Submissions

Dr Gerard FITZGERALD

Crown Law
Queensland Government

Department of
Justice and Attorney-General

Your ref:
Our ref: CS5/HEA027/5744/DZP
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26 October 2005

Mr David Groth
Secretary
Queensland Public Hospitals Commission of Inquiry
Level 9
Brisbane Magistrates Courts Building
363 George Street
BRISBANE Q 4000

Dear Mr Groth

Submissions in response to Notices of Potential Adverse Findings

I **enclose** submissions on behalf of Drs Fitzgerald, Nydam, Krishna and Huxley, Ms Erwin-Jones, Mr Allsopp and Ms Miller in response to Notices of Potential Adverse Findings (or, as the case may be, Notices of Potential Adverse Findings and Recommendations) given to each of those individuals.

The submissions were drawn by Mr Farr of counsel and settled by Mr Boddice SC.

Yours faithfully

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QUEENSLAND PUBLIC HOSPITALS *COMMISSION OF INQUIRY*

SUBMISSIONS ON BEHALF OF DR GERARD FITZGERALD

1. The evidence of Dr FitzGerald appears at:

   (a) Exhibits 225, 226, 227 – Statements of Dr FitzGerald;

   (b) Exhibit 225, Attachment GF14: Memorandum to Director General dated 24 March 2005, enclosing Clinical Audit Report;

   (c) Exhibit 230: Clinical Audit Report;

   (d) Transcript: T4195 – 4266; 6094- 6168.

2. At all material times, Dr FitzGerald held the position of Chief Health Officer.

3. The Chief Health Officer's office was first contacted on 17 December 2004 following a referral by the Audit Branch, Queensland Health, of material that had been forwarded to it by Mr Leck, District Manager for Bundaberg Health Service District regarding complaints concerning Dr Patel. Dr FitzGerald was commencing annual leave, and did not return to his office until mid January 2005.

4. On 17 January 2005, Dr FitzGerald spoke to Mr Leck concerning the matter. Subsequently, on 19 January 2005, Mr Leck forwarded a bundle of material to Dr FitzGerald.[1] At that time, Mr Leck advised that Dr Patel did not intend to renew his contract when it expired on 31 March 2005. It was not obvious from a perusal of that material that Dr Patel was "*a dangerously incompetent surgeon*"[2].

5. Dr FitzGerald determined that further inquiries would be necessary before any opinion of clinical standards could be offered.[3] He advised Mr Leck that his review would take the form of a "clinical audit" and would not be an investigation into any individual.[4]

6. On 14 and 15 February 2005, Dr FitzGerald and his assistant, Ms Jenkins, attended the Bundaberg Base Hospital to interview staff and collect further information. Prior

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[1] Exhibit 225, Annexure GF10.
[2] T3205/45.
[3] Exhibit 225, para 48.
[4] Exhibit 225, para 61.

to their attendance at the hospital, Ms Jenkins had requested various documentation be provided to them.

7. During the interviews, staff members were advised that Dr FitzGerald was collecting personal impressions of issues of concern and not evidence for any particular disciplinary or other process.[5] This process is consistent with the nature and intent of a clinical audit, which is "*intended to be non-judgmental or non-threatening to ensure that people do participate in the clinical audit*"[6]. This process is viewed by experts in the field and by literature to be the way to exact system improvement and improve the quality of health care[7].

8. The principle issues of concern raised with Dr FitzGerald during his visit to the hospital were that Dr Patel was conducting surgical procedures which were not within the reasonable scope of practice of the hospital and that patients were being retained at the hospital when they would be better cared for in a larger hospital.[8]

9. Prior to leaving Bundaberg, Dr FitzGerald obtained assurances from Dr Patel and Dr Keating, the Director of Medical Services, that Dr Patel would not in the future conduct surgical procedures which were not within the reasonable scope of practice of the hospital and would transfer patients more readily to higher level facilities.[9] Indeed, Dr FitzGerald was told that this arrangement was already in place.[10] Dr FitzGerald derived confidence from Dr Keating that these arrangements would be honoured.[11]

