



Transcript of Proceedings

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THE HONOURABLE G DAVIES AO, Commissioner

MR D C ANDREWS SC, Counsel Assisting
MR R DOUGLAS SC, Counsel Assisting
MR E MORZONE, Counsel Assisting
MR D ATKINSON, Counsel Assisting

IN THE MATTER OF THE COMMISSIONS OF INQUIRY ACT 1950
COMMISSIONS OF INQUIRY ORDER (No. 2) 2005
QUEENSLAND PUBLIC HOSPITALS COMMISSION OF INQUIRY

BRISBANE

..DATE 08/09/2005

DIRECTIONS HEARING

[NOTE: Consequent upon the order of the Commissioner, the Honourable G Davies AO, made on 08/09/05 that all the evidence taken by the BUNDABERG HOSPITAL COMMISSION OF INQUIRY pursuant to COMMISSIONS OF INQUIRY ORDER (No. 1) 2005, other than the evidence of Mr Leck and Dr Keating, be admitted into evidence, the transcript of proceedings of the QUEENSLAND PUBLIC HOSPITALS COMMISSION OF INQUIRY pursuant to COMMISSIONS OF INQUIRY ORDER (No. 2) 2005 commences at p. 5099.]

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

THE COMMISSION RESUMED AT 2.12 P.M.

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COMMISSIONER: I'll start with appearances, and what I really had in mind doing was going through the names of those who appeared for the parties who were granted leave to appear before the previous Inquiry, and I intended, subject to any objection, to immediately then grant them leave to appear here, but I'd like you to interrupt me if I get the names of those people who are now appearing wrong, if they're not the same as they were before.

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Mr Boddice SC and Mr Fitzgerald for Queensland Health or, more specifically, the Director-General Queensland Health and other employees of Queensland Health who will give evidence or have given evidence. Correct?

MR BODDICE: With Mr Farr and Mr Fitzpatrick of counsel, if your Honour pleases.

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COMMISSIONER: Thank you. Mr Tait SC with Ms Gallagher for AMAQ and its members.

MS HEYWORTH-SMITH: Ordinarily Mr Tait would be appearing. Mr Tait was unavailable today.

COMMISSIONER: That's all right. Thank you. Mr Mullins and Mr Harper for the Patient Support Group.

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MR MULLINS: Thank you, Commissioner.

COMMISSIONER: Mr Morrison QC and Mr Macsporrán for Ms Mulligan.

MR BARTLEY: I'm here today for Ms Mulligan, Brian Bartley.

COMMISSIONER: Yes, Mr Bartley. I know who you are. Mr Jackson QC and Mr Ashton for Mr Leck.

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MR ASHTON: If it please, Commissioner, I'm not led here today, but Mr Jackson-----

COMMISSIONER: But you will be at some stage perhaps.

MR ASHTON: Possibly, Commissioner.

COMMISSIONER: Thanks. Mr Applegarth SC for Dr Buckland.

MR APPLGARTH: I appear with my learned friend Ms Klease.

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COMMISSIONER: Thanks, Mr Applegarth. Ms Dalton SC for Dr Scott.

MS DALTON: I appear with Mr Harding of counsel.

COMMISSIONER: Thanks, Ms Dalton. Mr Martin SC for Ms Edmond.

MR QUINN: Mr Martin is not here this afternoon, Commissioner. I'll be appearing, if necessary. 1

COMMISSIONER: Okay, thanks. Mr Gotterson QC and Mr O'Sullivan for The Honourable Mr Nuttall.

MR GOTTERSON: Correct, your Honour, yes.

COMMISSIONER: Mr S Couper QC for Professor Stable. 10

MR COUPER: If it please, Commissioner.

COMMISSIONER: Mr Devlin with Ms McMillan for Medical Board of Queensland.

MR DEVLIN: Thank you, Commissioner.

COMMISSIONER: Mr Diehm for Dr Keating.

