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HOUSE of REPRESENTATIVES

STANDING COMMITTEE
ON
LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO CRIME IN THE COMMUNITY:

- VICTIMS
- OFFENDERS
- FEAR OF CRIME

SPECIAL SUPPLEMENTARY SUBMISSION TO SUBMISSION 142

SUBMISSION
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GLOSSARY

ASA - Australian Society of Archivists
CJC - Criminal Justice Commission
CMC - Crime and Misconduct Commission
DFSAIA - Department of Family Services and Aboriginal and Islanders Affairs
MCCOC - Model Criminal Code Officers Committee
QDPP - Queensland Department of Public Prosecutions
QPOA - Queensland Professional Officers' Association, Union of Employees
QPS - Queensland Police Service
QTU - Queensland Teachers' Union
SCAG - Standing Committee of Attorneys-General
SSCUWC - Senate Select Committee on Unresolved Whistleblower Cases
The Code - *Criminal Code (Qld) 1899*

CASES CITED

Goodman v Mayor of Melbourne (1861) 1 W & W (L) 4;
R v Taylor (1863) 2W & W (L) 23;
South Australian Banking Co v Horner (1968) 2 SALR 263.
R v Rogerson (1992) 174 CLR 268
R v Selvage [1982] QB 372
R v Fingleton [2003] QCA 266
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

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"No power ought to be above the laws."
Cicero, de domo sua, 57 B.C.

INTRODUCTION

Significant developments have occurred since the tabling of Submission 142[1], dated 5 March 2003, which make this special supplementary submission quite essential so that the Committee may better appreciate the seriousness and veracity of the original submission's contents, and also, so that the general public and history may better judge just how seriously our Federal elected representatives in 2003 took their job when allegations of high level wrongdoing and criminal cover up by executive government came before them.

In my opinion, there is nothing more redolent and worthy of outright condemnation by ordinary law-abiding Australian citizens, whose goodwill towards each other, respect for the rule of law and general acceptance of the national ethos of a "fair go for all" keeps our nation free and harmonious, than when public officials, elected or appointed, take the moral high ground in respect of declaring an abhorrence of law-breaking and criminal cover-up in others but fail to apply the same standards to themselves when faced with the same test on their patch of the Australian Constitution for which they are responsible.

Nothing undermines the rule of law more than when public officials, who have sworn an Oath or Affirmation to a relevant authority to faithfully enforce and uphold the law honestly and impartially and without fear or favour to anyone, fail to apply the criminal law uniformly in materially similar circumstances which has the effect of seeing lawbreaking by public office holders in positions of trust escape justice before the nation's courts while an ordinary citizen has the full weight of the law applied to him for the same conduct. This absence of uniformity in applying the criminal law in materially similar circumstances is a serious matter. It has the potential to gravely undermine the rule of law and endanger the fabric of any civilised society. It reduces the obligation on all civilised men and women to respect another's rights and property, to turn their minds to embrace a self-interest way of life by joining clichés or parties of the favoured few to then abuse and use the extended network of well-placed mates in order to get away with deliberate lawbreaking by the *modus operandi* of who you know and who you are.

When such abuse occurs, it is a dagger in the heart of democracy with all its allied dangerous consequences, and simply must be resisted and corrected. The Heiner Affair (Heiner) is such a spectacle writ large. Over and above losing my job for daring to blow the whistle, Heiner stirs me because I believe that equality before the law is non-negotiable and a birthright which is so deeply rooted in our national psyche as to be the foundation of our national spirit of openness and our much vaunted deprecatory larrikin streak of calling a spade a spade – a propensity to prick pomposity.

The Heiner Affair has therefore become such a litmus test, even more so since I said this at Point 19.13 in my original submission: *"...The Heiner Affair now stands before the House of Representatives of the Commonwealth Parliament. How it is handled is a litmus test on just how fair dinkum our nation's lawmakers truly are about crime, its perpetrators, its victims and justice."*

This special supplementary submission also shows why.

[1] http://www.aph.gov.au/house/committee/laca/crimeinthecommunity/subs/sub142.pdf

1. MODEL CRIMINAL CODE FOR THE COMMONWEALTH OF AUSTRALIA

1.1. This Inquiry cannot properly address its terms of reference without some examination of the principle of the uniform application of the criminal law for all Australian citizens and the relevance of the Model Criminal Code of the Commonwealth of Australia in respect of that principle particularly dealing with core offences relating to the administration of justice.

1.2. The concept of establishing a model criminal code occurred on 28 June 1990 before the Standing Committee of Attorneys-General (SCAG) and its first formal meeting took place in May 1991. Over a period of time, it has examined different offences from drug-related offences to the contamination of goods in April 1998. It works through the release of Discussion Papers with representatives from each jurisdiction in the Commonwealth coming together under the Model Criminal Code Officers Committee (MCCOC).

1.3. In July 1998 the MCCOC produced Chapter 7 of the Model Criminal Code dealing with the administration of justice. Of particular relevance to this submission is the offence of destroying evidence, which by any standard, is one of the key building blocks underpinning the administration of justice going to the right to a fair trial. It is closely related to the other offences of attempting to pervert the course of justice and conspiracy to pervert the court of justice.

1.4. The following criminal codes are therefore relevant flowing out the progenitor legislation of the *Queensland Criminal Code* (1899) drafted by eminent jurist the Hon Sir Samuel W Griffith GCMG, Chief Justice of Queensland's Supreme Court, Queensland Premier and Attorney-General and Australia's first Chief Justice of the High Court:

- ACT: *Crimes Act 1900* (ACT)
- Cth: *Crimes Act 1914* section 39
- NSW: *Crimes Act 1900* (NSW) section 317
- NT: *Criminal Code Act* (NT) section 102
- SA: *Criminal Law Consolidation Act 1935* (SA) section 243
- TAS: *Criminal Code 1924* (Tas) section 99
- WA: *Criminal Code 1913* (WA) section 132.

1.5. As the MCCOC confirms, all Australian criminal codes proscribe, as an offence against the administration of justice, the conduct of any person, knowing that any book, document or other thing of any kind is or may be required in evidence in judicial proceedings, wilfully destroys it or renders it illegible or indecipherable or incapable of identification with intent thereby to prevent it from being used in evidence. The offence is captured either by the specific offence of destroying evidence, or, as in Victoria and the ACT, by the common law offence of attempting to pervert the course of justice.

1.6. The leading authority is *R v Rogerson* (1992) 174 CLR 268 building on *R v Selvage* [1982] QB 372 where it was held that the offence of perverting the course of justice was committed when proceedings of some kind were in being or imminent or investigations which might bring proceedings about were in progress. The 1990 Gibbs Committee – in its 4th Interim Report para. 7.13 – recommended that an offence be created of fabricating, altering, concealing or destroying evidence with intent to influence the decision by any person whether or not a judicial proceeding should be brought or to influence the outcome of a current or future judicial proceeding.

1.7. For the record, the benchmark provision dealing with destruction of evidence is found in section129 of the *Criminal Code* (Qld) 1899, and it provides for:

> *"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 3 years."*

1.8. In terms of uniformity within the criminal law relating to this plank in the administration of justice, section 132 of the *Criminal Code* (WA) 1913, section 102 of the *Criminal Code Act* (NT) and section 317 of the *Crimes Act* (NSW*)* 1900 mirror precisely section 129 of the *Criminal Code* (Qld) 1899 while section 39 of the *Crimes Act* (Cth) 1914 has a minor word-variation of no interpretative consequence, and the other jurisdictions of South Australia and Tasmania have broadened the provision's scope to include concealment, alteration and falsification of evidence which is or may be required in a judicial proceeding.

1.9. For the record section 243 of the *Criminal Law Consolidation Act 1935* (SA) - **Fabricating, altering or concealing evidence –** provides for**:**

"*A person who—*

> *(a) fabricates evidence or alters, conceals or destroys anything that may be required in evidence at judicial proceedings; or*
> *(b) uses any evidence or thing knowing it to have been fabricated or altered,*
> *with the intention of—*
> *(c) influencing a decision by a person whether or not to institute judicial proceedings; or*
> *(d) influencing the outcome of judicial proceedings (whether proceedings that are in progress or proceedings that are to be or may be instituted at a later time),*
> *is guilty of an offence. Penalty: Imprisonment for 7 years.*

1.10. It appears that this provision does not permit evidence to be destroyed up to the moment of a writ being filed and/or served That is, the term *"…is or may be required in evidence in a judicial proceeding"* is clear in terms of the element of futurity/foreseeability and therefore the prohibition extends beyond what may be lawfully termed the commencement of judicial proceeding with the filing and serving of a writ. Additionally, this substantive provision of destroying evidence is supported in its task by the alternate offences of attempting to pervert the course of justice and conspiracy to pervert the course of justice which *Rogerson* makes clear may occur *before* curial proceedings commence.

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1.11. What therefore becomes relevant for the Committee to resolve is whether or not evidence which is or may be required in a judicial proceeding has a uniform interpretation and application throughout the Commonwealth of Australia as it applies in various criminal codes. The Model Criminal Code plainly acts as a benchmark for all Attorneys-General in their respective jurisdictions throughout the Commonwealth of Australia, and should be respected in its spirit at all times even though it has no legal or constitutional force.

1.12. It is quite clear that the Model Criminal Code finds as its base the landmark work of Sir Samuel Griffith in his 1899 *Queensland Criminal Code*, and given that the Model Criminal Code recognises 'future' judicial proceeding in this area of debate on destruction of evidence, it cannot support the term 'judicial proceeding' being read down. Compelling evidence is therefore available which strongly suggests that double standards have been consciously at play in Queensland in the application of the criminal law in Heiner which had the effect of criminal charges not being laid against members of the Goss Cabinet and senior public servants, including legal officers in the Office of Crown Law.

1.13. In Heiner, the Queensland law-enforcement agencies have declared publicly and before the Federal Parliament that section 129 ***could not apply*** because a judicial proceeding was not on foot at the time the order to destroy the known evidence was taken. As my original submission says, that view put forward by the Criminal Justice Commission (CJC) and others like the Queensland DPP Mr Royce Miller QC was always contested by me, and other legal practitioners.

