



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 28/09/2005

..DAY 13

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THE COMMISSION RESUMED AT 10.00 A.M.

MR DOUGLAS: Commissioner, before we resume-----

COMMISSIONER: Yes, go on.

MR DOUGLAS: -----the cross-examination of Mr Collins, can I deal with an issue arising out of his evidence?

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COMMISSIONER: Yes.

MR DOUGLAS: I did indicate to you at the Bar table here when Mr Collins was last before the Commission, there was a document missing from his statement. I don't say that critically but just factually, and that is the MQS report for 2005. That was an economical description of the document that was missing. More precisely, it was the MQS report for Bundaberg Health Service District for 2005. That document has now been produced to the Commission by Queensland Health and has been distributed to the parties, and I tender that document.

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COMMISSIONER: That will be Exhibit 385.

ADMITTED AND MARKED "EXHIBIT 385"

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COMMISSIONER: Before you go on, though - have you finished with that?

MR DOUGLAS: Yes, Commissioner.

COMMISSIONER: I just want to raise a matter with Mr Freeburn. Mr Freeburn, in the light of the submissions that were made and the intimation I made yesterday during the course of the closed hearing, do you intend to proceed with the application outlined in your instructing solicitor's letter to the Commission?

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MR FREEBURN: Yes.

COMMISSIONER: Do you want to advance argument as to why the documents referred to in that letter should not be made public by being made exhibits in this Commission?

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MR FREEBURN: Yes.

COMMISSIONER: You do?

MR FREEBURN: Yes. Can I propose a compromise position?

COMMISSIONER: Do you want to do this in closed Court?

MR FREEBURN: I have got some written submissions. I think if there is going to be a debate about it, it probably would be worthwhile-----

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COMMISSIONER: I think so. I think I might do this matter first.

MR DOUGLAS: Certainly, Commissioner. If it is being dealt with in closed Court, I should indicate in open Court it should be ensured that all lines of communication to outside areas-----

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COMMISSIONER: We did that yesterday afternoon.

MR DOUGLAS: -----are occluded.

COMMISSIONER: For those who are not either representing parties before this Commission or the parties themselves, please leave the courtroom, and would you ensure that those lines of communication outside are closed off.

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IN-CAMERA PROCEEDINGS ENSUED

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JUSTIN EDWARD COLLINS, RECALLED:

COMMISSIONER: Do you want to say something about that last matter?

MR BODDICE: No, it is just in relation to Mr Collins. I understand Mr Collins wants to correct a date in his statement.

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COMMISSIONER: Just before we go ahead, I just want to announce in open session that I accepted as an exhibit before this Commission a submission on behalf of Mr Leck and that submission is Exhibit 386.

ADMITTED AND MARKED "EXHIBIT 386"

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COMMISSIONER: I have not finally ruled on that submission. Yes.

MR BODDICE: I understand Mr Collins wishes to correct a date in one of his statements. It might be helpful to do that before the cross-examination commences.

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COMMISSIONER: Very well.

EXAMINATION-IN-CHIEF:

MR BODDICE: Mr Collins, is there a date you wish to correct within your statement?-- Yes.

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Can you identify which statement and the paragraph?-- It is the second statement, the addendum, page 8, paragraph 36.

Yes?-- Where I say, "It was originally drafted by Adele Thomas, then principal project officer. Ms Thomas went on leave from late 2002 until about early April 2004." That should be April 2003.

COMMISSIONER: Thank you. Now, have we established the order of asking questions of Mr Collins?

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MR HARPER: I am happy to go first, Commissioner.

COMMISSIONER: Have we agreed upon an order?

MR DIEHM: Commissioner, we have generally agreed upon an order for all witnesses which would see my learned friend

going next.

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COMMISSIONER: All right.

MR DIEHM: As I understand it, he may not have been a party to it.

COMMISSIONER: Doesn't sound like it.

MR DIEHM: But Mr Mullins has been in the past.

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MR HARPER: My apologies.

CROSS-EXAMINATION:

MR HARPER: Mr Collins, my name is Harper and I appear on behalf of the Bundaberg patients. I might just put up on the screen the extract from the measured quality report for 2003 for the Bundaberg Hospital. At the top there you will see highlighted a section "credentialing". Could I ask you, firstly, are you able to explain what the code underneath that SIC02 means?-- The code under SIC02?

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No, that code SIC02?-- Yep, that's reference to the indicator number.

