SUPREME COURT OF QUEENSLAND

CITATION:	*Kennedy v Davies & Anor* [2005] QSC 343
PARTIES:	**DUNCAN ALEXANDER ROBERT KENNEDY** (applicant) **v** **THE HONOURABLE GEOFFREY DAVIES AO, COMMISIONER, QUEENSLAND PUBLIC HOSPITALS COMMISSION OF INQUIRY** (first respondent) **THE HONOURABLE THE ATTORNEY GENERAL FOR THE STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	SC No 718 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	25 November 2005
DELIVERED AT:	Townsville
HEARING DATE:	22 November 2005
JUDGE:	Cullinane J
ORDER:	**1. The application is dismissed** **2. I give the parties leave to apply in writing on the issue of costs within seven days**
CATCHWORDS:	ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - GENERALLY - where the applicant sought to have the circumstances surrounding the death of his mother investigated by the Commission of Inquiry established under the the *Commissions of Inquiry Order* (No. 2) 2005 - where the Commissioner determined that this issue did not fall within his terms of reference - whether applicant entitled to be heard on the issue of whether the matters were within the terms of reference - where the applicant seeks judicial review of the decision of the Commissioner - whether there was a denial of natural justice *Commissions of Inquiry Act* 1950 (Qld) *Judicial Review Act* 1991 (Qld) *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, cited *Annetts v McCann* (1990) 170 CLR 596, followed

Cornall v AB (A Solicitor) [1995] VR 372, cited
Dickson v Canada (Governor in Council) [1997] 3 FC 169, discussed
Ferguson v Cole [2002] FCA 1411, discussed

COUNCIL: M O Plunkett for the applicant
R G Marsh for the first respondent
J Logan SC for the second respondent

SOLICITORS: Ruddy Tomlins & Baxter (Townsville) for the applicant
Crown Law for the first and second respondents

[1] This is an application for judicial review of a decision of the first respondent. The Attorney General intervened pursuant to s 51 of the *Judicial Review Act* 1991 (Qld) as amended. The first respondent was represented but in accordance with well settled principle, indicated that he abided the order of the Court.

[2] The Attorney General conceded, or perhaps more correctly did not raise any issue, about the standing of the applicant.

[3] In order to understand the application it is desirable to set out a summary of relevant events.

[4] On 26 April 2005, pursuant to an Order in Council (*Commissions of Inquiry Order* (No. 1) 2005), Mr Morris QC was appointed "to make full and careful inquiry in an open and independent manner with respect to" a number of matters. These primarily concerned a medical practitioner, one Dr Patel and his employment and also matters concerning the clinical practice and procedures conducted by Dr Patel or other medical practitioners at the Bundaberg Base Hospital to which Dr Patel had been appointed. It was also to inquire into:

> *"The role and conduct of the Queensland Medical Board in relation to the assessment, registration and monitoring of overseas-trained medical practitioners, with particular reference to Dr Jayant Patel or other overseas-trained medical practitioners."*

[5] There were other associated matters to be inquired into and the Commissioner was asked to make recommendations in relation to a wide variety of matters in the light of his findings in respect of the matters to be inquired into.

[6] On 1 September 2005 the Supreme Court made orders which had the effect of bringing the inquiry to an end.

[7] On 6 September 2005 the first respondent was commissioned pursuant to *Commissions of Inquiry Order* (No. 2) 2005 to "make full and careful inquiry in an open and independent manner" in respect of a number of matters which included the matters referred to in paragraph [4] of these reasons. In addition, other matters which were not referred to in the first Order in Council were to be inquired into. For present purposes the most relevant of these is 2(c) which provides as follows:

> *"Any substantive allegations, complaints or concerns relating to the clinical practice and procedures conducted by other medical practitioners,*

> *or persons claiming to be medical practitioners, at the Bundaberg Base Hospital or other Queensland Public Hospitals, raised at the Commission of Inquiry established by the* Commissions of Inquiry Order *(No. 1) of 2005."*

[8] The first Order in Council did not contain any term of reference relating generally to clinical practice and procedures conducted by medical practitioners or persons claiming to be medical practitioners at public hospitals in Queensland.

[9] In other respects the terms of reference were considerably more narrow than in the case of the first Order in Council, particularly so far as the making of recommendations is concerned.

[10] By the Order in Council the first respondent is obliged to report in respect of the matters he is to inquire into by 30 November 2005.

