



Legal doubts surround sale

The ACT Government's \$77 million plan to buy Calvary Hospital probably exceeds its lawful powers, **PETER O'KEEFFE** argues

Now we know. Even "massive" public opposition to the Calvary sale won't change the Government's mind ("Calvary sale won't be decided by public", October 17, p2). If the Assembly passes the \$77 million appropriation bill, the Government will buy Calvary. The Little Company of Mary will first buy the hospice for \$9 million and get a 30-year palliative care service contract.

The Greens support the Calvary purchase and have blocked an Auditor-General's inquiry. The LCM sisters have persisted thus far, aren't likely to change, and their English HQ won't interfere.

In spite of Archbishop Mark Coleridge's concern about selling a unique Catholic public hospital, Cardinal Pell and the Papal Nuncio will likely advise the Vatican not to interfere and risk a backlash – the more so since it's the LCM who are voluntarily surrendering their 50-year legacy.

But the proposed Calvary/hospice sale is questionable. Indeed, it may well be unlawful – beyond the lawful powers of the Government. There is no doubt that under currently disclosed agreements and leases, the Government cannot acquire Calvary unless the LCM decides to discontinue the conduct of the hospital.

Equally, there is no doubt that if the LCM decides to discontinue, they must surrender their lease and are not entitled to compensation for the value of any buildings or improvements which have been paid for by the taxpayer.

At that time the public's reversionary rights crystallise and the non-compensation clause operates. The public assumes a reversionary ownership of Calvary. Nor is there any concept of "sunk" costs in this reversionary public ownership.

That's why there has never been

any legal or budgetary impediment to government investment in Calvary – such investment is capital, not an expense, because if the LCM discontinues, Calvary reverts to the public account.

Thus the LCM may not be compensated unless the Government agrees to pay money in a new agreement. There may be agreement that the LCM be given \$77 million, but that cannot be for taxpayers' assets, nor for discontinuing unless the current agreement is first unconditionally revoked – that is, until the Government unconditionally surrenders the community's existing rights.

Then a new agreement may give the LCM an enforceable government gift of \$77 million. That gift will be conditional on the Assembly's appropriation bill.

A law to give a near-billion dollar corporation an enforceable gift of \$77 million may well be invalid under the ACT Self-Government Act since it cannot, by definition, be a law for the good government of the territory.

The LCM will not "sell" Calvary until it first owns the hospice and has a minimum 30-year contract for palliative care services. This will exclude competitors for a generation. The ACT Government can sell the LCM legal ownership of the hospice buildings along with a Crown lease. And, however irresponsibly, a government can probably enter a contract lasting for the life of eight or nine Legislative Assembly terms, and that is enforceable against our grandchildren.

Moreover, the hospice sale and service contract rights are not reversible, whatever challenge is made to the appropriation bill.

It is, of course, imprudent to sell any public facility without tender, the more so a unique facility.

To sell a unique facility to the

contractor who, without previous tender, currently operates it is questionable, may be maladministration and may constitute a breach of ACT financial management standards.

It may arguably exceed the legislative and executive powers of the ACT Government, under the ACT Self-Government Act, to sell such a facility without tender and enter a 30-year contract for the purchase of services from the new owner.

Even if this proposal were untainted by its role as an incentive to the LCM to "sell" Calvary, it may be unlikely the Parliament and its committee, in facilitating the grant of a Crown lease, would be satisfied with the propriety and legality of what is proposed.

Speculation is inevitable because there are few if any major policy decisions where so little primary documentation has been made public. Not a word of legal advice. Not a line of the complex draft agreements. Not a table from the valuations. Not a sentence examining the advantages of retaining Calvary. Not a paragraph justifying hospice privatisation or the incredible 30-year service contract.

Not a note about why the LCM should be given the right to profit by on-selling the hospice to another operator. Not a footnote about the impact on palliative care services a generation hence. Not a page of advice from any professional public servant, doctor, or lawyer about the legality, necessity or effects of what is proposed.

Until Minister Gallagher releases something more convincing than massaged consultation documents, people will vehemently oppose such secrecy and such profligacy.

■ Peter O'Keeffe is a lawyer with a long-standing interest in the hospice.



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