10. Upon his return to Brisbane, Dr FitzGerald, on 16 February 2005, spoke to Mr O'Dempsey, from the Medical Board, in relation to Dr Patel. Dr FitzGerald was advised that Dr Patel's registration was due for renewal, and it was agreed the Registration Advisory Committee would defer consideration of Dr Patel's current application for renewal of registration until after the finalisation of his clinical audit report[12] and any further investigation.[13] Dr FitzGerald knew that Dr Patel was an

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[5] Exhibit 225, para 63.
[6] T3214/25.
[7] T6121/25.
[8] Exhibit 225, para 65.
[9] T3210/25.
[10] T3247/40.
[11] T6143/25.
[12] Exhibit 225, para 67: T6146/25 – 35.
[13] T6147/20 – 30.

Area of Need Registrant, that such registration only lasted 12 months, and that Dr Patel could not work unless that registration was renewed by the Medical Board.[14]

11. Thereafter, Dr FitzGerald began to compile his report. This process was delayed by the need to obtain further data. On 22 March 2005, Dr FitzGerald was contacted by the Minister's office following allegations being raised in the Queensland Parliament. Dr FitzGerald met with the Minister and advised him that the significant issue regarding the competency of Dr Patel appeared to relate to his preparedness to take on cases which were beyond the capacity of the Bundaberg Hospital and possibly beyond his personal capacity.[15] He also advised the Minister that his report was nearly complete.[16] At the time of that meeting, Dr FitzGerald was still awaiting some statistical data.[17]

12. On 24 March 2005, Dr FitzGerald completed his report and supplied it undercover of a Memorandum to the Director General.[18]

13. At the time of provision of his report, and earlier, Dr FitzGerald was of the opinion that there was insufficient evidence to take any particular action against any individual, and that to suspend anyone would be unjust and inappropriate[19]. However, Dr FitzGerald referred his concerns about Dr Patel to the Medical Board of Queensland on the same day he completed his report, namely, 24 March 2004.[20] He did so knowing his earlier approach to Mr O'Dempsey had resulted in a deferral of consideration of any application to renew Dr Patel's registration which expired on 31 March 2005.

14. On 29 March 2005, Dr FitzGerald was advised by Mr Leck that Dr Patel was on sick leave and was intending to leave the country.[21]

15. In assessing Dr FitzGerald's actions in relation to the concerns raised with respect to Dr Patel, it is important to have regard to the information available <u>at that time</u> rather than the substantial body of information now available in relation to Dr Patel's clinical conduct. If regard is had only to the information available at that time,

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[14] T6147/15 – 30.
[15] T6136/45 – 49.
[16] T6141/41.
[17] T6134/40.
[18] Exhibit 225 – Attachment GF14; Exhibit 230.
[19] T6138/40 – 50.
[20] Exhibit 225, GF13.
[21] T6107/25.

Dr FitzGerald's actions were reasonable in all the circumstances. To find otherwise involves a consideration of Dr FitzGerald's actions with the benefit of hindsight, having regard to the information now available concerning Dr Patel's clinical competence, including information about his conduct in the United States of America.

16. Dr FitzGerald repeatedly emphasized that his clinical audit and subsequent report were conducted and prepared for the purposes of examination of, and recommendations in relation to, systems and associated issues.[22] This process was adopted in order to obtain the full cooperation of staff, such cooperation being forthcoming in a blame free environment intended to look at systems and structures rather than make judgement about individuals.[23] The importance of such an approach was emphasised by Professor Woodruff[24], Dr Wakefield[25] and Dr Buckland.[26]

17. Against that background, it would be unreasonable and unfair to make adverse findings against Dr FitzGerald in relation to the content of his Clinical Audit report. Such criticisms only arise if the report is viewed as something which it was not intended to be. That would entail extending the report beyond the scope which was foreshadowed by Dr FitzGerald to staff at the commencement of his interviews at Bundaberg.

