BARRETT ADOLESCENT CENTRE
COMMISSION OF INQUIRY

EXTENDED FORENSIC TREATMENT AND REHABILITATION UNIT (EFTRU)

1. The Statutory Declaration of Dr Darren Neillie[1] is relevant. Dr Neillie is a Consultant Forensic Psychiatrist and the Clinical Director, High Secure Inpatient Services at The Park, WMHHS between November, 2007 and July, 2014. As Clinical Director of HSIS, Dr Neillie was heavily involved in the planning and development of EFTRU and had clinical oversight of that service when newly opened in 2013.

2. At paragraphs 7.5 to 7.7 of his Statement, Dr Neillie explains that the patient intake assessment procedures for EFTRU were robust, as was the process of supervision of EFTRU patients, there may have been a perception that there were risk implications for BAC patients by reason of its co-location with EFTRU because EFTRU was a new service to Queensland whose patient intake risk assessment procedures were untested.

3. At paragraph 7.2 of his Statement, he relates that in late 2012, [redacted] This incident caused great concern, reflected in significant media attention and political and Departmental security and demonstrated that security breaches can occur notwithstanding risk assessment and management processes being in place.

4. Dr Neillie is thus able to accept that even robust risk assessment frameworks do not entirely remove risk, as shown by the 2012 [redacted] – see at paragraph 7.6(c) of his Statement.

[1] WMS.9000.0001.00001.

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DR CORBETT'S LETTER (9 AUGUST, 2013) AND FAST FACTS

1. It is understood that these documents, emanating from the West Moreton Executive, are criticised by Counsel Assisting on the basis that they impart "mixed messages" to their recipients (families) regarding transition, especially the composition and timing of new services.

2. Dr Corbett's letter is to be found as part of "MC-32" of her Statement (at page 231 – WMS.1007.0025.0008).

3. Fast Facts 1 through 11 are bundled at "SK-26" to Ms Kelly's Statement (at pages 891 through 905 – WMS.1002.0005.00028 to WMS.1002.0006.00005).

4. Dr Corbett's letter evidences a timely response to email 6 August, 2013 to the West Moreton Board urging reconsideration of the BAC closure which the Minister for Health announced on the date of email, namely, 6 August, 2013. email, also part of "MC-32" (pages 226 – 230 – WMS.0017.0001.02532-6).

5. It is to be noted that the initial chain of communication involving and Dr Corbett follows immediately upon the relevant Ministerial announcement of the closure on 6 August. It is also to be noted that the language of Dr Corbett's letter borrows heavily from the Minister's own language (conveniently reproduced, for present purposes at paragraph 58 of the State's Supplementary Submissions tendered 15 April, 2016). Given that the Minister for Health sits at the apex of the Queensland public health system, the question must be asked: How can Dr Corbett be criticised for adopting language publicly broadcast by the Minister of State only three (3) days before?

6. It is also to be observed that full consideration of the documentary exchange bundled at "MC-32" concludes with an email from (WMS.0022.0002.00005) in which confirms having met with Ms Dwyer and Drs Steer and Stathis on 25 November, 2013 and having received a full explanation of future services, and the timing thereof. As appears from the email chain, that meeting was facilitated by West Moreton and, as expressed in email, it totally satisfied enquiry and is highly complimentary of West Moreton's responsiveness:

> "As always, Lesley has been accessible, allocating time within her busy schedule to discuss my concerns and reassured me that there will be a positive outcome for young people. I am grateful for her availability during this process.
>
> I thank you for any time you may have taken to consider the issues I raised in my recent email.
>
> Regards,

7. Regarding the Fast Facts, repeated criticism has stemmed (apart from the issue that one (1) parent did not receive a number of the documents owing to non-currency of their email address – a petty criticism given that this can happen with any database and was remedied by West Moreton as soon as it was discovered) that there was a gap in documentation from 21 May, 2013 until 23 August, 2013. In the overall scheme of things, this is hardly grevious. In any event, the gap is plainly explicable on the basis that, during the relevant period, consultation was being had with the Minister's office regarding the closure decision. Given the Minister's necessary involvement in that process, and his acknowledged interest in the subject and more particularly, his power of veto in the event that he disagreed with any aspect of the closure, it was clearly inappropriate for West Moreton, whether by Fast Facts communication or other means, to pre-empt what the Minister might decide.

8. The balance of Fast Facts is otherwise timely and informative, and their content is supportable having regard to West Moreton's involvement as set out, for example, in the State's Supplementary Submissions tendered 15 April, 2016.