[11] Plainly at least one of the purposes of appointing the first respondent to inquire pursuant to the second Order in Council was to continue an inquiry into the subject matter of the first Order in Council and to bring to finality such inquiry. It was also to bring to finality allegations complaints or concerns of the kind referred to in clause 2(c) in so far as those matters were "raised at the Commission of Inquiry". Just what is meant by the words "raised at the Commission of Inquiry" was the subject of argument before me and is one of the primary issues to be determined upon this application.

[12] The applicant is the son of the late Blanche Elizabeth Brierley Kennedy who died in the Townsville General Hospital on 16 October 1992.

[13] Following the death of his mother, the applicant sought to have an inquest conducted and has also sought, to quote his affidavit, "assistance directly from the said Hospital, the Coroner, the Attorney General and the Health Rights Commission to assist me in arriving at an explanation for my mother's death and the reasons why she did not receive more specialised treatment".

[14] His attempts to obtain an inquest have been unsuccessful as appears from the letters from the Attorney General which are exhibited to his affidavit (see exhibit B).

[15] It appears that the applicant has formed the view that his mother ought to have been treated differently by removal from the ward that she was in to specialist cardiac care and that she ought to have received medication which she did not receive. This is a very brief summary and does not perhaps do justice to the totality of his allegations of inadequate or negligent treatment or, as is suggested in some of his letters, deliberate mistreatment. As a result of his complaints a report was obtained from the cardiologist at the hospital, Dr Gunawardane, which was provided to the applicant by the Townsville General Hospital under the hand of the Director of Medical Services. Dr Gunawardane's report which is dated 18 December 1992 was to the effect that the treatment which she received was appropriate in all of the circumstances.

[16] The applicant has alleged that Dr Gunawardane and others have been engaged in a cover up of the matter. He also alleges that Dr Gunawardane and others who have been involved in reviewing the treatment of his mother in the hospital did so

incompetently. Allegations are also made of a failure to perform duty on the part of those holding the position of Coroner in Townsville.

[17] By a letter of 13 July 2005 which is part of exhibit B to the applicant's affidavit, he set out his complaints to the first Commission of Inquiry. The letter extends over some eight pages and contains allegations against many people from those who were involved in his mother's treatment upon admission to those who have reviewed the matter in a medical sense to those who have been approached to conduct a inquest or to direct the holding of an inquest. It concludes with the following words "Please now help us to obtain an inquest."

[18] A further letter of 27 July 2005 (exhibit D to the applicant's affidavit) was sent pointing out that no reply had been received to his earlier letter. This letter stated that the applicant would "welcome the Commission to now fully independently investigate this matter…".

[19] By a letter of 5 August 2005 the secretary or someone on his behalf responded to the applicant in the following terms:

> *"Thank you for your letter dated 13 July 2005 which has been received by the Commission.*
>
> *The Commission's investigative team is presently analysing the information provided by you. You will be contacted if further information is required."*

[20] It was about a month later that the inquiry was terminated.

[21] Upon the appointment of the first respondent it appears that the public were notified that anyone who wished to provide evidence to the inquiry should do so before 28 September 2005. This produced a response from the applicant who wrote to the Commission by letter of 27 September 2005 (exhibit G to the applicant's affidavit).

[22] This largely involved a restatement of the matters that had been set out in the letter sent to the first inquiry. In that letter, he said:

> *"I would here again like to re-emphasize, the very seriousness of that gross negligence, premeditatively practised by Ward 4AB, to knowingly cause Mrs. Kennedy's death. There is just no other explanation. Medically it is totally inexcusable, and those responsible should now be brought to justice.*
>
> *For during an Officially conducted Training Exercise for a British Trainee-Doctor, Dr. Megan Turner and also for the Ward Staff, in one of the largest hospitals in Qld, contrary to all medical expectations, no normally to be expected emergency CPR-defibrillation, and antiarrhythmic drugs, were ever provided by Ward 4AB, for those arrhythmias known to occur before cardiac arrest, and which when normally supplied to cardiac arrest victims like Mrs. Kennedy, was then known by the TGH, Ward 4AB, and by the Medical Profession, to then in fact reliably save up to 80% of patients."*

[23] In a later part of the letter he said:

> *"Also now in common with other patients' cases now investigated under the Terms of Reference set for your Commission, it is clearly obvious, that*

Dr. Gunawardane, who was also trained overseas, then did not reach the Medical Standards required to then be the Cardiologist-in-Charge at the TGH. His medical inexperience or ignorance is displayed in his letter he wrote upon the request of Dr. Wood, and was dated 18/12/92, and you have already been supplied with a copy. His letter shows that he then was not apparently aware, that patients like Mrs. Kennedy, would then greatly improve when they received known highly effective cardiac drug therapy, and he then did not seem to be aware, that Mrs. Kennedy's medical condition could then have been stabilized with such cardiac drug therapy, until her heart-valve replacement could be arranged."

