



Parliament of Australia
House of Representatives

**STANDING COMMITTEE
ON
HEALTH AND AGEING**

**INQUIRY
INTO
HEALTH FUNDING**

**SUBMISSION
by
Whistleblowers Australia**

22 November 2005

Terms of Reference

The Committee shall inquire into and report on how the Commonwealth government can take a leading role in improving the efficient and effective delivery of highest-quality health care to all Australians.

The Committee shall have reference to the unique characteristics of the Australian health system, particularly its strong mix of public and private funding and service delivery.

The Committee shall give particular consideration to:

- a. examining the roles and responsibilities of the different levels of government (including local government) for health and related services;
- b. simplifying funding arrangements, and better defining roles and responsibilities, between the different levels of government, with a particular emphasis on hospitals;
- c. considering how and whether accountability to the Australian community for the quality and delivery of public hospitals and medical services can be improved;
- d. how best to ensure that a strong private health sector can be sustained into the future, based on positive relationships between private health funds, private and public hospitals, medical practitioners, other health professionals and agencies in various levels of government; and
- e. while accepting the continuation of the Commonwealth commitment to the 30 per cent and Senior's Private Health Insurance Rebates, and Lifetime Health Cover, identify innovative ways to make private health insurance a still more attractive option to Australians who can afford to take some responsibility for their own health cover.

INTRODUCTION

Whistleblowers Australia (WBA) seeks to address the following term of reference:

- *considering how and whether accountability to the Australian community for the quality and delivery of public hospitals and medical services can be improved.*

Our submission concerning “accountability” is structured around two foundation stones.

Firstly, it stands on the following definition of “public accountability” enunciated by Citizens’ Circle for Accountability (CCA)¹ founded in Canada in the wake of the 1990’s major public health scandal concerning the contamination of the Canadian Red Cross Blood supply which saw the establishment of the Krevers Royal Commission to investigate the scandal.

Secondly, WBA seeks to restate and extend its recommendations already placed before Commissioner the Hon Geoffrey Davies of the Queensland Public Hospitals Commission of Inquiry, and its (aborted) forebear the Bundaberg Hospital Commission of Inquiry under Commissioner Anthony Morris QC.

To aid Committee members, WBA attaches, as exhibits A & B, our submissions of 18 August and 16 September 2005. WBA respectfully requests that they be made public together with this submission.

In the board, CCA’s definition of “public accountability” says:

“...When people in authority fail to do their jobs properly, we can expect needless harm, injustice and waste of public money. Holding to account is a powerful lever to cause authorities to act diligently in the public interest, but we have never used it. It means exacting and validating the public explanations we need

¹ <http://www.accountabilitycircle.org/>

from authorities that help us to make sensible decisions as citizens -- including what trust to place in the authorities. If we do not trust people in authority, society will not work properly.

Accountability means the obligation to explain -- to report, at the time it is needed, how responsibilities are being carried out. Accountability does not mean the responsibility to do something, which is the obligation to act. Nor does it mean answering questions in an inquiry. Public accountability means the obligation to explain publicly, fully and fairly, how responsibilities affecting the public in important ways are being carried out. Public answering for responsibilities cannot be rejected or evaded, because the obligation is politically neutral and tells no one how to do their jobs. It is simply the requirement to explain.

Holding authorities fairly to account has two purposes. First, it produces useful information that we would not otherwise have but which we need if we are to make sensible decisions about authorities, including the trust decision. Holding effectively to account helps prevent "spin" from authorities, because their public answering will be validated. As the American George Washington said two centuries ago, "...I am sure the mass of Citizens in these United States mean well, and I firmly believe they will always act well, whenever they can obtain a right understanding of matters..." He spoke for all societies.

Secondly, holding to account imposes a self-regulating influence on those asked to account. People who must report publicly on their responsibilities will want to say something praiseworthy. Since what they say they intend and achieve will be subject to scrutiny and validation by knowledgeable organizations or professional audit, exposed lying brings high personal cost. Most important, intentions that would lead to harm or unfairness tend to self-destruct when they are exposed.

Authorities such as governments and large corporations have resisted the obligation to answer fully and fairly for their responsibilities because public answering shares power and the self-regulating effect tends to restrict whim in their intentions.

Explaining publicly, fully and fairly how responsibilities are being

carried out means that authorities will report intentions that would affect the public in important ways and the reasons for those intentions. They will also report the performance standards they intend for themselves and those they oversee. They will report their actual performance, as they see it, the outcomes they think they have brought about, and the learning they gained and how they applied it.

For example, a government adequately accounting for its responsibilities can reasonably be expected to meet each of these standards of public reporting. Conversely, a government not wanting to take responsibility for adequate and cost-effective healthcare, for example, can be expected to publicly explain its intentions and reasoning, using the same answering standards.

We need to know what authorities such as executive governments and their agencies and corporate governing bodies intend, for whom, and why they intend it. Without this reporting, and without validation of what authorities assert, we have no assurance whether authorities' intentions will lead to fairness or harm. We are therefore not well-enough informed to sensibly commend their intentions, or act to alter or halt them. At present all we seem to have is blind faith or public protest -- with protest usually too late. Once authorities' agendas have been set, citizens' restraining forces seldom match authorities' driving forces. Holding fairly to account can reduce the driving forces because the public answering requirement produces the self-regulating influence."

In order to ensure public accountability through "public answering", it needs to be enshrined in appropriate legislation to make it an obligation at law.

The Establishment of a Federal Public Accountability and Answering Commissioner

Building on *The Citizen's Guide's* proposals regarding appropriate legislative measures, WBA recommends, as a high priority, that a **Public Accountability and Answering Commissioner** be established and made an officer of the Parliament in the same manner as Auditors-General and Ombudsman are, and that:

- The Federal Parliament formally state to the public their expectations for public answering within their jurisdictions.
- Ministers of the Crown immediately they are sworn in, each report to Parliament (which means reporting publicly) their interpretation of their statutory powers and duties and their statutory and commonsense public answering obligations. This is the first indicator for legislators' confidence in the minister.
- All executive bodies (ministers and governing boards) overseeing departments, branches, corporations and agencies of government and entities controlled by government, and those bodies overseeing municipal and regional corporations and the entities they control, regularly and publicly account for the discharge of their responsibilities.
- The accountability reporting obligation applies to all entities and public bodies that receive, directly or indirectly, a significant part of their funding from the public purse.
There are no excluded entities.
- The overseeing governing bodies meet standards of public answering reasonable to expect for their responsibilities, which include holding fairly to account all entities they oversee.
- Governing bodies answer for fairness, efficiency and compliance with the law. (where fairness responsibilities include safety, health, justice and the environment).
- When the precautionary principle applies in governing bodies' responsibilities, their public answering includes their compliance with intent of the principle.
- Governing bodies' answering includes reporting the extent

to which they inform themselves for their decision-making. (This means that governing bodies will manage their information to a standard.)

- Governing bodies report what they plan to bring about, and why, their specific achievement objectives and key performance standards, their actual results as they see them, and the learning they gained and how they applied it. **When what they plan to do would affect the public in important ways, they explain publicly their reasoning for their intended action through equity statements or their equivalent.**
- Bills introduced in a legislature have attached to them the sponsoring minister's or legislator's publicly-challenged equity statement or equivalent, whenever stakeholders can reasonably expect legislators to use such a statement for their decisions on the Bill. This statement of explanation of the Bill's intention becomes part of the public record when the Bill becomes law.
- For each Bill, the **Public Accountability and Answering Commissioner** gives to the legislature committee dealing with the Bill his or her opinion whether the government's reporting of the Bill's intentions and reasoning has met reasonable standards of disclosure in public answering. **Public Accountability and Answering Commissioner** also reports whether the Bill's provisions for public answering by those who would be given important responsibilities under the Bill meet a reasonable standard of public answering. (These are politically-neutral matters.)

WBA recommends that the following may act as a Mission Statement at least, or set the framework for legislation establishing a **Public Accountability and Answering Commissioner**:

Whereas:

1. Citizens must be informed for their civic duty to ultimately oversee their elected representatives, administrators and judiciary at every level who are responsible and accountable for regulating fairness in society.
2. The implications of legislative, administrative, judicial and business power in today's world require that those in authority affecting the public in important ways inform themselves adequately and make clear to the public the outcomes they intend, for whom, and their reasoning. This allows citizens, through due process, to commend, alter or halt authorities' intentions.
3. Public accountability is the obligation to answer publicly for the discharge of responsibilities affecting citizens, and holding to account means that citizens exact fair, complete and timely answering from decision-makers in authority. This leads to greater public trust in the authorities.
4. Adequate public answering is of such importance in achieving a fair society that the public answering obligation ought to be put to the people by referendum for inclusion in the *Constitution*
5. An accountability Amendment would complete the needed balance of authorities' powers, responsibilities and answering obligations. Clarity of all three is necessary to judge the diligence of those in authority.
6. Those with the obligation to account are the identifiable persons (elected or appointed) who constitute the directing mind and will of the entity whose actions are subject to public answering. It is therefore identifiable people who account, not a "government" or a "corporation."
7. Because the obligation to answer tells no one how to do their jobs, yet exerts a self-regulating effect on the conduct of people in authority, a public accountability amendment to the *Constitution* could be expected to:
 - o reduce deception by authorities and reduce citizens' time, stamina and funds spent on lobbying and fighting,
 - o limit legislation or executive orders benefitting only a few,

- improve elected representatives' understanding of intended actions, outcomes and means and, ultimately,
- improve citizen respect for and cooperation with authorities, and the development and deployment of the nation's human resources.

The Australian Public Service Code of Conduct

The Code of Conduct² for the Australian Public Service (APS) requires that an employee must:

- behave honestly and with integrity in the course of APS employment;
- act with care and diligence in the course of APS employment;
- when acting in the course of APS employment, treat everyone with respect and courtesy, and without harassment;
- when acting in the course of APS employment, comply with all applicable Australian laws;
- comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction;
- maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment;
- use Commonwealth resources in a proper manner;
- not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment;
- not make improper use of:
 - (a) inside information, or
 - (b) the employee's duties, status, power or authority,
 in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person;
- at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS;

² <http://www.apsc.gov.au/conduct/index.html>

- while on duty overseas, at all times behave in a way that upholds the good reputation of Australia; and
- comply with any other conduct requirement that is prescribed by the regulations.

Section 10 of the *Public Service Act 1999* - APS Values - provides for:

(1) The APS Values are as follows:

(a) the APS is apolitical, performing its functions in an impartial and professional manner;

(b) the APS is a public service in which employment decisions are based on merit;

(c) the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;

(d) the APS has the highest ethical standards;

(e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;

(f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;

(g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;

(h) the APS has leadership of the highest quality;

(i) the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;

(j) the APS provides a fair, flexible, safe and rewarding workplace;

- (k) the APS focuses on achieving results and managing performance;
- (l) the APS promotes equity in employment;
- (m) the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment;
- (n) the APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
- (o) the APS provides a fair system of review of decisions taken in respect of APS employees.

(2) For the purposes of paragraph (1)(b), a decision relating to engagement or promotion is based on merit if:

- (a) an assessment is made of the relative suitability of the candidates for the duties, using a competitive selection process; and
- (b) the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and
- (c) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties; and
- (d) the assessment is the primary consideration in making the decision.

Corruption-Free Workplace

WBA recommends that in line with our submission to the Bundaberg Hospital Commission of Inquiry underpinning "accountability" that section 10 (j) of the *Public Service Act 1999* referring to APS Values which currently provides for "... a fair, flexible, safe and rewarding workplace" be amended to state "...a fair, flexible, safe, **corruption-free** and rewarding workplace."

Section 16 of the Public Service Act 1999 - Protection for whistleblowers - provides for:

A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:

- (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or
- (b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.
- (c) an Agency Head or a person authorised for the purposes of this section by an Agency Head.

Establishment of a Whistleblower Protection Authority

WBA recommends that in line with our recommendation to the Bundaberg Hospital Commission of Inquiry and the Queensland Public Hospitals Commission of Inquiry regarding the establishment of Queensland Whistleblower Protection Authority that (a) a **Federal Whistleblower Protection Authority** be established where public interest disclosures (PID) regarding federal jurisdictional affairs may be made and shall be required and/or capable of:

- (a) to protect any public official or person who makes a public interest disclosure (PID) to either a proper public authority or, if necessary, Member of Parliament or the media from any act of retribution by another;
- (b) to secure probative evidence relating to the PID, and personal files relating to the whistleblower;
- (c) to receive on-going progress and final report from the relative investigative authority on the PID;
- (d) upon satisfying certain criteria concerning the nature (i) of the PID; (ii) ensuring its non-vexatious nature; and (iii) of the retribution and/or detriment, to fund a legal action in damages or specific performance against the Federal Government and its agencies, other body or person who knowingly inflicts a detriment on a whistleblower as defined and protected by the **Federal Whistleblower Protection Authority** relating or tending to relate to his/her PID; and

(e) to report to the Australia people through an all-party **Parliamentary Whistleblower Protection Authority Committee** and that its responsible Minister be either the Prime Minister or Attorney-General.

WBA recommends that section 16 of the *Public Service Act 1999* be amended to include the aforesaid as “a proper authority” to whom a whistleblower may make his or her PID.

WBA would be happy to appear before the Committee in due course and speak to this submission under oath.

National President

Whistleblowers Australia

22 November 2005

EXHIBIT A

**Submission
by
Whistleblowers Australia**

**BUNDABERG HOSPITAL
COMMISSION
OF
INQUIRY**

**Contact: Mr. Greg McMahon
National Director – Whistleblowers Australia**

18 August 2005

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CASE LAW AND ACTS CITED

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- Lazarus Estate Ltd Vs Beasley*, (1956) 1 QB. 702
- MFA v The Queen* (2002) 77 ALJR 139, 146,150
- Ottoman Bank v Chakarian* [1930] AC 277
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- Bennett v President, Human Rights and Equal Opportunity Commission* [2003] FCA 1433
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- Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 174
- British American Tobacco Australia Services Limited v Cowell* (as representing the estate of Rolah Ann McCabe, deceased) [2002] VSCA 197 (6 December 2002)
- Erglis v Buckley & Ors* [2004] QCA 223
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- Metropolitan Properties Co. (F.G.C.) Ltd. v Lannon* (1969) 1 QB 577
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- Gilbert v Volkers* [2004] QSC 436
- Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] Qd R 8
- Article 9 of the *Bill of Rights 1688*
- Parliament of Queensland Act 2001*
- Constitution of Queensland 2001*
- Coroners Act 2003*
- Nursing Act 1992*
- Defamation Act 1899*
- Whistleblowers Protection Act 1994*
- Public Sector Ethics Act 1994*
- Libraries and Archives Act 1988*
- Public Records Act 2002*
- Crime and Misconduct Act 2001*
- Queensland Crime Commission Act 1997*

1.0 FOREWORD

- 1.1. Queenslanders would like to believe that they live in a civilized society governed by the rule of law. They would like to believe that tyrannical and oppressive government is neither welcome nor capable of surviving in “post-Fitzgerald Queensland” without being exposed. They would like to believe that our governance system of checks and balances, and the presence of a self-described vigilant free media, unafraid to ask serious questions and willing to persist until the truth is exposed and corrected, would protect them.
- 1.2. The fact that the serious long-term suspected malpractice at the Bundaberg Base Hospital came to public notice by a whistleblower ought to concern everyone. Informing an elected Member of Parliament, as the option of last resort, a whistleblower urged him to make the public interest disclosure (PID) under the protection of parliamentary privilege on the floor of the Queensland Legislative Assembly. It is evident that other reporting options under the *Whistleblowers Protection Act 1994* and the *Crime and Misconduct Act 2001* either failed to function as they should, were inadequate or were simply not trusted. These Acts have proven to be of little if any value to Queensland in preventing or mitigating the pain and sorrow that has been accumulated by Queenslanders under the administration of Queensland health.
- 1.3. It ought to be concerning that the fear of doing the right thing, as a public official or concerned citizen, still exists in the Queensland Public Service in 2005. Great should be the concern when viewed against the background of constant assurance from Queensland’s political leaders and various law-enforcement authorities that this is a truly open and democratic society governed by the most open and accountable government in Queensland’s history. Something is wrong somewhere.
- 1.4. How, then, could a major breakdown in civil society, such as that uncovered by the Bundaberg Hospital revelations, occur? Plainly, the facts show a different story about how open and accountable our government really is. Inescapably, it must give rise to serious

questions about why the public, especially the people of Bundaberg and surrounding region, were being kept in the dark for so long, even when lives were being harmed and lost.

- 1.5. It is respectfully suggested that Queenslanders have to face up to the possibility that perhaps they have been living through a charade or in a Fool's Paradise. Perhaps, more worryingly, they have been conned or "dumbed-down", by those in authority and in positions of trust, into believing that Queensland is a democratic 'paradise', in terms of its openness and accountability – as with the truth as to how bad hospital waiting lists in Queensland really are? Perhaps, even worse, no one in authority or in a position of trust in government really knows what is going on anywhere? Either way, Whistleblowers Australia (WBA) suggests that excuses carry no currency anymore when people's lives have been at constant risk, and, in some cases, lost.
- 1.6. As the facts have emerged at the Bundaberg Hospital Commission of Inquiry (BHCI), it can be said, with some certainty, that fear of dissent permeates our polity and our public service, like an insidious cancer. The Bundaberg episode is, WBA submits, a secondary cancer stemming from a pre-existing greater cancer in the body politic which, unless addressed, may never see Queensland's public administration restored to good health.
- 1.7. Fear of disclosing suspected or known wrongdoing, even when fellow citizens are unnecessarily dying or being harmed because of that conduct, simply cannot be tolerated. Queensland is either an open and accountable society, or it is 'something else.' Openness and fear are mutually exclusive ideals. They are inimical to each other. It is reasonable therefore to suggest that that 'something else' must be a profound societal illness, hostile to a civil society. It is something which must be identified and isolated by the BHCI, and rectified through thoughtful recommendations.
- 1.8. **WBA strongly suggests that Queensland is suffering from anti-democratic, unfettered, systemic abuse of power, where executive decree, uninterrupted by a politicized public service and regulatory capture of its watchdog authorities, has become superior to the rule of law.**
- 1.9. Through the well-documented experience of Queensland whistleblowers who have been "*through the mill*", and who have fought this abuse of power firsthand during and since the

Fitzgerald reforms, WBA believes that it has something uniquely positive to say and to recommend in all this regard if the next step in achieving good governance is to be taken.

