Senate Legal and Constitutional Affairs Reference Committee

Dr Scott Prasser

Question Date: 1 February 2024

Senator Paul Scarr asked the following question:

1. What do you suggest should be done in regard to the current COVID-19 Response Inquiry being conducted by the Department of the Prime Minister and Cabinet? Should the evidence already collected by that inquiry be incorporated into a royal commission or do we start again? Alternatively, the Royal Commission could be asked to reflect on the findings of that inquiry and other inquiries which have been undertaken at a Federal and State level. Do you have a view?

The response to the question is as follows:

My view is that:

1. The current COVID inquiry should be closed down and its evidence so far collected passed on to a new royal commission;
2. There are precedents for a second inquiry taking over and absorbing the findings and evidence of a first. this occurred in Qld over the overseas doctors' scandal in 2005. The first inquiry under Morris KC, the Bundaberg Hospital Commission of Inquiry was found by the Supreme Court to have been 'apprehended biased' and was closed down (it did make a final report, but did give a interim report) – after some search for alternatives it was replaced by the a new inquiry – the Queensland Public Hospitals Commission of Inquiry chaired by retired judge Geoff Davies – he reviewed the former inquiry's terms of reference, made some changes for his new terms of reference and worked out a way to absorb all the evidence previously given without having to recall witnesses;
   NB both these inquiries were established under the Qld Commission of Inquiry Act 1950 and thus were royal commissions in all but name.
3. Another precedent was that there was the 1964 Royal Commission on the loss of HMAS Voyager which did report but was controversial and led to a second royal commission in 1967 (the first RC had a single member, the second had three) – read Tom Frame Where Fate Falls;
4. One point to note is that the current non-statutory inquiry has not been taking evidence under oath as occurs with a royal commission – so that affects perceptions on the standard of that evidence;

5. Relating as to whether a royal commission should reflect on the findings of the present inquiry – that would mean a delay in the RC starting its review and also the findings of the current inquiry would be used to contradict or set unnecessary comparisons and debates with what a royal commission might find;
6. To be clear – I am not saying that to replace the current inquiry some major flaw as occurred with the Morris Commission has to be found – the govt merely has to say – it has heard the report from this Senate Cmtee and believes a more wide ranging review is needed – thank the current members – ask PM&C to arrange a handover of the first inquiry's material and start the RC asap

Please find attached:

Prasser article on these two QLD health commissions
Press release by Premier Beattie on appointing second commission

Premier & Treasurer
The Honourable Peter Beattie

Tuesday, September 06, 2005

Retired Judge Davies The New Royal Commissioner

Retired judge Geoff Davies will head a new independent inquiry into allegations relating to Jayant Patel, following the Supreme Court's shut-down of the Bundaberg Hospital Commission of Inquiry.

Premier Peter Beattie this afternoon presented Commissioner Davies, a former Appeal Court judge, with a letter of appointment and released terms of reference for his inquiry.

"Commissioner Davies is empowered to look at allegations about Bundaberg Hospital, plus allegations raised during the Morris Commission about any other Queensland public hospital," Mr Beattie said.

"The terms of reference ensure his Royal Commission powers in relation to possible misconduct are as strong as those given to Bundaberg Hospital commissioner Tony Morris.

"In fact Commissioner Davies' terms of reference include an explicit point that is additional to Mr Morris's terms of reference.

"That is: to examine whether any Queensland Health official made reprisals or threatened reprisals against anyone who blew the whistle about Patel.

"The government has added this point because we are determined to protect anyone who blew the whistle in the Patel case, and to reassure Queensland Health staff that legitimate whistle blowers will always be looked after.

"Commissioner Davies is one of Queensland's most distinguished and respected jurists, with more than four decades of legal experience.

"He was a Judge of the Court of Appeal for more than 13 years before he retired this year.

"He was also Queensland Solicitor-General (1989-1991) and a president of the Queensland Bar Association and the Australian Bar Association.

"He was admitted to the bar in 1962 and became a Queen's Counsel in 1976.

"As a QC, he specialised in appeals and appeared in many High Court cases of constitutional and commercial importance.

"He has challenged conventional thinking and made a significant contribution to law reform.

"I have every confidence that he will be independent, open and careful in his inquiry.

"He shares my determination to gain the information we need to help prevent any recurrence of the Bundaberg problems.

"His appointment ensures the work of the Morris Inquiry yields results, in line with the six-point plan announced last week.

"In my letter today I have stated that while the government favours open hearings and transparent processes, decisions about how the inquiry runs are entirely for the commissioner.

"I have assured Commissioner Davies he will have the government's full cooperation in ensuring serving ministers, former ministers and public officials give evidence if and when required."

Attorney-General Linda Lavarch said Commissioner Davies will operate independently of the government and the Crime and Misconduct Commission.

"He will make recommendations to the government and the CMC before 30 November," Mrs Lavarch said. "Mr Davies will have full access to all material and evidence from the Morris Inquiry," said the Attorney-General.

Like Tony Morris QC, Commissioner Davies will examine claims regarding the Medical Board of Queensland as well as Queensland Health.

Mr Beattie said: "His reference on the Medical Board takes in the assessment, registration and monitoring of overseas-trained doctors, particularly Patel.

"Like Mr Morris he will have the power to recommend disciplinary action if someone's conduct is questionable but is not a clear-cut case of official misconduct," the Premier said. Governor in Council approved Commissioner Davies' appointment in a special meeting this afternoon.

Mr Beattie's letter of appointment to Commissioner Davies plus full terms of reference are attached.

6 September 2005

Media contact: Premier's office 3224 4500 AG's office (Paul Childs) 3239 6400

6 September 2005

The Honourable Geoffrey Davies AO NEW FARM QLD 4005

Dear Mr Davies

I refer to previous discussions regarding the conduct of a Commission of Inquiry to continue the work of the Bundaberg Hospital Commission of Inquiry previously conducted by Mr A.J.H. Morris QC.

I am pleased to advise that Her Excellency the Governor acting by and with the advice of the Executive Council today approved your appointment under the Commissions of Inquiry Act 1950 as Commissioner to conduct this Inquiry. On behalf of the Government, I thank you for accepting the appointment.

I know that you share my determination to obtain the information required by the Government to help Queensland develop and implement remedies to prevent any re-occurrence of the Bundaberg issues.

A copy of the Order approved by the Governor in Council including the terms of reference of the inquiry is enclosed. You will note that, while they are based on paragraphs 1-5 of the terms of reference of the Morris inquiry, they also require inquiry into whether any reprisals have been taken against persons on account of their making disclosures about matters relevant to the other terms of reference.

Otherwise, the only substantive difference between your terms of reference and those of the Morris inquiry relate to systemic matters. Those are being examined by Peter Forster's Queensland Health Systems Review. Because of the urgency of implementing systemic reforms, I have asked Mr Forster to report on those matters by his original reporting date (30 September 2005). Accordingly, your terms of reference focus on cases of possible wrongdoing.

You will also note that you are to report both to me as Premier and Treasurer and to the Crime and Misconduct Commission (CMC) by 30 November 2005. Your report and recommendations will be publicly released in full.

The Government's intention is to ensure that your inquiry should be conducted independently of both the Government and the CMC. The intention is that, without limiting any recommendations you might make, the CMC will make its own recommendations in light of your report about any criminal or disciplinary proceedings in accordance with its usual functions.

Now that your appointment is formalised, you will have immediate access to the evidence and other materials of the Morris inquiry. You are free to engage as many of the counsel assisting and staff of the Morris inquiry, or any other counsel or staff you require, as you think fit. Please feel free to raise these matters and any other resources you require with the Attorney-General and Minister for Justice.

You are empowered to conduct any public and private hearings that you think appropriate. Decisions about your processes including whether you hold public hearings are matters entirely at your discretion. However, where feasible, I favour the most open and transparent processes because it is vitally important that the public can see that the proceedings are conducted in an appropriate way. You will have the Government's full cooperation in ensuring that serving or former Ministers and public officials are available to give evidence according to your requirements.

You will be remunerated at the rate of $5000 per day or $500 per hour per part of a day during which you are engaged upon the Inquiry, plus actual expenses approved by the Attorney-General and Minister for Justice, incurred in the performance of your duties. You will also be entitled to business class travel in the course of your duties.

