



Transcript of Proceedings

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THE HONOURABLE TIMOTHY FRANCIS 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

Continued from 17/07/2012

..DAY 2

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THE COMMISSION RESUMED AT 9.59 A.M.

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COMMISSIONER: Yes, good morning. The Commission's reconvened in public session this morning to deal with a recusal application that was made at last week's directions hearing by or on behalf of Mr Lindeberg, I think by Mr Rofe.

Now, what I will do is I will take appearances or applications for leave to appear and then I will stand down briefly and then resume.

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MR BOSSCHER: If it pleases the commission, my surname is Bosscher, initial M. I'm a solicitor with Bosscher Lawyers. I seek your Honour's or this Commission's authority in a limited capacity to appear in relation to this application this morning and to make oral argument on behalf of Mr Lindeberg.

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COMMISSIONER: What is the limited role that you want to play, Mr Bosscher?

MR BOSSCHER: Simply in relation to the application that was foreshadowed by Mr Rofe QC and that is that your Honour recuse yourself from hearing term of reference 3E of the Terms of Reference of this inquiry.

COMMISSIONER: All right. Mr Copley, any problem?

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MR COPLEY: Mr Commissioner, it would be appropriate in the circumstances to give Mr Bosscher authority to appear for that limited purpose. For the sake of the record in connection with this matter, as you will recall last week Mr Rofe QC sought authority to appear. You did not rule on that as I read the transcript.

COMMISSIONER: I actually don't think he asked. I think he just appeared.

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MR COPLEY: That's true, actually, yes, yes, but for the record since then at least two pieces of correspondence have been received in connection with who might appear and I wish to tender them. I don't recall the order in which they appeared on the 20th of July or received, but the first is a letter from Bosscher Lawyers under the hand of Mr Michael Bosscher explaining that due to health reasons Mr Rofe would not be returning to the matter and that he would be appearing or seeking authority to appear today. So I tender that as an exhibit.

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The second is a letter under the hand of Mr David F Rofe QC which he wrote to you on the 20th of July, the same day, stating that as a matter of courtesy he had been asked to withdraw as counsel from representing Mr Lindeberg and so he accepted that he had to withdraw and he wished to advise this commission accordingly. I tender that letter.

COMMISSIONER: The Bosscher letter will be Exhibit 1.

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ADMITTED AND MARKED "EXHIBIT 1"

COMMISSIONER: The Rofe letter will be Exhibit 2.

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ADMITTED AND MARKED "EXHIBIT 2"

MR COPLEY: Would that be on this application or generally because last-----

COMMISSIONER: That's on this application.

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MR COPLEY: Very well, because there already is an Exhibit 1 generally.

COMMISSIONER: No, I will keep the side applications and the exhibits tendered and marked in them separate from the substantive proceedings of the Commission, I think.

MR COPLEY: I don't wish to make any submission about the content of either of the two letters and would suggest-----

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COMMISSIONER: I would just suggest that Mr Rofe's not here, but he thinks he's not here for one reason and Mr Bosscher thinks he is not here for another one.

MR COPLEY: Yes, yes.

COMMISSIONER: And they're not the same reason.

MR COPLEY: Thank you.

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COMMISSIONER: It doesn't matter anyway, he is not here, so, Mr Bosscher, I give you leave to make submissions on Mr Lindeberg's behalf in relation to the scope and my role in inquiring into paragraph 3 of the Order in Council.

MR BOSSCHER: Thank you, Mr Commissioner.

COMMISSIONER: Anyone else? Mr Burns, you're lurking in the back there.

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MR BURNS: I appear for the Crime and Misconduct Commission. My name is Burns, initials MJ, of Senior Counsel instructed by the Official Solicitor. Your Honour, the Commission has leave under Terms of Reference 4A. This application appears to relate to 4E, but we seek leave to appear to assist the Commission and to that end we have provided some material by affidavit which I understand was delivered yesterday. There

is contents of a QCC file, I think from memory three documents, and a fourth document, a file note, is a CJC note. Then there is an affidavit also by Mr Callinan, the assistant Crime Commissioner at the time.

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COMMISSIONER: Well, does anyone want to say anything about Mr Burns appearing? It seems to me to be perfectly legitimate that the Crime Commission and the former Criminal Justice Commission merged on the 30th of December 2001 to form the Crime and Misconduct Commission, so presumably there's an overlap between the two commissions, the records that the CMC currently holds and which might be relevant to contextualise the application for recusal.

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MR COPLEY: Yes, it is appropriate that Mr Burns be given that leave. It would also be appropriate, in my submission, Mr Commissioner, that if Mr Burns is instructed to tender any affidavit or affidavits to the Commission in connection with this application this morning, that he should do so now because you foreshadowed an intention to adjourn for a short time.

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The tender of those affidavits now would then permit Mr Bosscher, if he wishes, to peruse the contents of either/or both of them before he makes his oral submissions to you.

COMMISSIONER: Sure. Good idea. Mr Burns, do you want to-----

MR BURNS: Thank you. There are two affidavits, the originals of which were provided to the Commission yesterday afternoon. There's an affidavit of John Callinan sworn on the 20th of July. He was the Assistant Crime Commissioner in December 2001 and there's also an affidavit of June May sworn yesterday. Ms May is a records officer at the CMC. She retrieved what is described as the QCC file relevant to this matter and as I have submitted earlier, it consists of four documents, three of which are QCC documents and the fourth a file note, a CJC document. She also exhibits an extract from the diary of a lady by the name of Therese Flynn who was the executive assistant to the Crime Commissioner in December 2001 and there are two entries that may or may not be relevant. So I tender both affidavits.

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COMMISSIONER: All right. Thanks, Mr Burns. The affidavit of John Callinan will be Exhibit 3 in this application.

ADMITTED AND MARKED "EXHIBIT 3"

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COMMISSIONER: June May's affidavit will be Exhibit 4.

ADMITTED AND MARKED "EXHIBIT 4"

COMMISSIONER: Have you got copies?

MR BURNS: Yes, we do.

COMMISSIONER: All right. Now, any other applications for leave to appear?

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MR GRUNDY: Mr Commissioner, my name is Graham Bruce Grundy.

COMMISSIONER: Yes.

MR GRUNDY: I did write to you seeking leave to be represented or to represent myself and I was asked to come to the table and to seek that leave from you this morning.

COMMISSIONER: You want leave for what purpose, Mr Grundy?

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MR GRUNDY: Well, Mr Commissioner, I did write a letter to you about the recusal matter.

COMMISSIONER: Yes, but we're in public session now, so just repeat what you - just make your application for leave.

MR GRUNDY: Mr Commissioner, I make application for leave to appear this morning in relation to the matter of recusal.

COMMISSIONER: Yes, and you want to make submissions about-----

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MR GRUNDY: And if we get to that stage, to make submissions about my continued representation here, please.

COMMISSIONER: Right. So you support Mr Lindeberg's application for my recusal, do you?

MR GRUNDY: In my own independent way, this is not a caucusing matter, I have made my own application in my own way.

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COMMISSIONER: All right. So you want to support your own application for me to recuse myself?

MR GRUNDY: Yes, thank you.

COMMISSIONER: You've provided a written synopsis of the basis of your argument, have you?

MR GRUNDY: Yes, yes.

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COMMISSIONER: All right. Mr Copley?

MR COPLEY: It would not be inappropriate to give Mr Grundy authority to appear to make submissions in support of his application that you disqualify yourself. Insofar as he applies for authority to appear generally in connection with this term of reference, my submission is any such application

can and should be deferred until a later time.

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COMMISSIONER: Yes, I think the final decision about your continued involvement and whether you have a sufficient interest in the terms of 3E can wait until later, but I will give you authority to appear for the limited purpose of making submissions in support of your application for me to disqualify myself from personally participating in hearings or considerations of the matters raised in paragraph 3E of the Terms of Reference. Mr Copley?

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MR COPLEY: One further thing, Mr Commissioner, for you to consider from the point of view of the record: I just invite you to consider whether or not it would be appropriate to have admitted and marked as exhibits the outline of written submissions that Mr Bosscher has had delivered to the Commission on Friday and which Mr Grundy had cause to be sent to the Commission on either Friday or Monday.

COMMISSIONER: Yes, I have thought about that and if they still want to rely on those submissions without any correction or clarification, then they can tender them when I resume.

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MR COPLEY: All right.

COMMISSIONER: They might have changed their mind. Like, for example, I think Mr Rofe when he was here, as I understood him, his application for recusal related to all the Terms of Reference.

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MR COPLEY: Yes.

COMMISSIONER: It appears that Mr Bosscher's is more limited in its ambit. I will just check that with Mr Bosscher.

MR COPLEY: Yes.

COMMISSIONER: Mr Bosscher?

MR BOSSCHER: That is so, Mr Commissioner, and I wrote to the Commission in terms to that effect shortly after we adjourned on Tuesday of last week.

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COMMISSIONER: All right. So from your point of view anyway there's no problem with me doing everything else within the Order in Council, the only problem you have is me doing anything with respect to paragraph 3E; is that right?

MR BOSSCHER: That is so, Commissioner.

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COMMISSIONER: All right. Well, I will stand down. Is there anything else before I do that?

MR COPLEY: No.

COMMISSIONER: I will read the material I have been provided with and then we will resume - unless someone gives me a message that they want more time I will resume in 10 minutes.

MR BOSSCHER: Thank you, Commissioner.

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THE COMMISSION ADJOURNED AT 10.11 A.M.

THE COMMISSION RESUMED AT 10.23 A.M.

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COMMISSIONER: Now, Mr Bosscher and Mr Grundy, have you had a chance to read the CMC material?

MR BOSSCHER: I have had a chance to read the covering affidavits. The exhibits I haven't read in detail, but it's material that I'm familiar with.

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COMMISSIONER: Mr Grundy?

MR GRUNDY: I haven't seen them, Mr Commissioner.

COMMISSIONER: You haven't seen them?

MR GRUNDY: No, I didn't realise they would relate to me. I haven't seen them.

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COMMISSIONER: Right. Well, we might proceed. If you feel that it is progressing in a direction that you feel that because you haven't read them you are missing out-----

MR GRUNDY: Yes.

COMMISSIONER: -----let me know and we will rectify it.

MR GRUNDY: Thank you.

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COMMISSIONER: Now, Mr Bosscher, having read the material produced by the CMC, do you still persist in your application?

MR BOSSCHER: Thank you, Commissioner, I do. My instructions are to proceed.

COMMISSIONER: Right. All right then. Proceed away.

MR BOSSCHER: Thank you. As a preliminary matter I filed with the Commission on Friday, or Mr Lindeberg did, in fact, an outline of submissions. Attached to that outline were a number of documents. I would seek to tender those to form an exhibit as part of this particular application.