1.10. To better understand what is really going on in terms of open and accountable government in Queensland, the “whistleblower dots” need to be joined together. Seeing them in isolation distorts reality. WBA shall attempt to join them into a continuum. It shall be done from a whole-of-government perspective, using the concerns outlined in BHCI Discussion Paper No 2. It shall set out how what has gone before explains why Queensland has reached this current parlous state. The politicization of the Public Service and the regulatory capture of watchdog authorities are two root causes of the current despair.

1.11. The hope is that remedies may be adopted so that a better and more secure future might be reached where trust in government might be restored.

RECOMMENDATIONS

Recommendation 1.

The BHCI recommends the establishment of an independent statutory **Whistleblower Protection Authority**. The **Whistleblower Protection Authority’s** prime statutory duty, *inter alia*, shall be:

- (f) to protect any public official or person who makes a public interest disclosure (PID) to either a proper public authority or, if necessary, Member of Parliament (State or Federal) or the media from any act of retribution by another;
- (g) to secure probative evidence relating to the PID, and personal files relating to the whistleblower;
- (h) to receive on-going progress and final report from the relative investigative authority on the PID;
- (i) upon satisfying certain criteria concerning the nature (i) of the PID; (ii) ensuring its non-vexatious nature; and (iii) of the retribution and/or detriment, to fund a legal action in damages or specific performance against the State of Queensland and its agencies, other body or person who

knowingly inflicts a detriment on a whistleblower as defined and protected by the **Whistleblower Protection Authority** relating or tending to relate to his/her PID; and

- (j) to report to the Queensland people through an all-party **Parliamentary Whistleblower Protection Authority Committee** and that its responsible Minister be the Queensland Premier.

Recommendation 2.

The BHCI recommends that any deliberate act of retribution and/or detriment by another against a person who makes a PID to a proper authority – so defined as a “judicial proceeding” pursuant to section 119 of the *Criminal Code* - be treated as a breach of section 119B of the *Criminal Code 1899* (Qld).

Recommendation 3.

The BHCI recommends that section 119B of the *Criminal Code 1899* (Qld) concerning the word “witness” be amended, as and where necessary, to include in its meaning “*any person making a public interest disclosure to a proper authority or other defined avenue.*”

Recommendation 4.

The BHCI recommends that, in the *Public Sector Ethics Act 1994*, and in all other relevant legislation covering the employment of Queensland Crown employees, especially in areas of health care, that the right of any such employee to work in a “corruption free workplace” shall be guaranteed, otherwise an action in damages may be brought against the State of Queensland by any aggrieved employee who suffers a detriment as a consequence of that “corruption free workplace” being knowingly eroded, absent or compromised through neglect of any kind.

Recommendation 5.

The BHCI recommends that the *Public Records Act 2002* be amended to oblige the State Archivist to issue pro-actively a “service-wide or specific location edict of non-destruction of relevant public records” - suitable to the circumstances at hand or in contemplation by government or other body such as a commission of inquiry or coronial inquest *et al* - in which said public records are known to be or may be reasonably foreseen to be required for that legal or accountability purpose or proceeding.

Recommendation 6.

The BHCI recommends that *Public Service Act 1996* section 51 (2) – **Responsibilities of chief executives** – be amended to include:

- (o) **taking all reasonable measures to maintain a “corruption free workplace” for all departmental employees.**

Recommendation 7.

The BHCI recommends that the *Crime and Misconduct Act 2001* be amended concerning the terms and conditions of appointment etc for its senior officers to mirror the *Electoral Act 1992 (Qld)* Section 23 (4) which states, relevantly, that “...A person who is a member of a political party is not to be appointed as a senior electoral officer.”

Recommendation 8.

The BHCI recommends that a bi-partisan **Bundaberg Hospital Commission of Inquiry Implementation Committee** be established to oversee and report on a regular basis to Parliament on progress until all recommendations have been implemented.

Recommendation 9.

The BHCI recommends that the **Bundaberg Hospital Commission of Inquiry Implementation Committee** shall have two **Public Interest Health Monitors** appointed to it by the Queensland Government, in consultation with the

Opposition, and they shall be required to provide an independent report to Parliament, on a half-yearly basis, or earlier, on the progress of the Committee's task.

Recommendation 10.

The BHCI recommends to the Federal Government that the **Medicare Rebate Arrangement** with hospitals throughout Australia be made conditional upon each hospital being accredited to perform the particular surgery before attracting any rebate, and if any application is made without appropriate accreditation, such matter shall be reported to the appropriate Queensland medical authority to investigate.

Recommendation 11

The BHCI recommends that the **Legislative Assembly Members' Ethics and Parliamentary Privileges Committee** issue a discussion paper on the better or more cautious use of parliamentary privilege when either a Minister of the Crown or elected member of Parliament wishes to make an adverse comment about a whistleblower *after* the PID has been made and/or come to public attention, including in the media as a first time exposure, to ensure the privilege is not abused and so that any comment is reasonably based on fact and not designed to mislead the Parliament out of malice or party political self-interest.

THE SWORD AND THE SHIELD

The national policy of Whistleblowers Australia on whistleblower protection, a document referred to as '*The Sword and the Shield*', is attached for the consideration of BHCI.

2.0. INTRODUCTION

*“...I will remember that there is art to medicine as well as science,
and that warmth, sympathy, and understanding may outweigh the
surgeon's knife or the chemist's drug.*

*I will not be ashamed to say "I know not," nor will I fail to call in
my colleagues when the skills of another are needed for a patient's
recovery.”*

Extract from the Modern Hippocratic Oath

- 2.1. The overriding issues for this inquiry to address are the questions of “public confidence”, what a civilized democratic society governed by the rule of law expects of its public service, and how to protect whistleblowers who defend that rule of law from reprisal.
- 2.2. WBA believes that this submission falls well within the scope of the BHCI's terms of reference, Issue Paper No 2 and addresses comments by Commissioner Morris QC concerning whistleblowing in his opening statement on 23 May 2005.
- 2.3. All civilised democratic societies rely on public confidence in the institutions of government if they are to function harmoniously, properly and in an orderly fashion. Nowhere is this truer than in the requirement of the polity to have confidence in its parliamentary, justice and health systems, because they concern personal liberty, security and wellbeing. When that confidence is eroded, jeopardized or placed in doubt, civilized society has the capacity to break down significantly, bringing with it great harm to life and liberty.
- 2.4. It follows that service to the public is both a high duty and an honour. It brings with it also special rights and obligations for and on those who choose to seek employment in the public service. Those rights and obligations may be often overlooked for the sake of keeping a job and paying the mortgage.
- 2.5. This emphasis on “service”, however, appears to have been lost since the move of governments in the 90's towards a ‘politically sensitive’ public service, to corporatize and privatize service delivery and to adopt the title of “public sector” rather than civil service.

This change may have underhandedly and psychologically caused those working in the area, and in government itself, to devalue their role in civilized society. It may have caused them to downgrade rights and obligations which government, employees and the public itself should meet and respect, lest essential services be placed at risk, engendering a falloff in public confidence in all levels of government.

- 2.6. The great watchword of the polity in any democracy is vigilance. Consequently, the prime duty of the “governors” is to ensure that all necessary steps are taken to keep the “governed” confident in themselves that, when placing their trust in either the parliamentary, justice or health systems, as generally happens to everyone at some stage of life, that neither injustice nor injury will be their lot at the hands of those elected or appointed public officials.
- 2.7. It follows that the service providers must not engage in corruption, abuse of power, incompetence or negligence. Furthermore, where a suspicion of its existence surfaces, it must be addressed expeditiously, thoroughly and fearlessly. It must not be covered up.
- 2.8. At its most basic, polity confidence in government owes its life to a commitment by government to truth, public accountability and public answering. Otherwise, that trust, which is the glue binding us together as a caring, cohesive whole, evaporates. It will slowly wither on a toxic diet of self-serving political spin and deceit. It will be replaced with crushing pessimism and leave a residue of distrust and a deep sense of hopelessness and bewilderment throughout the community, especially amongst the elderly. And, in the process, a loss of pride will occur for those who are or who may seek to be a career public servant.

The Rule of Law

- 2.9. Queensland functions under the provisions of the *Constitution of Queensland 2001* and various laws. Constitutional government requires that the doctrine of the separation of powers be respected by the three arms of government. It is no trite doctrine. The polity permits and expects the judiciary, pursuant to law, to have an independent capacity to take away or restore a citizen’s liberty and property, enforce obligations and punishments when the law demands - be that against either government, corporation or citizen. Or likewise, the expectation is that the law will order reparation of a varying kind for damage done to parties

by others. But, at all times, it is expected that authorities will only exercise that power so long as the law is applied consistently, predictably and equally, by all arms of government, on the polity from the lowest to the highest. This is commonly known as “government by the rule of law”.

- 2.10. Chief Justice of the High Court the Right Honourable Sir Gerard Brennan, in a speech entitled “*The Courts for the People – Not People’s Courts*” at the Inaugural Law School Oration on 26 July 1995, described the rule of law in these terms:

“...the rule of law must rest on a surer foundation than force or the imminent threat of force. It must rest on the common acceptance by all who are subject to the jurisdiction of the courts of the authority of the courts to determine cases and controversies. The rule of law in a free society can be maintained only if, in the event of dispute, it is accepted that curial judgments will prescribe the norm to which all parties will conform.

The rule of law assumes its equal application. The principle of equality under the law is based on respect for the equal dignity of every person. By equal application of the law, the rule of law is made to govern every case, so that justice according to law is administered. It is a corollary of the principle of equality that no person is so powerful or so privileged as to avoid the law to which that person is subject. These principles can operate in practice only if there be such a degree of public confidence in the courts that neither power nor riches, nor political office nor numerical superiority can stand against the weight of the court's authority.

To destroy public confidence in the courts is to destroy the foundation of the rule of law...”

Crown employees and their toxic workplace

2.11. WBA submits that the Crown and its employees, be they Governor, Ministers of the Crown, politicians, judicial officers, doctors, nurses, lawyers, directors-general or public servants must conduct themselves with the highest standards of probity in all matters at all times. This obligation, in some cases enforced by a sworn Oath of Office, is long settled at law. In *Eastern Trust Co v McKenzie, Mann & Co*³ the Privy Council said:

"...It is the duty of the Crown and of every branch of the Executive to abide by and obey the law ... it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it."

2.12. WBA submits that Crown employees are entitled not to be placed in a work environment, especially in a hospital intensive care unit or operating theatre, where lives are at stake, in which adherence to high standards of probity, professional standards and impartial service in the public interest are missing. The community expects a decent work environment for Crown employees. It ought not to be subsumed by the unethical conduct of superiors over subordinates, or reinforced by intimidatory conduct and abuse of power against dissenters just because those dissenters want to deliver services honestly, impartially and in the public interest.

2.13. Such a toxic workplace appears to have existed at the Bundaberg Hospital where Dr. Patel may have ruled the roost with a dominating personality and high-ranking network of local supporters.

2.14. It is difficult to accept, however, that the Bundaberg Hospital experience, regarding bullying and the cover-up of bad news within a dysfunctional workplace, is not replicated throughout the Queensland health system. Indeed, consider the experiences of Royal Brisbane Hospital Ward 9B intensive care nurse Ms. Wendy Erglis, where a reprisal was inflicted on her, after her PID, under an abuse of parliamentary privilege by the then Health Minister the Hon Wendy Edmonds. Senior Specialist Visiting Physician/Consultant Dr. Brian Senewiratne was also professionally marginalized within the hospital system forcing his eventual resignation, after he made disclosures concerning inadequacies at QEII and Princess

³ [1915] AC 750 at 759

Alexandra Hospitals. Senior Cardiologist at Prince Charles, Dr. Con Aroney, was intimidated and bullied by senior health Department officials after his 2004 PID over funding cuts to cardiac services which saw his resignation in early 2005. All are glaring cases in point.

2.15. The eradication of this toxic situation is not assisted by the paucity of checks and balances inherent in Queensland's unicameral system of government. To that end, the experience of other whistleblowers in this submission demonstrates this point, by **joining the dots together** to reveal its insidious systemic character. Our unicameral system of parliamentary democracy arguably throws up the potential for an elected dictatorship. This, in turn, provides a ready-made hot-house for rule by executive decree where a climate of bullying is too easily generated from the very top of government, to seep inexorably all the way down to the cellars of a highly politicized workplace.

2.16. Where contracted Queensland departmental directors-general owe their jobs to political masters of the day, it can be argued that the traditional Westminster system of government, of having a truly politically-neutral public service, has been terminated and buried. True accountability becomes an easy, early casualty in politicized environments. In short, a climate of fear and lack of trust permeates the mainstream public service of Queensland and runs through its veins like an infection. It acts as an inhibitor on speaking out against wrongdoing involving the governance of Queensland. Queensland public officials obviously live in fear of losing their jobs or jeopardizing career advancement if they dare to rock the ship of state. The fear renders silence a more self-serving comfortable option, with the public interest becoming the loser.

2.17. The existence of this fear was amply attested to at Bundaberg Hospital in Ms. Hoffman's evidence-in-chief of 23 and 24 May 2005, and by other witnesses like nurse Ms. Lindsay Druce on 21 June 2005. This crisis was set in train within weeks of Dr. Patel's arrival, when he first put on display his inadequate surgical skills in the operating theatre. The descriptions of this tragedy have been supported by Dr. Peter Cook in evidence on 27 July 2005.

2.18. For years, even in the wake and in the knowledge of such negligence occurring on a daily basis on an unsuspecting public who paid all their salaries, Dr. Patel kept performing surgery beyond his capacity, and beyond the capacity of the Hospital. The continuing silence to the

outside world from the registered medical and nursing staff, and from certain administrative officials, caused unnecessary damage on the lives of patients, their immediate families, relatives and friends alike. So intent was Dr Patel on performing surgery, and, arguably, to generate income for the Bundaberg Hospital at the same time, he appears to have prowled its corridors seeking out unsuspecting patients to go under his surgery. Dr Patel appears to have been able to do this when better medical judgement suggested that it was either unwarranted or downright dangerous under the circumstances.

2.19. The Federal Government's Medicare rebate arrangements may therefore have played a perverse role in this scenario, like some 'perpetual milking cow'. It may have been seen as a means to supplement inadequate budgets out of the Queensland Department of Treasury, when neither Dr Patel's professional capacity nor the Hospital's facilities could realistically cope. All the while, the patients' welfare played second fiddle. The BHCI ought to consider this 'enticement' closely, and, if necessary, recommend that Medicare should only make rebate on operations for which the particular hospital is accredited to perform. **(See Recommendation 10).**

2.20. For those who believe that we live in a civil and open society, it ought to be both alarming and unacceptable to know that, in 2005 in "post-Fitzgerald" Queensland - with the *Public Sector Ethics Act 1994* and its codes of conduct and mission statements in place, and the Crime and Misconduct Commission (CMC) with its duty on principal officers to refer all suspected official misconduct to the CMC all in force - the only relief to the corrosive work environment at the Bundaberg Hospital, or elsewhere for that matter, was found through **whistleblowing**.

2.21. It is obvious that concerned, public sector workers neither had nor have any confidence in the CMC, or in other current accountability structures, to remedy their problems of addressing suspected wrongdoing. This clearly includes the *Whistleblowers Protection Act 1994* and the procedures required to be followed by that Act when blowing the whistle, if the making of disclosures are to be deemed legally acceptable and thus be afforded the Act's legal protection from subsequent reprisal. The whistleblowers at Bundaberg ultimately had to go via an unauthorized route to get their disclosures to the public at risk. WBA believes their wariness about the CMC and about the procedures required by the *Whistleblowers Protection Act 1994* was well-founded.

A Dilemma of Conscience for Whistleblowers

2.22. Whistleblowing is an appalling dilemma of conscience for anyone, let alone public sector care-givers, where a PID is the only option left if workplace probity and public safety are to be restored. This is especially so when the would-be whistleblower knows that the experience of most whistleblowers is an unhappy and traumatic one. The step of blowing the whistle is life-changing in every respect. It also changes the particular workplace, and washes over the whistleblower's family and friends like a tsunami.

2.23. In the final analysis, however, if the rule of law matters, silence on the part of any public official is inexcusable. In the face of personal knowledge of consistent negligence, unethical and unprofessional conduct by Dr. Patel, going to potential official misconduct or criminal conduct, disclosures had to be made. This is because lives were being put at risk, and lost.

2.24. The evidence of Ms. Hoffman at page 39 on 23 May 2005, when she said that one public hospital official, an anesthetist, said of a patient about to undergo surgery "...*This is a very expensive way to die*", is most chilling, probative and utterly damning.

2.25. It would, however, be certainly morally, if not legally, wrong to isolate all BHCI findings of wrongdoing to Dr. Patel himself. The BHCI should not treat him like some modern day "catch-all scapegoat" for the ills of Queensland's dysfunctional health system. WBA submits that it would be simply incomprehensible for the BHCI, having already recommended in its Interim report that criminal charges of murder and/or manslaughter be brought against him, to then allow other professionals to escape admonition of some kind. Others saw Patel's *prima facie* inculpatory conduct but failed to register a concern. Dr. Patel simply can not be treated as "the one-man band" of this dreadful scandal.

2.26. For instance, consider Dr. Peter Miach's evidence concerning his determination to ensure that none of his patients underwent surgery by Dr. Patel. It has to be said, at first glance, that his efforts were commendable and proper, but unfortunately, apparently limited. On a closer

scrutiny, it must be asked, what about other patients who were to be operated on by Dr. Patel, who, although not Dr. Miach's patients, may have been known by him (and others) to be also putting their lives in grave danger. What action was taken on his part as a registered medical practitioner to protect others?

2.27. On the face of the evidence, it is open to suggest that, once citizens living in Bundaberg and the surrounding region fell seriously ill requiring surgery, it became a lottery in which their survival was the real prize. Those who came under Dr. Miach's watchful eye won the lottery; while those who did not took their chances of surviving once they came before Dr. Patel in the operating theatre.