[24] By letter of 5 October 2005 the secretary to the Commission of Inquiry responded to the applicant in the following terms:

"Thank you for your letter dated 27 September 2005.

I note your allegations of medical negligence and that you are of the view than an Inquest should have been held in respect to the death of your mother. I also note that representations for an Inquest have been made to various bodies including the Health Rights Commission, the Queensland Medical Board and the Department of Justice and Attorney-General without success.

Unfortunately the issue raised by you does not fall within the Terms of Reference of the Commission and in the circumstances the Commission is not in a position to investigate the matter."

[25] The applicant wrote again by letter of 30 October 2000 (exhibit I to the applicant's affidavit). In this he referred to clause 2(a) of the terms of the reference and to "the role and conduct of the QMB." He went on, "Dr Gunawardane was also overseas-trained and we here question the conduct of the QMB and of Qld Health when they then both failed to ever act upon the Doctor's then obvious incompetence…"

[26] Other references are made to the Queensland Medical Board later in the letter in which he refers to their failure to investigate the Townsville General Hospital properly.

[27] Solicitors on behalf of the applicant wrote to the secretary to the Commission on 11 November 2005 seeking reasons and these were provided and a response of the same date under the hand of the first respondent:

"Thank you for our letter of 11 November 2005.

Mr Kennedy's concern, expressed to me, for the first time, in his letter to this Commission on 27 September 2005, the day before evidence was due to close, sought examination of the conduct of Townsville General Hospital and Queensland Health in relation to the death of his mother whilst a patient in Ward 4AB of that hospital. He was mistaken in thinking that my Inquiry permitted an examination of all public hospitals in Queensland.

On the contrary, so far as conduct in a public hospital is concerned, my inquiry was limited to:

'(c) Any substantive allegations, complaints or concerns relating to the clinical practice and procedures conducted by other medical practitioners, or persons claiming to be medical practitioners, at the Bundaberg Hospital or other Queensland Public Hospitals raised at the Commission of Inquiry established by Commissions of Inquiry Order (No 1) of 2005*.'*

I have construed that term as limiting my Inquiry to allegations, complaints or concerns relating to the clinical practice and procedures conducted by medical practitioners at Queensland public hospitals in respect of which, and only to the extent that evidence was given before the Commission of Inquiry No 1 of 2005. The only clinical practices and procedures by medical practitioners at Townsville Hospital in respect of which evidence was given before that earlier Commission of Inquiry were those of Mr (or Dr) Berg, an alleged psychiatrist, and Dr Myers, a neurosurgeon. In both cases, the evidence was of limited aspects of the conduct of each.

It follows that your client's complaint with respect to the practice and procedures of practitioners of Ward 4AB of Townsville Hospital was not within the above term of reference. Nor, in my opinion was it within any other of my terms of reference though I shall, below, deal with your client's apparent belief that it also came within paragraph (a).

Mr Kennedy's second letter of 30 October 2005, after the completion of evidence before this Commission, referred, for the first time, to possible misconduct of the Medical Board which, he suggested, brought his complaint within paragraph (a) of my terms of reference. He gave no particulars of how he said the Medical Board had acted improperly in relation to the conduct of doctors involved in his mother's treatment, or of any inaction by that Board when it should have acted. Nor was any evidence given to this Commission which could have been relevant to that issue. Indeed, in that letter also, Mr Kennedy's main concern appears to have been with the treatment or failure of treatment of his mother whilst she was in Ward 4AB of the hospital.

Under its terms of appointment, this Commission is directed to report before 30 November 2005. If the terms of reference were wide enough to permit an investigation of your client's complaints, a proper investigation of them would have required oral evidence, and potentially notices of adverse inference and submissions. That process would have taken time and would have prevented the Commission from reporting on time. In the circumstances as I have outlined them, it would have been improper, in my opinion, to have delivered the report late so that I could investigate your client's complaints.

