

Submissions

Hon Gordon NUTTALL MP



Crown Law

Queensland Government

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Your ref:
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Department of
Justice and Attorney-General

25 October 2005

The Secretary
Queensland Public Hospitals Commission of Inquiry
9th Level Magistrates Court Building
363 GEORGE STREET
BRISBANE QLD 4000

E-MAILED
25/10/05

Attention: Mr Cowley-Grimmond

PRIVATE AND CONFIDENTIAL

Dear Sir

NOTICE OF POTENTIAL ADVERSE FINDINGS

I refer to your letter dated 14 October 2005 addressed to the Hon Gordon Nuttall MLA for whom I act.

Your letter lists four possible adverse findings against Mr Nuttall and invites submissions in relation to them. I wish to make submissions on behalf of Mr Nuttall in respect of each possible adverse finding. These submissions were drawn and settled by Mr Gotterson QC and Mr O'Sullivan of counsel. It is convenient to deal with the possible adverse findings in the order in which they are listed in your letter. It is not proposed to set out the proposed adverse finding to which each submission relates.

Possible Adverse Finding 1 – Submission

1. Mr Nuttall stated in evidence that when Dr FitzGerald attended on him on 22 March 2005, the latter advised Mr Nuttall as follows:-
 - (a) he had conducted an investigation concerning allegations about Dr Patel;

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- (b) his report of the investigation was near completion and would be finalised in the near future;
- (c) Dr Patel had performed surgery outside his scope of practice;
- (d) he (Dr FitzGerald) had advised Bundaberg Hospital that Dr Patel was to cease performing surgery outside his scope of practice. (Exhibit 319 para. 27).

This written evidence was confirmed in his oral testimony at T5311.30 – T5312.12. He was not challenged on this.

2. On the same date, Dr FitzGerald emailed to the Senior Departmental Liaison Officer in Mr Nuttall's office, a document containing a suggested response to parliamentary questions. The document is titled "Surgical Services at Bundaberg Hospital Suggested response". It is within Exhibit 391. The document consists of two parts, namely Background and Suggested Response.
3. The Background includes the following statements:-

"The key findings to date are:

- Procedures have been performed at Bundaberg which are beyond the capacity and facilities of the Bundaberg Hospital. The hospital executive, in collaboration with clinicians, should define service levels for the hospital using the Queensland Health Service Capability Framework which outlines the minimum support services, staffing, safety standards and other requirements to facilitate the delivery of safe and appropriately supported clinical services. **The Medical Superintendent has taken action to limit the scope of surgery performed by this surgeon and to ensure that critically ill patients are appropriately referred to higher level hospitals.**
- Concerns were raised regarding the rates of wound dehiscence (break down). The data have shown that this rate is reducing.
- Concerns were also raised regarding the rate of unplanned re-admissions. This rate also appears to be reducing.
- With regard to other complications, these concerns relate particularly to the more complex procedures. Benchmarking data suggest that, for one complication, Bundaberg Hospital appears to have a higher rate than

other similar hospitals, however, this has not been tested for statistical significance.

- There is significant conflict within the workplace which requires attention by the hospital administration and behavioural management strategies put in place.

The significant issue regarding the competency of Dr Patel appears to relate to his preparedness to take on cases which are beyond the capacity of the Bundaberg Hospital and possibly beyond his personal capacity. There is no evidence that his general surgical skills are inappropriate or incompetent.

However, the fact that he has taken on those cases may reflect significantly poor judgment to a level which may be grounds for disciplinary action by the Medical Board. Thus, the CHO has recommended that this matter be referred to the Medical Board for attention.” (emphasis supplied)

4. The Suggested Response includes the following suggested response points prepared by Dr FitzGerald:-

“The Chief Health Officer, Dr Gerry FitzGerald, has undertaken a review of clinical outcomes at the hospital and is currently finalising his report.