18. Further, it is illusory to read the report in isolation of the accompanying Memorandum to the Director General. That Memorandum enclosed the Clinical Audit Report. Plainly, that Memorandum was designed to address issues which related to the individual.[27] This is consistent with Dr FitzGerald having performed what he intended, namely a clinical audit, but having appropriately raised issues of clinical concern relating to an individual which had arisen in the course of that clinical audit.

19. The Memorandum enclosing the report specifically bought to the attention of the Director-General all relevant issues that Dr FitzGerald had discovered relating to both systemic issues and the individual. There is no evidence before the inquiry to suggest

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[22] T6111/18: 6113/35: 6115/8 – 35: 6122/6: 6126/41.
[23] T6113/40: 6115/25-35.
[24] T4332 – 4334.
[25] T4522/50.
[26] T5505/50.
[27] T6113/40.

that Dr FitzGerald should not have reasonably expected that the contents of the Memorandum would be considered and acted upon appropriately.[28]

20. As Dr FitzGerald said, the Memorandum and audit report "*were intended to be complimentary and for different purposes*".[29] The Memorandum was intended to raise issues "*about the standard and quality of medical services ... concerning Dr Patel*".[30] The information set out in the accompanying Memorandum resulted in the Director General being explicitly advised of Dr FitzGerald's concerns on the issues concerning Dr Patel's clinical competence and judgement.

21. Dr FitzGerald's actions were also reasonable having regard to:

(a) The fact that Dr FitzGerald was told by Dr Keating and Mr Leck that there were no patient complaints.[31] Whilst Dr Keating initially disputed that there had been any question about patient complaints, he subsequently accepted that such a request had been made[32], although he did not accept that they were told there were no complaints, asserting they were told that there were minor complaints that had been resolved. [33] Significantly, Mr Leck accepted that Dr FitzGerald and Ms Jenkins asked about patient satisfaction and patient complaints.[34] Whilst Mr Leck could not recall that the answer given was that there weren't any patient complaints, he accepted that prior to that interview he had looked through the most recent volume of complaints files and hadn't located anything which related to Dr Patel and that he may have indicated that to Dr FitzGerald and Ms Jenkins[35];

(b) The conflicting information Dr FitzGerald was receiving in Bundaberg. Dr FitzGerald received "*disparate views about Dr Patel on the issue of competency, practical competency and surgery*"[36]. He was told that Dr Patel "*was not the best of surgeons but he also was not the worst*" by people "*who knew him and observed his surgery*"[37]. Importantly, these views were

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[28] T6132/30.
[29] T6115/45.
[30] T6132/20.
[31] T6150/20.
[32] T7027/60.
[33] T7028/20.
[34] T7305/40.
[35] T7305/45.
[36] T6149/20.
[37] T6119/5.

proffered by anaesthetists who, in Dr FitzGerald's experience "*are usually most observant of people's surgical skills*"[38];

(c) The undertaking he obtained from both Dr Patel and Dr Keating prior to leaving Bundaberg Base Hospital that Dr Patel would "*undertake only those procedures which are within the scope of the surgical services and relevant support services*" of the hospital, and "*to transfer patients more readily to higher level facilities*"[39]. It was entirely reasonable for Dr FitzGerald to accept that Dr Patel and Dr Keating would honour those undertakings. He was informed such an arrangement was already in place.[40] Further, Dr Keating "*would know what those procedures were*"[41], and Dr FitzGerald reasonably believed such undertakings would satisfy any concerns regarding issues of patient safety as the principal issues and complaints that had been brought to his attention related to the matters the subject of the undertakings;