MR DIEHM: Thank you, Commissioner. 20

COMMISSIONER: Mr Allen for the Queensland Nurses Union.

MR ALLEN: Thank you, Commissioner.

COMMISSIONER: Mr Perrett for the Health Rights Commission.

MR PERRETT: Thank you, Commissioner.

COMMISSIONER: Ms Kelly for Queensland Clinician Scientists Association. 30

MS KELLY: Thank you, Commissioner.

COMMISSIONER: And Mr Douglas SC as counsel assisting me this afternoon.

Are there any other applications for leave to appear? Very well. Thank you. 40

This is, of course, a public inquiry, and unless I make any order to the contrary, all proceedings will be made public.

There's also a question of TV and radio coverage. I had in mind making an order generally in terms of the order made by the Commissioner of the terminated inquiry. Does anyone have any objection to that? Very well.

I direct as follows: 50

1. Except as provided in the respects I'm about to mention, audio and video recording of proceedings at the Commission's public sittings in Brisbane and the taking of still photographs be permitted in accordance with the conditions set out in this ruling and in accordance with arrangements to be approved by the Secretary to the Commission;

2. A witness giving evidence solely in the capacity of a patient who received medical treatment from Dr Patel or otherwise at Bundaberg Base Hospital or another hospital, or in the capacity of a member of such a patient's family, must not be filmed or photographed either within the Inquiry hearing room or in the precincts thereof, and the evidence of such a witness must not be recorded for the purpose of broadcasting without the consent of the witness;
3. Any other witness may apply to the Commission for a similar order to be made in respect of that witness;
4. If a witness is filmed or photographed or the evidence of the witness is recorded in contravention of the orders I've just made, the film, photograph or recording must not be broadcast or otherwise published.

I propose to make, unless someone objects, the Commissions of Inquiry Order (No. 2) 2005 an exhibit in these proceedings. It is, of course, a public document, but I thought for convenience of parties and others it would be appropriate that I do that. I'll make that Exhibit 1 then in this Inquiry.

ADMITTED AND MARKED "EXHIBIT 1"

COMMISSIONER: Whilst I'm on the question of the Terms of Reference, there are two matters that I'd like to raise. The first was raised in a letter to me yesterday from Gilshenan & Luton. That's a letter dated 7 September 2005. It's marked "Confidential", but, Mr Devlin, I can't see why it should be confidential. This is a letter from your solicitors which deals with two matters. It deals with some further evidence that may be proposed.

MR DEVLIN: Yes.

COMMISSIONER: And it deals with a question of construction of the Terms of Reference.

MR DEVLIN: There's no reason to keep it confidential now. It was confidential for your purposes, Commissioner.

COMMISSIONER: I understand that. Thank you for that. I propose to have a separate list of exhibits for those exhibits which, so to speak, have a limited shelf life, those which aren't going to be here for the duration of the Inquiry, because they may clog up the record a little too much. This is one of those. I propose to call those Exhibits A, B and C. They will be public record, of course, but it's just that we don't want too many documents on the permanent record, if we can avoid that.

I make that letter Exhibit A.

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ADMITTED AND MARKED "EXHIBIT A"

COMMISSIONER: So far as it relates to the Terms of Reference, it makes a point which, if I may say so, Mr Devlin, is a very good point, and it is that there was in the Terms of Reference in the previous Inquiry a provision which permitted the Commissioner to determine whether there was sufficient evidence to justify the bringing of disciplinary or other proceedings or the taking of actions against or in respect of any person. That is, it mentioned Dr Patel, but it mentioned other people as well, and that seems to have somehow - and I'm sure this is accidental - seems to have dropped out of the Terms of Reference for this Inquiry.

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I've been assured by the Premier that if there are any Terms of Reference which have been omitted which I think should be included, that they will be, and so I think you may all assume that there will be a provision inserted in the Terms of Reference which will cover that point.

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MR DEVLIN: Thank you.

COMMISSIONER: I think that you should assume that the evidence will need to do that.