As I'm sure you will appreciate, there have been many complaints made to this Commission about actions or inaction by doctors in public hospitals in Queensland which this Commission has been unable to investigate. I do hope your client understands that my inability to investigate his complaint is not intended to reflect adversely, in any way, on its seriousness."

[28] The challenge to the first respondent's determination that the matters raised by the applicant did not fall within the Commission's terms of inquiry was based upon a number of grounds.

[29] Firstly it was contended that the first respondent had misconstrued clause 2(c) of the Order in Council in so far as he considered that it was limited to matters in respect of which and only to the extent that evidence had been given before the first inquiry and that in consequence the only clinical practices and procedures at the Townsville General Hospital, relevant to the inquiry were those of the persons named in the letter of 11 November 2005.

[30] Secondly the applicant contends that his letters raised an issue under clause 2(a) of the terms of reference and that the first respondent wrongly concluded that such matters were not within his terms of reference or wrongly refused to inquire into the matters raised.

[31] Thirdly it is said that the applicant was denied natural justice. This argument is based upon the proposition that prior to concluding that the matters raised in the first letter of the applicant to the second commission were not within its terms of reference the first respondent ought to have indicated a provisional view in this regard to the applicant and afforded him the opportunity to be heard on this subject.

[32] In addition to the above the applicant challenged what he said was the first respondent's determination that even if the matters raised were within the terms of reference it would not have been possible to investigate them within the time available.

[33] Consideration of each of these matters must necessarily take place against a clear understanding of the function and role of a Commissioner appointed pursuant to the *Commissions of Inquiry Act* 1950.

[34] In *Dickson v Canada (Governor in Council)* [1997] 3 FC 169 Marceau JA of the Federal Court of Canada contrasted the role of such a Commission with that of a Court:

> *"Courts of law are designed, if civil, to settle disputes between opposing parties and, if criminal, to establish guilt or innocence. They must arrive at definitive conclusions; they cannot leave a problem aside for lack of evidence or absence of a clear solution. Briefly put, it is their duty to dispose of the issues brought before them, to judge. Procedural rules regarding such matters as the onus and burden of proof have been developed precisely to allow courts to discharge this duty. Commissions of inquiry, be they investigative or merely advisory, are not, in any way, under the same duty. As investigative bodies, they, of course, are called upon to seek the truth, and no doubt they are ideally suited for uncovering facts that could not be discovered otherwise (precisely because they have broad investigative powers, they are inquisitorial, and they are not subject to the strict rules of evidence that apply to a court of law). Hence, their prestige. But, nowhere do we find the imposition upon them of a duty to conclude. On the contrary, their purpose, which is primarily to advise and to help the government in the proper execution of its duties, is not conducive to settling issues and drawing definitive conclusions. It is the*

> *legal duty of the commissioners to report, but that report is limited to explaining what they have done, what they were able to draw from their investigations (in terms of findings of fact) and what advice they are in a position to give to the Executive in light of those findings. It may be unusual for an order in council setting up a commission of inquiry to be as detailed as was P.C 1995-442. But, the designated issues were simply meant to establish the terms of reference and to delimit the Commission's range of investigative powers in view, I suppose, of the extremely sensitive field of activity involved. The Governor in Council obviously could not require the Commissioners to determine, as a court of law, all of the issues mentioned in their terms of reference."*

[35] In *Ferguson v Cole* [2002] FCA 1411, Branson J speaking of the role of a Commission of Inquiry said, at [74]:

> *"Where the Executive Government has a need for information it has the option of seeking to obtain that information by one or more of various means. The establishment of a Royal Commission is one way in which the Executive Government may obtain information. In this case the Royal Commission is charged with making inquiries directed to the gathering of information both to ascertain matters of fact and to provide a basis for the formulation of policy. Indeed, the Commissioner is himself charged with identifying and reporting on legislative and administrative measures to achieve reform within the building and construction industry. The time provided to the Commissioner to provide the report required of him is a matter for the Executive Government. 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. These are not matters with which the law is directly concerned. However, the law does have a role to play where, because of the time or other restraints imposed on the Royal Commission, the Royal Commission acts in a way that destroys, defeats or prejudices a person's rights, interests or legitimate expectations without according that person procedural fairness (see* Annetts v McCann *per Mason CJ, Deane and McHugh JJ at 598).*

[36] It is now established that a body such as the Commission notwithstanding that it is investigative in character is obliged to afford procedural fairness to persons who may be adversely affected by findings which it makes. This includes damage to reputation. See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