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COMMISSIONER: When you say, "a number of documents", how many?

MR BOSSCHER: There were nine.

COMMISSIONER: Nine. Okay, thank you.

MR BOSSCHER: Well, there were nine attachments. Some of those attachments comprised a number of documents, but they were clearly marked as individual attachments to my outline.

COMMISSIONER: Okay. Well, the position paper, as I will call it, and the annexures will be admitted and marked Exhibit 5 in these proceedings.

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ADMITTED AND MARKED "EXHIBIT 5"

MR BOSSCHER: Thank you, Commissioner.

COMMISSIONER: I am just thinking whether I will let you proceed with - you want to address your written submissions orally?

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MR BOSSCHER: I do.

COMMISSIONER: Right. Are you going to say something new?

MR BOSSCHER: I hope so.

COMMISSIONER: All right. It is just that I have read it, that is all.

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MR BOSSCHER: Yes, no, I will be enlarging upon certain aspects of it and some of what I say I hope is new and most importantly all of what I say I hope is of assistance.

COMMISSIONER: I'm sure it will be. All right. Mr Copley, I need a hand here. Should I deal with Mr Bosscher before I accept any documents, submissions or applications for leave from Mr Grundy or will I do that first and then go back to Mr Bosscher?

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MR COPLEY: I submit that you should hear Mr Bosscher's oral submissions now, then you should hear Mr Grundy's oral submissions, then you can determine in what order you wish to receive submissions should any be wished to be made by any of the other parties who have leave or authority to appear.

COMMISSIONER: Yes, no, I think that is the right way to go too. Yes, Mr Bosscher?

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MR BOSSCHER: Thank you, Commissioner. If it assists, I can assure you that my submissions will not be more than half an hour in duration.

COMMISSIONER: That is assuming I don't interrupt you, Mr Bosscher.

MR BOSSCHER: Again, Commissioner. Mr Commissioner, as was foreshadowed last week by Mr Rofe QC, this is an application requesting that you as Commissioner recuse yourself from hearing Term of Reference 3E of the Commissions of Inquiry order number 1 of 2012. As was already indicated by way of correspondence, the position adopted by Mr Rofe asking that you recuse yourself from the entirety of this particular matter is withdrawn and was withdrawn by way of correspondence last week. The sole focus for determination for this Commission in relation to Mr Lindeberg's application is solely in relation to term 3E and is to be confined to that particular term.

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Mr Commissioner, it is impossible to make such an application as this without going into some little detail, and I stress "little detail" in relation to the background of this particular matter, the matter that is commonly known in the public domain as either the Heiner Affair or Shreddergate.

COMMISSIONER: Yes, that would be helpful because I - you know, when everybody talks about the Heiner Affair, I'm not sure if they're all talking about the same thing, so I would like to know what it means in the context of your submissions.

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MR BOSSCHER: Certainly, Commissioner. Probably the best way to articulate it is the material contained in the attachments to my outline would contain all of the relevant material that we would say constitute the Heiner Affair, but a little explanation on to the back - in relation to the background of it will assist.

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Commissioner, Term of Reference 3E, as you know, requires you to consider and to make full and careful inquiry in an open and independent manner of Queensland's child protection system with respect to reviewing the adequacy and appropriateness of any response of and action taken by Government to allegations including any allegations of criminal conduct associated with Government responses into historic child sexual abuse in youth detention centres. Mr Copley SC when he opened his address to this Commission last week firmly put the Heiner Affair on the agenda and he affirmed its relevance for consideration under term 3E when he addressed you, and I could take you to what he said, but I don't see the necessity of doing that.

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COMMISSIONER: No, I remember what he said. Are you going to address - see, I see that there are two issues here. They're related and they can't be severed. One is the scope of the Term of Reference, that is, what does it require me to look into and report on.

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MR BOSSCHER: Yes.

COMMISSIONER: Then the separate but related question is is anything I've done in the past in my capacity as Crime Commissioner going to embarrass me in performing that role or in some way undermine community confidence in the findings and authority of the Commission because of apprehended bias? All right. They're the two limbs of your argument, aren't they?

MR BOSSCHER: Yes, your Honour.

COMMISSIONER: Okay. Can you address me on the scope of the Term of Reference first because until you decide that you can't know what the relevance of anything I did as Crime Commissioner is, can you?

MR BOSSCHER: That's a point that I do intend to address you upon and if-----

COMMISSIONER: Can you do that first?

MR BOSSCHER: I can. I will just find the relevant area where I've made some notes on that particular point, Commissioner.

COMMISSIONER: Maybe if I pose a question-----

MR BOSSCHER: Certainly, your Honour.

COMMISSIONER: -----you might not need your note. It talks about what Government did or how Government responded. What does that mean?

MR BOSSCHER: Well, that was foreshadowed by Mr Copley in his opening remark to you, Commissioner, or the opening remarks to the Commission and the term "Government" was not - there is no definition section attached to the order that forms the Term of Reference of this Commission and so the definition or to use your Commissioner's word the scope of the term "Government" is one that is relevant. It is to be submitted on behalf of Mr Lindeberg in support of this application that a narrow reading of the term "Government" to simply be confined to elected officials and public servants would be, with respect, reading that far too narrowly in all the circumstances and that the term - particularly given what this Commission is required to do in total, the term must be read to include other Government agencies and statutory authorities and it is submitted on behalf of Mr Lindeberg that the Crime Commission and your role as the Queensland Crime Commissioner at a point in time is something that must come under the Terms of Reference 3E, as would all other Government agencies either direct or quasi Government agencies such as Corrective Services, then CJC, the now CMC, Department of Family Services and its various names over the course of time, but you couldn't properly consider Term of Reference 3E, nor could you properly consider many of the other Terms of Reference with respect if the term "Government" was given its narrow interpretation.

COMMISSIONER: Okay, let's just test that. Every other Term of Reference, except 3E, looks forward. 3E looks backwards.

MR BOSSCHER: Yes.

COMMISSIONER: It, in fact, uses the word "historic". I think intended to be "historical" rather than "historic" and it wants to look at how Governments responded to child - alleged

or suspected child sexual abuse in youth detention centres.

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MR BOSSCHER: Yes.

COMMISSIONER: It is confined to that and then buried in that is a direction to investigate whether a Government's response or action was allegedly criminal in nature. Now, as I understand Mr Lindeberg's propositions, it is that the shredding of the documents collected by Magistrate Heiner in the course of his inquiry into the rape at the John Oxley Youth Detention Centre amounted to criminal interference in the process and began a cover up - Government-wide coverup of the information that Mr Heiner's documents disclosed. Is that right?

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MR BOSSCHER: In summary, yes, that is right.

COMMISSIONER: So there are three concerns your client has got. One is that the rape incident - the original rape incident was never properly investigated by law enforcement.

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MR BOSSCHER: That's so.

COMMISSIONER: That's so. The second one is that the Heiner documents were shredded, so therefore other than Mr Heiner nobody - and those who were involved in the inquiry, the general public is denied access to the information contained in those documents.

MR BOSSCHER: That is so.

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COMMISSIONER: And to the extent that those documents embarrassed Government, the shredding of them meant that that embarrassment was never going to be brought to light.

MR BOSSCHER: That is also correct in its scope, yes.

COMMISSIONER: Yes. The third thing is the shredding didn't only destroy evidence, but it triggered a coverup which over the years has involved everybody, I think, from the Premier up to the Governor; is that right?

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MR BOSSCHER: That is - not that it has involved, Mr Commissioner, that it may have involved.

COMMISSIONER: All right.

MR BOSSCHER: Mr Lindeberg doesn't prejudge effectively the rights or wrongs of what's occurred, what he brings to this Commission and through the Heiner Affair in his pursuit is the request that somebody make those determinations as to whether those events have occurred.

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COMMISSIONER: That's right, that's why I called them his concerns.

MR BOSSCHER: Yes, they are his concerns.

COMMISSIONER: He doesn't have confidence in this Commission because it is set up by Government of being able to look at whether there was systemic corruption within Government over the years.

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MR BOSSCHER: No, that's - with respect, sir, that's not the case. He has the upmost confidence in this Commission and your role as Commissioner so far as they - so far as it touches on the other Terms of References. His sole concern is confined to the fact that as the Commissioner - the Queensland Crime Commission, therefore the head of what is submitted as a Government agency-----

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COMMISSIONER: All right.

MR BOSSCHER: -----at the relevant time, you, Commissioner, in a nutshell may, in fact, be called upon to judge your own conduct in relation to your involvement and the Commission's involvement in the Heiner Affair.

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COMMISSIONER: That would be untenable. If that was right, that would be untenable.

MR BOSSCHER: That's the position that is ultimately advocated in my outline and also I will advocate if necessary, of course, in my submissions. So the fact-----

COMMISSIONER: But - sorry-----

MR BOSSCHER: If I may, sir?

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COMMISSIONER: Yes.

MR BOSSCHER: The fact that it is set up by Government is of no concern to Mr Lindeberg.

COMMISSIONER: All right.

MR BOSSCHER: In fact, part of the submissions I was to make to you, Commissioner, is that the pre-election promises by the then Opposition and the subsequent statements whilst in Government having been followed through by the creation of this Commission and addressing term 3E in particular, which is his relevant cause, should be the subject to the upmost commendation.

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COMMISSIONER: Okay. Now, the Government has given me this job with lots of Terms of Reference and there's only three, but there's a lot of subparagraphs to those Terms of Reference.

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MR BOSSCHER: Yes.

COMMISSIONER: It is a systems wide review. They have given me to the 30th of April to report on that. Now, if I was to interpret 3E - the word "Government" in 3E as broadly as you contend, I wouldn't - I would still be here, wouldn't I, until the following April?

MR BOSSCHER: I can't answer that question, of course, without a crystal ball, but the task that's required of you under 3E is a vast one. The matter that we call the Heiner Affair has had a course of life now of nearly 22 years. It's been touched upon in one forum or another, one Commission or inquiry or another, on at least 11 separate occasions that I'm aware of.

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COMMISSIONER: How long do you reckon it would take us to do it?

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MR BOSSCHER: If it was-----

COMMISSIONER: Proper?

MR BOSSCHER: Properly?

COMMISSIONER: Yes.

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MR BOSSCHER: I would estimate that hearings in relation to the matter, because most of it can be done on the documents, they're not controversial of themselves, could be done within a month or two at the outside.

COMMISSIONER: What about assessing the documents? How many are there?

MR BOSSCHER: There would be in the vicinity of 2 to 3,000 pages.

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COMMISSIONER: So how many more months should I add on for that?

