THE HON TIM CARMODY SC,

Commissioner

MS K McMILLAN SC, Counsel Assisting

MR M COPLEY SC, Counsel Assisting

IN THE MATTER OF THE COMMISSIONS OF INQUIRY ACT 1950

COMMISSIONS OF INQUIRY ORDER (No. 1) 2012

QUEENSLAND CHILD PROTECTION COMMISSION OF INQUIRY

BRISBANE

DATE 24/07/2012

RULING

COMMISSIONER: Term of Reference 3(e) mandates: (a) a review of the adequacy and appropriateness of past Government responses to allegations of historic child sexual abuse in youth detention centres; and (b) any associated alleged criminal conduct.

The second limb of the Term of Reference is assumed, for present purposes, to refer to the so-called Heiner Affair which centres on the controversial shredding of documents from an investigation conducted in 1988 by Magistrate Noel Heiner into allegations of rape at a youth detention facility in and a suspected cover-up of the incident by government officials.

Kevin Lindeberg and Bruce Grundy were given leave to appear for the limited purpose of making submissions about why they say I should recuse or voluntarily self-disqualify from personally carrying out the requirements of paragraph 3(e). Conditional leave was granted (a) because both men have been tireless campaigners for a public inquiry to be held into the Heiner Affair for more than 20 years and there is no doubting their bona fides; (b) in the interests of openness and transparency; (c) in recognition of the need to maintain public trust in the intellectual integrity and authority of the Commission of Inquiry into a matter of such importance as the child protection system; and (d) because experience shows that ignoring such a serious claim or leaving it linger in the public domain unresolved for too long can itself risk compromising community confidence in the inquiry.

A final determination of whether either of them has sufficient standing to be heard on the actual subject matter of paragraph 3(e) is a question that can safely wait until later.

Recusal is a prudential step not to be taken lightly or prematurely: *Livesy v. New South Wales Bar Association* (1983) 151 CLR 288 at 294. It has to be justified on individual fairness or overriding public interest grounds, including the maintenance of community confidence in the process. In *re JRL, ex parte CJL* (1986) 161 CRL 342 Mason J noted that acceding too readily to a disqualification application is to be discouraged because it can lead to the undesirable practice of "judge shopping".

It would be quite wrong and tantamount to an abdication of duty for me to stand aside at the mere suggestion of criticism or to avoid personal embarrassment.

The present applications are based solely on the rule against apprehended bias. Its chief purpose is to ensure public faith in the legal system and administration of justice, but it applies no less strictly, albeit with slight modifications, in most nonjudicial settings, including, in particular, Commissions of Inquiry: *Keating and Morris*: (2005) QSC 243 at [39]

The rule also lies at the heart of the modern doctrine of procedural fairness which has as its main concern the assurance of individual justice.

The relevant principles encompass disqualifying associations and past conduct: *Webb v. The Queen* (1994) 181 CLR41 per Deane J at 71, however, by themselves a person's career history or disclosed professional relationships 'hardly ever' support a claim of suspected bias: *Locabail (UK) Ltd v. Bayview Properties Ltd* (2000)QB 451 .
In Kartinyeri v. The Commonwealth, (1998), Justice Callinan was asked to recuse himself from a constitutional case because of advice he had previously given to the Queensland State Government on validity of a challenged use of legislation. His Honour refused to step aside for prejudgment because there were no issues of fact and credibility at stake and no need to form or express a view on the merits when he provided his earlier opinion.

In *McCreed v. The Queen* (2003) 27 WAR 554, a gap of eleven and a half years since a Judge had prosecuted an accused standing trial before him was held not to amount to perceived bias or suspicion of prejudgment. Significant weight was given in *Wewaykum Indian Band v. Canada* (2003) 2 SCR 259 to the uncontested fact that the judge had no personal recollection of having been involved in the subject matter of later litigation because it was a factor in determining whether his ability, even subconsciously, to be impartial was compromised.

Strict adherence to the rule against perceived or ostensible bias is a practical guarantee that… "decision-makers act according to the facts before them rather than extraneous and often irrelevant factors and… fosters values of fair treatment and is likely to enhance respect for administrative action": M Groves, *the Rule Against Bias,* in Australian Administrative Law: Fundamentals, Principles and Doctrines, Groves, M & Lee, HP. (eds) Cambridge University Press (2007) at 316. That is not to say, however, that the overall best interests of the community may not sometimes clash and even override an applicant's own vested interest in the outcome of a recusal application because of wider considerations like cost and time efficiency or necessity: *Metropolitan Fire Brigade and Emergency Board v. Churchill* (1998) VSC 51.

Disqualification for the appearance of bias is relevantly underpinned and affirmed by two famous legal maxims. The first is centuries old. It is, "No man ought to be a Judge in his own cause": *British Tobacco Australia Services Limited v. Laurie*, (2011) HCA 2 per French CJ at 34. The second is more recent but no less influential. It was best stated by Hewitt CJ in *R v. Sussex Justices, ex parte McCarthy* (1924) IKB 256 at 259, when he said that, "…justice should not only be done, but should manifestly and undoubtedly be seen to be done." Despite employing different turns of phrase each is an expression of the requirement of impartiality. Both of these fundamental precepts are invoked by the current applicants.

Justice can only be done if there actually is no bias and it can only be seen to be done if there is no real hint of it: McCreed at 557. A biased mind lacks the essential quality of impartiality which is a distinguishing and indispensable feature of basic fairness in our system. Impartiality consists, in the absence of a predisposition, to favour the interest of one side of a dispute over the other. The opposite of impartiality is partiality which involves a faulty process of reasoning of a prejudiced or tightly closed mind which, it has been said, tends to overvalue evidence confirming first impressions, preconceived notions or predetermined ideas, on the one hand, and ignores or overlooks falsifying facts appearing to contradict or disprove them, on the other.