Dr Fitzgerald has identified a number of issues of concern at the hospital and will be making recommendations in regard to those concerns.

There is insufficient evidence at this time to take any particular action against any individual, and to suspend anyone would be unjust and inappropriate.

The Bundaberg Hospital has taken certain action to limit the scope of some general surgery performed at the hospital which should address the majority of issues raised by staff. The report will also make recommendations regarding the management of staff conflict at the hospital.

However, the report has also identified that there is a relatively high satisfaction amongst patients and that waiting times for elective surgery have been reduced considerably in recent times. Junior staff have been very complementary in regard to the teaching and guidance provided to them.

However, Dr FitzGerald has raised concerns about the clinical judgment exercised by one member of staff and will be referring these concerns to the Medical Board for consideration.” (emphasis supplied)

5. What Dr FitzGerald advised in his emailed document is consistent with the oral advice that he gave to Mr Nuttall on 22 March 2005. At no time after 22 March and before 9 April 2005 did Dr FitzGerald communicate to Mr Nuttall any information which might have given Mr Nuttall reason to suspect that the findings or opinions expressed or advice given to Mr Nuttall on 22 March 2005 were not accurate at that date or that Dr FitzGerald had subsequently altered or modified his findings, opinions or advice.
6. It is submitted that the evidence does not warrant the making of this possible adverse finding for the following reasons.
 - (a) That Mr Nuttall took no action to ascertain from Dr FitzGerald the substance of his findings or preliminary findings.

Reasons

Mr Nuttall did take action to ascertain from Dr FitzGerald the substance of his findings or preliminary findings. He conferred with Dr FitzGerald on 22 March 2005 at which time Dr FitzGerald advised Mr Nuttall of his findings concerning Dr Patel as set out in paragraph 1 *ante*. These findings were confirmed in Dr FitzGerald's emailed document of the same date as set out in paragraph 3 *ante*, and were not thereafter qualified by him in any communication addressed to Mr Nuttall as noted in paragraph 5 *ante*.

- (b) That Mr Nuttall took no action to suspend Dr Patel or to restrict his scope of practice.

Reasons

As noted, the advice given by Dr FitzGerald in the document emailed on 22 March 2005 was that there was insufficient evidence at that time to take any particular action against any individual, and that to suspend anyone would be unjust and inappropriate: see paragraph 4 *ante*.

The professional advice from Dr FitzGerald, the Chief Health Officer, at 22 March 2005 therefore was that there was insufficient evidence to suspend Dr Patel or to restrict his scope of practice. That advice was not altered by Dr FitzGerald in any communication to Mr Nuttall at any time on or before 9 April 2005. Given that advice, it would not have been appropriate for Mr Nuttall to have suspended Dr Patel or to have restricted his scope of practice.

- (c) That Mr Nuttall took no action to further investigate or cause further investigation of Dr Patel's actions.

Reasons

The advice given by Dr FitzGerald on 22 March 2005 was that there was no evidence that Dr Patel's general surgical skills were inappropriate or incompetent: see paragraph 3 *ante*. That advice was not altered by Dr FitzGerald in any communication to Mr Nuttall at any time on or before 9 April 2005.

Dr FitzGerald identified two issues with respect to Dr Patel in the document emailed on 22 March 2005. The first was his preparedness to take on cases which were beyond the capacity of the Bundaberg Hospital and possibly beyond his personal capacity: see paragraph 3 *ante*. As to that issue, Dr FitzGerald advised that the Medical Superintendent of Bundaberg Hospital had taken action to limit the scope of surgery performed by Dr Patel and to ensure that critically ill patients were appropriately referred to higher level hospitals: see paragraph 3 *ante*.

The second issue concerned Dr Patel's clinical judgment, namely, that he might have had significantly poor judgment to a level which might be grounds for disciplinary action by the Medical Board: see paragraphs 3, 4 *ante*. As to this issue, Dr FitzGerald advised that he would be referring concerns relating to Dr Patel's clinical judgment to the Medical Board: see paragraph 4 *ante*.