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The second question relating to the Terms of Reference so far as they arise at the moment concerns waiting lists, and I should tell you that I was asked by the Premier early yesterday morning whether I thought waiting lists were covered by the Terms of Reference. I said I thought they probably were, and I said I thought they were probably covered by paragraph 2(c) of the Terms of Reference, but that matter may not be absolutely clear, and if there's any doubt about that, and if anyone thinks that they aren't covered by 2(c) then I'd like to hear from you about that, because again I would seek an additional Term of Reference to ensure that waiting lists, secret waiting lists and so on are covered by this Inquiry, because I intend to examine and report on those.

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MR DEVLIN: May I be heard briefly on that, Commissioner? Is it appropriate at this moment?

COMMISSIONER: Well, what I had in mind was if you wanted to make a submission about that as to whether a term should be included, or if so what term should be, that you would do so in writing to me.

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MR DEVLIN: Thank you.

COMMISSIONER: Perhaps do so in writing to me by 10 o'clock on Monday. The same is true, I should add, generally about the Terms of Reference. If someone wants to make submissions

about whether they cover this or that, then please do so also in writing, and do so by Monday morning at 10 a.m.. I don't want to be having arguments at the end of this Inquiry as to what's covered by the Terms of Reference, if we can possibly avoid it.

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I propose also to make a practice direction in terms generally of the practice direction which was made in the previous Inquiry. That really, for convenience - I suppose if I was starting afresh I might make one slightly differently, but that's neither here nor there, I think, and so unless someone objects, I intend to make a practice direction generally in the terms of the direction made by the Commissioner under Commission of Inquiry Order (No. 1) 2005. Does anyone have any objection to that?

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One matter arising out of that involves hearing times. I had in mind, subject to any other order, that hearing times would be normal Court hours Monday to Thursday. That is, 10 a.m. until 1 p.m., 2.30 to 4.30 Monday to Thursday. We may, of course, need to sit outside those hours to accommodate certain witnesses or for some other reason - any other reason, but subject to that I already have that in mind. Anyone have any objection to that?

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The only other things that I should mention about the practice direction are that we will have a new website, but for technical reasons we can't get that up yet. In the meantime we will use the existing website. The same is true also of an e-mail address. We have, unfortunately, a new and longer name for this Commission of Inquiry. I tend to get this wrong, and I'll be corrected, I think, by you, but I think it's called the Queensland Public Hospitals Commission of Inquiry. Bit of a mouthful.

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The next question I want to deal with is the evidence from the previous Inquiry. As some of you may know, I indicated publicly shortly after my appointment that I thought that evidence which was admitted in the previous Inquiry, other than the evidence of Mr Leck and Dr Keating and any exhibits tendered during the course of their evidence, should be admitted as evidence in this Inquiry.

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I indicated, however, that I had no final view on that question, and that I wouldn't make any order in that respect before hearing submissions on it. Are there anyone among counsel here who want to make submissions to the contrary?

MR COUPER: Commissioner, if I might be heard briefly. Some of the evidence led in the previous Inquiry appears to be outside the Terms of Reference of this Inquiry, even if expanded to things like waiting lists and things of that sort.

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COMMISSIONER: Oh, they may, and I'm conscious of that, Mr Couper, and I don't want to cut short anything you may want to say, but it seemed to me that they would be only prejudicial to any witness in this Inquiry in respect of the conduct of that witness which is within the Terms of Reference

of this Inquiry, and because I knew so little about it at the moment, I could see nothing wrong with admitting evidence that may be - or part of which may be outside the Terms of Reference for this Inquiry if in fact they didn't prejudice any witnesses other than in respect of matters within the Terms of Reference of the Inquiry.