MR BOSSCHER: Again, without a crystal ball I can't answer you, but again with respect the time that's required for you to fulfil your obligations if as I submit they are on behalf of Mr Lindeberg under 3E is maybe not the most primary consideration in Mr Commissioner determining this matter.

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COMMISSIONER: No, it's not and, as you say, you can't work out how long it is going to take because it takes as long as it needs to.

MR BOSSCHER: That's so.

COMMISSIONER: But it does help, doesn't it, in trying to work out what was intended taking the whole Order in Council into account, what was intended by the word "Government"?

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MR BOSSCHER: That is so, but it is submitted, with respect, that the Order in Council that you have and extraneous material leading up to the creation of this inquiry into your appointment is such that it contemplates very clearly, as Mr Copley said in his opening address to the Commission, an examination of the Heiner Affair and that's not, I don't think, controversial. The proposition that you put, Mr Commissioner, that that examination be confined solely to a

narrow reading of the term "Government" would, I submit, be an impossible task in many respects and you could not adequately address the role of Government in the Heiner Affair without by simple necessity of then travelling into all of the other areas as you proceed down that path because all of the other things that have happened in one form or another have touched upon various areas of Government and gone backup through the executive to Cabinet, to the speaker of the House of Representatives, to the Governor and a lot of the activity or - in this particular case inactivity of relevant Government agencies cannot be fenced away for you to adequately consider that Term of Reference.

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COMMISSIONER: So what's the main focus - what does it become? Is it the coverup that's the main focus or is it the shredding of the documents or is it the initial incident of the alleged rape?

MR BOSSCHER: All of them - it is impossible to prioritise one as being more important than the other. All of them have vast repercussions in every respect so far as the conduct of Government in its broader sense to this particular matter. All things are equally heinous, if I can use - phrase it that way.

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COMMISSIONER: Okay. So very serious allegations touching successive Governments since the early nineties-----

MR BOSSCHER: Yes.

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COMMISSIONER: -----to today or till - at least until the Commission of Inquiry was constituted.

MR BOSSCHER: Certainly until recent times, yes.

COMMISSIONER: Involving Government and all its organs - all its relevant organs.

MR BOSSCHER: Or those that participated one way or another, yes.

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COMMISSIONER: Yes, or those that should have.

MR BOSSCHER: Or those who should have, yes.

COMMISSIONER: Right. You would say because that includes the Crime Commission I couldn't - and because there is a grievance about the Crime Commission's inaction-----

MR BOSSCHER: That's so.

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COMMISSIONER: -----I couldn't Judge myself objectively.

MR BOSSCHER: That's again - in an abbreviated format, that is the submission that is put forward and contended.

COMMISSIONER: Because there would be a conflict between my duty to investigate and my self-interest in not investigating

myself too harshly.

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MR BOSSCHER: Certainly, Mr Commissioner.

COMMISSIONER: All right. Well-----

MR BOSSCHER: The argument put another way is that a fair-minded person could reasonably form the view that the inaction of the Crime Commission when all of the circumstances are considered was not an unreasonable position that was adopted, but it is also submitted and has been in the public forum that the inactivity of the Crime Commission could, in the mind of a fair and reasonable person, be subject to criticism and judgment and when both of those hypotheses are competing with each other and provided they meet the test of being fair and reasonable, ultimately, Commissioner, you will be called upon, it is submitted, to effectively judge yourself and the Commission of which you were head at the relevant time.

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COMMISSIONER: Well, not only that, I might have to call myself as a witness, mightn't I?

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MR BOSSCHER: That is so.

COMMISSIONER: Could you have a look at annexure C to the affidavit of Ms May which is Exhibit 4?

MR BOSSCHER: Yes.

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COMMISSIONER: As I understand it, what happened was - and you tell me if I am wrong - Mr Grundy published some articles in the newspaper in early November 2001.

MR BOSSCHER: That's so.

COMMISSIONER: The Crime Commission was going to merge with the CJC to become the CMC at midnight on the 31st of December; is that right?

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MR BOSSCHER: That's my recollection that was the case, yes.

COMMISSIONER: Yes. The matter was specifically raised with me by Mr - by your client at a meeting at the Crime Commission on the 13th of December.

MR BOSSCHER: That's so.

COMMISSIONER: That was within 24 hours of him writing to me asking to meet me on the 12th.

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MR BOSSCHER: That's so.

COMMISSIONER: Okay. Then what I did - and he was at that time requesting for me to refer to the Management Committee a request to ask me to investigate the incident at the John Oxley Centre.

MR BOSSCHER: Yes, the term that your Assistant Commissioner uses is criminal paedophilia. 1

COMMISSIONER: Yes, that's right.

MR BOSSCHER: I'm not sure what non-criminal paedophilia is, but criminal paedophilia.

COMMISSIONER: Well, it's basically child sex offences. The Crime Commission had a standing reference to look at that. 10

MR BOSSCHER: That became apparent to Mr Lindeberg upon receiving a response from the Assistant Commissioner.

COMMISSIONER: That's right, and then that response was received on the 19th of December. That's six days after the meeting, right?

MR BOSSCHER: Yes, that's so. 20

COMMISSIONER: It looks like I referred Mr Lindeberg's request to the General Counsel and the Assistant Crime Commissioner for advice by the 21st.

MR BOSSCHER: I don't dispute that.

COMMISSIONER: That's document A.

MR BOSSCHER: Yes. 30

COMMISSIONER: All right. I did that on the 13th. That's the same day that Mr Lindeberg saw me.

MR BOSSCHER: Again, I don't dispute that again.

COMMISSIONER: Then in the letter to - then the letter you have referred to from the Assistant Crime Commissioner was sent to Mr Lindeberg on the 19th, six days later.

MR BOSSCHER: Yes. 40

COMMISSIONER: He then says, "I'm writing to you instead of Mr Carmody because he's no longer here."

MR BOSSCHER: It does say that you're on leave, yes.

COMMISSIONER: Yes. So therefore - well, I am on leave and I'm not coming back.

MR BOSSCHER: Well, that may be the case. 50

COMMISSIONER: Right.

MR BOSSCHER: I don't know whether the fact that whether you were still the Crime Commissioner at that point in time-----

COMMISSIONER: I would have still held the office, yes.

MR BOSSCHER: I would anticipate you still held that position.

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COMMISSIONER: That's right, I did, until the 30th - until midnight on the 30th of December.

MR BOSSCHER: Yes.

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COMMISSIONER: And then Mr Callinan explains a couple of things to Mr Lindeberg and says one, it's a major crime, but the Crime Commission can't do major crime without a reference from the Management Committee and the Management Committee doesn't have a quorum because the community representative's just resigned.

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MR BOSSCHER: Well, he does say that, but that's said in error, it's submitted.

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COMMISSIONER: Right. Well, unless you've got something to show that that's an error, I'll work on the basis that this is accurate.

MR BOSSCHER: It's using my terms, but it's stated in the balance of the letter that that assertion is incorrect.

COMMISSIONER: Righto, but in any event this is what Mr Callinan's working on. Let's assume - let's give him the benefit of the doubt and assume that he believes it, even if it might actually be wrong. Can we do that?

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MR BOSSCHER: Certainly. On page 2 is where I'm referring.

COMMISSIONER: Okay, but I'll just follow it through. So - and then he says, "But in any event it doesn't matter. Even if we did have a quorum it's too late for us to be investigating this now. It's something that happened a long time ago and the Crime Commissioner himself had actually never sought a reference of a major crime personally in its history."

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MR BOSSCHER: That may be the case, yes.

COMMISSIONER: I'm just going through what he's explaining to Mr Lindeberg, and then he says, "Oh, by the way, it would also fall within criminal paedophilia, and we've had a standing reference to investigate that area and our files will go over to the CMC when it's created and it can make up its own mind"; right?

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MR BOSSCHER: Can I make some comments-----

COMMISSIONER: Just bear with me. Because then Mr Lindeberg writes back and he says, "Yep" - this is attachment C.

MR BOSSCHER: Yes.

COMMISSIONER: "My initial approach was seeking a referral by the Management Committee because of Bruce Grundy's articles and he says, "While this belief is now - has proved not to be" - sorry. "It appears that I may have failed to explain or avert adequately to the full [indistinct] extent of the possibility criminality involved and hence I need to clarify it." Right?

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MR BOSSCHER: Yes.

COMMISSIONER: So on the 21st of December he's clarifying matters that he discussed with me on the 13th when I'm on leave and the Assistant Crime Commissioner is the person receiving this correspondence from Mr Lindeberg; right?

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MR BOSSCHER: Yes.

COMMISSIONER: He says, "It's now clear that this new evidence enlivens the Commission's jurisdiction on criminal paedophilia." So he's picked up on what Mr Callinan's pointed out, and he says, "Not only is it a major crime but it's criminal paedophilia as well", and he respectfully requests - well, no. He requests that an investigation under the standing reference commence immediately.

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MR BOSSCHER: Yes.

COMMISSIONER: Right, and he lodges at that time and for the first time, it appears - he lodges a complaint concerning the cover up of criminal paedophilia at the John Oxley Detention Centre in which the shredding of the Heiner Inquiry documents and related matters are linked. Right?

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MR BOSSCHER: I - we'll discuss that part with you in a moment, yes.

COMMISSIONER: So, it appears that - well, then he goes on to ask for the appointment of a special prosecutor instead of the CMC to look at - instead of the QCC to look at it.

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MR BOSSCHER: Yes.

COMMISSIONER: So, it seems at least up until the 21st of December there's still some sorting out to do about exactly what type of investigation and under what authority and which body Mr Lindeberg wants to investigate his complaint.

MR BOSSCHER: Again I'll address you on that in a moment.

COMMISSIONER: Okay. You can address me now on it.

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MR BOSSCHER: If we go back, Commissioner, to firstly. Exhibit B to that particular affidavit.

COMMISSIONER: Yes.

MR BOSSCHER: The point I was going - I was endeavouring to make when you were going through that is that the body of the first page of the letter indicating that the Crime Commission couldn't investigate the matter because there was no Management Committee and the Crime Commission had never asked the Management Committee for a term of reference, et cetera, is completely negated by the second part of the particular letter which says that there's a standing reference for the Crime Commission to investigate the very matters relevant to Mr Lindeberg's-----

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COMMISSIONER: No, see, that's what I was trying to clarify

with you. It appears when Mr Lindeberg came to see me, and if you have a look at the front of his dossier that he left with me, "Request for referral to Queensland Crime Commission for investigation."

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MR BOSSCHER: Yes.

COMMISSIONER: Right. He was requesting the referral of the rape incident as a major crime.

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MR BOSSCHER: Yes.

