolute support to the project team in terms of the current strategy and approach.

34. On Wednesday 23 January 2019, (**A33887882 - Finance and Resources Committee Minutes 2005 – Present - Bundle 13, Volume 7, Page 1067**) I updated the F&R Committee on the position on completion of the new facility and commercial arrangements with IHSL, such position being documented in SA1 between the NHSL and IHSL. It is recorded in the minutes that the Committee noted the contents of the paper and the progress made in recent weeks. The Committee continued to support the commercial and technical position as described which would be reported to the NHSL Board for approval at its February meeting.

35. On Wednesday 20 March 2019 **(A33887882 - Finance and Resources Committee Minutes 2005 – Present - Bundle 13, Volume 7, Page 1077)** I provided the F&R Committee with confirmation that the commercial arrangements with IHSL were now documented in SA1 between the Board and

IHS Lothian Limited on 22 February 2019. The Committee accepted significant assurance that the conclusion of SA1 was in line with the previous reports to the Committee and NHSL Board. The Committee noted that a due diligence report (**A33406223 – Report on PA Settlement Agreement dated 28 February 2019 - Bundle 10, Page 156**) had been received from Macroberts Solicitors and that all parties were now working to the programme and contract as amended by SA1, with a planned full service operational commencement date of 15th July 2019.

NHS Lothian Board

36. I also reported to the NHS Lothian Board in relation to the ongoing negotiations with IHSL that lead to SA1. Minutes from 4 April 2018, 27 June 2018, **(A33887885 - Minutes of NHS Lothian Board Meeting - Bundle 13, Volume 7, Page 1079 and 1095).**

37. 5 December 2018 **(A33887885 - Minutes of NHS Lothian Board Meeting - Bundle 13, Volume 7, Page 1141)** reflect those discussions.

38. On 4 April 2018, **(A33887885 - Minutes of NHS Lothian Board Meeting - Bundle 13, Volume 7, Page 1079)** I reported to the NHSL Board that following the previous Board Development session a special meeting of the Finance and Resources Committee had been held which had been attended by a representative from MacRoberts NHSL's legal advisers. The meeting had concluded that an interim court order should be prepared for possible issuing to IHSL to get the ventilation work concluded. The timescale to move to a court hearing would take up to a year. The process around the serving of the court order was explained. The detail and timescales around the court order had been shared with IHSL in draft form and included affidavits. Communication continued with IHSL in order to keep lines open. Opportunities still remained for a negotiated settlement.

39. On 27 June 2018 (**A33887885 - Minutes of NHS Lothian Board Meeting - Bundle 13, Volume 7, Page 1095)** I reported to the NHSL Board that

ventilation work was underway and design work had been agreed and Multiplex were progressing this. I also reported that SA1 was taking time to conclude and the draft agreement was being worked through. It is recorded that in terms of the financial settlement it had initially been hoped to provide a loan to IHSL. A capital injection supported by a Business Case was being looked at. The minutes reflect that Scottish Government was comfortable with this process with a key issue being that value could be demonstrated. Although the proposition had been developed it had not yet been shared with IHSL. Essentially the offer would be what NHSL deemed to be appropriate. I commented that it was in IHSLs interest to get SA1 signed. There was a residual danger that if SA1 was not reached then Multiplex might walk away from the Project leaving the hospital incomplete.

40. On 6 February 2019 **(A34978959 - 6.2_0111_Private Board Minutes 2005 – Present - Bundle 13, Volume 7, Page 1159)** there was a private session of the NHSL Board in order to approve SA1 by way of Board legal minute. NHSL Board members received an update on the progress made in recent weeks on the conclusion of SA1 with IHSL, and the associated commercial and technical agreements. The NHSL Board was asked to receive assurance that all negotiations on the terms of SA1 had been supported by the NHSL's legal and technical advisers. The NHSL Board approved SA1 with IHSL and considered a short extension to the longstop date to allow all commercial and technical matters to be concluded.

