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## TRANSCRIPT OF PROCEEDINGS

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**THE HONOURABLE MARGARET WILSON QC, Commissioner**

**MR P. FREEBURN QC, Counsel Assisting**

**MS C. MUIR, Counsel Assisting**

**IN THE MATTER OF THE COMMISSIONS OF INQUIRY ACT 1950**

**COMMISSIONS OF INQUIRY ORDER (No. 4) 2015**

**BARRETT ADOLESCENT CENTRE COMMISSION OF INQUIRY**

**BRISBANE**

**9.31 AM, THURSDAY, 28 JANUARY 2016**

**Continued from 19.11.15**

**DAY 5**

**RESUMED**

**[9.31 am]**

5 COMMISSIONER WILSON: Good morning, everyone. Can I begin by taking your appearances. I know most of you have announced your appearances previously but for the benefit of the reporters I have to ask you to do it again.

10 MR P.A. FREEBURN QC: Commissioner, Freeburn, initials P.A., Queen's Counsel. I appear with MS CATHERINE MUIR as Counsel Assisting.

COMMISSIONER WILSON: Mr Freeburn, I did hear but only just so if you could speak up, thanks. Ms Wilson.

15 MS E.S. WILSON QC: Good morning, Commissioner. My name is Wilson, initial E. of Queen's Counsel. I appear with my learned friends, MS N. KEFFORD and MS J. CRAWFORD and we represent the State of Queensland and its employees. And we are instructed by Crown Law.

20 COMMISSIONER WILSON: Thanks, Ms Wilson. Who's next?

MR D. O'BRIEN QC: If it please the court, my name is O'Brien, initial D. of Queen's Counsel. I appear for Mr Ian Maynard. I'm instructed by Herbert Smith Freehills.

25 COMMISSIONER WILSON: Thanks, Mr O'Brien.

30 MR D.B. O'SULLIVAN: May it please the Commission, my name is O'Sullivan, initials D.B. I appear with MR O'REGAN instructed by McCullough Robertson for the Honourable Lawrence Springborg MP.

COMMISSIONER WILSON: Thank you. Yes.

35 MS K.A. McMILLAN: Yes. Good morning, Commissioner. My name is McMillan, initials K.A., Queen's Counsel. I appear with MR FITZPATRICK for the West Moreton Hospital Health Service and Board and we're instructed by Corrs Chambers Westgarth.

COMMISSIONER WILSON: Thanks, Ms McMillan.

40 MS K.A. MELLIFONT QC: Good morning, Commissioner. My name is Mellifont, initials K.A. I appear together with my learned friend MS M. ZERNER instructed by Clayton Utz and we appear for Metro South Hospital and Health Service.

45 COMMISSIONER WILSON: Thank you.

MS J.M. ROSENGREN: Good morning, Commissioner. It's Rosengren, initial J. I'm instructed by K&L Gates and I appear on behalf of Dr Trevor Sadler.

COMMISSIONER WILSON: Thanks, Ms Rosengren.

MS ROSENGREN: Thank you, your Honour.

5 MS S.B. ROBB: Good morning, Commissioner. Robb, R-o-b-b, initials S.B. I  
appear on behalf of Mara Kochardy, Matthew Beswick, Moira MacLeod, Victoria  
Young, Rosangela Richardson, Peta-Louise Yorke, Susan Daniel, Christie Burke,  
10 Lourdes Wong, Janella Bowra and Stephen Sault. And I'm instructed by Roberts &  
Kane Solicitors.

COMMISSIONER WILSON: Thanks, Ms Robb.

MS K. PHILIPSON: If it please the Commission, my name is Philipson, initial K.  
15 Counsel instructed by Meridian Lawyers. I appear on behalf of Professor Brett  
McDermott.

COMMISSIONER WILSON: Thank you. Yes.

MR G.R. MULLINS: Commissioner, my name is Mullins, initials G.R., instructed  
20 by Shine Lawyers. I appear on behalf of Nichole Pryde, Vanita Olliver and Justine  
Wilkinson.

COMMISSIONER WILSON: Thanks, Mr Mullins.

25 MR B.I. McMILLAN: Commissioner, my name is McMillan, initial B., counsel. I  
appear on behalf of Deborah Rankin. I am instructed by Gilshenan & Luton Legal  
Practice.

COMMISSIONER WILSON: Thanks, Mr McMillan.

30 MR A.W. DUFFY: Good morning, Commissioner. Duffy, D-u-f-f-y, initials A.W.  
Counsel instructed by Ashurst Australia for Dr Bill Kingswell.

COMMISSIONER WILSON: Yes.

35 MR G.W. DIEHM QC: Commissioner, Diehm, D-i-e-h-m, initials G.W. of Queen's  
Counsel. I'm instructed by Avant Law and appear on behalf of Dr Anne Brennan, Dr  
Tony O'Connell and Dr Michael Cleary.

40 COMMISSIONER WILSON: Thanks, Mr Diehm.

MR A. ROSS: Commissioner, my surname is Ross, first name is Andrew. I'm a  
solicitor with Sparke Helmore Lawyers and I appear for Justine Oxenham.

45 COMMISSIONER WILSON: Mr Ross. Yes.

MR P.J. McCAFFERTY: Commissioner, my name is McCafferty, initials P.J. Pursuant to a grant of leave dated yesterday, 27 January, I appear for Ronald Simpson instructed by Kaden Boriss.

5 COMMISSIONER WILSON: Thank you. Anyone else?

MR A.I. O'BRIEN: Commissioner, my name is O'Brien, initials A.I. I'm instructed by Rodgers Barnes & Green and I appear for Ms Georgia Watkins-Allen.

10 COMMISSIONER WILSON: Yes. Thank you.

MR B. ATHANASELLIS: Commissioner, my name is Athanasellis, A-t-h-a-n-a-s-e-l-l-i-s, initial B. from Franklin Athanasellis Cullen and I appear for Dr Groves.

15 COMMISSIONER WILSON: Thank you.

MR J. ATTENBOROUGH: Commissioner, my name is Attenborough, A-t-t-e-n-b-o-r-o-u-g-h, initial J. from Moray & Agnew and I appear on behalf of Dr Thomas Pettet.

20 COMMISSIONER WILSON: Yes. Anyone else? Alright. Thank you for that. If I can simply set the scene and then I'll ask Counsel Assisting the Commission to take over for the moment.

25 You will recall at the end of last year there were a couple of directions hearings. On about 10 December, the Governor in Council extended the reporting date for the Commission to 24 June 2016. In light of that, the Commission was able to timetable the various phases of the work that it has to undertake in order to meet that deadline.

30 Public hearings are scheduled to commence on 15 February and to run for four weeks. After that there will be the receipt of written submissions from Counsel Assisting and from parties with leave to appear.

35 Any oral submissions will be heard in the four days leading up to Easter; that is from Monday, 21 March. That will be the conclusion of the public hearings. Then there will be the drafting of the report. Persons against whom adverse findings are a possibility will be given notice of the proposed findings and the opportunity to make written submissions in response. Then the report will have to be finalised and it will have to go to the printer.

40 The purpose of this morning's hearing is to advance the preparation for the public hearings to commence on 15 February. Parties who have been given leave to appear have had access to the Commission's database through individual secure online data rooms.

45 Not everything that has been supplied to the Commission has been placed in those data rooms. But what has been placed in one data room has been placed in every other data room. The data rooms have facilitated communication between the Commission and the parties and, in particular, they have become the medium by

which the Commission is making copies of witness statements and other documents available to the parties on a confidential basis ahead of the hearings. It's not intended that any of these documents will be made publicly available until they have been tendered before the Commission at a public hearing and received into evidence.

5 Mr Freeburn, can I ask you, please, to outline the issues you wish to raise this morning?

MR FREEBURN: Commissioner, there are a number of issues to consider today. Fortunately, most have either been resolved or are not controversial. Can I first of all  
10 deal with the topic of witnesses. Available on the Commission's website from today should be a list of the witnesses which the Commission intends to call. It's now up on the screen. That list of 45 witnesses, plus some unidentified witnesses, is the subset of the total number of witnesses who have given statements to the  
15 Commission. I should say a few things about that list. The first is that the list and the order of the witnesses is subject to change.