Again, I appreciate you agreeing to accept appointment to this commission. The substantial public interest in a fiercely independent examination of these matters goes without saying. I wish you all the best for this challenging role and look forward to receipt of your report by 30 November 2005.

Yours sincerely

PETER BEATTIE MP PREMIER AND TREASURER

Commissions of Inquiry Act 1950

COMMISSIONS OF INQUIRY ORDER (NO. 2) 2005

TABLE OF PROVISIONS

Section Page

Short Title

1. This Order in Council may be cited as Commissions of Inquiry Order (No. 2) 2005.

Appointment of Commission

2. UNDER the provisions of the Commissions of Inquiry Act 1950, Her Excellency the Governor, acting by and with the advice of the Executive Council, hereby appoints Honourable Geoffrey Davies AO to make full and careful inquiry in an open and independent manner with respect to the following matters:-

(a) The role and conduct of the Queensland Medical Board in relation to the assessment, registration and monitoring of overseas-trained medical practitioners, with particular reference to Dr Jayant Patel and persons claiming to be overseas-trained medical practitioners.

(b) (i) Any substantive allegations, complaints or concerns relating to the clinical practice and procedures conducted by Dr Patel at the Bundaberg Base Hospital;

(ii) the employment of Dr Patel by Queensland Health; (iii) the appointment of Dr Patel to the Bundaberg Base Hospital; (iii) the adequacy of the response by Queensland Health to any complaints received by it concerning Dr Patel; and (iv) whether or not there were any reprisals or threatened reprisals made by any official of Queensland Health against any person who made the complaints referred to in (iii) above. (c) Any substantive allegations, complaints or concerns relating to the clinical practice and procedures conducted by other medical practitioners, or persons claiming to be medical practitioners, at the Bundaberg Base Hospital or other Queensland Public Hospitals raised at the Commission of Inquiry established by Commissions of Inquiry Order (No. 1) of 2005.

(d) The appropriateness, adequacy and timeliness of action taken to deal with any of the allegations, complaints or concerns referred to in (a), (b) and (c) above, both:

(i) within the Bundaberg Base Hospital; and

(ii) outside the Bundaberg Base Hospital.

(e) In relation to (a) to (d) above, whether there is sufficient evidence to justify:

(i) referral of any matter to the Commissioner of the Police Service for investigation or prosecution; or

(ii) action by the Crime and Misconduct Commission in respect of official misconduct or disciplinary matters.

Commission to report

(3) AND directs that the Commissioner make full and faithful report and recommendations concerning the aforesaid subject matter of inquiry and transmit the same to the Honourable

the Premier and Treasurer and to the Crime and Misconduct Commission before 30 November 2005. Report to be made public

(4) AND further directs that the Report transmitted to the Honourable the Premier and Treasurer be made public upon it transmission to the Honourable the Premier and Treasurer.

Application of Act

(5) The provisions of the "Commissions of Inquiry Act 1950" shall be applicable for the purposes of this inquiry except for section 19C - Authority to use listening devices.

Conduct of Inquiry

(6) The Commissioner may hold public and private hearings in such manner and in such locations as may be necessary and convenient.

ENDNOTES

1. Made by the Governor in Council on 6 September 2005. 2. Published in an Extraordinary Gazette 6 September 2005. 3. Not required to be laid before the Legislative Assembly. 4. The administering agency is the Department of the Premier and Cabinet.

AJPA Australian Journal of Public Administration
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CONTROVERSY/COMMENTARY

The Queensland Health Royal Commissions

Scott Prasser
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Utilisation of public inquiries and royal commissions in Westminster systems of government is a source of continuing interest. That royal commissions continue to be appointed when there is an increasing array of other institutions governments can now employ and given that royal commission reports often have very adverse impacts on the appointing governments, remains a key issue. So the appointment by the Queensland government of not one, but two royal commissions in 2005 into the same topic – the recruitment and performance of doctors recruited abroad working in Queensland public hospitals – provides a special opportunity to analyse the circumstances in which a royal commission mechanism is activated. That one of these royal commissions had to be disbanded because of legal action taken by several of those being investigated is another reason to assess these royal commissions. This is almost without precedent in Australia and has implications for the future conduct of such bodies. Lastly, how the Queensland government was able to minimise the blame from the subsequent royal commission's highly critical report, is also instructive and worthy of assessment.

Key words: *royal commissions*, *Queensland Health, royal commission processes*

While governments in the Westminster mould are rarely keen to establish royal commissions and kindred public inquiries, they nevertheless do so for a variety of purposes and in a variety of circumstances. These purposes embrace investigation of policy particularly where there is a need for extensive fact-finding, and where it is desirable to canvass a broad range of opinion. The other major use of the royal commission instrument is for inquisitorial purposes, where there has been a major failure in policy or administration. The field has recently been surveyed (Prasser 2006a; Prasser 2006b).

It is the aim of this article to explore these aspects of royal commission activity further by providing an account of how in 2005, the Beattie Labor government in Queensland, used the royal commission device to address the scandals at the Bundaberg Hospital and the employment of doctors recruited abroad.

These royal commissions deserve our attention for several reasons. First, in the event, the Labor government appointed not one but two royal commissions into the Bundaberg Hospital crisis issue in Queensland. The first, the *Royal Commission into Bundaberg Hospital* (Morris commission), was appointed in April 2005. It was terminated five months later following a Queensland Supreme Court judgment about its bias against certain witnesses.

The second, the *Queensland Public Hospitals Commission of Inquiry* (Davies commission), was appointed a week after the Morris commission had been disbanded. Although the Davies commission continued the work of the Morris commission, it was, as Premier Beattie said, 'a new independent inquiry' appointed under new instructions by the Governor under the *Commissions of Inquiry Act 1950* (Beattie 2005a). It reported in November 2005. The appointment of two royal commissions by the same government so close to each other, to inquire into the same issue with almost identical terms of reference, is unusual and without precedent in Australia.[1]

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Secondly, while royal commissions have often been challenged in the courts,[2] few in recent times have been terminated so dramatically and been criticised so strongly by the courts as the Morris commission was concerning treatment of witnesses and overall processes.[3]

That the Labor government resorted to the royal commission instrument when, like other governments throughout Australia during the last decade, it long sought to avoid its use (Prasser 2006a:28–29), needs explanation. This raises the perennial question of why governments appoint royal commissions (Cartwright 1975; Donoghue 2001; Hanser 1965).

These two royal commissions are additionally of interest for the way they investigated not only the initial issue concerning the qualifications and competencies of a doctor recruited overseas working at Bundaberg Hospital that sparked their appointment, but on the wider problems of Queensland's health system that they highlighted. This was in contrast to some previous Queensland royal commissions such as the 1963 *Royal Commission into the National Hotel Allegations* that was seen to have had too narrow a focus to identify endemic police corruption (Fitzgerald 1990). In particular, these two royal commissions command our attention, not only for the problems they revealed about Queensland's health system, but for the serious defects they identified in public administration and accountability. They reminded the public that, nearly 20 years later, there is continuing criticism that the proposals of the Fitzgerald Commission of Inquiry into Police Misconduct (Fitzgerald 1989) in relation to public administration, parliamentary democracy and accountability have yet to be fully realised. Recent comments by Tony Fitzgerald himself (Fitzgerald 2009), practitioners such as the Clerk of Queensland's Parliament (Laurie 2009) and academics (Ransley 2008) have reinforced this assessment. The review of the *Freedom of Information Act 1992* initiated by the Queensland government in September 2007 and its more recent 2009 *Integrity and Accountability Green Paper* and response to this review of current arrangements following the jailing of former Beattie Health Minister Gordon Nuttall for corruption and complaints about the close relationships between former Labor minsters and staff lobbying government are indicators that the Queensland cabinet had itself recognised these deficiencies. Indeed, the inadequacies of Queensland's *Freedom of Information Act 1992* and the *Whistleblowers Protection Act 1994*, which stemmed from the Fitzgerald commission process, were particularly highlighted by the Davies commission (Davies 2005: Chapter 6).