1.14. To reiterate, a critical question demands an answer. Was this interpretation genuinely misconceived or deliberately contrived for an unlawful purpose?

2. THE DELIBERATE PERVERSION OF THE CRIMINAL LAW FOR AN IMPROPER PURPOSE

2.1 In my original submission, the unavoidable issue of certain public officials deliberately twisting the criminal law for an improper purpose was addressed in these terms:

> "10.11. In summary, the particular interpretation of section 129 of the *Criminal Code (Qld)* by Messrs Miller[2], O'Shea[3], Barnes, Le Grand[4] and Nunan has been the shield from criminal charges being brought against the wrongdoers in Heiner. All the while I have held that section 129 was being twisted for an unlawful political purpose which reasonably reached the level of a conspiracy, and that the CJC's claim (supported of the Queensland Premier the Hon Peter Beattie MLA despite personally examining the *Lindeberg Petition*) that my allegations have been investigated to "*the nth degree*" was a demonstrable untruth, and that certain CJC officials, and other public officials, were knowingly aiding in a major cover-up and not applying the law honestly and impartially."

2.2. This is a hugely serious allegation. However, because of the supporting evidence, it is logical, reasonable and appropriate to make in the public interest because due cause exists; and, in so twisting the law, those with a duty to uphold and enforce the criminal law have knowingly advantaged another to escape a serious crime being properly prosecuted.

2.3. Section 208(2) of the *Crime and Misconduct Act 2001* – abuse of Commission – may be relevant in this matter, although it is uncertain as to whether a time bar may exist which may then cause the alternate relevant provisions of the *Criminal Code (Qld)* dealing with accessory after the fact[5] and obstruction of justice[6] to be invoked. Section 208(2) provides for:

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[2] Former Queensland Director for Public Prosecutions
[3] Former Queensland Crown Solicitor.
[4] Former Director of the CJC's Official Misconduct Division.
[5] See sections 554 and 545 of the *Criminal Code (Qld) 1899*
[6] ibid section 132

"A Commission officer who uses or takes advantage of his or her office to improperly gain benefit or advantage for himself or herself or someone else or to facilitate the commission of an offence a crime" Maximum penalty 595 penalty units or 7 years imprisonment.

This section reflects section 127(2) of the *Criminal Justice Act 1989.*

2.4. This allegation has increased in its seriousness and urgency I suggest because Queensland's newly appointed first State Coroner is Mr Michael Barnes. He commenced his judicial duties on 1 July 2003.

2.5. In my view, it is an indispensable requirement of the general public, other government instrumentalities and the courts to have absolute confidence in the State Coroner's integrity, impartiality and legal competence because it is a position of great public trust because findings may lead to an indictable offence, official misconduct (including police misconduct) charge/s[7] being laid against a person flowing out of inquests. Coronial recommendations calling for legislative changes also go to government, and any government is entitled to rely on the veracity of the process used and who used it in reaching such recommendations.

2.6. As Mr Barnes claims that the facts associated with Heiner do not trigger section 129 of the *Criminal Code (Qld)* or the alternate sections of 140 and 132, let alone not giving rise to any official misconduct under the *Criminal Justice Act 1989* on the part of public officials closely involved in Heiner, then, by the application of uniformity, it is open to suggest that in any future coronial investigation involving the death of an individual in questionable or suspicious circumstances, including persons in the care and custody of the State/Crown in detention centres and elsewhere,[8] that he would be quite happy for (or even defenceless to prevent) the holder of relevant evidence to such an incident, which may include the State/Crown, to destroy it up to the moment of a coronial inquest actually commencing even when notice of such an inquest has been given to the party in possession and control of that evidence, and it may be done for the specific purpose of preventing their use in the anticipated inquest.

2.7. He also advised the Federal Parliament that it was not the responsibility of the State Archivist by law to be concerned about the "legal value" of public records in the appraisal process (i.e. deciding whether to retain or destroy) as the Archivist's role was limited to only deciding on their "historical value."[9] While this view has been resolutely repudiated by the Australian Society of Archivists and the archives profession worldwide, it has not been recanted by either Mr Barnes himself, the CJC/CMC or the Queensland Government.

2.8. In the public interest, it may be open for the Committee to conclude that as a consequence of his conduct in Heiner that an unacceptable cloud hangs over Mr Barnes' capacity to function as State Coroner and judicial officer honestly and impartially, and it should be addressed as a matter of urgency. (See **Recommendation 20.11**)

2.9. The same concern may also extend to Brisbane Stipendiary Magistrate Mr Noel Francis Nunan. (See **Recommendation 20.12**)

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[7] Section 48(2) of the *Coroners Act 2003*

[8] See *Crime and Misconduct Act 2001, Police Powers and Responsibilities Act 2000, Justices Act 1886, Juvenile Justice Act 1992*, and the *Corrective Services Act 2000*

[9] Senate Select Committee on Unresolved Whistleblower Cases Senate *Hansard* 23 February 1995 p108

3. SUPPORTING EVIDENCE CONCERNING THE INTERPRETATION OF SECTION 129 OF THE *CRIMINAL CODE (QLD)*

3.1. The central point concerning the interpretation of section 129 of the *Criminal Code (Qld)* here is not whether the interpretation expressed by Messrs Miller QC, O'Shea and other Crown Law legal officers, Le Grand, Barnes, and Nunan was wrong at law because plainly it was, but rather whether it was ever reasonably open to them to make such an interpretation as experienced lawyers well versed in the criminal law.

3.2. In short, was it an unfortunate happenstance where they all – just by pure coincidence – got it plainly wrong, or was it deliberate giving rise to abuse of office and conspiracy to pervert the course of justice whose intent was to prevent criminal charges being laid against the Queensland Government over the shredding of the Heiner Inquiry documents?

3.3. This can no longer be put down to a simple academic difference of views between lawyers in which both sides are entitled to their respective view of this provision of the criminal law without improper motives being inferred because we now have the reality of an Australian citizen, residing in Queensland, being charged and committed to stand trial in Queensland's District Court for a breach of section 129 because he destroyed evidence in his possession and control some 6 years ***before*** a judicial proceeding commenced.

3.4. Let me remind the Committee that solicitors acting for the would-be known plaintiff (Mr Peter Coyne) informed the Queensland Government by phone (14 February 1990) and follow-up letter (15 February 1990) in these unequivocal terms that a judicial proceeding would commence. In the relevant Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) memorandum dated 14 February 1990 to the Departmental acting Director-General[10], which records the phone conversation between the solicitor and the acting Director-General's Executive Officer Mr Terry Walsh, it says this:

> *"…Mr Berry[11] is seeking assurances from you that the documents relating to the Heiner Inquiry will not be destroyed…"*

And

> *"…Mr Berry made it quite clear that there is still an intention to proceed to attempt to gain access to the Heiner documents and any departmental documents relating to the allegations against Mr Coyne and that they have every intention to pursue the matter through the courts."*

3.5. I remind the Committee that, in my official capacity as a trade union organiser, I also met personally with the acting DFSAIA Director-General Ms Matchett on 23 February 1990, and placed the Queensland Government on further notice by telling her that two unions, the Queensland Teachers' Union and the Queensland Professional Officers' Association, would be joining Mr Coyne in his foreshadowed judicial proceeding to gain lawful access to the records in question.

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[10] Ms Ruth L Matchett
[11] Solicitor representing Mr Coyne

3.6. Compelling evidence already exists from eminent counsel rejecting the narrow view placed on section 129 by the aforesaid legally qualified persons. Indeed Mr Ian Callinan QC argued in a Special Submission to the Senate in August 1995 that the "*…Criminal Justice Commission's narrow/strict interpretation of "judicial proceeding" is too significant to ignore. There are now clear compelling reasons for these matters to be investigated comprehensively.*" Other senior counsel have agreed with his view.

3.7. The view expressed by Mr Callinan QC and others is being applied against the Baptist minister in our courts by the DPP. Indeed, on 11 March 2003 when putting final arguments to the Magistrate, the Crown Prosecutor argued that section 129 ***did not require*** a judicial proceeding to be on foot to trigger it, and, in the alternate, stated that an attempt to pervert the course of justice could occur before curial proceedings commenced, and cited *R v Rogerson*.

3.8. Put bluntly, the DPP ran my legal argument and that of Messrs Callinan QC, Morris QC and Greenwood QC (in Heiner) against this citizen, which had been scoffed at for over a decade by the Queensland law-enforcement authorities, including the Goss and Beattie Queensland Governments.

4. QUEENSLAND SUPREME AND APPEAL COURT JUDGE ON SECTION 129

4.1. Since compiling my original submission, more compelling evidence has come forward which shows that the interpretation of section 129 by DPP Mr Royce Miller QC in November 1995 *was never open to be made*.

4.2. In the April/May 2003 edition of *The Queensland Independent,*[12] recently retired Queensland Supreme and Appeal Court Justice the Hon James Thomas QC AM was interviewed. He is one of Queensland's most eminent and highly respected jurists. He was asked for his interpretation of section 129.

4.3. Of relevance, Mr Thomas said it was incorrect to claim that a person could not be charged because at the time he or she destroyed documents no court action relating to those documents was actually under way, and that it was still open for those involved in the action to be charged.

4.4. Of additional significance, Mr Thomas said that it was never open to the interpretation that a judicial proceeding had to be on foot to trigger it and added:

> *"I can't see how it is even arguable that a legal proceeding be on foot.*
>
> *"The section itself contemplates that legal proceedings might not be on foot,"* he said.
>
> *"There were some things in the law that were open to different interpretations, but due to the wording of the section, this clearly isn't one,"* he said.

[12] Addendum A

5. WESTERN AUSTRALIA'S DPP ON SECTION 129

5.1. On 17 April 2003, in the wake of Queensland DPP charging the Minister of religion under section 129 of the *Criminal Code* (Qld), I wrote to Western Australia's DPP, Mr Robert Cock QC seeking his interpretation of the provision because section 132 of the *Criminal Code* (WA) was a mirror reflection of section 129 of the *Criminal Code* (Qld).

