Submission 142

Parliament of Australia

HOUSE of REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO CRIME IN THE COMMUNITY:

- **VICTIMS**
- **OFFENDERS**
- **FEAR OF CRIME**

SUBMISSION
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CONTENTS

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

INTRODUCTION

Since 11 September 2001 Al-Qaeda terrorist attack on the United States of America and the 2002 Bali bombing atrocity, our world has fundamentally changed in terms of domestic and global security.

As a nation, we now face the real threat of global terrorism for an indeterminate time and of a potentially indiscriminant nature of such ferocity that we could see hundreds if not thousands of our citizens killed in just one attack by a chemical, biological, or nuclear weapon of mass destruction without warning. In short, the sociological, psychological and political dynamics of the fear of crime in Australia has irreversibly changed within the last two years. It is therefore particularly timely for the Federal Parliament through the aegis of this Committee to reassess the impact of crime on our society so that Australia - as one of the world's oldest continuously-functioning democracies governed by the rule of law - is better prepared to combat the threat of crime, in all its forms, without being urged to forego any of its cherished freedoms which might too easily (and possibly unnecessarily) be demanded by law-enforcement agencies and governments as trade-offs in this unprecedented climate of national and global fear in some unrealistic hope that we may all live without becoming victims of criminal conduct during our lifetimes.

In my view, steps taken by the State to encroach on our individual rights and liberties in its fight against crime should be greeted with extreme caution and careful analysis by the community at large as I am somewhat inclined towards St Augustine's belief that without the rule of law States themselves were nothing but organised robber bands. That is not to suggest that the law should not be expanded where and whenever necessary by the State, but rather, to simply say that when authority is given to the State over the lives of the people as a requisite element in civilizing or protecting society so that peace, harmony and good government might prevail, it is incumbent on us all, including elected representatives and the media, to be forever vigilant and watchful that it (the law) is handled honestly, impartially and in the public good by those in authority otherwise it may become an instrument of oppression by the State for improper sectional purposes.

While it is accepted that it is the rule of law which protects our freedoms and property rights in civilized societies, the litmus test is whether or not it is functioning on the condition it was enacted in the first place by Parliament on behalf of the people, namely "equality before the law." For any society, let alone Australia, to allay fear of crime in the mind of the people then equality before the law must be its binding operational principle. Nothing engenders fear of crime or instils a sense of hopelessness more in any society than to have law-enforcement by double standards which, in turn, may tend to encourage ordinary citizens, out of disrespect, to take the law into their own hands to achieve so-called 'justice' when they see others in high places escape palpable wrongdoing while they, not so socially, financially or politically advantaged, must face the full force of the law when they breach it.

And nothing undermines community confidence in our democratic institutions and democracy itself more than when politicians, of whatever political persuasion, claim all virtue unto themselves in terms of respecting the law in public office when the truth shows otherwise, and

when such public office holders readily squib their responsibility, abuse their influence and authority in whatever forum to obstruct the administration of justice out of self or party-political interest paying no regard to the doctrine of separation of powers, Parliamentary probity and responsible government and the need to avoid apprehensions of bias in decision-making.

No where is this more relevant than when governments become the law-breakers themselves because it is to governments (i.e. the State/Crown) that civilized democratic societies must look for security and law-enforcement and be entitled to see them as respecters and upholders of law and order otherwise committing crime may be encouraged. Generally, when governments engage in wrongdoing, the checks and balances within our system of responsible government (including the three arms of government respecting the constitutional rights of the other under the doctrine of the separation of powers and their relevant functioning rules[1] to ensure due process), hopefully bring them quickly to account through an alert Opposition[2], parliamentary committees, watchdog bodies like police, auditors-general, ombudsmen, crime fighting commissions, freedom of information bodies, the media, special interest group, or, in some cases, lone whistleblowers. In this mix, the right and/or preparedness to dissent are therefore other necessary ingredients in fighting wrongdoing in any democratic society, and therefore, it should be understood from the start that this inquiry flows from a wide catchment area given that Australia, as a democratic nation, is supposed to be governed by the rule of law, accepts the right to dissent, and is not governed by unbridled executive decree. This means that the people will inevitably and quite properly look to politicians and the State/Crown, its various emanations, for vital leadership in setting appropriate standards of probity and fair dealing, and a citizen, of whatever station in society, should be able to go to the police or relevant proper authority with a belief that their allegation of wrongdoing or impropriety, even touching the highest levels of government, will be dealt with honestly and impartially.

Reporting wrongdoing to any law enforcement body, in a so-called free society like Australia, should be an act of hope that justice will be done, and not one in which the fear of retribution is present.

In Queensland's public administration pursuant to provisions of Division 3 - Duty to notify - of the *Crime and Misconduct Act 2001*, a mandatory obligation is cast on principal officers[3] to report ***all*** suspected official misconduct[4] which may come to their attention in the course of performing their public duties. While in law this obligation looks commendable and complete, its non-compliance is examined in this submission.

Protecting Public Records

It also follows that an important element of fighting crime in the public sector and holding governments to account, is the proper protection of public records in which possible wrongdoing by public officials (elected and appointed) may reside and be required in judicial proceedings[5] as evidence. This ‘fact-finding process’, so fundamental to the due administration of justice, should cause the Committee to address the legislative need of all State/Federal/Territory archivists being

[1] Standing Rules and Order of each sovereign Parliament and the Rules of the Supreme Courts.
[2] It should be noted that Queensland is the only State in Australia with a unicameral system of government and therefore the Executive does not experience the normal checks and balances which inevitably flow out of a House of Review which may not be controlled by the government of the day.
[3] CEO's of units of public administration
[4] This is a mirror provision of the replaced *Criminal Justice Act 1989* (see section 37).
[5] Anticipated/pending proceedings in a court, commission of inquiry, lawfully established tribunal or police and/or proper authority investigation (eg ACC, ICAC or CMC etc).

able to truly function independently and impartially in their recordkeeping duties, and capable of withstanding any improper pressure (which may happen unexpectedly from time to time) from or by executive government on them to comply with its desire to rid itself of potentially embarrassing public records which may be used in evidence against them in anticipated/pending judicial proceedings, Parliamentary inquiries or in public and parliamentary debates. The Committee should also be mindful that without proper public recordkeeping, freedom of information regimes operating throughout the Commonwealth of Australia may be rendered ineffectual**. (see Recommendation 20.4)**

Whistleblower Protection Legislation

The shameful anomaly that no federal whistleblower protection legislation yet exists stands as an indictment on all federal governments (of both political persuasion) in terms of how genuine they really are about fighting crime within their own midst because the failure to enact any sort of legal protection for those who may feel obliged to blow the whistle against government wrongdoing to serve the public good, means they risk everything without any legislative safety net. **(see Recommendation 20.6)**

The clear signal being sent by Federal governments is that if anyone dares to report suspected misconduct or crime in public administration then you are on your own as far as the Executive and Legislature are concerned.

It is a morally bankrupt position not worthy of a so-called civilised society like Australia.

That said however, most State whistleblower legislation is a sham and in need of radical amendment, not least being the establishment of a Whistleblowers Protection Authority (WBA). The WBA's sole purpose would be to protect whistleblowers from the inevitable reprisals which always seem to come as a consequence of whistleblowing against those in positions of authority. (see Recommendation 20.7) The public interest disclosures should be investigated by a proper authority because it is quite clear, from the unhappy experience of other whistleblowers, let alone myself[6], that protecting the whistleblower and investigating public disclosures are or can become mutually-exclusive functions as can be attested to by Queensland whistleblowers who have had dealings with the Criminal Justice Commission which was statutory obliged to fulfill both functions. This dual function has been carried on by the Crime and Misconduct Commission (CMC) since its amalgamation with the Queensland Crime Commission on 1 January 2002.

As a background to considering this submission's contents, I respectfully suggest that the Committee should be mindful of the words of Justice Louis D Brandeis of the United States Supreme Court in dissenting in *Olmstead v United States, 277 U.S. 438, 475 (1928)*:

"Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

[6] The Heiner Affair has been categorised by Whistleblowers Australia as one of four cases of national significance.

TERMS OF REFERENCE

The House of Representatives agreed to the following Terms of Reference:

The Committee shall inquire into the extent and impact and fear of crime within the Australian community and effective measures for the Commonwealth in countering and preventing crime. The Committee's inquiry shall consider but not be limited to:

(a) the types of crime committed against Australians
(b) perpetrators of crime and motives
(c) fear of crime in the community
(d) the impact of being a victim of crime and fear of crime
(e) strategies to support victims and reduce crime
(f) apprehension rates
(g) effectiveness of sentencing
(h) community safety and policing

1. BACKGROUND

1.1 This submission seeks to use the compelling lessons embodied in the so-called Heiner Affair (Heiner) - also commonly known as *Shreddergate* - and make relevant recommendations in respect of a number of the above 'dot' points. It is important that the State/Crown assure the people, through example, that Executive Government and public officials are not above the law and that the law-enforcement bodies will uphold the law without fear or favour and not aid in covering up crime and systemic corruption. It is important that the people, including would-be whistleblowers, concerned about law-breaking including suspected terrorism, not be afraid to report such matters to the police or other appropriate law-enforcement bodies like the Australian Crime Commission (ACC), Independent Commission Against Corruption (ICAC), the Queensland Crime and Misconduct Commission (CMC) and other proper authorities otherwise fear of crime will become endemic and have the potential to undermine the very fabric of Australian society. I submit therefore that it is important for Parliaments of the Commonwealth of Australia through their respective Ministers of the Crown and elected representatives show leadership in respect of the non-acceptability of turning a blind eye to crime;

1.2 The notion of the State/Crown acting with the highest standards of probity is well settled at law and fundamental in any fight against crime, and one expression of that notion was by Vaisey J. in *Sebel Product Ltd v Commissioner of Customs and Excise* (1949) Ch 409 at 413:

"At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendents being an emanation of the Crown, which is the source and fountain of justice, are in my opinion, bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control..."

1.3 Another key feature in allaying community fear of crime is the surety that the doctrine of the separation of powers is being respected by all relevant players so that the people can be sure

that the principle of equality before the law always applies rather than who you are and who you know.

1.4 Gaudron J in *Nicholas v The Queen* [1998] HCA 9 (2 February 1998) at 111 spelt out this principle eloquently. She said:

"If the doctrine of the separation of powers is to be effective, the exercise of judicial power needs to be more than separate from the exercise of legislative and executive power. To be fully effective, it must also be free of legislative or executive interference in its exercise. As a result, legislation that is properly characterised as an interference with or infringement of judicial power, as well as legislation that purports to usurp judicial power, contravenes the Constitution's mandate of a separation from legislative and executive powers."

1.5 Taken to its finest point under the doctrine of the separation of powers, the conduct of Legislature, pursuant to Article 9 of *1688 Bill of Rights*,[7] may not be questioned in any other forum, however, while it is a privilege of the highest order which permits Parliaments to carry out their democratic function "within their walls" free from outside interference and intimidation, it is unfettered so long as they remain within the rule of law and the constitution otherwise the privilege renders itself justiciable (see in *Hamilton v Al Fayed* [2000] 2 WLR 609 at 615; *R v Richards; Ex parte Fitzpatrick and Brown*(1955) 92 CLR 157 at 162; *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336; *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 674-675; *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203 at 204-205; *Clayton v Heffron* (1960) 105 CLR 214 at 234-235; *Cormack v Cope* (1974) 131 CLR 432 at 451-454, 464-466, 467, 472; *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 193-198).

1.6 In *Egan v Willis [1998] HCA 71 (19 November 1998)* Kirby J stated at 4: *"… Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review. Federation cultivates the habit of mind which accompanies constitutional superintendence by the courts. Courts recognise a large measure of power in, say, the chamber of a State Parliament, to define and enforce its notions of its own privileges. But the Australian constitutional context does not accord to such a body a completely unreviewable entitlement, in law, to define and enforce its own powers. Any such powers can only be exercised in conformity with the political and judicial system which the Constitution creates. Decisions of other countries and from other times therefore need to be adapted in the modern Australian context when it is suggested that they apply to the privileges of a House of Parliament of an Australian State."*[8]

1.7 This privilege, however, is unfortunately open to abuse. Its prime safeguard from abuse is strict adherence by all elected representatives to the highest standards of probity, which, by perception engendered through either public cynicism or apathy towards the political process, and sometimes by dreadful reality when certain elected representatives have been caught out engaging in corrupt conduct, appears to be nothing more than a pipedream once the players enter in the bear-pit of party politics. Nevertheless, it is the courts which place a

[7] Article 9 states: *'the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."*

[8] Despite the equivalent to Art 9 of the Bill of Rights in the United States Constitution, it was not suggested that the Supreme Court not determine where the limit of privilege lay. See *Quinn v United States* 349 US 155 (1955). As to the position in India see *The President's Reference No 1 of 1964* (1965) 1 SCR 413 (SC India); and criticism in Seervai, *Constitutional Law of India*, 4th ed (1993), vol 2 at 2169-2196.

final interpretation on the law and the constitution and, on occasions, it is the courts which may properly adjudicate on how far Parliamentary privilege extends as seen in *Egan* in which the High Court of Australia ruled that it was constitutionally lawful for the Legislative Council of the NSW Parliament to access certain exempted records held by the Executive in order that the Legislative Council could carry out its constitution function of informing itself. In summary, the Executive and the Legislature were prepared to accept a ruling on parliamentary privilege by the Judiciary despite the obvious tension when one arm of government ventures into the jurisdiction of the other;

1.8 Parliamentary privilege however seems to have evolved along with the role of Parliament down through the centuries, and seems to have taken on a different scope to which it was first granted as a protection of elected representatives from the unfettered wrath of the Monarch when the Divine Rights of Kings still held sway until overturned by bloody revolution in the UK;

1.9 In unicameral Queensland, the ability of both the Executive and Legislature to function free from judicial review appears to be unfettered (*See CJC & Ors v Dick [2000] QSC 272* Justice Helman's judgement at page 4-5 and *Corrigan v Parliamentary Criminal Justice Committee* [2000] QSC 96 (27 April 2000)) even when it comes to reporting evidence of suspected criminality in its possession and control;

1.10 Despite the obligation cast on principal officers of a unit of public administration to report ***all*** suspected official misconduct which may come to their attention in accordance with the provisions of the *Crime and Misconduct Act 2001*, it remains a foggy area of the law as to whether a Minister of the Crown or an elected representative has the same duty;