2.28. Trusting patients became victims, and loved ones and the public were left in shameful ignorance and distress. The sham of respectability was knowingly continued for years, until Ms. Hoffman managed to break through the logjam of fear and indifference by urging a parliamentarian to speak out using society's ultimate guardian against abuse of power, namely, parliamentary privilege. The Member for Burdekin, Mr. Rod Messenger MP, spoke out against Dr. Patel under the protection of parliamentary privilege. He was free from fear of reprisal in a defamation action which, in turn, brought long-overdue media attention to the problem. This resulted in this inquiry being set up by the Queensland Government, when it had no choice other than to do the right thing after the CMC declined to act. It is fair to say that no one in authority came running to this scandal.

2.29. WBA suggests that who the real whistleblower is in this affair must be set straight, lest the public and BHCI become confused, and that confusion negatively affect any relevant recommendations on whistleblower protection. Unfortunately, Mr. Messenger has been described in the media as the "whistleblower" member of Parliament. He is not that. If anyone in this affair warrants the title, it is Ms. Hoffman. While he still warrants commendation for taking her PID seriously, Mr. Messenger was doing his duty as an elected representative of the people in bringing Hoffman's PID to public attention. He did this under the unassailable protection of parliamentary privilege, which has been well entrenched since the *Bill of Rights 1687*⁴. Ms Hoffman did not have this protection – her actions were especially meritorious because of the risks that she ran in skirting around the processes of

⁴ "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

the CMC and of the Queensland Public Service, processes used in practice to identify whistleblowers and to silence them. What Mr. Messenger did is truly commendable, but not at the same level of peril faced by the public officer, and not an abnormal occurrence from parliamentarians who take their duties of representing their constituents seriously.

2.30. On the use of parliamentary privilege and its power, it ought not to be abused. It ought to always be used for the public good in the exercise of free speech. Whereas WBA suggests that Mr. Messenger exercised the privilege responsibly, the same cannot be said for former Queensland Health Minister, the Hon Wendy Edmonds, when she attacked ICU nurse Ms. Wendy Erglis on the floor of Parliament after Ms. Erglis made her PID regarding lack of resources *et al* in the ICU Ward 9B at the Royal Brisbane Hospital.

2.31. Against all this disturbing background, WBA submits that an inescapable conclusion for reasonable minds to reach about this scandal is that, underneath everything in Queensland amongst its public servants, there lurks a profoundly dark sense of fear to speak out against wrongdoing. As stated earlier, it pervades public life like a cancer. Equally concerning, there appears to be an unhealthy sycophantic deference to Ministers and government as a whole. This deference abides within and outside the system, and has turned our society on its head or placed it in grave jeopardy of a significant breakdown.

2.32. These twin anti-democratic and anti-social features can too easily act in combination, leaving government and the public service capable of being negligent in their duty to serve the people, and to act unethically and unlawfully.

2.33. The fear of speaking out - plainly flowing from a lack of faith in the integrity of the current disclosure and protection procedures in place - was experienced by the BHCI itself when concern was initially expressed by Commissioner Morris that public servants were not coming forward. Around the same time, Premier Beattie publicly suggested that if those public servants did not trust the system, they could contact him direct with their PID. His comments greatly alarmed WBA because it was showing that proper democratic principles in Queensland - which ought to support dissent - depended on one powerful personality, not the law and lawful procedures.

2.34. WBA submits that Premier Beattie's suggestion also demonstrates the "unreality" of Queensland politics, because it suggests that Premier Beattie himself is beyond reproach, and, while all around him may be malfunctioning, he was not. In that sense, the Beattie administration's handling of the Erglis disclosures, the Heiner affair, the displacement of Col Dillon, and other cases described later in this submission provide the electric shock to jolt everyone back to reality. In turn, these jolts are argued to support WBA's main recommendation for the establishment of a **Whistleblower Protection Authority**.

2.35. Nevertheless, the fear of speaking out finds force in the notion or belief that Ministers of the Crown, and the State bureaucracy, are above the law. It spins out of a commonly-held belief that "...you can't beat City Hall!" It sees righting embarrassing wrongs of government by government as an impossible task, and one which no sane citizen should take on. Governments of all political complexions are reluctant to admit their own mistakes. There is an attitude inside the Queensland Government of forever "...moving on" or describing an incident of uncorrected wrongdoing as "...old hat" or "...yesterday's news." This attitude of being able to act freely beyond the reach of the law makes the 15-year-old experiences of whistleblower Mr. Kevin Lindeberg in the Heiner affair and the two-year-old experiences of whistleblower Wendy Erglis (to pick two of the cases set out later in this submission) so instructive and useful in making any prospective findings and recommendations for the BHCI on whistleblowing, governance and accountability matters.

Of Little Comfort

2.36. Of course, in matters before the BHCI, some nurses (and doctors) appear to have taken certain preventative actions against Dr. Patel's otherwise unconstrained damaging conduct. These were, however, largely token. Instead of resigning in protest, no doubt at some considerable sacrifice or risk initially, some may have thought that their continuing presence, in some way or other, could mitigate against his unprofessional excesses and malpractice. WBA recognizes the dreadful predicament in which these concerned nurses (and doctors) found themselves. WBA nevertheless suggests that, while these preventative actions of hiding patients away from Dr. Patel may have been well intentioned, they now offer little comfort to any of his patients who became a victim *after* it was known by staff that Dr Patel was grossly incompetent and a danger to them on and off his operating table.

2.37. It must be stated, at least as some form of redemptive conduct, that a few public hospital officials who were sufficiently concerned did report their concerns higher up the chain of command. This included approaching other State authorities which themselves had a statutory duty to inquire, but then did not. It does appear, however, that, more than anyone else, Ms. Hoffman was, to all intents and purposes, the only staff member - which included registered medical and nursing practitioners - prepared to put her head constantly on the chopping block to end Patel's regime once she realized the truth about his lack of professionalism. Her courageous stand must be acknowledged by all.

2.38. WBA submits that it may be open to the BHCI to make adverse findings against those higher-up in the accountability chain at Bundaberg Hospital, or elsewhere in Queensland Health, or against those in any relevant statutory authority, who had a duty to intervene on incidents of questionable deaths, and who were made aware but then failed to act. The role played by, and any response from, the State Coroner's Office in these regards should be investigated.

2.39. WBA submits that this inspection ought to include registered medical and nursing practitioners. They had a mandatory duty under the *Crime and Misconduct Act 2001* and their respective professional legislation (e.g. *Nursing Act 1992* and Nursing Oath) to ensure, by referral, that checks and balances to eradicate suspected official misconduct worked.

Duty to Obey the Law

2.40. WBA submits that the BHCI, in the public interest, cannot reasonably ignore or fail not to make adverse findings of some kind regarding this "knowing continuing silence" on the part of any public official at the Bundaberg Hospital and elsewhere who betrayed their public duty of care and obligation to obey the law and to refer knowledge or suspicions of suspected wrongdoing.

2.41. These Crown employees maintained their silence while still being well remunerated for their specialist life-saving skills. Their training came from taxes gathered by the State from those same patients and the community at large. The basic premise of civilized democratic society is that the Crown must obey the law in all matters at all times in whatever its manifest forms. Equally, it is obliged to deliver safe services insofar as it can reasonably be expected to do so. In this instance, the State of Queensland failed on both counts. Accordingly, it is open to

find that unsuspecting patients suffered pain unnecessarily and, in some cases, an untimely death. Therefore some penalty ought to ensue. This is because civil society puts a value on human life and the pursuit of happiness, and those values are imbedded in its civil and criminal justice system.

2.42. This harm could have been prevented. That is an inescapable fact. Instead, fear paralyzed the Crown itself. It is tantamount to a police officer turning tail at the first sight of real, present or perceived danger, thus abandoning the public and expecting each member of the public - which the police officer is sworn to protect without fear, ill-will or favour - to fend for themselves. Unless adverse findings are made against those who owed the public a duty of care and failed to deliver it, the BHCI itself may be encouraging a recipe of taking the law into one's own hands, and no civilized society can survive that.

Betrayal of public trust

2.43. In short, the Bundaberg Hospital crisis appears to be one of the most serious breakdowns unimaginable for any civilized society. It appears to be a betrayal of public trust on a significant scale by almost all involved. It potentially reaches as high as responsible Ministers and heads of department who unquestionably knew about the potential problem of "deeming" of overseas-trained doctors to be suitably qualified, but who have been willing to shoot the messenger, intimidate others and ignore the message of alarm, instead of welcoming it in the public interest.

2.44. WBA submits, however, that such a breakdown in the public health system is dwarfed when the government acts in a continuing self-serving unconstitutional manner, breaches the law and undermines the administration of justice to serve its own interests. When the justice system breaks down, it permits acts of tyranny by the executive for the executive's sake to occur to the detriment of the "governed". It may see the criminal law abused and reduced to an instrument for sectional application instead of being impartially applied to underpin freedom and civil society. Such a breakdown would inevitably deny aggrieved citizens, for example, Dr. Patel's victims, their legitimate rights, because public confidence in the justice system's impartiality and integrity will have been undermined. Justice will be undermined when it is seen that high ranking public officials, including Ministers of the Crown, have eluded justice by having the law applied differently, and erroneously, to advantage them.

2.45. In the demotion of Fitzgerald Inquiry hero Inspector Col Dillon, for example, the CJC ignored the findings of the Bingham Committee on which it was represented, and did nothing to rescue him from the disadvantages that the Committee had found had been imposed upon his employment by the post-Fitzgerald Police Force. In the Heiner affair, for example, destruction of evidence by Cabinet has been ignored while, for the same destruction-of-evidence conduct, the full force of the law was properly applied against a citizen, Pastor Douglas Ensbey. These cases of regulatory capture and others will be explored later in this submission. In that regard, WBA submits that the abuses involved in the unanswered expulsion of Col Dillon from the Queensland Police Service (QPS) and in the unresolved Heiner affair, both just examples of a raft of uneven legal treatments, are highly relevant. The evidence of regulatory capture of watchdog authorities within the Beattie administration must be dealt with by the BHCI because of their relevance to whistleblowing and public confidence in:

- (a) the Queensland Government's resolve to implement the Inquiry's findings and recommendations - especially if they involve possible misconduct or criminal charges against Ministers of the Crown, senior bureaucrats and others, over and above the recommended charges already laid against Dr. Patel. Remember that the Heiner Inquiry was about an equally heinous matter of the rape and abuse of children in a state-run institution;⁵
- (b) the probability that the CMC will carry out its role, given the CMC's - and the CJC's - earlier handling of the Bingham Committee's Report on the post-Fitzgerald Police Force; and given its handling of the Heiner affair, where it has recently decided not to expend resources because there is now (allegedly) no public interest in investigating its demonstrable own failure to earlier apply the criminal law properly and equally; and
- (c) the Office of State Coroner, in particular the State Coroner himself, Mr. Michael Barnes, being able to carry out statutory functions properly, impartially and in the public interest, surrounding the deaths of certain of Dr. Patel patients, against his earlier handling of the Heiner affair.

⁵ a.k.a "the Heiner affair." Also see <http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/Heiner01.html> and the University of Queensland School of Journalism and Communication's *The Justice Project*.

3. 0. A NEW MEANING TO A SAFE WORKING ENVIRONMENT

- 3.1. WBA submits that the breach of contract of employment in the Department of Surgery, concerning a safe environment for Crown employees under the operating theatre regime of Dr. Patel, Dr. Keating, Mr. Leck and other registered theatre staff, was profound. It was so profound that it demands that the employment principles, touching on the rights and duties of parties to a contract of employment in the public service, as first settled in the landmark *Ottoman Bank v Chakarian*.⁶ case, be reassessed. They need to be made responsive to the demands of 21st century-society for governments be open and accountable in their dealings.
- 3.2. Any remedy should advance those principles to a new understanding of what a safe working environment ought to mean for State/Crown employment in the 21st century. This is especially the case in the health system where lives, particularly in operating theatres and intensive care units, are always at some risk. It is not acceptable to expect theatre and intensive care medical and/or nursing staff's security, financial and psychical wellbeing to be placed at risk just because they want to ensure that ethical and professional standards are upheld in their public workplace. The standards that secure patient wellbeing all find their foundation in the expectations of civil society and its judicial system that the State/Crown will obey the law at all times.
- 3.3. Lord Greene MR in *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 174 appears to have recognized that one class of employees may be treated differently to another. He said:

"...It has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. Prima facie it seems to me on considering the authorities and the arguments that it must be a question on the facts of each particular case. I can very well understand that the obligation of fidelity, which is an implied term of the contract, may

⁶ [1930] AC 277

extend very much further in the case of one class of employee than it does in others."

Corruption-free workplace in Crown Employment

- 3.4. Consider if the matters touching on Dr. Patel and related concerns are substantiated and the current checks and balances in the hospital system ensuring patient safety and wellbeing found deficient. In this circumstance, the long-settled employer obligation to ensure workplace health and safety for employees ought to be expanded to cover the right to work in a "corruption-free" work environment while in Crown employment.
- 3.5. WBA recommends that this "corruption-free workplace" guarantee ought to be legislated as a human right for Crown employees, because it underpins the good governance of Queensland. It may also find additional force in Australia's obligations under the UN Human Rights International *Convention on Civil and Political Rights*. Such a recommendation, in principle at least, would obviate the need for any public sector employee to blow the whistle to ensure compliance with these values and obligations.
- 3.6. As a rider, however, to the aforementioned recommendation, the BHCI ought to further recommend that the State of Queensland shall, as a sign to engender public confidence in the integrity of its hospital system and its workplaces, be open to an action in compensation by any whistleblower. The action should have the financial support from a new ***Whistleblowers Protection Authority***⁷ in the bringing of an action, where the whistleblower has been forced to make a PID which, unless made, would otherwise leave the health and wellbeing of the public at risk, and / or the Crown in breach of the law.
- 3.7. WBA suggests that, on available evidence, Dr. Patel corrupted the Bundaberg Hospital workplace by falsifying his qualifications when he failed to report adverse matters known to him concerning his earlier practice in the United States of America. In short, he brought that fraud with him into a workplace, and knowingly corrupted it. Had it been known, it would have banned him from practicing surgery, and it only became evident again when he put his inadequate skills to work on Bundaberg patients, both in and out of the operating theatre. This was exacerbated by an automatic elevation in his surgical status without either

⁷ http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/wbns.html

supervision or peer accreditation, which, to all intents and purposes, made him a law unto himself at Bundaberg Hospital.

- 3.8. WBA submits that this right of whistleblowers to sue the State of Queensland, with the aid of public moneys, would be a form of protection of patients, in the same way public moneys may be posted, from time to time, by government to aid in the capture of heinous offenders such as those involved in the disappearance of children (e.g. Daniel Morcombe on the Sunshine Coast). It is done in the public good so that public safety may be restored or assured, so that further crimes are not committed by allowing such offenders to remain on the loose to prey on others. In the United States, whistleblowers are actually rewarded for blowing the whistle when and if there is a public good in their disclosure, not just protected. It might be argued that if protection were to have been available in this situation and brought about a correction earlier, the State of Queensland may well have saved itself the millions of dollars in damages it is now facing from Dr. Patel's aggrieved patients and next-of-kin.
- 3.9. Obviously, such a right to sue, founded in any legislation to establish a **Whistleblower Protection Authority**, would require appropriate vetting by a competent body capable of evaluating whether the disclosure was to public wellbeing. The ultimate proving of the claim and any subsequent quantum in compensation would be decided by the courts, acting independently of government, the legislature, and, for that matter, the whistleblower.
- 3.10. WBA submits that it has no doubt about the BHCI's preparedness to inquire rigorously and fearlessly so that appropriate findings and recommendations may be made. WBA suggests that the issue of what the Queensland Government does with the findings and recommendations afterwards, particularly if there are recommendations that official misconduct and/or criminal charges be laid against senior bureaucrats, remains a matter of concern. A mechanism ought to be found to ensure the implementation of the Inquiry's recommendations so that it can be watched over on the community's behalf by members of the community itself. In posing this concern, WBA recognizes that this area belongs to the province of parliamentary politics and of public will, which may be beyond the Inquiry's terms of reference.

3.11. Nevertheless, to address this public concern that any report is not buried, or later undermined, WBA suggests that a bi-partisan parliamentary implementation Committee be established to oversight matters, and to report to Parliament regularly on progress until all recommendations have been implemented. **(See Recommendation 8)** In that way, if the Queensland Government declines to establish such a Committee, it would give an early signal of a lack of preparedness on its part to restore public confidence in the health system and in government itself. It would put the public in a better position to judge just how committed the Queensland Government really is about facing the truth of a dysfunctional health system openly and honestly.

3.12. WBA recommends that, on the **Bundaberg Hospital Commission of Inquiry Implementation Committee**, two **Public Interest Health Monitors** shall be appointed by the Queensland Government who shall be required to present an independent report to Parliament on a half-yearly basis, or earlier, on progress concerning the implementations of the BHCI's findings and recommendations **(See Recommendation 9)**. This strategy, admittedly, did not work with the Bingham Committee, as the mistreatment of Col Dillon was simply ignored by the QPS who were conducting the mistreatment and by the CJC (now CMC) who were permitting it. In the scenario proposed by this submission, however, there will also be a Whistleblower Protection Authority, whose sole reason for being will be the protection of whistleblowers such as Wendy Erglis and Toni Hoffman. While regulatory capture of a Whistleblowers Protection Authority is possible (and has happened in other jurisdictions), the failures of a single purpose authority such as this have been quickly identified in other jurisdictions and rectified (e.g. in the USA).

3.13. The politicization of the Queensland Public Service disqualifies members of the public service from serving in a Whistleblowers Protection Authority. A politically sensitive Whistleblowers Protection Authority will fail from its first challenge, as currently the other watchdog authorities in the Beattie administration have failed so thoroughly with Queensland Health.