Finally, there is the question of how the Labor government, unlike many other governments, so successfully managed the adverse findings from each commission that it was able to secure victory by a near landslide at the elections in September 2006, less than a year later. Labor secured 59 of the Legislative Assembly's 89 seats – a loss of only four seats. Certainly, there are other explanations for this success. These include a weak and divided Opposition and Queensland's continuing economic growth. Nevertheless, it was effective and proactive deployment of 'blame minimisation' (Weaver 1986) tactics by the government that reduced the impact of what should have been the major political issue during the 2006 election campaign.

Reasons for Appointing Royal Commissions

It is worthwhile recalling the complexity of motivations lying behind appointment of royal commissions and other public inquiries (Smith and Weller 1978:3–5; Prasser 2006a; Prasser 2006b). These may include the gathering of facts, educating the public about issues, mobilising support, promoting consultation, and allowing grievances to be expressed. Royal commissions, as Walls observed, provide independent analytical advice that can 'place before government . . . a cold blooded impartial survey followed by an equitable solution to the problem submitted to it, a solution without concern as to its implication or on whose toes it may figuratively step' (Walls 1969:365).

However, royal commissions like all public inquiries can serve a range of both legitimate and politically expedient goals. As Bulmer (1982:99) concluded, royal commissions

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can act as 'a symbolic response to political demands, damp down concerns, promote stability without involving any commitment of resources or tangible benefits to citizens, allowing them to deal with the "politics" of the situation rather than the situation itself'. This is because, according to Sheriff (1983:672), the public processes and prestige of royal commissions allow the task not only to be dealt with 'but be seen to be dealt with'. Hence, the predominance of royal commissions appointed, especially in recent times, to investigate issues of impropriety, maladministration and public scandal or crises rather than general policy issues (Prasser 2006a:28–30; Tiffen 1999).

One aspect of the potential political role of royal commissions is that elected officials are not only vote seekers or 'credit claimers', but also 'blame minimisers' (Weaver 1986:372), seeking to employ 'after-the-fact damage-control' tactics and 'reactive-blame-avoidance' strategies (McGraw 1991:1195). In this context, royal commissions, if handled effectively by the appointing government, can, because of their perceived prestige, independence and, in particular, the status of their members, assist in such 'blame avoidance' strategies (Sulitzenu-Kenan 2006:627). Blame minimisation possibilities should be kept in mind in assessing the Queensland government's appointment of the two health royal commissions.

Background Events

These royal commissions were appointed into issues that became public 'scandals' and appeared to involve significant maladministration in both health and elsewhere. What made Dr Jayant Patel's alleged surgical malpractices such a 'scandal' was the culmination of previous events and long held concerns about the employment of doctors recruited overseas, health spending, administrative practices and hospital waiting lists that had been ignored by successive Coalition and Labor governments. It was the 'alarmed discovery' of Patel's alleged practices in 2005 that finally pushed the issue of the competence of doctors recruited abroad, the overall state of Queensland's health system and eventually the very integrity of Queensland's public administration so firmly onto the policy agenda (Downs 1972).

The 'scandal' concerned Dr Patel, a surgeon recruited abroad in April 2003 to work temporarily at Bundaberg Hospital. Despite numerous complaints that began within a few months of Patel's appointment concerning his surgical practices from both patients and staff, it was not until December 2004 that action was taken to assess his performance. Conducted by Queensland Health's Chief Medical Officer, Dr G. Fitzgerald, the investigation was a narrow 'clinical' assessment that did not review Patel's performance in relation to individual patient treatments. Despite questions and comments from the National Party dominated Opposition, prompted by the 'whistleblowing' activities of Bundaberg Hospital nurse Toni Hoffman, the then Minister for Health, Gordon Nuttall, denied any awareness of the issue (Nuttall 2005a), but the next day, following Health Department briefings, he acknowledged Fitzgerald's review and stated he was awaiting his final report (Nuttall 2005b).

It needs to be appreciated that concerns about the competence of doctors recruited abroad was not new when the Patel issue developed. In 2003 a report by Dr Denis Lennox, medical adviser on rural health services to Queensland Health, was leaked to the media. Lennox was reported as suggesting that a growing number of doctors recruited abroad 'lacked medical competence and capability' (Thomas 2003a). This assessment was rejected by the then Health Minister, Wendy Edmonds, and the Medical Board of Queensland. Minister Edmonds stated: 'This report (Lennox Report) has no official status and was not accepted or endorsed by the Queensland Health Executive' (Thomas 2003a). There were, as the Davies commission and Crime and Misconduct Commission (CMC) investigations were to highlight, many times when Minister Nuttall was informed about problems of medical staff recruited abroad prior to the Patel affair erupting and the subsequent inquires that this caused (CMC 2005).

In the meantime, while Fitzgerald's inquiry proceeded, Patel continued to practise surgery. Senior Health Department officials

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reprimanded Bundaberg Hospital staff for leaking information about Patel and even publicly defended Patel's surgery skills. Despite offers to extend his contract Patel resigned and left Australia on 2 April 2005. Not only did Queensland Health pay for his airline ticket home, but Patel received a strong supportive reference from Dr Keating, Medical Service Director at Bundaberg Hospital.

On 7 April 2005, at a meeting with Bundaberg Hospital nursing staff Minister Nuttall stated that given Patel's resignation, Fitzgerald's report and other internal inquiries underway, no further action was needed. Reports that Minister Nuttall and senior Health Department managers threatened nursing staff who may have wanted to pursue the Patel issue, combined with leaks about patient deaths and rumours about the quality of the large number of doctors recruited abroad in the health system raised public disquiet about Patel and the public hospital system (Thomas 2007:210–215). Although senior Health Department staff at this time found through the web details of Patel's previous cases of negligence at several hospitals in the United States, it was only when this was reported a week later by journalist Hedley Thomas (*Courier-Mail* 13 April 2005; Thomas 2007:276–277) that this information received wider public attention. It made Queensland Health's failure to check Patel's qualifications and the competence of the Medical Board of Queensland seem even worse.

Given these revelations – 'alarmed discovery' of the crisis – meant that the government had to confront the question of how best to respond to these increasing criticisms.

Appointing the Morris Royal Commission

The government had several options. It certainly could no longer ignore the issue given the level of public attention that the Patel affair had attracted; it had become what has been described as a 'public scandal' (Tiffen 1999). Initially, it rejected calls for a royal commission as being unnecessary and too expensive. The government had, as Minister Nuttall explained (*Courier-Mail* 12 April 2005), already appointed several inquiries to assess the issue. These had included, said the minister, the review led by Fitzgerald; the consequential reassessment by the Medical Board of Queensland (MBQ) of processes for checking the credentials of overseas doctors; and a medical team headed by Dr Woodruff from outside the Health Department to assess individual cases handled by Patel. Such responses were seen as inadequate by the media, often positioning itself as the opposition, key interest groups, the National Party led Opposition and commentators (*Courier-Mail* 14 April 2005; Thomas 2007: 292–4). Fitzgerald's review was seen as too narrow. The MBQ's investigation was too little, too late, and inappropriate given its incompetence in failing to verify Patel's documented experience. The Woodruff review was seen as having too narrow a focus and, more importantly was not an open and public inquiry (editorial, 'Independent judicial inquiry must be held' *Courier-Mail* 15 April 2005; Thomas 2005a).

Demands, not least from the media, as well as others, for a royal commission consequently grew. A *Courier-Mail* editorial ('Independent judicial inquiry must be held' 15 April 2005) captured the mood of public opinion and highlighted its self-perceived role of seeking to be seen to be setting the policy agenda in Queensland:

> The scandal involving patients who have suffered . . . at the hands of Jayant Patel threatens to irrevocably dent public confidence in Queensland's health system . . . Several inquiries are under way . . . These are worthy exercises . . . But they are essentially internal investigations into a health system with a record of ignoring or downplaying warnings . . . a case of Caesar judging Caesar. Only an independent judicial inquiry with the powers of a royal commission can get to the bottom of a scandal that suggests there are fundamental and life threatening flaws in the system.

The government nevertheless continued to resist appointing a royal commission. Instead, as it had done two years previously in relation to foster child care abuse, it sought to refer the Patel matter to the CMC, Queensland's anti-corruption watchdog (CMC 2004). However, the CMC recused itself on the grounds that

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it had no direct jurisdiction to investigate the medical aspects of the Patel issue (*Courier-Mail* 19 April 2005).[4] Only after this avenue had been exhausted did the government finally relent and announce a royal commission to 'find the answers to the questions that need answering' and 'to re-establish public confidence in the system' (Beattie 2005a; see Thomas 2007:296).