5.2. My letter may be found as **Addendum C**. It says in part (quote):

> *"…It seems to me that the term "judicial proceeding" is not open to being read down. If it were, it would suggest that records even when known to be required in anticipated court proceedings may be destroyed with the intent of preventing their use in those (anticipated/foreshadowed) proceedings up to the moment of a writ being filed and/or served. Can you please confirm that your interpretation of section 132 does not embrace such a narrow view of judicial proceedings?"*

And says further:

> **"…***It would seem legally nonsensical to have one section of the law protecting the administration of justice working in conflict with another, whereas one would rationally think that all provisions should complement and support the other in the overall task of protecting the administration of justice.*
>
> *Is it therefore fair to suggest that because such a narrow reading-down interpretation of this section, given that it would invite and/or create untold mischief to the due administration of justice by preventing the Judiciary (and police for that matter) from carrying out their constitutional functions by undermining its fact-finding process and preventing a citizen from enjoying his constitutional right to a fair trial - which all, in varying degrees, depend on the proper protection of evidence - that no legal practitioner could seriously suggest these sections can be read down to only mean a judicial proceeding which is on foot?"*

5.3. In his reply of 5 June 2003 Mr Cock QC said the following which is highly relevant to the question of whether or not section 129 was ever open to the interpretation given to it by Messrs Miller QC, Barnes, O'Shea, Le Grand and Nunan in Heiner:

> *"…This section has not been the subject of any judicial interpretation in Western Australia. This is probably because the clear language used in the section leaves little room for ambiguity or confusion as to what behaviour the section is directed at preventing."*

6. ACADEMIA ON SECTION 129

6.1. So as to complete the uniformity of section 129's interpretation from the judiciary, Crown prosecutors, law-enforcement to law schools, I cite the following views expressed by law professors and senior lecturers from a variety of law facilities in Australian universities.

6.2. In his letter of 28 November 1995 to then Coalition Shadow Minister for Justice and Attorney-General Mr Denver Beanland MLA, Queensland DPP Mr Miller QC advised the

following in respect of the suggestion put by Mr Beanland that section 129 of the *Criminal Code* (Qld) had been breached in Heiner. I quote:

> "I refer to your letter of 9 November asking that I give consideration to instituting criminal charges arising out of the destruction of "the Heiner documents". You have referred to section 129 of the Criminal Code.
>
> Form 83 relating to an indictment for an offence against section 129 read as follows, with regard to the body of the charge:
>
>> "Knowing that a certain book [or deed (or as the case may be)] was [or might be] required in evidence in an action then pending in the Supreme Court of Queensland between one EF and one GH (or as the case may be), wilfully destroys the same and wifully renders the same illegible (or undecipherable or incapable of identification), with intent thereby to prevent it from being used as evidence is the said action (or as the case may be)."
>
> It is my view that there must be on foot a legal proceeding before this section is cable (sic) of application. The closing words of the body of the section namely, "with intent thereby to prevent it from being used in evidence" clearly indicate that there must at the time the action is undertaken by the alleged culprit an impending proceeding."

6.3. Associate Professor David Field at Bond University's Faculty of Law advised ***The Justice Project*** of the University of Queensland's School of Journalism and Communication on Mr Miller QC's view in these terms (See **Addendum C** - in part):

> "He said an offence under Section 129 did not require that the case be one which was destined for the Supreme Court.
>
> "Given the restricted de facto jurisdiction of that Court to matters involving homicide and serious drug offences, it would clearly be a defective law were it so limited," Professor Field said.
>
> Moreover, the wording of Section 129 was not capable of supporting an inference that the judicial proceeding must already be on foot when the document was destroyed before an offence might be committed, he said.
>
> "This would be a most unfortunate interpretation", he said, "since it would result in a situation in which a person could escape all legal liability for destroying vital evidence against him, provided that he did so prior to any charges being laid."

6.4. Former Australian National University Senior Lecturer in its Law Faculty, Solicitor and barrister, former Senior Crown Prosecutor and academic, and co-author of the biggest selling case book on evidence in Australia, Mr Peter Waight, had this to say to **The Justice Project** (See **Addendum E** in part):

"Mr Waight said he disagreed with former Director of Public Prosecutions (DPP) Royce Miller's claim that for charges to be brought under section 129 of the *Criminal Code* [destruction of evidence] legal proceedings had to be "on foot".

Mr Miller made the claim in 1995 when he revealed why charges were not laid against those involved in the destruction of the so-called Heiner documents.

"My legal view is that [Mr Miller's interpretation of s.129] is not, in fact, correct …a number of judges including High Court judges have commented on that in fairly recent times, and even expressed their views very clearly," Mr Waight said.

And said further:

"Mr Waight said charges laid in March this year against a man for destroying pages of a diary when no court proceedings relating to them had begun showed that the current DPP's interpretation of section 129 and that of Mr Miller's were "clearly in conflict".

"The two [DPP interpretations of s.129] are totally inconsistent; they can't have it both ways," Mr Waight said.

"Either they've got to drop the charges against [the citizen] on the basis that Miller's view is right and still adhered to, or if they say it's wrong, then they've got to re-examine whether the prosecutions arising out of the so-called "Heiner matter" should now be reconsidered," he said.

Section 129 of the Criminal Code states that any person who knowingly destroys evidence that is, or may be, required for a judicial proceeding, commits an offence.

Mr Waight said interpreting section 129 as requiring judicial proceedings to be "on foot" as suggested by Mr Millar, would cause problems.

"It reduces everything down to chance …it seems totally absurd to me to say in one case there is an offence and in the other there can't be. I think the law would be open to serious reproach if that sort of distinction was brought on a charge," Mr Waight said.

He also said no time limits existed in criminal law and the DPP could still bring charges against the public officials involved in the shredding of the Heiner documents in 1990. He said this would be consistent with the DPP's stance in the recent Queensland case in which a man acquitted of murder in 1973 was subsequently charged with perjury in connection that matter.

"I don't think the DPP can say, 'Oh well, ten years, 13 years, has gone,' because why did they think it appropriate to bring a charge of a much greater time frame?" Mr Waight said.

6.5. On 22 May 2002, Mr Alastair MacAdam, Senior Law Lecturer, Law Faculty at the Queensland University of Technology was interviewed on *ABC-Radio 612* on the Heiner Affair. On this particular point dealing with the interpretation of section 129, he said the following (See **Addendum G** in part):

> *"…the CJC used a … clearly wrong rule for trying to read down the operation of the relevant provisions of the criminal code.*
>
> *They tried to say that proceedings had to be instituted in order for there to be a perversion of the course of justice, etc. And very, very clearly, their reasoning, if it had been written, I commented before, in a first year law assignment, it would have resulted in a clear failing grade."*

7. MORRIS/HOWARD REPORT ON SECTION 129

7.1. In May 1996 the (Borbidge) Queensland Government commission two Queensland barristers (Messrs Anthony Morris QC and Edward Howard) to examine "on the papers" the so-called "Lindeberg allegations" to ascertain whether they had substance and, if they did, whether it would be in the public interest to hold an open inquiry pursuant to the *Commissions of Inquiry Act 1950.*

7.2. In October 1996 their Report was tabled in the Queensland Parliament recommending the establishment of an open inquiry because of the seriousness of the wrongdoing they had managed to discover "on the papers." They suggested that the matters found were more serious than issues relating to the Fitzgerald Inquiry. In their Report they discussed, in some detail, their interpretation of section 129 of the *Criminal Code (Qld)* which is relevant, once again, to this inquiry going to the consideration of whether or not it was ever properly open to others to claim that a judicial proceeding had to be on foot to trigger its provision. Their discussion is covered at pp88-96 in the Report.

7.3. In November 1996, or thereabouts, the Queensland Government forwarded the Report to Queensland's DPP, Mr Royce Miller QC, seeking threshold advice on the proper interpretation of section 129 and whether it was in the public interest to hold the recommended public inquiry.[13] The advice, returned to the Queensland Government sometime in 1997 remains hidden from public scrutiny, save that it was publicly reported that the DPP advised not to hold a public inquiry because a great many people had tried to establish the truth over such a long period that it was now time to put the matter to rest because it was not in the public interest to pursue it. He advised that certain people could be charged in relation to abuse of office but it was not in the public interest to do so. It was not mentioned in the media release what view he took of section 129.

7.4. For the record, I was outraged and immediately issued a media release (and appeared on *ABC-TV News*) declaring that the law was being administered by double standards.

7.5. It is therefore appropriate for the Committee to be apprised of Messrs Morris QC and Howard's view of section 129. Firstly, they stated (at pp88-89) that Form 83 in Section II of Part I of the Schedule to the *Criminal Practice Rules of 1900* was subordinate legislation promulgated by the Judges of the Supreme Court of Queensland under section 707 of the Criminal Code and

[13] *The Courier-Mail* 15 November 1996 journalist John Lehmann "Heiner shredding claims go to DPP".

could not alter the substantive provision of the Criminal Code. In short, the substantive provisions of the Code must prevail over the form.[14]

7.6. In regard to the debate about whether a judicial proceeding had to be "pending/on foot", they went into considerable detail in pp 90-96 and certain passages are worth quoting which, in my view, overwhelmingly demonstrate how a contrary interpretation by lawyers, well versed in the law, was never open as former Queensland Supreme and Appeal Court Justice the Hon James Thomas QC AM recently told **The Justice Project**, and WA's DPP, Mr Robert Cock QC confirms in his letter of 5 June 2003.