4.0. JOINING THE WHISTLEBLOWER DOTS TOGETHER – THE REGULATORY CAPTURE OF WATCHDOGS & THE POLITICISATION OF THE QUEENSLAND PUBLIC SERVICE

- 4.1 To understand any political circumstance, it is best not done by looking at it in isolation as if to believe that it came about solely by its own momentum and elements, and that nothing preceded it. Rather, it should be seen in the broad pattern of things. This is because of the inter-connectedness of modern government, especially where government is centralized and more easily controlled under a unicameral system. In other words, what has gone before colours and shapes the present and the future, unless a halt or change occurs breaking that continuum. Such a break occurred with the Fitzgerald Inquiry in the late 80's, but, even then, not in a complete manner.
- 4.2 Plainly there is a fear of dissent which permeates our system of government, despite the constant claim by the Beattie Government that it is the most open and accountable in the State's history. If the claim were true, then it would only be true in relative terms.
- 4.3 For instance, the Criminal Justice Commission (CJC), its record and its conduct, have not been thoroughly and independently investigated in public under oath, save by the Connolly/Ryan Judicial Review into the Effectiveness of the CJC in 1996/97. This is so, notwithstanding the triennial reviews by its parliamentary accountability committee. The Connolly/Ryan inquiry, however, was ordered closed by Supreme Court Justice James Thomas on the grounds of bias after an application by the CJC and then Commissioner Kenneth Carruthers QC who was looking into the controversial Memorandum of Understanding involving the Queensland Police Union and the Borbidge Government.
- 4.4 In short, the CJC's legacy and template, laid since 1989/90, if ever independently investigated, may show that its function was and remains highly politicized. It may show that the CJC/CMC became and remains a blockage in the arteries of a truly open and accountable government, especially for whistleblowers with PID's involving allegations of high level political corruption and/or wrongdoing. The principal cases are the removal of Fitzgerald Inquiry whistleblower Colin Dillon from the QPS and the shredding of the Heiner Inquiry documents. In that sense, the "whistleblower dots" from the past to the present must be

joined together so that all may judge for themselves what is true and what is fiction concerning the true state of the governance of Queensland in its “post-Fitzgerald era”. Regrettably, *The Courier-Mail* has pointedly failed to call for this to be done since the demise of the Connolly/Ryan Inquiry.

Mr. Colin Dillon (Former Queensland Police Service Inspector)

4.5 Poignantly, the Fitzgerald Inquiry Report in speaking about “the Police Code” (of silence) said this of police officers who dared to break the wall of silence. It was whistleblowers led by Col Dillon who, through their courage, arguably turned it into one of the most successful commissions of inquiry in Queensland’s history, and turned its findings into a watershed political/governance moment of lasting significance:

“...Sergeant Eric Gregory Deveney, a former head of the Gold Coast Consorting Squad, wept before the Commission as he told how, after he reported an alleged bribe attempt, dog dropping were left on his desk, the word “dog” was written across his note pad and fellow officers barked at him. Asked what the word “dog” meant in police parlance, Deveney said it meant” Being a crawler and running to the bosses.”

Slade, Powell, Deveney and other police who gave evidence before the Inquiry, such as Sergeant Colin Dillon and Constable Salvatore Di Carlo, all claimed to have feared for their lives as a result of their failure to fall in with and silently condone misconduct.”⁸

4.6 Mr. Dillon has been categorised by WBA as one of Australia’s five Whistleblower Cases of National Significance.⁹ Having assisted in exposing serious corruption in the Queensland Police Force, and having aided an inquiry to bring about much-needed governance changes to Queensland and to the police force itself, one would have reasonably thought that his future career in the police would be assured, especially under new Police Commissioner Jim O’Sullivan. As an Inspector, Mr. O’Sullivan himself headed up the so-called “*The*

⁸ See Page 204 Point 7.3

⁹ Messrs. Mick Skrijel, Bill Toomer, Jim Leggate and Kevin Lindeberg

Untouchables” with the Fitzgerald Inquiry.¹⁰ It is reasonable to suggest that O’Sullivan may have seen and known firsthand the immense trauma and risk officers like Sergeant Dillon, and others mentioned above, went through when giving evidence in public against fellow corrupt officers. Their evidence, in turn, made Mr. O’Sullivan’s secondment to the Fitzgerald Inquiry both a success and potential stepping stone to Police Commissioner in the wake of the disgraced, and later jailed, Terry Lewis. Nothing, however, could be further from the truth concerning Mr. Dillon’s career in “post-Fitzgerald” Queensland.

- 4.7 Notwithstanding his initial supersession by junior officers, and then his hard-won, eventual promotion to the rank of Inspector, Mr. Dillon was subsequently made to report to a public servant whose standing was well below that on an inspector of police and totally contrary to normal promotional practices. Inspector Dillon was given little meaningful work commensurate with his senior rank or experience. He was, to all intents and purposes, a dead man walking, and was isolated or ostracized by an administration under the leadership of Commissioner O’Sullivan. His treatment was a disgrace. The *Report on the Review of the Queensland Police Service* written by Sir Max Bingham described the treatment as “anomalous in the extreme”, but the report referred to Inspector Dillon by his position rather than by his nationally known name. The CJC members on the Bingham Committee did nothing to correct his treatment, and when Inspector Dillon approached QPS authorities about the lack of action on the Reports findings, he was told “not to rock the boat”.

Warning Bells

- 4.8 It ought to sound warning bells for Ms. Hoffman, let alone for the BHCI itself which may owe its success to the courage of whistleblowers such as her. Inspector Dillon was only restored to public worth when the Federal Government’s Minister for Aboriginal and Islander Affairs, Senator the Hon John Herron, appointed him as the Federal Government’s nominated Commissioner to the Board of ATSIC. When that tenure of public office was completed and he returned to the QPS, he took early retirement realizing that his career was going nowhere - he was sent by the so-called reformed post-Fitzgerald Police Service to a “gulag”, given neither duties nor a workstation.

¹⁰ See Page 19 Point 1.6.4. Police Officers Seconded to the Commission. They were a small band of specially seconded police officers to the Fitzgerald Inquiry from the Queensland police because of their integrity.

4.9 WBA submits that the lesson of “the Dillon experience” is a salutary one. Despite his ‘hero’ status within the general community and national media as a whistleblower and ‘honest cop’, the system still ‘chewed him up’ afterwards and effectively forced him out of the very workplace his PID made better for his fellow police officers. His experience, in WBA’s view, speaks volumes for the urgent establishment of a **Whistleblowers Protection Authority** which could have acted as a shield against the unethical and improper retribution inflicted on him. WBA regrettably submits that Ms. Hoffman, and others like her in the years to come, may need a shield if she wishes to remain in employment in the Queensland Public Service.

Mr. Kevin Lindeberg – the Heiner Affair

4.10 WBA believes that it is important to use Mr. Lindeberg’s long-running whistleblower experience because it concerns the integrity of the administration of justice and the probity of our parliamentary democracy. In short, it is about respect for the rule of law and constitutional government. At its most basic, it is about whether those who govern the people are above the law themselves, and whether the government may apply the criminal law by self-serving double standards.

4.11 The BHCI was established by the Beattie Queensland Government under the *Commissions of Inquiry Act 1950*. Those appearing before it, notwithstanding some may be under summons, are doing so in good faith that they will be treated equally, predictably and consistently by the Commissioners, free from bias and according to law.

4.12 It is in that context that what has occurred in the Heiner affair brings another raft of salutary lessons which ought to be considered by the BHCI when making its findings and recommendations. This is because the lessons are not happy ones, and ought not be repeated. How would the BHCI countenance the destruction by the Cabinet or by Queensland Health of the papers and records collected by the BCHI? The PID about the shredding of the papers of the Heiner Inquiry remains unresolved.

4.13 Ultimately, those who may have charges recommended against them by the BHCI, and others who have suffered detriments and who may seek civil relief in damages in the courts, will have to rely on and seek justice in Queensland’s judicial system. They will do so on the

basis of equality before the law. Into this mix is the expectation that the Queensland Government will act in the public interest and as a 'model litigant according to law', and not abuse public office or breach the doctrine of the separation of powers. Unfortunately, neither can be guaranteed when one knows the facts of the Heiner affair and sees that it has set an unacceptable template in "post-Fitzgerald Queensland."

4.14 For the uninitiated, Mr. Lindeberg's PID concerns the deliberate destruction of public records by Executive Government of Queensland to prevent their use as evidence in anticipated judicial proceedings, and, as has been subsequently discovered, when allegedly knowing that the records contained evidence about the abuse of children in the State-run John Oxley Youth Detention Centre (JOYC).¹¹

4.15 The Queensland Cabinet also allegedly ordered the destruction of the records to prevent their contents being used against the careers of the JOYC staff, including the manager. It also involved the extraordinary disbursement of public moneys (in the sum of \$27,190) on the condition that "the events" leading up to and surrounding the relocation of the Centre manager were not made public. Around 1997, it was unearthed that those "events" were arguably known to be about the real and/or suspected abuse of children by the parties to the February 1991 Deed of Settlement, potentially involving the pack-rape of a 14-year-old female indigenous inmate by other male inmates during a supervised bush outing in May 1988. This allegation was never properly investigated. The alleged assault fell under the legal category of "criminal paedophilia" under the *Queensland Crime Commission Act 1997*.

4.16 The CJC and Queensland Government dismissed Mr. Lindeberg's allegation that the order to destroy the records to prevent their known use as evidence in a judicial proceeding may have breached section 129 of the *Criminal Code*¹². They claimed that the judicial proceeding in which the records were known to be required had to be "on foot" before it could be triggered. Mr. Lindeberg claimed the interpretation was wrong. He suggested that it was deliberately contrived to prevent criminal charges being brought at all members of the Goss Cabinet of 5 March 1990. He took his complaint to the QPS in early 1994 arguing that a cover-up was occurring inside the CJC, and that, as the *Criminal Code* was in *prima facie* breach, his PID

¹¹ UQ's *The Justice Project* <http://justiceproject.net/content/default.asp>

¹² "Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years";

enlivened the QPS's jurisdiction under the *Police Service Administration Act 1990*. In effect, the affair became one man's expanding struggle to restore integrity to the system, with his initial PID extending to engulf certain high-level CJC officers whom, Mr. Lindeberg believed, were not carrying their duties honestly and impartially.

4.17 As the years passed, the PID's gravity increased as the cover-up persisted and extended further into the system, sucking in other accountability arms of government until it now cuts across all Queensland's law-enforcement and accountability arms, reaching into Parliament, the Office of Premier and Cabinet, the Office of the Director of Public Prosecutions, Office of the Attorney-General, Crown Law, and, the Office of the Queensland Governor.

4.18 The affair has been alive and refreshed constantly for the last 15 years. WBA submits that it is simply not open for any reasonable person, acquainted with the facts, to claim now in 2005 that it is too stale to investigate. Mr. Lindeberg has been at the coalface constantly, asserting that section 129 of the *Criminal Code* had been breached, and/or as has sister provisions like sections 132 and/or 140 of the *Criminal Code*. His whistleblowing experience has also been categorized by WBA as one of Australia's five Whistleblower Cases of National Significance,¹³ The Shredding of the Heiner Inquiry documents is well known throughout the Queensland legal fraternity and elsewhere in the media and the world of academia, as well as in both Houses of the Federal Parliament.

4.19 It has been categorized by the world recordkeeping community as one of the 14 greatest shredding scandals of the 20th century, standing alongside the infamous Iran/ContraGate shredding affair and others of similar ilk.¹⁴ Its significance to proper recordkeeping, and other disciplines like law, political science, governance and journalism, sees the affair now being taught in some 20 major universities throughout Australia and the world.¹⁵ Mr Lindeberg's long struggle for justice featured on *ABC's Australian Story* in May 2004, called "*Three Little Words*"¹⁶ and earlier in February 1999 in Channel 9's *Sunday's "Queensland's Secret Shame"*, and, in 2003/04, came under investigation by the House of Representatives Standing Committee on Legal and Constitutional Affairs as part of its national inquiry into

¹³ http://www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/wbns.html

¹⁴ See major academic 340-page book entitled "*Archives and the Public Good – Accountability and Records in Modern Society*" published by Quorum Books Westport Connecticut (USA) and London in July 2002

¹⁵ E.g. Manitoba, British Columbia, Amsterdam; Liverpool (UK), Cape Town, Moi (Kenya), Simmons College (USA), Botswana, Michigan, Toronto, Pittsburgh, Melbourne, Edith Cowan, Queensland, Bond, Salamanca (Spain).

¹⁶ <http://www.abc.net.au/austory/content/2004/s1109660.htm>

“crime in the community: victims, offenders and fear of crime.” (See Volume 2 August 2004 Report)

4.20 WBA submits that it is open to conclude that the affair has set an unacceptable template of unlawful and unconstitutional conduct by government which must be corrected if the rule of law and constitutional government are to matter in Queensland, and if public faith in government is considered important. It is clear that both the CMC and QPS are now protagonists. They simply cannot come to the matter with clean hands. The issues go to the heart of open and accountable government and public confidence in the third arm of government, the judicial system.

An Unacceptable Template and Regulatory Capture

4.21. The affair also graphically highlights the unacceptable pattern of treatment of whistleblowers and how the CJC, and now the CMC, and other law enforcement or accountability authorities can be captured by the system from which they are supposed to eradicate misconduct. The affair shows how watchdog authorities can turn to become protagonists themselves against the interests of whistleblower, the rule of law, and the public interest.

4.22 Compelling evidence exists in the affair showing that those authorities may ultimately come to act in their own interests, and in the interests of those caught up in the PID for their own survival. Initially, this case involved all the members of Executive Government and certain Department of Families senior bureaucrats, but now involves other public officials, like, for instance, the Office of the Information Commission, who may have failed to carry out their statutory function honestly and impartially when the affair came before them. When investigation into the Lindeberg allegations of criminality and suspected official misconduct is questioned and shown to be deeply flawed and lacking in impartiality, competence and sound legal interpretations, it is arguably open to be seen as deliberately corrupted for an improper purpose to advantage another.¹⁷

¹⁷ See Section 208(2) of the *Crime and Misconduct Act 2001*

4.23 More detail on the extent and totality of regulatory capture regarding the Heiner Affair will be set out at Annex A.

Ms. Wendy Erglis – ICU Ward 9B – Royal Brisbane Hospital

Abuse of Parliamentary Privilege

4.24 Ms. Erglis was a registered nurse experienced in oncology nursing. She was employed as a nurse in Ward 9D of the Royal Brisbane Hospital from about August 1989 to October 2001. Her case is important for several reasons over and above her PID, and WBA submits that the BHCI ought to consider her experience carefully when making recommendations on whistleblowing and a more accountable health system. The BCHI should also learn from her of the need for a more watchful State Parliament concerning the use of parliamentary privilege when Ministers or elected representatives seek to “bag” public officials or others who may have made a PID embarrassing to government. In that regard, BHCI may wish to recommend that the Legislative Assembly Members Ethics and Parliamentary Privileges Committee review this area by the issuance of a discussion paper so that more cautious use of parliamentary privilege against whistleblowers be incorporated into Standing Rules and Orders. (See Recommendation 11)

4.25 Ms Erglis was awarded Queensland Whistleblower of the Year for 2003 by Whistleblowers Action Group because of her PID.

4.26 WBA understands that parliamentary privilege in terms of allowing free speech is unassailable, and guaranteed under *Article 9 of the Bill of Rights 1687* and under sections 8 and 9 of the *Parliament of Queensland Act 2001*.

4.27 The right of free speech on the floor of Parliament is recognized in the *Defamation Act 1889*. **Section 10. Absolute protection – privilege of Parliament** provides for:

(1) A member of the Legislative Assembly does not incur any liability as for defamation by the publication of any defamatory matter in the course of a speech made by the member in Parliament.

(2) A person who presents a petition to the Legislative Assembly does not incur any liability as for defamation by the publication to the Assembly of any defamatory matter contained in the petition.

However, whereas Parliament probity is respected, whistleblowers may too easily find themselves being defamed under the privilege of Parliament. Whistleblowers have had little chance of proper redress, either reputationwise, or, by compensation, as may happen if the same words were said outside Parliament. In the wake of the Bundaberg Hospital revelations, which, in large measure, find their roots in inadequate budgets, the “Erglis experience” is a sorry tale pre-Bundaberg. If it had been properly handled, the Erglis PID may have not only addressed the resource and related problems of Ward 9B, but may have washed throughout the health system, to Bundaberg and to elsewhere. Perhaps it could have saved lives or prevented harm emanating from various ICUs.

4.28 Notwithstanding the matter is not settled, Ms. Erglis is quite properly and reasonably attempting to recover her good name through the courts, because of the abuse of Parliamentary privilege by former Health Minister the Hon Wendy Edmonds. Ms. Erglis now finds herself potentially facing huge legal costs, when arguably, all she was trying to do in the first place was to save lives and make her workplace a “corruption free workplace.” In that regard, instead of her having to bear the huge financial burden flowing out of her PID, if a *Whistleblowers Protection Authority* had been in place with the legislated authority to fund an action against the State of Queensland, a fairer remedy may have been able to be found.

Dr. Brian Senewiratne – Princess Alexandra Hospital and QEII Hospital

4.29 Dr. Senewiratne was made Whistleblower of the Year in 1994 by the Whistleblowers Action Group for his PID’s relating to the unacceptable working conditions and patient care conditions at the Princess Alexandra and QEII Hospitals.

4.30 In many respects Dr. Senewiratne has been the health system trailblazer for other whistleblowers. He had to take the unprecedented step of filming the appalling conditions in both hospitals to stir the authorities into action, but then paid a heavy price of being gradually marginalized out of the health system by those above him.

4.31 His stand then, and his actions more recently concerning Mt Isa Hospital problems, have never won admirations from any government of the day. WBA suggests that the treatment of Dr. Senewiratne represents a perversity of the a so-called democratically elected government - whose prime duty is to serve the public - turning on a professional like Dr. Senewiratne just because he dared put the public's health interest first.

4.32 The "Dr. Senewiratne experience" within the health system, after his PIDs, when the system was allegedly acting in a manner so as to inflict a detriment on him – which in itself ought to have enlivened both the CJC and CMC - gives further good reason for the BHCI to recommend the establishment of a **Whistleblowers Protection Authority** to act as a shield.

Mr. Greg McMahon

4.33 Mr. McMahon was included in the Senate Select Committee on Public Interest Whistleblowing August 1994 Report entitled "*In the Public Interest*"¹⁸. He was one of the 9 unresolved whistleblower cases which that all-party Committee unanimously recommended ought to be reviewed by the Goss Government. The Senate recommended this because the Senate Select Committee considered that the CJC had failed to properly investigate them. The Goss Government refused to act. This caused the Senate Select Committee on Unresolved Whistleblower Cases to be established in December 1994 to further examine the cases for the purposes of formulating national whistleblower legislation.