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Right. And the indicator number then would give a criteria against which that is to be assessed and recorded?-- It is generally used as a reference to the technical supplement which has details of the actual indicator, so descriptions and so forth.

Okay. Moving along the row there, it says that for credentialing the answer to current is yes. So that would indicate there is a credentialing system in place?-- Yes.

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And that's to the middle of 2002, I think, report?-- Yes, that's right.

So prior to that next column along, NR means not recorded?-- Yes.

The next one, the peer group - just to clarify for my purposes, that means that out of the peer group for the Bundaberg Hospital, 13 hospitals-----?-- Yes.

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-----nine of them had a credentialing process in place?-- Yes.

And four didn't?-- Yes.

And across the State then, 52 out of the 58 hospitals across the State had a credentialing system in place?-- That's my understanding, yes.

Okay. Can I show you now the 2004 report? You will see there, referring back to the 2003 one there is a change in the codes for credentials and clinical privileges?-- Yes.

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Are you aware of what brought about that change and why that was put in place?-- I believe there was an addition to the indicator.

Yeah?-- Credentialing and clinical privileges.

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Okay?-- Which sought to expand on the indicator itself.

Okay. So then the first one there, SIC02/01-----?-- Yes.

Is what was previously SIC02, by the looks of it?-- I believe so, yes.

Again, that then shows that within that 12 months, there seems to have been an improvement so that by July 2003 then, each of those hospitals, in fact every hospital around the State had a credentialing process in place?-- Yes.

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And can I just clarify again, these reports, who would have provided the information which informed these reports?-- This particular area is informed by both information that we gather corporately from information systems-----

Right?-- -----but is also supplemented by an annual survey of hospitals.

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Okay?-- So where they respond to certain questions, we receive that back and it goes into the indicators.

Okay, so obviously the hospital would have had to indicate it had a credentialing system in place in accordance with the requirements under the code?-- I believe so, yes.

Okay. Can I get you then - the next column there was "medical staff reviewed by committee". That's the percentage - do you know, what's the reference there to the committee?-- I believe the credentialing committee.

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Okay. So that percentage there then is percentage of medical staff at each hospital?-- Yeah, under the peer group meeting or the-----

Sorry - okay, sorry, the peer group - 12.7 per cent of the peer group of medical staff in those peer group hospitals are being credentialed?-- I believe that's right.

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Okay. And 59.6 per cent across the State?-- Yes.

But Bundaberg wasn't recording that?-- It says not reported.

Can I take you then to the 2005 report? Again, there seems to have been another change to the terminology for it?-- Yes.

So is the reason for the first part of the previous one, being the process?-- Yes. 1

It is removed because - do you know why it was removed?-- I believe it is because there was 100 per cent compliance in the previous year.

Do you know if that was a conscious decision to remove it?-- I believe it would have been removed based on reference to an expert group and discussion prior to actually removing it. 10

Right. Do you know what would have happened had a hospital let its credentialing system slip?-- I believe - well, perhaps it may have been monitored in the next year's report. If it was still 100 per cent, perhaps the decision would have been to leave it out, but if it had a change, perhaps it would have been included then.

Okay. The other change then is that the previous 2004 report, the criteria was "medical staff reviewed by committee" and now we're actually looking at "medical staff with current clinical privileges"?-- Yes. 20

Was that again a conscious change that was made?-- Yes, I believe there were different data sources from this one to the previous one.

Okay. Was this regarded as a more accurate-----?-- Yes.

Right, okay. I have nothing further, Commissioner. 30

COMMISSIONER: Thank you. Who is next?

MR DIEHM: I have no questions, Commissioner.

MR MARTIN: I have no questions, thank you.

MR ALLEN: I have already cross-examined.

MR COUPER: I have no questions, Commissioner. 40

COMMISSIONER: No other questions?

MS McMILLAN: No.

MR BODDICE: I have no questions.

COMMISSIONER: Mr Douglas?

MR DOUGLAS: No re-examination, thank you. May Mr Collins be excused? 50

COMMISSIONER: No objection to that? Thank you, Mr Collins, you are excused from further attendance?-- Thank you.

WITNESS EXCUSED

MR DOUGLAS: Mr Clare is the next witness, I understand, before this Commission.

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COMMISSIONER: Are you calling him?

MR DOUGLAS: Mr Andrews is taking Mr Clare.

COMMISSIONER: Right.

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MR DOUGLAS: Perhaps a short adjournment might be apt, Commissioner?