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SUBMISSIONS

1. On Monday, 11 April, 2016, the Honourable Margaret Wilson QC, Commissioner, remarked:

> "This is not adversarial litigation, where someone makes a claim, usually others respond to it, then the parties search out the evidence and present it to a judge, who must determine whether the claimant has proved his or her case. Here, it is for the Commission to search out and assemble the evidence. It is not bound by the rules of evidence that apply in adversarial litigation, but it is obliged to afford procedural fairness to those whose interests may be affected by its findings. ...[1]

And also that:

> "In the present case, there are few primary facts in issue. The real disputes are as to the conclusions I should draw from those primary facts. I cannot engage in speculation. My conclusions have to follow logically from the facts I find. They will necessarily involve evaluation, that is, making judgment calls. And so it is to be expected that there will be vigorous debate about the conclusions I should draw. That is perfectly normal and proper."[2]

2. The legal principles which underpin these remarks are not in dispute and are long-standing and sourced in high authority, as follows:

(a) A Commission ought not make adverse findings on the basis of "indirect proofs, indefinite testimony or indirect inferences."[3]

(b) A Commission ought to take particular care where it is urged to make findings on the basis of inferences and circumstantial matters.

(c) Where circumstantial evidence alone is relied upon to make a finding, a Commission ought consider the High Court's words in *Bradshaw v McEwans Pty Ltd*[4]:

> "In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of ability so that the choice between them is mere matter of conjecture ..."

In *Jones v Dunkel*[5], Dixon J said after quoting the above passage:

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1 T26-2. 30-35.

2 T26-3. 25-35.

3 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 (Dixon J).

4 (1951) 217 ALR 1 at 5.

> "But the law which this passage attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn on the truth of the fact which the tribunal of fact may reasonably be satisfied."

(d) It follows that where indirect evidence alone is equally consistent with inferences of equal probability, no adverse finding ought to be made.

(e) It is established that a Commission should act consistently with the above approach, especially when urged to make findings that a person has been dishonest, misleading, or false. Where findings of this kind are in contemplation by a Commission of Inquiry, the subjects reputational interest attracts the application of the rules of procedural fairness and natural justice, including that any determination be based on evidence of probative value.[6]

3. In our submission this Commission of Inquiry ought not make findings which may adversely affect reputation unless it is "reasonably satisfied" of the truth of those findings.[7] "Reasonably satisfied" necessarily means satisfaction based upon reason, not speculation, indirect proofs, indefinite testimony or indirect inferences.

4. These principles are reflected in the practice of other respected Commissions of Inquiry. For example, in the Queensland Floods Commission of Inquiry, Justice Holmes (as the Honourable the Chief Justice then was) said:

> "Generally, unless otherwise stated, the Commission has made findings of fact on the balance of probability. It has made its ultimate adverse findings only where satisfied that the evidence, taken as a whole, does not reasonably allow of any other conclusion.[8]

[our emphasis]

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5 (1959) 101 CLR 298 at 305.

6 *Mahon v Air New Zealand Ltd & Ors* (1983) 50 ALR 193 at 206-7, and *The Queen v Carter and the Attorney-General*, unreported judgment Tasmania (Supreme Court of Tasmania Full Court), BC9100040, at 7.

7 See *Briginshaw* (supra) at 361.

8 Queensland Floods Commission of Inquiry Final Report Volume 2 at page 440. See also the comments of Judge Stretton of the Victorian County Court appointed to inquire into and report upon the effects of the organisation and practice of the Victorian Bread Industry (Bread Industry Commission (1949)) who reported that:
"A Royal Commissioner may inform himself by whatever means he chooses. He does not act as a judicial officer, deciding the matters in issue between contending parties and arriving at the decision to which he is led by a preponderance of probability. His function is that of an enquirer seeking the truth. Insofar as the rights of persons may ultimately be affected by legislative or other action taken upon his findings, he will impose himself the duty to be satisfied only upon convincing proof (Report, 5, reproduced in "Royal Commissions and Boards of Inquiry", Hallett, The Law Book Company Limited, 1982 at page 164, emphasis supplied).

5. In his authoritative work, "Royal Commissions and Boards of Inquiry – Some Legal and Procedural Aspects", Hallett[9], at page 164, submits that whenever the conduct of an individual is in question, and reference will be made to that conduct in the Report, the rules of evidence as they apply in courts of law should be applied:

> "... Those rules do not always result in accurate findings, but they are the product of a tradition which has taken hundreds of years to develop in the search for a just system. Why discard those principles when a person's reputation is at stake? The principles which have resulted from the lengthy research and consequent development of the legal system should not be discarded when the reputation of an individual is at stake."

6. In all of this, the role of Counsel Assisting is critical in ensuring procedural fairness and ultimately, the Commission's ability to make findings which are soundly based. This is one consequence of the fact that witnesses at an inquisitorial inquiry are usually called and examined by Counsel Assisting and that practice has been followed in the current hearings.