COMMISSIONER: And it wasn't until Mr Callinan wrote to him on the 19th that he became aware that the Crime Commissioner or the Crime Commission didn't really need a reference to investigate the rape because it could investigate it under its criminal paedophilia standing reference, if it so chose.

MR BOSSCHER: That's so.

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COMMISSIONER: So then it changes. It goes from a major crime involving the rape to a criminal paedophilia related investigation involving a cover-up of child sex abuse at the John Oxley Centre. That's what happened, isn't it?

MR BOSSCHER: Well, it doesn't go to that as the letter - the first letter sent to you, Commissioner, and the documents contained in the file that were on my instructions provided to you on the 13th of December at that meeting all cover quite comprehensively those particular issues in quite some detail.

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COMMISSIONER: Yes.

MR BOSSCHER: And that the Assistant Commissioner was in possession of all that material at the time. So, whether Mr Lindeberg is in error as to his assertion that a term of reference or a referral from the Management Committee is required or not is not particularly relevant if - within the knowledge of the Crime Commission, that it doesn't require such a term of reference and could have proceeded in any event.

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COMMISSIONER: It could have, but it - that's right. So he was asking for a reference but a reference wasn't needed because it fell within criminal paedophilia.

MR BOSSCHER: Yes.

COMMISSIONER: But then what he was saying was that the shredding of the Heiner documents was well within criminal paedophilia as well, because it was inextricably linked.

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MR BOSSCHER: There is an argument that that could be the case. It certainly doesn't remove an obligation, with respect, on the Commission it's submitted.

COMMISSIONER: Yes, but he didn't come up with that until the 21st of December.

MR BOSSCHER: Well, again with respect I'd disagree insofar as that the material provided initially - and more importantly if you look at annexure D of the same affidavit, the issue of the rape was within the purview of the Commission as at 5 November of 2001, the exact same issue that Mr Lindeberg subsequently brought to the attention of the Commission.

COMMISSIONER: It was within the purview in the sense that it was technically within the Commission's power to investigate that incident since its inception in 1997.

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MR BOSSCHER: Well, that's so, but the only-----

COMMISSIONER: It occurred in 1990, didn't it?

MR BOSSCHER: No. I believe from memory 1988. May 1988, the incident.

COMMISSIONER: Okay.

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MR BOSSCHER: But again if I take you to annexure D of that same affidavit, that's the first record that we have or that is in existence that we're aware of, which indicates that quite clearly this particular issue involving this particular female, this 14 year old girl, was within the knowledge - the specific knowledge of the Commission as opposed to just general criminal paedophilia as at 5 November 2001 and as part of what you will need to assess with respect under term 3E. The decision made at that time to take no further steps in relation to that newspaper article or investigate that particular matter is something again that you may be called upon to judge as to whether or not the response of the Queensland Crime Commission was appropriate in not following through with that particular matter.

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COMMISSIONER: What should it have done that it didn't do? What should it have done that it didn't do?

MR BOSSCHER: It should have at least commenced an investigation and made sure that a relevant and appropriate body was tasked to investigate the matter.

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COMMISSIONER: Didn't Mr-----

MR COPLEY: Mr Commissioner, I'm reluctant to intervene, but I apprehend my role to be somewhat different to - to that of counsel in an ordinary proceeding, be it civil or criminal. I just wish to posit for your consideration this point: that Mr Bosscher and you both agreed that the central matter for determination this morning was the ambit of paragraph 3E of the Order in Council, and-----

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COMMISSIONER: Yes.

MR COPLEY: -----if paragraph 3E in its ambit was sufficiently wide to include the response of the Queensland Crime Commission-----

COMMISSIONER: I'd stand down.

MR COPLEY: Exactly. So, what I'm perhaps positing respectfully for you to consider is whether this exchange between yourself and Mr Bosscher-----

COMMISSIONER: Is very fruitful.

MR COPLEY: -----is really going to help you make a determination about that matter.

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COMMISSIONER: Well, it's probably not, so thanks, Mr Copley. Did you want to say anything more about the width of term 3E?

MR COPLEY:

MR BOSSCHER: At the risk of incurring Mr Copley's ire again, along with you, Mr Commissioner, I will just follow-up on the last comment that you made, or the question that you posed to me because it speaks to the actual crux of the application. You posed to me the question of what should it have done? That's a matter, with respect, that I submit is appropriately for consideration under term 3E and by so being under term 3E if the broader view of the term government is adopted that's a matter that - that's a question that, Commissioner, you may be required to pose to yourself.

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COMMISSIONER: And it's one I couldn't answer.

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MR BOSSCHER: Of course.

COMMISSIONER: No, we accept all that, so that, as Mr Copley reminds us, takes us back to the ambit of the term of reference.

MR BOSSCHER: I forget the last question you asked me.

COMMISSIONER: Is there anything you wanted to say about the interpretation of any word in the term of reference that might assist about its scope?

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MR BOSSCHER: There are only two words that require interpretation, for want of a better term, and I must submit statutory interpretation has never been my strong suit, however, they are the term government, of course, as outlined by Mr Copley and then, of course the term historic child sex abuse. I don't really intend to address you unless you require me to in relation to the latter because it seems to be the case that Mr Copley has conceded, for want of a better term, that the Heiner affair or the allegations in relation to the pack rape at the John Oxley Detention Centre fall within that term of reference.

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COMMISSIONER: Well, let's assume for present purposes that it does.

MR BOSSCHER: Yes. So the only other term, unless you have

something specific in mind, is the one that we discussed earlier and that is the term government.

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COMMISSIONER: Did you want to add anything to what you've already said about that?

MR BOSSCHER: No, other than I can only say that even if you were to form the view, and it's submitted that you shouldn't, that the term be read narrowly to include executive and public servants and perhaps representatives of the Crown, even if you were to confine it to that in an endeavour to put a fence around that, it is inevitable when considering the roles of those particular bodies, parties and individuals that you will, with respect, end up back down the path of investigating the agencies that were providing information, recommendations, referrals, et cetera, to those particular bodies and even with trying to narrowly define that term as a - and I mean no disrespect by this - as an artifice to try and contain it, it's not going to be successful and there's every possibility that with respect you would be unable to fulfil your functions then as that matter was enlarged and undeveloped, and given the rather unenviable history of this State over recent decades in relation to its commissions of inquiry, or at least in relation to some of them, it's for that very reason that this matter is put on the record now at the commencement of the inquiry rather than at some point in time when it may otherwise have become relevant.

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COMMISSIONER: That's why I provoked it, Mr Bosscher.

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MR BOSSCHER: Sorry, your Honour - Commissioner?

COMMISSIONER: Why I provoked the issue.

MR BOSSCHER: And to your credit and to the credit of this Commission that it get dealt with now and we not end up with an aborted inquiry or an aborted partial inquiry in relation to this matter.

COMMISSIONER: Okay. Now, should Mr Bosscher address his other limb of the argument, or should we deal with - how would you like to deal with it, Mr Copley?

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MR COPLEY: If by reference to that you're directing attention to the apprehended bias point-----

COMMISSIONER: No. You've dealt with that as well, haven't you?

MR BOSSCHER: I've dealt with that at length in my written outline and also I believe adequately in - not my oral submissions but in my address or conversation with you, Mr Commissioner.

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COMMISSIONER: Yes. So, as I understand it, I can't investigate what I did as Crime Commissioner if that's what term 3E requires me to do-----

MR BOSSCHER: That's so.

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COMMISSIONER: -----because that would offend the rule against being a Judge in your own course-----

MR BOSSCHER: Yes.

COMMISSIONER: -----and it would undermine public confidence in whatever conclusion I reached.

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MR BOSSCHER: Yes. There are some other matters in relation to the issue of apprehended bias which are contained in my affidavit - sorry, my outline which are previous statements made by you as Commissioner in this forum and at the time of your appointment, et cetera, but those of themselves I don't think would be sufficient on their own to be-----

COMMISSIONER: But are they part of the context?

MR BOSSCHER: They are, and they're also contained in the written outline and unless you want me to specifically address you on them I'd be almost reciting what it is that I've already written.

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COMMISSIONER: I don't think that that's necessary, but that's part of the indicia of apprehended bias that you would want the fair-minded onlooker to take into account.

MR BOSSCHER: Yes, that is so, Commissioner.

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COMMISSIONER: Okay. All right. I understand that. Thanks, Mr Bosscher.

MR BOSSCHER: Commissioner, you referred to the second limb of my argument. I'm at a little bit of a loss.

COMMISSIONER: No. Well, that was really it. I wanted to know what the full context of it was and I thought that you dealt with it all in your written submission.

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MR BOSSCHER: I have.

COMMISSIONER: Okay. No, that's all right.

MR BOSSCHER: I would seek opportunity, if I may, and with your leave, to make some further comments that I believe are relevant but don't necessarily speak specifically to the issue. I'm not using this as a forum to grandstand, but-----

COMMISSIONER: Well, I don't know. You can't unring the bell, Mr Bosscher.

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MR BOSSCHER: No, but if I speak slowly-----

COMMISSIONER: So if you say something irrelevant, what am I going to do with that?

MR BOSSCHER: Well, if I speak slowly it will give you an

opportunity to throw something at me before I finish.

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COMMISSIONER: Okay. Well, tentatively I'll allow you to proceed, Mr Bosscher.

MR BOSSCHER: Thank you, Commissioner. I think it important to put on the record the fact that for whatever motivation that the examination of the Heiner affair has effectively constituted the last 22 years of work with Mr Lindeberg.

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MR COPLEY: Well, in my submission that's - that's not relevant. You have not questioned the sincerity of the application for refusal.

COMMISSIONER: No. No. I'll make it clear that clearly Mr Lindeberg and Mr Grundy are sincere, dedicated and committed to their course in the pursuit of truth and justice.

MR BOSSCHER: Yes, and I was going to go on to say that it's with quite some reluctance given the contents of term 3E that Mr Lindeberg feels compelled to bring this application because term of reference 3E has effectively contained all of those matters that he has been agitating for proper resolution for 22 years. So, he doesn't bring this application lightly and in many respects he brings it reluctantly because he believes it's the right position to adopt to ensure the proper outcome in relation to the review of the Heiner matter, despite what some may regard as his personal interest in effectively taking what has been offered by this government for an examination of the matters that he holds dear to his heart. That's as far as I intend to make it.

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COMMISSIONER: No. I accept that he's making the application in good faith and in the public interest chiefly so that the community can have confidence in the conduct of the inquiry and its outcome.

MR BOSSCHER: Thank you, Commissioner. Unless I can assist you further, they would be the submissions on behalf of Mr Lindeberg.