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MR COUPER: Commissioner, I don't pretend to be across all the evidence in the Inquiry. I came into the matter very late, but there are matters I'm conscious of which potentially have an adverse impact on Professor Stable for whom I appear which seem to be beyond the Terms of Reference, the result of which may be he's compelled to respond to matters not within the Terms of Reference, but within this evidence, or otherwise he'd be content to address himself to what seem to be fairly limited matters left so far as his evidence is concerned which is within the Terms of Reference. I can't be more specific than that. I'm not across the totality of the evidence.

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COMMISSIONER: All right. Anyone else want to make any submission abouts that?

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MR APPLGARTH: My client finds himself in a similar position in that we came into the matter a few weeks ago. We haven't had a chance to-----

COMMISSIONER: Who are you for?

MR APPLGARTH: Dr Buckland.

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COMMISSIONER: Yes, right.

MR APPLGARTH: And I don't have any instructions at the moment to oppose the course that you've suggested, but I would want the chance to obtain those instructions.

COMMISSIONER: Yes.

MR APPLGARTH: It occurs to me that the point that my learned friend Mr Couper just made is a point well made in that apart from matters potentially outside the Terms of Reference, various adverse things have been said about our respective clients and others, and we weren't here to meet them at the time. If they go deeper, as it were, well and good, but they become part of your record and it does present the problem of the extent to which my client would wish to or be expected to respond to them.

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I don't want to descend into detail, but can we have a chance to formulate a submission to you and perhaps suggest a process by which as much of the evidence as possible goes forward, but we don't want to have this Inquiry expanding out by having to revisit evidence that impacts on our clients directly or indirectly given the types of findings that were made by Justice Moynihan at paragraph 90 of his reasons.

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COMMISSIONER: All right. Anything else?

MS DALTON: Commissioner, I'd support that. I act for Dr John Scott. Really there's who two issues. There's evidence which was probably outside the terms of the Morris Inquiry and which is outside the terms of this Inquiry, and I think that can be identified perhaps in correspondence as we go before my witness comes to give evidence.

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Another matter - I don't object to the course that you're proposing, but I would like to place on record that it is much more than simply comments about the evidence by Commissioner Morris. The form of the question and the substance of the question is in many cases very objectionable, and I suppose at this stage all I want to do - all we want to do is bring that to your attention.

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COMMISSIONER: Yes, I understand that. I understand that objection. What I propose to do then - anyone else want to say anything?

MR DIEHM: Commissioner, I wanted to ask, if I may ask a question at this stage, because it would affect whether I want to say anything about that course, and that is what is then proposed to be done, though, with respect to that evidence? If it is admitted in documentary form, is that the end of the matter as far as that evidence is concerned? Or do you propose recalling witnesses, for instance.

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COMMISSIONER: Well, subject to any applications to the contrary, that would be the end of the matter so far as that evidence. I can see how, for example, it may be that the perceived bias of Mr Morris may have inhibited cross-examination of, say, Ms Hoffman or Dr Miach by some people. If that could be demonstrated then I would consider an application that those persons be recalled for further cross-examination. But it will depend upon those circumstances.

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MR DIEHM: Commissioner, for not one moment do I wish to make a submission that all of these people should be recalled for all of their evidence to be heard.

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COMMISSIONER: I hope not. I don't think you'd be listened to if you did.

MR DIEHM: Commissioner, it will certainly be satisfactory for my client's purposes if-----

COMMISSIONER: Who is your client again?

MR DIEHM: Dr Keating.

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COMMISSIONER: Oh, yes.

MR DIEHM: That in the event that there was an issue that arose about a witness's evidence where there was some reason to suppose that it was necessary for that witness to be recalled, then an application could be made to the Commission concerning that, and they can be dealt with individually on

their own merits rather than having any general practice other than, as you say, to in the first instance receive that evidence as part of the evidence. 1

COMMISSIONER: What I propose to do - I would still receive that evidence in the first place, but I would entertain an application by you in writing-----

MR DIEHM: Yes. 10

COMMISSIONER: -----seeking leave to cross-examine any witness that you identify with the basis upon which you seek leave to do that, and I would then rule on that.