7. This practice, and the sound legal principles which underlie it, were discussed by the Honourable Margaret White AO in the Queensland Racing Commission of Inquiry, Chapter 1, at 1.2.9:

> "Mr Bentley (plus other individuals nominated by the Commissioner whose names are not reproduced) ... have complained that the process has been unfair. This seems to derive from a misconception of the nature of a Commission of Inquiry. It is not litigation. They have been provided with all the documents ... which have been provided to the Commission and all statements received by the Commission ...; they have had legal representation from the inception of the Commission; they have had access to the transcripts of all evidence ... as well as each of the documents shown to each witness ... (They) were examined by Counsel Assisting at the public hearings and each had put to him matters that might lead to adverse findings ...
>
> 1.2.10 The process seemed to the Commission to be appropriately fair, and consistent with legal authority which has considered such matters."

8. The authorities require that a party or witness be put on notice that a statement made by the witness may be used against the party or witness or that an adverse inference may be drawn against the witness or an adverse comment made about the witness in order that the witness may respond and give an explanation.[10] This is demonstrable from the judgment in *Browne* itself, discussed in *White Industries* (at 217):

> "Lord Herschell LC said (at 70):

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9 The Law Book Company Limited, 1982.

10 *Browne v Dunn* [1894] 6 R 67 at 70; *Bulstrode v Trimble* [1970] VR 840 at 849; *Karidis v General-Motors Holden Pty Ltd* [1971] SASR 422 at 425-6; *Allied Pastoral Holdings Pty Ltd v FCT* (1983) 44 ALR 607 at 623, all discussed in *White Industries (Qld) Pty Ltd v Flower & Hart (a Firm)* (1998) 156 ALR 169 at 216-7.

> 'Now, my Lords, I cannot help saying that it seems to be to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, while he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair dealing with witnesses.'

His Lordship then referred to complaints about excessive cross-examination and continued (at 71):

> 'But it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth ...'

Lord Halsbury said (at 76-7):

> 'My Lords ... I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.'"

9. Counsel Assisting did not substantively respond to criticisms advanced of them in the written Submissions of Mr Springborg, State of Queensland, and by West Moreton.

10. The response of Counsel Assisting supports a conclusion that their conduct shows a lack of independence and impartiality with the consequence that their Submissions should be afforded less weight than they otherwise might be, and that particular care ought be taken when reviewing their presentation of evidence.

Kathryn McMillan QC
and
Christopher Fitzpatrick
14 April, 2016

BARRETT ADOLESCENT CENTRE
COMMISSION OF INQUIRY

SUPPLEMENTARY SUBMISSIONS ON BEHALF OF STATE OF QUEENSLAND

1. These Submissions accurately summarise the relevant events.

2. From West Moreton's perspective, they disclose:

   2.1 a "parallel" process whereby the BAC closure was independent of progression of the State-wide service model, and proceeded utilising individual "wrap-around" care packages for current BAC consumers (see paragraphs 1.3.1 to 1.3.5 of the Supplementary Submissions);

   2.2 advice given to West Moreton, current from at least May, 2013 that Children's Health and the Mental Health Branch of Queensland Health would lead the development of State-wide consultation and service planning (see the Supplementary Submission at paragraphs 16(c) – Dr Corbett's understanding; 17(b) – Mr Eltham's understanding; 22 – Ms Kelly's understanding, based on her receipt of assurances from Dr Kingswell that a youth residential extended treatment facility would be established in SEQ by around January, 2014);

   2.3 contemporaneous documentary support for the prospective January, 2014 time-line (see, for example, paragraph 6 of the 15 July, 2013 Briefing Note discussed at paragraphs 34 to 39 of the Supplementary Submissions, especially the discussion at paragraph 36);

   2.4 the precise development of this issue is hampered significantly through the failure to question the relevant witnesses concerning their individual involvement (as pointed out in paragraphs 19 (Ms Dwyer), 29 (Ms Dwyer, Dr Steer, Dr Geppert and Ms Kelly), 39 (Dr Geppert), 47 (Dr Springborg, Dr Corbett and Ms Dwyer), 59 (Mr Springborg), 62 (Ms Kelly), 67 (Dr Corbett).

3. From the above, it can be appreciated the difficulties in reaching reliable conclusions regarding the issues of particular interest identified by the Commissioner and reproduced at paragraphs 3(a) to (c) of the Supplementary Submissions.

4. However, based on the evidence which is available, it clearly appears that West Moreton embarked on the transition process throughout the second half of 2013 on the basis that it should devise individualised "wrap-around" packages for existing BAC clients, and also in reliance on authoritative, external advice from Queensland Health itself of the availability of new services in January, 2014.