7.7. Messrs Morris QC and Howard state the following (at pp 90-91):

> "10. The language of Section 129 does not lend support to the view that proceedings must be "pending" at the relevant time for an offence to be committed. The use of the words "or may be" – referring to "any book, document, or other thing of any kind, [which] is or may be required in evidence in a judicial proceeding" – is significant in two respects. On the one hand, it indicates that it is sufficient to constitute an offence if the book, document or thing will probably (or possibly) be required in evidence, and excludes the necessity to prove as a matter of certainty that the book, document or thing was or would be required in evidence. But, on the other hand, the use of the words "or may be" introduces an element of futurity: the requirement need not be one which exists (or which is capable of existing) at the time when the book, document or thing is destroyed; it is sufficient if such a requirement is one which "may" arise at a future time.
>
> 11. Had s.129 been intended to apply only in the limited circumstances suggested by the Crown Solicitor, it would have been a very easy matter to draft the Section in such a way as to make that intention perfectly clear. Rather than referring to "a judicial proceeding", the section could have been drafted to refer to "a judicial proceeding then pending." It is not a legitimate process of statutory construction to assume that a provision is subject to an unstated limitation or qualification, especially where it would have been a very simple matter for that limitation or qualification to be expressed clearly and succinctly.
>
> 12. There is nothing in the language of s.129 to support the Crown Solicitor's contention that it should be "read down" as applying only to judicial proceedings pending at the relevant time, it is appropriate to ask whether such a construction can be supported having regard to the objects of the Section and the mischief which it was intended to remedy. In our view, it is entirely artificial to read the Section as applying only in respect of proceedings which are currently on foot. The actual date of commencement of proceedings may, in many cases, be a matter of pure coincidence. If the proceedings in question are civil proceedings, it is difficult to see why the operation of s.129 should depend on the fact that a Writ has been issued, or that a Plaint has been filed, so that conduct which would constitute a serious criminal offence on the day after the issuing of a Writ or the filing of a Plaint – whether or not the defendant is aware that a Writ has been issued, or that a Plaint has been filed – would not attract criminal consequences if the same act was

[14] *Goodman v Mayor of Melbourne* (1861) 1 W & W (L) 4; *R v Taylor* (1863) 2W & W (L) 23; and *South Australian Banking Co v Horner* (1968) 2 SALR 263.

committed 48 hours earlier. In the case of criminal proceedings, if the police or other law enforcement authorities are investigating the commission of an offence – if, for example, a search warrant has been executed, or a suspect has been taken into custody – it is difficult to see whey criminal liability under s.129 should depend upon whether an information or complaint has been laid before a court.

13. It may be argued that a "wide" construction of s.129 would create a very onerous situation for persons in the possession of books, document and other things in respect of which there is a remote possibility that such items may be "required in evidence in a judicial proceeding" at some future time. But the language of the Section itself affords ample protection to those innocently involved in the destruction of books, documents and other things. To be criminally liable, the person must know that the books, documents and other thing "is or may be required in evidence", and must also have an "intent…to prevent it from being used in evidence". Actual knowledge – rather than, for example, mere suspicion – is an ingredient of the offence; so, also, an actual intention to prevent the item being used in evidence – rather than, for example, a consciousness of the possibility that destruction of the item will prevent its being used in evidence – is essential to sustain a conviction. It would be extraordinarily difficult to suggest that a person has knowledge that a book, document or other thing "is or may be required in evidence in a judicial proceeding", or that the person has an intention to prevent its being used in evidence, unless something has occurred to put that person on notice of the possibility that a requirement for the item to be adduced in evidence may arise at a future time. Where the proceedings are of a civil nature, the fact that the person has received a letter of demand threatening the institution of proceedings could, in our view, suffice to show that the person knew that a book, document or thing "is or may be required in evidence in a judicial proceeding"; and in the case of criminal proceedings, the fact that the police or other law enforcement authorities have (for example) executed a search warrant or taken a suspect into custody might well suffice to show that a person, aware of those facts, had knowledge that a particular book, document or thing "is or may be required in evidence in a judicial proceeding". Similarly, if a person is shown to have had knowledge that proceedings are about to be instituted, and to have destroyed material which may be relevant as evidence in those proceedings with that knowledge, those circumstances may support an inference that the person's intention was to prevent the material being used in evidence. Plainly, a person could not be convicted of an offence under s.129 merely because the person was aware of circumstances which might conceivably give rise to the institution of some form of judicial proceeding, if nothing had occurred to put that person on notice of a real likelihood that a judicial proceeding may subsequently be instituted."

7.8. Messrs Morris QC and Howard went on at Point 16 and respectfully disagreed with the Crown Solicitor's interpretation of section 129, and at Point 17 concerning the state of knowledge of members of State Cabinet who resolved to destroy the Heiner Inquiry documents, they said:

"17. At this point, we wish to state, with perfect clarity, that we do not suggest that the members of State Cabinet who resolved to destroy the Heiner documents on 5 March 1990 may have committed an offence under section 129. As we have not had access to Cabinet records, we have no way of knowing what information was available to the Cabinet in making that decision. In those circumstances, it is

impossible for us to express a view, one way or the other, as to whether the members of State Cabinet made that decision "knowing" that the Heiner documents "may be required in evidence in a judicial proceeding" or "with intent…to prevent [the Heiner documents] from being used in evidence."

7.9. As was set out in my original submission, we now hold the relevant February/March 1990 Cabinet records and they plainly show that the Queensland Government knew, at the time, that solicitors were seeking the documents for a judicial proceeding but had not yet issued the Writ, and, in ordering the shredding of those records, it was done to prevent their use in evidence in a judicial proceeding.

7.10. Under these gravely serious circumstances the 1996/97 access to advice provided to the Queensland Government by Mr Royce Miller QC, Queensland's DPP, becomes relevant – and may be potentially highly explosive. It is being sought by this author but is currently being withheld under the "blanket Cabinet exemption" of section 36(1) of the *Freedom of Information Act 1992.* I have claimed that such an exemption is "unconstitutional and undemocratic" because this advice to the Executive Government of Queensland has the potential to cover up a fraud or crime. (See **Recommendation 20.13**.)

8. ACTING ON LEGAL ADVICE

8.1. The Goss and Beattie Queensland Governments have consistently suggested that because it acted on legal advice and approval under the *Libraries and Archives Act 1988* it afforded those involved in the shredding protection from criminal charges.

8.2. This view is misplaced, and is well settled at law.

8.3. Firstly, acting on legal advice cannot supersede what the law requires.

8.4. In the recent matter concerning jailing of Queensland's Chief Magistrate Ms Di Fingleton after being found guilty by a jury in the Supreme Court of Queensland over a retaliation action she took against a fellow magistrate as a witness to a judicial proceeding,[15] it was known that she acted on legal advice but it afforded no protection whatsoever to the charges being brought in the first place and subsequently being found guilty. The verdict was upheld unanimously

by the Appeal Court of Queensland.[16]

8.5. To suggest that a person may be shielded from the criminal law because he or she has legal advice suggesting that the action may be done leaves the criminal law open to ridicule, subservient to bad, illegal or contrived advice, and its uniformity of application in complete disarray.

8.6. In Heiner, anyway, it is by no means settled that the Office of Crown Law ever advised the Cabinet to destroy the records when the chronology of events is objectively studied because it is absolutely clear that Crown Law took a back seat in the matter and was happy to disport its first duty to the administration of justice to whatever decision Cabinet ultimately took about the fate of the documents. While taking this back seat in February and March 1990, Crown Law clearly

[15] See *R v Fingleton* [2003] QCA 266

[16] *The Courier-Mail* Saturday 7 June 2003 p6 "Solicitor's opinion no defence to charges."

knew that the Heiner records were required for a judicial proceeding (as indeed did the Queensland Cabinet and senior departmental officials) but Crown Law paid no heed or concern to the public records' relevance to:

(a) Mr Coyne and others rights under the administration of justice to enjoy their day in court without interference;
(b) the Rules of the Supreme Court of Queensland dealing with discovery/disclosure which it knew were applicable;
(c) the Crown always acting as the model litigant, and duty bound to obey the law; and
(d) official misconduct or criminality contained therein.

8.7. In short, the decision to destroy the Heiner Inquiry documents became a crude unilateral exercise of executive decree over the rule of law with the acquiescence of the Office of Crown Law.

9. PRIOR APPROVAL FROM THE STATE ARCHIVIST

9.1. Secondly, the claim that prior approval to shred was obtained from the State Archivist under the *Libraries and Archives Act 1988* does not stand scrutiny. In seeking the State Archivist's approval, the Queensland Cabinet did not provide all the known relevant information about the records. That is, information concerning the legal claims on the records was withheld, and she was deliberately misled into believing that no one wanted the records, let alone as evidence for a judicial proceeding.

9.2. Thirdly, even if the approval were lawfully sought and obtained, the *Libraries and Archives Act 1988*[17] could never override the provisions of the *Criminal Code (Qld)* otherwise the administration of justice would be open to unfettered assault by the State Archivist.

9.3. However, we are now faced with the scoundrel-like spectacle of the Queensland Government attempting to scapegoat its own State Archivist in Heiner by using the approval obtained under the *Libraries and Archives Act 1988* as a shield from charges over its own decision to destroy the records.[18] In effect, the Queensland Government is suggesting that it was the State Archivist's duty to check with the courts and others to ensure that public records under appraisal for disposal are not required as evidence in a judicial proceeding before approving their destruction when plainly it was, and remains, the obligation of the applicant to properly and honestly inform the State Archivist of all relevant information concerning public records (i.e. beforehand) when seeking approval to have them destroyed. In Heiner, the State Archivist was deceived on the face of the relevant records, and was the victim of a fraud committed against her office by the Executive Government of Queensland and Crown Law.

10. OPEN LETTER TO THE COMMONWEALTH PARLIAMENT

10.1. In the wake the unprecedented tabling in the Queensland Legislative Assembly of the Anglican Church Report into the Handling of Certain Child Sexual Abuse Incidents by the Queensland Premier the Hon Peter Beattie MLA and the May 2003 debate in both Houses of the Federal Parliament over the handling of child sexual abuse by (then) Governor-General His Excellency Dr Peter Hollingworth when he was the Anglican Archbishop of Brisbane, I decided

[17] Now replaced by the *Public Records Act 2002 (Qld)*
[18] Statement to Parliament by Queensland Premier the Hon Peter Beattie on 15 May 2003.

to write the attached Open Letter dated 30 May 2003 because of the double standards on display by all parties. (See **Addendum A**).

10.2. The Open Letter speaks for itself and interconnects with submission 142 and the *Lindeberg Grievance* currently sitting before the Australian Senate.