MR DIEHM: Thank you, Commissioner.

MR ALLEN: Commissioner, I'd ask that if any party sought leave to cross-examine any witness who gave evidence before the Commission of Inquiry No. 1, that they also give notice of that application to the legal representatives for that witness. 20

COMMISSIONER: I think that's very sensible.

MR ALLEN: Because my client's position is to strongly-----

COMMISSIONER: Who is your client?

MR ALLEN: For the Queensland Nurses Union. 30

COMMISSIONER: Yes.

MR ALLEN: And I'd strongly support the proposal that the evidence of witnesses given before the previous Commission be accepted as evidence before this Commission, and that only if a party can satisfy you that it is necessary in the interests of justice for a witness to be recalled, that that should occur.

COMMISSIONER: Well, that's certainly sensible. 40

MR DEVLIN: Just briefly on behalf of the Medical Board, Commissioner, one of the interests of the Medical Board here is to assist the Commission in teasing out the evidence with respect to particular surgical procedures because of its responsibility to consider any disciplinary action against medical practitioners under the Health Practitioners Professional Standards Act.

COMMISSIONER: Yes. 50

MR DEVLIN: To that end it perceives that there may be pockets of evidence that need to be further explored, although I frankly admit that there is also the prospect that the Board can carry out its own inquiries at an appropriate time to the same end. So I simply place on record that we also will consider our position and go on paper to you.

COMMISSIONER: All right, thank you.

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MR ASHTON: Might I be heard?

COMMISSIONER: Yes.

MR ASHTON: I'd also have no objection to the course generally proposed.

COMMISSIONER: You're for Mr Leck, are you?

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MR ASHTON: Yes, if it please, Commissioner, and my reservations, I think, are a species of what's already been raised. Can I mention, though, for a start, there is at least some specific evidence which is inextricably connected to Mr Leck's evidence and seems to have no other connection and no other point than to deal with things about which he was questioned.

COMMISSIONER: What's wrong with that, though?

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MR ASHTON: Well, in my submission - and it will be a matter of going to the particular evidence, of course. It may be infected by the kinds of considerations that, for example, my learned friend Ms Dalton mentioned.

The difficulty here, Commissioner, is not the reception of the evidence. I'm not concerned about that. But at some point we need some kind of intimation about what evidence is going to be had regard to, otherwise we're independently and randomly trawling through-----

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COMMISSIONER: Once the evidence is in I might have regard to all of it. I don't know that I can be more certain than that at any stage before I give my final report.

MR ASHTON: Yes, well, I merely make the observation that that really leaves us all trawling through the thousands of pages of evidence, randomly seeking to identify pieces or slabs that might be affected-----

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COMMISSIONER: I think it would be your task, as the task of other counsel, to identify the relevant issues relevant to the Terms of Reference at the time you're making addresses to me.

MR ASHTON: If it please, Commissioner.

COMMISSIONER: What I propose to do is to admit the whole of the evidence the subject of the previous Inquiry, but I will give leave to Mr Applegarth, Ms Dalton and Mr Couper to make submissions as to why some part of that evidence should be deleted from the record. How long do you want to make those submissions?

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MS DALTON: I'd make mine tomorrow in writing, Commissioner.

COMMISSIONER: Some time next week is sufficient, I'm sure.

MR APPLGARTH: I'm sorry, sir? 1

COMMISSIONER: Some time next week, I'm sure, would be sufficient.

MR APPLGARTH: We have a lot to read through, but we'll do our best.

COMMISSIONER: By Wednesday next week? 10

MR APPLGARTH: We'll aim for that.

MR COUPER: Could I ask for Thursday, Commissioner, next week?

COMMISSIONER: Thursday, all right. Okay. That's a bargain. Thursday next week. 10 o'clock on Thursday next week.

MR DOUGLAS: Commissioner, you said you're receiving all the evidence. Of course you've already said you have excluded the evidence of Mr Leck and Mr Keating. 20

COMMISSIONER: I'm just about to make the order.