The precipitate nature of this decision was indicated by the government's inability to announce the proposed commission's terms of reference or its membership (Beattie 2005b). Usually, when governments announce royal commissions, their memberships and terms of reference have been settled (Prasser 2006b:121–129). Six days passed before these matters were finalised (Beattie 2005c). The then Premier, Peter Beattie, stressed the impartial, external membership and public nature of the royal commission when he stated that 'it is essential that Queenslanders have complete confidence in this inquiry – that justice is seen to be done' (Beattie 2005c).

During the week that the royal commission was announced, the government also appointed management consultant and former Treasury official, Peter Forster, to chair the Queensland Health System Review (Forster review) to examine the management and budgetary processes of Queensland Health. The media and the Opposition regarded the Forster review as duplicating the work of the Morris commission (Cole and Viellaris 2005). The Foster review was, however, clearly important in the government's strategy for managing the health crisis in Queensland.

In summary, the Beattie government appointed the Morris commission only after it had exhausted all other avenues and in a climate of 'crisis' and 'scandal'. The appointment of the royal commission may be seen as the government caving in to media pressure. It also showed the limitations of existing government institutions in responding to such serious complaints and being seen as independent in investigating such matters properly. In such circumstances, the royal commission instrument was an 'institution of last resort' – the only acceptable body in terms of both perceived independence and with adequate powers to investigate such serious allegations effectively. The government did so partly because it understood that its own health agencies and minister were increasingly compromised by the issue. Although there was a danger that the royal commission would unveil a host of other problems, in the short term it provided respite from continuing public and media criticism. The royal commission showed the government was 'doing something'. It took attention away from the intrinsic health issues and focussed them for a time on the form, membership and processes of the commission. It gave the government time to consider how best to manage the crisis. The royal commission was a key element in the government's 'blame minimisation' and 'after-the-fact damage-control' tactics. Underpinning this strategy was to be the notable speed of the government in responding to issues emerging during the Morris commission's proceedings.

The Morris Royal Commission

Membership

Membership is important in ensuring that an inquiry is seen to be impartial and to act independently from government as well as reflecting an inquiry's competence to investigate the issue at hand. The aforementioned delay by the government in announcing the membership of the Morris commission reflected its efforts to ensure this particular royal commission met these key criteria.

This was achieved by having three members in contrast to the usual one for such inquiries (Prasser 2006a:34–35). Such multi-membership allowed the commission to include legal, political and health expertise.

Tony Morris's selection as the chair, was especially important. He was a Queen's Counsel and thus had the necessary legal expertise. His background in the law was further strengthened by a previous assignment as associate to Tony Fitzgerald when the latter was on the bench. In addition, Morris's perceived alignment with the non-Labor side of politics in Queensland ensured he was seen as independent of the Labor

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government. He was an honorary legal adviser to the Queensland Liberal Party and his report on the Heiner affair was critical of the Criminal Justice Commission's (CJC) investigations that had exonerated the Goss Labor government over the shredding of documents.

Further reinforcing the commission's independence was the appointment of Sir Llew Edwards as another member. Edwards was not only a medical practitioner, but had been health minister, treasurer and deputy premier in Queensland Coalition governments. Margaret Vider, the third member of Morris commission, a qualified nurse and director of a major hospital, rounded off the commission's professional appeal. These appointments allowed Premier Beattie (2005c) to stress the Morris commission's independence.

The one major concern about the commission was that Morris was not a member or former member of the judiciary unlike those who have chaired many other similar royal commissions in Australia (Prasser 2006a:33). Beattie (2005a) had initially hinted when first announcing the commission that 'we need someone with judicial experience' and when this did not occur the Opposition initially argued that the commission had less prestige than other similar royal commissions. The editorial in the *Courier-Mail* ('The case for ex-judge to head Patel inquiry' 23 April 2005) summed up the issue: 'a . . . Queen's Counsel would quite likely have good forensic skills . . . but would be grounded in assembling and presenting a brief rather than searching for a considered and balanced view'.

However, there were precedents for such appointments. Frank Costigan QC had chaired the Fraser government's 1980 *Royal Commission into the Activities of the Federated Ship Painters' and Dockers' Union* (Costigan royal commission). Other commentators were more concerned that Morris's known aggressive personal style may be inappropriate for a royal commission chair (see King 2005b; Thomas 2007:301).

The Morris commission's terms of reference (Appendix 1) were wide and went beyond the specific aspects of Patel's surgical practices or even just overseas doctor appointments. They included a broad brief to examine 'possible improvements to Queensland Health' and to provide advice on 'what can be done to make more doctors available'. These terms of reference were later expanded, at Morris's request, to include public hospitals at Hervey Bay, Charters Towers, Townsville and the Prince Charles Hospital in Brisbane where malpractices by doctors recruited abroad were also suspected. Overall, despite Opposition and some media criticism that the terms of reference were too focussed on Patel (editorial, 'Morris takes charge of health inquiry' *Courier-Mail* 27 April 2005), it is not a critique that stands up to scrutiny.

The Morris commission's initial five month deadline (September 2005) could have been seen as an attempt to limit its activities. However, the government stressed that the timeframe reflected the urgency to 'fix' the problem rather than control the inquiry. Subsequent extensions dispelled any suggestion that the government was seeking to control the commission. Nevertheless, these deadlines imposed pressures on the commission that may have affected Morris's behaviour and contributed to its demise.

Overall, the appointment of the Morris commission was welcomed by the media, commentators, the Australian Medical Association (AMA) and those possibly adversely affected by Patel's surgery (Odgers and Gregory 2005). One commentator believed the Morris commission clearly 'passed' the royal commission test in terms of membership, independence, terms of reference, powers, political support, and apparent resources, though the tight timeframe was an issue (King 2005b).

Processes

Morris followed the usual royal commission processes of public hearings with witnesses invited to give evidence and be cross-examined by commissioners and legal counsel representing different parties. There were, even so, some variations. Unlike other royal commissions, Morris rather than Counsel Assisting asked most of the questions of witnesses. Another innovation was that the commission's hearings were televised. This was welcomed

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by observers; an editorial in the *Courier-Mail* ('Keeping up right appearances' 10 June 2005) commented: 'how the commission is seen to do its business is as important as what it actually does'.

One unusual feature of the Morris commission was its release of an Interim Report on 10 June, only two weeks after public hearings had begun, and before Woodruff's clinical review on Patel's surgical malpractices had been completed. Most royal commissions only present a final report. A few long-running royal commissions produce interim reports such as the Costigan Royal Commission and *Royal Commission into Aboriginal Deaths in Custody*, only after they have collected considerable evidence or there is some urgency for certain actions to be taken.

The Interim Report made recommendations (Morris 2005a) that it was urgent to lay criminal charges for murder against Patel, to seek his extradition from the United States, to make administrative changes to the Medical Board of Queensland and to introduce certain legislative changes. Rather, some saw the Interim Report as more a reflection of Morris's 'grandstanding' and publicity-driven style and possible influence from a government desperate for some public action (Parnell 2005). The government's immediate acceptance of these recommendations (Beattie 2005d) and subsequent initiatives to 'prevent another Patel' (Beattie 2005e) included: granting immunity to inquiry witnesses; tightening regulations on overseas doctors' appointment; and changes to the MBQ; and attacks on the federal government for inadequate doctor training, were seen as being politically motivated and part of the government's 'diversionary activities' and 'damage control' tactics (Cole 2005). Significantly, the Interim Report was also severely criticised by Judge Moynihan in the legal action brought against the Morris commission by two Health Department officials (see below).

The government's very public pursuit of Patel that included sending a Queensland cabinet minister to Patel's home residence in the United States with a letter requesting his attendance at the royal commission, was seen as an over-reaction and a political stunt to deflect 'attention from systemic failings in Queensland's health system' (editorial, 'Dr Death manhunt is a political sideshow' *The Australian* 19 June 2005) and 'knee-jerk populism' (editorial, 'Missing the target in the Patel debate' *The Australian* 4 July 2005). That two years were to elapse before the Queensland Police actually issued a formal warrant for Patel's extradition from the United States – a matter commented upon by Justice Moynihan in the case brought against the Morris commission by two health officials in the Supreme Court[5] – underlined this view. Indeed, it was not until 2008 that legal proceedings to extradite Patel actually began in the United States.

