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The Hon. Geoffrey L Davies A.O.,  
Commissioner  
Bundaberg Hospital Commission of Inquiry  
Level 9, 363 George Street  
BRISBANE QLD 4000

8 September 2005

Dear Commissioner

**Counsel Assisting – Commission of Inquiry No 2 of 2005**

The Medical Board of Queensland will formally seek your leave to appear by Counsel when the proceedings are scheduled to commence this afternoon.

These submissions by the Medical Board of Queensland are in no way intended to impede the important work of the second Commission of Inquiry into the Bundaberg Hospital. These submissions are made in the public interest and in an attempt to aid the Commission in the proper discharge of its functions.

Concern is raised to the proposed request for appointment of Mr Andrews SC, Mr Morzone and Mr Atkinson of Counsel as Counsel Assisting the second Inquiry. There is no concern in relation to the proposed request for appointment of Mr Douglas SC on the basis that the findings of "ostensible bias" against the first Commission of Inquiry occurred at a time in the life of the Inquiry prior to the involvement of Mr Douglas SC. There is no suggestion that any act of "ostensible bias" occurred during the appearance of Mr Douglas SC as Counsel Assisting.

What follows is intended as respectful advice to the Commission, proffered in the public interest.

The proper role of Counsel Assisting

No assistance is gleaned from the terms of the *Commissions of Inquiry Act 1950*, in relation to the proper role of Counsel Assisting. A learned commentator has addressed the role thus<sup>1</sup>:

*"The position of counsel assisting has in a general sense been equated to that of a Crown Prosecutor in that it is his or her duty to perform his or her functions in a fair and even-handed way. In this respect it has been observed:*

*The role of a Crown Prosecutor in England and in Canada is not to struggle at all events for a conviction. His duty is as an officer of the court to ensure that all evidence, both favourable and unfavourable to the accused, is put before the court.*

<sup>1</sup> "Investigating corruption and misconduct in public office; Commissions of Inquiry – Powers and procedures" by Peter M Hall at pages 675 – 676

*This has been repeatedly stated in the courts here and abroad. In the Supreme Court of Canada in Boucher v. The Queen 1955 [SCR 16], Rand J said at page 23:*

*"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.*

*In my view, this definition of the role of the Crown Prosecutor is also an apt description of the duty of Commission Counsel in an Inquiry such as this one".*

*The comparison is valid in the sense that ultimately, a commission of inquiry is concerned to establish the truth of matters it investigates and hence care must be exercised in seeking evidence both for and against any working hypothesis and in providing a fair opportunity for those who may be the subject of adverse findings to deal with them. That of course does not limit the role of counsel assisting in the development of plans and strategies with commission investigators to flush out evidence on an issue".*

There was further commentary by Hall<sup>2</sup>:

"Ashley J<sup>3</sup> considered at some length the role of counsel assisting in terms of whether or not his or her conduct could be relevant to an allegation of ostensible bias by the Commissioner himself. He emphasised, that the conduct of counsel assisting cannot per se be imputed to the Commissioner. However, if his or her conduct was, or reasonably appeared to be, partial and if the Commissioner appeared to condone such conduct, then the hypothetical observer might reasonably apprehend partiality on the Commissioner's part. Ashley J in that respect, added:

*"So, for example, if the conduct of counsel assisting showed an evident and persisting inequality of treatment as between witnesses espousing one view of matters under inquiry and witnesses espousing an opposing view, if one group of witnesses was apparently aided in giving its account of events whilst the other group was apparently frustrated in its attempts, and if a Commissioner either gave support to or took no action to redress the situation which unfolded before him, it would not be wrong to consider that support or inaction if an allegation of apprehended bias on the Commissioner's part was raised by an individual whose conduct was under scrutiny. Whether a conclusion adverse to a Commissioner might then be drawn must depend upon the particular circumstances; pp 8-9".*

In the decision of Keating and Leck v. Morris & Others [2005 QSC] Moynihan J observed<sup>4</sup>:

*"The role of counsel assisting allows an inquirer to stand aside from involvement in the collection and presentation of evidence and to focus on its impartial evaluation..."*

<sup>2</sup> *Ibid* at pages 742-743

<sup>3</sup> *Firman v. Lasry* QC (In his capacity as Royal Commissioner into the Metropolitan Ambulance Service) Unreported, Supreme Court of Victoria Common Law Division. No. 5022 of 2000. See particularly paras [24] – [29]

<sup>4</sup> See note 21 at page 78 of Moynihan J's Judgment.