10.3. At the time of finalising this special supplementary submission, the only response to my Open Letter has come from the Department of Prime Minister and Cabinet on 18 June 2003 indicating that the matter had been referred to the Minister for Children and Youth Affairs the Hon Larry Anthony MP for attention.

10.4. It therefore seems appropriate to repeat my comment at Point 19.13 in my original submission:

> *"…The Heiner Affair now stands before the House of Representatives of the Commonwealth Parliament. How it is handled is a litmus test on just how fair dinkum our nation's lawmakers truly are about crime, its perpetrators, its victims and justice."*

<u>11. RECOMMENDATIONS</u>

11.1. While my original recommendations 20.1 to 20.10 stand, I seek to extend them in light of material contained in this special supplementary submission.

20.11. That, in accordance with Terms of Reference (b), (c), (d) and (e) should the Legal and Constitutional Affairs Committee be satisfied that this submission gives rise to sufficient *prima facie* evidence of unresolved wrongdoing and/or criminal conduct concerning role of former Criminal Justice Commission official Mr Michael Barnes in the matter, especially in light of his appointment of Queensland's first State Coroner in the newly established Office of State Coroner pursuant to the *Coroners Act 2003,* the Committee may recommend to either (a) the Commonwealth Attorney-General the Hon Daryl Williams QC; (b) Minister for Justice the Hon Senator Chris Ellison; and/or (c) the Queensland Attorney-General the Hon Rod Welford MLA, (notwithstanding the presence of apprehended bias[19] but pursuant to the doctrine of necessity on his part) take appropriate action to address the suspected wrongdoing and/or criminal conduct pertaining to Mr Barnes as a matter of urgency to ensure the integrity of and public confidence in the Queensland Office of State Coroner;

20.12. That, in accordance with Terms of Reference (b), (c), (d) and (e) should the Legal and Constitutional Affairs Committee be satisfied that this submission gives rise to sufficient *prima facie* evidence of unresolved wrongdoing and/or criminal conduct concerning role of former *pro-tempore* Criminal Justice Commission official Mr Noel Francis Nunan in the matter, especially in light of his position in the Queensland Magistracy, the Committee may recommend to either (a) the

[19] *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

Commonwealth Attorney-General the Hon Daryl Williams QC; (b) Minister for Justice the Hon Senator Chris Ellison; and/or (c) the Queensland Attorney-General the Hon Rod Welford MLA, (notwithstanding the presence of apprehended bias but pursuant to the doctrine of necessity on his part) take appropriate action to address the suspected wrongdoing and/or criminal conduct pertaining to Mr Nunan (SM) as a matter of urgency to ensure the integrity of and public confidence in the Queensland Magistracy;

20.13. That, in accordance with Terms of Reference (b), (c), (d) and (e) should the Legal and Constitutional Affairs Committee be satisfied that this submission gives rise to sufficient *prima facie* evidence of unresolved wrongdoing and/or criminal conduct, the Committee may request that the Queensland Government release the Queensland DPP's advice to the (Borbidge) Queensland Government in respect of the findings of the October 1996 Morris/Howard Report into the Lindeberg allegations in the public interest in order to ensure the integrity of and public confidence in the Queensland Office of Director of Public Prosecutions.

CONCLUSION

Once again I am prepared to appear before the Committee and provide evidence under Oath.

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KEVIN LINDEBERG

1 July 2003

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ADDENDUM A:

OPEN LETTER TO THE COMMONWEALTH PARLIAMENT OF AUSTRALIA

THE HEINER AFFAIR & UNRESOLVED CHILD ABUSE

The Hon John Howard MP, Prime Minister of Australia and Leader of the Liberal Party of Australia
The Hon John Anderson MP, Deputy Prime Minister of Australia, Minister for Transport and Leader of the National Party of Australia
The Hon Simon Crean MP, Leader of the Opposition and Leader of the Australian Labor Party
Mr Peter Andren MP, Independent Member for Clare
The Hon Bob Katter MP, Independent Member for Kennedy
Mr Tony Windsor MP, Independent Member for New England

Senator Andrew Bartlett, Leader of the Australian Democrats
Senator Bob Brown, Leader of the Greens
Senator Brian Harradine, Independent Senator for Tasmania
Senator Len Harris, One Nation Senator for Queensland
Senator Meg Lees, Leader of the Australian Progressive Party
Senator Shayne Murphy, Independent Senator for Tasmania

I write in the public interest on a matter of the utmost gravity.

In May 2003 our national Parliament engaged in an historic debate on the controversy surrounding then Governor-General Dr Peter Hollingworth, failure of people in authority to do their duty (which reasonably embraces respect for the rule of law) in properly addressing allegations of child abuse, and declarations by all MPs of their abhorrence of all forms of child abuse, especially paedophilia.

I write on the same issue of an unresolved case of sexual child abuse while under the care of State authorities which now confronts the Commonwealth Parliament.

Because of the seriousness of the so-called Heiner Affair (Heiner) and the confluence of events beyond my control or influence, I am obliged to construct this letter as an open communication to the Commonwealth Parliament of Australia so that all may know what the other has been told in an open and transparent manner.

I attach to this open letter a copy of a letter dated 9 May 2003 to Senate President Senator the Hon Paul Calvert. I requested that it be tabled so that the Senate might consider its contents and take whatever action it thought appropriate. By return letter of 14 May 2003, as President of the Senate, he declined suggesting that I should request another senator to do so as he was rightly concerned about protecting the independence of his position as Senate President. No adverse inference should be drawn in respect of his decision.

The content of the Calvert letter stands. It complements and reinforces other public records held by both Federal Houses on Heiner. Those records may be found at:

- Public submission 142 dated 5 March 2003 to the Standing Committee on Legal and Constitution Affairs chaired by the Hon Bronwyn Bishop MP; and
  http://www.aph.gov.au/house/committee/laca/crimeinthecommunity/subs/sub142.pdf
- The Robert F Greenwood QC submission dated 9 May 2001 to the Australian Senate setting out the Lindeberg Grievance.
  http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/Heiner01.pdf

So that this open letter's timing, form and relevance is understood, I cite some of the views expressed in both Houses in May 2003 for current and historic reference.

The Hon Simon Crean on 26 May 2003 (at p14563 *Hansard)* said this *"…you cannot have people in authority who have covered up for child sex abuse. It is as simple as that…"* and *"…Isn't a person of authority who failed to act on issues of child sexual abuse guilty of moral turpitude? Of course he is. This is a person in authority. This was a person to whom the allegations were made, and he failed to act…"*

The Opposition's Shadow spokesperson for Children and Youth and the Status of Women, Ms Nicola Roxon on 13 May 2003 (at p139979 *Hansard)* said:*"...We cannot afford to brush it aside, keep it behind closed doors or say it is someone else's issue. We need to be prepared to take a leadership role here. It might be awkward for the government. We need to take some action so this terrible issue is dealt with. The community thinks that leaders in this country are covering up what has happened in the past. Whether they think it is church leaders, politicians or other powerful people, we must make sure that we are never part of that conspiracy. We on this side of the House and, I am sure, the people on the other side of the House do not want to cover up this issue..."*

The Minister for Children and Youth Affairs the Hon Larry Anthony MP on 13 May 2003 (at p13979 *Hansard*) said *"...I will say that all of us in this House, no matter what our political persuasion, are absolutely appalled by the increasing level of child abuse in this country and, in particular, by the issue of child sex abuse. No-one of any right mind can give any type of sympathy to those individuals who abuse children or who follow a path of paedophilia..."*

South Australian Senator the Hon Nick Bolkus on 14 May 2003 (at p10883 Senate *Hansard*) said *"...In our performance, in our response, we also will be judged on whether and how we respond to this important challenge. If we as a national parliament do not take the right and proper moral stand on issues relating to paedophilia that affect our children, then we too could be condemned – and I think quite fairly so – by the public of Australia for turning a blind eye to paedophilia, its victims and those who tolerate it….*" (emphasis added)

Victorian Senator Stephen Conroy on 14 May 2003 (at p 10873 Senate *Hansard*) said *"...Victims, parents and the community do not want any more cover-ups. They want their stories told, they want perpetrators brought to justice and they want further generations of children to be protected from such suffering..."*

It cannot be said now or later that those of us who heard or read such public affirmations are not entitled to believe that those high standards, expressed to the nation by both Houses of the Commonwealth Parliament, would surely apply equally if a matter of child sexual abuse and obstruction of justice were to come before either House. Otherwise, people would be entitled to view the current serving representatives in the Senate and the House of Representatives as hypocrites and driven by grand convenient platitudes, and who govern this nation by double standards. In short, what they demand of others morally, ethically and legally, they must also demand of themselves.

Paradoxically, and without invention on my part, history had placed Heiner before both Houses when the aforesaid debate took place, and Heiner remains unresolved and unfinished business for both, and deals directly with covering up sexual abuse of children.

At Point 2.3 of my public submission No 142, Heiner's epicenters are:

> "1. The pack-rape of a 14-year-old Aboriginal female inmate of the John Oxley Youth Detention Centre by four male inmates during a supervised bush outing in May 1988 which was covered up and not properly investigated;
> 2. The shredding of the Heiner Inquiry documents - which included evidence of the aforesaid unresolved pack-rape incident and other child abuse - by order of the members of the (Goss) Executive Government on 5 March 1990 when it was known that:
> (a) the records were required in anticipated judicial proceedings;

(b) the records contained evidence about the abuse of children;[20]
(c) the Cabinet's intent was to (i) prevent the records being used as evidence in those anticipated judicial proceedings; (ii) prevent the information gathered by Inquiry Head Mr Noel Heiner (Rtd Stipendiary Magistrate) being used against the careers of the JOYC staff who owed a duty of care to the children sentenced into the care and custody of the State by the Judiciary; and, it is open to conclude, (iii) prevent the gathered evidence concerning the abuse of children (including the pack-rape incident) being available in any future damages legal action against the State of Queensland by the known victims.

3. A widespread cover-up by Queensland's system of government of the Executive's (i.e. Cabinet) unlawful act by the exercise of systemic corruption in manifest forms."