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COMMISSIONER: Thanks, Mr Bosscher. Now, Mr Grundy, Mr Copley? Mr Grundy?

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MR GRUNDY: Thank you, Mr Commissioner. This is very unfamiliar territory for me and if I transgress in any way because I'm not a qualified lawyer, I'm sure you will pull me up. I want to say at the outset that I am here in the same regard as Mr Lindeberg. I have pursued this matter assiduously for well over a decade and, indeed, close to 20 years and it is a great relief in a sense for this Commission to finally be looking at that matter, however, I'm here really because of your remarks a week ago in which you said you had a fortnight in which to consider the matter of the girl - of a girl being raped and-----

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COMMISSIONER: No, I think I said that I was gone within a fortnight of the 13th of December.

MR GRUNDY: Well, my-----

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COMMISSIONER: In fact, it turned out I was gone really six days.

MR GRUNDY: Okay. Well, regardless of that, the reality as it relates to me is that I wrote a story that appeared on the 3rd of November - in fact, there were two stories in that newspaper on the 3rd of November and I believed that the Crime Commission would have a capacity to peruse the local press. Nevertheless, as I said in my written statement-----

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COMMISSIONER: Actually, before you go on we might give that written statement an exhibit number. You have given two, haven't you? You have made an application for leave to appear.

MR GRUNDY: Yes.

COMMISSIONER: Then you followed that up with a submission on the issue of recusal.

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MR GRUNDY: Yes, Mr Commissioner.

COMMISSIONER: I make your written application for leave to appear Exhibit 6.

ADMITTED AND MARKED "EXHIBIT 6"

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COMMISSIONER: Your submissions on the present point, Exhibit 7.

ADMITTED AND MARKED "EXHIBIT 7"

COMMISSIONER: Okay, sorry.

MR GRUNDY: The stories appeared on the 3rd of November and as I said I would have assumed the Crime Commission would have a capacity to peruse material in the local newspapers as they might impinge on its activities. However, as I said in my submission, I have learned over the years to assume nothing and I rang the Queensland Crime Commission on the Monday morning, the 5th of November, to alert the Commission to the fact that those stories existed and having done that I believe that I had enlivened the Commission's interests in a matter of criminal paedophilia which was covered in your Act to give you a standing reference to deal with such a matter.

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As the weeks went by I reported on other matters related to that incident and linking it to the Heiner Affair, but I also revealed the story of another girl who was raped - at least a claim that she made that she was raped in the John Oxley Youth Centre and that occurred by the 20th of November.

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So my position here is, given the ambit of 3(e), why would it not be reasonable for the average citizen to ask what the Crime Commission did or, indeed, why it appears that it did nothing in relation to matters of criminal paedophilia which were brought to its attention? It seems to me that somewhere down the track in this process one will have to ask the Crime Commissioner what his response to those propositions is. Now, the Crime Commissioner is the person conducting this Commission and it seems-----

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COMMISSIONER: It would be efficient, but it wouldn't be very satisfactory.

MR GRUNDY: Well, indeed.

COMMISSIONER: Mr Grundy, you then are also in Mr Bosscher's position with respect to what "Government" means in 3E.

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MR GRUNDY: Yes.

COMMISSIONER: Does it include the Crime Commission and bodies like it?

MR GRUNDY: Yes, sir.

COMMISSIONER: So do you want to address that point?

MR GRUNDY: Well, being a simple soul and just a citizen, my determination and definition of "Government" is all the agencies of Government. I don't see Government as the Executive Building. I don't see Government as the Parliament. I don't see Government as a bunch of politicians. I see Government as a manifestation of being governed - the community being governed by those people that it elects to do the job and they then create a whole environment in which that is carried out and so that-----

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COMMISSIONER: It is that environment that 3E-----

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MR GRUNDY: That environment is embraced within 3E.

COMMISSIONER: Yes, I understand that. Just to shorten things, I think you're right, if the Crime Commission is included within the term "Government"-----

MR GRUNDY: Yes, sir.

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COMMISSIONER: -----then people would be entitled to know what the Crime Commission did and didn't do and why.

MR GRUNDY: Yes.

COMMISSIONER: If it is included, there's no way in the world that I can continue to sit.

MR GRUNDY: I did say in that submission - I did say in that submission that you or the Crime Commission may have a response to that, but you are not in a position, in my estimation, to consider your response. Someone else has to consider your response if we are to have, you know, faith in the operation of this.

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COMMISSIONER: Yes, no, I perfectly understand, Mr Grundy.

MR GRUNDY: The only other-----

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COMMISSIONER: But I don't think that's a controversial proposition.

MR GRUNDY: Thank you. The only other thing I would say, and it is in that submission that I made to you, is that you and I did talk about this matter admittedly after you had finished up in your role, but we did talk about it and I raised with you then the matter of why the Crime Commission had not acted in this regard.

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COMMISSIONER: Yes.

MR GRUNDY: You did recall in that conversation that you had knowledge of the pack rape incident, so it just seems to me to heighten my concern that with the greatest of respect you are not the right person to conduct the inquiry into 3E.

COMMISSIONER: I perfectly understand your - clearly understand your Commission, Mr Grundy.

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MR GRUNDY: Thank you, Mr Commissioner.

COMMISSIONER: Now, Mr Copley, did you want to respond?

MR COPLEY: Yes, I will make some submissions now, if that is convenient.

COMMISSIONER: Yes.

MR COPLEY: I would invite, Mr Commissioner, you to have regard to the document that was made Exhibit 1 last Tuesday, namely the Order in Council.

COMMISSIONER: Yes.

MR COPLEY: My submission about the ambit of paragraph 3E of that order is to be developed as follows: that pursuant to the Order in Council, the Commissions of Inquiry order number 1 of 2012, you are required to make "a full and careful inquiry" of "Queensland's child protection system" with respect to five matters. Matter A requires you to review the progress and implementation of certain reports made in one case in May 1999 and in the other case in January 2004. Matter B requires you to review Queensland legislation concerning the protection of children, including a Statute passed in 1999 and a Statute passed in 2000. Matter C requires you to review the effectiveness of Queensland's current child protection system in four areas, namely the adequacy of available resources and whether available resources could be used more efficiently, the current Queensland Government response to those persons in the system and the appropriate level of support for frontline staffing, the process from intervention through to Court or Tribunal outcomes, and the passage of children into and out of the system. You are required fourthly to review the complaint mechanisms for the system and to identify ways to improve oversight of public - oversight and public confidence in the system. Lastly, you are required to review the adequacy of and the appropriateness of any response of an action by Government to allegations into historic child sexual abuse in youth detention centres, including allegations of criminal conduct associated with Government responses into such allegations.

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The Order in Council also lists matters that you are not to have regard to. Relevantly to paragraph 3E of the Order in Council you are not to have regard to the operation generally of youth detention centres. The Order in Council directs that you are to make a full and faithful report and recommendations on the above-mentioned subjects and to then transmit the report and recommendations to the Premier by the end of April next year and it is significant that you are required to make a full report on all of those subjects by April next year.

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The relevance of that time frame is this: that it is a matter that informs how you are to interpret the ambit of your terms of reference. In the matter of Ferguson versus Cull or Ferguson and Cull, rather, [2002] FCA 1411, Justice Branson said that the nature and extent of the Commissioner's inquiries and the detail of the measures recommended by him will be influenced by the time frame within which he is required to work and the resources provided to him. In making recommendations you are required to chart what is described as a new road map for the system, the child protection system, for the next decade, but in so doing you are injected to be mindful of certain financial or economic considerations and

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you are to ensure that you make recommendations about four particular topics.

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None of those four topics, though, have any obvious connection with paragraph 3E of the Order in Council. It is for you to determine the scope of the inquiry by reference to the paragraphs contained in the Order in Council and for that proposition I rely upon Easton and Griffiths (1995) 69 ALJR page 669 per Justice Toohey at 672 paragraphs A to B and 674 paragraphs B to C; Ross and another and Costigan (1982) 64 Federal Law Reports 55 at 69 and an unreported judgment of Justice Ashley in the matter of Firman versus Lasry [2000] VSC 240 at paragraph 283.

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Now, the Order in Council does not define any of the terms employed in it. An Order in Council, though, is a statutory instrument pursuant to section 7(3) of the Statutory Instruments Act of 1992.

Subject to certain exceptions, the Acts Interpretation Act of 1954 applies to a statutory instrument, however neither the Statutory Instruments Act nor the Acts Interpretation Act defines the expression "Government".

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Insofar as paragraph 3 is concerned, there are a couple of matters to be noted. The first is is it to be regarded as confined to a review of responses and actions of Government concerning allegations of abuse in those places actually styled as youth detention centres? It seems that the places known as Cleveland, John Oxley, Westbrook and Sir Leslie Wilson only came to be called, for example, the Cleveland Youth Detention Centre on and from the 1st of September 1993, and for that proposition I rely upon the Juvenile Justice Regulation 1993 SL number 314 of 1993, regulation 8 thereto in the schedule, or is the expression in paragraph 3E, "Youth Detention Centres", to be regarded as permitting you to review in the manner indicated allegations connected to places of detention set aside for persons who are not adults howsoever those places were then described.

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COMMISSIONER: It's a question of whether you look at the label on the bottle or what's in it.

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MR COPLEY: Yes. My submission is that you would regard Term of Reference or paragraph 3E as requiring you to have regard to places set aside for the detention of people who are not adults in the criminal justice system so that you would-----

COMMISSIONER: Well, it's function, whatever it does - whatever it is called, doesn't matter, it is what it does that matters.

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MR COPLEY: That's right. That's right. If you take that view of the ambit of paragraph 3E then you are, indeed, entitled to look back to what may have occurred at the John Oxley Youth Centre or what occurred in connection with it even if the alleged incident might have occurred somewhere else.

COMMISSIONER: Provided that comes within the term "historic child sexual abuse".

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MR COPLEY: Yes, and comes within the term "Government". Paragraph 3C, on the other hand, speaks of current Queensland Government responses to matters. That can be contrasted again with paragraph 3E which speaks of responses and actions by Government and allegations of criminal conduct associated with Government responses. So that serves to illustrate, in my submission, that 3E is wide enough at least to include the responses and actions of previous Governments.

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COMMISSIONER: Well, that's what I was wondering. Does it mean successive Governments? It doesn't say "Governments", does it? It says "Government".

MR COPLEY: That's correct, but it doesn't direct you to any particular Government.

COMMISSIONER: No, therefore I was going to say which Government?