That is for a number of reasons. One of the principal reasons is that you will see that many of the witnesses are either doctors or other medical professionals. Some are from interstate and a couple will be giving evidence from the UK. As a matter of  
20 practicalities, Commission staff will try and arrange the evidence for a time which is the least disruptive to those practitioners' practices.

The second point I should make about the list is that the Commission is still receiving documents and answers to questions. The Commission's investigation  
25 process is continuing. That means that some witnesses may drop off the list as they, in effect, answer questions which fill gaps. It also means that other witnesses may be added. Those will not be significant changes but the witness list is subject to that change.

30 The third point I should make about the list is the hearing times for witnesses may change during the course of a hearing. A witness may take more or less time than the time anticipated. Commissioner, the next topic I wish to cover is cross-examination.

35 COMMISSIONER WILSON: Before you move onto that, Mr Freeburn, I'll have a copy of the draft witness order which is being displayed on the screen marked as exhibit 13.

40 **EXHIBIT #13 ADMITTED AND MARKED**

MR FREEBURN: Thank you. Commissioner, it's anticipated that further editions of this document will continue to be published on the website as time goes on, and  
45 we'll endeavour to do that in a way that highlights for people the changes that are made.

COMMISSIONER WILSON: Very well.

MR FREEBURN: Commissioner, about cross-examination, Ms Muir and I do not think it necessary for you to make any directions about cross-examination at this time. The estimates and topics received in advance of today's hearing appear to be within reasonable bounds.

5

In good time before each witness is called, the Commission will alert that witness and their lawyers to the Commission's areas of interest. We'll also alert the witness and their lawyers to the relevant documents Counsel Assisting propose to take the witness to. In each case, the objective is to do that seven days before each witness gives their evidence, and that is even though the guidelines specify three days as the cut-off time, that is, we're proposing to do better than the guidelines.

10

Can I answer a controversy that raged a little in the correspondence over the past couple of days that notice to each witness will be copied to all of the other parties so each person will know the areas of interest for each witness.

15

Commissioner, a number of parties have expressed concerns about the prospect of me tendering witness statements today. Those concerns involve two broad areas: one, the need for some further confidentiality checks through the Commission's redaction process, and secondly, the need to see some further important witness statements. So far as Ms Muir and I are concerned, we have agreed to accommodate those concerns, and witness statements – or at least a large number of them – are likely to be tendered on the first day of the hearing, which, as you have said, is 15 February.

25

Can I say that because of the very sensitive nature of the subject matter of this inquiry some whole statements, such as statements of former patients and family, will not be publicly available. Similarly, where a witness deals with specifics of a patient's medical treatment, that part of that witness' evidence will not be available. And the same principles will apply to the hearings. Most of the proceedings will be open hearings, but where the specifics of patients or their medical treatment are involved, the proceedings will be closed.

30

Commissioner, can I take you to a draft order which is, I think, largely agreed. It's now up on the screen. The first proposed order identifies the sittings of the Commission. The second proposed order identifies two specific days of closed sittings amongst the 20 or so days of sittings. And during those two days, it's expected that former patients and families of former patients of the Barrett Centre will give evidence in closed sittings. We are presently talking to the parties about the procedures for that – those closed hearings.

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The third proposed order deals with witnesses who may give part of their evidence in open sitting, but also part of it in closed sitting, where they deal with patient records and similar matters. There is a specific incident which involves some patients which, it's proposed, be the subject of an order under section 16 of the Act that it be held in closed sittings, and that order, I think, in the version most recently distributed has – well, paragraph 4 is the proposed substantive order, but as

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a matter of drafting it may be that that paragraph 4 is better substituted into the amendments that I'll come to in a minute.

5 Can I deal with paragraph 5. Paragraph 5 suggests some changes to the order that you made, Commissioner, on the 15<sup>th</sup> of October. Paragraph (a) is a correction. Paragraph (b) is a refinement suggested by the State, with which we agree; doesn't change the substance. Paragraph (c) is that incident that involves specific patients which ought to be the subject of confidentiality.

10 Now, thus far I don't anticipate there is controversy about the form of the order. There are some controversies which I'll come to in a moment. One, which I'll leave Ms Wilson to explain deals with the *Child Protection Act*, and another deals with the *Education (General Provisions) Act*, and a third relates to the prohibition on identification.

15 The last issue that I wanted to raise is that we've asked the State of Queensland for an update on its outstanding disclosure issues, and Ms Wilson's side provided us with two affidavits yesterday. As I understand it, the position is that the list of outstanding items to be disclosed by the State of Queensland has gone from 10  
20 outstanding items to now three, which are, in order, a privileged 2009 document, a privileged 2012 document, and a category of documents called capital division documents. The first two, as I understand it, are subject to cabinet processes before they can be released, and I understand that that is underway. The last, the capital division documents, are to be supplied by 1 February. I should say that the delays in  
25 this category of documents, like some of the other categories of documents, is because millions of documents need to be searched in order to find the relevant ones, and the searching produces still many thousands of documents, which are then gone through by Crown Law employees.

30 COMMISSIONER WILSON: Mr Freeburn, when the matter came before a public hearing last year, there was a lot of concern about emails. How has that been resolved, and has it been completely resolved?

35 MR FREEBURN: The process involved selecting priority email accounts. That is, a cost benefit analysis is done, and in an agreement between Commission staff and Crown Law, certain identified employees and identified email accounts were identified as priority accounts, and those documents, I'm told, have been supplied to the Commission, and we're content that that process, whilst not comprehensive, is as much as can be done as is reasonable in the circumstances.

40 COMMISSIONER WILSON: So given that accounts have been prioritised, is it the position that there are no outstanding issues of disclosure about emails, or are there still some to come in?

45 MR FREEBURN: There are no outstanding issues about emails. As I understand, all the priority email accounts have been supplied, and Commission staff are content with that.

COMMISSIONER WILSON: Thank you.

MR FREEBURN: So the three categories that remain are expected shortly. So if it's convenient, I'll leave Ms Wilson to raise the issues she wishes to raise.

5

COMMISSIONER WILSON: Yes, Ms Wilson.

MS WILSON: Thank you, your Honour – thank you, Commissioner. In respect of the documents, perhaps I'll address that first. Counsel Assisting stated that there were three categories of documents outstanding. In relation to the first two, as I understand it, those documents were provided yesterday to the Commission. In relation to the third category, which is to do with the capital works documents, an extension was granted by the Commission to Monday, and work is still being undertaken on those documents.

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COMMISSIONER WILSON: Just – I want to be clear. Your instructions are that the cabinet documents, one from 2009 and one from 2012, have now been supplied.

MS WILSON: Yes.

20

COMMISSIONER WILSON: Thank you.

MS WILSON: Commissioner, I have three issues that I wish to raise this morning.

25 COMMISSIONER WILSON: Before you move on, do you wish to tender those two affidavits or not?

MS WILSON: I can – I can, Commissioner.

30 COMMISSIONER WILSON: It's a matter for you.

MS WILSON: I don't think there's any need to.

COMMISSIONER WILSON: Very well.

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MS WILSON: If any need arises, then I'll revisit that, Commissioner, but at this point in time, considering the Commission's extension, there is no need to.

COMMISSIONER WILSON: Thank you.

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MS WILSON: Commissioner, I wish to raise three issues this morning. The first is to do with a proposal to amend the practice guideline of 02-2015, and this is in relation to – that the Commission will provide three days' notice of areas of interest and relevant documents, and then as the guideline presently stands on that three days, then the parties seeking to cross-examine, they should actually provide the documents. Now, Counsel Assisting this morning has stated that the first part of our amendment – that is, that the documents should be provided to all of the parties –

45



will occur, and that should be reflected in amending the practice direction. We still seek to be able to have some time to be able to consume that information and consume those documents, so that when we provide the information back to the Commission about the documents that may be required for cross-examination, it is done with more consideration. We propose that this will enhance a more efficient system to be able to have that time to be able to consider the areas of interest.