MR DOUGLAS: Thank you.

COMMISSIONER: I order that the whole of the evidence admitted in the Commission of Inquiry constituted by Commission of Inquiry Order (No. 1) 2005 other than the evidence of Mr Leck and Dr Keating, and any documents tendered as exhibits during the evidence of either of them, be admitted as evidence in this Inquiry. 30

I give leave to Mr Applegarth, Ms Dalton and Mr Couper to make submissions to me in writing by 10 o'clock next Thursday directed to the question as to whether some part of the evidence which I have now admitted should be expunged from the record for any reason.

I would now like to deal with an application which has been foreshadowed by Mr Devlin which is an objection to counsel who assisted the previous Inquiry assisting me in this Inquiry. Now, I appreciate, Mr Devlin, you're concerned for the sensitivity of this matter, but it seems to me that the public interest outweighs the sensitivity of the matter. 40

MR DEVLIN: I'm in your hands, Commissioner.

COMMISSIONER: Thank you, and that your solicitor's letter which contains your submission should be made public. 50

MR DEVLIN: I'm in your hands. I tender a copy of it.

COMMISSIONER: Thank you. Again that may be a document, the life of which won't last throughout this Commission, so I shall make it Exhibit B.

ADMITTED AND MARKED "EXHIBIT B"

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COMMISSIONER: For those who haven't seen it-----

MR DEVLIN: I can indicate I've circulated to counsel that had previously leave to appear with the concurrence of senior counsel assisting the Inquiry, so at least legal counsel have seen it.

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COMMISSIONER: There are other people in this room who may be interested, Mr Devlin.

MR DEVLIN: Thank you.

COMMISSIONER: All I will say is that the summary of your submission is that:

"In the unusual circumstances of the second Inquiry, Counsel Assisting will, we expect, be called upon to advise you" - that is me - "on the important questions as to what further inquiries are relevant to the new Terms of Reference, and as to what evidence already taken by the previous Inquiry is or is not tainted by the apprehension of bias.

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Throughout the first Inquiry not one of the three Counsel Assisting raised a note of dissent from the bar table at any time in an attempt to correct the Commissioner. It is not known whether such attempts were made privately.

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We raise for your consideration whether the three Counsel, in the circumstances, remain qualified to provide you the independent and impartial advice you will require to discharge the Terms of Reference."

I should say also that I've had some indirect communication with Mr Devlin this morning. I made a recommendation to the Government well before I received any submissions from him or knew of any contention being made by him that counsel who assisted the previous Inquiry should assist me in this one for obvious reasons.

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I then received an indication of the application and I then received Mr Devlin's submissions and I indicated to him, indirectly through Mr Douglas, that having read his submissions I had no intention of withdrawing my recommendation.

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What's happened since is that at the regular Executive Council meeting this morning, those counsel have been appointed. So the submission now, Mr Devlin, really should be, I suppose, that I should request the Government to revoke that appointment. Do you wish to persist in that submission?

MR DEVLIN: I wish you to simply consider the matter in the public interest. That is the wish of the Board.

COMMISSIONER: Yes. You're making that submission that I should do that?

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MR DEVLIN: Yes, consider the matter.

COMMISSIONER: Consider the matter? Well, I have considered it, Mr Devlin. Thank you. Does anyone else want to support that submission?

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MS HEYWORTH-SMITH: Commissioner, the AMA Queensland supports Mr Devlin's submission and adopts his submissions.

COMMISSIONER: Adopts them? All right. Thank you.

MS DALTON: Commissioner, I support that submission too. I'm not saying that I support every word of this letter, but I support the submission.

COMMISSIONER: You don't wish to add anything?

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MS DALTON: No.