1.11 So complete - as it currently seems to be although not having been tested in a court of law for judicial interpretation - is the relief of not reporting suspected evidence of criminality and/or official misconduct when it comes before Executive Government (i.e. the Cabinet) that in March 1995, the (Goss) Queensland Government amended the *Freedom of Information Act (Qld) 1992*[9] exempting all documents and submissions brought into existence for or relevant to Cabinet and Executive Council, and declared that a "no public interest" test apply in respect of accessing these public records. As ruled by the Queensland Information Commissioner ruled in Re *Lindeberg and Department of Families, Youth and Community Care* (Decision No 97008 30 May 1997) – which is part of the Heiner Affair - Under the heading "No public interest exception"(pp6-7) he stated:

> "25. Where an exemption provision of the *FOI Act* contains a public interest balancing test, evidence that disclosure of matter in issue would expose a crime or fraud would be likely to give rise to one or more public interest considerations favouring disclosure of the matter in issue, notwithstanding that it is claimed by an agency to be exempt under that exemption provision. However, as I have explained at paragraph 13 above, neither s.36(1) nor s.37(1) incorporates a public interest balancing test. I can see nothing in terms of those provisions which would justify the implication of a public interest exception. Even if the documents in issue were to contain evidence of a crime or fraud (and I do not suggest that they do), I would still be obliged to find that they satisfy the relevant tests for exemption laid down by Parliament in terms of s.37 of the *FOI Act*." (Underlining added)

[9] Sections 36(2) and 37(2) of the *Freedom of Information Act 1992*

1.12 In my opinion, the aforesaid "Cabinet exemption" enacted the Queensland Executive and Legislature (if properly interpreted by the Office of the Information Commissioner) is unconstitutional. It gives the Executive the legal right to withhold evidence of a fraud or crime from the people (including the police) when plainly the constitution – the people's contract with responsible government – does not and was never intended to extend such a blanket privilege to its elected representatives in respect of the fact-finding process for law-enforcement or the Judiciary when it is well settled in law that concealing such evidence (of a fraud or crime) within the general community to prevent its examination in a police investigation or in a relevant criminal justice judicial proceeding may leave the perpetrator of such a deliberate act open to a possible charge of obstruction of justice at the very least (see *R v Rogerson*);

1.13 This is not to suggest however that there may not be occasions, during times of national security, when Executive government should be lawfully afforded protection in revealing what it knows concerning enemies of the nation but it can hardly be reasonably suggested that Heiner (which effectively only involves the Queensland Government and not the Federal Government) falls into such a category save for its serious legal/criminal/political ramifications on those in Executive Government who were party to the order to destroy the material and who have knowingly perpetuated the myth of its (alleged) lawfulness ever since that fateful decision of 5 March 1990 and who never want the truth to come out revealing their culpability which may, in turn, catapult Queensland into an unprecedented constitutional crisis;

1.14 In my view *F.A.I. Insurances Ltd v Winneke* (1982) 151 CLR 342 at 4 states the relevant constitutional position in which Executive Government stands in respect of obeying the law of the land. Sir Harry Gibbs CJ said:

> *"…The fact that the Governor in Council is the authority which grants the approval provides no ground for excluding the rules of natural justice. In exercising the power given by s.72 the Governor does not act personally or as a representative of the Crown exercising any of its prerogatives. He acts on the advice of his Ministers, and it is to be expected that such advice will be based upon the recommendation of the Minister in charge of the Department concerned. It would be to confuse form with substance to hold that the rules of natural justice are excluded simply because the power is technically confided in the Governor in Council. I can see no reason in principle why the rules of natural justice should not apply to an exercise of power by the Governor in Council, who is of course not above the law."* (Underlining added);

1.15 However, as the Committee will see, when it comes to Heiner, the rule of law - as practised in Queensland, and (apparently) accepted by the Australian Senate when Heiner came before it pursuant to the Terms of Reference of the Senate Select Committee on Unresolved Whistleblower Cases in 1995 and the Senate Committee of Privileges in 1996 and 1997 - seems to have a different set of standards applied for the Executive and Legislature.

2. HEINER'S EPICENTRES

2.1. The Heiner Affair has several epicentres which have been unearthed over 13 years of struggle to see the truth come out and justice served;

2.2. In exposing the truth, the relentless role of investigative journalist Mr Bruce Grundy[10] must be recognised - and due tribute paid to him. The truth was always held by the Queensland Government but deliberately withheld from public view, including proper examination by the Australian Senate when Heiner came before its committee system in 1995, 1996 and 1997. (see Recommendation 20.2)

2.3. Those epicentres might be described as:

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;[11]
   (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.

3. CRITICAL FACTS

3.1. The Heiner Inquiry was lawfully established. Its accumulated records ***were always*** public records pursuant to section 5(2) of the *Libraries and Archives Act 1988*. The witnesses were known to be covered by qualified privilege*;* and that the State had accepted any liability flowing out of consequential court proceedings*;*

3.2. Mr Peter Coyne, the John Oxley Youth Detention Centre manager, had a legal right to access the records pursuant to *Public Service Management and Employment Regulation 65*, and sought to enjoy that right or have that right affirmed by a court ruling. The Queensland Government ***was aware*** of that right at all material times, and Crown Law accepted that right of access in its advice to government but never told Mr Coyne;

[10] Former Associate Professor of the University of Queensland's Department of Journalism, now Journalist-in-residence at the University of Queensland's School of Journalism and Communication.
[11] 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."

3.3. The Crown Law advice of 23 January 1990 which advised the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) that it could shred the records providing no legal proceedings had commenced requiring their production was predicated on an incorrect assumption that the Inquiry's records were Mr Heiner's private property. This was corrected in later advice to Cabinet on 16 February 1990. The 23 January 1990 advice was provided when court proceedings ***had not been foreshadowed***, and it did not address the legal question of what could be done to the records once it was known that they were required for anticipated court proceedings because it was not a relevant issue at the time. ***That changed some 2 weeks later***.

3.4. The Queensland Government was put on notice as early as 8 February, and unquestionably on 14 and 15 February 1990. This information was provided to the Queensland Cabinet at all material times in Cabinet submissions, and was shared by the Office of Crown Law;

3.5. Both the Queensland Cabinet and Crown Solicitor ***knew*** that once Mr Coyne's anticipated writ was filed/served, the records in their possession and control would be discoverable pursuant to the rules of court of the Supreme Court of Queensland. They ***knew*** any claim of Crown Privilege would fail. This advice came to Cabinet in Crown Law advice of 16 February 1990;

3.6. The Crown Solicitor, as an officer of the court, had an overriding obligation to comply with the rules of the Supreme Court of Queensland before any duty he may have had to the Queensland Government;

3.7. The Queensland Government informed the would-be litigants (i.e. Mr Coyne and two trade unions[12]) on 16 February and 19 March 1990 that its position was "***interim***" and that the Crown Solicitor was still considering the question of access, and once that advice was received, they would be informed. **They were not informed until 22 May 1990 *after* the Heiner records had been clandestinely disposed of**. In the meantime, the Queensland Cabinet and Crown Law had together agreed on the contents of a letter dated 23 February 1990 to the State Archivist seeking her urgent approval to shred the records but withheld the known information that the records were required for anticipated court proceedings; then, having received approval on the same day by those deceptive means, Cabinet ordered their destruction on 5 March 1990 (while knowing that solicitors were actively seeking access to them) with the secret shredding carried out on 23 March 1990;

3.8. On 16 May 1990 the State Archivist ***was made aware*** by Mr Coyne that the records she had approved for destruction on 23 February 1990 were, in fact, required for foreshadowed court proceedings. On advice sought from the Families Department, the State Archivist declined to respond to Mr Coyne's request for information concerning the fate of the records, and, on instructions from that Department, advised him to contact either the Department itself or Office of Crown Law for information;

3.9. On 22 May 1990 the Office of Crown Law assisted Ms Ruth Matchett, DFSAIA CEO, to unlawfully dispose of public records (i.e. the original complaints which aided in the establishment of the Inquiry) when knowing that they were required as evidence in a (foreshadowed) judicial proceeding and the subject of a legally enforceable access

[12] Queensland Professional Officers' Association and Queensland Teachers' Union

regulation on which Crown Law had advised Ms Matchett on 18 April 1990 that the would-be plaintiff (i.e. Mr Coyne) was entitled to access pursuant to the relevant law[13];

3.10. On 23 May 1990, the DFSAIA unlawfully shredded photocopies of the original complaints in its possession and control while knowing that they were required as evidence in a (foreshadowed) judicial proceeding and the subject of a legally enforceable access regulation; and after having lied Mr Coyne on 22 May 1990 that it did not hold any such records;

3.11. In her 30 May 1990 internal report on the matter, the State Archivist acknowledged reading the Heiner records before authorising their disposal on the basis that they had no permanent value and noted that some of the contents were of a defamatory nature concerning the management of the Centre.

4. RELEVANT *CRIMINAL CODE (QLD)* PROVISIONS TO HEINER

4.1 In Heiner, eminent counsel have advised, on different occasions, that the following sections of the *Criminal Code (Qld)* are relevant to its factual elements. Those sections are:

4.2 Section 129 of the *Criminal Code (Qld)* – destruction of evidence – 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 three years."*

4.3 Section **132** - Conspiring to defeat justice - provides for

> *"Any person who conspires with another to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime, and liable to imprisonment for 7 years."*

4.4 Section **140** - Attempting to pervert justice - provides for:

> *"Any person who attempts, in any way not specifically defined in this code, to obstruct, prevent, pervert, or defeat, the course of justice is guilty of a misdemeanour, and is liable to imprisonment for two years."*

4.5 Section **92(1)** - Abuse of Office - provides for:

> *"Any person, who, being employed in the public service, does or directs to be done, in abuse of the authority of the person's office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour, and is liable to imprisonment for 2 years."*

[13] *Public Service Management and Employment Regulation 65*

5. INCULPATORY PUBLIC ADMISSIONS

5.1. In 1995 the Senate Select Committee on Unresolved Whistleblower Cases (SSCUWC) inquired into the Heiner Affair as the facts were known at the time, albeit by some. The Committee was chaired by then Tasmanian ALP Senator Shayne Murphy who has since resigned from the ALP to sit as an independent;

5.2. Of relevance to this Committee's terms of reference, the admissions made by the CJC concerning the state of knowledge of the Queensland Cabinet and its reason for shredding the records in question are of significance. The CJC was represented at the hearings by lawyers Messrs Mark Le Grand and Michael Barnes, with Mr Barnes having the major carriage of Heiner. The Chairman of the CJC at the time was Mr Rob O'Regan QC, who was succeeded by Queensland barrister Mr Frank Clair;

5.3. On 29 May 1995 Mr Barnes said at page 655 of Senate *Hansard:*

> "*it is clear that Cabinet made a decision to destroy the documents knowing full well that Coyne wished access to them. It may be that Cabinet made that decision to destroy the documents on the basis that, in its view, the public interest in protecting the people who gave evidence before Heiner outweighed Coyne's private interest in having access to them.*"

5.4. Further, at page 663 Mr Barnes says:

> "*Mr Coyne says at page 10 of his submission that the destruction of the documents all but extinguished the possibility of defamation proceedings brought by him against those who gave evidence against him - presumably, before Mr Heiner. Certainly, the destruction of those documents made such proceedings more difficult to prove. Indeed that was why the Crown Solicitor advised that it be done. But, equally importantly, it protected Coyne from further damage to his reputation that the continued existence of the documents posed.*"

5.5 At page 682 the interchange between Senator Abetz and Mr Barnes is more relevant:

> "***Senator ABETZ -*** *Did that not alert you or the CJC that there was something of importance to Mr Coyne there? Documents had been shredded, but the official advice to him that they had been shredded and the final advice received was two months after the event?*
> ***Mr Barnes -*** *I do not see that the delay is either here or there. There is no doubt that the documents were destroyed at a time when the cabinet well knew that Coyne wanted access to them. There is no doubt about that at all.*
> ***Senator ABETZ -*** *Are you saying that there is no doubt about that in your mind?*
> ***Mr Barnes -*** *No, the*
> ***Senator ABETZ -*** *Is there no doubt in your mind that cabinet knew that Coyne wanted the documents?*
> ***Mr Barnes -*** *I am confident that is the case.*"

5.6 Again at page 685 Mr Barnes said:

> "*Which is clearly a case that cabinet, Matchett and the department knew that there was a possibility that Coyne would seek to sue people.*"

5.7 At page 696 the following occurs:

> ***Senator ABETZ*** *- I am trying to get a handle on this. What seems to have occurred is that, with the potential threat of a defamation suit, cabinet decided to shred the documents because they were of no historical value, knowing full well that it may be the material evidence on which a potential litigant would rely to pursue or prosecute his case.*
> ***Mr Barnes*** *- I think that probably is a fair summary. As a result of the actions, the correspondence and the communications, I think they believed that Coyne was considering suing the people who gave evidence before Heiner for defamation. As you say, the Crown Solicitor's advice seems quite clear that that was a potential and, consistent with that advice, cabinet decided that they would prevent that from happening.*"

5.8 Another revealing exchange took place between Senator Christabel Chamarette and Mr Barnes for the CJC on this area of "anticipated/pending" court proceedings and what he claimed the law permitted in terms of the treatment of documents in the possession and control of parties to anticipated court proceedings. At Senate *Hansard* 23 February 1995 pp104-105, this was said:

> ***Senator Chamarette*****:** *I have a question that flows from that. You earlier implied, and perhaps you should clarify it, that if there had been definite knowledge of litigation being on foot, then it would have been possibly appropriate to consider that destruction official misconduct. Is that correct?*
>
> ***Mr Barnes*****:** *I believe that then the acting director-general would have acted inconsistently with advice she had received from the Crown Solicitor; and then the matters which Mr Callinan referred would come into play. I think it's probably clear that if you destroy documents once litigation is on foot, you are in contempt of court in which the action has been commenced.*
>
> ***Senator Chamarette*****:** *Is it not possible then to consider that if the reason for the destruction of the documents is to prevent litigation going to court, you are doing exactly the same thing as interfering with litigation on foot? The very reason for the destruction of the documents is to prevent litigation being prepared, for whatever motive, and therefore the same rationale should apply.*
>
> ***Mr Barnes*****:** *You may well be right; but my opinion on that point - and, with respect, Mr Callinan's opinion - is irrelevant. The opinion that is relevant is the one received by the acting director-general from the Crown Solicitor. She acted in accordance with that advice. Your question, I suggest, gets back to the point Senator Abetz was raising about the inappropriateness of that action. I can understand that reasonable minds might well differ on that, whatever the motivation for the destruction of the documents.*

Senator Chamarette**:** *I am seeking your advice. It is not as though I am asking you to make a judgment, I am just asking you to clarify this for me. You believe that there was no case of official misconduct because technically the documents were being destroyed without any litigation being on foot. Is that correct?*

Mr Barnes**:** *Yes, that is right.*

Senator Chamarette**:** *And I am trying to establish whether if there had been litigation of foot, they would have been in error to have destroyed the documents. That is just a legal -*

Mr Barnes**:** *Certainly, I think it is quite clear that it would be consistent with crown law advice that they should not be destroyed if litigation was on foot. As that was not the case, their destruction was consistent with crown law advice.*

Senator Chamarette**:** *I am then saying that to me, from a lay point of view, to actually destroy the documents to prevent litigation being on foot seems very similar. Are you now saying that to actually use as a rationale for the destruction to prevent litigation on foot is somehow different from litigation already being on foot?*

Mr Barnes**:** *Yes. With respect, I say it is a lot different. What you do with your own property before litigation is commenced, I suggest, is quite different from what you do with it after it is commenced."*

6. WHAT THE QUEENSLAND CABINET KNEW

6.1 The Cabinet submission[14] of 5 March 1990 records the following at page 2:

"***URGENCY***

Speedy resolution of the matter will benefit all concerned and avert possible industrial action.