(d) The steps Dr FitzGerald took, upon his return to Brisbane following the visit to Bundaberg Base Hospital, to advise the Medical Board that there were possible concerns and to arrange that Dr Patel's registration not be renewed until all issues had been finalised. Dr FitzGerald knew that Dr Patel, being an area of need Registrant, would not be able to continue working beyond his registration period, namely 31 March 2005, without being further registered by the Board.[42] Against that background, Dr FitzGerald's concession that, as at 24 March 2005, he knew Dr Patel could carry out "*tens if not hundreds of operations*"[43] whilst awaiting the finalisation of a Medical Board investigation must necessarily be incorrect. Likewise, his agreement with the suggestion that it was his belief up until 29 March 2005 that Dr Patel "*may well continue to operate as a surgeon at Bundaberg Hospital until at least the end of June 2005*" [44] must necessarily be incorrect. Dr FitzGerald was told, when he spoke to Mr O'Dempsey on 16 February 2005, that Dr Patel's registration was coming up for renewal, and Dr FitzGerald had arranged for any consideration

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[38] T6149/30; see also T6154/20.
[39] T6107 - 6108.
[40] T3247/40.
[41] T6108/25
[42] T6147/15 – 30.
[43] T6118/1 – 11.
[44] T6159/40.

of that renewal to be deferred pending completion of his report and other investigations. Dr FitzGerald had earlier been told by Mr Leck that Dr Patel's contract expired on 31 March 2005. Accordingly, Dr Patel had one week left before his registration expired and he could not work beyond that date;

(e) The notification Dr FitzGerald gave the Medical Board of his concerns by letter dated 24 March 2005 [45]. This was the day he delivered his Memorandum to the Director General enclosing the Clinical Audit report. That letter specifically sought an assessment of Dr Patel's performance by the Medical Board . Significantly, it stated:

> *"My investigations to date have not been able to determine if Dr Patel's surgical expertise is deficient, however, I am concerned that the judgement exercised by Dr Patel may have fallen significantly below the standard expected. This judgement may be reflective of his decision to undertake such complex procedures in a hospital that does not have the necessary support, and in his apparent preparedness to retain patients at the hospital when their clinical condition may warrant transfer to a higher level facility."*

Dr FitzGerald believed that the Medical Board would then conduct an investigation into Dr Patel. This is not an unreasonable approach given that Dr FitzGerald knew that Dr Patel's registration was about to expire, and, further, the complaints regarding Dr Patel were now public knowledge and Dr FitzGerald had notified the Director General and the Medical Board of his concerns.

22. The steps taken by Dr FitzGerald to ensure a formal assessment of Dr Patel would be undertaken by the Medical Board, rendered superfluous any need for him to review or have reviewed Dr Patel's credentials or clinical privileges. Indeed, the concerns expressed by Dr FitzGerald with respect to Dr Patel's judgement meant that a formal assessment by the Medical Board was the more appropriate procedure in all the circumstances, particularly where Dr FitzGerald knew that Dr Patel's registration was about to expire and he would be unable to work at Bundaberg Base Hospital or elsewhere without first having his registration renewed by the Medical Board.

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[45] Exhibit 24, attachment MDG5.

23. The criticism of Dr FitzGerald's actions, given the apparently high complication rate of Dr Patel arising from the performance of laparoscopic cholecystectomies must be viewed against Dr FitzGerald's evidence that the data relevant to this issue was unreliable. Dr FitzGerald was not comfortable with that sort of data as it is coded by somebody else, and it is necessary to know more details about the particular cases.[46] In fact, Dr FitzGerald did not have confidence in it[47]. Further, the other available data was showing a much different and mixed position.[48]

24. Due regard must be given to a medical practitioner's view of the reliability of such data, particularly where, as here, Dr FitzGerald is not alone in relation to concerns as to the reliability of such data. Both Mr Johnston [49] and Professor Woodruff [50] comment on the need for further investigation before relying on such data. Indeed Professor Woodruff's most recent review of this issue, whilst yet to be fully completed, would seem to prove that the data was spectacularly inaccurate[51] and that Dr Patel's complication rate was consistent with the national average. Further, data drawn from other hospitals by Dr FitzGerald showed these hospitals "*were up and down across the parameters and some of them were much more*".[52]