COMMISSIONER WILSON: So that I can understand precisely what you're saying, could you tell me what amendment you seek?

MS WILSON: Yes. The amendment to practice guideline 02-2015.

COMMISSIONER WILSON: Yes.

MS WILSON: That is – and – that the Commission ought consider further amending the practice guideline to provide three days' notice of - - -

COMMISSIONER WILSON: Three days' notice.

MS WILSON: - - - areas of interest.

COMMISSIONER WILSON: I'm sorry, I didn't catch what you said.

MS WILSON: Sorry, I should speak clearer.

COMMISSIONER WILSON: To provide how many days' notice?

MS WILSON: Three days' - - -

COMMISSIONER WILSON: Yes.

MS WILSON: - - - notice of areas of interest and relevant documents to – this will be the amendment – all parties, and for parties seeking to cross-examine to respond two days prior to the witness being called.

COMMISSIONER WILSON: Yes. I have a note of that.

MS WILSON: Thank you, Commissioner. In our submission, this would ensure a more efficient process. I understand that it is hoped for the Commission to actually provide that areas of interest document sometime earlier than the three days. The more time that the parties have that document, the more times – the more opportunity it will have to be able to provide a better response to the Commission.

The second matter that I wish to raise is in relation to amendments sought relating to the order of publication of evidence, and that, Commissioner, was your order made on 15 October. Commissioner, the matters that I wish to raise in my submissions

before you – it is our submission that they should be done in closed court for them to be properly done at this point in time.

5 COMMISSIONER WILSON: Well, without disclosing anything that is obviously of a confidential nature, can you just give me an idea in general terms of the types of matters that you want me now to close the hearing for?

10 MS WILSON: Certainly, Commissioner. It is in relation to the order that – and as Counsel Assisting pre-empted that I would be raising, it is to include in the order at – a new paragraph 1AA should be inserted in the following terms, and that is information the subject of Chapter 6, Part 6 of the *Child Protection Act 1999* Queensland, and personal information under section 426 of the *Education (General Provisions) Act 2006* Queensland.

15 COMMISSIONER WILSON: Do you have copies of that legislation?

20 MS WILSON: Of the legislation? Certainly. And another – that is, in terms of the *Child Protection Act 1999* and *Education (General Provisions)*. Commissioner I've only taken out what we regard as the relevant provisions.

COMMISSIONER WILSON: Yes. That's fine. If you could give me a moment to have a look at it.

25 MS WILSON: Yes.

COMMISSIONER WILSON: It was section 426 of the *Education (General Provisions) Act*, wasn't it?

30 MS WILSON: That is the case.

35 COMMISSIONER WILSON: Can I ask you this in open hearing. Is your concern simply with the disclosure of the identity of a child who may have been the subject of the provisions in the *Child Protection Act* or someone who may have been a student under the *Education (General Provisions) Act*?

MS WILSON: That is the case. That is particularly the case and also – but it's – they are a different category, because they are not covered – or they may not be covered by the existing order, because they may not be BAC patients.

40 COMMISSIONER WILSON: So you're suggesting there may have been children who would normally have the protection of the *Child Protection Act* or of the *Education (General Provisions) Act* who were not patients or former patients of the Barrett Adolescent Centre. I ask that question for the obvious reason that there is already in place a fairly wide order protecting the identity of patients and former  
45 patients.

MS WILSON: Yes, yes.

COMMISSIONER WILSON: It doesn't have to arise in a medical context.

MS WILSON: No, no. In particular terms of the Education – we can actually point you to examples that relates to students who have – were not patients at the Barrett.

5

COMMISSIONER WILSON: Is there anything else you wish to say about your application for me to close this hearing before I ask any other counsel or solicitor if they want to say anything about closing the hearing?

10 MS WILSON: No, Commissioner – except that there is one other aspect that I would submit that really should be done in closed hearings. And that is the expansion of the order to insert the following words at the end of paragraph 1(b)(i). And that is to include these words:

15 *Which includes but is not limited to the following types of detail: gender, date*  
- - -

COMMISSIONER WILSON: Just a moment. And you said gender - - -

20 MS WILSON: Date of birth, home address slash – or addresses.

COMMISSIONER WILSON: Yes.

MS WILSON: Or geographic location, point in time the person was an inpatient.

25

COMMISSIONER WILSON: Yes.

MS WILSON: In brackets: or day patient.

30 COMMISSIONER WILSON: Yes.

MS WILSON: Treating clinician, patient-specific transition arrangements, including the location or name of the receiving service.

35 COMMISSIONER WILSON: Yes.

MS WILSON: The patient's clinical diagnosis and anything else relating to their clinical information or their family.

40 COMMISSIONER WILSON: Or their - - -

MS WILSON: Family.

COMMISSIONER WILSON: - - - family. And - - -

45

MS WILSON: They are the two categories of amendments that we wish to - - -

COMMISSIONER WILSON: Could you outline for me in general terms why submissions relating to that need to be in closed hearing?

5 MS WILSON: Because, your Honour, the examples that will be given, we would say, should be in closed hearings. And to discuss them in detail about why they are – they should be in closed hearings – if the end result is that they should be in closed hearings, then it has been ventilated in open court in quite detail. And until there has been a decision, it should be in closed hearings.

10 COMMISSIONER WILSON: Alright. Now, I intend to ask other counsel and solicitors if they want to say anything about closed hearings. Are there any other matters that you want to raise that you're not asking to be dealt with in closed hearing?

15 MS WILSON: The only other matter that has been brought to the – my attention this morning is a direction that is being sought on behalf, as I understand it, Mr Springborg's counsel but also being endorsed by a number of counsel here today in relation to the Counsel Assisting providing key issues and a copy of the opening address. We endorse that with the – but with the appropriate amendments to reflect  
20 the State's position. I will let others - - -

COMMISSIONER WILSON: Well, have you already made your submissions about that under your first point about amendments to the practice guideline, or is there  
25 more that you want to say?

MS WILSON: No. This is a different species.

COMMISSIONER WILSON: Alright. Well, do you want to make your submissions on that now or do you want to wait and make them in response to what  
30 Mr O'Sullivan says?

MS WILSON: Yes. I – others are going to make those submissions, and we simply endorse those submissions.

35 COMMISSIONER WILSON: Anything else, Ms Wilson?

MS WILSON: No. Thank you.

COMMISSIONER WILSON: Before dealing with the question of closing this  
40 hearing this morning, can I ask if any other counsel or solicitor wishes to make any submissions about Ms Wilson's first point, which related to amendment of practice guideline

45 MS WILSON: No, thank you.

COMMISSIONER WILSON: Before dealing with the question of closing this hearing this morning, can I ask if any other counsel or solicitor wishes to make any submissions about Ms Wilson's first point, which related to amendment of practice guideline 02 of 2015. Perhaps if I ask you in the order in which you appeared, it  
5 might be the most convenient. Mr O'Brien of Queen's Counsel?

MR D. O'BRIEN: No further submissions, your Honour.

COMMISSIONER WILSON: Alright. Mr O'Sullivan?  
10

MR O'SULLIVAN: We support the application.

COMMISSIONER WILSON: Okay. Ms McMillan?

15 MS McMILLAN: Yes, we support it, save that my learned friend mentioned that other parties respond within effectively 24 hours to that notice given by Counsel Assisting, which, if it's a witness that has a very comprehensive statement, that might be logistically a little difficult. So perhaps 24 hours prior to that witness being  
20 called.

COMMISSIONER WILSON: So it would be respond within 48 hours?

MS McMILLAN: Yes.

25 COMMISSIONER WILSON: Alright. Ms Mellifont?

MS MELLIFONT: Commissioner, the submission is supported. The objective obviously is to put at least a day between when we receive the issues relevant to that particular witness and when we need to respond to the Commission in respect of it,  
30 and we are happy to hear that the Counsel Assisting are hoping to have the list of issues a little earlier than three days.