4.34 Mr. McMahon's experience with the CJC and other accountability agencies like the Ombudsman and Office of the Information Commissioner is relevant to the BHCI's concern about whistleblowing because, in critical areas, he followed in the path set by Mr. Lindeberg, and suffered as a consequence. WBA suggests that this lends support to our proposition that fear of blowing the whistle in Queensland can only be properly understood by joining the dots together, and Mr. McMahon's experience reveals the interconnectedness.

4.35 In respect of regulatory capture and the earlier-established template on agencies brought about because of the flawed findings relating to and the handling of the Lindeberg allegations, Mr. McMahon found himself caught up in the same flawed legal interpretation of section 129 of the *Criminal Code*. He found himself caught up in the same inertia of the CJC,

¹⁸ See Page 5: Messrs Kevin Lindeberg, Des O'Neill, Peter Jesser, Gordon Harris, Tom Hardin, Robert Osmark; Bill Zinglemann and Ms Teri Lambert

Ombudsman and Office of the Information Commissioner to do anything after these watchdogs were approached in good faith. Disclosures made to these watchdogs concerned the disposal about June 1996 of public records known to be required for the judicial proceedings that Mr. McMahon had commenced in October 1995. The disposal allegedly was to prevent their use as evidence because of their inculpatory character against those who had inflicted a detriment on Mr. McMahon after his PID.

4.36 In respect of the disposal of the relevant evidence, it was done by the Queensland Government without any approval from the State Archivist under the *Libraries and Archives Act 1988* whatsoever, and after the relevant judicial proceeding had commenced. When Mr. McMahon approached State Archives over the matter, it declined to do anything itself, or report the suspected official misconduct to the CJC.

4.37 Now, with *R v Ensbe*y plainly settling the correctness of Mr. Lindeberg's long-held view of section 129 of the *Criminal Code* and the proper protection of public records, these agencies stand completely naked and compromised. The CJC refused to investigate Mr. McMahon's PID if he criticized the CJC – Mr. McMahon's arguments included refutation of the CJC's interpretation of s129 of the *Criminal Code*. The CMC asserts that Mr. McMahon's PID is not official misconduct but may be maladministration within the jurisdiction of the Ombudsman, while the Ombudsman holds that Mr. McMahon's PID is not maladministration but may be official misconduct, and thus should go to the CJC. WBA submits that it is open to conclude that the CJC and Ombudsman's Office may have engaged in obstruction of justice either singularly or in concert. Evidence held by Mr. McMahon reveals knowledge of the interconnectedness of his PID and that of Mr. Lindeberg. The only defence by the watchdogs over the years may have been delay, dissembling and obfuscation, perhaps hoping that both of the whistleblowers would lose interest or be deterred from carrying on because of legal costs. WBA submits "the McMahon experience" would have been exposed years ago had a **Whistleblower Protection Authority** been in existence acting as his shield.

5.0 WHISTLEBLOWING AND THE ROLE OF THE MEDIA

- 5.1. Ethical conduct in public office and public interest whistleblowing are blood brothers. One cannot exist without the other, indeed one drives the other. Socrates, in Plato's *Republic*, said of ethics:

"...We are discussing no small matter, but how we ought to live." Ethics "... is concerned with values - not what is, but what ought to be. How should I live my life? What is the right thing to do in this situation?"

- 5.2. The 1996 Fitzgerald Commission of Inquiry Report said this about whistleblowing before whistleblower protection legislation was on Queensland statute books:

"...It is enormously frustrating and demoralizing for conscientious and honest public servants to work in a department or instrumentality in which maladministration or misconduct is present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority. Even if they do report their knowledge to a senior officer, that officer might be in a difficult position. There may be no-one that can be trusted with the information.

If either senior officers and/or politicians, are involved in misconduct or corruption, the task of exposure becomes impossible for all but the exceptionally courageous or reckless, particularly after indications that such disclosures are not only unwelcome but attract retribution."¹⁹

- 5.3 Dr. Simon Longstaff, Director of the St. James Ethics Centre, said this about whistleblowing:

"...There is no denying that whistleblowers face a dilemma in determining whether or not to draw attention to matters which so trouble their consciences that they feel bound to expose themselves and others to censure. From one point of view whistleblowing might be regarded as evidence of failure. On such an

¹⁹ See Fitzgerald Commission of Inquiry Report Page 134 Point 3.5.7

account the finger of blame could point in many directions: at organisations which have tolerated intolerable behaviour; at individuals who have put private advantage above the interests of all others, to whole groups of people whose custom and practice have left them blind to corruption and to others who, through apathy, fear, prudence or whatever have failed to accept responsibility for saying no to harmful attitudes and behaviour.

Yet, at another level, whistleblowing may be seen as a triumph of unsettling proportions. It is, perhaps, a little startling to see people willing to risk opprobrium by following the dictates of their consciences. It is even more unsettling to realise that they are motivated by values to which we subscribe, albeit in private.

The challenge is to erect structures that allow light to penetrate the veil of corruption. Such a structure will need to build using existing resources such as: the common law, various codes affecting the professions, the media and so on. However, the foundation will have to be a general feeling, within the community, that various corrupt practices must be stopped because they are wrong. People are starting to realise that unethical behaviour causes harm not only at the level of the hip-pocket nerve. They are also coming to see that a corrupt society is harmed in less obvious but nonetheless tangible respects. All of this may lead to a growing sense that integrity should be 'rewarded' with something other and better than a ruined life.²⁰

- 5.4 As said earlier, it might therefore seem doubtful to observers in 2005, with whistleblower legislation in existence since 1994, and supported by the *Public Sector Ethics Act 1994*, freedom of information legislation, judicial review legislation and the corruption watchdog, the CMC, that public servants are still afraid to blow the whistle on real or suspected wrongdoing or corruption.

²⁰ http://www.ethics.org.au/things_to_read/articles_to_read/whistleblowing/article_0144.shtm

Dangers for Whistleblowers Using the Media

5.5 In the matter of *Gilbert v Volkert*²¹, the judgement reads in part relevant to this submission:

“...Counsel for the respondent, Mr. Byrne QC, criticised the applicant for having generated adverse and damaging publicity against the respondent. She had, he said, identified herself to the media, had sought an inquiry by the Crime and Misconduct Commission, and had participated in a number of media stories both before and after she became aware of the possibility of a private prosecution. It was discreditable for a prospective prosecutor to engage in such conduct.”

5.6 And in her judgement, Her Honour, Justice K Holmes ruled:

“...Weighing the public interest in a resolution of the applicant’s allegations by jury trial against the public interest in not permitting a trial flawed by delay, publicity and the risk of misperception of its purpose, I consider, on balance, that I ought not give leave for the prosecution to proceed. I dismiss the application.”

5.7. The *Volkert* case, in WBA’s view, is extremely concerning for Queensland whistleblowers, and for whistleblowers throughout Australia generally. Whistleblowers are often forced to involve the media in their quest for justice, albeit as an option of last resort. On the facts of the case, Holmes J found that a *prima facie* case had been established against Mr. Volkert. Holmes J decided, however, to prevent prosecution of Mr. Volkert because of past and possible future media coverage of the allegations against him. When and if the system fails, causing the dissenter and/or aggrieved citizen to bring pressure on the system via the media, – as is permitted in any free and democratic society – that local and national exposure can be turned against the dissenter/aggrieved. That method of disclosure can be used as a reason to suggest that the defendant and/or accused may not get a fair trial. A denial of prosecution could become the punishment of the whistleblower for going to the media. Plainly, the whistleblower is placed between a rock and a hard place once the justice system fails, if Holmes J view was to be evenly applied.

²¹ [2004] QSC 436

- 5.8. The message flowing out of the *Volkers* case is that whistleblowers ought to think very carefully before going to the media, i.e. *The Courier-Mail*, *4 Corners* or the Internet, as they may be undercutting all chance of receiving justice.
- 5.9. The other limb, however, is that, unless the media does become involved in matters concerning justice or public administration, then accountability will unquestionably slide. This will allow potential wrongdoers to escape justice, or, worse, allow governments to break the law and not be held to account pursuant to the constitutional democratic principle that, in Australia, we are all supposed to be equal before the law. WBA strongly contends that no democracy, including our justice system, can truly function properly without a free and courageous press. The courts ought to recognize that democratic fact more favourably when deciding issues brought under Section 686 of the *Criminal Code*.
- 5.10. It therefore seems that another application to take out a private prosecution under Section 686 of the *Criminal Code* might need to be taken to Queensland's Supreme Court by a citizen. This other application might be made in the hope that the courts will redress the imbalance which the Holmes J decision in *Volkers* case represents – at least, in terms of the media coverage. As it currently stands per the judgement of Holmes J, media coverage undermines the right to a fair trial. On this view, it might already be argued that Dr. Patel has no chance whatsoever of getting a fair trial in Queensland or in Australia, because of the open manner by which the BHCI has been conducted, and because of earlier adverse public comment - let alone his being dubbed "Dr. Death". There seems little doubt, especially in the wake of the Heiner affair, that our system of government and justice (outside the court room at least) is quite capable of acting in its own interests, and not in the public interest. WBA suggests that the Holmes J decision in *Volkers* presents a mechanism by which government can suppress any disclosures made to it, and escape any disclosures made to the media.
- 5.11. WBA suggests that whistleblowers must be afforded protection at law when and if they are forced to make their PID through the media. It is clear from experience that few whistleblowers ever engage in vexatious or frivolous "disclosures", and that most are highly principled people fully conscious of the need to protect privacy and essential Crown secrets concerning national security when seeking a remedy to their workplace concern.

5.12. WBA suggests that would-be whistleblowers would make their first port-of-call before blowing the whistle to the **Whistleblower Protection Authority**. The Authority could advise them as to the weight of the disclosure as part of its “shielding” function, and, when and if necessary, under its legislative power be able to receive and/or secure the relevant documentation to the PID.

Dangers from the Media

5.13. Whistleblowers also are aware that the media too can be turned into a weapon against the whistleblower, and that parts of the media can be captured too. Of concern regarding the cases cited earlier are the regrettable instances where *The Courier-Mail* defamed Col Dillon; *The Courier Mail* surrendered notes from interviews with Ms Erglis to the Government; and the restricted coverage by *The Courier Mail* of the significant developments in the Heiner Affair since about 2001.

5.14. It is a telling fact to whistleblowers in Queensland that *The Courier-Mail*, in commenting upon the selection of Mr. Tony Morris QC to the BHCI, included references to some affiliation with the Liberal Party but nowhere, to our reading, referenced the recommendations and findings of the Morris/Howard Report on the Heiner shredding. This exemplifies, to our judgement, the alleged ‘capture’ of a vital media outlet in Queensland, not to disclose to the Queensland public select information on a particular scandal. That scandal has only recently realized the first published acknowledgement by Commissioner Atkinson, in the wake of *Ensbey*, and the Bishop Report, that the shredding of the Heiner Inquiry documents may have to be revisited because section 129 was erroneously interpreted at an earlier time.

6.0 THE ROLE OF THE STATE ARCHIVIST

6.1 WBA submits that the role of the State Archivist, under the *Public Records Act 2002* in terms of protecting public records in the public interest in order to hold governments to account for their action, is vital. It ought to be a proactive role. The State Archivist ought to be expected to be mindful of what is happening in the world of public accountability in which public records might play a role in accountability processes and in respect for the rule of law.

6.2 In this respect, there has been a curious convergence of events between the BHCI and the Heiner affair which WBA believes give rise to a worthwhile recommendation. (See **Recommendation 5**)

6.3 Without seeking any advantage whatsoever, it must be recorded, as a matter of fact, that one of Dr. Patel's alleged 8 victims is Mr. Lindeberg's first cousin. Certain matters came to a head around March/April 2005 when Mr. Lindeberg became aware that his cousin, who was alleged to have died from pancreatic cancer, may have been one of Dr. Patel's possible victims, and he made contact with his cousin's wife in Bundaberg. He did so with a view to express sympathy, support and ensure that his cousin's records were not destroyed. On advice from Mr. Lindeberg, a lawyer acting on behalf of the alleged victim's wife, phoned the State Archivist Ms. Janet Prowse. The lawyer asked Ms. Prowse what steps she had taken under the *Public Records Act 2002* to secure the relevant evidence at the Bundaberg Hospital and elsewhere in the health system. The lawyer was informed that no steps had been taken by State Archives.

6.4 *The Courier-Mail* featured Mr. Lindeberg's cousin as one of Dr. Patel's alleged victims in its lead stories. He published his picture and headstone at the Bundaberg Cemetery.²² Around this same period, *The Courier-Mail* ran a front page story about possible improper shredding occurring at the Bundaberg Hospital which saw both Commissioner Morris QC and Premier Beattie issue stern warnings that, if anyone was caught improperly destroying relevant documents, then the full force of the law would be imposed against the wrongdoer. It was viewed by both as a serious illegal conduct – and rightly so.

²² The wife of Mr. Lindeberg's cousin appeared on *ABC Australian Story "At Death's Door"* screened on 27 June 2005 which featured whistleblower Ms. Hoffman's struggle to get her story believed and aired. <http://www.abc.net.au/austory/content/2005/s1400735.htm>
Also see *The Courier Mail* 23 April 2005.

6.5 On or about 15 April 2005, as a consequence of the contact by the lawyer, Ms. Prowse wrote to (then) Director-General of the Health Department Dr. Steve Buckland, informing that the lawyers (for Mr. Lindeberg's cousin*) were considering taking an action in compensation against the State of Queensland, and she directed that no records of the alleged victim held by the Bundaberg Hospital be destroyed. The letter went on and cited the "Disposal Authority Schedule" making the following "conditions" statement:

"Public Records must not be disposed of if they are required:

(i) for any civil or criminal court action which involves or may involve the State of Queensland or an agency of the State; or (Underlining added)

(ii) because the public records may be obtained by a party to litigation under the relevant Rules of Court, whether or not the State is a party to that litigation, or

(iii) pursuant to the *Evidence Act 1977*, or

(iv) for any other purpose required by law. (Underlining added)

* (This letter is held in Bundaberg. It would be available to the BHCI by approach to the alleged victim's spouse).

6.6. This "conditions" statement, under the *Public Records Act 2002*, build on the same conditions that existed under the *Libraries and Archives Act 1988* when the shredding of the Heiner Inquiry documents occurred. Both the CJC and the Queensland Government assert that this legislation afforded legality to the order to destroy those records. WBA does not concur with this assertion. The purpose of archives legislation is to secure the administration of justice, not undermine it, by giving the State Archivist greater authority than a court of law concerning what records shall be available for foreseeable or known judicial proceedings.

Duplicity Exposed

6.7. On 23 February 1995, current State Coroner and lawyer, Mr. Michael Barnes, then Chief CJC Complaints Officer, gave the following evidence to the Senate Select Committee on Unresolved Whistleblower Cases concerning the so-called proper role of the State Archivist pursuant to the *Libraries and Archives Act 1988* by limiting it thus:

"...We have to look at the archivist, because Mr. Lindeberg is concerned that her actions in authorizing the destruction were inappropriate. You are aware that the advice of the archivist was sought because the Crown Solicitor said that these documents could be public records. The archivist's duty is to preserve public records which may be of historical public interest; her duty is not to preserve documents which other people may want to access for some personal or private reason. She has a duty to protect documents that will reflect the history of the state. Certainly she can only preserve public records, but there is no commonality necessarily between public records and records to which Coyne and other public servants may be entitled to access pursuant to regulations made under the Public Service Management and Employment Act.

In my submission, the fact that people may have been wanting to see these documents - and there is no doubt the government knew that Coyne wanted to see the documents - does not bear on the archivist's decision about whether these are documents that the public should have a right to access forevermore, if necessary. That is the nature of the discretion that the archivist exercises. The question about whether people have a right to access these documents is properly to be determined between the department, the owner of the document and the people who say that they have got that right. That is nothing to do with the archivist, so I suggest to you that the fact that was not conveyed to the archivist is neither here nor there. That has no bearing on the exercise of her discretion"

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6.8 In the CJC's so-called "nth degree" investigation of the Heiner affair, the State Archivist was **never questioned**. Insofar as the letter of 23 February 1990 from the Cabinet Secretary to the State Archivist reveals, it is a matter of public record that the Queensland Government **did not inform** the State Archivist of the known evidentiary value of the records when seeking her urgent approval to destroy them. They sought this destruction despite knowing that solicitors were actively seeking access to them for a judicial proceeding. Instead, the letter to the State Archivist said that the records were "**...no longer required or pertinent to the public record.**"

²³ Senate Select Committee on Unresolved Whistleblower Cases *Hansard* 23 February 1995 p108.

6.9 The point to be made is that both the CJC and Queensland Government appear to have misrepresented the role of the State Archivist in the Heiner affair. This misrepresentation was not contradicted by the then State Archivist despite the national²⁴ and international world of public recordkeeping repudiating it, and despite the existence of the aforementioned Disposal Schedule in operation under the *Libraries and Archives Act 1988*. Albeit the wording was slightly different, the wording *did not* ignore that need to preserve records known to be required for a legal purpose. In short, it is open to conclude that it was not in the interest of either the CJC, or the Queensland Government, or for that matter the State Archivist herself after she had approved the destruction in an *ad hoc* appraisal fashion, to repudiate anything. This was because it afforded them some ill-conceived view that the shredding was legally carried out under a statute.

6.10 However, as the October 1996 Morris/Howard Report into the Lindeberg Allegations pointed out, archives legislation cannot and does not override the provisions of the *Criminal Code*. It is pertinent to cite the highest legal judicial authority in *R v Rogerson* Brennan and Toohey JJ at 503 which ruled:

"....A conspiracy to pervert the course of justice may be entered into though no proceedings before a Court or before any other competent judicial authority are pending."