MR APPLGARTH: Commissioner, if I may be briefly heard, my client's position is to raise the same concerns, ask you to consider it. In addition to the matters canvassed in the letter, we would ask you to consider the particular position in which, for example, my client and others find themselves in the light of Justice Moynihan's finding at paragraph 90 that certain references were illustrative of "pervasive"-----

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COURT REPORTER: I'm sorry, Mr Applegarth, I'm having a little trouble hearing you.

COMMISSIONER: I can't hear you either.

MR APPLGARTH: I'm sorry. I'll come forward.

COMMISSIONER: I thought you were just mumbling a bit.

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MR APPEGARTH: I will admit to that. References were illustrative of-----

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COMMISSIONER: I think I have lost Justice Moynihan's reasons in my papers.

MR APPEGARTH: I was only going to refer to a sentence in paragraph 90.

COMMISSIONER: Okay, and that is?

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MR APPEGARTH: That is that certain passages of evidence which his Honour quoted were illustrative of "evasive disdain for or contempt towards bureaucrats and doctors who administer but do not treat patients", and that was manifest by the Commissioner. Of course, that's a criticism of the Commissioner, but whatever observations it made in our learned friend's letter in relation to the role of counsel assisting would appear to apply to that type of observation.

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In addition, there are matters that postdated Justice Moynihan's - the hearing before Justice Moynihan which was specific to my client, and I have dealt with them on the record and I don't wish to go into them in detail here. I can or I could make a submission.

COMMISSIONER: No.

MR APPEGARTH: But there was some specific references which, to say the least, were unfortunate and which counsel assisting didn't do anything to correct, or play any role, but let them stay on the record, in my submission. Having regard to the matters that have been raised in the letter from Mr Devlin's instructing solicitors, we would ask you to consider the matter.

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COMMISSIONER: Thank you. I am sorry, I didn't get the appearance - who were you appearing for?

MS HEYWORTH-SMITH: For the AMA Queensland, Commissioner.

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COMMISSIONER: Mr Devlin, who appears with Ms McMillan for the Medical Board, has submitted that I should at least consider requesting that Mr Andrews QC, Mr Morzone, and Mr Atkinson should not be retained to assist me in this Commission. In other words, that I should request that their appointment, which was made by Executive Council this morning, should be terminated.

That submission was supported by Ms Dalton for Dr Scott, Mr Applegarth for Dr Buckland, and Ms Heyworth-Smith for the AMA Queensland.

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Mr Devlin's submission was based, as appears from the written submission, on three matters:

the acquiescence of counsel in the conduct of Mr Morris in dealing with Mr Leck, Dr Keating, Dr Miach and

Ms Hoffman;

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their lack of substantive response to correspondence from solicitors for the Medical Board as to the conduct of evidence; and

their attendance or likely attendance at private meetings with Mr Morris, and with Mr Morris and prospective witnesses.

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The substance of the submission is that having regard to this conduct, I and the parties could not have confidence in those counsel that they could objectively either assist me in sifting through the evidence from the earlier Commission as to that which is tainted or untainted, or in progressing this Commission of Inquiry in relation to the evidence to be led.

This submission in particular is that in consequence they may have difficulty in giving objective advice to me on what evidence from the previous inquiry was tainted by apprehension of bias. I think it follows from what I have said with respect to the admission of evidence from that inquiry, that the only evidence which, in my opinion, was tainted by the apprehension of bias of the Commissioner was the evidence of Mr Leck and Dr Keating.

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On the other hand, as I have also indicated, it may be that apprehended bias would permit further cross-examination of some witnesses, but I will await further submissions in respect of that. Because of the exclusion of the evidence of Mr Leck and Dr Keating from this inquiry, I don't think that that submission has any substance.

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More generally it was submitted that counsel ought to have in some way dissociated themselves from the Commissioner's conduct which led to his disqualification and that their failure to do so should disqualify them from assisting me.