The effect of Dr FitzGerald's advice therefore was that the two issues that he had identified in respect of Dr Patel had been addressed or were being addressed by him. That advice having been given, there was no cause for Mr Nuttall to investigate or cause further investigation of Dr Patel's actions.

Possible Adverse Finding 2 – Submission

7. Mr Nuttall gave evidence that he had no knowledge of the existence of the FitzGerald Report until matters concerning Dr Patel were raised in the Parliament on 22 March 2005. After speaking with the director-General, Mr Nuttall was of the opinion that the FitzGerald Report could not be released because:-
 - (a) it was incomplete;
 - (b) Dr Patel could not give his version of events to the Chief Health Officer and therefore Dr Patel could not be afforded natural justice;
 - (c) the report contained confidential patient information (Exhibit 319 paragraphs 97-100).
8. Mr Nuttall did attend a meeting at the Bundaberg Base Hospital on 7 April 2005, during which the staff at the hospital were informed by him of the matters addressed in

paragraph 1(a), (b) and (c) hereof. Further, similar information was provided to the media by Mr Potter on the Minister's behalf. (Exhibit 319 paragraphs 98-99).

9. It is suggested by the Commission that the conduct of Mr Nuttall in respect to his advice to the staff is capable of supporting a finding that it was misleading, unreasonable and careless.
10. It is submitted that the evidence does not warrant the making of any such adverse findings against Mr Nuttall for the following reasons:-
 - (a) The report being prepared by the Chief Health Officer was incomplete.

Reasons

Mr Nuttall did state to the staff that the report was incomplete. At that time, Mr Nuttall was acting on information that had been given to him by Dr Buckland, the Director-General, and by the Health Department (Exhibit 319 paragraph 100, and refer T5321 ff, esp T5323.60).

Mr Nuttall attended the staff meeting with Dr Buckland. In respect to that meeting, Dr Buckland gave evidence that the information provided by him to staff of the hospital as follows:-

"I also advised that Dr Patel had left the country, the audit process being conducted by Dr FitzGerald in relation to Dr Patel would be difficult to finalise as natural justice had not been afforded to him...

In hindsight, I can see that perhaps I caused confusion by the expressions I used at the meeting and by my failure to clearly articulate how the audit process works and the difference between the finalisation of the audit report and the finalisation of the audit process. In my mind, I stated that no action could be taken against Dr Patel without first according him an opportunity to respond to the CHO's report but the review process would continue, and recommendations could be implemented, in relation to the broader systemic issues that the report raised. In writing this statement, though, I can see that this was probably not clear to all of the staff because of the terminology I used and because I spoke from a perspective that assumed the staff understood the subtleties of the audit process." (Exhibit 335 paragraphs 33-34).

It is clear that Mr Nuttall was acting on what he understood to be the advice provided to him by the Director-General when he informed the staff as discussed above. Dr Buckland has conceded that he failed to articulate the distinction between the finalisation of the audit report and that of the audit process. This may have led to some misunderstanding in the mind of the Minister. Nevertheless, Mr Nuttall was entitled to upon the advice as he understood it. There is no evidence that he knew that the information he provided to staff was incorrect. In consequence, it is submitted that his conduct could not be regarded as misleading, unreasonable or careless.

- (b) Dr Patel had not given his version of events to the Chief Health Officer and therefore had not been afforded natural justice.

Reasons

This information provided to staff was consistent with the advice received by Mr Nuttall from the Director-General as referred to in the preceding section. There is no evidence that Mr Nuttall believed this view of the matter to be incorrect. It has never been suggested to him that he was not entitled to hold this view. In fact, Mr Nuttall was advised by the Department of the importance of the natural justice issue in the briefing note dated 15 April 2005 (Exhibit 350). This note stated that one of the "key messages" was as follows:

"It would further compromise natural justice to make public comment about the competence or otherwise of Dr Patel and other staff at Bundaberg Hospital until the review process is complete."
(Key Message no. 5)

In the circumstances, it is submitted that this conduct could not lead to any adverse finding against him.