Representations have been received from a solicitor representing certain staff members at the John Oxley Youth Detention Centre. These representations have sought production of the material referred to in this Submission. However, to date, no formal legal action seeking production of the material has been instigated." (Underlining added)

6.2 In a public admission on Channel Nine's February 1999 *Sunday* programme on the Heiner Affair as it was known at the time - titled "Queensland's Secret Shame" - former Goss Cabinet Minister the Hon Pat Comben declared that at the time the Cabinet ordered the records be destroyed that *"…in general terms"* it knew the inquiry was about the abuse of children;

6.3 Furthermore, DFSAIA Minister the Hon Anne Warner was aware that children were being abused at the Centre and urged the Cooper Queensland Government to establish an Inquiry

[14] Tabled in the Queensland Parliament on 30 July 1998 by the Queensland Premier the Hon Peter Beattie MLA

while in Opposition as confirmed in her public comments in *The Sunday-Sun* of 1 October 1989. Some 6 weeks later she became the responsible Minister when the ALP won office for the first time in 32 years in the aftermath of the Fitzgerald Inquiry revelations;

6.4 It is therefore open to conclude that the Goss Cabinet and the ALP's transition-into-government team were fully aware of why the Heiner Inquiry was established and the type of evidence it was gathering, and to suggest otherwise is not credible. With such a state of knowledge, it was lawfully never open to the Queensland Government to destroy such important evidence as it may have contained evidence of inappropriate and/or criminal behaviour against children in care as was later established, after a decade of cover-up, to be true.

7. THE NUB OF THE ARGUMENT

7.1 Mr Barnes' aforesaid final claim to Senator Chamarette concerning the handling of documents known to be required in a judicial proceedings up to the moment of a writ being filed and/or served is essentially the nub of the argument, and, with respect, invites the Committee's serious attention because of its significant legal and constitutional ramifications;

7.2 In a special submission dated 9 May 2001, my (then) counsel Mr Robert F Greenwood QC[15] presented compelling evidence to then Senate President the Hon Margaret Reid that the Senate had been seriously misled in respect of its handling of the Heiner Affair by the Queensland Government and CJC. He advised that it was open to conclude that:

> "(a) both Committees of the Senate were misled by both the Goss Queensland government and Criminal Justice Commission (CJC); and
> (b) the findings of both Committees, in particular matters, are unsafe and cannot be allowed to stand; otherwise:
>
> (i) the Senate will be brought into disrepute; and
> (ii) an injustice will have been inflicted on our client, as a witness before the Senate, of such an unconscionable nature as to undermine public confidence in the workings of the Senate's committee system.[16]

7.3 More specifically, in Mr Greenwood QC's view, the effect of the CJC - now known as the Crime and Misconduct Commission - deliberately misleading the Senate in Heiner in 1995 and on other occasions was:

(a) knowingly misleading those committees and their findings to prevent or attempt to prevent adverse findings being made against itself (the CJC) and others;
(b) causing a detriment to our client;
(c) bringing disrepute on the Senate by casting doubt over its respect for the rule of law and fundamental human rights, including the rights of children; and
(d) undermining the Australian Federal Government's commitment to relevant United Nations' Human Rights conventions and treaties e.g.:

- International Covenant of the Rights of the Child;
- International Covenant on Civil and Political Rights;
- The Right to Organise and Collective Bargaining.[17]

[15] Former Special Prosecutor/Head of the Commonwealth War Crimes Unit by appointment of the Hawke Federal Government.
[16] Senate *Hansard* 8 August 2001 p25783 - the *Lindeberg Grievance*

7.4 In regard to the (Goss) Queensland Government, its withholding of highly relevant evidence had the effect of:

(a) knowingly misleading those committees and their subsequent findings to prevent adverse findings being made against the Goss Queensland Government;
(b) causing a detriment to our client;
(c) bringing disrepute on the Senate by casting doubt over its respect for the rule of law and fundamental human rights;
(d) undermining the Australian Federal Government's commitment to relevant United Nations' Human Rights Conventions and Treaties as mentioned above.[18]"

8. SIMPLY UNTENABLE

8.1 In respect of the Australian Senate's view about the shredding of the Heiner Inquiry as merely being an *"…exercise in poor judgement"*, Mr Greenwood QC had this to say:

"It is simply untenable to permit the shredding of public documents containing evidence of alleged child abuse in a State-run institution and required for court action to be described by the Australian Senate solely in political terms while ignoring its legality or otherwise.

Our democracy requires that political decisions can or should be taken only within the framework of upholding and respecting the rule of law. In this regard, the Senate, as its view stands concerning certain conduct by Government and other public officials in the Heiner Affair, appears to suggest, on the Parliamentary record, that Executive decree can be placed above both legal considerations or consequences when arguably it is open to conclude that certain sections of the *Criminal Code (Qld)* may have been breached in respect of those same Cabinet and related decisions.

Such a notion is a danger to Australia's liberal Parliamentary democracy and the individual rights of all Australians enjoyed under our Constitution."[19]

9. PROHIBITED CONDUCT BY THE CROWN

9.1 Mr R F Greenwood QC went on to suggest that the law prohibited the following conduct in Heiner:

"POINT 1:

knowingly order the destruction of public records containing evidence of the alleged abuse of children while in the care of the State or Commonwealth so that the evidence

[17] Senate *Hansard* 8 August 2001 p25783
[18] ibid
[19] ibid

cannot be used, for whatever reason, in particular, holding public officials who were or may have engaged in such alleged misconduct to account (including their superiors who may have been aware of such conduct).

In this regard, there is evidence (yet to be fully explored by an appropriate body) suggesting that the Goss Government acted in an unconscionable and illegal manner when it knowingly destroyed relevant evidence for the purpose of affording protection to certain accountable Youth Workers and Mr Coyne over alleged offences of criminal assault against children (by whomsoever) placed in the John Oxley Youth Detention Centre by order of the courts or by statute. The law required that their known alleged misconduct be properly and impartially addressed.

POINT 2:

knowingly order the destruction of public records in its possession and known to be required as evidence for foreshadowed court proceedings for the purpose of preventing those records being used in those proceedings.

POINT 3:

deliberately withhold or conceal relevant information concerning the real status of public records during an appraisal process from its State or Federal Archivist in order to achieve its desire to have such records destroyed by using the archivist's deceptively obtained approval to destroy such records when knowing that access to them is being sought by a citizen pursuant to law.

POINT 4:

buy the permanent silence of any public official from the public purse in a Termination State or Federal government Deed of Settlement about known alleged abuse of children in a State-run institution for the rest of his or her life.[20]…"

9.2 In his oral submission to the SSCUWC on 23 February 1995 in Brisbane, my senior counsel, Mr Ian Callinan QC said this on the point of destroying known evidence which is or may be required in court proceedings:

"The real point about the matter is that it does not matter when, in technical terms, justice begins to run. What is critical is that a party in possession of documents knows that those documents might be required for the purposes of litigation and consciously takes a decision to destroy them. That is unthinkable. If one had commercial litigation between two corporations and it emerged that one of the corporations knowing or believing that there was even a chance that it might be sued, took a decision to destroy evidence, that would be regarded as conduct of the greatest seriousness - and much more serious, might I suggest, if done by a government."[21]

9.3 Despite Mr Callinan QC not having access to the relevant Cabinet submissions - as we now do - so that it could be precisely known what was the state of knowledge enjoyed by Cabinet at the time it ordered the records be destroyed, he advised in a special submission, against the aforesaid compelling admissions by Mr Barnes that it was open to conclude that all the

[20] Senate *Hansard* 20 August 2001 p26003
[21] Senate *Hansard* 23 February 1995 p3 – Senate Select Committee on Unresolved Whistleblower Cases.

members of the Goss Cabinet were in breach of section 129 of the *Criminal Code (Qld)* and/or section 132 of the *Criminal Code (Qld)*, namely having engaged in a conspiracy to pervert the course of justice. He cited *Rogerson* as the relevant authority;

9.4 This opinion was placed before the Australian Senate on 8 August 1995, and yet, in its report *"The Public Interest Revisited"* the Senate saw fit to describe and adopt the deliberate act of Executive Government destroying evidence required in a judicial proceeding which a citizen had a right to access in order to enjoy his constitutional right to a fair trial as *"…an exercise in poor judgement."*

9.5 For the record, *R v Rogerson and Ors (1992) 66 ALJR 500* Mason CJ at p.502 says:

> *"...it is enough that an act has a tendency to deflect or frustrate a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be implemented...*"

9.6. Also see Brennan and Toohey JJ at p.503 in *Rogerson:*

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

9.7. In my opinion, Mr Greenwood QC's May 2001 description of the Senate's public position as being *"…simply untenable"* is appropriate and legally sound, even moreso given that we now know that in the records destroyed by the Queensland Cabinet was evidence about the May 1988 pack-rape of a 14-year-old indigenous female minor by male inmates during a supervised bush outing in which no one was ever held to account because of the cover-up.

10. DOUBLE STANDARDS AT WORK

10.1. Ever since my dismissal as a trade union organiser from the Queensland Professional Officers' Association on 30 May 1990 in which my handling of the "Coyne case" was used as an instrument for my sudden sacking (after I had challenged the Goss Queensland Government over its secret plans to shred the Heiner Inquiry documents and been instantly removed from the case on the insistence of DFSAIA Minister the Hon Anne Warner), I have held that section 129 of the *Criminal Code (Qld)* applied to the act. This view was conveyed to the CJC by me in late 1990 and beyond into the various arms[22] of government and the Queensland Legislature by me or other means;

10.2. The CJC claimed that section 129 was only triggered when judicial proceedings were on foot. Then DPP, Mr Royce Miller QC, in December 1995, took the same view when asked to act in this matter by then Shadow Attorney-General the Hon Denver Beanland who wrote in light of Mr Callinan QC's opinion of the matter in his special submission to the Senate;

10.3. The other barrister who supported this view of section 129 was Mr Noel Francis Nunan when he reviewed my allegations in August 1992 on contract by the CJC. Mr Barnes told the

[22] Queensland Audit Office, Queensland Police Service, Office of the Information Commissioner, Office of the Parliamentary Criminal Justice Commissioner, Office of Crown Law; Office of the Director of Public Prosecutions, Government House.

Senate that Mr Nunan was allocated my case *"…purely by chance."* I was unaware at the time of Mr Nunan's close political affiliation with and activism in the ALP over many years. He did not declare this conflict of interest to me when I was interviewed by him in CJC Headquarters on 11 August 1992. The CJC argued before the Senate in 1995 that once Mr Nunan was allocated the case it could not remove him because of his (prior) political connections with the ALP as it would be a breach of Section 7(1)(j) of the *Queensland Anti-Discrimination Act 1991*.[23]

10.4. In reality, Mr Nunan's appointment to or removal from the case was never an issue of discrimination as put by the CJC but of the high duty every legal practitioner owes the administration of justice: Justice must not only be done, it must be seen to be done;

10.5. As Mr Nunan, a barrister and officer of the court, allowed himself to be placed in the role of decision-maker in a matter which could have seen the Goss ALP Queensland Government charged with serious criminal offences thereby bringing about an unprecedented constitutional crisis, it is therefore reasonable to suggest that he should not have allowed his profession's code of conduct or the administration of justice to be brought into jeopardy, and should have declined the commission once he realised its ramification and who the alleged wrongdoers were; **(see Recommendation 20.8).**

10.6. Inescapably, he was investigating his political mates - and he knew it;

10.7. The courts are not silent in this important threshold matter of coming to a criminal/disciplinary/civil/administrative matter with clean hands free of any apprehensions of bias. It is fundamental to respect for the rule of law. In *Vakauta v Kelly* (1989) 167 CLR 568 F.C. 89/040 Dawson J said:

"…*The relevant principle is that laid down in Reg. v. Watson; Ex parte Armstrong (1976) 136 CLR 248, at pp 258-263, and applied in Livesey v. New South Wales Bar Association (1983) 151 CLR 288, at pp 293-294, namely, that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it."*

10.8. Gaudron J in *Nicholas v The Queen* [1998] HCA 9 (2 February 1998) at 74 also said:

"*In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartially and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute."*

10.9. This principle on bias finds earlier expression by Lord Denning MR in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1969) 1 QB 577 at p599 in which he said*:*

[23] See pp38-40 CJC February 1995 Submission to SSCUWC.

"…The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand…". ... Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough .... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased."

10.10. In his January 1993 findings, Mr Nunan (under Mr Barnes' signature) cleared the Goss Queensland Government of any wrongdoing. In reaching his conclusion, he misquoted *Public Service Management and Employment Regulation 65*, misrepresented and/or failed to apply the relevant provisions of the *Criminal Code (Qld*) and *Criminal Justice Act 1989*, misrepresented the role of the State Archivist (whom neither he nor the CJC ever interviewed) pursuant to the *Libraries and Archives Act 1988*, with his other findings in respect of the disbursement of public monies in the sum of $27,190 to Mr Coyne for his silence - as set out in a Deed of Settlement[24] - about *"…the events leading up and surrounding his relocation from the Centre"* being found to be flawed. He failed to apply *Rogerson* despite its clear relevance, let alone another authority in *R v Murphy* in respect of a conspiracy to pervert the course of justice may be found to occur *before* court proceedings commence;

10.11. In summary, the particular interpretation of section 129 of the *Criminal Code (Qld)* by Messrs Miller, O'Shea[25], Barnes, Le Grand[26] 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.