I think there are considerable difficulties in that submission. There are, of course, rare circumstances in which biased conduct by counsel assisting, if acquiesced in by the Commissioner, can lead to the successful exclusion of the Commissioner. (See *Firman v. Lazry* [2000] Victorian Supreme Court 240 at paragraphs [24] to [29]. It would be even more rare for that to operate the other way around because counsel assisting has no power to make ultimate or binding decisions, whether as to reception of evidence or ultimate findings. That's a matter for the Commissioner. Unsurprisingly, no precedent for that course was referred to by any counsel who supported that submission today.

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Counsel had no ability to control Mr Morris. Ultimately, they were answerable to him as Commissioner. The same is true of this inquiry. In a counsel of perfection, they might have perhaps privately warned the Commissioner that he was exceeding what was proper conduct. I have not asked them whether they did that and I don't know. But Mr Morris, as his inquiry demonstrated, has strong views. I think it unlikely

that if they had done that, he would have heeded it.

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On the other hand, I think it is self evident that to lose the benefit of the considerable experience of those counsel garnered from their period of time with the previous Commission, would diminish my ability to discharge my task in the best public interest and within the limited time-frame which I have been allowed.

Taking those matters into consideration, it is, in my opinion, fair and in the best public interest that counsel who were appointed by the Executive Council this morning be retained to assist me.

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I therefore reject the submission which has just been advanced.

The only other matter that I think I need to raise at this stage involves a question of starting evidence. The staff here have been working very diligently, and counsel assisting also, to try to assemble witnesses at the earliest possible date. I was optimistic at one stage, I think perhaps hopeful is a better word than optimistic, of starting evidence tomorrow, but I think that's unlikely. I think the first likely date is - first possible date is going to be on Monday and I am not sure that we will get a full day's hearing on Monday, but we're endeavouring to assemble evidence and we'll let you know at the earliest possible opportunity. Is there anything else that anyone wished to raise in a preliminary way now?

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MR MULLINS: Can I just raise one practical matter?

COMMISSIONER: Yes.

MR MULLINS: Your Honour has admitted all of the evidence of the previous inquiry subject to some limitations.

COMMISSIONER: Yes.

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MR MULLINS: That would include the exhibits.

COMMISSIONER: Yes.

MR MULLINS: And the transcript of evidence.

COMMISSIONER: Yes, I have kept to the same numbers.

MR MULLINS: Your Honour has just started with a new exhibit 1 for the Commission-----

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COMMISSIONER: Yes, I have, but exhibit 1 of the previous inquiry was the Terms of Reference for that inquiry, the Order in Council, which I forgot to do, but you have reminded me. I so order that to be expunged from the record of this inquiry. So the other exhibit numbers will remain the same.

MR MULLINS: Thank you.

MR GOTTERSON: If your Honour please, there is correspondence that's come from the Commission inviting those I think witnesses who haven't yet given evidence to provide - it is put this way: "contents of that statement, the one that's already been given, should be revisited and amended to deal with only those matters within the new Terms of Reference".

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COMMISSIONER: Mmm.

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MR GOTTERSON: Now, it appears that there were requests, when earlier statements were provided, to deal with matters that many thought went beyond the Terms of Reference.

COMMISSIONER: Of the previous inquiry?

MR GOTTERSON: The previous inquiry, yes.

COMMISSIONER: Yes.

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MR GOTTERSON: Now, rather than an amended statement, I would envisage it would be more convenient to deal with things by way of a fresh statement confined to what's in the Terms of Reference for the current inquiry.

COMMISSIONER: Or expanded to refer to the Terms of Reference, as the case may be.

MR GOTTERSON: Yes, perhaps expand - I would think it would be contracted.

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COMMISSIONER: It may be, but in some respects the Terms of Reference here are wider than the previous ones. That's the only - I think that's a matter for you at the moment. I can't direct you how to do your statement.

MR GOTTERSON: We will do it by way of a fresh statement.

COMMISSIONER: All right. Nothing else? Well, we will adjourn, at least at the moment, I hope, until Monday morning.

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THE COMMISSION ADJOURNED AT 2.55 P.M.

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