COMMISSIONER: We might have finished a bit too quickly. Perhaps I will wait here and see what happens.

MR ANDREWS: Commissioner, I call Michael John Clare. Mr Clare, would you come to the witness-box?

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MICHAEL JOHN CLARE, SWORN AND EXAMINED:

MR ANDREWS: Mr Clare, you were summonsed and as a result provided a statement yesterday, dated the 27th of September 2005?-- That's correct.

Would you have a look at this photocopy? Do you see that it contains paragraphs 1 to 4 and then from paragraph 23 to 28 of the statement taken from you yesterday?-- Yes, those are the sections of the statement.

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And paragraph 23, do you see that the first sentence appears to have been blanked out in the photocopying process?-- Yes, yes, I see that.

Are the facts recited in what remain of the statement true and correct to the best of your knowledge?-- They are.

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And are the opinions you express honestly held by you?-- Yes, they are.

I tender that copy statement, Commissioner.

MR COUPER: Commissioner, I rise to see what's happened administratively. The copy of the statement I have just been handed still contains paragraphs 5 to 23. I am not sure what's been distributed generally. It is appropriate that what's distributed generally is what's being tendered.

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COMMISSIONER: Why is it appropriate that be tendered?

MR COUPER: I am sorry, your Honour. Commissioner, what's been tendered is perhaps 1 to 4 and then paragraphs 23 and following of the statement. I have got no difficulty with that. I am simply saying what's been distributed to me and I

think perhaps to others-----

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COMMISSIONER: That's a mistake.

MR COUPER: That's a mistake. I wanted to ensure that what's distributed generally, made publicly available, is what's tendered and not something else.

COMMISSIONER: Yes. Well, I am sure that someone will endeavour to ensure that, Mr Couper. That will be Exhibit 387.

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ADMITTED AND MARKED "EXHIBIT 387"

MR ANDREWS: Thank you, Commissioner. Mr Clare, you are currently a resident manager and, as I understand it, you have some continuing connection with the health sector through your involvement with two Boards?-- Yes, I do.

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And are you still a public member of the Medical Board of Queensland?-- Yes, I am.

You were, for 26 years, employed by Queensland Health?-- That's right, I was.

And from January 1997, for five years you were the manager Parliamentary and Ministerial Services and Cabinet Legislation and Liaison Officer?-- Yes, that was my job and the title was quite a mouthful.

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Your responsibility was for the management and coordination of all the processes associated with the preparation, scheduling and lodgement of cabinet submissions generated within the health department?-- Yes, that's right.

Also for the management and coordination of the preparation of briefing material on cabinet submissions contained within a weekly cabinet bag?-- Yes, that's right.

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You would liaise with other departments on matters being prepared for cabinet's consideration?-- Yes, that was a very central role.

The section you managed was called the Parliamentary and Ministerial Services section?-- Yes, that's correct.

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And it was a small specialised unit comprising you and four other officers?-- That's right, from time to time there was a part-time fifth person, but by and large there were four of us.

The nature of your work led you into frequent direct contact with the Minister, the Director-General of the Department of Health, and the respective staff of both those positions?--

Yes, it did.

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Did you - I see from paragraph 25 of your statement that you recall from time to time cabinet submissions were prepared on various matters which had been the subject of freedom of information applications?-- Yes, that was certainly the case and on a range of matters - not just related to waiting lists, but a range of matters. Waiting lists was just one of them.

Well, with respect to waiting lists, at paragraph 26 you advise you were advised by Dr Stable that an FOI - that is freedom of information - application had been lodged either by the labour opposition at the time or The Courier-Mail?-- Yes.

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Was that in respect of a waiting list matter?-- Yes, in relation to the surgery-on-time project and hospital waiting lists generally.

The surgery on time project was at the time a coalition government initiative?-- Yes, I believe so.

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And is it the case that - well, was it relevant that an FOI application had been lodged relating to information concerning the waiting lists in public hospitals?-- Yes, it was, an application had been lodged around that time and this matter of the FOI application was the subject of some discussion between the then manager of the legal administrative law unit and the Director-General and myself.

And what was resolved as a result of that discussion?-- The manager of the legal and administrative law unit has responsibility for FOI matters in the department and I think in the course of processing the FOI application, it had been determined that there were quite a lot of documents that existed that would be covered by that application.