It goes on:

"13.8. In Heiner, the public interest issues at stake concern:

(a) the right to a fair trial without wilful interference by the State in the administration of justice in the form of destroying known relevant evidence held in its possession and control and known to be accessible pursuant to the rules of the Supreme Court of Queensland in discovery upon the commencement of judicial proceedings;
(b) equality before the law;
(c) the upholding of Parliamentary propriety and the doctrine of the separation of powers;
(d) the State not engaging in covering up crime, going to the offence of criminal paedophilia against a child held in the care and custody of the State;
(e) the lawful disbursement of public monies not to be used as "hush money" to cover up criminal conduct perpetrated by the State and/or its officials."

In unequivocal terms it says that the Federal Parliament was deliberately misled by the Queensland Government for an improper purpose to cover up obstruction of justice in respect of a judicial proceeding and known child abuse – going to the crime of criminal paedophilia involving an indigenous female minor placed in State care and control by court order.

In misleading the Federal Parliament, the Queensland Government (i.e. its Cabinet) and others have escaped culpability by the twisting of the criminal law in respect of the offence of destruction of evidence while being prepared to have that same provision [section 129 of the *Criminal Code* (Qld)] properly apply to a citizen of the Commonwealth residing in Queensland in materially similar circumstances.

I invite your attention to The Justice Project webpage at University of Queensland on Heiner. (Amongst others see http://www.uq.edu.au/~uqggrund/justice/still_be_charged.htm)

Section 129 of the *Criminal Code* (Qld) 1899 is mirrored in section 132 of the *Criminal Code* (WA) 1913, section 102 of *Criminal Code Act* (NT) and section 39 of the *Crimes Act* 1914 (Cwlth). Heiner therefore gives rise to serious questions for the Commonwealth Parliament pertinent to Chief Justice of the High Court of Australia the Hon Murray Gleeson's public understanding (see the Calvert letter) of what the rule of law means and requires: Does our Constitution guarantee that the criminal law shall apply equally in material similar circumstances in Queensland and in other States and Territories within our Commonwealth where the relevant

[20] Public admission made by former Goss Cabinet Minister the Hon Pat Comben MLA in February 1999 on Channel 9's *Sunday* programme "Queensland's Secret Shame."

law mirrors the other in wording and/or intent; and, are Australian citizens living in the Queensland entitled to enjoy the same Constitutional right to fair trial as other Australian citizens do in other States and Territories within our Commonwealth without interference by the State and its law-enforcement bodies?

It is suggested that the Federal Government's Constitutional jurisdiction for indigenous affairs may be enlivened here as the pack-rape victim is such a person and has been denied justice in matters associated with Heiner. (See section 51(XXVI) The Constitution). Through the improper conduct of the Queensland Government and its various administrative and law-enforcement arms in Heiner now touching on the Commonwealth Parliament, it appears to have placed Australia's obligations to its international and Commonwealth of Nations treaties and conventions in jeopardy (see the Greenwood QC submission), and, at the same time, damaged our standing in the eyes of the international community.

Against the backdrop of the public declarations denouncing the horror of child sexual abuse earlier cited in both Houses of the Commonwealth Parliament, I am imploring honourable Members to remember famous parliamentarian Edmund Burke's saying; "It is necessary only for the good man to do nothing for evil to triumph."

By your own standards, enunciated during the May 2003 debates cited above, Heiner is now your litmus test about handling effectively and seriously allegations of child sexual abuse, thereby carrying out of your public duty.

This open letter respectfully seeks relief from the Commonwealth Parliament in all matters associated with Heiner through appropriate Federal means as a matter of urgency and in the public interest.

………………………………………
Kevin Lindeberg
11 Riley Drive
CAPALABA QUEENSLAND 4157
30 May 2003

ADDENDUM B:

THE QUEENSLAND INDEPENDENT
MAY 2003

Public Officials Can Still Be Charged

By Georgina Robinson

ONE of Queensland's most highly respected legal authorities has warned senior public officials who destroyed documents being sought for legal action a decade ago could still face criminal charges.

Retired Supreme and Appeal Court Judge and author of the text *Judicial Ethics in Australia*, James Thomas QC, was commenting on a case in which charges were never brought against those who authorised and carried out the destruction of a large collection of records being sought for legal action in 1990.

Mr Thomas said it was incorrect to claim that a person could not be charged because at the time he or she destroyed documents no court action related to those documents was actually under way.

The retired judge specifically rejected the view taken by former Director of Public Prosecutions (DPP) Royce Miller QC who said those involved in the 1990 document destruction could not be charged.

Mr Thomas said action could still be taken against the public officials who took part in that destruction. “There’s nothing to stop the present DPP from instituting action if there’s a complainant,” Mr Thomas said.

“Any police officer could bring a charge if he or she has reason to believe there’s been a breach of the law,” he said.

In November 1995, Shadow Attorney-General Denver Beanland asked Mr Miller to consider prosecuting the public servants involved in the shredding.

In his reply, Mr Miller said: “It is my view that there must be on foot a legal proceeding before this section (s.129 of the *Criminal Code*) is capable of application”.

But Mr Thomas said the section was never open to such an interpretation.

“I can’t see how it is even arguable that a legal proceeding be on foot.
The section itself contemplates that legal proceedings might not be on foot,” he said.

There were some things in the law that were open to different interpretations, but due to the wording of the section, “this clearly isn’t one,” he said.

In the Brisbane Magistrates Court eight weeks ago a man who guillotined some pages of a diary at a time when no court proceedings relating to them had been commenced was committed to stand trial for destroying evidence (s.129) or attempting to pervert the course of justice (s.140).

Section 129 states that any person who renders evidence “illegible or indecipherable”, knowing it is, or may be, required for a legal proceeding, is “liable to imprisonment for three years”.

Former Police Commissioner Noel Newnham said since a member of the public was now facing trial for a similar offence, police should now “consider the wisdom of not laying charges” against public officials who had done the same thing.

Mr Newnham said the duty of the police service was plain. “Sometimes it may be unpalatable, but that’s beside the point,” he said.

“The police oath says ‘without fear or favour’ and that means without regard to a person’s social or political influence, wealth or power.

“It is simply beyond question that the Commissioner should see the members of his service apply the law,” Mr Newnham said.

He also said the view attributed to the former DPP in relation to s.129 of the *Criminal Code* was “always nonsense”.

“It’s not what the law states,” Mr Newnham said.

In early 1990 it was revealed that an inquiry into a Brisbane detention centre conducted by former magistrate Noel Heiner was shut down shortly after it began and all the documents it had gathered were shredded in secret.

The Labor Cabinet of the time ordered the destruction of the documents on March 5, 1990, despite the government receiving numerous communications from parties seeking access to them for legal purposes.

Officers of the State Archive and Family Services Department carried out the shredding two-and-a-half weeks later, on March 23, 1990.

Family Services officers carried out a further shredding of related documents on May 23, 1990.

In 1996 the Borbidge Coalition government commissioned an investigation into the matter. In their report following the investigation, barristers Anthony Morris QC and Edward Howard said among other things it was "open to conclude that Section 129 of the *Criminal Code* was breached by an officer or officers of the Department of Family Services".

Cabinet's role in approving the destruction, despite being aware the documents were being sought by a firm of solicitors wishing to pursue court action, was not revealed until two years after the barristers had submitted their report. In their report they had recommended the setting up of a public inquiry to fully investigate the shredding matter.

Instead, the Borbidge government sought advice from the Director of Public Prosecutions, Mr Miller.

According to a press statement released several months later by Premier Borbidge, Mr Miller had advised against charges being laid under s.132 (conspiracy) or s.140 (attempt to pervert the course of justice) and he had wondered if the public interest would not be better served if the matter were put rest.

No mention was made in the press statement of Section 129.

Mr Thomas said the legal system was a human system and, therefore, had its share of errors.

"The fact there was no further inquiry seems to have been based on bad advice from a public official," he said.

The retired judge's comments also raise serious concerns about the stand taken by the Criminal Justice Commission [now Crime and Misconduct Commission] on the matter. In 1992 the CJC took advice on the matter from Brisbane barrister Noel Nunan. Mr Nunan told the CJC a legal proceeding had to be "on foot" (begun) before a charge under s. 129 could be sustained.

Mr Nunan is now a Brisbane magistrate.

Following the Nunan advice, former Misconduct Division Chief Complaints Officer Michael Barnes told a Senate hearing in 1995 and the *Sunday* program in 1999 that court action had to be under way before a charge of destroying evidence could be sustained.

-oOo-

ADDENDUM C

Kevin Lindeberg
11 Riley Drive
CAPALABA QLD 4157
17 April 2003

Mr Robert Cock QC
Director
Office of the Director of Public Prosecutions - Western Australia
Westralia Square
141 St Georges Terrace
PERTH WA 6000

Dear Director

RE: CONSISTENCY IN THE APPLICATION OF CRIMINAL LAW

I write in the public interest.

As a layman, I am interested in the equal application of criminal law and the contribution eminent jurist Sir Samuel Griffith played in the construction of such law in the Commonwealth of Australia. A recent tribute was paid to Sir Samuel in Queensland's Supreme Court concerning his magnificent work in writing the Queensland's Criminal Code, and this has spurred my interest further in criminal law.

I am particularly interested in the administration of justice, and the provisions in State (i.e. Queensland and Western Australia) and Commonwealth law which underpin its security, in particular the protection of evidence.

I am interested in section 132 of the *Criminal Code (WA),* section 129 of the *Criminal Code (Qld)* and section 39 of the *Crimes Act 1914* respectively, which all deal with destruction of evidence under respective Parts of those Acts concerning the administration of justice. The sections effectively mirror each other in their wording. For the record, the progenitor section 129 of the *Criminal Code (Qld)* provides for:

"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 3 years."

I note that under section 39 of the *Crimes Act 1914*, the aforesaid conduct is deemed a crime inviting a penalty of 5 years imprisonment upon being found guilty.