COMMISSIONER WILSON: Very well. Ms Rosengren?

35 MS ROSENGREN: Thank you, Commissioner. I have no submissions to make in relation to this issue.

COMMISSIONER WILSON: Thank you. Ms Robb?

40 MS ROBB: Thank you, your Honour. We have no submissions to make, although if we are required to respond, we would like to be clear about what exactly that means.

COMMISSIONER WILSON: What it is.  
45

MS ROBB: Thank you.

COMMISSIONER WILSON: Ms Philipson?

MS PHILIPSON: No submissions to make.

5 COMMISSIONER WILSON: Mr Mullins?

MR MULLINS: Your Honour, we – Commissioner, we support the position of Ms McMillan.

10 COMMISSIONER WILSON: Mr B. McMillan?

MR McMILLAN: I have no submissions, thank you.

COMMISSIONER WILSON: Thank you. Mr Duffy?

15

MR DUFFY: I have nothing further.

COMMISSIONER WILSON: Thank you. Mr Diehm?

20 MR DIEHM: Nor I, your Honour.

COMMISSIONER WILSON: Mr Ross.

MR ROSS: I have no submissions, thank you, your Honour?

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COMMISSIONER WILSON: Okay. Mr McCafferty?

MR McCAFFERTY: No submissions, thank you, Commissioner.

30 COMMISSIONER WILSON: Mr A. O'Brien?

MR A. O'BRIEN: ..... Commissioner.

COMMISSIONER WILSON: Thank you. Mr Athanasellis?

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MR ATHANASELLIS: No further submissions, your Honour.

COMMISSIONER WILSON: And Mr Attenborough?

40 MR ATTENBOROUGH: I have no further submissions, Commissioner.

COMMISSIONER WILSON: Thanks.

45 MS McMILLAN: Your Honour, could I just – I'm sorry, I omitted to say we would obviously prefer the seven days that my learned friend Mr Freeburn outlined he would endeavour to do, because the more time, that obviously logistically makes everybody's life somewhat easier.

COMMISSIONER WILSON: Can I say this: in my observation, Counsel Assisting, both of them, are doing their very best to get things out as fast and as early as they can, but there are limits upon what can be achieved - - -

5 MS McMILLAN: Understood.

COMMISSIONER WILSON: - - - and it's not always solely within their control. It's dependent on material coming in from the parties, very often.

10 MS McMILLAN: I understand that, Commissioner. I meant no criticism. I'm just – obviously, given the large body of material and that some of these statements are very, very lengthy.

15 COMMISSIONER WILSON: Very well. Alright. Now, the question of closing the present hearing for the reasons put forward by Ms Wilson. Does anyone wish to make submissions in relation to that? Mr O'Brien of Queen's Counsel?

MR D. O'BRIEN: No submissions, Commissioner.

20 COMMISSIONER WILSON: Okay. Mr O'Sullivan?

MR O'SULLIVAN: No.

25 COMMISSIONER WILSON: Okay. Ms McMillan of Queen's Counsel?

MS McMILLAN: No. No, your Honour.

COMMISSIONER WILSON: Ms Mellifont QC?

30 MS MELLIFONT: Your Honour, the submission is supported for the reason articulated, which is the ventilation of the issues. Particularly, in respect of the intended application to include the descriptors as to the means of identification could – ventilating that issue could inadvertently disclose information relevant to a patient, and it's so easy for that to happen inadvertently, so the submission is supported.

35 COMMISSIONER WILSON: Very well. Ms Rosengren?

MS ROSENGREN: No submission, thank you, Commissioner.

40 COMMISSIONER WILSON: Ms Robb?

MS ROBB: No submission, your Honour.

45 COMMISSIONER WILSON: Ms Philipson?

MS PHILIPSON: No submission, your Honour.

COMMISSIONER WILSON: Mr Mullins?

MR MULLINS: No submission, Commissioner.

5 COMMISSIONER WILSON: Mr B. McMillan?

MR McMILLAN: No submission.

10 COMMISSIONER WILSON: Mr Duffy of Queen's Counsel?

MR DUFFY: No, thank you.

COMMISSIONER WILSON: Mr Diehm QC?

15 MR DIEHM: No, Commissioner.

COMMISSIONER WILSON: Mr Ross?

20 MR ROSS: Nothing, Commissioner, thank you.

COMMISSIONER WILSON: Mr McCafferty?

MR McCAFFERTY: No, thank you.

25 COMMISSIONER WILSON: Mr A. O'Brien?

MR A. O'BRIEN: No, thank you, Commissioner.

30 COMMISSIONER WILSON: Mr Athanasellis?

MR ATHANASELLIS: No, thank you, Commissioner.

COMMISSIONER WILSON: And Mr Attenborough?

35 MR ATTENBOROUGH: No, thank you, Commissioner.

COMMISSIONER WILSON: Alright. Can I ask Counsel Assisting if he wants to say anything in reply before I make a decision on this point.

40 MR FREEBURN: In respect of the change to the practice guideline, we're content with the majority view.

COMMISSIONER WILSON: Okay. And with respect to closing this hearing?

45 MR FREEBURN: It can be appreciated that if counsel for the State wishes to refer to specific examples, that will necessitate, in my submission, a closing of the court.



COMMISSIONER WILSON: Very well. I will close this hearing to receive submissions on these points. I'll stand down for a few minutes to allow the courtroom to be reorganised. Can I say firstly, the live streaming will have to be switched off, and I want to be sure that has happened before the submissions resume.  
5 Secondly, I will allow counsel and any instructing solicitors or solicitors who are to make submissions to remain here in the hearing room. Otherwise, I would ask that all persons vacate the hearing room while I receive these submissions, apart from staff, such as our court orderly, formerly bailiff; person fulfilling the role of Associate; obviously, the recording staff. Thank you.

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**ADJOURNED**

**[10.16 am]**

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**RESUMED**

**[10.57 am]**

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Closed Hearing

Pages 18 through 39 redacted for the following reasons:

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Closed Hearing

COMMISSIONER WILSON: Alright. Well, I think the live streaming should be turned on, then, and if anyone else wishes to come back into the hearing room they can. Is the live streaming on? Very well. Mr O’Sullivan.

5 MR O’SULLIVAN: May it please the Commission. May I hand up a copy of a very short direction that we seek.

COMMISSIONER WILSON: Yes. Thank you.

10 MR O’SULLIVAN: What you have, Commissioner, is in typed form the direction that we seek, which those who have given leave to appear have seen. We’ve also added some manuscript annotations to make the order globally applicable following discussions that I had with those appearing for the State. May I explain the thinking. The situation of my client and, indeed, of many who have been summonsed to give  
15 evidence is that in September last year they were provided with a summons requiring three pages of questions to be answered, as the Commission knows. Forty-four questions in the name – in the position of my client. That was in September.

The impression we have very much is that that was a very wide net that was cast  
20 when the thinking of the Commission was at its infancy. The Commission didn’t have the benefit of the documentation and statements that it now has. Our impression from correspondence we’ve had with the Commission is that, indeed, the matters that my client – I withdraw that. The matters that the Commission is interested in in relation to my client are, in fact, narrower than that. We’ve had the  
25 benefit of a letter in December which very helpfully sets out the Commission’s then present view about the matters that my client – the matters in respect of which he’s giving evidence that are really of interest to the Commission. And that was very helpful. And they’re really confined and, with respect, sensible. That was the position in December last year.

30 Now, my client has served the statement as directed by you yesterday. We’ve also provided, as directed, a list of the persons in respect of whom we would seek your leave to cross-examine. And we’ve given the documents and topics, as directed. Now, two matters arise that prompt us to move for this direction. The first is that it’s  
35 your intention to have a hearing after the close of evidence in respect of which a notice is going to be given about potential adverse findings in relation to any of those who are appearing.

COMMISSIONER WILSON: No. I didn’t say there would be a hearing.

40 MR O’SULLIVAN: I withdraw that.

COMMISSIONER WILSON: I said notice would be given.