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These were documents relating to surgery waiting lists in public hospitals?-- That's right. And it was felt, for whatever reason, that those documents weren't wished to be made available under that application, and, so, there was discussion about the preparation of a cabinet submission, and the putting together of those documents under cover of that submission and thereby being able to invoke one of the exemptions under the FOI legislation for not disclosing those documents.

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Well, during the course of that conversation, who expressed the wish that these documents be made part of a cabinet submission for the purpose of creating an exemption from disclosure?-- Well, the discussions I had were between the Director-General and the manager of the Legal and Administrative Law Unit and there was a consensus, I guess, between the parties that this is what needed to happen.

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COMMISSIONER: You don't know who the origin of that view was, whether it started with them or started with someone else?-- Well, there may have been - there may well have been previous discussions had with the Director-General.

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With other people?-- Yes.

I don't want you to speculate?-- If I could just perhaps amplify on a standing process that occurred in Queensland Health with respect to FOI applications, the FOI unit had a standing practice of flagging FOI applications that were received from areas of the Opposition or the media and specifically preparing a briefing note on those matters and sending them up to the Director-General and to the Minister's office, just to alert them that potentially sensitive matters were covered by an application, and then it was, I guess, up to those parties either in the Director-General or Minister's office to be alerted or take whatever action.

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If you weren't privy to those discussions-----?-- Not those direct discussions, no. But if a decision was made for it to go to Cabinet, then I was brought in.

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MR ANDREWS: And so with respect to the event discussed at paragraph 26, is it your evidence that you are unable to say whether Dr Stable had of his own initiative determined to invoke the exemption or whether it was as a result of a conversation he may have had, for instance, with the Minister or indeed anybody else?-- No, I couldn't - could not say absolutely that matter - you know, originated from Dr Stable. No doubt he would have had discussions.

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COMMISSIONER: Don't speculate.

MR ANDREWS: Now, this particular event was back in the time of a Coalition government, so that meant that it was prior to early 1998?-- Yes, it would have been, I think - just casting my memory back, I think this was in '97, this particular Cabinet submission.

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You had to go to some trouble to find a fridge trolley to deliver documents to the Cabinet room?-- Yes. That was not part of our plant and equipment that we would normally need.

Do you recall who selected the documents which related to surgery waiting lists that were included on that trolley?-- My recollection is the documents themselves were included in that bundle that went up to the Cabinet room which were delivered up by us to people working in the Surgery on Time project. I believe Mr Gary Walker was the manager of that unit at the time and-----

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That was a unit in Queensland Health?-- Yes, that's right.

You observe at paragraph 27 that, "Following the change to a Labor Government in 1998 Queensland Health had a practice of urging Ministers to send material to Cabinet in order to avoid public scrutiny of matters subject of FOI applications." Are

you able to say who in Queensland Health established that practice?-- There were several times. There were very intense discussions between the Director-General and the FOI unit in the department about matters that could come up that would be subject to FOI applications and-----

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What do you mean "intense discussions"? Do you mean there was disagreement or do you mean-----?-- No, there was - there were conveyed expressions of - you know, it was quite a grave matter that - you know, it would be quite disastrous if certain things covered under the scope of these - the application were to come out and that was not desirable at all and it was very important that - you know, ways be explored to not release that material.

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Did you overhear some of these discussions?-- When the decision had been made to prepare the Cabinet submission, I was - I would come up and discuss the timing and the mechanics of that with the Director-General and sometimes with the FOI people.

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COMMISSIONER: How did you know the discussions had taken place? Who told you that?-- Well, they would often still be occurring when-----

I see?-- -----I was there.

Right?-- And it would be - you know, the scope of the FOI application would be talked about and the types of things that would be covered under it were talked about.

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Right?-- And undesirability of releasing that information.

Thank you.

MR ANDREWS: Can you explain the Cabinet Forward Timetable?-- Pardon me. At the time the Cabinet Forward Timetable was a document that all government departments were required to prepare or the person in the position that I occupied in each of the government departments was required to prepare, which contained a forecast of all the matters that the department anticipated that at that particular time would come forward for Cabinet's consideration. There were certain things that couldn't be forecast, but there was a large number of ongoing things that departments would be working on at any particular time. That document was prepared and updated periodically and sent up to the Cabinet office and it would give them an idea of the types of things that would potentially be coming through, and it would help the Cabinet secretariat to schedule the timing and the - you know, when particular matters went to Cabinet.

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So, would the Cabinet Forward Timetable give the Cabinet secretary an idea of things that were proposed to be briefed either to the Minister or to Cabinet for some future time?-- Yes, that's correct.