In a speech delivered on 7 November 2001, in his "rule of law" series at the University of Melbourne, Chief Justice of the High Court of Australia, the Hon Murray Gleeson said that the rule of law encompassed:

- The right to a fair trial;
- The right to judicial review of administrative action;
- The courts may not grant the executive dispensation from the criminal law;
- The separation between the executive and judicial functions;
- The content of the law should be accessible to the people;
- The criminal law should operate uniformly in circumstances which are not materially different;
- Access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements of standing;
- The Courts have a duty to exercise a jurisdiction which is regularly invoked.

I am particularly interested in the above legal principle that the law should operate uniformly in circumstances which are not materially different.

On this point, I respectfully request your affirmation or otherwise concerning the 'uniform' application of the law in respect of the aforesaid sections given they mirror each other in their construction, and presumably intent coming from the same author, Sir Samuel Griffith but passed by different Parliaments into law subsequent to Queensland's Legislative Assembly enacting the Code around 1898.

In short, I wish to know:

(a) whether or not the same words in section 132 of the *Criminal Code* (WA) are uniformly interpreted in your State jurisdiction as they are in other relevant State and Federal jurisdictions;
(b) if the interpretation is different in respect of when it is lawful to destroy documents, which interpretation prevails.

It appears that when the *Crimes Act* was enacted, this particular section was a direct take from Sir Samuel's Queensland Criminal Code. He took many provisions from the New York and Italian penal codes I understand. Interestingly, it appears that he would have been Australia's first Chief Justice of the High Court when the federal government enacted the *Crimes Act* in 1914. I understand that the Western Australian Government adopted his Code completely, as have other nations throughout the world.

Although I have no knowledge of whether or not he ever ruled on section 39 while on the High Court Bench, one would have reasonably thought that he would have expected its interpretation (given its mirror reflection of section 129 of the *Criminal Code (Qld)* which he drafted) to be the same as the Queensland courts and police adopted.

I understand that an Office of Director of Public Prosecutions in Queensland was not established until 1984, hence its interpretation may predate the creation of that Office, and perhaps you find yourself in that same situation as Director of Public Prosecutions in Western Australia.

The Interpretation of section 132 of the *Criminal Code (WA)*

Is it correct to say that this section does *not* require a judicial proceeding to be on foot to trigger it?

That is, its construction provides for "future" judicial proceedings by the use of the term *"...is or may be required",* and its triggering does *not* depend on whether a judicial proceeding has commenced with the serving and/or filing of a writ, but rather, it turns on the doer's state of mind and his intent when destroying the record to prevent its use in a (pending or anticipated) judicial proceedings of which the doer has real or anticipated knowledge.

In section 129.10 in *Carters, Chapter 16 - Offences Relating to the Administration of Justice - The Criminal Code Queensland* cites these elements as needing to be present to trigger the section.

The Accused:

- Knowing any book, document or other thing is or may be needed in evidence;
- Wilfully destroys it or renders it illegible, or indecipherable, or incapable of identification;
- With intent to prevent it being used in evidence.

It mentions nothing about a judicial proceeding being on foot.

It seems to me that the term "judicial proceeding" is not open to being read down. If it were, it would suggest that records even when known to be required in anticipated court proceedings may be destroyed with the intent of preventing their use in those (anticipated/foreshadowed) proceedings up to the moment of a writ being filed and/or served. Can you please confirm that your interpretation of section 132 does *not* embrace such a narrow view of judicial proceedings?

If your view is inconsistent with the interpretations adopted by Queensland wherein the DPP holds hold that a judicial proceeding does *not* have to be on foot to trigger section 129, and presumably the Commonwealth DPP embraces the same interpretation, how can such an inconsistency stand in your jurisdiction in the light of Gleeson CJ's comment?

Perhaps this is going too far because you may confirm that there is no inconsistency in your jurisdiction and therefore such a question does not arise.

I am aware for instance that if section 132 is adopted on such a narrow based (which I respectfully doubt), then other provisions going to obstruction of justice under the Criminal Code may be triggered to protect the administration of justice as was found in *R v Rogerson*. That is, an attempt to pervert the course of justice may be found before a judicial proceeding commences.

However, I cannot believe that Sir Samuel (or Parliament) would have knowingly constructed such a key provision as section 132 underpinning the administration of justice as to invite a narrow interpretation of it thereby suggesting that evidence known to be required in a judicial proceeding may be wilfully destroyed lawfully before the writ was filed and/or served in order to prevent its use in those proceedings given his commitment (as Chief Justice of Queensland at the time) to other relevant legal considerations and obligations such a discovery and disclosure pursuant to the rules of the Supreme Court of Queensland which I understand he also drafted while Chief Justice of Queensland's Supreme Court.

It would seem legally nonsensical to have one section of the law protecting the administration of justice working in conflict with another, whereas one would rationally think that all provisions should complement and support the other in the overall task of protecting the administration of justice.

Is it therefore fair to suggest that because such a narrow reading-down interpretation of this section, given that it would invite and/or create untold mischief to the due administration of justice by preventing the Judiciary (and police for that matter) from carrying out their constitutional functions by undermining its fact-finding process and preventing a citizen from enjoying his constitutional right to a fair trial - which all, in varying degrees, depend on the proper protection of evidence - that no legal practitioner could seriously suggest these sections can be read down to only mean a judicial proceeding which is on foot?

To conclude, in a society governed by the rule of law like Australia, I cannot believe that any lawyer, as an officer of the court, once knowing that records in the possession and control of a client are required for foreshadowed court proceedings, may lawfully advise his client to destroy them quickly before the anticipated writ arrives to prevent their use in those expected proceedings, and then look to sections 39, 129 or 132 (as mentioned above) as legal justification for providing such advice. Acting under such a state of knowledge and providing such advice I suggest would be tantamount to engaging in obstruction of justice, and possibly be a serious contempt of the court worthy of some form of discipline against the practitioner.

Your comment in this matter of uniformity in the application of the law concerning the protection of evidence would be appreciated.

Yours sincerely

KEVIN LINDEBERG

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ADDENDUM D:

http://www.uq.edu.au/~uqggrund/justice/heiner_shredders_could.htm

THE JUSTICE PROJECT

Heiner shredders could have been charged

By Dao Thi Nga (12 May 2003)

Those responsible for shredding documents gathered by the 1990 Heiner Inquiry could have been charged with destroying evidence or attempting to pervert the course of justice, a former senior public prosecutor has said.

Associate Professor of Law at Bond University, David Field, who was Queensland's Solicitor for Prosecutions during much of the 1990s, was commenting on a decision not to prosecute senior

public officials over the destruction of the documents gathered during an investigation into a Brisbane youth detention centre.

In 1995 the-then Director of Public Prosecutions (DPP) determined that because of the wording of a Supreme Court form, charges could not be laid against those involved because at the time of the destruction no court action connected with the documents was actually underway.

However, two months ago a man was charged and committed to stand trial under Section 129 of the *Criminal Code* for destroying material likely to be required in a judicial proceeding when no such proceeding was underway.

The conduct complained of in this case was essentially no different from that in the Heiner case, Professor Field said.

He said an offence under Section 129 did not require that the case be one which was destined for the Supreme Court.

"Given the restricted de facto jurisdiction of that Court to matters involving homicide and serious drug offences, it would clearly be a defective law were it so limited," Professor Field said.

Moreover, the wording of Section 129 was not capable of supporting an inference that the judicial proceeding must already be on foot when the document was destroyed before an offence might be committed, he said.

"This would be a most unfortunate interpretation", he said, "since it would result in a situation in which a person could escape all legal liability for destroying vital evidence against him, provided that he did so prior to any charges being laid."

Professor Field also said Section 140 of the *Criminal Code* ("attempting to pervert justice") which covered an alternative charge brought against the man committed to stand trial two months ago, was equally applicable in the Heiner case. He said apart from exceptional powers given to undercover police officers he was totally opposed to any arrangement under which a person was not prosecuted "for behaviour which would lead to the prosecution of anyone else who committed it".

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ADDENDUM E:

http://www.uq.edu.au/~uqggrund/justice/waight_story2.htm

THE JUSTICE PROJECT

Action against shredders must now be reconsidered

By Luke Pentony

A criminal law expert has said public officials involved in the shredding of the Heiner documents must still be considered for prosecution.

Solicitor and barrister, former Senior Crown Prosecutor and academic, and co-author of the biggest selling case book on evidence in Australia, Peter Waight, was commenting on the recent case in Queensland in which a citizen charged with an offence was sent to trial despite no action being taken against senior public officials who had earlier committed a similar act. **(For background see: <u>Equality Before the Law</u>; <u>Shedders Could Have Been Charged</u>; and <u>Public Officials Could Still Be Charged</u>).**

Mr Waight said he disagreed with former Director of Public Prosecutions (DPP) Royce Miller's claim that for charges to be brought under section 129 of the *Criminal Code* [destruction of evidence] legal proceedings had to be "on foot".

Mr Miller made the claim in 1995 when he revealed why charges were not laid against those involved in the destruction of the so-called Heiner documents.

"My legal view is that [Mr Miller's interpretation of s.129] is not, in fact, correct …a number of judges including High Court judges have commented on that in fairly recent times, and even expressed their views very clearly," Mr Waight said.

Mr Waight said charges laid in March this year against a man for destroying pages of a diary when no court proceedings relating to them had begun showed that the current DPP's interpretation of section 129 and that of Mr Miller's were "clearly in conflict".

"The two [DPP interpretations of s.129] are totally inconsistent; they can't have it both ways," Mr Waight said.

"Either they've got to drop the charges against [the citizen] on the basis that Miller's view is right and still adhered to, or if they say it's wrong, then they've got to re-examine whether the prosecutions arising out of the so-called "Heiner matter" should now be reconsidered," he said.

Section 129 of the Criminal Code states that any person who knowingly destroys evidence that is, or may be, required for a judicial proceeding, commits an offence.

Mr Waight said interpreting section 129 as requiring judicial proceedings to be "on foot" as suggested by Mr Millar, would cause problems.

"It reduces everything down to chance …it seems totally absurd to me to say in one case there is an offence and in the other there can't be. I think the law would be open to serious reproach if that sort of distinction was brought on a charge," Mr Waight said.