Soon, other concerns about Morris's conduct of the inquiry emerged. These included his over deferential approach to some witnesses compared to his 'inquisitional style . . . adversarial approach and his direct questioning' of others (King 2005a). There was also, unusual for a royal commissioner, Morris's private meetings with the premier and even some witnesses. Morris's arguments with legal counsel representing one of the key public servant parties at the commission's hearings reinforced a perception of 'bias' against these individuals and raised concerns about the appropriateness of Morris's behaviour as a royal commissioner. Michael Lavarch (2005), Attorney-General in the Keating government, presciently warned that such actions could lead to legal challenges if procedural fairness was not followed.

Legal Challenges and Termination

These concerns came to a head in July 2005 when Dr Darren Keating, the Director of Bundaberg Hospital, and Peter Leck, the local District Health Manager, lodged an action in the Supreme Court against the Morris commission on the basis of an 'apprehended bias' in their treatment by Morris in his conduct of the inquiry (*Keating v Morris & Ors* [2005] Queensland Supreme Court 243; *Leck v Morris & Ors* [2005] Queensland Supreme Court 243; Hamer 2006; Thomas 2005b). The issue, as Justice Moynihan summed up in his judgment, was 'not whether the decision-maker is in fact

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biased, but whether a fair minded observer might reasonably apprehend that the decision-maker might not bring an impartial or unprejudiced mind to bear on the task' (*Keating v Morris & Ors* [2005]: para 37). Keating and Leck complained of Morris's 'sarcastic and cynical tone' towards them, his aggressive cross-examinations, and the inadequate time they had for preparation before giving evidence (*Keating vs Morris & Ors* [2005]). Others also suggested that Morris had effectively threatened to make adverse findings against Keating if he challenged the evidence of those who made accusations against him (Hart 2005). Similar complaints about Morris's conduct of the hearings were made by some other witnesses.[6]

Even with the legal action pending the Morris commission continued to garner evidence on an ever-widening range of issues: suppression of public hospital waiting lists; reports from the Woodruff inquiry that linked 13 deaths to Patel's clinical practices; appointment of non-qualified staff to other hospitals; lack of supervision of overseas doctors at Hervey Bay Hospital; shortage of doctors in Queensland; failure of the Director-General of Queensland Health to act on reports concerning Patel; lack of credentialing of overseas doctors; and public hospital budgeting systems that promoted throughput of patients at the expense of their safety (Morris 2005b). By the end of August, the Morris commission had sat for 50 days, examined 85 witnesses and been granted an extension of time (Beattie 2005f).

However, on 1 September 2005 Justice Moynihan of the Supreme Court ruled on a number of issues concerning the conduct of the Morris commission. Justice Moynihan considered the Interim Report in the context of its impact on Dr Keating and Mr Leck. The Interim Report not only proposed further investigations into Patel, as is usual for investigative commissions, but, as noted, that Patel be charged with a range of offences ranging from false representation to murder (Hamer 2006:134). Consequently, Justice Moynihan concluded that the Interim Report 'manifests a prejudgement . . . of the evidence' provided by certain witnesses (Toni Hoffman and Dr Miach) that was 'untested and inadmissible in a criminal trial' (*Keating vs Morris & Ors* [2005]: paras 125–126; see Hamer 2006:134). Not only was Patel being dealt with unfairly, but this also affected perceptions of Keating and Leck as it appeared to give 'premature endorsement' to evidence from some witnesses (*Keating vs Morris & Ors* [2005]: paras 131–132).

Justice Moynihan was furthermore critical of the inability, because of intervention by Morris, for a counsel representing Keating and Leck to cross-examine witnesses effectively. Moynihan believed that such intervention was 'hostile . . . unjustified and intemperate' (*Keating vs Morris & Ors* [2005]: para 115). Justice Moynihan found that Morris's interrogation of Keating, his intervention in the cross-examination of a witness by Keating's barrister, combined with threats of adverse findings, were 'unjustified, and at best intemperate' (*Keating vs Morris & Ors* [2005]: para 115) In addition, Morris's 'effusive endorsement' of some witnesses' 'untested evidence is of particular concern' (*Keating vs Morris & Ors* [2005]).

Justice Moynihan noted Morris's private meetings with some witnesses that had the potential to breach the fundamental principle of natural justice to 'hear evidence or receive representations from one side behind the back of another' (*Keating vs Morris & Ors* [2005]: para 156; Hamer 2006:135).

Overall, Justice Moynihan was 'satisfied that each of the applicants (Keating and Leck) has made out a case of ostensible bias' (*Keating vs Morris & Ors* [2005]: para 158) and that the actions of the Morris commission 'would give rise, in the mind of a fair minded and informed member of the community to a reasonable apprehension of lack of impartiality on the Commissioner's part in dealing with issues relating to each of the applicants' (*Keating vs Morris & Ors* [2005]: para 159). Justice Moynihan also concluded that as the deputy commissioners of the Morris commission 'did not disassociate themselves from his (Morris's) conduct,' they were similarly biased (*Keating vs Morris & Ors 2005*: para 163).

'It is impossible', commented one editorial (*Courier-Mail* 2 September 2005), 'to find a good word for Mr Morris in the . . . judgement'. Observers believed Morris's actions had been

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both excessive and unnecessary (Thomas 2005c). Royal commissions, wrote one analyst, 'cannot lose sight of the legal framework' within which they have to operate and that 'the process . . . should be fair, and not some kind of kangaroo court' (Ransley 2005). 'The main lesson', about the Morris commission, was 'that commissions of inquiry are a tricky business . . . fearless investigation is one thing, but excessive play to the public gallery risks compromising fairness' (Ransley 2005).

Appointing the Davies Commission

In the aftermath of the Supreme Court's findings the government faced a difficult range of options. Its situation was even more serious than previously, given the many problems about health administration that had now been revealed by the Morris commission and the parallel Forster *Queensland Health System Review* whose critical interim report had just been released at this time. Adding to these problems was the way Health Minister Nuttall was exposed by the Deputy Director-General of the Department of Health, Dr John Scott before the Legislative Assembly's estimates committee hearings in July 2005 prior to the Supreme Court's decision. Minister Nuttall had denied previous knowledge about problems pertaining to overseas doctors and reconfirmed this before the estimates committee (Nuttall 2005c:6). Dr Scott contradicted Minister Nuttall stating that he had in fact been frequently briefed by the Health Department (and others) about problems concerning doctors recruited abroad (Scott 2005:6). Scott's statement was publicly supported by the then Director-General of Health, Dr Steve Buckland (see Viellaris 2005). This issue provoked further calls for Nuttall to resign (editorial, 'Put an end to this sad joke' *Courier-Mail* 11 July 2005). However, Premier Beattie declared that Nuttall was 'an honest person' (*Courier-Mail* 9 July 2005). Nuttall remained in the ministry, but was moved to a different portfolio at the end of July (Beattie 2005g). It also led to a CMC inquiry (CMC 2005) concerning whether Minister Nuttall had given false evidence to a parliamentary committee and whether this was an offence against the *Criminal Code* (see below). Last, the government had, as noted, endorsed the Morris commission's Interim Report and sought to implement its recommendations. Now that the Supreme Court had found that the Interim Report had made inappropriate recommendations, this also suggested that the government's actions had been premature.

The government contemplated an appeal against the Supreme Court's decision. This would have been time-consuming and the outcome uncertain. Premier Beattie (2005m) stated that he did 'not support the closing down of this inquiry and within the realms of the law I will do everything I possibly can to resist it'. Within two days of the Supreme Court's decision, the Morris commission was terminated despite strong protests from Morris (*Courier-Mail* 3 September 2005; see also Morris 2005c).

The government then ruled out establishing another royal commission. It pointed out that Justice Moynihan's judgment had implied that all the evidence gathered by the Morris commission would have to be collected again, thus imposing a hardship on certain witnesses. Instead, Premier Beattie (Beattie 2005h) proposed a six-point action plan involving ongoing work by the Forster review, further investigations by Crown Law, the Coroner, the Police, the CMC and compensation for patients. Beattie explained this approach would 'ensure information gained by the Bundaberg Hospital commission of inquiry produces results' (Beattie 2005h).