45 MR O’SULLIVAN: I’m so sorry.

COMMISSIONER WILSON: I said notice would be given. I anticipate it being given in writing and there being an opportunity for a written response.

MR O'SULLIVAN: Yes.

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COMMISSIONER WILSON: I do not anticipate a further public hearing.

MR O'SULLIVAN: Thank you for that clarification. Now, the – and, with respect, I can see the sense in that when this is a Commission obliged to accord procedural  
10 fairness. We can see the perfect sense. The practical issue that, of course, arises is those submissions that you would be inviting would be submissions made after all the evidence is closed. The decisions which will already have been made at that point in time by myself and others in my position will already have been made. And those decisions, as your Honour – as you can appreciate, Commissioner, are critically  
15 who to cross-examine, what questions to ask and, indeed, what documents do we wish tendered before you. We have no right to tender them. We would have to ask Counsel Assisting to tender them. Those critical decisions will already have been made.

20 Now, there's a mechanism at the moment for dealing with cross-examination, which is, with respect, sensible, within three business days of the witness giving evidence. I and those in my position need to provide a notice three business days before, which asks for leave and identifies the documents and topics. The practical difficulty and the reason for moving now is that that means by 10 February I and those in my  
25 position must make a decision – that's three business days before the 15<sup>th</sup> – we must make a decision in respect of the first day – on 11 February the second day and so on – whether – a final decision as to whether we wish to cross-examine those witnesses and a final decision about topics and documents.

30 The difficulty is that one must make a sensible, practical, responsible decision about who to cross-examine and why and not – and the reason for asking for the direction in paragraph 1 is so that we have clarity that we're on the same page as the Commission about the matters in respect of which the Commission is interested in hearing evidence from our client. We've already had something very general which  
35 we think is sufficient. Paragraphs 3(a), (b), (c) and, I think, (g) and (h) of the Terms of Reference, closure of Redlands and the decision – sorry – the ceasing of Redlands and the decision to close the Centre between two dates in late 2012 and late 2013.

40 That would be sufficient compliance with the direction we're seeking, because it would enable us, then, to know, well, we've been asked a very wide range of questions. The Commission is interested in this subset. And we'll make responsible decisions about cross-examination on that basis. So that's the reason – that's the thinking behind the request for the direction in subparagraph (a). And, as I say, we don't think it's going to be onerous for the Commission. And those in my situation  
45 have to make, as I say, a responsible forensic decision about cross-examination once

and for all and later about which documents we wish to tender. In relation to subparagraph (b) - - -

5 COMMISSIONER WILSON: Can I say with respect to (a) – and I’ll hear anyone else who wants to make submissions and hear what Counsel Assisting have to say in relation to it. But it occurs to me that we don’t live in a perfect world. We are all operating under time constraints. The whole of this Commission’s work including the report has to be finished by a certain date. There are still statements coming in, unfortunately. Some of that can be attributable to late requests for information or  
10 late requests for supplementary information. Some of it, I think, may still be attributable to people being slow.

MR O’SULLIVAN: Yes.

15 COMMISSIONER WILSON: Whatever it’s attributable to, there’s no point in setting a date for Counsel Assisting to do something which cannot be achieved. That’s what I need to hear from Counsel Assisting about. I understand your position but, of course, while I am very keen for there not to be two bites at cherries, there is always the fallback mechanism of seeking leave to do something that’s outside the  
20 guidelines – seeking leave to have a witness recalled so that you can ask him questions. Now, I’m not trying to encourage that for one minute.

MR O’SULLIVAN: No.

25 COMMISSIONER WILSON: But I’m wanting to make it clear that the door is not being slammed in anyone’s face. The important thing is that things are done in an orderly fashion, that we set achievable targets and that no one is prevented from asking questions on a topic or of a witness in relation to which he or she has a  
30 legitimate interest.

MR O’SULLIVAN: Absolutely. And that, with respect, is absolutely right. We don’t live in a perfect world, but it would be most unsatisfactory for all of the counsel assembled here to have to come back on another day because someone needs to be recalled. The cost of reassembling this Commission every day is very  
35 significant and insofar as you need to make a decision about which path to chart, in our respectful submission, one which is sensitive to the – one which tends to lead to an outcome where the risks of that happening are minimised, in our submission, would be the right course. And it seems to us that subparagraph (a) has a tendency to bring about that outcome, because people know with greater clarity where they stand.

40 Achievability is absolutely essential. We’ve only chosen the 8<sup>th</sup>, if it please the Commission, because the 10<sup>th</sup> is the date by which on your practice direction everyone must make a decision about whether to seek a notice of cross-examination in respect of those giving evidence on the first day. If a later date is needed to  
45 accommodate the convenience or the workload of Counsel Assisting which, may I say, we fully respect and we’ve had a very good working relationship with Counsel

Assisting – we have no complaints at all. If more time is needed, we, of course, don't have any problem with that. Does - - -

5 COMMISSIONER WILSON: Alright. Do you want to move on to your second point?

10 MR O'SULLIVAN: Now, the second point is one directed less at a forensic decision about cross-examination and more about the fact that whilst we may not wish to cross-examine a witness, it may be that there are documents that can be tendered through that witness that we wish to be tendered. Again, it is simply impossible in four weeks for you to deal with all of the matters in the Terms of Reference in detail. It's simply impossible. A decision has to be made about where the focus will be, what matters are important and what matters are not important – in particular, what matters are not important. With respect, it seems to us it's  
15 achievable and sensible for Counsel Assisting to provide those parties who have leave to appear even the briefest of summaries of the oral address which will be provided on the 15<sup>th</sup>, and even – and some sort of broad indication of what are the key issues to be examined, which descends to slightly more detail than the terms of reference. Again, if the 8<sup>th</sup> is not achievable, you wouldn't order the 8<sup>th</sup>. You would  
20 make a direction that was achievable and sensible. It is, in our respectful submission, not satisfactory for those appearing for persons whose interests may be severely prejudiced by the outcome of this to be told for the first time on the 15<sup>th</sup> what are the key issues that those who are given the responsibility of Counsel Assisting intend to focus on. It's the right approach for some advance notice to be given as to what  
25 those issues are, subject, of course, to its workability.

COMMISSIONER WILSON: So what you're saying, I think, Mr O'Sullivan, is that there ought to be early disclosure of the issues Counsel Assisting considers relevant to a particular witness, and there ought to be early disclosure, if that's the word, of  
30 the *in globo* issues which Counsel Assisting considers to be of importance in this inquiry.

MR O'SULLIVAN: That's so. And in relation to the first point, it may be that I should read into the transcript the amendments to the printed form which not all  
35 parties will be aware of. But your Honour's summary – your summary is absolutely right, Commissioner, of what you just said. Should I just tell those at the bar table the - - -

40 COMMISSIONER WILSON: Yes, please do. You're free.

MR O'SULLIVAN: Thank you. In relation to subparagraph (a), in the first line, instead of the words "McCullough Robertson", the copy handed to the Commissioner is replaced with the following words:

45 *Each party with leave to appear (and a copy to each other party with leave to appear).*

In relation to the third line of paragraph (a), in substitution for the words “Mr Lawrence Springborg”, the words would be “that party”, if the Commissioner was minded to make a global order rather than one specific to the client for whom I act. Those are our submissions.

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COMMISSIONER WILSON: Thanks, Mr O’Sullivan. Now, does anyone wish to make any submissions in relation to the points Mr O’Sullivan has raised? Ms Wilson?

10

MS WILSON: Thank you, Commissioner. Commissioner, we would endorse any assistance that Counsel Assisting can give us in relation to the issues relevant to our witnesses and also the global issues. We appreciate the significant burdens that Counsel Assisting is under at the moment with the workload, and any timeframes that have to be given have to be achievable, not only for Counsel Assisting but also

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for the parties. So any assistance that Counsel Assisting can provide, in terms of the issues of giving us a heads up or advance notification, would be certainly appreciated, and, I may say, I would hope be able to make a more efficient process, because we can respond in a more efficient way.