6.11 WBA submit that the double standards concerning the role of the State Archivist and the protection of public records for a legal purpose – as it currently exists in Queensland under the *Public Records Act 2002*, the *Criminal Code* and the discovery/disclosure Rules of the Supreme Court of Queensland - simply cannot stand if public confidence is to be restored in government and public recordkeeping

6.12 It is made all the more urgent because the CMC is to conduct its own inquiry into the Bundaberg Hospital scandal after the BHCI hands down its report. The CMC is to see whether or not any public official has engaged in official misconduct, and yet, the CMC shall seek to do so with the Dillon demotion ignored, and the Heiner shredding on its books as being investigated to “*the nth degree*”. Not one scintilla of official misconduct has been

²⁴ Australian Society of Archivists

found by the CJC/CMC in either case. That can surely do little comfort for the victims of Dr. Patel, or, for that matter, public servants who shall be obliged to undergo scrutiny by the CMC for their conduct while expecting that the CMC shall act honestly, impartially and in the public interest in all his activities irrespective of the political consequences.

- 6.13 In respect of the State Archivist, WBA believes that it was unacceptable to discover that no action on her part had occurred to preserve the evidence for victims, and for the BHCI itself, prior to the lawyer for the wife of Mr. Lindeberg's cousin contacted the State Archivist in mid-April 2005. It was well known that an inquiry was to happen. It ought also to be noted by the BHCI that, as far as WBA is aware, no similar necessary proactive steps have been taken by the CMC, or by the Qld Health department leadership, including the Minister or Premier, to secure vital evidence at the Bundaberg Hospital, or elsewhere in the Queensland health system.

7.0 CONVERGENCE

- 7.1. Further material concerns about the state of the total administration in Queensland is provided in annexes A and B. These annexures will facilitate different treatments by BHCI of parts of the WBA submission that are in more detail on chosen topics introduced by the main text.
- 7.2. It is necessary to be total with the BHCI regarding our perspectives, as a simple focus on Dr. Patel, or Bundaberg, or Queensland Health will miss the root cause of the problems of which Dr. Patel, Bundaberg Hospital and Qld Health are mere symptoms.
- 7.3. It is the total Queensland Public Service that is in failure mode, in our view.
- 7.4. The individual Departmental Heads are responsible, but so too are the watchdog authorities that have had the responsibility for responding to the PIDs that have been made to them about wrongdoing in the Public Service more generally, and also within Queensland Health.
- 7.5. From Dillon to Lindeberg, there is no difference in the crushing treatment that whistleblowers have received. From Senewiratne to Erglis, there has been given, to professional staff within Queensland Health, a simple unmistakable confirmation that the crushing treatment will also be used on them.
- 7.6. The problem that the current Public Service culture has with whistleblowers, even with heroes like Colin Dillon, is that whistleblowers are not 'politically sensitive'. This is the normative descriptor of the desired culture of a modern public service attributed to the architect of the current Queensland Public Service, Dr. Peter Coaldrake. Whistleblowers do not fit this descriptor.
- 7.7. The politics of public health in Queensland have been a combination of bureaucrats cost cutting in hand with image-makers covering-up the consequences of that cost cutting. Whistleblowers have sought to make known the consequences. Politically sensitive public servants have prospered in the conflicted environment. They have done so by conspiracies and cooperations that have dispensed with the services of persons like Dr Senewiratne and

Ms. Erglis, and brought in their place professionals such as Dr. Patel and the colleague of Ms. Erglis who defamed her.

- 7.8. With the arrogance of a 1970's American MBA, the Public Sector Management Commission fifteen years ago broke the centuries old British tradition of a neutral Public Service. The promises and predictions of greater responsiveness and efficiencies, from a politically sensitive culture, has flowered across the Public Service in forms such as the 'Jesus Christ' files at the Families Department, the black-outs from Energex, fruit disease breakouts at Emerald and asbestos environments in public schools.
- 7.9. The reasons for a neutral Public Service may have been lost over those centuries, but the vulnerabilities that accompany a Public Service, sensitive to the needs of a competing political party presently in power, were always understood. The self interest of power politics was always going to force political advantages through a public service 'sensitive' to the political goals of their Ministerial masters. The only force to resist the inappropriate or the ill-advised engagement by public officers in politically sensitive activities was going to be the integrity of the public officer.
- 7.10. It is a basic principle of the management technique, termed Force Field Analysis, to diminish the forces opposing an initiative in order to propagate its implementation. Surely Force Field Analysis is a part of every MBA completed by the principals at the Public Sector Management Commission.
- 7.11. Whistleblowers, of course, represent those forces of integrity resisting the inappropriate or the ill-advised. Crushing whistleblowers is, in the pragmatic minds of a politically sensitive public service chief, the logical outcome of modern management techniques designed to achieve the human resource management ends of worker alignment (to the objectives of the organisation) and supportive worker culture. Punitive transfers, gulag assignments, glass ceilings and adverse performance appraisals have become stock-in-trade for public service human resource systems. Loss and disposal of related documents have become a usual occurrence in the document management and Freedom of Information administrations of 'politically sensitive' public service organisations.

- 7.12. These events have been brought to the attention of watchdog authorities, such as the Equity Commissioner at the Office of Public Service, the Office of Ombudsman and Information Commissioner, the State Archivist, the CJC/CMC, the Justice Department, the Office of the Director of Public Prosecutions, the Queensland Police Service, the Office of Premier and Cabinet, and the Office of the Governor.
- 7.13. Each time these watchdogs ignored the crush being put on a whistleblower, they were themselves showing political sensitivity to the wants of the administration. The watchdogs were becoming part of 'the alignment', and were becoming passive participants in 'the culture'. That is the explanation we offer as to why the CJC did nothing when the QPS started the crush on Col Dillon – to the judgements of the CJC, how could the QPS achieve 'alignment', with Inspector Dillon questioning why no investigation was conducted over the pack rape of an aboriginal girl at the John Oxley Youth Centre, or with him showing some other political insensitivity? By the time Ms. Eglis made her disclosures, the crush, left unaffected by the CJC/CMC and other watchdogs, had achieved a level of sophistication that few could fully comprehend save those who felt it – even the Parliament had become a part of the crush.
- 7.14. The Queensland justice system, too, is seeing allegations and concerns about the apparent rise, up through the levels of our courts, of political sensitivity in decisions. Even the Queensland's Chief Justice the Honourable Paul de Jersey can claim to be a whistleblower when, as reported in the media, he has expressed concerns about the selection processes used in appointing new judges. Why should we select our judges by a process with more integrity than the processes that we use to select police officers and doctors, nurses and mine inspectors, Information Commissioners and Chief Magistrates? It is only an act of arrogance, to rival that shown by the Public Sector Management Commission when it abandoned the neutrality of the Public Service, to expect that 'they wouldn't dare' choose politically sensitive applicants when it came to selecting judges.
- 7.15. While the concerns of whistleblowers may be wider than the BHCI's terms of reference, there are examples from within the Health Sector that demonstrate that the processes of politicisation have captured Queensland Health **and its watchdogs**. It is the perspective upon the watchdogs that will allow the BHCI to track wider than the Health Sector, and so open the door upon the true malady of our public service system.

- 7.16. WBA submits that compelling reasons exist for the BHCI to recommend the establishment of a *Whistleblowers Protection Authority*. This is because, if **the sword** (i.e. the CJC/CMC/police) fails, and the sword is then turned against the whistleblower, still **the shield** (i.e. the **Whistleblower Protection Authority**) will remain to afford some form of protection of the whistleblower from reprisals. The whistleblower is more likely to survive.
- 7.17. **The shield** thus offers an avenue to restore integrity to government. The first act of the corrupt official and of the corrupted organization is to silence the whistleblower – an organization that preserves the whistleblower and their evidence of the corruption that they have disclosed defeats the first act of the corrupt.
- 7.18. The indestructibility of whistleblowers like Col Dillon and Kevin Lindeberg and Brian Senewiratne and Wendy Erglis, and now Tony Hoffman, is a demonstration of the greatness that surviving whistleblowers can achieve within failing systems and organizations.

8.0 FURTHER DETAILING OF REGULATORY CAPTURE OVER THE HEINER AFFAIR

The Morris/Howard Report into the Lindeberg Allegations

- 8.1 In their October 1996 Report on Mr. Lindeberg's allegations, on finding numerous *prima facie* breaches of the *Criminal Code*, *Criminal Justice Act 1989* and *Libraries and Archives Act 1988*, founded substantially on a *prima facie* breach of section 129 of the *Criminal Code*, and recommending a public inquiry be held because of the seriousness of the matters involved, exceeding those which brought into being the 1987/89 Fitzgerald Commission of Inquiry, Messrs. Morris QC and Howard made this concerning statement at page 215:

"...Whilst we are of the view that the events which occurred between January 1990 and February 1991 involve very grave and serious matters, we are even more concerned that those matters have remained successfully covered up for so many years. In what is commonly referred to as the "post-Fitzgerald era", there are many people in our community who feel a measure of confidence that serious misconduct by senior public officials cannot go undetected. Even the Criminal Justice Commission's strongest supporters, like Mr. Clair and Mr. Beattie, must now have cause to reconsider their confidence in the exhaustiveness - to say nothing as to the independence - of the Commission's investigation into this matter."

- 8.2 It is an open question that files revealing the abuse of children may have been concealed from Messrs. Morris QC and Howard, because it took another 12 months before investigative journalist Mr. Bruce Grundy started to unearth the child abuse material. It was not until November 2001 before the May 1988 pack-rape incident was unearthed. It appears that history may have nearly repeated itself for the BHCI, with an embarrassing audit report

concerning the Townsville Hospital and a bogus doctor being withheld by former Health Director-General Dr. Buckland - fortunately, it was discovered by Inquiry staff by use of their discovery powers.

Missing Inculpatory Memoranda

8.3 It was subsequently discovered by Mr. Lindeberg, in his 2001 freedom of information application against the CJC, that “memoranda between Minister Warner and Departmental Director-General Ms. Ruth Matchett” – which he was seeking access to under the *Freedom of Information Act 1992* - which strongly inculcated all members of the Goss Cabinet of 5 March 1990 in the (illegal) order to destroy the Heiner Inquiry records, **which was viewed by Mr. Barnes** during a secret visit to the Department in late 1994/early 1995, had curiously disappeared. Incredulously, Mr. Barnes did not take copies of the incriminating memoranda during his investigative visit despite knowing that they would have been highly probative evidence to Mr. Lindeberg allegations.

8.4 The 1998/99 Forde Inquiry into the Abuse of Children in Queensland Institutions (which had greater coercive powers than Messrs. Morris QC and Howard who were restricted to an “*on the papers*” investigation in 1996) also appears not to have discovered the pack-rape file, or other highly incriminating material revealing child abuse at JOYC. Further, the Forde Inquiry appears to have failed to have asked questions of staff in the witness box who had engaged in child abuse or had reported it in writing.²⁵ This was despite Commissioner Leenen Forde having terms of reference and the power of a commission of inquiry to do so. The Forde Inquiry specifically refused to investigate the shredding of the Heiner Inquiry documents (letter from K Holmes, Counsel Assisting, 28 Sep 98), as set out in a submission from Mr. Lindeberg, claiming that it fell outside its terms of reference. The TOR were set by the Beattie Government which had five Ministers serving in it who were members of the first Goss Ministry when the order to shred was made. The Inquiry was informed that the shredding was also done for the purpose of preventing the gathered evidence being used against the careers of the staff at the Centre. It is now apparent that at least one Minister of the Crown, the Hon Anne Warner, was aware of the abuse before coming into government. Possibly, all members knew, as former Environment and Heritage Minister the Hon Pat Comben told Channel 9’s *Sunday* program “*Queensland’s Secret Shame*” in February 1999.

²⁵ The Dutney Document of 1 March 1990

8.5 It is open to suggest that, had the full scope of what was shredded in the Heiner Inquiry documents been known to Messrs. Morris QC and Howard in 1996, then a different and more serious view of the term “...events leading up to and surrounding Mr. Coyne’s relocation” in the February 1991 Deed of Settlement may have been reached. This evidence may have brought more serious findings of breaches of the *Criminal Code* involving collusion, extortion and bribery, under the *Financial Administration and Audit Act 1977* and *Criminal Justice Act 1989*, given the concern expressed at the BHCI about Dr. Patel’s travel payment to the United States after resigning.

8.6 Arguably, in the Heiner affair, public moneys were *knowingly* disbursed to cover-up known suspected official misconduct and/or crime. This is because parties to the Deed of Settlement (including the Office of Crown Law) *knew* about the unaddressed child abuse occurring at the Centre when drafting and signing off on it as an instrument of binding silence after terminating the employment of JOYC Manager’s, Mr. Peter Coyne. This knowledge of child abuse ought to have been referred to the police or CJC. Furthermore, to highlight its curiosity, as the final payment of \$27,190 was made up of so-called award entitlements, any payment did not have to be constrained by a legal instrument, and nor, for that matter, is public service remuneration ever based on actual work done (i.e. “the events”) but rather on time worked. In respect of the payment, neither the CJC nor CMC could find any suspected official misconduct or potential criminality.

Section 129 of the *Criminal Code* and Its Significance the Rule of Law in Queensland

8.7 The CJC and Queensland Government washed their hands of Mr. Lindeberg’s allegations of criminality concerning the shredding of the Heiner Inquiry documents by arguing that the anticipated judicial proceeding in which the records were known to be used as evidence, did not commence. In short, they argued that evidence could be deliberately destroyed up to the moment of the expected writ being filed and served, and done for the purpose of preventing their use in those (anticipated/expected) proceedings. Mr. Lindeberg contested the view.

8.8 In his struggle over many years to have the law applied correctly, respected jurists concurred with his view of section 129 of the *Criminal Code*. The issue of document destruction

became a national concern in *McCabe vs BATAS*, and in the Enron collapse in the United States which brought in the Sarbanes-Oxley law in the United States Congress.

8.9 In 1995, Mr. Lindeberg's senior counsel, Mr. Ian Callinan QC²⁶, argued before the Senate that, on the admissions made by Mr. Barnes in evidence that section 129 of the *Criminal Code* was in breach, and, in the alternate, section 132 of the *Criminal Code*. Significantly, he advised the Senate that the CJC's (erroneous) interpretation of section 119 dealing with the definition of "judicial proceeding" was too significant to ignore. Put simply, if sections 119 and 129 were not enlivened until the expected writ was filed and/or served to "commence" a judicial proceeding, then those sections, drafted specifically by Sir Samuel Griffith to protect the administration of justice, could be seen and used as a positive law to destroy all relevant evidence to prevent its use in the expected judicial proceeding. In other words, the interpretation used by the CJC and Queensland Government was perverse and attacked the administration of justice.

Section 129 Not Even Arguable

8.10 In 2003, *The Independent Monthly* was advised by former Queensland Supreme and Appeal Court Justice the Hon James Thomas that section 129 was never open to the interpretation placed on it by government watchdogs – namely, the Queensland Office of the Director of Public Prosecutions (in the wake of Messrs. Morris QC and Howard's correct interpretation of the section 129 in their Report on the Heiner affair), or the CJC. He advised that while many laws were arguable, section 129 was not.

The Binding Ruling in R vs Ensbe

8.11 In 2004, some ten years after his destruction-of-evidence conduct, the police charged a Queensland citizen, Pastor Douglas Ensbe, pursuant to section 129. Before the matter was advanced, the legal team for Pastor Ensbe placed a submission before the current DPP, Ms. Leanne Clare, in October 2003, seeking to have their client relieved of the charge under section 129. Their argument was because of the interpretation by Mr. Royce Miller QC, the former DPP, of the provision in the Heiner affair. She declined. She advised that section 129 involved "futurity" and that it was in the public interest to proceed with the prosecution.

²⁶ Now Justice of the High Court of Australia

8.12 In March 2004, a District Court jury found Pastor Ensbey guilty of the crime of destroying evidence under section 129 of the *Criminal Code*. Then, Queensland Attorney-General the Hon Rod Welford MP appealed the 6-monthly fully suspended jail sentence because of its manifest inadequacy against the seriousness of the offence, and took the matter to the Queensland Court of Appeal. This action was taken on the back of Mr. Lindeberg's long-held interpretation of section 129, which the Queensland Government had rejected but which it *knew* had been incorrectly applied in the Heiner affair. That misinterpretation, it also appears to have known, thereby relieved all members of the Goss Cabinet of *prima facie* criminal charges which may have found them guilty of criminal conduct if put before the courts in the same way that the actions of Pastor Ensbey had been put before the courts.

8.13 The central structure for confirming the conviction in *Ensbey*²⁷ by their Honours Davies, Williams and Jerrard JJA at 15 in respect of section 129 was put in these terms:

"...It was not necessary that the appellant knew that the diary notes would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence at the time the offence was committed. It was sufficient that the appellant believed that the diary notes might be required in evidence in a possible future proceeding against B, that he wilfully rendered them illegible or indecipherable and that his intent was to prevent them being used for that purpose."

8.14 Their Honours confirmed the legal correctness of Judge Nick Samios' direction to the District Court jury, which was as follows:

"Now, here, members of the jury, the words, 'might be required', those words mean a realistic possibility. Also, members of the jury, I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence. There does not have to be something going on in this courtroom for someone to be guilty of this offence. If there is a realistic possibility evidence might be required in a judicial proceeding, if the other elements are made out to your satisfaction, then a person can be guilty of that offence."

²⁷ *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 on 17 September 2004

8.15 It is highly relevant to note Jerrard JA's reasoning in *Ensbey* on the definition of "judicial proceeding." He demonstrated its unfettered meaning by its plain reading and application to the offence of perjury (i.e. section 123). In short, it could not be plainly "unfettered" in perjury, but "fettered" when dealing with the destruction of evidence. Consistency and predictability must apply under statutory interpretative principles.

8.16 In dealing with the CJC's understanding of the law, WBA points to *Ostrowski*,²⁸ wherein Callinan and Heydon JJ, in finding a guilty verdict against Mr. Palmer, a crayfisherman from Western Australia who obtained Crown advice before acting on it which happened to be erroneous, said:

"...A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it..."

Standing Committee on Legal and Constitutional Affairs finds *Prima Facie* Criminal Conduct in the Heiner affair

8.17 In August 2004, the Committee handed down its report into the Heiner affair, but not before all ALP members of Committee resigned *en masse*. In an unprecedented landmark report in the history of Australian political life, a Federal Government Committee recommended criminal charges be laid against the entire Cabinet of a State jurisdiction. This is what was recommended:

Recommendation 1

That the Queensland Government publicly release the 1997 advice on the Morris/Howard Report provided by the Director of Public Prosecutions to the then Borbidge Government.