And is it your recollection that some time in 1998 or

thereabouts, or shortly thereafter, that the Cabinet Forward Timetable would on a quarterly basis include an information paper on hospital waiting lists and Queensland Health's budget position?-- That's right. That became a standing item on our forward timetable.

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Were you at the time familiar with the provisions of the Freedom of Information Act of 1992?-- Yes, I was broadly familiar with them, yes.

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I don't guarantee that this is the form of the Act as it appeared in 1998, but I will put up on the screen some excerpts of section 36 of the Act as it appears now. Does it accord with the broad understanding that you had at the time that a matter was exempt from production in response to an application made for information to the Freedom of Information Commissioner if it was prepared for briefing a Minister or even a Chief Executive, being, for instance, the Director-General of Queensland Health, in relation to a matter that was proposed to be submitted to Cabinet by a Minister?-- Yes. That was the - my understanding, and I believe the understanding of the FOI decision-makers in the department.

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May I see further down the page, please. And if it was a draft of a matter proposed to be submitted to Cabinet by a Minister or a copy of even a draft of such a matter, it would obtain an exemption?-- Yes, that's right.

And is it the case that if this was a regular quarterly Cabinet Forward Timetable, which included hospital waiting lists and Queensland Health's budget position as topics, that it - a practical result was that any information compiled with respect to Queensland Health's budget or hospital waiting lists was likely to be a matter that would fall within the description of being prepared for briefing either the Minister or a Chief Executive in relation to a matter proposed to be submitted to Cabinet-----?-- That was certainly the view that was held. It was also felt in putting the - this matter on the Cabinet Forward Timetable that that would also help to establish the legitimacy, I guess, of this process, should there be any appeal to the Information Commissioner in relation to any of the parties that had applied under FOI.

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Now, you don't attribute this practice to one government or another?-- No.

Is it the case that it was a practice so far as you recall that was employed by each government?-- Yes, it certainly was. It was a departmental given, I guess.

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Now, you have used the expression "waiting lists" in your statement. I wonder, were you in a position to ever peruse the documents yourself?-- Oh, look, from time to time I'd have a look through them, but on the occasions where there were vast amounts of documents we certainly didn't look at each one of them. We felt that - and I am sure that Cabinet didn't look at each one of them either, but I guess it's - that's speculation.

With respect to - well, would you turn the page, please, on the monitor. It didn't matter in determining whether a matter - whether a document was proposed to be submitted to Cabinet whether Cabinet actually ultimately dealt with it, did it? All that counted was that it was proposed to submit it to Cabinet?-- Well, what happened in the Cabinet room we will never know.

No?-- But we would deliver the material to the Cabinet room and retrieve it from there afterwards.

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The Commission has heard evidence that waiting lists can contain information which show the numbers of persons who are waiting for surgery, but there are other lists which might show persons waiting for appointments for assessment for possible surgery, and there are lists which might show persons who have appointments to be assessed as to whether they should have surgery?-- Yes.

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Has the concept of such differentiations ever been a matter about which you were aware?-- I am certainly aware of the different nature of those various lists, yes.

When did you become aware of the different nature of those various lists?-- Well, there was discussion of that - of those distinctions certainly during my time in the department. The Surgery on Time project was considered to be a major innovation and quite a lot of money and effort was put in to trying to get extra surgery through and to improve waiting times, but it was also known that there was a difficulty in having people assessed prior to getting them on to those surgery waiting lists, and that was part of the process that needed to be addressed as well.

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Do you remember whether there were lists in your time that went to Cabinet or, I beg your pardon, became the subject of the FOI exemptions that related to lists of persons waiting to get on to the waiting list for surgery?-- Amongst the large amount of material that was compiled for submission with those Cabinet submissions was material, computer print-outs, manual lists of various natures. I don't have their specific details, of course, but there was a vast - a large volume of material of a significantly detailed statistical nature. Scrutinising that particular material was certainly beyond what I had time to do.

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Thank you. I have no further questions, Commissioner.

COMMISSIONER: Thank you. Are you first, Mr Harper? Are you going first?

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MR HARPER: I have nothing, Commissioner.

COMMISSIONER: You are not going first?

MR ALLEN: No questions, thank you, Commissioner.

COMMISSIONER: Beg your pardon?

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MR ALLEN: No questions, thank you.

MS McMILLAN: No questions, thank you.

MR MARTIN: No questions.

COMMISSIONER: Mr Couper?