11. THE DECEPTION REVEALED

11.1. On 22 and 23 January 2003 in the Brisbane Magistrate's Court, I witnessed the Queensland Director of Public Prosecutions (DPP) bring committal charges against a Queensland citizen, namely a Minister of religion, in the form of breaches of section 129 of the *Criminal Code (Qld)* – destruction of evidence – and/or section 140 of the *Criminal Code (Qld)* – attempting to pervert the course of justice. (See attached *Courier-Mail* articles in addendums B and C).

11.2. This matter is covered at the following University of Queensland Webpages:

http://www.uq.edu.au/~uqggrund/charges.htm & http://www.uq.edu.au/~uqggrund/

[24] The State of Queensland and Mr Coyne entered into a Deed of Settlement in February 1991 when Mr Coyne's career ended in which $27,190 was paid to him on the condition that he never speak publicly about the events leading up and surrounding his relocation. ***Both parties knew those events included the abuse of children*.**
[25] Former Queensland Crown Solicitor.
[26] Former Director of the CJC's Official Misconduct Division.

http://www.uq.edu.au/~uqggrund/cjc.htm & http://www.uq.edu.au/~uqggrund/claim.htm

http://www.uq.edu.au/~uqggrund/morrishowardextract.htm

http://www.uq.edu.au/~uqggrund/rape02.htm

11.3. Simply put, if it is good enough to charge a Minister of religion and put him before the Magistrates court for committal pursuant to section 129 of the *Criminal Code (Qld)*, why shouldn't Ministers of the Crown in Heiner be treated equally for the same, if not more serious, conduct?

11.4. Of relevance, the shredding conduct which the Minister of religion was alleged to have committed thereby enlivening section 129 of the *Criminal Code (Qld),* occurred some 5 years *before* a sexual-assault incident was taken to the police by the victim, and one more year *before* the perpetrator was brought before the courts and sentenced for his admitted guilt;

11.5. In its submission to the court, the DPP held that at the time the pastor guillotined the victim's diary in which he also knew the girl recounted being sexually assaulted by one of his parishioners, it was beyond reasonable doubt that he knew that the document would be required in a judicial proceeding (and any prospective police investigation) and in destroying the document, he breached section 129 of the *Criminal Code (Qld*) as it prevented its use in a judicial proceeding;

11.6. In short, the provision, enacted by the Queensland Legislative Assembly over 100 year ago, did not require – ***and never has required*** - a judicial proceeding to be on foot to trigger it;

11.7. The critically relevant point flowing from the DPP's current action is not whether the Minister of religion is committed by the Magistrate to face trial, or even whether he is ultimately found not guilty in a superior court, but merely that his alleged criminal conduct was put before the court under section 129 of the *Criminal Code (Qld)* in particular, and section 140 of the *Criminal Code (Qld)* as sufficient *prima facie* evidence existed.

12. APPLICATION IN HEINER

12.1. In Heiner, the triggering elements, as set out in *Carters,* are more compelling and unequivocal in respect of section 129 of the *Criminal Code (Qld),* and/or sections 132 and/or 140 of the *Criminal Code (Qld)* than pertaining to the Minister of religion;

12.2. For the Committee's benefit, the elements of the offence are as follows at section 129.10 in *Carters, Chapter 16 - Offences Relating to the Administration of Justice - The Criminal Code.*

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;

12.3. The proposition put forward by Mr Barnes (and its Heiner contracted-reviewing barrister Mr Noel Nunan)[27] and the Queensland Office of Crown Law that judicial proceedings had to be on foot before section 129 of the *Criminal Code (Qld)* applied, was always legal nonsense. It was and is profoundly dangerous to the administration of justice in regard to respecting the rules of the Supreme Court of Queensland concerning discovery/disclosure and protecting evidence generally so that the Judiciary may carry out its constitutional function which was recently explored in *McCabe* and the Victorian Court of Appeal decision in *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002);

12.4. In Heiner however, the decision to destroy the evidence was taken within a matter of days with an ***undoubted state of knowledge*** that the material (a) contained evidence of suspected child abuse; and (b) was required for anticipated court proceedings. The Queensland Executive Government has admitted that it destroyed the material to prevent its use in legal proceedings, and to prevent the material being used against the careers of the public servants at the Centre where it knew child abuse was occurring against children held in the care and custody of the Crown;

12.5. Simply put, if it is good enough for a Minister of religion to stand charged before Her Majesty's courts, then I submit, by the application of equal justice, that it is good enough for Ministers of the Crown (and public servants) to be brought before Her Majesty's courts for the same conduct, in which no statute of limitations exists, so that justice may be done and the law is not brought into disrepute.

13. THE ROLE OF THE ATTORNEY-GENERAL

13.1. For the record, the then State Attorney-General (Queensland's first law officer) the Hon Dean Wells MLA[28] was party to the decision also being a member of Executive Government in Queensland. It cannot be credibly argued by the State/Crown that the issue of wilfully destroying records known to be required in a (anticipated) judicial proceeding does not have a societal resonance amongst the people of being unacceptable conduct, let alone the obligation on the State to act with openness and transparency in respect to the administration of justice so that the people may have confidence in the system of justice and not be encouraged to take the law into their own hands. In Heiner, neither caution nor transparency was present in the model litigant's (i.e. the Queensland Crown) conduct but rather deceit;

13.2. The fact that the first law officer and guardian of the public interest sits in Executive Government throughout the Commonwealth of Australia may tend to undermine the rule of law should Heiner replicate itself again because it effectively means that the Attorney-General, if required to authorise the bringing of charges against persons going to a conspiracy to pervert the course of justice (as is legislatively required in Queensland), would find him or herself be caught up in the self same conspiracy given that the alleged main conspirators in Heiner were all the members of Executive Government in attendance at the Cabinet table on 5 March 1990, and one of whom was the Queensland Attorney-General;

[27] Elevated to the Magistracy by the Goss Government in 1994. When allocated the Heiner case in 1992 by Mr Barnes, it was known by him (Barnes) that Mr Nunan was a former ALP activist, member of Labor Lawyers Queensland Branch (as Mr Michael Barnes was also), and former work colleague with Mr Wayne Goss at the Caxton Street Legal Service before Mr Goss entered State Parliament.

[28] Now Minister for the Environment in the Beattie Government.

13.3. It is therefore open to suggest that in allaying the community's fear of crime, the Committee might recommend that all Commonwealth Attorneys-General not be members of Executive Government as applies in the United Kingdom so that the position of first law officer and guardian of the public interest is not be open to taint or compromise; **(see Recommendation 20.9);**

13.4. Relevant to this dual role performed by Commonwealth Attorneys-General (i.e. Members of Executive Government and first law officer), the late Professor John Edwards, of the University of Toronto and foremost expert on the role of Attorneys-General in the Commonwealth, had this to say in his book "*The Law Officers of the Crown"* commented further in his book on this dual role when he stated:

"...Where, as has sometimes happened, members of the government, political colleagues of the Attorney-General, have been directly involved in the subject-matter of the inquiry, it has been suggested that the clash of loyalties involved renders it unlikely that the public interest entrusted to the Attorney-General of England will be effectively represented."[29]

13.5. In another book *"Politics and the Independence of the Attorney-General"* Professor Edwards described the role of the Attorney-General in the following terms which I submit remains relevant:

"This unique office stands astride the intersecting spheres of government and parliament, the courts and the executive, the independent Bar and the public prosecutors, the State and the citizenry at large. When speaking of politics as impinging on the diverse roles of the Attorney-General this may involve the exercise of that official's statutory or prerogative powers, the action of the Director of Public Prosecutions or his superior in terminating an ongoing prosecution, as well as the Attorney-General's difficult role as both the chief legal adviser to the Government and to the House of Commons."[30]

13.6. He warned against political favouritism ever being exercised by the Attorney-General, and said:

"...Any Attorney-General who places the avoidance of embarrassment to his political party, his political colleagues or even his political opponents as the foremost consideration in fulfilling his official duties is in violation of that trust."[31]

Lord Hartley Shawcross and the Lynsky Tribunal

13.7. Over 50 years ago, eminent British Attorney-General Lord Hartley Shawcross when involved in the Lynsky Tribunal in 1948 which inquired into allegations of corruption against certain members of the Attlee Government addressed his duty in the following manner in his later writings:

"....it was of the utmost importance from the public point of view to maintain the position that it was the duty (however personally unpleasant) of His Majesty's Attorney-General to represent the public

[29] Professor John Ll J Edwards LL.D. (Cantab) (1964) Professor of Law and Director of the Centre of Criminology University of Toronto. "*The Law Officers of the Crown*". Sweet and Maxwell London p.286

[30] Professor John Ll J Edwards 1984. "*The Attorney-General, Politics and the Public Interest*" Sweet & Maxwell London. Introduction.

[31] ibid.

interest with complete objectivity and detachment, and that to refuse to discharge that duty in a particular case in which the public interest might be suspected to conflict with the interests of certain of his friends or of his political colleagues would be tantamount to saying that the office itself was inadequate to represent and protect the public interest against whosoever might challenge it. It was in many ways a very distasteful decision to have to make, but I hope it helped to consolidate the Attorney-General's right and duty - and that is what I emphasise in these matters - the duty - to be wholly detached, wholly independent and to accept the implications of an obligation to protect what he conceives to be the public interest whatever the political results may be."[32]

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.

13.9. Despite these compelling public interest accountability/crime-related concerns being patently at issue, political considerations appear to have outweighed the prime public duty to protect the administration of justice and Queensland Attorneys-General the Hon Dean Wells, Matt Foley and Rod Welford have remained inert, and, on occasions, contemptuous of Heiner on the floor of Parliament. To reiterate, inaction, duplicity or obstruction has won the day with the so-called checks and balances of the system, in which the community places its deep faith that all are equal before the law, collapsing in around Executive Government's unlawful conduct in Heiner.

14. THE ROLE OF THE QUEENSLAND OFFICE OF CROWN LAW

14.1. Of relevance to the conduct of the Office of Crown Law and other legal officers who came to Heiner, including solicitors at the CJC and other government agencies, the Committee should be aware that on 6 December 2002, in *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) at 173, the court handed down its decision, and although overturning Justice Eames' decision in *McCabe* and ordering a retrial, it unanimously found in the legal matter relevant to Heiner thus:

"… it seems to us that there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The balance can be struck,

[32] Professor John Ll J Edwards LL.D (Cantab) 1964. "The Law Officers of the Crown" Sweet & Maxwell p.298

we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court, meaning criminal contempt (inasmuch as civil contempt comprises wilful disobedience of a court order and will ordinarily be irrelevant prior to the commencement of proceedings). Such a test seems to sit well with what has been said in the United States as well as what has been said in England. Whether contempt, even criminal contempt, is possible before any proceeding has been instituted need not be examined on this occasion. (For instance, in James v. Robinson, which did not involve disobedience of a court order, it was said that that there can be no contempt of court before there is any litigation actually on foot, but, as the majority in the High Court pointed out, that case concerned only the narrower type of contempt, namely interference with the fair trial of a particular cause. Certainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as R. v. Rogerson *demonstrates, and that, we think, provides a satisfactory criterion in the present instance."*

14.2. While this judgement is subject of appeal before the High Court of Australia, it is reasonably certain that in any High Court decision in this upcoming appeal *Rogerson* will not be overturned; or, that the High Court will be rule for the permissibility for any party, let alone the State/Crown, so aware of anticipated court proceedings and of the relevance of the documents in their possession and control to those proceedings (as in Heiner), to so instantly and with such deliberate intent to legally destroy them up to the moment before the anticipated writ is filed and/or served to prevent their use on the known proceedings;

14.3. Against the above, the Committee should know that in Crown Law's advice[33] of 16 February 1990 to the Goss Cabinet, the Crown Solicitor stated the following concerning the question put by the Secretary of Cabinet in regard to third party discovery as it pertained to the Heiner Inquiry documents held in the possession and control of the Office of Cabinet at the time having been secretly transferred there from DFSAIA in early February 1990. The Crown Solicitor advised at pages 2 and 3:

> "…If then, for example, anyone suspects he or she was defamed in any of the material produced by Mr Heiner, were to commence an action against him in respect thereof, the plaintiff would, no doubt, at a fairly early stage in the action, seek an order for third party discovery of the material pursuant to Order 35 Rule 28 of the Rules of the Supreme Court.
>
> The person in whose "possession or power" the documents are, could oppose the making of such an order on several possible grounds, viz. that it was fishing, that it was not necessary that he inspect the document at that stage of the proceedings and that generally it would not be just that an order for production be made.
>
> If it be the case that the documents are in the possession or power of the Crown (and I shall deal more fully with this aspect presently), then a claim of Crown Privilege could also be made. Even if the documents are

[33] See Senate Select Committee on Unresolved Whistleblower Cases, Submission, Supplementary Submissions and Other Written Material Authorised to be Published, Volume 1 Queensland Government

not in the “possession or power” of the Crown, such a claim could probably still be made.

However, if the documents are not “Cabinet documents”, then the claim would have limited chances of success.

The documents under consideration in this case could not be fairly described as Cabinet documents. Notwithstanding the fairly broad definition of these in the Queensland Cabinet Handbook, to be a Cabinet document so as to attract the special protection given by the Courts to such documents under the Crown Privilege rule, they would have had to have come into existence for the purpose of a submission to Cabinet. The mere fact that Cabinet has seen a document or listened to a tape in the course of its deliberations does not bring the document or tape within the rule.

Subject to further instructions on the point the Department of Family Services and Aboriginal and Islander Affairs may care to give, I cannot see how it could be argued that this material was gathered in order to formulate a Cabinet Submission or for the purpose of being placed before Cabinet.

The argument for resisting a third party discovery application on the basis of Crown Privilege would therefore have to be based on a more general basis of the Public Service and Government not being able to function effectively if such evidence and other material were not to be protected from production.

In my opinion, such an argument would, as I said previously, have a very limited chance of success, and whilst it may well be possible to resist third party discovery on one of the other grounds which I mentioned earlier, if the documents sought were sufficiently identified, it would be only the questions of relevance and Crown Privilege which could be argued once the subpoena was issued after the matter had been set down for trial.”