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COMMISSIONER WILSON: Alright. Thank you for that.

MR FREEBURN: Commissioner, I hesitate to interrupt, but I can offer something of a compromise which I think might save some time.

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COMMISSIONER WILSON: Certainly.

MR FREEBURN: Do you mind if I - - -

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COMMISSIONER WILSON: Not at all.

MR FREEBURN: - - - make my submissions now?

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MS McMILLAN: Sorry, Commissioner, could my learned friend speak up? It’s really very difficult to hear him, and I regret to say as well you, Commissioner, in the - - -

COMMISSIONER WILSON: Yes, I’ll try.

40

MS McMILLAN: In the back row, so to speak.

COMMISSIONER WILSON: Thank you.

MS McMILLAN: Thank you.

45

MR FREEBURN: Two quick points. First of all, we only got Mr Springborg’s statement late yesterday. I haven’t read it yet, and I expect Ms Muir hasn’t read it yet. It certainly hasn’t been analysed, and so to give – it’s – I can’t say too much

about what we can do with Mr Springborg's statement until I read it. The second short point is this: I'm not sure that Mr O'Sullivan has read the practice guidelines accurately, and we're trying to get those up, but what I can say is that Ms Muir and I prepared to – and I'll just read this out:

5

*By 4 pm on 10 February, Counsel Assisting shall serve upon the parties with leave to appear a document identifying key issues that the Commission intends to focus upon during the course of the hearings.*

10 Now, that's the key issues, and we're content to do that and content to do that by Wednesday the 10<sup>th</sup> for everybody, not just Mr Springborg. But I should say a few things about what is proposed. The first is this is not a civil or a criminal proceeding; it's investigative. And so the status of the key issues document that we produce should not be assumed to be of the same status as a pleading. It is identifying key  
15 issues. As you mentioned, Commissioner, there are further statements which are coming in; further investigations that are taking place.

Now, I'm not sure that that will satisfy Mr O'Sullivan, but can I say that the burden of producing a key issues document for 45 to 50 witnesses – perhaps 100 if his  
20 submissions are designed to – or 45 to 50, I'm assuming he's referring to, would be too large to produce in a couple of weeks' time. And can I say that in relation to the witnesses specifically, our present intention is to – a week before each witness gets in the witness box, that witness will receive a form which identifies the issues of concern to the Commission relating to that particular witness and a list of the  
25 relevant documents. So every witness will get that, and all other parties will - - -

COMMISSIONER WILSON: So that form will be when?

MR FREEBURN: Well, our present intention is seven days.  
30

COMMISSIONER WILSON: Seven days before being called or - - -

MR FREEBURN: Before the witness is called. Under the directions, it's requiring three days, but our present intention is to do that a week before the witness - - -  
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COMMISSIONER WILSON: And that form will contain?

MR FREEBURN: That will contain notice of the areas of interest of the Commission and a list of the documents that I, as Counsel Assisting or Ms Muir, as  
40 Counsel Assisting, will take the witness to, but of course it won't include the documents that are attached to the witness's own statement. So anything outside their own statement. That'll be clear from the form itself. So I'm not sure whether that shortens it, but that's what Counsel Assisting is prepared to - - -

45 COMMISSIONER WILSON: Well, I think what I will do is turn back to Mr O'Sullivan to hear his response to what you've just said. Before doing that, can I



make it clear to all parties that my endeavour is to treat all parties even-handedly and not to – certainly not intentionally, and so far as possible not inadvertently to treat any preferentially, so that the scheme that is settled upon has to be one that will apply to everyone. Mr O’Sullivan, do you want to say more?

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MR O’SULLIVAN: May it please the Commission. I’ve – in relation to the second point, it’s good to have, seven days before one’s client is called, information about the areas of interest and list of documents. That’s good. The problem is that we’ve already made decisions about who we will cross-examine outside the seven day  
10 timeframe, and that’s the problem. That’s the problem. If we were given that information before the hearing commenced, the problem would be solved. Seven days doesn’t solve the practical problem that I and those in my position have, which is we need to make a very significant and responsible decision about do I cross-examine; if so, on what; and which topics. That’s the practical problem, and that’s  
15 what we’re trying to address.

COMMISSIONER WILSON: I can see your problem, but you heard Mr Freeburn express his problem, that it’s simply not achievable to do what you ask for 45 or 50 witnesses a week or even half a week out from the commencement of the public  
20 hearings.

MR O’SULLIVAN: Well, the answer is that it should be confined to those who are giving evidence in the first two weeks.

25 COMMISSIONER WILSON: Well, there’s still a very long list, if you look at the batting order which was put up on the screen this morning of witnesses who are to give evidence in the first two weeks.

MR O’SULLIVAN: Well, it’s – but you see, Commissioner, within seven days of  
30 each of those appearing these documents that are going to be done will have to be done in any event. What we’re looking at is simply bringing forward a more abbreviated form of the same kinds of information. The numbers who appear in the first two weeks are – there are certainly – I don’t have the exact number, but it’s not 40 or 50, and we emphasise that the task that Counsel Assisting have is, in any event,  
35 a heavy one because they have to give the detailed information seven days before each of those witnesses. All we’re doing is dealing – is trying to assist those who are appearing by asking for a high-level set of information so they can make informed cross-examination decisions.

40 In relation to the first point that was made, I must say I’ve looked at my version of the practice direction number 2, and I can’t see the reference to 10<sup>th</sup> of – something’s going to happen on 10 February. I just – I haven’t been able to locate that.

45 COMMISSIONER WILSON: I don’t think that date is mentioned, but I think what is mentioned is three business days before - - -

MR O’SULLIVAN: That’s right.

COMMISSIONER WILSON: - - - the witness is called, so three business days before Monday the 15<sup>th</sup> would be what?

5 MR O’SULLIVAN: The 10<sup>th</sup>, your Honour.

COMMISSIONER WILSON: The 10<sup>th</sup>. Well, that’s how it’s arrived at.

MR O’SULLIVAN: Yes, but that’s only in respect of those appearing on the 15<sup>th</sup>.

10 COMMISSIONER WILSON: Yes, it is. I understand the point that you’re making.

MR O’SULLIVAN: Yes. I have no further submissions, if it please the commission, but I do note that you haven’t heard from other counsel.

15 COMMISSIONER WILSON: No, I intend to hear from them. Thank you for that. Mr O’Brien QC?

MR D. O’BRIEN: Commissioner, Mr Maynard, my client, supports the position that has been articulated by Mr O’Sullivan. My client is, too, concerned about the exact issues which this Commission seeks to focus on, so far as my client is concerned. I endorse the submissions made by Mr O’Sullivan, and beyond that I don’t have anything else to add.

25 COMMISSIONER WILSON: Thank you. Ms McMillan?

MS McMILLAN: Commissioner, I endorse both what my learned friends Mr O’Brien and Mr O’Sullivan have said. The terms of reference are very broad, so the sooner we can have some articulation – because that also goes to witnesses that are not currently slated to give oral evidence and decisions that may still need to be made about those.

30 COMMISSIONER WILSON: Alright. Thank you. Ms Mellifont?

MS MELLIFONT: Your Honour, we have no submissions to make. We do welcome Mr Freeburn’s offer to provide a list of key issues in globo by 10 February.

COMMISSIONER WILSON: Thank you. Ms Rosengren?

MS ROSENGREN: Endorse the submissions of Ms McMillan QC and do just make the point that some arbitrary line shouldn’t be drawn in relation to the witnesses for the first two weeks. If a consideration was being given to make such an order, the purpose of the order is to enable all witnesses – or the order sought or directions sought to make informed decisions about cross-examination, and those witnesses who are scheduled to be on those two weeks shouldn’t be disadvantaged if such an order was to be made.

45 COMMISSIONER WILSON: Thank you. Ms Robb?

MS ROBB: I have no specific submissions to make; however, welcome the global issues list, and seven days' notice would be wonderful.

5 COMMISSIONER WILSON: Thank you. Ms Philipson?

MS PHILIPSON: No specific submissions, your Honour.