This decision soon proved politically untenable. As Ransley (2005) argued, the problem with the six-point action plan was that 'these bodies could have done the investigations in the first place, but the public lacks confidence in their independence and will to conduct a full and proper inquiry'. That some Queensland Health Department officials had been in conflict with the Morris commission and others were reported to be celebrating its demise (*Courier-Mail* 2 September 2005) hardly encouraged confidence in existing government institutions to tackle the issues. As the editorial in the *Courier-Mail* declared: 'the more

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closed to outside scrutiny the efforts to improve Queensland Health are, the less credible those efforts will be to the public' ('Salvaging credibility from crisis' *Courier-Mail* 6 September 2005). This is the very issue that a royal commission seeks to overcome. It is what drives public demands for the appointment of such external reviews (McCarthy 2008:30–33).

A new royal commission was suggested as the only means to restore confidence that the issues would be properly investigated (Prasser 2005). With the six-point plan being criticised, the government's attempts at blame minimisation were clearly failing. Comments at this time by retired Supreme Court Judge, James Thomas, that problems concerning evidence collected by the Morris commission could be easily overcome and all that was needed 'was political will' (*Courier-Mail* 6 September 2005), prompted action. The very next day the government appointed retired Court of Appeal judge, Geoff Davies, to head a new royal commission. It had, as noted, almost the same terms of reference as its predecessor, though with extra requirements to recommend disciplinary action against individuals and to examine any reprisals by the Health Department against whistleblowers (Beattie 2005i). Again, only an independent, external and impartial body like a royal commission, this time headed by a former judge, was sufficient to satisfy public demands for the Patel affair and other related health matters to be properly investigated.

Davies Commission Processes

Within three days of being appointed the Davies commission was hearing evidence. Davies struck out the previous evidence from Keating and Leck, stressed 'he would not be reading the transcripts of their evidence', and thus overcame the 'tainted evidence' problem (Watt 2005). Davies also ruled against the Medical Board of Queensland's suggestion that the commission's legal team members were 'biased' because some had worked for the Morris commission.

The Davies commission made quick progress. Health Department officials Dr Keating and Mr Leck were recalled and cross-examined. Other key witnesses such as former Health Director-General, Dr Steve Buckland, and his deputy, Dr John Scott, were called. Importantly, Davies, unlike Morris, allowed Counsel Assisting to ask most of the questions. Cabinet was forced to hand over documents concerning waiting lists and the Measured Quality Reports about hospital performance. There was correspondence from Beattie to Davies on this matter, denying that the government had altered the Measured Quality Reports. Also revealed in detail were processes by which both Coalition and Labor administrations had literally wheeled trolley loads of documents into cabinet for it to qualify as 'cabinet' material and thus avoid freedom of information applications. Former Beattie government health ministers Wendy Edmonds and Gordon Nuttall were called as witnesses, and their inaction, cover-ups and ineptitude exposed in relation to waiting lists and specific cases (Davies 2005: paras 6.567–6.620). After a month, Davies asked for and received extended terms of reference to report on hospital waiting lists and possible changes to the *Coroner's Act* (Beattie 2005j).

What the Davies Royal Commission Said

The great strength of royal commissions is not just their powers of investigation, but that their investigations and reports are usually public. It is one of the main features which distinguishes public inquiries, like royal commissions, from many other government advisory mechanisms (Woodward 1985). Although, as advisory bodies, royal commissions do not have any power to enforce their recommendations, the very public nature of their reports, and the subsequent attention they receive, is a powerful force that can generate considerable public opinion and interest group support that eventually influences government actions (Bashevkin 1988; Hanser 1965).

How royal commissions approach their topic is also an important factor in affecting their impact. Some royal commissions stick strictly to their terms of reference. Their reports are narrow and focus on very particular events and

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issues. Such was the case, with the Queensland *Royal Commission into the National Hotel Allegations* (Fitzgerald 1990) and the 1964 *Royal Commission on the Loss of HMAS Voyager* (Frame 1992). Other royal commissions, sometimes assisted by broad terms of reference, but also taking a broader view of the issues, seek to consider systemic factors that caused such problems to occur. The 1989 Queensland Fitzgerald inquiry for instance, was seen to have adopted this broader approach despite its initial narrow terms of reference. Hence, the Fitzgerald inquiry sought to highlight not only police corruption, but Queensland's system of government that had allowed such problems to fester (Coaldrake and Wanna 1988).

Both the Morris and Davies commissions resolved to explore the underlying causes of the Patel affair. The flaws that the Morris commission had begun to reveal in terms of health administration, doctor registration processes and the overall hospital system (Morris 2005b), were more fully exposed in the Davies commission's final report delivered in November 2005 (Davies 2005). Davies was highly critical of not only particular Health Department staff at Bundaberg Hospital and the last two health ministers in the Beattie government, but of the health system as a whole and key aspects of Queensland's public administration including the operations of cabinet.

Concerning Patel, the Davies commission identified a litany of flaws including: mismanagement of his selection and referee checking by an outside recruitment agency (Davies 2005: paras 3.106–3.118); failure by the MBQ to check Patel's qualifications and to follow up issues as they arose (paras 3.132–3.138); formal appointment on the basis of 'area of need' that was not properly verified (para 2.25ff); inappropriate appointment of Patel as Director of Surgery (para 3.164); lack of supervision or regular clinical auditing of his practices (paras 3.169–3.180); failure by Bundaberg Hospital and other health administrators to investigate numerous complaints (paras 3.306–308); suppression of complaints and those who made them; and inept responses once they began. As Davies wrote, these problems were 'astonishing' (para 1.18) and 'breathtaking' in terms of their breadth, failure to follow existing policies and laws and, in some cases, involved a deliberate construction of lies (see para 3.138).

Importantly, Davies, like Morris, appreciated that the Patel affair was indicative of how the whole 'health system failed Bundaberg so badly' (Davies 2005: para 3.406). Davies concluded (para 6.1) that:

> It is . . . unsurprising, that these problems, common to a number of hospitals. . . had common causes . . . Unless all those causes are removed, or their effects diminished, a serious risk of inadequate and unsafe health care in public hospitals will remain.

In summary, the Davies commission identified system-wide factors which contributed to the Patel problem. Queensland's inadequate health budgets, combined with poor internal budget allocation systems, pressured public hospital managers to meet elective surgery targets, thus explaining why Patel, so efficient in operation throughputs, was tolerated by management at Bundaberg Hospital for so long – he literally saved budgets if not patients. Queensland's health expenditure per person was 14% below ($200 per person) the national average of $1,444 per person (Davies 2005: para 6.13). Davies believed this was an appalling situation given Queensland's decentralised nature, growing population and the increasing proportion of aged people (para 6.19–22). This problem was compounded by a shortage of doctors and poor pay for specialists (para 6.23), which prompted Queensland's heavy reliance on doctors from underdeveloped countries. Also, Queensland Health spends 82% more on health administration than other states (para 6.58).

The issue that Davies emphasised was not just that 50% of Queensland's resident medical officers were overseas-trained, but that their country of origin made it difficult for them to operate effectively. As Davies (2005: para 6.26) concluded:

> This is an unsatisfactory situation for health services in Queensland, as a growing share of overseas trained doctors are being drawn from countries with different cultures and first languages other than ours . . . from a medical education system which is either less developed than ours or

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> one in respect of which it is difficult to make an informed judgement.

In addition, regulatory regimes for checking doctors recruited abroad were under-resourced and had poor processes. Key agencies like the MBQ only checked overseas doctors' credentials in a 'cursory way' (Davies 2005; para 6.93), failed to monitor conditions of registration, and had no effective credentialing and privileging arrangements to assess their performances. Further, despite extensive policy guidelines on issues such as credentialing, these were rarely followed. In relation to Patel, Davies observed that, 'astonishingly,' Keating, manager of Bundaberg Hospital, failed at any time to have Patel's clinical competence evaluated despite repeated complaints from doctors, nurses and patients (Davies 2005: para 6.183).