14.4. In short, there is no doubt that members of Executive Government and the Office of Crown Law were fully aware that the records, in their possession and control whose fate they were deciding, were relevant to a foreshadowed judicial proceeding; and both parties knew would be discoverable pursuant to the rules of court of the Supreme Court of Queensland once the (expected) writ was filed and/or served, and that any argument claiming "Crown privilege" put forward by the State of Queensland would fail under the prevailing circumstances. Yet, with this state of knowledge, the State wilfully destroyed the records after obtaining urgent approval from the State Archivist pursuant to the provisions of the *Libraries and Archives Act 1988* by deceptive means of withholding known relevant information that the records were required for a judicial proceedings as signalled by solicitors for a citizen (together with two trade unions), and pretending to the Archivist that the records were *"…no longer required or pertinent to the public record."*

15. THE PROPOSED LEGAL PROFESSIONAL AMENDMENT (DOCUMENTS) REGULATION 2002

15.1. I am also in possession of the proposed Legal Professional Amendment (Documents) Regulation 2002 under the *Legal Profession Act 1987* from the NSW Legislative Council. This "declaratory law" announcement, in the wake of Enron and *McCabe* shredding scandals, was endorsed by the August 2002 Cairns meeting of the Standing Committee of Attorneys-General (SCAG), including the Commonwealth Government's Attorney-General the Hon Daryl Williams QC. It was agreed that the existing legal profession disciplinary regulations in each jurisdiction would include this SCAG amendment. Its purpose was plainly to demonstrate to the community at large that the right to a fair trail was being protected by the first law officers of the Commonwealth in their respective jurisdictions;

15.2. To show that the double standards has always plagued and obstructed Heiner's proper resolution, the Committee might note that the Queensland Attorney-General and Minister for Justice the Hon Rod Welford MLA endorsed this declaratory law amendment also, which, if applied in Heiner, would cast Crown Law officers into its ambit of engaging in professional misconduct at the very least. It is simply untenable to suggest that legal officers of the Crown may willfully destroy documents in their possession and control up to the moment of a writ being filed/served while lawyers practising in the private sector who engaged in the same conduct are open to disciplinary action and possible disbarment from the profession, going to possible criminal prosecution for obstruction of justice (see *R v Rogerson*);

15.3. The objects of the amendment are as follows:

> (1) to place restrictions on the giving of advice by legal practitioners to clients to the effect that documents that might be required in anticipated legal proceedings should be destroyed or should be removed, and
> (2) to place restrictions on a legal practitioner aiding and abetting a person to destroy or move such documents, and
> (3) to declare that a contravention of the restrictions referred to in paragraphs (a) and (b) is professional misconduct.

15.4. Of relevance the amendment goes on to say (in part as in clause 69I) under – Advice on and handling documents:

> (4) A legal practitioner must not give advice to a client to the effect that a document should be destroyed, or should be moved from a place at which it is kept or from the person who has possession or control of it, if the legal practitioner is aware that:
> (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and
> (b) following the advice will result in the document being unavailable for the purposes of those proceedings.
> (5) A legal practitioner must not destroy a document or move it from the place at which it is kept or from the person who has possession or control of it, or aid or abet a person in the destruction of a document or

in moving it from the place at which it is kept or from the person who has possession or control of it, if the legal practitioner is aware that:

(a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and

(b) the destruction or moving of the document will result in the document being unavailable for the purposes of those proceedings.

Disciplinary Action Against Rogue Crown Law Legal Officers

15.5. The difficulty which presents itself in Heiner, is who can discipline Crown legal officers who have wilfully breached their first duty to the courts to uphold the administration justice and respect the rules of the Supreme Court of Queensland?

15.6. It is by no means clear that the Office of Crown Law did advise the Executive Government on 23 January 1990 that the Heiner documents may be immediately destroyed so long as no court proceedings have commenced requiring their production because that advice was (a) based on an incorrect premise about the ownership of the records in question; (b) addressed to DFSAIA; and (c) arguably provided on incomplete information;

15.7. However, there is no question that when Cabinet took the decision on 5 March 1990 to destroy the records to prevent their use in (anticipated) judicial proceedings, Crown Law knew that the records were vital evidence for anticipated judicial proceedings having been put on notice by a firm of solicitors, and yet failed to intervene or advise against Executive Government's course of action which put the legal officers in Crown Law at odds with their overriding obligation to the court and its rules;

15.8. In March 1995, the Office of Crown Law provided advice to State Parliament in an attempt to counter Mr Callinan QC's evidence before SSCUWC in which he argued that it was open to suggest that the shredding obstructed justice. In its advice, Crown Law misrepresented *Rogerson* and persisted in the spurious notion that evidence known to be required in anticipated court proceedings was not afforded protection under law up to the moment of a writ being filed/served;

15.9. It is therefore open to suggest that the Office of Crown Law could not have come to Heiner with an impartial mind given its previous involvement and knowledge of the decision to shred, and having knowledge that the shredded material contained evidence about the abuse of children, which, as later events have shown, the Queensland Government was aware of also but not myself not until 1998 and beyond when it was discovered that the child abuse concealed from the Senate (save Document 13)[34] and public view went to the possible heinous crime of criminal paedophilia;

15.10. The legislation dealing with improper conduct by Queensland registered solicitors is found in the disciplinary provisions of *Queensland Law Society Act*, but its reach only applies to solicitors in private practice, not legal officers of the Crown/State. In my view, this leaves an unsatisfactory gap in the administration of justice which the Committee might wish to consider because Heiner demonstrates that the so-called "model litigant" is quite capable of

[34] Document 13 which revealed an incident of children being handcuffed to grates through the night was provided to the SSCUWC in June 1995 by the Goss Government in a highly edited form designed to embarrass Mr Coyne and myself.

being anything but model and transparent, to downright deceptive and subservient to an unlawful Executive desire. Under the *Public Sector Ethics Act 1994* and related Code of Conduct, it is the departmental CEO who oversights its alleged breaches, together with the CJC/CMC, and it is plainly not credible to suggest that either (i.e. the CEO or CJC/CMC) would wish to discipline the Crown Law officers caught up in Heiner because of their own culpability in the cover-up too. **(see Recommendation 20.5).**

16. CRIMINAL CONTEMPT OF COURT AND PARLIAMENT

16.1. Given that Heiner stands as a benchmark for Queensland Executive Government (and Legislature) in respect of how it conducts itself in respect of the constitutional right to a fair trial, equal justice, and the administration of justice, it can hardly allay community fear of crime if this Committee does not publicly reject such conduct immediately, or, at the very least, in its interim or final report to the Parliament of Australia, and, at the same time, strongly urge that the Senate take appropriate remedial steps to correct the misleading evidence provided to it by the Queensland Government and CJC in 1995, 1996 and 1997 still standing on the Parliamentary record as acceptable;

16.2. To leave such serious misleading evidence and findings on the Parliamentary record of the Senate may tend to make a mockery of the committee system of the Federal Parliament, and should concern this Committee of the House of Representatives. It would seem that when State Government and law-enforcement agencies deliberately mislead them, even to covering up serious criminality going to the crimes of obstruction of justice and possible criminal paedophilia (as in Heiner), and the Senate can see no wrong, how are the people expected to feel safe and comforted that its "grand inquisitor - the Parliament"[35] will always seek out the truth fearlessly and protect its privileges from contempt - irrespective of whom the alleged culprit may be - because Parliamentary privilege is absolutely vital in maintaining freedom in society at large, just as privileges attached to the Judiciary are; **(See Recommendation 20.3);**

16.3. Surely, when this occurs, it encourages public to be frightened, fearful, cynical or apathetic about two contradictory standards of law-enforcement existing side by side in our society? Why should anyone care about crime, respect the law or care about integrity in government when double standards apply? Sadly, unless we all care and remain vigilant, the law of the jungle can quickly overtake any so-called civilised society as occurred in Nazi-Germany;

16.4. Recent comments made by Parliamentary procedure expert Mr Harry Evans, Clerk of the Senate, to the Australasian Study of Parliament Group in Parliament House Melbourne (11-12 October 2002) are most revealing. He said this (at p7) in respect of parliamentary inquiries:

"…This leads to a consideration of the practical barriers to the exercise of the parliamentary inquiry powers. The principal barrier is that already identified: governments are the most likely recalcitrant, and coercion of governments is much more difficult than coercion of private citizens. The law of parliamentary power, like other legal powers, in practice works very well against the ordinary citizen, where it is not needed,

[35] Description used by Lord Denning

but is less effective against the great and powerful, where it is needed, and governments are the greatest and most powerful. What are parliamentary committees and their houses to do when governments flatly refuse to allow public servants to appear and give evidence, and refuse to produce documents?"

16.5. When the Senate came to Heiner in 1995, the Queensland Government refused to allow key public servants to appear and give evidence, and failed to provide all the relevant evidence which we now have revealing grave *prima facie* criminality including the covering up of a pack-rape of a female minor in a State-run institution;

16.6. Interestingly, just before the SSCUWC took evidence in Brisbane, a highly confidential Cabinet submission setting out how the Queensland Government intended dealing with the SSCUWC was leaked to (now) Queensland Senator the Hon Santo Santoro who was sitting in the Queensland Parliament at the time. He tabled the submission. It revealed that not only did the Queensland Government intend to disallow key public servants from appearing and giving evidence but even the Queensland Police Service, under Police Commissioner Jim O'Sullivan, had agreed that it would not co-operate with the Senate despite its legal obligation under the *Police Administration Act 1992* to act independently of Executive Government;

16.7. Mr Evans went on to make this prophetic statement:

"…In Australia, the system of government is waiting for a Watergate, that is, waiting for an issue of government malfeasance and concealment sufficiently serious to prompt the Senate to use its legal/ and/or political powers to their full extent. Such a case will probably sooner or later arise, given the hubris to which Australian governments and ministers are prone. It is hoped that such an occasion would result in a victory for parliamentary accountability and a lesson to all future ministries. Australian governments have not obliged by producing a full-scale Watergate, only a serious of small-to-medium Watergates which do not sufficiently arouse the public (who are anyway not so easily aroused)…"

The Heiner Affair now stands before both House of the Commonwealth Parliament: the Australian Senate and the House of Representatives. It cries out for resolution.

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No Statute of Limitations Applicable

16.8. Against compelling evidence demonstrating that certain parties have knowingly scandalised the discovery/disclosure processes of the rules of court of the Supreme Court of Queensland, and given that there is no statute of limitations applicable either, it is open to conclude that the Queensland Office of Crown Law - and other solicitors (as officers of the court) with knowledge of the facts and who sanctioned the shredding of the Heiner Inquiry documents - and the (Goss) Queensland Cabinet may be in criminal contempt of the Supreme Court of Queensland;

16.9. It is also open to suggest that contempt of Federal Parliament (i.e. the Senate) may exist as Mr Greenwood QC advised in his major May 2001 submission in which he set out the so-called "Lindeberg Grievance" before he later died from lung cancer in October 2001. **(See Recommendation 20.3)**

17. THE HEINER AFFAIR - ONE OF THE 20TH CENTURY'S WORST SHREDDING/RECORDKEEPING SCANDALS

17.1. As a credible example of how seriously another profession views the Heiner Affair, I point to a major academic 340-page book entitled *"Archives and the Public Good – Accountability and Records in Modern Society"* published by Quorum Books Westport Connecticut (USA) and London in July 2002.[36] It was jointly edited by Professor Richard Cox, School of Information Management and Archives, University of Pittsburgh, and Assistant Professor David A Wallace, Assistant Professor, School of Information, University of Michigan;

17.2. The book features 14 essays by some of the world's foremost archivists on the world's worst shredding/archives scandals of 20th century. It features the Heiner Affair in this notorious company and is Australasia's sole example. According to this independent analysis, Heiner has relegated Queensland into the category of a rogue world State in respect of proper public recordkeeping. For example, it is ranked alongside the Iran-Contra Affair and the shredding of South Africa's apartheid records in the finals days of that notorious racist regime;

17.3. The book derides the role of the CJC[37] (and the Queensland Government) in handling the Heiner Affair, and the notion that acting on legal advice may provide an unchallengeable shield for a client who deliberately destroys documents required for anticipated court proceedings;

17.4. For example, the author of the chapter on the Heiner Affair, Mr Chris Hurley[38] makes this assessment of the proposition put to the Australian Senate in 1995 by then CJC Chief Complaints Officer Mr Michael Barnes,[39] in which he declared that an archivist's sole discretion when appraising public records for retention and/or disposal was limited to considering their "historical" value. At page 314, Mr Hurley says:

> *"...The Queensland Electoral and Administrative Review Commission found that its investigation of alleged irregularities in electoral redistribution was thwarted by the lack of an adequate public record. It concluded that the state's archives system had to be upgraded and strengthened. Can anyone suppose, as CJC would apparently have us believe, that EARC's concern was for the lack of an adequate* historical *record? The Western Australian Royal Commission into W.A. Inc., scandals concluded that its investigations were hampered by gaps in the official record. It recommended that the Western Australian archives system should be upgraded and strengthened. It is nonsense to suggest, as the CJC must*

[36] See Amazon url: http://www.amazon.com/exec/obidos/ASIN/1567204694/qid%3D1028653373/sr%3D11-1/ref%3Dsr%5F11%5F1/102-6116804-6768961

[37] Since 1 January 2002, it is now the Crime and Misconduct Commission

[38] Former General Manager of New Zealand Archives and former State Archivist of Victoria, Australia. Former Australian representative on UNESCO's International Council on Archives stationed in Paris. Keynote speaker in 1991 for EARC's seminar on "*Archives Legislation*" as part of the Fitzgerald reform process.

[39] Now Head of Queensland University of Technology's School of Criminal Justice Studies.

contend, that the Royal Commission was worried solely about the impact on scholars."