COMMISSIONER WILSON: Mr Mullins?

10 MR MULLINS: No submissions, your Honour.

COMMISSIONER WILSON: Mr B. McMillan?

15 MR McMILLAN: Your Honour, I respectfully agree with the submissions made by my learned friend Ms McMillan QC, particularly in relation to witnesses who are not yet scheduled to give oral evidence. A decision will need to be made about whether applications are made in respect of those witnesses.

20 COMMISSIONER WILSON: Thank you. Mr Duffy?

MR DUFFY: Commissioner, we'd like as much notice and as much detail as possible, but there's nothing I can really usefully add to the submissions.

25 COMMISSIONER WILSON: Thank you. Mr Diehm?

MR DIEHM: I am content and, indeed, grateful for the concessions and offers made by Mr Freeburn and Counsel Assisting. With respect, it's probably about as much as we could really hope for in a practical situation.

30 COMMISSIONER WILSON: Thank you. Mr Ross?

MR ROSS: No submission, your Honour – Commissioner.

35 COMMISSIONER WILSON: Mr McCafferty?

MR McCAFFERTY: No submissions, thank you, Commissioner.

COMMISSIONER WILSON: Mr A. O'Brien?

40 MR A. O'BRIEN: Commissioner, we're content with the proposal from Counsel Assisting. Our particular concern is, from a cost-effective point of view, determining when it's going to be necessary for us to attend. So if we're given seven days' notice of particular issues, that should be sufficient for us.

45 COMMISSIONER WILSON: Thank you. Mr Athanasellis.

MR ATHANASELLIS: No specific submissions, Commissioner, but we do thank Counsel Assisting for the offers - - -

5 COMMISSIONER WILSON: Sorry, “no specific submissions”, then I missed what you said.

MR ATHANASELLIS: Sorry. But we do thank Counsel Assisting for the offers of assistance as early as possible.

10 COMMISSIONER WILSON: Thank you. Mr Attenborough?

MR ATTENBOROUGH: There’s no submission, Commissioner.

15 COMMISSIONER WILSON: Alright. Now, is there anything in response to all of that? Well, I’ll give a decision on that point this afternoon also. It’s now a little after 12.30. If we come back at 2.30.

20 **ADJOURNED** **[12.33 pm]**

**RESUMED** **[2.41 pm]**

25 COMMISSIONER WILSON: I’m sorry to keep you waiting, ladies and gentlemen.

Before I begin, the Executive Director of the Commission has drawn a matter to my attention. I inadvertently misled you early on in relation to the data rooms when I said what’s there for one person is there for everyone. That is certainly so with  
30 respect to witness statements and the like. But there are some documents, for example, a person who has been served with a notice to answer questions may have asked for access to particular documents in order to answer those questions. And such a request would come to me. If I have authorised the release of the documents to him for that purpose they would be released now via the data room and so those  
35 documents wouldn’t be available to everyone. So I’m sorry I misled you.

Mr Freeburn.

40 MR FREEBURN: Commissioner, can I just raise one matter. Mr Mullins asked to be excused for this afternoon. We discussed something of a protocol that might operate generally because it’s understood that barristers and solicitors in the course of this hearing will want to come and go at different times. And we perhaps will establish an agreed practice about that.

45 COMMISSIONER WILSON: Yes, certainly. And I don’t regard it as any sort of discourtesy that he’s had to leave.

I’ll begin by dealing with those matters which appear not to be in controversy. Counsel Assisting handed up a draft order and, as I understand it, the terms of that

draft are not in issue. And so I will make orders in terms of paragraphs 1, 2, 3, 4 and 5 of the draft. Consequently, paragraphs 1(b), (c) and (d) will be renumbered as 1(c), (d) and (e). There are two issues which have required consideration and a ruling by me this afternoon. The first relates to the terms of paragraph – I’m sorry. I’ve left  
5 something out and I think it’s probably better if I go back to it before I come to the controversial issues. In addition to paragraphs 1 to 5 of the draft order, there is to be inserted after paragraph 1(a) a new (b) in the following terms:

10 *Information the subject of chapter 6, part 6, of the Child Protection Act 1999 and personal information under section 426 of the Education (General Provisions) Act 2006; or –*

Consequent upon that what I said a moment ago about renumbering paragraphs 1(b), (c) and (d) as 1(c), (d) and (e) needs to occur.

15 Then I come to the two controversial issues. One relates to the confidentiality order and whether there should be an amendment to paragraph 1(b)(i) and the other is a matter of sequencing and whether there should be an amendment or amendments of Practice Guideline 2 of 2015.

20 Relevantly, the order of 15 October 2015 provided:

- (1) *Subject to further order of the Commissioner,*
- 25 *(b) any evidence given before the Commission, information given to the Commission (whether orally or in writing) and the contents of any book, document, writing or record produced to the Commission that:*
- 30 *(i) identifies or is likely to lead to the identification of a patient or former patient of the Barrett Adolescent Centre or their family;*
- must not be published or made publicly accessible except:*
- 35 *(c) by and to the Commissioner; and*
- (d) by and to Counsel Assisting the Commission, staff of the Commission and any consultants or experts retained by the Commission for the purpose of exercising their functions and duties.*

40 Senior Counsel for the State of Queensland sought an amendment of subparagraph (i) by the insertion of the following words after “family”:

45 *Which includes but is not limited to the following types of detail: gender, date of birth, home address or addresses or geographic location, point in time the person was an inpatient or day patient, treating clinician, patient specific transition arrangements including the location or name of the receiving service, the patient’s clinical diagnosis and anything else relating to their clinical information or their family.*

5 The thrust of counsel's submission was this: she sought to add a non-exhaustive list of descriptors which should be the subject of a confidentiality order. She submitted that because the BAC cohort of patients was so small, about 15 inpatients and five day patients, one or more of those descriptors might assist former patient A to work out the identity of former patient B and, consequently, former patient B's medical and clinical information and personal information. She submitted that it might do so even though an outsider might not be able to work out that identity. Counsel went so far as to submit that, to take a hypothetical example, a statement that X percentage of female patients suffered eating disorders might lead to patient A's identifying another patient. Several other counsel supported the proposed amendment, some, subject to a qualification suggested by me in argument, namely that a reference to patient gender, condition or diagnosis in generic or statistical terms ought not be prevented by a confidentiality order.

15 I raised also the question of the three young people, all former patients of the BAC, who died within months following its closure. Information about them is already in the public arena through social media, otherwise through the internet, through the print media, television and radio.

20 Counsel for the State of Queensland submitted that there ought not be publication of evidence given before the Commission or information given to the Commission as to their identity or cause of death, which has not yet been determined by the Coroner. Counsel for their families, Mr Mullins, had no objection to the publication of such evidence. Some counsel made no submission on the area. Some supported the position of the State of Queensland. Some submitted that their identities and the facts of their death without the cause of the deaths, including the timeframe in which they died, should be allowed to be published.

30 Counsel Assisting the Commission and Mr Mullins, for the families of the three, submitted generally that any prohibition on the publication of the Commission's evidence needs to be clear and concise. It is intended that there be closed hearings for evidence which ought to be kept confidential. The Commission has a redaction process which it is applying to statements and other documents. This order, Counsel Assisting submitted, was intended as a backstop to ensure that any inadvertent disclosure is not published.

40 He stressed that the order is directed at the non-publication of evidence which identifies or is likely to lead to the identification of a patient or former patient. He said that many former patients know about this Commission of Inquiry, that they know their own experiences and know some of the experience of others in their cohort. In his submission, the additional words proposed by counsel for the State of Queensland are unnecessary. They could add obscurity to the judgment call which has to be made about whether particular evidence is likely to lead to the identification of a patient or their family. As for the three deceased young people, he was content to adopt Mr Mullins' approach.

I think the following factors are of particular significance in determining this application. The Commission has an obligation to make full and careful inquiry into the matters in the Terms of Reference in an open and independent manner. It has

power to exclude the public or a portion of the public where it is in the public interest expedient to do so, having regard to the subject matter of the inquiry and the nature of the evidence.