[37] In *Annetts v McCann* (1990) 170 CLR 596 at 598 the requirement to act in a procedurally fair way was put more generally by Mason CJ, Deane and McHugh JJ:

> *"It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests of legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment…"*

[38] On the other hand it has been held that procedural fairness does not have to be afforded persons in relation to a decision to institute or to consent to a prosecution. See *Cornall v AB (A Solicitor)* [1995] VR 372

[39] I do not think however that any of these principles would support the proposition advanced here, namely that the first respondent was obliged, prior to making a decision as to whether the matters raised in the applicant's letter or letters came within the Commission's terms of reference, to notify the applicant that the Commissioner was inclined to the view that the matters did not come within his terms of reference and to afford the applicant the opportunity to persuade him otherwise. I think that what Senior Counsel for the Attorney General said is correct. The applicant like any other citizen has the right to submit material to the Commission and request that it be investigated and the Commissioner has to determine whether anything in the material falls within the Commission's terms of reference. There is in my view no justification for imposing a requirement upon the first respondent to give the applicant the opportunity to be heard upon this question. I should add that the applicant was not able to cite any authority in which such a requirement was held to exist.

[40] So far as the second matter raised is concerned, this claim must be rejected. Simply to state that a medical practitioner who was overseas-trained was guilty of negligence in one way or another in the treatment of a patient or in providing a subsequent assessment of the adequacy or otherwise of such treatment and to assert that in consequence, the Queensland Medical Board must in some way have failed in its duties because of this, does not raise an issue as to the role and conduct of the Board in relation to the assessment, registration and monitoring of overseas-trained medical practitioners in terms of clause 2(a) of the Order in Council. Plainly, the applicant has attempted to broaden his complaints about his mothers' treatment and the subsequent alleged cover up in a way intended to bring these within the terms of reference. He has, in my view, failed. Even if, arguably, the matter was within the terms of reference, the first respondent was justified, as set out in his letter, in refusing in inquire into such vague and unspecified allegations.

[41] So far as the first issue or the issue of construction is concerned, the meaning of clause 2(b) must be a matter of impression. I was not referred to any authority which assists in its construction although I was referred to a number of dictionary meanings of the word "raised". The words "raised at the Commission of Inquiry" obviously connote location. On the ordinary meaning of these words I do not accept that the applicant can, by virtue of doing no more than forwarding to the first Commission the letters of 13 July 2005 and 27 July 2005 be said to have "raised at the Commission of Inquiry" the allegations contained in those letters. Something more in my view is contemplated by the language used in 2(c). I think that the words "raised at" at the Commission of Inquiry should be regarded as synonymous with "raised before the Commission of Inquiry" and contrasted with "raised with the Commission of Inquiry" which might describe the applicant's position here.

[42] The applicant has not persuaded me that the first respondent's construction of the clause is erroneous. On the contrary, I think it is correct.

[43] The above findings are sufficient to dispose of the matter. However whilst the applicant argued that a favourable finding on the first issue (or the second issue) should result in the matter being sent back to the first respondent and that he would

be content with this, he also argued that the first respondent had made a reviewable decision when he said that even if the matters raised were within his terms of reference the Commission would not have been able within the time available to investigate such matters. The argument went that the first respondent even if he could not fully investigate the matters raised, might have given consideration to a recommendation of some kind (such as the holding of an inquest or some other inquiry or investigation). It was said that Commissions of Inquiry often make such recommendations and sought to impugn the decision because of what was said was a failure on the part of the first respondent to consider this.

[44] Counsel for the Attorney General argued that no reviewable decision is involved but that if it is, it is amply justified by the reasons given.

[45] I cannot accept the applicant's argument that the first respondent was obliged to consider possible courses beyond what he was charged by the Order in Council to do, namely inquire and report.

[46] It seems to me that if the applicant had otherwise succeeded it does not particularly matter whether there is a reviewable decision involved in relation to this matter or whether there is no more than an intimation of what would have occurred if the respondent had concluded that the matters raised were within his terms of reference. The outcome would be the same. If it is a decision it was plainly justified by the considerations referred to in the letter of the 11 November 2005. If not then such considerations would have provided a strong justification for the denial of the relief sought on discretionary grounds if the applicant had otherwise succeeded.

[47] The application is dismissed.

[48] I give the parties leave to apply in writing on the issue of costs within seven days.