17.5. In respect of the shredding itself and the view taken by the CJC, Mr Hurley makes this comment at page 305:

> *"...The CJC's contention that there is no evidence of criminal intent is dubious to say the least. The record shows that it was Cabinet's intention to prevent Coyne from getting the documents and using them in a legal action he was contemplating. Having formed this intention, which may or may not have been criminal, the government sought legal advice on how to carry it through. CJC seems to have reached a conclusion that whatever criminality may have been involved in forming an intention to destroy records in these circumstances, it is removed once a lawyer says you can do it!"*

17.6. Earlier to the aforesaid July 2002 USA academic publication, the Australian Society of Archivists issued a position statement on the Heiner Affair in 1999 and roundly criticised the misleading evidence provided by the CJC to the Senate Select Committee on Unresolved Whistleblower Cases in 1995. **(see Recommendation 20.4)**

18. THE MAY 1988 COVERED-UP PACK-RAPE INCIDENT

18.1. The Queensland Department of Families and Disability Services holds a file on this incident. I understand that the file holds reports from the Centre staff who went on the supervised outing and others who later became involved which unquestionably confirm that the girl was pack-raped and no one held to account or charged. The departmental memoranda also reveal that the girl (a minor by law) wanted the boys charged, and held that view for at least two days despite being threatened by other inmates to drop her complaint;

18.2. The memoranda also reveal that the indigenous girl was administered a sufficiently high dosage of the contraceptive pills by the State to act as a "morning-after" abortion pill. Furthermore, a doctor did not examine the girl until three days ***after*** the assault, and the police did not come to the Centre until four days ***after*** the assault;

18.3. *There is no indication that any steps were taken to preserve any evidence whatsoever. The girl was not removed from the Centre into a safe haven either;*

18.4. It is recorded that when the police interviewed the child four days ***after*** the sexual assault and having endured threats of violence by others at the Centre, she changed her mind about wanting the boys charged, and signed a letter to that effect. It is recorded that the police told her that it would take some considerable time to bring the matter before the courts;

18.5. The legal position was that the girl was a minor in the care and protection of the State, and it was not her call to decide whether or not criminal charges for this major crime should be brought. In summary, the records declare that (a) the minor was pack-raped while in the care and custody of the State; (b) the State knew; and (c) no one was charged for the offence or disciplined for dereliction of duty;

18.6. This file was referred to the CJC by the Department of Families and Disability Services after the incident appeared in *The Courier-Mail* on 3 November 2001 (see Addendum A & D). Notwithstanding an understanding agreed to inside the CJC on 11 November 1996 in a 'highly confidential memorandum'[40] written by Chief Complaints Officer Mr Barnes to his superiors Messrs Frank Clair[41] and Mark Le Grand[42] after the tabling of the Morris/Howard Report in the Queensland Parliament that it (CJC) could not come to Heiner after its independence had been questioned by the Parliament, the CJC ignored that undertaking and purportedly investigated the records impartially;

18.7. In its media release dated 16 November 2001, the CJC declared that there was no cover-up or any suspected official misconduct in the incident because *"…the allegations were referred to the police at the time."*

18.8. The CJC also publicly declared that *"… the girl was examined by a paediatrician at the time, at the request of the police."*

18.9. On the facts, the CJC's claim that action was taken *"…at the time"* is seriously misleading, if not deliberately deceptive for an unlawful purpose involving its own role and that of others in Heiner given that police procedures in handling the crime of rape demand urgent action in respect of obtaining and preserving vital body evidence;

18.10. To extrapolate, if the handling of this Heiner-related matter sets the benchmark on how the State/Crown may handle the crime of criminal paedophilia (in the specific form of pack-rape of a minor) as found to acceptable by the CJC/CMC, it reasonably means this for the Queensland community:

(a) the crime of rape and/or pack-rape, within minutes or an hour of it occurring may be reported by the victim to State/Crown officials who have a duty to act, and request that the alleged offenders be charged;
(b) then, with that state of knowledge, pack-rape victim may then be told by the State/Crown to go home (and presumably shower and not preserve any evidence) and permit examination by a doctor (and police) to be delayed for 36 to 48 hours ***after*** the offence has been reported;
(c) the pack-rape victim may be knowingly left in an environment where she can be intimidated into dropping her complaint of rape by the accused/s and/or associates;
(d) a minor in the care and protection of the State by court order, may determine whether or not the major crime of rape/criminal paedophila will be put before the courts by the State/Crown even when the alleged rapists are known and held in the custody of the State/Crown.

18.10. It can hardly be suggested that such conduct will allay community fear of crime;

18.11. It is therefore open to conclude that this matter, together with the shredding of the Heiner Inquiry documents and related matters, goes to a grievous breach of duty of care by the

[40] Lawfully accessed by Mr Lindeberg in July 1997 when Heiner came before the Connolly/Ryan Judicial Review into the Effectiveness of the CJC.
[41] CJC Chairman.
[42] Director of the CJC's Official Misconduct Division.

State/Crown at the very least, to the more serious offence of conspiracy to pervert the course of justice which had the effect of:

(a) covering up major crime (rape) and the crime of criminal paedophilia;
(b) denying justice (in every sense of the word going to the right of a fair trial) to a child rape-victim inflicted against her person while being held in the care and custody of the State/Crown at the Centre;
(c) allowing those responsible for the crime to escape justice;
(d) allowing certain public officials legally responsible for the victim's welfare under the *Children's Services Act 1965* and to escape the consequences of their dereliction of duty according to the full extent of the law; and
(e) allowing certain police officers to breach the (then) *Police Act* in failing to apply relevant law in accordance with their Oath of Office.

The Role of the Queensland Crime Commission

18.11. I lodged a complaint with then Crime Commissioner Mr Tim Carmody SC on 13 December 2001. He was given a detailed submission. I believed that the pack-rape fell within the QCC's jurisdiction as a "major crime" which in fact it did, but the offence went further. When I left the QCC's Coronation Drive Headquarters on 13 December 2001 I had the clear impression from Mr Carmody that he would attempt to obtain a reference to investigate from the QCC's Reference Committee before the Commission's statutory life ended at midnight on 31 December 2001 and became the Crime and Misconduct Commission by the amalgamation with the CJC. The reference did not materialise;

18.12. The legal reality was however that a reference to investigate the pack rape was not required;

18.13. On 19 December 2001 I received a response to my submission from Assistant Crime Commissioner Mr Callanan in which he stated that as the alleged pack-rape of the 14-year-old Aboriginal girl fell within the legal definition of "criminal paedophila" under the *Queensland Crime Commission Act 1997,* and a standing reference to investigate such a crime existed under the Act;

18.14. In short, once the news broke in *The Courier-Mail* on 3 November 2001 about the pack-rape of the minor in a State-run institution, the QCC was mandated by the Parliament to act by its own motion. There is no evidence that it lifted a finger.

18.15. After receiving Mr Callanan's letter I immediately responded on 21 December 2001 and called on him to open a file on the matter. This was put to the QCC (in part):

> *"Given the QCC's standing reference to investigate criminal paedophilia, and the fact that evidence of such an incident was first published on 3 November 2001 clearly linking it to the Heiner Affair, it is reasonable to assume that the QCC has already been enlivened to investigate, and therefore a file may already be open.*
>
> *Notwithstanding the above, I hereby lodge a complaint concerning the cover-up of criminal paedophilia at John Oxley Youth Detention Centre in which the shredding of the Heiner Inquiry documents and related matters are indissolubly*

linked (as provided in my submission to Crime Commissioner Carmody SC on 13 December), and request that an investigation commence immediately.

I respectfully request the reference number of the QCC's file and its creation date for my record purposes please."

18.17. My comments went on:

"…The body of facts surrounding this complaint points towards the credible and unacceptable existence of systemic corruption on a wide scale over a prolonged period which has irrefutably contaminated our justice system in Queensland.

The Heiner Affair carries with it, for all sworn statutory law-enforcement agents and officers (i.e. decision-makers) who handle it, inescapable threshold questions of prejudgement, apprehended and/or actual bias, and apprehended bias giving rise to suspected official misconduct.

In short, these threshold questions must be settled before any law-enforcement agency or official comes to the matter. The seriousness of the alleged criminality, reaching as high as Executive Government and Executive Council, demands impartiality and disinterestedness in the outcome (save that the law is upheld equally) from any decision-maker, investigator or reference committee.

However, your immediate obligation is to ensure that justice is not denied by delaying justice any longer. This obligation has the added edge of the seriousness of the allegations now confronting the QCC.

It is both illogical and inappropriate for you to argue, at the same time, that this matter cannot be advanced now because (a) the QCC management committee lacks a community representative; or (b) the Crime Commissioner has not sought a referral, when, by law and your own admission, you know that the QCC does not need a referral because it already has it pursuant to section 46(7) of the Crime Commission Act 1997.

With respect, your duties and obligations under the Crime Commission Act 1997 *extend up to midnight 31 December 2001, and to do nothing now when you have a standing reference to investigate immediately, is, in my opinion, tantamount to denying justice by obstructing it…"*

18.18. Concluded with this:

"…While I appreciate that the Crime and Misconduct Act 2001 *repeals your ability to investigate criminal paedophilia as at 1 January 2002, the Crime and Misconduct Commission (CMC) will be obliged, at the appropriate time, not to ignore that the facts of the case which strongly suggest that the police will not be able to come to the matter impartially because of other attendant factors set out in the material you hold:*

> *[a] my submission, dated 13 December 2001, and relevant media coverage;*

[b] the Lindeberg Petition;
[c] Greenwood QC submission to the Australian Senate;
[d] Greenwood QC submission to the International Commission of Jurists;
[e] submissions to the Office of the Information Commission; and
[f] the police's 1988 handling of the incident of criminal paedophilia which is now open to question.

At the same time, the CJC has recognised that it is also tainted and can no longer come to the matter. By law, the CJC is now a protagonist in this matter.

It would be investigatively absurd and inappropriate to suggest that the incident of criminal paedophilia can be isolated from the events which followed, namely the Heiner Inquiry, the shredding of its evidence and reasons for doing so, the unlawful disbursement of public monies to buy the silence of a public official and so on when all had knowledge of the incident of criminal paedophilia.

The evidence show that (a) Mr Heiner took evidence on the matter; (b) the Executive Government shredded the gathered evidence to cover up criminal paedophilia and other abuses of children held in the care and protection of the Crown at John Oxley Youth Detention Centre by court order, and which, the Executive Government knew was required for litigation; and (c) the Crown unlawfully disbursed public monies by use of an unlawful Deed of Settlement to effect the cover-up.

Put simply, the Heiner Affair is about prima facie State-sanctioned criminal paedophilia against children placed in its care and protection by court order.

The vehicle to achieve this unlawful activity involves systemic corruption reaching over a decade, and now, by my complaint, the QCC has become involved until midnight 31 December 2001. Until your responsibility has been discharged, this alleged wrongdoing must be acted on.

As to what happens after 31 December 2001 because of the extraordinary circumstances surrounding this matter – the Heiner Affair – is something which shall have to be handled appropriately at the time in order that justice is served honestly and impartially so that any wrongdoer is brought to justice.

To suggest that there is no statutory vehicle whereby notice can be given to the Queensland Government and People that a Special Prosecutor should ideally handle this matter, is to suggest that those who have engaged in systemic corruption and abuse of office for over a decade, which aided in covering up State-authorised criminal paedophilia, are to escape independent public scrutiny.

This is simply intolerable and unacceptable by societal standards if we, as a so-called civilised society, wish to claim that we live by the rule of law and care for our children wherever they may live.

It should be of great concern to the QCC that another Grundy article published in The Courier-Mail *on 20 November 2001 (p5) revealed another victim of criminal paedophilia and rape while in the care of the Crown at Sir Leslie*

Wilson Youth Detention Centre and John Oxley Youth Detention Centre respectively. (See attached).

These above values cannot be mutually exclusive for men and women of goodwill who seek to respect the law, otherwise, the law, instead of being our cherished instrument of justice, will have become the instrument of continuing injustice and held in contempt by all. That must not be permitted to happen."

18.19. Nothing further was heard from the Queensland Crime Commission and when the new crime fighting body, the Crime and Misconduct Commission, was formed on 1 January 2002 the silence continued and remains;

18.20. In May and December 2002, the victim lodged claims in the Supreme Court of Queensland against the State of Queensland alleging negligence, breach of fiduciary duty *et al*, seeking compensation amounting to approximately $1.1m. The matter is on-going.

THE *LINDEBERG DECLARATION*

18.21. On 17 April 2002, the *Lindeberg Declaration* was tabled in the Queensland Parliament by (now) Leader of the Opposition the Hon Lawrence Springborg MLA, during the second reading debate on the Public Records Bill 2001, and this relevant comment is made concerning the conduct of certain staff:

"5.29. Put at its best, had full and frank disclosure to the archivist occurred, it may have stopped the Government – assuming its motives were in fact pure and bona fide throughout - embarking on a such reckless venture and allowed the administration of justice to take its proper course. However, more disturbing evidence has emerged concerning child abuse within a State-run institution, and now, it remains an open question that perhaps the Goss Government may have had another hidden agenda to fulfil when coming to office. The shredding permitted the known staff misconduct to be destroyed and not used against those Youth Worker staff[43], whose unions (the Australian Workers' Union (AWU),[44] and the Queensland State Services Union) had direct lines of communication into and considerable influence within the new Labor Government (before and after coming to office), particularly the AWU. The Australian Labor Party (ALP) had been in the political wilderness in Queensland for close on 32 years and for the first time had the opportunity to wield unfettered power in Queensland's unicameral system of government. Also, within the high ranks of the public service across several departments, self-interest existed to ensure that the May 1988 pack-rape of a female JOYC inmate, which was covered up by the system at the time, never saw the light of day. In respect of the pack-rape incident, it brought the Queensland Teachers Union into the equation given that one of the teachers, Ms Karen Mersiadies, was seeking access to the Heiner Inquiry records too when we now know, a decade later, she was on the outing and that the incident was a feature in the Inquiry."

[43] See Forde Commission of Inquiry into the Abuse of Children in Queensland Institutions section.
[44] Queensland's largest trade union and affiliated to the ALP. Mr Goss, although non-aligned, owed his elevation to the ALP leadership to the AWU and its factionally aligned MP's.