Findings of Moynihan J, so far as they affect the role of Counsel Assisting

Firstly, attention is drawn to the findings of Moynihan J in relation to the calling as witnesses of both Applicants, Leck and Keating<sup>5</sup>.

It is respectfully submitted that full allowance should be given to the important proposition that<sup>6</sup>:

*“Counsel Assisting should be encouraged to carry out his or her work fearlessly and independently...An inquiry is ultimately the responsibility of the Commissioner conducting it and over-riding control and direction remains with the Commissioner. It is for this reason that in a sense counsel assisting could be described as undertaking a managerial role in relation to investigations, the assembling of evidence and its presentation. However, he or she remains ultimately subject to the direction of the commissioner in all matters relating to the investigation or inquiry.*

*Commissioners conventionally encourage Counsel Assisting to act with a sense of independence for maintaining a certain detachment serves the overall interests of an effective inquiry. A working relationship that is based upon a sense of independence of mind provides a healthy environment in which matters can be examined from more than one point of view even to the point of debate and disagreement, as and where appropriate, in public hearings and otherwise.”*

It nevertheless should be observed that, just as a Commissioner may be the subject of a finding of apprehended bias by his/her acquiescence in, or support for, the actions of Counsel Assisting, per the observations of Ashley J, so Counsel Assisting may be accountable if there is a consistent failure to act independently to attempt to correct an erring Commissioner.

Counsel Assisting apparently took no steps to dissuade the Commission from proceeding in this way in relation to the witnesses Leck and Keating. The Commissioner acted in breach of his own Practice Directions.

Secondly, attention is drawn to the judgment of Moynihan J<sup>7</sup>, in which the Commission was strongly criticised for differential treatment of witnesses. All three Counsel Assisting were present at various times when the Commission engaged in such conduct, and no apparent steps were taken by them to attempt to prevent a repeat of the Commissioner’s conduct criticised by Moynihan J.

Thirdly, attention is drawn to the judgment of Moynihan J<sup>8</sup>, in which Commissioner Morris’ intervention in the proper cross-examination of an important witness by Counsel for Keating was strongly criticised as being *“unjustified and ... at best intemperate”*. Counsel Assisting did not attempt to be heard at any time during the incident as it unfolded.

Fourthly, attention is drawn to the judgment of Moynihan J<sup>9</sup>, in which the Commission was criticised for holding private meetings with proposed witnesses. Commissioner Morris announced that one of

<sup>5</sup> Paragraphs [55] – [96]

<sup>6</sup> *Ibid* at page 676

<sup>7</sup> Paragraphs [97] – [108]

<sup>8</sup> Paragraphs [109] – [118]

<sup>9</sup> Paragraphs [133] – [157]



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the Counsel Assisting was present at each of those meetings<sup>10</sup>. On one occasion, Senior Counsel Assisting was called upon to confirm Commissioner Morris' recollection of a particular meeting<sup>11</sup>.

On the available material, then, Counsel Assisting – whichever of them attended such meetings – put himself/themselves in the position of being a witness in the Commission of Inquiry itself. In this connection, see a reference to correspondence under the hand of Counsel Assisting, at paragraphs [145] -[147]. Note in particular that the letter of Counsel Assisting dated 15 June 2005<sup>12</sup> did not address specific queries as to whether an important witness, Chief Health Officer, Dr Gerry Fitzgerald, was one of the witnesses spoken to<sup>13</sup>.

### Conclusion

In the unusual circumstances of this second Inquiry, Counsel Assisting will, we expect, be called upon to advise you 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.

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.

With the greatest respect, 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.

We advise that the content of the above correspondence has been settled by Mr Devlin of Counsel.

Yours faithfully  
GILSHENAN & LUTON



Paul McCowan  
Partner  
Encl.:1

<sup>10</sup> Moynihan J at para [137]

<sup>11</sup> Moynihan J at para [141]

<sup>12</sup> Inquiry Exhibit 4

<sup>13</sup> Moynihan J at para [148]