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MR COUPER: I have some. I am just taking some instructions at the moment. If I might have a minute or two to take those instructions about some of the oral evidence this morning I will be in a position shortly----

COMMISSIONER: Right. What about you, Mr Diehm?

MR DIEHM: I have none.

MS DALTON: I have no questions, thank you.

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COMMISSIONER: Anyone else at the back? Mr Boddice, do you have any?

MR FARR: Commissioner, I will deal with this issue. We perhaps will, depending upon the questions that Mr Couper has to ask.

COMMISSIONER: I see.

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MR FARR: It might be we will need to take some instructions as well. We only received this statement this morning.

COMMISSIONER: Yes.

MR FARR: I suspect a lot of those questions will be covering issues that I would be covering.

COMMISSIONER: How long do you need, Mr Couper?

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MR COUPER: I think probably about 10 minutes, Commissioner, if that's convenient.

COMMISSIONER: All right. I will adjourn for 10 minutes in a moment. Before I do, what's the position, there are no more witnesses today?

MR ANDREWS: Correct.

COMMISSIONER: I have in mind some time today, and obviously we will finish evidence fairly shortly, so probably at the moment say 2.30, I intend to give an intimation about conclusions on the evidence so far and in the absence of further evidence I would be likely to make with respect to elective surgery waiting lists and the measured quality

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reports. I propose to do that to give any person the opportunity to adduce further evidence if he or she wishes to do so.

I will now adjourn.

THE COURT ADJOURNED AT 10.47 A.M.

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MICHAEL JOHN CLARE, CONTINUING:

COMMISSIONER: Yes, Mr Couper.

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MR DIEHM: Commissioner, if I may just before Mr Couper resumes?

COMMISSIONER: Yes.

MR DIEHM: I was intending to withdraw for the balance of the day, but you made mention of your intention to make some observations at 2.30.

COMMISSIONER: I think I might do it before then, if this witness finishes well before lunch, I'll do it immediately then.

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MR DIEHM: Oh well then, I'll remain, Commissioner, thank you.

COMMISSIONER: Yes. Mr Couper.

MR COUPER: Thank you, Commissioner.

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CROSS-EXAMINATION:

MR COUPER: Mr Clare, from your time as the Manager, Parliamentary Ministerial Services and Cabinet Legislation Liaison Officer, I take it that you were aware that it was a decision of the Minister whether material went to cabinet or not?-- Yes, that is, that is certainly the case, the material nonetheless is prepared in every - at every stage in the department.

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And would it be fair to say the process was that if material was to go to cabinet, the material would be prepared in the department first and then submitted to the Minister's office?-- Eventually, that was at the very end of the process, once a matter had been determined to go on the cabinet timetable, the early drafts of it would be prepared in the relevant area of the department, I would liaise with those officers, often there would need to be liaison with other departments who may be effected or may have an interest in that particular matter and then the matter would progress up through those officers and their superiors and I wouldn't accept the draft from those officers until it had been signed off by their branch director and then I would look at it again and then forward it up to both to the Director-General and to the Minister.

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And you're aware, aren't you, that on numerous occasions, the form of submission which went to cabinet for the Minister's office differed from the form of submission finalised in the department because it was changed in the Minister's office?-- Yes, from time to time changes were made by both the Minister and the Director-General to the drafts that were presented to them.

And perhaps it's trite to say, but do you agree that the decision as to what information contained within Queensland Health could be publicly released, leaving aside FOI applications for the moment, was a decision made at Ministerial level?-- I'm having a bit of trouble, you divorce from that from the FOI process?

Perhaps we can approach it this way, Mr Clare: if material goes to cabinet and it becomes FOI exempt, cabinet can still decide to make it public material?-- They certainly can.

Whether or not an FOI application is made with any particular material or Queensland Health a decision might be made to publicly release it; that's a possibility isn't it?-- It's a possibility, yes.

And what I'm suggesting to you is that that decision about public release of material was made at Ministerial level; correct?-- I'm just trying to picture the scenario here, it certainly, it would be a made at cabinet level if it went to - if it was a matter that went to cabinet.

COMMISSIONER: These are matters of law, Mr Couper, they're pretty obvious.

MR COUPER: I won't pursue it, it's a statement which is obvious, Mr Commissioner.

Can I take you, Mr Clare, to paragraph 26 of your statement? Now, this is the paragraph dealing with the time project and time documents taken to cabinet. Now, I think you've already agreed that you don't know whose decision it was that those documents be taken to cabinet; is that so?-- That's correct.