Biased reasoning due to prejudgment, prejudice or some other contaminant has nothing, or very little, to do with the true merits of the case, but somehow insinuates itself in the determination of it either consciously or unconsciously: see G. Hammond, *Judicial Recusal, Principles, Process and Problems,* Hart Publishing (2009) at 33-36.

A claim of apprehended bias is assessed objectively. It requires proof that the fair-minded and informed onlooker *might* conclude that there was a real possibility of bias: *Ebner v Official Trustee* (2000) 205 CLR 337. Reasonable apprehension of bias must be "firmly established": *The Queen v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546.

The starting point for the fair-minded onlooker is the objective facts of the case. He or she knows as much as the decision-maker but does not have any personal knowledge of the parties concerned.

The central question is whether a "real possibility of bias" can reasonably be inferred as a probability from known facts. The test reflects the reaction of the ordinary member of the public to a claimed irregularity on the basis of the assumption that it is this standard which is most likely to maintain public confidence in the administration of justice: Webb v. The Queen at 71.

In *Johnson v. Johnson* (2009) 201 CLR 488 at [53] Kirby J identified the attributes of the fictitious observer to whom the question of apprehended bias is to be decided. His Honour explained such a person is not a lawyer, yet neither is he or she a person highly uninformed or uninstructed about the law in general or the issue to be decided.

Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on the fair understanding of all the relevant circumstances. The notional bystander would be taken to know common place things such as the fact that adjudicators sometimes say or do things that they might later wish they hadn't without necessarily disqualifying themselves from continuing to exercise their powers. The objective spectator must also now be taken to have at least in the very general way some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate time limits and to ensure that time is not wasted.

The fair-minded onlooker will also be aware of the strong professional pressures on adjudicators reinforced by the facilities of appeal and review to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance of isolated temper or remarks to the parties or their representatives which was taken out of context. He or she (a) is not unduly sensitive or overly suspicious; (b) does not make up his or her mind before listening to both sides of the argument; (c) is slightly detached but engaged; (d) is not to be confused with the aggrieved party and does not necessarily share the applicant's suspicions or

assumptions; (e) contextualises political, social and geographical information; (f) always reserves judgment on every point until both sides have been fully seen and understood; (g) will not shrink from the conclusion if it can be justified objectively that things that have been said or done or associations that have been formed may make impartiality difficult.

It might be added that he or she is capable of reading between the lines and is not given to holding grievances for negligible causes.

In *Royal Commission on Thomas's case* (1981) NZLR602, the characteristics attributed to the lay observer included; (1) knowledge of the nature and purpose of the Commission of Inquiry and the rights of the persons likely to be affected and (2) the essential purpose, function and mode of operation of the Commission.

Importantly, the bias test has two distinct steps; (1) the identification of the potential risk factors or indicia of suspected bias and (2) the explanation of how, that is in what way, the relevant conduct or association might derail the thinking process so as to cause the case to be decided otherwise than purely on merit.

Failing to act impartially is not the same thing as a litigant's expectation that the case will not be decided in his or her favour but judging one's own conduct naturally gives rise to a justifiable suspicion of bias because of the overwhelming and notorious influence self-interest undeniably has on human behaviour.

It would, therefore, be untenable for me to review the role of the Crime Commission in the Heiner Affair in 2001 because of the self-evident conflict between my current duty under Term of Reference 3(e) and my strong self-interest in defending my performance as Crime Commissioner and head of that agency. If paragraph 3(e) requires me to do that I would be obliged to disqualify myself.

However, whether or not this is necessary depends on the scope of ToR 3(e) which is a matter for me personally to decide: *Easton v Griffiths* (1995) 69 ALJR 669 at 672. The key term “government” is not defined in the Order in Council Statutory Instruments Act or the Acts Interpretation Act. Consistently with the submissions of Senior Counsel assisting and Mr Hanger QC for the Crown, I interpret the words government action and responses in the context of Term of Reference 3(e) as referring to the political executive; that is, the Premier and Cabinet. This, according to D Clark, *Principles of Australian Public Law*, Third Edition, LexisNexis, 2010, at page 4, (1.6), is its most

often used sense, citing at footnote 19: *Electricity Trust of South Australia v Linterns Ltd* [1950] SASR 133 at 138; *Jellyn v State Bank of South Australia* [1996] 1 Qd R271 at 286 (FC). See also the opinion of the Law Officers in 1862 commenting that the Queensland legislature was not part of the 'government' in this sense, though the opinion did note the wider second sense of the term to refer to all departments of the State, but this was not the legal meaning of the term. See Law Officers to Colonial Office, No 99 (Queensland), 10 January 1862 in Law Officers Opinions, Vol 1 (1860-69). These opinions are in the Library of the Supreme Court of Queensland.

Notably, section 51 of the State Constitution expressly recognises "Executive Government" as an entity with full legal attributes.

Accordingly, I am satisfied that I am not commissioned to review or report on the activities of the Crime Commission between 1997 and 2002. There being no other basis of alleged apprehended bias identified or seriously relied on the recusal applications are dismissed.

This is a revised version of the draft ruling on the recusal application made by Kevin Lindeberg and Bruce Grundy on 24 July 2012 with edits and amendments including the addition of unintended omissions made during the oral delivery.