Davies (2005) concluded that there was an adequate policy framework for managing complaints, but that its key elements were not being properly implemented (paras 6.263 and 6.370). Also, the complaints system suffered from overlapping jurisdictions by different agencies, excessive bureaucracy, under-resourcing and was too slow in responding to patient concerns. This problem was exacerbated by a deficient whistleblower system (paras 6.487–6.512) and inadequate reporting processes to the Coroner of deaths in hospitals that meant that such cases were not always properly investigated (paras 7.13–7.24).

Last, and most importantly, the Davies commission highlighted the 'culture of concealment' that started at the top in Queensland Health and government concerning hospital expenditure, waiting lists and hospital performance standards (Davies 2005: paras 6.282 and 6.513). This explains why the Patel and similar cases at other hospitals were allowed to continue for as long as they did. As Davies (2005: para 6.513) summed up:

> The evidence before this commission . . . yielded, among other things, examples of persons in stewardship roles in Queensland Health engaging in conduct pertaining to clinical practice and procedure, which diminished the prospect of facts being open to proper scrutiny. An occasional concomitant of concealment is reprisal. There was also some evidence of this.

More significantly, the Davies commission highlighted how the political nature of the public hospital surgery waiting lists was an underlying driver in allowing the Patel case to occur. Successive Coalition and Labor governments manipulated surgery waiting lists to give false impressions of progress and to reduce political embarrassment (Davies 2005: paras 6.517–536). The Davies commission identified several waiting lists and disentangled confusion about their meaning and manipulation. As Davies (2005: para 6.525) lamented: 'it would be much more meaningful for the public . . . to know not just the total number of persons awaiting surgery, but also how long it takes to receive appropriate treatment'. Coalition and Labor governments, including, most recently, the Beattie government, had prevented the public release of accurate information pertaining to waiting lists by manipulating freedom of information exemption processes (paras 6.531–536).

Similarly, the commission showed how the reports from the Measured Quality Service (MQS) process established to assess hospital performance were 'sanitised' by the Premier's Department and their distribution restricted. This reduced their impact for effective performance monitoring. That the MQS process survived at all, noted Davies, was largely because of the efforts of Dr John Scott, Deputy-Director General of Health, who, as noted earlier, had been dismissed by the government after he had contradicted Minister Nuttall at the estimates committees. Indeed, Davies (2005: para 6.558). concluded that 'the termination of Dr Scott's employment by the present Beattie government was a considerable loss to Queensland Health'. Scott has never been reinstated.

The commission, in an unprecedented finding, concluded that successive cabinets (Coalition and most recently, the Beattie cabinet) had misused the freedom of information laws to suppress details about the hospital waiting lists (Davies 2005: paras 6.559–6.566). According to Davies such actions were 'inexcusable and an abuse of the *Freedom of Information Act*',

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as they involved 'a blatant exercise of secreting information from the public gaze for no reason other than that the disclosure . . . might be embarrassing to government' (para 6.559). Commissioner Davies found that such decisions by Coalition cabinets in 1997 and 1998 were 'contrary to the public interest' (para 6.564). Davies also concluded that decisions by 'Cabinet under an Australian Labor Party government' to limit the public release of the full details of hospital waiting lists had been 'misleading and was contrary to the public interest' (para 6.564).

The concern by Davies in relation to suppression of information on waiting lists and Measured Quality Service reports was clear in the exchange he recorded with Premier Beattie concerning this matter. During the inquiry Premier Beattie had written to Davies on these issues and stressed that 'I am prepared to act to continue my government's record of openness and accountability' (Davies 2005: para 6.562). Davies assessed this statement by the Premier as being 'inconsistent with the facts . . . pertaining to elective surgery waiting lists and Measured Quality hospital reports' (para 6.563).

Davies particularly singled out former Beattie government health ministers, Wendy Edmonds (Health Minister, 1998–2004) and Gordon Nuttall (Health Minister, 2004–2005) for criticism. Concerning Edmonds, Davies concluded that, as minister, she had deliberately made misleading statements and press releases about waiting lists and 'knowingly misrepresented that the published surgery list comprised all of the waiting list data' (para 6.576). Furthermore, Davies (2005: para 6.580) believed that Edmonds had also 'set a very poor example for Queensland Health staff in relation to openness with which they should deal with matters which might be embarrassing to the government or Queensland Health' and that her decisions as minister on these issues were 'contrary to the public interest'(para 6.599f).

Davies was similarly scathing concerning Nuttall. He rejected Nuttall's version of events pertaining to the 7 April meeting with Bundaberg Hospital staff, believed his approach and language at that meeting were inappropriate and, in some instances, inaccurate. In relation to Nuttall's handling of the Patel issue, Davies (2005: para 6.620) concluded that his 'conduct was misleading, unreasonable and careless'.

Other findings were made against Health Department officials including former Director-General Steve Buckland; Dr Fitzgerald over the focus of his review and his failure to move swiftly to suspend Patel; and Dr Keating and Mr Leck concerning their unwillingness to investigate complaints about Patel and their concealment of any problems from wider scrutiny.

Managing the Royal Commissions

Most governments allow royal commissions investigating corruption or maladministration to run their course so as to avoid any suggestion of interference. At best, governments will claim credit in setting up such inquiries and seek to cooperate with commissions by extending their terms of reference or providing any additional resources requested. Only after the report has been delivered do governments adopt more aggressive tactics to manage adverse impacts. Tactics may include: ignoring reports; establishing complex processes to assess their recommendations; attacking their recommendations and/or their members (Costigan 1986; Moffitt 1985; Prasser 2006a:43–44).

The important feature of the Beattie government's management of these two health royal commissions was that it was characterised by pre-emptive activity, an aggressive strategy of 'blame minimisation' that began from the moment each commission was established. This was not only in terms of responding positively to each commission's requests for more time or resources, but by government announcements, initiatives and actions seeking to show that issues being raised during the commissions' investigations were already being acted upon.

The Forster review that operated in parallel with the commissions was an important part of this containment strategy. It created an impression of action while giving the government another source of advice that by virtue of its being a consultancy was more specific in its proposals, less concerned with allocating blame and faster in reporting. Moreover,

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as Premier Beattie (2005k) admitted, release of the Forster report some two months before the Davies commission allowed 'the government to address systemic issues to improve health'. This was the 'we are already doing it' tactic so often used by government in response to impending royal commission reports (see Prasser 2006b).

It was a tactic that was further seen in the many wide-ranging structural and personnel changes announced by the government before the commissions reported. These included: terminating the employment of the then Director-General of Health (Dr Buckland) in July 2005 and announcing his replacement with a senior bureaucrat from the Department of the Premier and Cabinet; moving Minister Nuttall to a different portfolio; and terminating the employment of Dr John Scott, Deputy Director-General of the Health Department.

The pattern was the same. Each time an issue was raised at the commissions' hearings the government would announce an initiative that pre-empted the commissions' recommendations. This was seen, as noted, in relation to the government's full acceptance of the Morris commission's Interim Report. Also, once the Davies commission began to focus on the lack of full public reporting of MQRs and hospital waiting lists the government announced that 'legislation currently before parliament will be amended making it mandatory for State government to publish them (MQRs) each year' (Beattie 2005l). Reports of underfunding health led the government to announce, in October, Queensland's first mini-budget to increase health spending (Beattie 2005k). So, too, the Taskforce on Medical Standards was appointed in reaction to questions raised at commission hearings.

Sometimes these pre-emptive tactics partly backfired. Too easy acceptance of the Interim Report, for instance, proved embarrassing following the Supreme Court's assessment of the legal aspects of these proposals. Appointing Dr G. Fitzgerald as the new Deputy Director-General in July proved premature, as the Davies commission was critical of his performance in relation to the Patel affair, forcing him to resign from this new position.

In addition to these tactics, the government launched an extensive taxpayer-funded advertising campaign outlining its initiatives to fix Queensland's public health system problems. The October mini-budget provided further opportunities for the government to promote and advertise its health initiatives.

Conclusions

The appointment of the Morris and Davies commissions of inquiry raises a number of important issues about the use of royal commissions and the state of public administration in Queensland.

In relation to royal commissions the resort to this investigative instrument highlights the limitations of existing institutional arrangements in ensuring that administrative and policy failures were identified and appropriate remedial actions taken. There is little doubt that the many problems of Queensland Health and the government would not have been revealed except for the probing by these royal commissions.