19. THE QUEENSLAND EXECUTIVE IN CONTEMPT OF THE JUDICIARY

19.1. In Heiner, the Queensland Government (i.e. "the Executive" in the constitutional understanding of the term) has declared that it is perfectly lawful to destroy public records in its possession and control, known to be required by in anticipated judicial proceedings, to prevent their use in those proceedings up to the moment of a writ being filed and/or served while also knowing that such records will be discoverable pursuant to the rules of court of the Supreme Court of Queensland (i.e. "the Judiciary");

19.2. In this matter the Executive knew that it was destroying evidence about the abuse of children. It did so to prevent the gathered evidence being used against the careers of the Centre staff. They were officers of the Crown obliged to uphold the law and not entitled to preferential treatment if found to have broken the law on the assumption that the principle of equality before the law was respected by the Executive;

19.3. It is important to note that the Office of the Information Commissioner through my various freedom of information applications seeking relevant Heiner documents was aware ***as early as 1994*** (as indeed was the Queensland Police Service to Commissioner Jim O'Sullivan himself) that both the Executive Government and the Office of Crown Law (and other DFSAIA public servants) had wilfully destroyed records when knowing that they were required for a judicial proceeding. I called on the Information Commissioner to report the suspected official misconduct evident *"…on the papers"* to the CJC. This did not occur despite the Information Commissioner, as the principal officer of that unit of public administration, being mandated to do so under section 37(2) of the *Criminal Justice Act 1989*

19.4. I am aware that the CJC/CMC holds the view that the Information Commissioner is mandated to report all suspected official misconduct which may come to his (or his agents) attention during the course of their public duty, and it cannot be delegated to another because the *Criminal Justice Act 1989* overrides confidentiality in other legislation. When this view was expressed by the CJC's general counsel on 22 May 2001, Mr David Bevan was the Director of the Official Misconduct Division making it highly relevant to his statutory function of eradicating crime in the public sector. Mr Bevan is now the Queensland Ombudsman/Information Commissioner;

19.5. As recently as March 2003 with Mr Bevan as Information Commissioner, the Office of the Information Commissioner, albeit under the signature of Deputy Information Commissioner Greg Sorenson, advised a citizen that far from being mandated to report all suspected official misconduct, the Information Commissioner enjoyed a "discretion" under the *Freedom of Information Act 1992* is this regard. It is suggested that this important area of "reporting crime" as it applies to suspected official misconduct/criminality in government should concern the Committee as it sends mixed messages, and of major concern, it is being sent to the community by the same person but wearing different hats. In my view, it is unacceptable. **(see Recommendation 20.10);**

19.6. It is not reasonably plausible to suggest that the State would not have been aware at the time it shredded this highly relevant evidence of the possibility that the victims (minors at law) of that abuse would seek compensation in the courts for this maltreatment at some future time as adults after managing to overcome their natural fear of the State which brutalised them as children;

19.7. The pack-rape victim now has an action before the Supreme Court of Queensland seeking considerable compensation for breach of fiduciary duty and negligence. The relevant Heiner Inquiry evidence will be missing having been deliberately shredded on 23 March 1990 by order of the Executive to prevent its use in judicial proceedings;

19.8. As earlier cited, Gaudron J in *Nicholas v The Queen* [1998] HCA 9 (2 February 1998) at 111 is highly relevant. She said:

> *"…If the doctrine of the separation of powers is to be effective, the exercise of judicial power needs to be more than separate from the exercise of legislative and executive power. To be fully effective, it must also be free of legislative or executive interference in its exercise. As a result, legislation that is properly characterised as an interference with or infringement of judicial power, as well as legislation that purports to usurp judicial power, contravenes the Constitution's mandate of a separation from legislative and executive powers."*

19.9. In summary, we are witnessing the Executive, with the acquiescence of the unicameral Queensland Legislature, in serious contempt of the other independent arm of government, the Judiciary. The Executive's deliberate intent was to prevent the Judiciary from carrying out its constitutional obligation of independently and impartially dispensing justice to all according to law without fear or favour by denying the Judiciary the wherewithal to do so by deliberately destroying known relevant evidence held in the Executive's possession and control when it suits or serves its (i.e. the Executive's) own interests;

19.10. *Heiner has reduced the administration of justice in Queensland to non-justiciable gridlock*

19.11. That is, the Executive arm of the Queensland Government knows that it would be effectively incriminating itself by bringing the matter before the courts and is therefore refusing to apply the law equally, hence the peace, order and good government of Queensland has been so gravely disturbed that fear of crime in the Queensland community has reached tyrannical levels where the Executive is prepared to apply the law to a Minister of religion but not to itself;

19.12. In my view, a more serious contempt is hard to imagine, especially given that documentation destroyed by the Executive in Heiner contained evidence of the known abuse of children in a State-run institution going to the possible crime of criminal paedophilia. Serious though this plainly is, and as other evidence exists showing a wide spread cover-up after the shredding and its continuing nature involving the various law-enforcement and accountability arms of Executive Government in Queensland, the community at large can hardly have any confidence that crime, wherever it may rise its ugly head, is taken seriously across-the-board when law-breaking by the State itself, as in Heiner, remains unresolved.

19.13. 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. **(see Recommendation 20.1).**

20. RECOMMENDATIONS

20.1 That, in accordance with Terms of Reference (d), (e) and (h), 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 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 take appropriate action to address the suspected wrongdoing and/or criminal conduct as a matter of urgency;

20.2 That, in accordance with Terms of Reference (d), (e) and (h), the Committee recommend to all Federal/State and Territory governments that a Special Prosecutors Act be enacted and/or remain on their respective statute books as permanent legislation in order that systemic corruption undermining the administration of justice (as the Heiner Affair reveals) may be appropriately addressed when and if it manifests itself in whatever Australian jurisdiction so that community confidence in the rule of law may be maintained;

20.3 That, in accordance with Terms of Reference (d), (e) and (h), should the Legal and Constitutional Affairs Committee be sufficiently satisfied that the 1995 findings of the Senate Select Committee into Unresolved Whistleblower Cases in respect of the Heiner Affair are unsafe and bring the integrity of the Commonwealth Parliamentary committee system into possible disrepute, even going to possible contempt by certain parties mentioned in this submission, the Committee may, with due respect, request that the President of the Senate the Hon Senator Paul Calvert revisit the matter by a select committee (as outlined in Mr R F Greenwood QC's submission to the Australian Senate of 9 May 2001 - known as the *Lindeberg Grievance* - and because of new evidence in this submission including the covering up of evidence of child abuse, going to the possible unresolved crime of criminal paedophilia, in a State-run institution by means of the shredding) so that the people may have faith in the Parliamentary process and Parliament as the "grand inquisitor";

20.4 That, in accordance with Terms of Reference (b) and (e), State/Federal Archivists be made officers of their respective Parliaments, in the same manner as Ombudsmen, Auditors-General and Clerks-of-the-Parliament are, so that their independence may be guaranteed in the face of any improper Executive abuse of power in order that public records - the people's records - may be impartially protected for all appropriate lawful purposes, including as evidence in a pending/anticipated judicial proceeding or revealing wrongdoing within government;

20.5 That, in accordance with Term of Reference (e), legal officers of the Crown/State be the subject of appropriate independent disciplinary processes if found to have engaged in

improper conduct in the same manner as solicitors in private practice are in their respective constitutional jurisdictions;

20.6 That. in accordance with Term of Reference (e), Federal Whistleblower Protection Legislation, in consultation with Whistleblowers Australia, be enacted as a matter of high policy priority by the Commonwealth Government of Australia;

20.7 That, in accordance with Term of Reference (e), a Whistleblowers Protection Authority be established as a matter of high policy priority by the Commonwealth Government of Australia to ensure that any whistleblower does not suffer a detriment and/or reprisal as a consequence of making a public interest disclosure;

20.8 That, in accordance with Term of Reference (e), in the interests of community confidence in the decision-making processes of public sector watchdog law-enforcement agencies (like the ACC, ICAC and CMC) in order to avoid apprehensions of bias, a person shall not be engaged in a senior investigative/decision-making position who is a member of a political party or known to have been active in a political party within 7 years of any appointment to such an agency (as to mirror, in part, Section 23(4) of the *Electoral Act 1992 (Qld);*

20.9 That, in accordance with Term of Reference (e), in the interests of community confidence in the decision-making processes of the administration of justice, that all Federal/State and Territory Governments in the Commonwealth of Australia, give consideration to removing their respective Attorneys-General from membership of Executive Government in order that their independence and impartiality as first law officer of the State/Crown and guardian of the public interest is assured;

20.10 That, in accordance with Term of Reference (e), in the interests of community confidence in the decision-making processes of the administration of justice and eradicating official misconduct and criminality in the public sector through the operation of *Freedom of Information Act 1992* and *Parliamentary Commissioner Act 1974*, the Committee seeks clarification from the Queensland Information Commissioner/Ombudsman David Bevan as to whether or not he was and/or is obliged to report ***all*** suspected official misconduct to a proper authority pursuant to section 37(2) of the *Criminal Justice Act 1989* and its equivalent in the *Crime and Misconduct Act 2002* which comes to his attention in the performance of his statutory function under the *Freedom of Information Act 1992* and *Parliamentary Commissioner Act 1974*, and if not, why not, or if so, how does he explain (a) the failure of his Office to report the suspected misconduct evident "on the papers" in Heiner, and (b) the contradictory view of his obligation expressed by Deputy Information Commissioner Sorenson.

CONCLUSION

The serious allegations set out in this submission are supported by hard evidence, and relevant exhibits have been provided.

I am prepared to appear before your Committee and provide evidence on Oath.

……

Kevin Lindeberg
11 Riley Drive
CAPALABA QLD 4157
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5 March 2003

ADDENDUM A

THE COURIER-MAIL

Page 2 Thursday 8 November 2001

Journalist Bruce Grundy

INQUIRY BOSS 'KNEW OF RAPE CLAIM'

THE former Children's Court magistrate who conducted the aborted 1989 inquiry into the John Oxley Youth Detention Centre was told of claims that a 14-year-old Aboriginal girl in care was gang-raped.

But the inquiry by former magistrate Noel Heiner was terminated by the Goss government whose cabinet directed that all of Mr Heiner's materials be shredded in 1990.

Allegations that the centre's management knew of the rape, for that it had been covered up for 12 years, were raised in *The Courier-Mail* on Saturday.

A former centre youth worker said yesterday that he had been interviewed in 1989 by Mr Heiner, who had specifically asked about the rape.

He said the interview "was about Peter Coyne (the manager of the centre) basically" but the rape "was one of the incidents that came out."

When asked if he had volunteered information about the rape claim or had been questioned about it, the man said; "He (Mr Heiner) asked...he knew about it already."

The man said everyone in the centre knew about the rape allegation.

A former minister in the Goss cabinet, Pat Comben said on television in 1999 that "in broad terms" the cabinet had been aware that the shredded documents had contained information about child abuse.

The next day Mr Comben said that his comments had been taken out of context.

Mr Heiner declined to comment on the matter yesterday.

A move by Families Minister Judy Spence to refer the pack rape cover-up allegations to the Criminal Justice Commission for investigation was strenuously opposed yesterday by a Queensland member of a Senate select committee which examined the shredding of the Heiner documents.

Former Democrats senator John Woodley, a member of the 1995 Senate Select Committee into Unresolved Whistleblower Cases, said it would be inappropriate for the CJC to investigate the matter because at the time of the Senate inquiry the CJC knew about cases of child abuse, but failed to disclose them to the Senate.

"That was an incredibly serious omission, and one can't have confidence that they will deal with it properly if it is referred to them again," Rev Woodley said.

According to former members of staff and the girl concerned, the gang rape took place when she was taken on a supervised excursion with a group of male inmates to a remote location in the bush.

The state Opposition yesterday called for a fresh public inquiry into the Heiner shredding. Opposition Leader Mike Horan said he was shocked to learn of the rape allegations.

"This latest allegation of pack rape indicated the seriousness of the allegations that were covered up by the members of a Labor cabinet, some of whom still sit in this House," Mr Horan said.

"Nothing short of a full and open inquiry into this matter will ensure that justice can finally be given to victims of abuse."

Premier Peter Beattie said police and the CJC were examining the allegations.

ADDENDUM B

The Courier-Mail

Pastor charged over destroying diary of abuse victim

Jasmin Lill

10 July 2002

A PASTOR appeared in a Brisbane court yesterday charged with destroying the diary of a child who was sexually abused by one of his parishioners.

The 51-year-old Baptist pastor has been charged with destroying evidence and attempting to pervert the course of justice on Brisbane's northside between May 1995 and July 1996.

But the man cannot be named after magistrate Robert Quinlan granted an application by the accused man's barrister, Frank Lippett, to suppress his client's name.

Police charged the pastor last month with attempting to pervert the course of justice after they claimed he advised a child's parent not to report a matter of indecent treatment to police.

The police said the pastor knew of the allegations, and that he interfered with notes written by the complainant in which she detailed the allegations.

Police say the man destroyed a document – namely pages from an exercise book – which might be required in evidence in a judicial proceeding in the District Court.

They claim the pastor rendered the pages illegible in a bid to prevent them being used in evidence.

Mr Quinlan granted the accused man's request for bail, on the condition that he have no contact directly or indirectly with the complainant's family.

He also agreed to schedule the accused man's next court date on the day after his return from holidays.

The charges against the pastor follow a case in the District Court in Brisbane in March where a 37-year-old man pleaded guilty to six counts of indecent dealing in 1994 and 1995.

The man, who molested his teenage baby sitter, escaped serving an actual jail sentence, partly because the court heard he had been humiliated in his church group.

During that hearing, the court heard the man had rubbed the girl's breasts and vagina on several occasions, and once had simulated sex with her.

The prosecutor told the court the man's behaviour stopped after elders from the man's Baptist Church became aware of the offences and spoke with him.

The man was placed on a 12-month intensive correction order combined with a two-year jail term wholly suspended for two years.

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ADDENDUM C

The Courier-Mail

Friday 24 January 2003

Pastor 'shredded' sex victim's diary

Journalist: Jasmin Lill

A church pastor shredded the diary of a teenage sex abuse victim and suggested holding a ceremonial burning of another of her diaries, a court heard yesterday.

The pastor also cancelled her baptism ceremony pending a church investigation into claims she had been flirting and taking photos of builders working at her parent's home, Brisbane Magistrate's Court was told.

The 51-year-old Baptist pastor on Brisbane's northside has been charged with destroying evidence and attempting to pervert the course of justice between May 1995 and July 1996 after he destroyed the diary of the girl who had been sexually abused by one of his parishioners.

The pastor has not been able to be identified since a court decision last July to suppress his name.

Police have told the court the victim's family provided their church pastor with diary notes their daughter made of the abuse.

But when they asked for the notes back, the clergyman returned them in shredded form, together with a letter indicating they should "just forget the matter", police said.

When the mother asked the pastor what they should do, he recommended the family come together to church, a pastoral care worker said yesterday.

He said the pastor told church staff or elders that he had recommended the sex offender seek advice from a lawyer, but the church worker denied that he and the pastor had ever discussed going to the police.

The pastoral carer said the teenage victim of the abuse was due to be baptised, but said the pastor called it off after a parishioner reported

concerns that she had taken a photo of young builders working at her home.

In earlier evidence, the girl's father claimed the pastor said the diary would be incriminating, and that pursuing her complaint through the courts would be difficult for her.

The victim's mother said she was initially relieved to talk to her pastor, and thought he would be able to tell them how to deal with it.