Recommendation 2

²⁸ *Ostrowski v Palmer*[2004] HCA 30 (16 June 2004)

Given that:

- it is beyond doubt that the Cabinet was fully aware that the documents were likely to be required in judicial proceedings and thereby knowingly removed the rights of at least one prospective litigant;
- previous interpretations of the applicability of section 129 as not applying to the shredding have been proven erroneous in the light of the conviction of Pastor Douglas Ensbey [as to which see later]; and
- acting on legal advice such as that provided by the then Queensland Crown Solicitor does not negate responsibility for taking the action in question.

the Committee has no choice but to recommend that members of the Queensland Cabinet at the time that the decision was made to shred the documents gathered by the Heiner inquiry be charged for an offence pursuant to section 129 of the Queensland *Criminal Code Act 1899*. Charges pursuant to sections 132 and 140 of the Queensland *Criminal Code Act 1899* may also arise.

Recommendation 3

That a special prosecutor be appointed to investigate all aspects of the Heiner Affair, as well as allegations of abuse at John Oxley Youth Centre that may not have been aired as part of the Heiner inquiry and may not have been considered by the Forde or other inquiries.

That this special prosecutor be empowered to call all relevant persons with information as to the content of the Heiner inquiry documents, including but not necessarily limited to:

- Public servants at the time, including staff of the then Department of Family Services, the Criminal Justice Commission, Queensland police, and the John Oxley Youth Centre
- Relevant union officials

That the special prosecutor be furnished with all available documentation, including all Cabinet documents, advices tendered to Government, records from the John Oxley Youth Centre and records held by the Department of Family Services, the Criminal Justice Commission and the Queensland Police.

8.18 WBA understands that these new facts and findings were put to the Queensland Premier and Minister for Trade, the Hon Peter Beattie, by Mr. Lindeberg urging his Government to appoint a Special Prosecutor to independently investigate the Heiner affair in order to restore confidence in government and the administration of justice. Premier Beattie declined to do so. He declared that the matter had been "...*exhaustively investigated*". When making his decision, it appears that Premier Beattie knew that the CJC's findings concerning ALP Ministers were based on an erroneous interpretation of section 129 of the *Criminal Code* as declared by Queensland's highest judicial authority.

8.19 As Mr. Lindeberg believed that a systemic cover-up was being perpetrated against the integrity of government and the criminal justice system reducing both to "non-justiciable gridlock". WBA understands that he also placed the matter before Her Excellency the Governor, the Hon Quentin Bryce AC, suggesting that her Government was acting outside the law and contrary to its Oath of Office. Mr. Lindeberg suggested that Queensland may be in constitutional crisis, sufficient to invoke her reserve powers pursuant to *Constitution of Queensland 2001*. It is understood that Her Excellency sought a report on the affair from the Beattie Government as early as October 2003, and did not receive it until sometime in March 2005, but its contents remain confidential. The Queensland Government purportedly delayed its report until the *Ensbey* case was settled, which, by its own admission, made the proper interpretation of section 129 of the *Criminal Code* the key point of relevance.

8.20 However, on 4 July 2005, WBA understands that Premier Beattie again informed Mr. Lindeberg that his Government did not intend doing anything about his concerns, but, at the time (of the decision to shred), he claimed that the Queensland Government had acted on the best available advice, as if to suggest it made the decision lawful. In short, Premier Beattie was admitting that it was the best "wrong" advice in town, and therefore, by some extraordinary twist of logic and application of the law, equally afforded those involved in

the shredding-order protection from the criminal law being enforced despite the triggering elements being present. WBA rejects Mr. Beattie's view outright.

8.21 WBA relies on *Ostrowski*, as cited earlier, that acting on wrong advice, even when provided by the Crown, is no excuse, and WBA suggests that the BHCI ought to do likewise.

8.22 In the meanwhile, WBA understands that the Queensland Opposition has written to both Police Commissioner Bob Atkinson and CMC Chairman, Mr. Robert Needham, citing the House of Representatives Standing Committee on Legal and Constitutional Affairs' Report and the ruling in *Ensbey*, and requesting that the affair be revisited. It is understood that Commissioner Atkinson has recognized that the affair may have to be revisited but has passed the task to the CMC.

8.23 For its part, on 5 July 2005, the CMC recognized in a letter to the Queensland Opposition that the section 129 of the *Criminal Code* may have been breached, but it was now relying on its interpretation of "the public interest" under section 46 of the *Crime and Misconduct Act 2001* and had decided not to expend any resources on a re-investigation claiming that it could not be justified.

When the Public Interest is Not the Public Interest

8.24 Mr. Needham has put forward these reasons why section 46 of the *Crime and Misconduct Act 2001* – dealing with complaints - was not enlivened:

- The age of the matter;
- Previous consideration of the matter by the DPP;
- The numerous and extensive inquiries into the matter undertaken by various bodies since 1991;
- The lack of utility of proceeding so long after the events in question for conduct taken on the advice of the Crown Solicitor (although it is acknowledged that mistake of law is no defence to a criminal offence it may be relevant to the exercise of the discretion to prosecute).

8.25 WBA submits that the aforesaid reasons are indefensible both at law, on the facts and on a true and impartial assessment of what is the "public interest". **Regulatory capture of the**

CMC could not be more in evidence. It is open to conclude that a concerted cover-up has been going on which has now reached the end of the road. Furthermore, it is open to suggest that the delay brought about by the cover-up, is now being used as an excuse to do nothing for an improper self-serving purpose for themselves (i.e. the CJC/CMC) and others when they caused the delay – i.e. causing the alleged staleness - in the first place despite Mr. Lindeberg’s constant claim that the law was not being applied honestly. WBA submits that it is not only not an end to the matter, it cannot be an end to the matter if the rule of law matters.

8.26 It ought not to be forgotten that into this mix of “joining the whistleblower dots together” stands the successful prosecution of a citizen, Pastor Ensbey, by the Crown for the same destruction-of-evidence conduct nearly ten years after the event. The current DPP, Ms Leanne Clare, declared that it was in the public interest to prosecute him, when arguably he was engaging in less serious shredding conduct than the Queensland Cabinet and senior bureaucrats. In short, WBA submits that the democratic constitutional principle of equality before the law – which stands at the centre of Mr. Lindeberg’s PID - now stands in the balance, and shall be found wanting if the Queensland Government and its law-enforcement authorities do nothing.

8.27 There was of course no political dimension to a Pastor being charged with the criminal offence. There was a political dimension to charging the whole of the Cabinet with the same breach of the *Criminal Code*. Thus may have come to the fore an act of political sensitivity – in which case being ‘politically sensitive’ is nothing more than a euphemism for placing politicians in power above the law.

8.28 The BHCI must be reminded that this affair, as it has been developed in recent years, has not attracted any comment by *The Courier-Mail*. Without gainsay, WBA suggests that any objective analysis of this affair would not be able to escape its seriousness to the governance of Queensland. When one compares it to the *WineGate* affair for instance, which received media coverage, it ought to concern the BHCI because it reveals the danger to open and accountable government and whistleblowers in Queensland when only one mainstream newspaper exists without any competition. Plainly, if *The Courier-Mail* decides “certain news isn’t news”, it has the capacity, albeit by omission, to be just as much party to the cover-up as the government itself.

8.29 Fortunately, this unsatisfactory vacuum left by *The Courier-Mail* has been filled, within its limited capacity and circulation, by University of Queensland's School of Journalism and Communication's newspaper *The Independent Monthly*. WBA pays it tribute publicly. WBA is confident that its constant coverage of this affair is wholly justified and represents journalism as it ought to be, not as it is with *The Courier-Mail*.

8.30 Accordingly, out of the "Lindeberg experience" involving "whole-of-government" wrongdoing, WBA submits that compelling reasons exist for the BHCI to recommend the establishment of a *Whistleblowers Protection Authority*. This is because, if **the sword** (i.e. the CJC/CMC/police) fails, and the sword is then turned on the whistleblower for whatever reason, then **the shield** (i.e. the **Whistleblower Protection Authority**) remains to afford some form of protection against reprisal for the whistleblower.

9.0 THE POTENTIAL FOR REGULATORY CAPTURE OF THE OFFICE OF STATE CORONER

- 9.1. The role of the State Coroner, under section 11 of the *Coroners Act 2003*, in terms of investigating unexpected and/or questionable “reportable” deaths of citizens “in care” in hospitals²⁹ and elsewhere, including “in custody” in Queensland’s juvenile and adult prison system, is an immensely important one. It is vitally important that the public, government, judiciary and Parliament have confidence in the integrity and competence of the office holder.
- 9.2. It is simply not possible, when examining the handling and findings of the Heiner affair, to go beyond the critical involvement of Mr. Michael Barnes when he worked for the CJC as its Chief Complaints Officer. The involvement of others like Messrs. Mark Le Grand and Noel Nunan, in particular, are closely linked to Mr. Barnes’s handling of the matter.
- 9.3. It is open to conclude that the affair has not been handled properly from the very beginning. It is open to conclude that the misapplication of the law (i.e. misquotation, misinterpretation, limited application, or non-application) may have occurred.
- 9.4. Mr. Barnes now holds the important office of State Coroner under the *Coroners Act 2003*. He enjoys the judicial standing of a Magistrate. He has the authority to recommend criminal charges against persons, and to make recommendations to government which could see the law changed and/or introduced. In short, he can greatly influence Parliament pursuant to section 3 of the *Coroners Act 2003*, and all conduct on his part must impact on the integrity of the Queensland Bench.
- 9.5. It appears that the Coroner’s Office may investigate the questionable deaths of some of Dr. Patel’s former patients relevant to the BHCI terms of reference.

²⁹ *Hospital Services Act 1991*

9.6. WBA submits that, to date, the Heiner affair remains serious unfinished business, based in large part on the contentions about deeply flawed legal and factual findings contained in CJC reports and advices dated 20 January 1993 and beyond. These reports and devices may have had the effect of preventing criminal charges being laid against members of Executive Government and senior bureaucrats. The appropriateness of Mr. Barnes to act in his Office as State Coroner may reasonably be perceived to remain under a cloud in cases touching upon the major issues raised with the Heiner shredding. This is particularly so given the recent rethink on the legality of the shredding by the Police Commissioner. To ignore the situation with changing attitudes towards the CJC's view on the shredding, may have the tendency to reflect adversely on the administration of justice in Queensland.

Deeply Flawed Conduct

9.7. The handling and findings by CJC/CMC inspections into the Heiner affair may be seen in and/or touching upon:

- erroneous interpretation of Section 129 of the *Criminal Code* - ***an interpretation which was never open to be made;***
- misquotation and misinterpretation of *Public Service Management and Employment Regulation 65*;
- failure to refer to recent precedent (*Rogerson*, 1992) or to long established precedent (*Vreones*, 1891) on the vital elements of the relevant law
- failure to apply *Criminal Code* sister-provisions of Sections 132 and/or 140 involving obstruction of justice offences;
- failure to apply properly the official misconduct provisions of the *Criminal Justice Act 1989*;
- failure to represent and/or address properly the *ex gratia*/special payment of \$27,190 and the February 1991 Deed of Settlement pursuant to the provisions of the *Financial Administration and Audit Act 1977*, *Criminal Code (Qld)*, *Income Tax Assessment Act* (Cwlth), and the *Criminal Justice Act 1989*;
- failure to represent properly the role of the State Archivist under the *Libraries and Archives Act 1988*;
- failure to interview the State Archivist and other State Archives staff involved in the shredding, appraisal process and other related subsequent events;

- failure to interview any Minister of the Crown involved in the shredding and/or payment of the *ex gratia*/special payment;
- failure to interview the DFSAIA Director-General Ms. Matchett and other DFSAIA departmental staff involved in the shredding and subsequent related conduct, including the *ex gratia*/special payment;
- failure to interview JOYC staff;
- failure to interview JOYC abused children;
- failure to interview Mr. Stuart Tait, the Cabinet Secretary;
- failure to interview relevant Crown Law officers;
- failure to interview relevant trade union staff of Queensland Professional Officers Association, Queensland State Services Union, AWU and Queensland Teachers Union;
- failure to investigate the handling of Mr. Lindeberg's 1994 FOI applications for relevant DFSAIA (incriminating) documentation by DFSAIA staff involving alleged obstruction of justice and real bias, and subsequent handling of the application by the Office of the Information Commissioner (as revealed in the Morris/Howard Report);
- failure to secure and/or obtain copies of known/seen/inspected "...*memoranda between Ms Matchett and Minister Warner which strongly inculcated all members of the Goss Cabinet*" in the illegal shredding decision when in communication with the Department in late 1994/early 1995 before constructing the CJC's February 1995 Submission to the Senate Select Committee on Unresolved Whistleblower Cases;
- failure to declare (*prima facie* disqualifying) conflicts of interest³⁰ allegedly present with Mr. Noel Nunan as an active member of the ALP and Queensland Labor Lawyers, and himself as an office bearer to Queensland Labor Lawyers;
- leaving unresolved serious questions surrounding the alleged tampering with an interview tape between Messrs. Kevin Lindeberg and Noel Nunan conducted at CJC Headquarters in August 1992, wherein certain words, alleged to reveal alleged bias on Mr. Nunan's part, were erased;
- alleged unaddressed demonstrable bias against Mr. Lindeberg by certain officers in the CJC (i.e. Messrs. David Bevan and Richard Pointing);

³⁰ *Livesey v New South Wales Bar Association* [1983] 151 CLR 288 at 294-294; *Metropolitan Properties Co. (F.G.C.) Ltd. v Lannon* (1969) 1 QB 577 at p599

- alleged misleading of the Parliamentary Criminal Justice Committee in its 20 January 1993 CJC Report on the Heiner affair;

- 9.8. In short, WBA submits that the handling of the affair ought to be the subject of independent examination by a Special Prosecutor in order that the public may have confidence in the competence and independence of past inquiries managed by former CJC officers involved with the Heiner referrals, former CJC officers who are now in other watchdog authorities, such as with the Office of the State Coroner. This, by association under the BHCI's terms of reference, may impinge on the BHCI's task insofar as inquests into the deaths of Dr Patel's patients are concerned.
- 9.9. WBA submits that, unless such a clearance is obtained, it is open to suggest that, if a circumstance arises where Executive Government or senior bureaucrats may be culpable under the *Coroners Act 2003* in any matter in the future, the State Coroner's Office may be perceived as possibly being less than impartial in its findings, and may be perceived to deny an aggrieved citizen his or her right to equal justice, and, at the same time, may bring the impartial administration of justice into disrepute.
- 9.10. Your Inquiry should not be surprised by this amount of concern about the Coroner's Office, or other watchdog authority managed by former Heiner investigators, because there are even greater concerns and adverse perceptions about the CMC (formerly CJC).
- 9.11. If the latter was not the case with the CMC, the CMC would be doing the Morris Inquiry. Even Premier Beattie can't sell the CMC as an independent and competent watchdog.
- 9.12. If the CMC/CJC and other watchdogs had not been captured and had been doing their job, including the protection of whistleblowers, we would not be in need of the current Inquiry which even Premier Beattie recognized had to be done.

ADDENDUM A

In a Disposal Authority form (Form QSA-TS-026) used by Queensland State Archives and brought into existence by Queensland's State Archivist, Ms. McGregor, while the war raged over this Affair, and the CJC's public misrepresentation of her role went unchallenged by her, it states as follows. This form is still in force under the new *Public Records Act 2001*:

"Authorisation for the disposal of public records is given under and subject to the provisions of Section 61 of the *Libraries and Archives Act 1988* (Reprint No.2) ("Section 61"). Public records must not be disposed of if disposal would amount to a contravention of Section. Particular care should be taken before disposing of public records of a Court or a Commission within the meaning of the *Commissions of Inquiry Act 1959 - 1989*.

Public records must not be disposed if they are required:

- (i) for any court action which involves or may involve the State of Queensland or an agency of the State; or (Underlining added)
- (ii) because the State holds documents which a party to litigation may obtain under the relevant Rules of Court, whether or not the State is a party to that litigation, or (Underlining added)
- (iii) pursuant to the *Evidence Act 1977*, or
- (iv) for any other purpose required by law. (Underlining added)

ADDENDUM B

This article shows that *The Courier-Mail* has recognized that the Heiner affair has never enjoyed a comprehensive independent investigation. *The Courier-Mail*, even in 2005, knows that the affair is unfinished business but WBA has no confidence in its attitude towards the Heiner affair .

However, this sole mainstream newspaper, which services the entire State, has not reported on:

- the significance of the September 2004 Queensland Court of Appeal ruling in *Ensbey* to the Heiner affair; -
- the inculpatory April 2005 advice from pre-eminent expert on the Griffith Criminal Code former Chief Justice of the High Court of Australia the Right Honourable Sir Harry Gibbs GCMG AC KBE suggesting that, at least, section 129 of the *Criminal Code* had been breached;
- the supporting 2003 advice by former Queensland Supreme and Appeal Court Justice Jim Thomas arguing that section 129 *was never open* to the interpretation placed on it by the Queensland DPP (i.e. Mr. Royce Miller QC), the Queensland Government and CJC/CMC;
- the significance of the (hidden) January 1997 DPP's advice on the findings of the October 1996 Morris/Howard Report which literally changed the face of Queensland politics through its (i.e. the DPP's) erroneous interpretation of section 129 of the *Criminal Code*;
- the August 2004 Report into the affair by the Standing Committee on Legal and Constitutional Affairs which recommended criminal charges be brought against all members of the 5 March 1990 Goss Cabinet pursuant to section 129 of the *Criminal Code*, and that a Special Prosecutor into the affair ought to be appointed; and
- the recent involvement of Her Excellency the State Governor.

WBA submits that such a grand failure on the part of *The Courier-Mail* is inexplicable and journalistically inexcusable. It gives reasonable rise to serious questions concerning the existence of gross political bias on its part which is inimical to democracy. WBA strongly suggests that the Heiner affair issues go to the heart of open and accountable government and warrant exposure by the mainstream media like *The Courier-Mail* and the *ABC*, as part of their legitimate watchdog role in the exercise of freedom of the press.