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MR COPLEY: Well, my submission is that it is broad enough to entitle you to investigate the response of, well, theoretically all Queensland Governments since the system of detaining youth in places-----

COMMISSIONER: Set aside-----

MR COPLEY: -----akin to a prison has been extant which I haven't looked into, but would imagine began somewhere in the latter half of the 19th Century. Is, however - this is the crux of the issue: is the term "Government" to - how is it to be determined? Is it to be regarded as encompassing the Executive Council, Cabinet Ministers, departments and agencies associated or connected to the Government of Queensland? Well, an answer to that might be found by reference again to the Order in Council because the Order in Council refers to a child protection system in connection with paragraphs 3A - sorry, 3C and 3D and in connection with what you must report on. It refers to the necessity to review State legislation about the protection of children. State legislation has established a regime for the protection of children. So much can be seen in sections 4, 5A and 5B of the Child Protection Act of 1999. State legislation has imposed functions connected with that subject on the Chief Executive of the Department of Government concerned. So much can be seen in section 7 of the Child Protection Act. Legislation of the State has established a Commission to promote and protect the rights of children and I refer to the Commission for Children and Young Persons and Child Guardian Act of 2000 and section 17 of that Statute requires the Commission to exercise functions which are designed to protect children.

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So it can be seen, in my submission, that when the Order in Council speaks of a child protection system, that phrase "system" is broad enough to encompass the full range of Government activities and, indeed, might even encompass the

actions of private sector bodies that receive financial aid from the Government to administer Government programs because the legislation has set up a system of child protection and the reference in the Order in Council to a child protection system which must be reviewed, investigated and reported upon and have recommendations made about it is to be contrasted with the way in which paragraph 3E is worded which speaks simply of the response of Government.

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COMMISSIONER: See, Mr Bosscher, I think, would say that 3E requires me to look at the responses of the criminal justice system.

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MR COPLEY: Well, if that is what it required, it would have said that, in my submission. It would have used that phrase because those who established this Order in Council were aware of or conscious of the need, it seems, to draft terms of reference which were broad enough to allow you to investigate the full ambit of the current child protection system. There is a matter perhaps lurking in that which is does the child protection system currently extend to any investigations about matters generally regarded as the province of the Youth Justice Act? I don't need to develop a further submission about that today.

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Just by way of example, the Commissions of Inquiry Children in State Care and Children on APY Lands Act of 2004 was a South Australian Statute which was set up according to the terms of reference which are annexed as a schedule to the Statute to inquire into allegations of sexual abuse or criminal conduct associated with children in State care and on these particular lands located in the north of South Australia. The Term of Reference said this: that the purposes of the inquiry are to examine the allegations referred to and, secondly, to report on whether there was a failure of the State to deal appropriately with such allegations.

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Now, the word here that is used is not "State" but "Government". If the word in paragraph 3E had been something such as "State", then in my submission it would be arguably broad enough to cover Government in all of its manifestations and all of the appendages to Government, but in my submission-----

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COMMISSIONER: Including the Crime Commission?

MR COPLEY: Including the Crime Commission, including the Criminal Justice Commission, including the police service, including the Director of Public Prosecutions office and the relevant Government department.

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COMMISSIONER: Even though the CMC, for example, would generally be regarded as being independent.

MR COPLEY: Yes, yes.

COMMISSIONER: But it's part of the State.

MR COPLEY: That's correct, it is part of the apparatus of the State. It only exists because the State exists and the State-----

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COMMISSIONER: And for State purposes.

MR COPLEY: -----Parliament passed it - yes, passed legislation establishing it and all those other bodies, but in the context of the Order in Council reading it in the context of the whole document, my submission is that the reference in paragraph 3E should be confined to the Executive Government of the State, an entity-----

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COMMISSIONER: Was does that include?

MR COPLEY: Well, an entity of this description is recognised in chapter 3 of the Constitution of Queensland 2001 and it would seem to embrace the following: the Governor in Council, see section 77 of the Constitution of Queensland; the Cabinet, see section 42; and the Executive Council, see section 48 of the Constitution. Now, the expression "Executive Government" which I have employed isn't just a euphemism or an adjective to describe all of those bodies, that expression actually finds recognition in section 51 of the Constitution of Queensland which states that the Executive Government of the State has all the powers of and legal capacity of an individual. So my submission-----

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COMMISSIONER: Somebody has to be responsible for what the Government does.

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MR COPLEY: That is so.

COMMISSIONER: That body politic we call Executive Government.

MR COPLEY: That's so. Some people might think that the concept of Government includes the Parliament. Some people might think the concept of Government extends to the Courts, to the Supreme Court and to the District and Magistrates Court. Some might say, "Well, it does because all three of those Courts are established pursuant to legislation passed by the State Parliament."

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COMMISSIONER: And there are Constitutional conventions and doctrines, aren't there?

MR COPLEY: That's right, and the Constitution of Queensland of 2001 distinguishes between the Legislature, the Executive and the Judiciary and the bodies that I have mentioned, the Governor in Council, the Cabinet Ministers, which is also mentioned in that chapter, and the Executive Council are all in the chapter concerning the executive. So by no stretch of the imagination could Term of Reference 3E as it presently stands be regarded as including the response of the Parliament or the response of the Courts. However, the contrary might be the case if 3E had said the "State".

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My submission to you is this: you should regard paragraph 3E

as being at least confined - well, as to embracing the executive Government at least and no more, in my submission. Now, if-----

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COMMISSIONER: Does it embrace the Queensland Crime Commission?

MR COPLEY: No, no, it doesn't because it's not part of, in my submission, the Executive Government. If it embraced the Queensland Crime Commission then it would embrace the Criminal Justice Commission, it would embrace the Queensland Police Service, it would-----

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COMMISSIONER: The Governor.

MR COPLEY: Beg your pardon?

COMMISSIONER: The Governor.

MR COPLEY: Personally, yes, yes, but you have to interpret the word in the context of the Order in Council in the context of what you ultimately have to do which is to review and make recommendations in a full way and in a comprehensive way by April 30 next year and give some context-----

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COMMISSIONER: You don't reckon I can do the child protection system and the criminal justice system by then?

MR COPLEY: No, no. There are many obstacles in your path to that and they're so obvious they don't need to be stated.

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COMMISSIONER: All right. Well, let's assume you're wrong for the moment, Mr Copley, what do you say about my fitness to fulfil the functions and exercise the powers conferred by 3E?

MR COPLEY: If I am wrong, then the evidence that has been adduced in the Commission today princely in the affidavits contained - in the affidavits of Mr Callinan and Ms May rebut completely the suggestion that you personally have prejudged Government response because Mr Callinan says in his affidavit at paragraph 7 that you played no deliberative role in relation to whether a QCC investigation was to commence or not commence in relation to the matters to which Mr Lindeberg referred.

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The affidavit of Ms May insofar as it discloses the documents held by the Crime and Misconduct Commission show that in the time available to you you personally acted, you sent the application for referral to the General Counsel and to the Assistant Commissioner for Crime and sought their advice by 21 December 2001, but - but-----

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COMMISSIONER: I suppose I am not the person who jumps on his bike with a deer stalker and goes out investigating things personally.

MR COPLEY: No, that was not your role, but having said that if I am wrong about the ambit of term 3E you would then be

required to potentially pass upon the conduct of the body you headed and my submission is that if you had to make findings and - make findings and come to conclusions about the body you headed, then it is arguably the case that there might be perceived in the mind of the ordinary reasonable hypothetical observer that that would not be a task that you could satisfactorily discharge.

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COMMISSIONER: So if I have to look at myself or the agency I headed in fulfilling 3E, I can't.

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MR COPLEY: You shouldn't.

COMMISSIONER: I shouldn't.

MR COPLEY: You can, but you shouldn't.

COMMISSIONER: I wouldn't, but otherwise it's okay because there's no evidence of - there's no indicia of any other form of impartiality - no other form of partiality or anything comprehended in the term "apprehended bias".

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MR COPLEY: Not - there's no other evidence to suggest that, no. What is relied upon, it seems, in Mr Bosscher's written material, which he didn't, of course, need to remind you of-----

COMMISSIONER: No.

MR COPLEY: -----because he was focusing on addressing the issues you posited to him was your alleged personal inaction in not ensuring that the body you headed investigated the matter that was brought to your attention on 13 December 2001.

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COMMISSIONER: So is that the conduct in the first step of Ebner?

MR COPLEY: Yes, I submit it must be.

COMMISSIONER: I will go back to Mr Bosscher shortly and ask him what it is.

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MR COPLEY: Well, at least this much is clear - well, perhaps I should state this now what the relevant test is for bias.

COMMISSIONER: Yes.

MR COPLEY: I agree with Mr Bosscher that the test is to be found in Ebner and The Official Trustee in Bankruptcy (2000) 205 CLR 337 at 344 paragraph 6, but I add that the question is one of possibility real not remote; see paragraph 7 of that judgment.

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COMMISSIONER: So there's got to be real possibility of partiality or prejudice infecting my mind to make it closed shut to persuasion-----

MR COPLEY: Yes.

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COMMISSIONER: -----before I should recuse myself and cost the State the money it's already spent?

MR COPLEY: Yes. Paragraph 8 of the judgment in Ebner reminds us that the applicant - well, reminds us that the party claiming that there is a need for disqualification - in this case the applicant Mr Bosscher represents - must first identify or show what it is said might lead a decisionmaker to come to a conclusion other than on its merits.

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COMMISSIONER: Yeah.

MR COPLEY: Then, secondly, he must set out the logical connection between what the decisionmaker has previously said, done or been involved in, which can be summed up in the word "the conduct", and the apprehended fear that the case will not be decided on its merits.

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COMMISSIONER: So step 1 is the what; that is, what conduct are you complaining about-----

MR COPLEY: Yes.

COMMISSIONER: -----as being the source of apprehended bias?

MR COPLEY: Yes.

COMMISSIONER: And the second step is what's the logical connection between the source of the apprehended bias and the faulty decision-making processes that you worry might go on because of that conduct?

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MR COPLEY: Yes.

COMMISSIONER: Is that right?

MR COPLEY: Yes.

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COMMISSIONER: Okay. Well, Mr Bosscher, can you help me with steps 1 and 2?

MR BOSSCHER: Certainly. I will assist to the best of my ability. The conduct in shortform can be submitted as follows: that being aware of allegations of criminal paedophilia within the timeframe that you were the Queensland Crime Commissioner, you either directly failed to act or failed to ensure that those under your direction failed to act to adequately address those matters. So that would be a summary of the conduct.

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COMMISSIONER: Failing to investigate the 1998 - sorry, 1988 rape allegation at the youth detention centre between 1997 and 2001, that's the failure?