41. It is of note that Audit Scotland and Scott Moncrieff had reviewed the settlement agreed with IHSL in light of a possible request by the Parliamentary Audit Committee and this review had been included in the external Audit Report where it had been reported that a good system of governance had been evident in respect of the IHSL settlement arrangements. I would agree with that finding.

The Phased Migration

42. Although I was party to the discussions on a phased migration the key considerations were clinical and took account of the challenges with the existing infrastructure that both the RHCYP and DCN were operating out of. That said the Cabinet Secretary had given a public commitment to open DCN in the Spring of 2020.

43. There were also commercial considerations, although the clinical ones were the key driver. Those commercial decisions related to the fact that Lothian was paying part of the service charge each month for the building. I don't know whether the fact we were paying the service charge carried significant weight for the Scottish Government but they were aware of it. Scottish Government and SFT had been briefed about SA1, which commenced the payments so it was a well-known position.

44. I also had a role in ensuring that the associated commercial and financial consequences for the PA with IHSL were considered, and agreed by NHSL, particularly in relation to Bouygues' performance while the building was part occupied (due to the phased migration) and partly in construction. In short, the operational phase of the Project Agreement had commenced on signing of SA1. Due to the delay, NHSL were entitled to apply deductions to the service payments made to IHSL and by virtue of the FM Agreement meant that Bouygues were not receiving their full service payment. In order to incentivise IHSL and Bouygues to agree to SA2, which NHSL was under significant political pressure to deliver, various compromises were agreed and parties reached a commercial settlement.

The Royal Hospital for Sick Children at Sciennes

45. The Royal Hospital for Sick Children at Sciennes was already providing safe and effective clinical care for children and young adults although the facilities had been assessed as inadequate for many years, hence NHSL Board's strategy to replace the hospital. The key piece of work as I recall was

determining whether any short term investment in the Sciennes buildings was possible that would enhance the environment and any of the critical systems. I am not aware of any issues with the ventilation system other that as a Victorian hospital it was not possible to deliver a ventilation system that met current standards.

Response to Grant Thornton Report

46. At the time of retiring NHSL had already set up a small working group to consider how the recommendations from the Grant Thornton report **(A32512442 - Grant Thornton Report – NHS Lothian Internal Audit Report – Report for the Audit and Risk Committee 31 July 2020 and the NHS Lothian Board 12 August 2020 - Bundle 10, Page 4)** could be implemented. As I recall this had already provided updates on progress to the Finance & Resources Committee. In addition, the Scottish Government had announced the establishment of NHS Scotland Assure, and its role also addresses some of the recommendations of the Grant Thornton report.

Reflection

47. Due to the extensive testing undertaken on completion of the rectification works I consider that the actions taken have been adequate and effective.

48. In my view, the utilisation of PPP funding for major complex hospital acute hospitals is challenging and in this case delivering a private public partnership (PPP) funded hospital on an existing (old) private finance initiative (PFI) funded hospital made this even more difficult. Undoubtedly this increased the risk profile for this project. In addition, at the time of awarding the preferred bidder status the policy was to prioritise the cost criteria marginally above the quality criteria. Although value for taxpayers money is essential, when the rectification and enhancement works were agreed as being required quality became the key driver. The public sector needs to be consistent as uncertainty or change costs taxpayers money. That said the extent of technical specification required for acute hospitals may mean that delivery of these projects is unlikely to be

affordable in the current financial environment. And if there is likely to be a future partnership between the private and public sector in how hospitals are funded there may need to be more flexibility/shared risk on how hospitals are delivered. Finally, there needs to be greater clarity on what is national guidance and what is mandatory.

49. I would also reflect that the separation between national policy and how projects are prioritised, and the implementation vehicle for delivery for major projects is important. This means that the Authority or legal entity delivering the project can evidence a robust project structure and system of control. For this project it was NHSL Board's system of control that identified the non-adherence to guidance although this was immediately prior to opening because of the terms of SA1, and hence far too late in the project.

Declaration

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