All right. You came in at the stage where a decision had been made by somebody and you were discussing the mechanics of the process to take documents to cabinet?-- Yes, that's correct.

Can I put to you this general proposition and ask you to comment, Mr Clare? That from your time in the department, it was common knowledge to you that decisions about taking documents to cabinet to create FOI exemption were decisions taken in the Minister's office?-- No, my, my understanding was that ultimately, yes, the decision would be made at the Minister's office in very close consultation with the Director-General and senior departmental officers.

Well, perhaps we can approach it this way: you say in paragraph 27 of your statement, "Following the change to a

Labor government in 1998, Queensland Health's practice of urging Ministers to send material to cabinet in order to avoid public scrutiny or FOI applications continues." You never heard Dr Stable urge any Minister to send material to cabinet to avoid public scrutiny or FOI applications, did you?-- No, I never heard him urge a Minister to do that, but he certainly urged me to have those submissions prepared and to ensure without fail that those matters were sent to cabinet, you know, within a particular timeframe.

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Well, let's be clear what you're saying, Mr Clare. After someone had made a decision that particular material should go to cabinet, Dr Stable directed you to do your job by preparing the submission and the material; correct?-- That's correct.

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There was no suggestion by Dr Stable that it was his idea that matters should go to cabinet for the purpose of obtaining FOI exemption, was there?-- No, that's correct.

And you had no reason to think in your time in the department that it was Dr Stable's idea or suggestion that matters should go to cabinet to create FOI exemptions, did you?-- No, I had nothing to make me think that it was his suggestion, my recollection was that he was certainly in agreement with the decision.

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Well, let's just consider that. Is that recollection based on the notion that he said to you do these things, prepare material for cabinet; is that the basis of your evidence?-- This has got to go to cabinet within this particular timeframe.

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And that's entirely consistent with him being told from the Minister's office that this has got to go to cabinet within a particular timeframe; isn't it?-- Yes, I guess it would be.

There's nothing in that which would suggest agreement by Dr Stable with that process, is there?-- Well, I imagine if he didn't agree with the process, that would be able to be ascertained from the way that it was put to you.

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What, you think Dr Stable should have discussed with you the nature and content of his discussions with the Minister?-- No, not particularly.

No. Can I suggest this to you: that at least during the time of Dr Stable's tenure as Director-General from 1996 to January 2004, there was no practice in Queensland Health of urging Ministers to send material to cabinet for FOI exemption, that's simply untrue; do you agree?-- No, I'm sorry, I don't agree with that.

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Well, do you say you heard somebody else in Queensland Health urge a Minister to take material to cabinet for FOI exemption?-- Well, for five years I was in the position of preparing cabinet material for submission to cabinet and I was certainly aware of discussions that had occurred between people about the need for various matters to go to cabinet and

aware particularly of the final vetting of FOI type matters and then the connection between that and the need for a cabinet submission, and that's, I suppose, the basis for my belief that the need for material to be hidden and taken to cabinet was identified in the department through processes such as FOI and suggestions were then put up via the Director-General to the Minister that these particular matters should go to cabinet.

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Well what you infer from something I'm not quite clear about, I'll come back to that, that suggestions were put by the Director-General to the Minister to take matters to cabinet; is that what you're saying?-- That's what I've inferred, yes.

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Although you've never had any such suggestion made by the Director-General to the Minister?-- No, not exactly.

Let's deal with the process. You've told us that there was a process whereby FOI applications from the media and the Opposition would trigger a briefing to the Director-General and to the Minister's office; is that so?-- That's correct.

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Could I suggest to you that the process which ensued was this: and you tell me if you have any information to say this is wrong: that the Minister's office would then make a direction to the Director-General that certain material should be taken to cabinet to create an FOI exemption and the Director-General following that direction would then set about the mechanical process often with you and the FOI people to bring that about; that's the process, isn't it?-- That could be one of the processes that ensued from that.

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You're not familiar-----

COMMISSIONER: Was there some other process that you knew of?-- Well, the briefings went up concurrently to the Minister and to the Director-General's office and-----

Briefings about what?-- Briefings about the content of FOI material.

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Yes?-- And from that material, that would have been examined, I guess both in the Director-General's office and the Minister's office and-----

But what would the briefings say? That this is sensitive material? Would the briefings give any advice about what should be done?-- No, it certainly wouldn't give any advice about - it would be drawing to the attention of the Director-General and the Minister.