MR BOSSCHER: In shortform, yes. You could add to that knowing when there was positive information available to you

as the Commissioner by virtue of the material provided by Mr Grundy and referred to in annexure I think it was D of that affidavit-----

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COMMISSIONER: So if it's not a general - you know, a total failure between 1997 and 2001 when I was the Crime Commissioner, it was certainly by the time Mr Grundy published his reports on the 3rd of November 2001, and certainly, if not then, after the 13th of December 2001 and before midnight on the 30th?

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MR BOSSCHER: Yes.

COMMISSIONER: Right. So it's I either failed to act to do anything about that particular incident for five years, or for two months, or for two weeks?

MR BOSSCHER: Yes.

COMMISSIONER: Okay. So that's the conduct?

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MR BOSSCHER: That's the conduct.

COMMISSIONER: Now, how is that failure - how would that failure, assume that it is a failure and assume that it's conduct within the meaning of the apprehended bias rule, that's the logical connection that the fair-minded observer would draw between that failure and the possibility of prejudgement or some form of prejudice or partiality?

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MR BOSSCHER: The issue is that if the broader definition of "government" is the one that's adopted, then - sorry, I won't use the broader definition, I will use the term the common definition of government is the one that's adopted, then you will be forced to be a judge in your own cause, that's the apprehended bias.

COMMISSIONER: Okay. That's one form of apprehended bias.

MR BOSSCHER: Yes.

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COMMISSIONER: There are two maxims though, aren't there?

MR BOSSCHER: Yes.

COMMISSIONER: There's being a judge in your own cause, and - that's because your personal - self-interest will conflict with your public duty, right, we all understand that.

MR BOSSCHER: Yes.

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COMMISSIONER: And that would be irreconcilable.

MR BOSSCHER: Of course.

COMMISSIONER: But then assuming that "government" means "executive government" for the purposes of 3E, you have nothing to say about apprehended bias? Your sole ground about

apprehended bias is me having to investigate myself and not being able to separate my self-interest in protecting myself from embarrassment or something and the public duty of exposing any shortcoming, is that it?

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MR BOSSCHER: Yes, that would be correct.

COMMISSIONER: Okay.

MR BOSSCHER: Of course, it's occurred to me that you being asked to determine the breadth of the definition "government", knowing what this argument is about also causes an issue in some respects because you're ruling on that particular definition, as given to you by the Order in Council, may or may not affect the outcome of the particular submission made on behalf - or application made on behalf of Mr Lindeberg.

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COMMISSIONER: What, so I can't even work out what 3E means in order to work out whether you're right or wrong?

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MR BOSSCHER: Look, I put it on the record, it's going to become a chicken and egg argument, and I don't think it's going to serve any of us to go down that path.

COMMISSIONER: Someone has to work out what "government" means, don't they?

MR BOSSCHER: Well, I would submit, with respect, a dictionary would be the starting point.

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COMMISSIONER: Have you looked it up?

MR BOSSCHER: I've looked up in the - I can't get the Oxford dictionary online, but I do have the services of the magnificent dictionary.com, which defines "government" as, "The political direction and control exercised over the actions of the members, citizens or inhabitants of communities, societies and states, direction of the affairs of a state," et cetera, "political administration," and then under one of the other limbs of that it says, "A branch or service of the supreme authority of a state or nation taken as representing the whole."

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COMMISSIONER: It sounds very American to me, Mr Bosscher.

MR BOSSCHER: It is dictionary.com, your Honour. If you want the Oxford dictionary, I have to pay for that and I didn't bring my credit card.

COMMISSIONER: You see, the thing is we're talking about a concept, aren't we?

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MR BOSSCHER: We are, of course.

COMMISSIONER: And "government" is going to have a body-----

MR BOSSCHER: Yes.

COMMISSIONER: -----its organs, its apparatus, it's going to have a mind, a directing mind, like a company, isn't it?

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MR BOSSCHER: Yes.

COMMISSIONER: But-----

MR BOSSCHER: Yes.

COMMISSIONER: And what 3E is looking at is the mind of government, isn't it, who's making decisions about who is going to do what to whom and when.

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MR BOSSCHER: For the purposes of argument, yes.

COMMISSIONER: Right. So am I right in understanding this, that if "government" means what Mr Copley says it means, then there is no basis for me to disqualify myself because I won't have to investigate myself. Whereas if it means what you say it means, I shouldn't continue with 3E because of the lack of confidence that will engender in the community because I'm virtually judging myself.

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MR BOSSCHER: That's so, with a qualification, and that qualification I've addressed you on already, and that is that even if you were to, as I said, define the term "government" as Mr Copley suggests as "executive government", that even when you embark upon that particular investigation, I've submitted to your Honour, given the material attached to the outline that I've provided, that with respect inevitably you are going to go down these other - you are going to be required to go down these other paths. So, although if you were to narrowly define the term "government" right now to "executive government", that doesn't mean that this particular issue won't enliven through the course of your inquiry.

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Is now an appropriate time just to address you in relation further to the term of "government"?

COMMISSIONER: No, I will get Mr Copley to finish.

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MR BOSSCHER: Yes.

COMMISSIONER: I just wanted to ask you what two steps - how you took the two steps in Ebner, that's all.

MR BOSSCHER: Yes, and the test is - there's no controversy on the test.

COMMISSIONER: Oh, there never isn't, it's the applying of it that is the hard bit.

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MR BOSSCHER: Unless I can assist further on that point?

MR COPLEY: Mr Commissioner, I've probably made all of the submissions I wish to make. Before Mr Bosscher does address you, if you are going to permit him further, about the ambit of the expression "government" having heard my submission

first, or before that, it would be-----

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COMMISSIONER: A decisionmaker being challenged for bias will be fairly generous in the time they give somebody.

MR COPLEY: Yes, but it would be appropriate to invite both Mr Burns, who's representing the Crime and Misconduct Commission-----

COMMISSIONER: Yes.

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MR COPLEY: -----and also Mr Hanger, who appears on behalf of perhaps we will call it today the State, as to whether or not they wish to make any submission about the matters discussed this morning before Mr Bosscher replies.

COMMISSIONER: Absolutely.

MR COPLEY: And Mr Grundy for that matter too replies.

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COMMISSIONER: Yes, of course. Mr Hanger?

MR HANGER: I have a written submission which I will pass up. I will speak to that if I might.

COMMISSIONER: Yes, of course.

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MR HANGER: We respectfully adopt what's been said by my learned friend. The Terms of Reference which I won't quote again refer to the word "Government". The Government responses refers to the responses of the Executive Government which is referred to in section 51 of the Constitution of Queensland.

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Speaking generally, Mr Commissioner, it seems to be common ground that the conduct to be investigated relates to the establishment by the Executive Government of what is colloquially referred to as the Heiner Inquiry, the disbanding of that inquiry, the destruction of documents provided through it and possibly the decision and/or failure to establish a subsequent inquiry in respect to the issues raised in that aborted inquiry.

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It is submitted you have not been commissioned to investigate the response of the Crime Commission. It is not part of the Government of the State and you have said repeatedly, Mr Commissioner, if, indeed, you were to investigate the Crime Commission you couldn't do it. So if the Terms of Reference-----

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COMMISSIONER: You would agree with that, Mr Hanger, wouldn't you.

MR HANGER: Yes, yes. Commissioner, the authority is that a Commissioner is the proper person to determine the meaning of the instrument of appointment. May I refer you to Easton and Griffiths. I have a copy of that to hand up.

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COMMISSIONER: Thank you.

MR HANGER: The reference is 69 ALJR 669. The passages I wanted to refer to are at 672 the right-hand column. I've actually marked it in pencil there as I was reading it. "It is for the Commissioner to determine the scope of his inquiry subject to any decision on the matter by a Court of competent jurisdiction."

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Over the page at 674 there is in the right-hand column there about - again I have referred to it between B and C. "That is not a matter within the Commission's Terms of Reference and as I already noted there is a real question as to just how far, if at all, the inquiry will attach the conduct of the plaintiff. That is something for the Commission to determine as the inquiry progresses in accordance with its Terms of Reference."

The next authority I refer to is Ross against Costigan.

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COMMISSIONER: I see in that case of Easton and Griffiths that was obviously an appeal to the High Court and it was by someone who had leave to appear before the Commission generally and for that reason he was treated as having a sufficient interest to bring the application to the High Court.

MR HANGER: Yes, and one of the interesting things there is that this is one of the few cases where they've said to a Commissioner, "We want to broaden your Terms of Reference. We want you to do more and clear our name.", rather than generally Commissions of Inquiry, the applicants are trying to restrict the terms.

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COMMISSIONER: Actually, do you know of any authority where a Commissioner has actually interpreted - underinterpreted the Term of Reference-----

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MR HANGER: No.

COMMISSIONER: -----as opposed to expansively done it?

MR HANGER: No, I haven't.

COMMISSIONER: Usually it's the other way. They try to do too much rather than too little.

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MR HANGER: Yes, and somebody wants to stop them doing-----

COMMISSIONER: Overstepping the mark.

MR HANGER: Yes, yes, but this was one where the suggestion was you should do more.

COMMISSIONER: Yes, okay.

MR HANGER: Ross and Costigan is (1982) 64 FLR. This was Mr Costigan's Commission of Inquiry into the painters and dockers and he was investigating there tax minimisation schemes. I think my learned friend gave you a reference at 69 there to the effect that the Commissioner determines his own.

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In the middle of page, again I have underlined it, "What questions the Commissioner should ask or allow to be asked is a matter for his own good sense and judgment. The terms have been widened, the scope of inquiry has been expanded. The limits of what is relevant have been correspondingly extended."

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Then at the bottom of that paragraph, "The Commissioner can look to what he bona fide believes will assist him in his inquiry."

The reality of it is that a fair degree of latitude is allowed to a Commissioner during an inquiry to determine the meaning of his Terms of Reference. My learned friend also referred to Firman and Lasry and we respectfully adopt that, but I shan't take you to any particular passage there.

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If I can move on to the issue of bias, the challenge is said to arise out of your position as head of the Crime Commission on the 13th of December 2001 when you had a meeting with Mr Lindeberg. That's two weeks before you were leaving the Commission and it was closed down. It is submitted the steps taken by you and the material that has come forward today

shows that what you did was entirely appropriate. There is no suggestion of actual bias. The application is made on the basis of perceived bias and the general principle is set out in many cases where in the absence of any suggestion of actual bias the question arises is the independence of a Judge or judicial officer, the governing principle is that a Judge is disqualified if a fair-minded lay observer might reasonably apprehend that a Judge might not bring an impartial mind in resolution of the question that the Judge is required to decide.