- (c) The report contained confidential patient information.

Reasons

As at 7 April 2005, Mr Nuttall had not been provided with the FitzGerald Report. He did not know of its contents save for that information which had been supplied to him by the Department. Corroborating the fact that Mr Nuttall had not seen the report is the ministerial briefing note dated 15 April 2005 (Exhibit 350) which outlines the audit findings for the attention of the Minister. This briefing note was noted by Mr Nuttall on 23 April 2005.

With respect to the proposition that the report could not be released, Mr Nuttall gave evidence that, as far as clinical audit reports were concerned, it was not the normal practice to release them because of privacy issues as the report "referred to individuals by name" (T5323.30-.60).

Reference is made to the evidence given by Dr Buckland, Director-General, in respect of clinical audit reports. At paragraph 25 of his statement (Exhibit 335), Dr Buckland said as follows:

"It is not usual for the report or the recommendations of clinical audits to be publicly released. Public release can result in informants and patients being identified (even where carefully de-identified) by the context and the concern by the CHO is that it would make his job harder in future audits as patients and staff may be less willing to voluntarily provide information if there is a risk of their identities being disclosed."

Dr Buckland thereby verified that the reports were not usually released to the public. Further, he verified that release of such reports can result in patients being identified even in circumstances where steps had been taken to prevent such an occurrence. In the circumstances, Mr Nuttall was justified in having concerns generally about the release of the report and its impact on privacy issues. Whilst Mr Nuttall did state that the report referred to individuals by name, it is obvious that this is an overstatement of the matter. What is clear from the evidence of Dr Buckland is that patients can be identified even if not named in the report. Therefore, it is respectfully submitted that, given the privacy concerns held by Mr Nuttall and the fact that the release of the report could identify patients, the slight misstatement of the matter to staff could not amount to conduct sufficient to support an adverse finding against Mr Nuttall.

- (d) The report therefore could not be completed or publicised in incomplete or complete form.

Reasons

Mr Nuttall gave evidence that the audit reports "as a matter of course, were not audits released publicly" (T.5323.28). This evidence is supported by Dr Buckland, Director-General, as referred to above. Neither Dr Buckland nor Mr Nuttall, at any stage, stated to staff that there was to be no further action in respect to the report (Exhibit 335 paragraph 33). In fact, Dr Buckland gave an undertaking to staff that Dr FitzGerald would return to Bundaberg to brief staff on his findings and that any system or hospital recommendation made would be followed up by Dr FitzGerald (Exhibit 335 paragraph 33). To this extent, it was foreshadowed to staff that any findings would be presented (or published) to them. In the circumstances, this issue could not lead to any adverse finding against Mr Nuttall.

- (e) You subsequently gave the media the same information in (d) above.

Reasons

Mr Potter gave information to the media that the report could not be completed because of the absence of Dr Patel and because it contained confidential information (Exhibit 319 paragraphs 98-99). The basis for the provision of this information has been addressed above.

Possible Adverse Findings 3 – Submission

11. By the time Mr Nuttall became Health Minister, the Surgical Access Team was no longer collecting information on the number of patients on waiting list for specialist outpatient services, that having ceased about March 2003. Mr Nuttall did not make any recommendation to Cabinet concerning the taking of such waiting lists to Cabinet.
12. Mr Nuttall was not Health Minister at the time any decisions were made concerning the taking of measured quality reports to Cabinet. He did not make any recommendations to Cabinet concerning that matter.

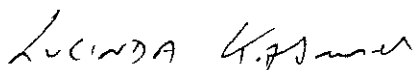
13. Insofar as this possible adverse finding is levelled at Mr Nuttall as a member of Cabinet, he relies on the submissions to be made to the Commission on behalf of Cabinet with respect to it.