In Queensland these royal commissions reinforce concerns that the reform process begun by the Fitzgerald inquiry of the late 1980s and the very problems of culture, secrecy and lack of accountability that it identified, have still not been fully addressed. This extends not just to issues of public administration, but to operations of cabinet and ministerial responsibility. Despite adverse reports during the Morris commission concerning Minister Nuttall he was neither dismissed nor stood down by the government. Instead, as noted Nuttall was given a new ministerial post. It was only when the CMC began its inquiry (CMC 2005) into his evidence to the estimates committee in August 2005 that Nuttall stood down from the ministry, but this was short-lived. Nuttall returned to his ministerial post in October before the CMC reported in December. The CMC (2005:44) concluded in relation to whether Nuttall knew about issues concerning overseas doctors and the Patel case when he gave evidence before the estimates committee that:

> There is an abundance of evidence, that the minister, prior to the Dr Patel scandal becoming

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> public . . . knew of such concerns from a number of sources, including departmental briefings.

Although the CMC believed 'prosecutions . . . should be considered' against Nuttall on this matter, it proposed that Parliament should resolve whether Nuttall should face criminal proceedings (CMC 2005:45). Only at this point with State Parliament being recalled for a special sitting to consider the CMC report was Nuttall finally forced to resign from the ministry.[7] The Opposition believed the matter should have been referred to the Director of Public Prosecutions. The government thought otherwise, arguing that in the name of parliamentary privilege a member of parliament should not face criminal proceedings even if he had possibly mislead a parliamentary committee. Consequently, Parliament passed the government's resolution to treat the matter as an issue of contempt of Parliament and to accept Nuttall's apology and resignation from the ministry (Beattie 2005n:4719–20). Some, like the Opposition, regarded this outcome as tantamount to allowing elected officials to be able to lie to Parliament without penalty.[8]

By contrast, the dismissal of senior staff in the Health Department in the wake of the two commissions and the special arrangements that were initiated to protect Minister Nuttall following the estimates committee hearings showed that in Queensland any mistakes will be borne primarily by the public service rather than elected officials. This is a fundamental undermining of responsible government whereby ministers should take responsibility for their departments, though there is considerable debate about what this means in practice in Australian politics (Page 1997; Weller and Jeansch 1980).

Concerning the operations of Queensland Health there has been considerable progress in addressing the issues raised by the commissions. Extra funding has been provided. There is more regular and honest reporting of a range of important hospital performance indicators including quality standards and waiting lists. But problems remain. Patel was only extradited from the United States in 2009 and his trial will not be completed till 2010. Former commissioner Morris (2006) noted that the new chair of the Health Quality and Complaints Commission, was a former Deputy Director-General of Queensland Health, had been employed as special adviser to the Minister for Health and observed that: 'it is not immediately apparent how the appointment of a former top bureaucrat, and later ministerial adviser, to this position can be reconciled with the main objects expressed in the legislation, which include, "independent review and management of health complaints". But there are no checks on these public appointments, are there?' Concerns still exist about the veracity of checking processes concerning overseas doctors' qualifications and growing waiting lists continue to cause considerable public agitation.

Finally, there are two other issues concerning royal commissions that the experiences of the Morris and Davies commissions have highlighted.

Foremost amongst these is the extent that executive government appointed inquiries, are now subject to increasing review by the courts. Previously, the courts were seen to have only limited jurisdiction to review the processes and activities of royal commissions. However, both overseas and in Australia, the trend during the last decade is for increasing levels of scrutiny of royal commissions and similar bodies by the courts and growing litigation concerning their powers and processes by those subject to their investigations (Lindell 2002; ALRC 2009:301–312). Such trends were particularly visible in relation to the Morris commission. Some have raised concerns as to whether investigative commissions and their members who serve quite different roles and have very different tenures than courts and judges should be assessed by the same standards as for courts and judges as this may reduce their investigatory effectiveness (Hamer 2006:142–143). At the same time the success of the Davies commission in avoiding the problems and court reviews of its predecessor shows just how effective the royal commission instrument can be if properly conducted.

The other issue is that these and earlier royal commissions, such as the Fitzgerald inquiry, have again highlighted the limitations

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of such temporary bodies to implement their recommendations. Non-implementation of recommendations has long been the cause of 'the greatest degree of dissatisfaction with royal commissions' (Bulmer 1983:441). Royal commission influence rapidly diminishes once they have reported and returned their commissions. Implementation too frequently lies in the hands of those who have but lately been under investigation or review, even when some of those in senior posts resign or have their contracts terminated. Though beyond the scope of this article, what this Queensland case suggests is a need to develop the royal commission instrument so that it extends beyond investigation and embraces review and scrutiny of implementation.

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Endnotes

1. The Davies commission had initially only one additional terms of reference concerning the need to inquire into 'whether or not there were any reprisals or threatened reprisals made by any official of Queensland Health against any person who made complaints'. The further addition to the terms of reference was given to Davies as the inquiry progressed. The closest example of two inquires into the same topic would be the two Commonwealth royal commissions appointed in 1964 and 1967 into the *HMAS Voyager* disaster. However, unlike the Queensland health royal commissions, the *Voyager* commissions were appointed several years apart by different governments and with very different terms of reference.

2. The 1980 *Royal Commission into the Activities of the Federated Ship Painters' and Dockers' Union* was challenged several times concerning its powers and processes (see Allars 1996). More recently, the *Royal Commission into the Australian Wheat Board* (AWB) was challenged by the AWB concerning the commission's ability to access information between the AWB and its legal advisers.

3. One related example was the closure of the Queensland Borbidge government's Ryan-Connolly inquiry into the Criminal Justice Commission in 1997 on the grounds that its members had exceeded their powers, see *Curruthers vs Connolly* 1998, 1, Qd R, 339 and Hamer 2006:137–138.

4. No press release on this matter was released by the CMC. This information was reported in the media following interviews with the Chief Executive Officer of the CMC. The CMC was to investigate whether there had been reprisals against nurses who had wanted to raise concerns about Dr Patel. The issue of criminal negligence was the responsibility of the Coroner.

5. See *Keating v Morris & Ors* [2005], Queensland Supreme Court, para 243; and *Leck v Morris & Ors* [2005], Queensland Supreme Court, para 243.

6. Legal counsel for the Bundaberg Director of Nursing, Linda Mulligan, made complaints that Morris had been 'rude' and 'badgering' to his client (*Courier-Mail* 14 July 2005).

7. Gordon Nuttall did not resign from Parliament at this point in time. He only announced his decision in August not to stand for re-election at the September 2006 state election. By this time other allegations and CMC investigations into whether Nuttall had received funds from business were surfacing.

8. However, this was not the end of the Nuttall affair. Less than a year later, the CMC announced a major probe concerning allegations that Nuttall had received undeclared funds from a mining magnate while he was a minster. Legal proceedings were commenced against Nuttall in January 2007 (CMC 2007) and in July 2009 he was found guilty of corruption and sent to prison.

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APPENDIX 1

Terms of Reference: Bundaberg Hospital Commission of Inquiry (Morris commission)

On 26 April, the Queensland government appointed Anthony Morris QC, assisted by the Hon Llew Edwards AC and Ms Margaret Vider RN, as a Commission of Inquiry to inquire into and report on:

- *Issues connected with the appointment of Dr Jayant Patel to the Bundaberg Hospital;*
- *Substantive allegations, complaints or concerns relating to clinical practice and procedures conducted by Dr Patel and other doctors at the Bundaberg Hospital;*
- *Systems of accountability necessary or appropriate to prevent the recurrence of unacceptable situations or incidents;*
- *The roles of the Medical Board of Queensland in assessing, registering and monitoring overseas trained doctors, and possible improvements to the Medical Board;*
- *Possible improvements to Queensland Health in respect of the recruitment, employment and supervision of medical practitioners;*
- *Possible improvements to Queensland Health to ensure that clinical complaints and allegations are properly received, processed, investigated and resolved;*
- *Arrangements between the federal and state governments for the allocation of overseas trained doctors to provide clinical services; and*
- *What can be done to make more doctors available for hospitals across Queensland.*

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