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That same principle is being held to apply to Commissions of Inquiry and I will give you a reference, but I won't read the book to you. That was in Carruthers and Connolly with which you would be well familiar, [1998] 1 Queensland Reports 339 at 371. It has also been said it is important that judicial officers discharge their duty to sit and do not accede too readily to suggestions of the appearance of bias. That appears in re JRL (1986) 161 CLR 342 at 352. I hand up a copy of that to you, Mr Commissioner.

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COMMISSIONER: Justice Callinan relied on this decision when he was asked to recuse himself from the Hindmarsh Constitutional case.

MR HANGER: Yes.

COMMISSIONER: What he had done there and was said to be the source of apprehended bias was he had given a written opinion about the validity of the Act when he was at the Bar, the same Act that was being challenged before him in the High Court. He was asked to recuse and he said he wouldn't and one of the reasons why he didn't - the main reason why he didn't was because when he was expressing his opinion, which is the ordinary barrister's word, he didn't make any judgment about the merits. He was simply asking - doing, you know, normal work and there was no suggestion that his mind wasn't - couldn't be persuaded that he was wrong.

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MR HANGER: That is what I-----

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COMMISSIONER: We often are in this business.

MR HANGER: That's right, and that's what I come to subsequently in the question your Honour asked me about my friend. It is a two stage test in the end.

The passage in that judgment of Mason J is at 352. They should not exceed too readily to suggestions of appearance of bias. Encouraged parties believe that by seeking disqualification of a Judge they will have their case tried by someone to be thought to be more likely to decide the case in their favour.

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COMMISSIONER: Well, that's why it developed as it did because there was a practice of Judge shopping and all you had to do once was use the word "bias" and everyone threw up their hands and ran away so if you did that enough you would end up with

the Judge you wanted.

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MR HANGER: Yes, that's right.

COMMISSIONER: Just by a process of exclusion.

MR HANGER: Yes.

COMMISSIONER: Now we have got a duty to sit if we should if it's appropriate rather than to be too quick to disqualify ourselves because obviously the State has got an investment in it and it is the public that has to have the confidence in the Commission of Inquiry, but it is also the public that has to fund it and has to live with its findings.

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MR HANGER: Quite so. Quite so. There is authority to say that the onus of proof is on the applicant on the balance of probabilities, but that the reasonable apprehension of bias must be firmly established.

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COMMISSIONER: Is that a Briginshaw-----

MR HANGER: Yes.

COMMISSIONER: -----standard?

MR HANGER: Yes. Again, I have given you two references there, R v. Commonwealth Conciliation and Arbitration Commission, ex parte Angliss (1969) 122 CLR 546 and cited with approval by Sir Harry Gibbs in re Shaw, ex parte Shaw (1981) 55 ALJR 12 at 14B.

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COMMISSIONER: So does that mean you have to firmly establish the probability of a possibility?

MR HANGER: Yes. It might be a little bit difficult, but that's what it - yes. It must be firmly established that such a suspicion may reasonably be engendered in the minds of the parties as was made clear by the Court in the other case.

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For the applicant to succeed in this application/disqualification they must establish two things, and you were referred to Edna and I refer to Edna. They must identify what it is asserted might lead a Judge to decide a case other than on its factual and legal merits. Now, what is it, I ask rhetorically, that would lead you to decide the reference under E other than on its merits? The answer in my submission is nothing whatsoever.

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COMMISSIONER: Nothing if I didn't have to judge the conduct of the Crime Commission or its head.

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MR HANGER: Look, if we're going to investigate the Crime Commission you can't do it. That's my submission. For the applicant - secondly, they must - there must be a logical connection between that material and the feared deviation from the course of deciding on its merits, and by way of elaboration the Court said:

"The bare assertion that a Judge or juror has an interest in litigation or an interest in a party to it would be of no assistance until the nature of the interest and the asserted connection with the possibility of departure from an impartial decision-making is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

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Again our friends haven't established either test one or test two that are laid down in Edna.

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So, in our submission there's nothing that would give Mr Lindeberg or any member of the public any reasonable apprehension of bias.

COMMISSIONER: Thanks, Mr Hanger. Mr Burns.

MR BURNS: I don't have any submissions, Mr Commissioner.

COMMISSIONER: Mr Bosscher.

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MR BOSSCHER: Thank you, Commissioner. I think the starting point may be that one of the - in reply. The fact that this Commission at this time is required to report by April of next year, although it is relevant I don't accept that it is - that the rule of necessity as outlined in the High Court test applies in this particular circumstance.

COMMISSIONER: I don't think anyone says it does, do they?

MR BOSSCHER: Okay. I'll leave that aside then. I just wanted to raise that. I'm thankful for Mr Copley and Mr Hanger's submissions because both of them refer to the term executive government as outlined in section 51 of the constitution and it's helpful in this respect, Commissioner, in that if the term of reference was to be confined to executive government then there would be nothing stopping the drafter of the term of reference to put the words executive government in there in place of the general term of

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government.

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COMMISSIONER: And likewise, if they wanted me to investigate the criminal justice system and its performance from 1988 to 2001, then they could have easily said so.

MR BOSSCHER: And it could be argued that they do so by using the broader definition of the term government and that is the submission we make to you.

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You used the term, Commissioner, the apparatus of State earlier and if you were to apply the ordinary use of the term government then clearly a body such as the Crime Commission obviously comes under the term of an apparatus of State, but in the mind of the ordinary man that - and that's the test we need to apply to it. It goes a little bit further than Edna.

COMMISSIONER: We don't need to apply the ordinary man test in deciding what government means.

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MR BOSSCHER: No, but we do - I may have stepped on my own foot, but we do need to be clear that additional to the decision in Edna that the American Tobacco Services Limited v. Laurie, decision in the High Court in 2011, says that we must address the issue of apprehended bias from the position of the ordinary lay observer and not the position of us as legal practitioners would address.

COMMISSIONER: It's an objective test.

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MR BOSSCHER: Yes.

COMMISSIONER: If we took it from the approach of the lawyer we wouldn't need the observer, we'd just be able to do it ourselves.

MR BOSSCHER: That's exactly what's said in that particular decision. It's submitted that it would be an artifice with respect to try and define the term government to not include a body that conducts public duties, is publicly funded, is publicly accountable and can be dismantled at the whim of government and created at the whim of government. To take the analogy that one step further, I can think of many clients who would have liked to have informed members of the Crime Commission that he didn't regard them as members of the government, that he wasn't going with them or going to be examined by them as being an ability to avoid what might otherwise-----

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COMMISSIONER: But he didn't do that because - he didn't turn up and be examined by the Crime Commissioner because he thought it was part of government. He did it because he got a summons and had no choice.

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MR BOSSCHER: I accept that, but the term government - again when we're dealing with a publicly accountable, publicly funded body with public duties, a body such as the Crime Commission, the CMC, the CJC have to be regarded, as you have

said, apparatus of the State, and the definition of the term government must include the apparatus of the State.

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COMMISSIONER: Let's say I went with you and I interpreted government to include all the apparatuses of State since 1988. Even assuming that people who were part of it then were still around to be asked questions of, the risk is that somebody else is going to wander in and say, "No, you're stepping over the mark. There you're getting too far. You've overinterpreted government." It's pretty clear what government means. Like, for example, do you know any other thing other than the Heiner Inquiry that involves any allegation of misconduct by government in responding to allegations of child sexual abuse in youth detention centres?

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MR BOSSCHER: I don't, but it doesn't mean there wasn't, but I don't personally. I would have thought, given my instructions, I probably would have.

COMMISSIONER: So it looks like it's the only one that gets a guernsey under 3E.

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MR BOSSCHER: Yes, and clearly again using the extraneous material of statements made in opposition and statement made - that it was meant to so do.

COMMISSIONER: But we might be wrong. There might be others out there who say, "Hang on, I've got a complaint of criminal conduct by government in respect of child sexual abuse. I want to come along under 3E."

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MR BOSSCHER: And they should, with respect, be entitled to it if that were to be the case.

COMMISSIONER: Well, they would be entitled to.

MR BOSSCHER: Of course, but at this point in time we can only deal with what is and there is nobody here. Nor is there anybody here challenging the position, although you haven't articulated, of course, a broader definition of government or, as is submitted, the appropriate definition of government. It doesn't mean there won't be.

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COMMISSIONER: No, well, that's right.

MR BOSSCHER: But again, with respect, we can only deal with what's here now. I have nothing further.

COMMISSIONER: I think we're in furious agreement about that, Mr Bosscher.

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MR BOSSCHER: I have nothing further, unless there's a specific point I can assist.

COMMISSIONER: Thank you. Mr Grundy, did you have anything by way of response?

MR GRUNDY: Not really, Mr Commissioner. Again I'm in

unfamiliar territory, but I would just say that it is my belief in relation to what term government means that the man on that Clapham omnibus or the St Lucia omnibus believe that government embraces all the agencies of government and not just the executive government.

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COMMISSIONER: And that's exactly why he decides bias because he's not blinded by being an insider and why he doesn't decide questions of law. Thank you. Mr Copley?

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MR COPLEY: I have no further submissions.

COMMISSIONER: Are we all done?

MR COPLEY: Yes.

COMMISSIONER: All right. Thanks, gentlemen. I'm going to adjourn until 3 o'clock and I'll give my ruling then.

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THE COMMISSION ADJOURNED AT 12.07 P.M. TILL 3.00 P.M.

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THE COMMISSION RESUMED AT 3.08 P.M.

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COMMISSIONER: Mr Copley, before I give my ruling I've received an e-mail from Mr Rofe QC. Have you been provided with a copy?

MR COPLEY: Yes, I have a few minutes ago, Mr Commissioner.

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COMMISSIONER: Mr Bosscher?

MR BOSSCHER: I have. I actually received it myself, Mr Commissioner, a copy of it earlier this afternoon.

COMMISSIONER: Look, I don't think anything needs to be said about it, but I think it probably needs to join the other two letters to complete the record, don't you?

MR BOSSCHER: Yes, Mr Commissioner.

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MR COPLEY: Perhaps it could be admitted and marked as Exhibit 2A.

COMMISSIONER: I can just join - all right, we will mark it Exhibit 2A.

ADMITTED AND MARKED "EXHIBIT 2A"

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COMMISSIONER: Do you have anything to say or want anything to say about the publication of it?

MR BOSSCHER: Not at this stage, no.

COMMISSIONER: Okay. Now, you will have to bear with me, I'm afraid. Resources being what they are, I have had to do this by hand and I will publish it in writing as soon as it has been transcribed and corrected.

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TAKE IN RULING

COMMISSIONER: I will publish my reasons once they're transcribed and corrected.

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MR COPLEY: Nothing further today.

COMMISSIONER: Nothing from anyone else? Thank you all very much for your help. Just adjourn the Court.

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THE COMMISSION ADJOURNED AT 3.28 P.M.

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