He also said no time limits existed in criminal law and the DPP could still bring charges against the public officials involved in the shredding of the Heiner documents in 1990. He said this would be consistent with the DPP's stance in the recent Queensland case in which a man acquitted of murder in 1973 was subsequently charged with perjury in connection that matter.

"I don't think the DPP can say, 'Oh well, ten years, 13 years, has gone,' because why did they think it appropriate to bring a charge of a much greater time frame?" Mr Waight said.

He said, however, that prosecuting a matter a long time after it had taken place could be viewed as an abuse of the process of the court.

Mr Waight held the positions of Senior Crown Prosecutor in Papua New Guinea (which adopted the *Criminal Code* of Queensland) from 1969 to 1973 and Senior Lecturer in Law at the Australian National University between 1974 and 1996. The text on criminal law and evidence he co-authored with Monash University's Professor Bob Williams is now in is sixth edition.

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ADDENDUM F:

http://www.uq.edu.au/~uqggrund/justice/former_solicitor_rejects.htm

THE JUSTICE PROJECT

Former Solicitor for Prosecutions rejects lawful shredding claims

By Georgina Robinson

A former senior public prosecutor has rejected claims by the Premier that the shredding of documents gathered by the Heiner Inquiry in 1990 was lawful.

Associate Professor of Law at Bond University, David Field, was commenting on Mr Beattie's response to questions raised by Opposition leader Lawrence Springborg in state parliament two weeks ago (May 13).

Mr Springborg said there were "inconsistencies" in the government's handling of the recent Anglican Church inquiry into the alleged sexual abuse of children, and its handling of allegations of child abuse at the John Oxley Youth Detention Centre in 1990.

He said the Labor Government at the time did not have to shred the documents gathered during the Heiner Inquiry because of their potentially defamatory nature, but could have given them parliamentary protection.

This would have afforded the material protection similar to that enjoyed by the Anglican Church Inquiry, Mr Springborg said.

Mr Beattie defended the actions of the Goss government in destroying the Heiner material and said in parliament the next day (May 14): " … the destruction was under the terms of Section 55 of the *Libraries and Archives Act of 1988*."

"It was not done without some authority, it was done on Crown Law advice under an Act of parliament," Mr Beattie said.

But Professor Field said last week Mr Beattie's response was "a complete diversion" and was "failing to answer the central issue".

He said shredding the documents under the terms of the *Libraries and Archives Act* did not make their destruction legal.

He said the *Libraries and Archives Act* did not supersede the *Criminal Code* (see stories: Action Against Shredders Must Now Be Reconsidered; Heiner Shredders Could Have Been Charged; Public Officials Can Still Be Charged).

Professor Field also said while it was not "out of the ordinary in political terms" for the government to act on the legal advice it was given, this would not exempt them from criminal charges.

"That doesn't stop it from being a criminal offence," Professor Field said.

Professor Field was Queensland's Solicitor for Prosecutions for nine years during the 1990s.

Note: It has also been claimed over the years that the John Oxley documents had to be destroyed because the Heiner Inquiry was not properly established.

However, internal Crown Law documents made public several years ago show that such a proposition was rejected by Crown Law even before the documents were shredded.

ADDENDUM G:

***ABC-Radio 612* Drive 20 May 2002. Transcript of Interview between *ABC* Presenter Mr Stephen Austin and Queensland University of Technology Law Faculty Senior Lecturer Mr Alastair MacAdam re The Heiner Affair**

ALASTAIR MacADAM – LAW FACULTY OF QUT:
Good afternoon Steve.
AUSTIN:
Thanks for coming in, now, you're one of the few lawyers around who's actually, for reasons of humanitarianism, I think, sort of, sought to follow this case more closely than most. What seems … what's occurred in this particular matter? The big question, everyone keeps asking, look you know, if this matter happened, why don't the justice bodies, the law bodies, simply look at it and make a finding?
MacADAM:
Well, what seems to be the trouble with this is that what lies at the heart of this was back in the early days of the Goss government, documents were destroyed. And it's alleged that that amounts to serious criminal offences under the criminal code. But it seems despite the urgings of the likes of Kevin Lindeberg and Bruce Grundy, that all the organs of government that are designed to protect us from the excesses of executive government, rather than carrying out their duties in a proper manner … look for all sorts of spurious reasons to say that the executive government has done no wrong.
AUSTIN:
And I think I've had some argue to me that the executive government is the supreme lawmaking body in the state, therefore you can't go any higher.

MacADAM:
Well, that's clearly … they're not the supreme lawmaking body, they like to think they are, but we have this quaint institution, the parliament, and it's actually the parliament that makes laws. But it's very, very difficult, if you and I were alleged to have done this, we would have been thoroughly investigated, no doubt prosecuted, and may very well have spent some time in jail.
AUSTIN:
Now, it's established (ph.sp.) as fact that the then CJC did look at this matter and said look, there's just nothing to answer.
MacADAM:
Yes, well the CJC investigation at two levels was proved to be well, I think I'd have to say the word hopeless. One, they didn't follow a document trail, and a couple of barristers later on led by Tony Morris QC did. He found most, if not, not quite all of the evidence, but most of the evidence. And the second thing is that the CJC used a … clearly wrong rule for trying to read down the operation of the relevant provisions of the criminal code.

They tried to say that proceedings had to be instituted in order for there to be a perversion of the course of justice, etc. And very, very clearly, their reasoning, if it had been written, I commented before, in a first year law assignment, it would have resulted in a clear failing grade.

AUSTIN:
Okay, so a law school lecturer, a senior lecturer, has just failed the Criminal Justice Commission in their law exam. This is 612 ABC Brisbane, it's a quarter to five, we're pursuing the pack rape of a young girl in state care. Now, is there a statute of limitations in this matter? This young woman is grown up. She's not going to have her matter heard in a royal commission. No one seems to care about her. She's only, you know … and I'm using this … I'm setting up a scenario here.
You know, she was a young street kid at the time, a bit of a troublemaker, an Aboriginal girl. Who cares all these years down the track?
MacADAM:
Yes. Well, you know, someone should care generally about these things. But the long and the short of it is that for serious criminal offences in Queensland, there is no limitation period. Members of the public …
AUSTIN:
So there's no statute of limitations in this matter?
MacADAM:
No statute of limitations. There are statute of limitations if you're overstay your time in your parking meter or you failed to lodge your egg (ph.sp.) marketing board return on time. They are generally a year, sometimes up to two years. But serious criminal offences … there are no limitation periods. And members of the public would be aware of that because we have seen evidence in recent times of people being prosecuted for sex offences against children extending back into the '60s and '70s.
AUSTIN:
Exactly. Now we did have the Premier of this state, Peter Beattie, who is I think … you know, to give him the benefit of the doubt, he is a good man but who points the finger at Archbishop Hollingworth for not pursuing properly matters of wrongdoing and child abuse within the Anglican Church. He seems to be remarkably two faced on this particular issue.
MacADAM:
Yes. Well, one of the problems as I understand it … he said Archbishop Hollingworth should have not looked at things from a legal point of view and taken advice from lawyers and looked at things from a more compassionate point of view and dealt with the victims accordingly. But as I

understand, the Queensland government is doing exactly the same thing as the Premier said the Archbishop should not.

It is relying upon a whole lot of technical legal points and the statute of limitations that do apply in civil proceedings to make it extraordinarily difficult if not impossible for the victims of these … victims of child abuse to get some form of justice.

AUSTIN:

As a layperson, as a person who has no background in the law, it looks to me like they're trying to do anything possible to substantiate the original Goss cabinet's decision to shred the documents and keep the matter out of the criminal court.

MacADAM:

Yes. Well, I guess we can speculate on that. But one of the problems of course is it's only in very recent times that we have become aware of just the serious nature of what was destroyed. Originally it was thought it was a couple of interpersonal disputes between union officials. But as a result of Bruce Grundy's and other people's investigation, it is clear that very, very serious matters were covered up by the destruction of the documents and the closing down of the inquiry.

AUSTIN:

And that's the point, isn't it? That as a result of recent access to the last of the state government's own records in this matter that Mr Grundy and others were able to get to the bottom of the fact that there was a pack rape of a young girl in state care and no one has done anything about it.

MacADAM:

No. Well, that's right. And the point that the Premier keeps making is he claims that these matters were being investigated to the nth [sic] degree. And nothing has been found. They have been investigated. Things have been found but the executive government hasn't promptly accepted its responsibilities.

AUSTIN:

Well, from what I've heard of the government – and the government has made this quite clear behind the scenes that they … somebody points the finger and says oh he's obsessed. This is the person who's investigating the matter.

MacADAM:

Well, this is a well known practice in Queensland. It's been highlighted by the Fitzgerald Inquiry. It was the tactic of Terry Lewis and other senior police to use terminology that is now being used against very well respected people like Bruce Grundy, respected people like Kevin Lindeberg who is just an honest citizen trying to make sure justice is done.

AUSTIN:

Bob Greenwood QC, who unfortunately has died.

MacADAM:

Yeah. Bob Greenwood who unfortunately has died. Not to waste your time unduly but a story … a person who was a student of mine … he was invalided [sic] of the police force because he's making serious allegations against Lewis and his cronies. And it was said that he was paranoid. After the Fitzgerald Inquiry, the psychiatrist that had said he was paranoid listened to the evidence and gave evidence that indeed he was not paranoid.

His diagnosis was wrong and he just simply had a reasonable suspicion that something was wrong. Bruce Grundy and Kevin Lindeberg have provided a whole lot of evidence that there is something wrong but it's just the practice of the Premier and his ministers to attempt to disparage these two people in my view quite unfairly.

AUSTIN:

I'm going to have to wind this up. But what could be done now, Alastair MacAdam?

MacADAM:

Well, one thing that could be done in respect to this is the Anglican Church have talked about an inquiry. Well, that will only have limited jurisdiction. The Prime Minister has ruled out an inquiry. There is no reason in the world that the Queensland government could not appoint an inquiry of their own. It would have troubles in relation to interstate matters but it would certainly be able to investigate a range of these things that have occurred. They have not been properly investigated in the past and they need to be.

AUSTIN:

Thanks for coming in. Alastair MacAdam is the senior lecturer at the law school of Queensland University of Technology.