25. Dr FitzGerald's concern as to the reliability of the data was noted in his letter to the Medical Board on 24 March 2005[53]. In that letter, Dr FitzGerald said:

> "*There is evidence that the outcomes of those complex operations (namely oesophagectomies), were relatively poor, with at least two of the patients dying in the immediate post-operative period. In addition, data produced during the audit demonstrated a significantly higher rate of complications than the peer group average, however, we have not been able to exclude the impact of differential severity on this complication rate.*"

26. Having regard to Dr FitzGerald's view that it would have been unfair to act on such data, given its unreliability, Dr FitzGerald's conclusion that there was "*insufficient evidence at this time to take any particular action against any individual and to*

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[46] T6116/25 – 50.
[47] T6163/10.
[48] T6161/45.
[49] Exhibit 492, paragraphs 7 – 9.
[50] Exhibit 498.
[51] Exhibit 498.
[52] T6119/5.
[53] Exhibit 24, attachment MDG5.

suspend anyone would be unfair and unjust"[54] was reasonably open. Further, his conduct in notifying the Director General and the Medical Board of Queensland as to his concerns was entirely appropriate and adequate in all the circumstances, having regard to his knowledge that Dr Patel soon would not be able to work due to the cessation of his registration on 31 March 2005.

27. Against that background, it is unreasonable to criticise the briefing note Dr FitzGerald gave to the Minister.[55] It factually detailed Dr FitzGerald's views, including noting that the Hospital had 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*", and that Dr FitzGerald had recommended the matter be referred to the Medical Board for attention.

28. The fact Dr FitzGerald received additional data after that briefing note was prepared did not render that briefing note inappropriate, inadequate or misleading. Dr FitzGerald did not consider the data reliable, and had no confidence in it. It did not alter his conclusions as expressed in that briefing note, or as expressed in the Memorandum enclosing the Clinical Audit report. Accordingly, there was no reason for Dr FitzGerald to provide a further briefing to the Minister.

29. It is also unreasonable to criticise Dr FitzGerald for failing to provide the Minister and Mr Leck with a copy of his audit report. Dr FitzGerald believed, reasonably, that the Director General would provide a copy to the Minister and subsequently to Mr Leck. By this time Dr FitzGerald knew the Minister was aware of the Clinical Audit undertaken by him and the matter was subject of public debate which, appropriately, was a matter for the Director General and the Minister.

30. In the case of Mr Leck, there was obviously a sound basis for Dr FitzGerald's belief because the report was ultimately provided to Mr Leck on 7 April 2005 "*at the request of the Director General*"[56]. It is unsurprising that at the time of provision of that report to Mr Leck, a copy of the accompanying Memorandum to the Director General was not supplied to Mr Leck. By that time, Dr Patel had left Bundaberg Base Hospital and the concerns raised in the memorandum in relation to Dr Patel were no

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[54] T6138/45.
[55] Exhibit 391.
[56] T6105/55.

longer an issue as he was not working at the hospital.[57]. It was the matters canvassed in the Clinical Audit report that then needed addressing by Mr Leck and the management of Bundaberg Base Hospital.

31. There is no proper evidentiary basis to find that Dr FitzGerald performed his duties other than in a conscientious manner and in good faith.

32. To make adverse findings and/or recommendations against an individual who has performed his duties conscientiously and in good faith is a serious step, and should only occur where there is strong and compelling evidence that the individual's conduct fell well short of errors of judgement, and amounted to incompetence.

33. A proper consideration of the information available to Dr FitzGerald as at the date of completion of his Clinical Audit report could not reasonably justify a finding of incompetence. Whilst reasonable minds may differ as to the steps that may have been taken, it is not open to conclude that Dr FitzGerald's chosen course of action was one no reasonable person, acting competently, could reach on information then available to that person. That being so, no adverse findings or recommendations ought to be made against Dr FitzGerald in respect of this matter.

[57] T6146/15.