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That there was an FOI application with respect to that material?-- Yes.

All right, yes, Mr Couper.

MR COUPER: Thank you, Commissioner.

Can I ask you your view about this, Mr Clare: let's take waiting lists as an example. Would you agree with this proposition, that the public release of information about both surgical waiting lists and outpatient waiting lists would have been a useful tool for the Director-General in enabling him to urge the government to increase funding to Queensland Health?-- Yes, I would agree with that.

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Yes. It follows, doesn't it, that it would be a bizarre thing for the Director-General to do to deny himself use of that tool by suggesting that that information be kept secret?-- In one sense, yes, it would appear bizarre but there could well be other reasons for wanting to keep that information secret.

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All right, we won't invite you to speculate, Mr Clare, I think we've ascertained the state of your knowledge about these matters. Thank you, Commissioner.

COMMISSIONER: Yes. Did you want-----

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MR DIEHM: No.

COMMISSIONER: You don't Mr Diehm? All right. Mr Farr?

MR FARR: Commissioner, I don't have any cross-examination given the questioning that's just taken place.

COMMISSIONER: Mmm-hmm.

MR FARR: Can I simply place on the record though that I've not had the opportunity of taking any instructions from a couple of officers whose titles were mentioned during the course of evidence today. I don't envisage that will be a problem, but I just want to place that on the record.

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COMMISSIONER: Very well. Mr Andrews, any re-examination?

MR ANDREWS: No, Mr Commissioner. May Mr Clare be excused?

COMMISSIONER: Unless there's any objection, Mr Clare, you're excused from further attendance, thank you.

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WITNESS EXCUSED

COMMISSIONER: I propose now to deal with now the intimation that I foreshadowed about findings which on the current state of the evidence and in the absence of further evidence, I'm inclined to make with respect to two issues. one is elective surgery waiting lists. The other is measured quality reports.

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Elective Surgery Waiting Lists.

Those findings are:

1. In 1997 and 1998, Cabinet under a Coalition Government decided not to disclose to the public statistics which showed the number of persons on elective surgery waiting lists. These lists included those persons waiting for appointment for assessment for possible surgery; those with such appointments but who had not been assessed, (which I shall together call the anterior waiting lists); and those who had been approved for surgery but who had not yet received it, (the surgery lists).

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2. That decision appears to have been contrary to the public interest.

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3. In 1998 and thereafter until 2005, Cabinet under an Australian Labor Party Government decided to disclose to the public the surgery lists but not the anterior lists and only that disclosure was made.

4. To disclose the surgery lists but not the anterior lists was misleading and appears to have been contrary to the public interest.

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Measured Quality Reports:

1. These were of two kinds: the first, the public reports, were reports intended for publication to the public about the performance of Queensland hospitals. The second, the hospital reports, which were reports specific to each of the hospitals which were part of the measured quality program, were intended by Queensland Health for publication only to managers and clinicians at those hospitals.

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2. In late 2002, Cabinet under an Australian Labor Party Government decided to limit publication of the hospital reports to an extent which appears to have been contrary to the public interest.

3. That decision was made contrary to the advice of officers of Queensland Health.

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These findings if made would be relevant to recommendations which I may make in respect of acts or omissions by current and former employees of Queensland Health. I've given this intimation at this stage to give to any person the opportunity to consider whether to give or tender further evidence upon either of these issues and to permit that consideration to be given before the close of evidence which will possibly occur at the end of next week.

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Mr Andrews, you're going to tell us about witnesses for tomorrow?

MR ANDREWS: Yes, Commissioner. Dr Fitzgerald and Mr Walker are proposed for tomorrow.

COMMISSIONER: And Friday?

MR ANDREWS: Dr Aroney for cross-examination and the parties have been contacted and asked to indicate their attitude to the tendering of a statement of a Mr Rollings in anticipation that there'd be no need to cross-examine him or to advise whether or not he could be cross-examined by telephone. There is the hypothetical possibility that Mr Rollings might be called on Friday for cross-examination by phone, it would be brief, he's a gentleman who investigated the, I think computer memory in Bundaberg to determine the genesis of changes made to an audit of peritoneal catheters placed by Dr Patel.

COMMISSIONER: Yes. All right. Thank you. We'll now adjourn.

THE COMMISSION ADJOURNED AT 11.22 A.M. TILL 10.00 A.M. THE FOLLOWING DAY

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