THE COURIER-MAIL

14 June 1999 Michael Ware

Many people in politics - primarily in the Labor party - moan long and loud whenever the much-maligned Heiner enquiry is mentioned.

Indeed, they squirm at the very utterance of its name and make a face as if to say: how could you even bring this up?

Why they do this, I don't know.

But their problem is that it does keep coming up: again and again and again.

There are several reasons for this, but one of them is that it's hard to find anyone who can get the story straight. So many people make so many mistakes when talking about the Heiner inquiry that the mistakes invariably lead to more confusion, more argument.

And I don't know why because, at its heart, it's a very simple affair.

But for those of you who have not been following (and I believe that I am now talking to the vast majority), this is the story: the inquiry was a departmental investigation by retired magistrate Noel Heiner set up in 1989.

Its job was to examine staff concerns about management and allegations of abuse at Brisbane's John Oxley Youth Detention Centre, a facility for young offenders aged between about 12 and 17.

However, within a couple of weeks, a legal hiccup was discovered about the level of protection against defamation thought to be on offer for witnesses. So the inquiry was abandoned in early 1990.

Instead of fixing the problem or starting again, the Goss Labor government of the day simply shredded the evidence, including that of mistreatment of the children, and transferred the manager.

Since then it's been a political game of cat-and-mouse.

What essentially is at issue here is whether the circumstances surrounding the shredding of the Heiner evidence in 1990 were legal.

If they were, then it's time to forget the whole sordid tale. If they're not, then it's time to start locking some people up - from the bureaucrats to the politicians.

The trouble is, we just don't know which way to go. No one's ever got to the bottom of it. No one has ever, really, investigated it.

Yet there's a proliferation of people who will, quite erroneously, tell you differently. People ranging from colleagues of the Labor ministers under the gun for having been party to the decision to shred, to supposedly savvy media-types who say the shredding's been investigated to death.

It's been done time and again, by a host of agencies, they say. The only tricky part with those sentiments is that they're not true.

Actually, a man whose life has been embroiled in the affair since 1990, former union representative Kevin Lindeberg, is currently trying to bring Premier Peter Beattie to task over this very issue.

And he's gone to the Speaker of Parliament to stake his claim.

This latest mini-battle stems from Beattie's statements to Parliament listing nine or ten bodies whom he said had made "inquiries" into the shredding.

But of all the agencies mentioned - from police to Criminal Justice Commission to Auditor-General, among others - none of them had, at any

given moment, all of the necessary ingredients to seek the truth of the shredding: the free rein, the power and the jurisdiction.

They've all been hamstrung.

If, in fact, the shredding had been properly investigated by anyone, surely it would have been discovered that the witness testimony that was destroyed had revealed the illegal handcuffing and drugging of child inmates.

I repeat, the illegal handcuffing of children.

However, this didn't come to light until *The Courier-Mail* unearthed it last year, sparking an immediate outcry and creating a special area of hearings for the recently completed Forde inquiry.

But, strangely enough, one of the agencies we've been told that had made "inquiries" into the shredding, the 1995 Senate Select Committee on Unresolved Whistleblower Cases, was discreetly given rock-solid proof of the abuse.

Proof produced, no less, by the Labor state government itself.

Why? Who knows. But a document detailing the handcuffing was buried amidst a mass of material sent to the committee. If the committee had actually been empowered to evince the truth of the shredding, and the government wanted it found, wouldn't the heinous abuse have come out?

Equally, if any of the agencies had really been able to look at the shredding to see if it had been legal, wouldn't they have stumbled on it themselves?

Of those agencies who made "inquiries", how many spoke to the Cabinet ministers who made the fateful decision to shred? None.

How many tried to find out what all the fuss was about, by speaking to the staff? None. How many have been to the John Oxley Centre? None. (Just for the record the Courier-Mail did all these things.)

So, if someone tries to tell you that the Heiner issue or the shredding of the Heiner documents has been investigated, you can laugh them away. But,

before we put the whole saga to bed, the sole question that remains is not why we should reinvestigate this hoary old chestnut. Rather, do we actually want the answers that we've never sought?

ADDENDUM C

Against a background not fully comprehended or known by the general community concerning the significance of knowing who was in attendance at the 5 March 1990 Cabinet meeting by examining the Cabinet Register, so that criminal charges might be confidently brought against each decision maker, and that Mr. Robert F. Greenwood QC, after examining the tabled February/March 1990 Cabinet submissions, and advised that all members of State Cabinet of 5 March 1990, may be in breach of the law, then Families Minister the Hon Anna Bligh made the following speech.

"Hon. A. M. BLIGH (South Brisbane ALP) (Minister for Families, Youth and Community Care and Minister for Disability Services) (6.46 p.m. 25 August 1998): *The motion before us tonight makes a series of very serious allegations serious allegations against five of my colleagues, serious allegations that do not bring forward one shred of evidence against these colleagues. It is time, as the Deputy Premier said, to call a spade a spade. This has not been debated on the facts; this is nothing more than a complicated, convoluted conspiracy theory a totally mad conspiracy theory. Far be it for me to ruin their grand conspiracy theory with some facts, but I feel I am bound to put them on the record here tonight.*

"... It seems to me that, if one is going to have a conspiracy theory, one ought to do it properly. If one is going to have a conspiracy theory, one really should have a totally mad one. One should have one that is gloriously mad, one that is grandly, gloriously, barking mad and this one bears all the hallmarks of that. Not only have members opposite come in here and made repugnant and malicious personal slurs on five Ministers, they have made false and disgraceful attacks on current and former officers of my department. We do not mind so much. We have broad shoulders. We take a lot of flak and we will take a lot more. But who else has been dragged into this barking mad conspiracy? Who else is being accused of communism, paedophilia and criminal activity? None other than the Crown law office, the Audit Office, the Office of the Information Commissioner, the Director of Public Prosecutions, the Queensland Police Service, the Criminal Justice Commission and the Federal Senate! I am disappointed here tonight. I had hoped to hear the full extent of this conspiracy.

"I was hoping that we would hear tonight of the involvement of the United Nations in this matter; that we would hear tonight about the involvement of the Vatican, the Pope and the entire Catholic Church around the world; that we would know tonight at last the truth about the involvement of the ABC in this; about how Bananas in Pyjamas have figured in this, and the role of the Wiggles

in this matter. But no! What we have had tonight is further nonsense about documents and documents and documents.

"While we are on the subject of documents, there is a lot of curiosity from One Nation members about the attendance register from Cabinet. I am going to let the One Nation members into a secret. Just so that they never know who is there and who makes these dastardly decisions, at the end of every Labor Cabinet meeting right throughout the Goss years and we have restored the tradition the Premier eats the attendance register. I say to the One Nation members: you will never get it. You can take us to the International Court of Justice and the attendance register will remain in the bowels of former Labor Premiers. It is part of the austerity drive; we do not get lunch."

EXHIBIT B

Whistleblowers Australia Supplementary Submission 16 September 2005

Commissioner the Honourable Geoffrey Davies QC
Queensland Public Hospitals Commission of Inquiry
Post Office Box 13147
George Street
BRISBANE Q 4003

The Queensland Public Hospitals Commission of Inquiry (QPHCI) holds a major submission dated 18 August 2005 from Whistleblowers Australia (WBA) presented to the Bundaberg Hospital Commission of Inquiry (BHCI) just prior to its closure by His Honour Justice Martin Moynihan on a finding of ostensible bias.

It is our understanding that WBA's 11 recommendations are to be taken into account in this renewed Inquiry's final report. While WBA accepts this assurance in good faith, we still hold concern that insufficient weight may be given to them, especially regarding the

creation of a **Whistleblowers Protection Authority** flowing out of our national “sword and shield” policy.

Since lodging our submission, we have seen your Inquiry uncover the pattern of document destruction and ‘spin’ production at work in the Department at large, not just at Bundaberg (and Hervey Bay and Townsville and et al – members of the Whistleblowers Action Group are critical of the difficulties of getting the Forster Inquiry paralleling your Inquiry to look into even worse situations in other Queensland cities). We assess that the mind of your Inquiry also may have moved to a limited perspective, namely the Departmental perspective.

Such a move will become a flaw in the progress already made. Your Inquiry, too, now has to deal with the destruction of documents. The sensitivity of the shredded report relevant to your Inquiry, going as it appears to prima facie fraud against the Federal Government's Medicare rebate, may enliven section 129 of the Queensland Criminal Code, notwithstanding no Federal Health/Police investigation has been established - but the report would have been relevant to the Davies Inquiry itself. In short, the shredders reasonably could be held to have known that they were ridding themselves of evidence likely to be required in a ‘judicial proceeding’, that is, a proceeding of a body capable of taking evidence on oath (see Section 119 of the *Criminal Code*). It would be remiss of your Inquiry not to identify the wide practice in the Public Service of destroying documents likely to be needed by judicial proceedings.

Your Inquiry has also heard evidence from former Qld Health bosses Professor Staples and Dr Scott about the role of ‘political sensitivity’ in persuading the administration to positions that it now may deeply regret. Our first submission gave evidence to the sourcing of that notion – that source was outside of Qld Health, was at the level of the leadership of the total Qld Public Service, and was from a watchdog over that QPS, namely the Public Sector Management Commission.

We further note a first time interest by your Inquiry, announced in the last few days, in a watchdog authority whose jurisdiction is wider than just the Department of Health. Again our first submission brought this watchdog, the State Coroner's Office, to the attention of your Inquiry – our concern was for any 'political sensitivity' that might be shown by that Office. Our submission, however, also tries to draw the attention of your Inquiry to other watchdogs whose decisions seem to have shown 'political sensitivity' in decisions made about matters in the public interest.

Our submission proposes the Whistleblower Protection Authority as a means for protecting those who act in the public interest irrespective of the political interests of those in power. The WPA will therefore protect the evidence held in the memory of such persons and in their documents and those of their organisations. This protection of witnesses and evidence, to our inspection, is where all existing watchdogs have failed the people of Bundaberg and of our State.

To restate our principle recommendation put to the BHCI:

Recommendation 1.

The BHCI recommends the establishment of an independent statutory **Whistleblower Protection Authority**. The **Whistleblower Protection Authority's** prime statutory duty, *inter alia*, shall be:

- (k) to protect any public official or person who makes a public interest disclosure (PID) to either a proper public authority or, if necessary, Member of Parliament (State or Federal) or the media from any act of retribution by another;
- (l) to secure probative evidence relating to the PID, and personal files relating to the whistleblower;
- (m) to receive on-going progress and final report from the relative investigative authority on the PID;

- (n) upon satisfying certain criteria concerning the nature (i) of the PID; (ii) ensuring its non-vexatious nature; and (iii) of the retribution and/or detriment, to fund a legal action in damages or specific performance against the State of Queensland and its agencies, other body or person who knowingly inflicts a detriment on a whistleblower as defined and protected by the **Whistleblower Protection Authority** relating or tending to relate to his/her PID; and
- (o) to report to the Queensland people through an all-party **Parliamentary Whistleblower Protection Authority Committee** and that its responsible Minister be the Queensland Premier.

WBA is concerned that your Inquiry may not embrace our key recommendation concerning the creation of a **Whistleblowers Protection Authority** because it is understood that it is unlikely that our comments on whistleblowing and related matters like the politicisation of the public service and regulatory capture will be placed under scrutiny at a public hearing before they are finalised in some 4 weeks time.

To recommend the establishment of such an authority on your part - out of the blue as it were, without any public airing or examination from the witness box - leads WBA to believe that no such recommendation shall therefore be made in your final report.

This is a matter of grave concern because it would seem to follow that your Inquiry may either accept or suggest that the current accountability structures of the Queensland's public administration are sufficient, efficient and robust enough to deal with the future, even after oversighting the current debacle for years which made this Inquiry so necessary.

Plainly, there is a missing link. Evidence gathered to date reveals this missing link. WBA strongly suggests that the establishment of a **Whistleblowers Protection Authority** fills that missing link. Its creation has the potential to impose considerable integrity on a system currently devoid of it which has seen Queensland Health patients lives both

unnecessarily harmed and lost because no one was prepared to blow the whistle for fear of retribution.

WBA submits that it is not open to the Inquiry, in the matter of legislative change regarding the real protection of whistleblowers and appropriate changes in employment conditions for Crown employees, to ignore or not test our evidence because the *Whistleblowers Protection Act 1994*, *Public Sector Ethics Act 1994*, *Criminal Code (Qld)*, *Public Records Act 2002*, *Public Service Act 1996* and *Crime and Misconduct Act 2001* operate in the broad, and may not be narrowed to just Queensland Health.

It is quite clear that would-be Queensland Health whistleblowers look beyond the experience of Queensland Health whistleblowers before deciding whether or not to blow the whistle. Whistleblowing is a dangerous activity. Uniquely, our submission reveals the systemic nature of the abuse of office in and the politicisation and bullying-mentality of Queensland's public administration because our submission is based in the broad, not in the narrow - joining the whistleblower dots together - and focuses on accountability authorities like the Crime and Misconduct Commission, Queensland Police Service, Office of the Director of Public Prosecutions, Office of the Information Commissioner, Ombudsman, the State Archivist and Office of the State Coroner *et al.*

In that regard, WBA provided cogent arguments based on indisputable evidence, case law and on the documented experiences of other whistleblowers who had to deal with those authorities over the last 15 years.

WBA submits that it would therefore not be in the public interest to miss this special opportunity to have those wide systemic issues addressed, in a significant manner, concerning whistleblowing involving public interest disclosures and misconduct.

Accordingly, WBA respectfully requests that urgent reconsideration ought to be given to placing our submission into public evidence and to have it tested in the witness box under oath so that, at least, our key recommendation concerning the establishment of a

Whistleblowers Protection Authority may be debated and put into the public domain, and, hopefully, adopted in your final report.

Yours sincerely

Greg McMahon.

National Director

For Ms Jean Lennane, President

Whistleblowers Australia

PO Box 859, **KENMORE Q 4069**

26 September 2005

RECOMMENDATIONS

For the record, these are WBA's 11 recommendations put to the BHCI:

Recommendation 1.

The BHCI recommends the establishment of an independent statutory **Whistleblower Protection Authority**. The **Whistleblower Protection Authority's** prime statutory duty, *inter alia*, shall be:

- (p) to protect any public official or person who makes a public interest disclosure (PID) to either a proper public authority or, if necessary, Member of Parliament (State or Federal) or the media from any act of retribution by another;
- (q) to secure probative evidence relating to the PID, and personal files relating to the whistleblower;
- (r) to receive on-going progress and final report from the relative investigative authority on the PID;
- (s) upon satisfying certain criteria concerning the nature (i) of the PID; (ii) ensuring its non-vexatious nature; and (iii) of the retribution and/or detriment, to fund a legal action in damages or specific performance against the State of Queensland and its agencies, other body or person who knowingly inflicts a detriment on a whistleblower as defined and protected by the **Whistleblower Protection Authority** relating or tending to relate to his/her PID; and
- (t) to report to the Queensland people through an all-party **Parliamentary Whistleblower Protection Authority Committee** and that its responsible Minister be the Queensland Premier.

Recommendation 2.

The BHCI recommends that any deliberate act of retribution and/or detriment by another against a person who makes a PID to a proper authority – so defined as a “judicial proceeding” pursuant to section 119 of the *Criminal Code* - be treated as a breach of section 119B of the *Criminal Code 1899* (Qld).

Recommendation 3.

The BHCI recommends that section 119B of the *Criminal Code 1899* (Qld) concerning the word “witness” be amended, as and where necessary, to include in its meaning “*any person making a public interest disclosure to a proper authority or other defined avenue.*”

Recommendation 4.

The BHCI recommends that, in the *Public Sector Ethics Act 1994*, and in all other relevant legislation covering the employment of Queensland Crown employees, especially in areas of health care, that the right of any such employee to work in a “corruption free workplace” shall be guaranteed, otherwise an action in damages may be brought against the State of Queensland by any aggrieved employee who suffers a detriment as a consequence of that “corruption free workplace” being knowingly eroded, absent or compromised through neglect of any kind.

Recommendation 5.

The BHCI recommends that the *Public Records Act 2002* be amended to oblige the State Archivist to issue pro-actively a “service-wide or specific location edict of non-destruction of relevant public records” - suitable to the circumstances at hand or in contemplation by government or other body such as a commission of inquiry or coronial inquest *et al* - in which said public records are known to be or may be reasonably foreseen to be required for that legal or accountability purpose or proceeding.

Recommendation 6.

The BHCI recommends that *Public Service Act 1996* section 51 (2) – **Responsibilities of chief executives** – be amended to include:

- (o) **taking all reasonable measures to maintain a “corruption free workplace” for all departmental employees.**

Recommendation 7.

The BHCI recommends that the *Crime and Misconduct Act 2001* be amended concerning the terms and conditions of appointment etc for its senior officers to mirror the *Electoral Act 1992 (Qld)* Section 23 (4) which states, relevantly, that “...*A person who is a member of a political party is not to be appointed as a senior electoral officer.*”

Recommendation 8.

The BHCI recommends that a bi-partisan **Bundaberg Hospital Commission of Inquiry Implementation Committee** be established to oversee and report on a regular basis to Parliament on progress until all recommendations have been implemented.

Recommendation 9.

The BHCI recommends that the **Bundaberg Hospital Commission of Inquiry Implementation Committee** shall have two **Public Interest Health Monitors** appointed to it by the Queensland Government, in consultation with the Opposition, and they shall be required to provide an independent report to Parliament, on a half-yearly basis, or earlier, on the progress of the Committee’s task.

Recommendation 10.

The BHCI recommends to the Federal Government that the **Medicare Rebate Arrangement** with hospitals throughout Australia be made conditional upon each hospital being accredited to perform the particular surgery before attracting any rebate, and if any application is made without appropriate accreditation, such matter shall be reported to the appropriate Queensland medical authority to investigate.

Recommendation 11

The BHCI recommends that the **Legislative Assembly Members' Ethics and Parliamentary Privileges Committee** issue a discussion paper on the better or more cautious use of parliamentary privilege when either a Minister of the Crown or elected member of Parliament wishes to make an adverse comment about a whistleblower *after* the PID has been made and/or come to public attention, including in the media as a first time exposure, to ensure the privilege is not abused and so that any comment is reasonably based on fact and not designed to mislead the Parliament out of malice or party political self-interest.