Possible Adverse Findings 4 - Submission

14. Any generalised finding about the reliability or plausibility of Mr Nuttall's evidence, if adverse, would need to be based on a significant number of significant contradictions between his oral evidence and, for example, reliable cotemporaneous documentary evidence or the oral evidence of a number of witnesses.
15. That is not the case with Mr Nuttall's evidence. For example, his oral evidence as to what Dr FitzGerald advised him on 22 March 2005 when he attended upon Mr Nuttall is corroborated by Dr FitzGerald's emailed document of the same date (Exhibit 391) as explained in the response to possible adverse finding 1. As well, his evidence as to what he said at the Bundaberg Base Hospital about the FitzGerald Report is consistent with and corroborated by Dr Buckland's evidence as noted in the submissions in respect of possible adverse finding 2 *ante*.
16. It is acknowledged that there is a discrepancy between the evidential accounts of Mr Nuttall and Dr Buckland concerning when and how Mr Nuttall learned of Dr Patel's disciplinary history in the United States. Each account is based solely upon individual recollection, uncorroborated by the evidence of other witnesses. There is no documentary evidence which suggest that one account is more reliable than the other.
17. In any event, it is submitted that the discrepancy is relatively unimportant so far as timeliness in addressing the issues at Bundaberg Hospital is concerned. Even if Dr Buckland's version, which puts it at Friday 8 April, is accepted, Mr Nuttall approved the appointment of the Review Team, the personnel of which included an expert suggested by him, on the following day.
18. In these circumstances, it is submitted that the discrepancy in question would not warrant any generalised findings about Mr Nuttall's evidence.

I respectfully request that the Commissioner takes these submissions into account in his deliberations. If you have any questions in relation to them, please contact me on 3239 3375.

Yours faithfully



Lucinda Kasmer
Principal Lawyer
for Crown Solicitor





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31 October 2005

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Attention: Mr Cowley-Grimmond

PRIVATE AND CONFIDENTIAL

Dear Sir,

REPLY TO REVISED SUBMISSION OF QUEENSLAND NURSES UNION

The revised submission by the Queensland Nurses Union (QNU) refers to the meeting held at the Bundaberg Base Hospital on 7th April 2005 attended by Dr Buckland, Mr Nuttall and staff of the hospital. I have already addressed issues arising from this meeting at paragraphs 4-6 of my letter to you dated 25th instant.

The revised submission by QNU refers specifically to the evidence of Ms Mears (T7375.3,4) in respect to her recollection of a statement allegedly made by Mr Nuttall concerning Mr Messenger. Unfortunately no attempt has been made in the submission to draw attention to the denial of such statement by Mr Nuttall. In the circumstances I refer you to the evidence of Mr Nuttall given during the course of his cross-examination by Mr Allen of Counsel representing QNU (T5321.20 - .30):-

“But just before we leave the 7th of April, I suggest you told the meeting words to the effect that, ‘The only way we can stop this rubbish’, and that is these public ventilation of complaints about Bundaberg Hospital, ‘The only way we could stop this rubbish and stop Mr Messenger was to vote him out at the next election’? -- That is a total fabrication. Simply – that is simply not true and, again, I find that very offensive.”

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Further, I note that Ms Jenner RN (statement Ex 508) gave evidence at the Commission hearing (T7384-7385) and made no reference to any statement by Mr Nuttall concerning Mr Messenger.

It is respectfully submitted that whether or not Mr Nuttall made the comments alleged about Mr Messenger, they are of no relevance to any issue concerning matters before the Inquiry. In any event there is no reason why the evidence of Mr Nuttall should not be preferred to that of Ms Mears. Given the lack of relevance of this matter and the lack of any adverse notice concerning this issue, I submit that the Commission should make no finding in respect to the issue.

Yours faithfully,

L. Kasmer

WMB Lucinda Kasmer
Principal Lawyer
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