- 5 It has power to prohibit the publication of evidence. While the Act is not express as to the circumstances in which such a prohibition order ought to be made, it is not difficult to envisage some circumstances where an order would be appropriate. For example, issues of national security, not compromising a police inquiry, trade secrets, in some cases privacy, and of pertinence to the present situation, the interests  
10 of the mental and physical health and wellbeing of persons associated with the inquiry or the subject matter of the inquiry.

- 15 Counsel for the State of Queensland drew my attention to expert evidence expressing concern about the potential for deterioration in the mental state of former patients if their identity and/or personal information were disclosed. In some cases, there would be a risk of copycat behaviour. On the other hand, there is considerable force in Counsel Assisting's argument that the language of any non-publication order needs to be concise, direct and simple.

- 20 I accept that someone comparatively unfamiliar with the BAC and the circumstances relevant to this Commission's Terms of Reference may not readily appreciate that publication of any of these descriptors in a particular case is likely to lead to the identification of a patient or the family of a patient.

- 25 On balance, I have decided that the order ought to be amended as follows: a new paragraph should be inserted between the existing (i) and (ii). The new paragraph, which I will call (i)(A) should be in these terms:

- 30 *contains, other than in generic terms and/or statistical context, any of the following descriptors of a patient or former patient: gender; date of birth; address or addresses or geographic location; point in time the person was an inpatient or day patient of the BAC; treating clinician; patient-specific transition arrangements, including the location or name of the receiving service; the patient's clinical diagnosis; and anything else relating to their*  
35 *clinical information or their family.*

That is not intended to be an exhaustive list, and, indeed, anything outside that list would still be picked up by the existing words of (i).

- 40 I come to the second issue of the Practice Guideline 2 of 2015. It has been intended for some time that the Counsel Assisting would provide notice of the areas of interest relating to a particular witness and the documents to be put by Counsel Assisting to that witness. The present Practice Guidelines provide for that to be done three days before the particular witness is called.

- 45 I'm satisfied that an amendment ought to be made having the effect that that notice of areas of interest and documents relating to witness A should be available not just to witness A, but to all parties.

5 There is then the question of when that notice and list of documents should be made available. In respect of all witnesses, should it be in advance of the commencement of the hearings on 15 February or should it be in advance of a particular witness' evidence? The provision of that notice of areas of interest and list of documents is relevant to other parties' consideration of whether they wish to cross-examine the particular witness at all, and if so, the topics on which they may wish to cross-examine.

10 There is then the question of when notice of cross-examination and of the list of documents to be put in cross-examination ought to be given. The Practice Guideline presently provides for this to be done three days before the witness to be cross-examined is called. There is a question of how the time for notice of cross-examination ought to relate to the provision of the notice of areas of interest and documents to be put by Counsel Assisting.

15 These questions have to be considered bearing in mind that the Commission is still receiving witness statements and other evidence. The hearings or the commencement of the hearings, is a little more than two weeks away. Approximately 50 witnesses are likely to be called over a four-week period. While a "batting list" has been provided by Counsel Assisting, it is subject to change, change in terms of when particular witnesses will be called and the possibility of some witnesses being added to the list and others being removed from the list.

20 Mr O'Sullivan of Queen's Counsel, who appears for Mr Springborg, asked that the notice of areas of interest and documents to be put to witness A be provided one week before the commencement of the hearings, or, alternatively, one week before the commencement of the hearings at least in relation to the first fortnight's witnesses. He also sought an outline of Counsel Assisting's opening one week before the hearings commence.

30 I can see practical difficulties in meeting Mr O'Sullivan's request. I've already outlined some of these. Further, I can see no reason to differentiate between the witnesses who are likely to be called during the first fortnight and the other witnesses.

35 Counsel Assisting pointed out that the statements of areas of interest are not pleadings, that this is not adversarial litigation, but an investigative process that is being undertaken. He offered by way of compromise to provide by 4 pm on 10 February the key issues the Commission intends to focus on during the hearings. I took that, really, to be in response to the request for one week's notice of the basic content of counsel's opening.

45 While I can appreciate that for a witness who is likely to be called in, for example, the third week it is difficult to decide which witnesses he wishes to cross-examine or on what topics when he has not received a notice of the Commission's particular areas of interest in relation to his own evidence, I think the current state of the Commission's workload and the program it is undertaking is such that it would be impractical to make an order giving Mr O'Sullivan all that he seeks.



What I intend to do is as follows: I intend to foreshadow amendments to Practice Guideline 2 of 2015 to achieve the following: that by 4 pm on 10 February, Counsel Assisting will provide all parties with a list of the key issues intended to be covered in the oral evidence; that at least four business days before a witness is scheduled to  
5 give evidence, Counsel Assisting will provide a notice of the areas of interest relating to that witness and documents Counsel Assisting intend putting to that witness. Such notice will be provided to all parties. Next, that any party wishing to cross-examine a particular witness must give notice of his intention and a list of the documents to be put in cross-examination at least two business days before the witness is called. And  
10 finally, that these directions are subject to any further orders I may make.

Now, have I overlooked anything? Mr Freeburn.

MR FREEBURN: Commissioner, can I just mention at the outset, in relation to  
15 what I'll call the education and the - - -

COMMISSIONER WILSON: Child protection.

MR FREEBURN: - - - child protection, as I recall, the position was that, largely, the  
20 parties had agreed to a form of order.

COMMISSIONER WILSON: Right.

MR FREEBURN: And were you, Commissioner, intending to adopt that agreed  
25 form of order?

COMMISSIONER WILSON: I was. I thought I jotted it down. Did I quote it inaccurately? Tell me if I did.

30 MR FREEBURN: I think you did.

COMMISSIONER WILSON: Alright. In what respect?

MR FREEBURN: I don't think it's – I can get out the precise version,  
35 Commissioner.

COMMISSIONER WILSON: Let's get it fixed up now if we can.

MR FREEBURN: Excuse me a moment. I think the object was to insert paragraphs  
40 after the identifying words. That is, after (b)(i) of the existing order. And use the same introductory words. That is:

*Identifies or is likely to lead to the identification of a student or former student  
45 of the –*

and there's a particular word:

*...the Barrett Adolescent Special Purpose School.*

And with the next one, it was again using the same introductory words:

5           *Identifies or is likely to lead to the identification of a child who has been the subject of a notification under the Child Protection Act 1999.*

COMMISSIONER WILSON: That's quite right, Mr Freeburn. I know what I've done. I've taken the wording, I think, possibly from the discussion paper. But I've  
10 found my note and I'm following what you're saying precisely.

MR FREEBURN: Alright. Thank you.

COMMISSIONER WILSON: So in lieu of what I said at the commencement of  
15 these reasons, I will order that there be inserted into paragraph 1(b) after (i), new paragraphs (ii) and (iii) with any necessary renumbering. And those new paragraphs will be in these terms:

20           *(ii) identifies or is likely to lead to the identification of a student or former student of the Barrett Adolescent Specific Purpose School;*

*(iii) identifies or is likely to lead to the identification of a child who is or has been the subject of a notification under the Child Protection Act 1999.*

25 MR FREEBURN: Thank you.

COMMISSIONER WILSON: Given what I said subsequently, there might need to be different renumbering from what I said but I think that can be sorted out.

30 MR FREEBURN: Yes.

MS WILSON: Just one word to be added, Commissioner.

COMMISSIONER WILSON: Certainly.

35 MS WILSON: Where – in terms of 1(b)(ii).

COMMISSIONER WILSON: Yes.

40 MS WILSON:

*Identification of a student or former student of the Barrett Adolescent Special Purpose School.*

45 COMMISSIONER WILSON: It's special, is it?

MS WILSON: Yes. It's special. Thank you, Commissioner.

COMMISSIONER WILSON: I'll have that changed. Anything else that's wrong? No. Alright. Well, thank you all very much for your submissions and for your patience this afternoon.

5

**MATTER ADJOURNED at 3.11 pm ACCORDINGLY**