She said the pastor alerted her to the existence of the diary, which he said the girl had been "bragging" about at school. The woman said she gave the diary to the pastor who interviewed the girl and her family.

"He said it's not bad enough to take to the police and even if you did, you wouldn't have a leg to stand on," she said. "We respected (him) and we went with his decision at the time."

The woman said she later became aware of a second diary and that the pastor had suggested they have a ceremony at his house where they would burn it as a form of closure for her.

But she said her daughter took matters into her own hands, and destroyed it.

In a last bid to sever ties with the church, the woman said she phoned the pastor and asked for the diary back.

After agreeing to return it, the woman said it arrived in a shredded form.

The hearing was adjourned.

ADDENDUM D:

MEDIA COVERAGE ON THE 1988 PACK-RAPE INCIDENT OF JOHN OXLEY YOUTH DETENTION CENTRE INMATE

THE COURIER-MAIL

Centre inmate, 14, pack raped

Bruce Grundy 3 November 2001 Page 3

A YOUNG Aboriginal woman has confirmed claims by several former staff members of a Brisbane youth detention centre that she was gang-raped while

being held in the centre as a 14-year-old.

The woman, now in her mid-twenties, said she was gang-raped twice on a supervised outing from the John Oxley Youth Detention Centre in the late 1980s.

Former members of staff at the centre also have claimed the matter was "swept under the carpet" and "hushed up".

One former youth worker said if what had happened to the girl in question had happened to a white girl, "there would have been hell to pay".

The woman, who cannot be identified, said she was taken on a bus trip with a group of Aboriginal and white male inmates to an isolated spot in the country.

One staff member accompanied the inmates into the bush and left her with the boys. The woman said the boys demanded sex and started arguing about who would "go through her" first.

She said she told them to leave her alone but they forced her on to a large rock and raped her.

The woman said that what had happened to her on the first walk was repeated later in the day.

When contacted about the incident Families Department public servant Jeffery Manitzky, who was allegedly in charge of the excursion, said: "I'm not interested in talking about that."

Mr Manitzky then denied he was aware of the incident.

Karen Mersiades, who also supervised the excursion, said she would prefer not to comment.

"I know that the manager of the centre informed (the girl's) mother of the allegations, and she came in to the centre," she said.

Ms Mersiades said the mother decided not to pursue the matter because she had been told the boys involved were "indigenous".

Former leading criminal lawyer and Director of Public Prosecutions at the time of the incident, Des Sturgess QC, said "unless the story was incredible the outcome of the matter was not one for the mother to decide".

"That would be for the police to investigate and determine," Mr Sturgess said.

However, the girl's parents strenuously denied ever being told of the incident.

They said the first they had heard of it was when asked by *The Courier Mail* why they had decided not to take any action over the matter.

Peter Coyne, the then manager of John Oxley, said anyone with allegations about the abuse of children at the centre should take them to the Families Department, the police or the Criminal Justice Commission.

"I would encourage anyone with such allegations to do so," Mr Coyne said.

Former assistant manager of the centre, Jenny Foote, also declined to discuss the matter. She works in the Families Department.

The Courier-Mail has been told by former members of staff they had "no doubt" the matter of the gang rape had been raised with the 1989 Heiner inquiry into the John Oxley Centre.

Following the closing down of the inquiry the manager of the centre was paid more than $27,000 for "entitlements" and required to sign a secrecy agreement.

Phone-interview
with'Michael' former JOYC Youth Worker and Mr Steve Austin Presenter *ABC* Morning Radio (612 4QR)
Brisbane
7 November 2001

I feel too many people are protecting their posteriors in the interest of self improvement at that time ... you know ... in getting on in the bureaucracy, government .. it was pure self interest.

Q. What do you know of the alleged rape of this young girl?

A. I cannot remember ... as I say ... this is going back about 1988 -- 87-88 ... I cannot remember if I was on duty or not ... everybody knew ... I wasn't told directly ... but we all knew ... we were summonsed down a couple of days later to Peter Coyne's office and we were told it would be handled internally, we were under the Secrecy Act and we were not to discuss it outside ... and they would handle it internally.

Q. What was the Secrecy Act that they cited as the reason why you couldn't speak?

A. That everybody who was a government employee in that sort of job, basically, you didn't discuss what went on outside of duty ... concerning the children.

Q. Did it surprise you when you were told that you could say nothing?

A. It did. It did .. because, quite frankly, I thought it would be taken to the highest level. I mean, rape is rape, isn't it ... and especially those children were in the care of ... us ... Peter Coyne being the manager.. and the other staff there ... they were in the protection ... OK, they weren't little angels, there were often nasty little children there, but the point is ... or, that is beside the point, that they were under the protection of the Family Services and they weren't getting it.

Q. The current government's attitude seems to be that this matter has all been dealt with by the Forde Inquiry, and that's essentially the end of the story ...

A. It's not ... because I was interviewed by ... oh what's his name ... then ... very nice man and his assistant ...

Q. This is way back in '89 are you talking about … Noel Heiner …

A. That's it … and he was very nice … put it all on tape and everything. I spent oh … a lot of us spent time in there … I can't give you the other names because I can't remember , but I was there and I know other people went and then I think Anne Warner had it all shredded.

Q. Well the government's attitude seems to be that the Forde Inquiry has dealt with all these matters so there is no further investigation …

A. No, I don't agree with that. I don't. I think it has all been pushed under the carpet.

ADDENDUM E

LAW AND JUSTICE

http://www.uq.edu.au/~uqggrund/charges.htm

Posted February 2003

A decade-long legal controversy has been re-ignited in Queensland following events in a Brisbane magistrates court almost four weeks ago.

The charging of a man on Wednesday January 22 with destroying evidence or alternatively attempting to pervert the course of justice has raised serious concern that the law is treating the average citizen in Queensland differently from the way it treats prominent public officials.

The matter arose when the Director of Public Prosecutions proceeded with charges against a man under Section 129 or alternatively Section 140 of the Criminal Code alleging he had guillotined some pages of a diary knowing the material was likely to be required in a legal proceeding.

Significantly, at the time of the guillotining no court action relating to matters contained in the diary had been commenced.

Such action was not commenced for several years.

However, in 1995 the-then Director of Public Prosecutions determined that a legal action had to be underway before anyone who destroyed material likely to be used in evidence could be charged.

His decision meant no charges were ever brought against members of State Cabinet and senior public servants who had sought or had authorised the destruction of evidence gathered by an inquiry into Brisbane's John Oxley Youth Detention Centre.

In a letter to the-then shadow Attorney-General Denver Beanland in November 1995, Director of Public Prosecutions Royce Miller QC said: It is my view that

there must be on foot a legal proceeding before this section [Section 129] is cable [sic] of application.

Despite High Court decisions to the contrary, Mr Miller's view has been strenuously supported for almost a decade by a range of Queensland agencies including Crown Law and the Criminal Justice Commission.

However, in the case brought before the magistrates court several weeks ago, although no legal proceeding for which the guillotined documents may have been required had been commenced, the charges proceeded.

When contacted about the matter, Opposition Leader Lawrence Springborg said the inconsistency in the approaches of the two DPPs was very grave and risked damaging the credibility of Queensland's legal system.

"There can't be one law for Ministers and public officials and another for everyone else", Mr Springborg said.

Public confidence in the law had been damaged, he said, because the fundamental principle that everyone was equal before the law had apparently not been upheld.

Mr Springborg said the current DPP should immediately review the case of the Ministers and public servants involved in the John Oxley matter, and if consistency were to be applied, she should charge them as she had done with the person who appeared in court last week.

"That person must be wishing he was a Minister of the Crown", Mr Sprinborg said. "If he had been, he would have had little to fear.

Mr Springborg said the current DPP had to act urgently to restore public confidence in the system.

Queensland University of Technology Senior Lecturer in Law Alastair MacAdam said the DPP's current policy of prosecuting people under Section 129 where legal proceedings had not been commenced meant she had no choice but to reconsider instituting proceedings arising out of the John Oxley Heiner Inquiry affair.

Mr MacAdam said while not commenting on the facts of the matter currently before the court, it was clear the act of charging a person over the destruction of evidence three weeks ago meant the Heiner case had to be reviewed with a view to instituting prosecutions.

"If it was you or I", Mr MacAdam said, "we would be prosecuted".

"In the Heiner matter all the organs of government, the DPP, the Crown Solicitor, the Ombudsman, the Auditor General, the Criminal Justice Commission, the Police Department, you name it, let Queensland down", Mr MacAdam said.
"Because they decided the executive government could do no wrong.

"Rather than doing their duty, they collapsed in around the executive government and protected it", Mr MacAdam said.

He said the events of the three weeks had produced a situation that had to be addressed urgently to restore public confidence in the law.

"The position I have maintained for years that there can be an attempt to pervert the course of justice before a proceeding is on foot, was recently confirmed in a case before the Victorian Court of Appeal (the British American Tobacco/ Rolah McCabe case).

"It demonstrated, yet again, that the views of the Criminal Justice Commission, and that of the former DPP as expressed to Mr Beanland, were clearly wrong".

Mr MacAdam said the CJC should admit its original reason for not investigating the Heiner Affair was wrong and should consider that, in the light of continuing public interest in the matter, further investigation should take place "against a background of the correct view of the law".

Greens Convenor Drew Hutton described the circumstances of the two cases as "double standards".

"The Beattie Government has to confront this matter fairly and squarely", Mr Hutton said.

Former shadow Attorney General Denver Beanland said he recalled asking the DPP in late 1995 to consider instituting prosecutions against those who shredded the Heiner documents and remembered getting the DPPs advice that there were no grounds to initiate such a prosecution.

Mr Beanland said as a result he had been most perplexed by the events of the last few weeks.

Whistleblower Kevin Lindeberg who has battled for more than ten years to have the shredding matter properly investigated said simply calling on the DPP or the police to consider laying charges against those who shredded the Heiner documents was unacceptable.

"No arm of government can now come to the Heiner Affair with clean hands", he said.

"The only legal way forward is for Parliament to appoint an independent Special Prosecutor who can fix our public administration without fear or favour from outside the system", Mr Lindeberg said. "This is an unprecedented constitutional crisis in all but name", he said.

Bruce Grundy - Journalist in Residence University of Queensland

ADDENDUM F

Equality before the law

http://www.uq.edu.au/~uqggrund/equalitybeforethelaw.htm

Posted February 2003

In the space of ten minutes just after noon on Wednesday 22 January, 2003, the fundamental notion that Queenslanders are all equal before the law and that there is only one law which applies to all of us, was alarmingly and starkly revealed to be otherwise.

What was finally revealed that day, after 13 years of denial, is that there is one law for the ordinary citizens of Queensland and quite another, much more lenient and accommodating, for public officials – particularly senior public servants and politicians.

On that Wednesday at a committal hearing in a Brisbane magistrates court a prosecutor from the Office of the Director of Public Prosecutions spelled out the charges being laid against a citizen of this state – charges under Section 129 or alternatively Section 140 of the *Criminal Code*. In essence the charges alleged that the citizen had destroyed evidence, or had attempted to pervert the course of justice, by guillotining material likely to be needed in a legal proceeding. At the time of the alleged offence there was no legal proceeding underway – that did not occur until many years later.

What is significant about this case is the fact that the citizen was charged – because in laying those charges and proceeding with them the Director of Public Prosecutions dropped a bomb into the middle of our legal system.

For more than a decade the agencies and authorities that administer the law in Queensland (the Office of Crown Law, the Office of the Director of Public Prosecutions and the Criminal Justice Commission, now the Crime and Misconduct Commission, for instance (see link to: CJC and destroying evidence) plus any number of Ministers, former Ministers and Members of Parliament, have relentlessly maintained in an untold number of circumstances that unless a legal proceeding has been actually commenced, destroying material that may be needed in such a proceeding is not an offence against the law (in particular Section 129 of the *Criminal Code*).

In the case against the citizen mentioned above, no legal proceeding had been commenced. But the case against him went ahead.

The matter of the citizen in court that day is in chilling contrast to what happened when a group of Ministers and senior public servants shredded (rather than guillotined, and dumped rather than returned) hundreds of hours of recordings and transcripts and other documents (rather than just a few pages) gathered by an inquiry into a youth detention centre.

The public officials were never charged. There was no legal proceeding underway it was said.

And what had happened in the case of the public officials was even more serious. What the public officials did was to destroy material that might not just have been needed in a legal proceeding, but material that was in fact required for a legal proceeding (see link to: Morris and Howard report extract).

Indeed, in their report to parliament two barristers who examined the matter said there were no less than 13 communications made to senior officials placing them on notice that the material was needed for potentially no less than four kinds of legal proceedings. The record also shows that the Cabinet Ministers of the day were informed that solicitors were seeking the material and that it was a matter of "urgency" that a decision be made as to the fate of the material.

Cabinet agreed, the State Archivist approved, and the material (what was going on in a youth detention centre) was shredded.

And, we have been told over and over, no one did anything wrong. Of course, it has been chorused, the material may have been needed for a legal proceeding, but as there was no proceeding actually underway, destroying the material was not a problem.

At the time the Director of Public Prosecutions (the same agency that brought the charges against the citizen four weeks ago) spelled out the law quite clearly – in writing.

In a letter dated 28 November,1995, to the shadow Attorney-General at the time, the Director of Public Prosecutions, Royce Miller QC, said: It is my view that there must be on foot a legal proceeding before this section [Section 129] is cable [sic] of application. The closing words of the body of the section namely " with intent thereby to prevent it being used in evidence" clearly indicates that there must [be] at the time the action is undertaken by the alleged culprit an impending proceeding ...

This position had earlier been taken by former Crown Solicitor Ken O'Shea and has been supported any number of times by the-then Criminal Justice Commission and others.

The basis for their view, it appears, is the wording of the Supreme Court form (Number 83) relevant to the application of Section 129.

Other lawyers have said anyone who would suggest that the wording of the law passed by parliament should be subordinate to the wording of an administrative legal form created by the judiciary would never pass first year law.

What is more, legal sources have said, the former DPP's view is even more difficult to understand since the Criminal Practice Rules (Chapter Two, Section 15) make it clear that the statement of an offence in an indictment in a case such as that raised by Mr Beanland may be in the words of the form or in the words of the Code or other Act creating the offence.

And since the citizen was charged alternatively with an offence under Section 140 of the Criminal Code (attempting to pervert justice) it is as well to remember that the two barristers who reported on the shredding said: … we are of the opinion that it is open to conclude that offences were committed under s. 132 [conspiring to defeat justice] and/or s. 140 of the *Criminal Code*, in connection with the destruction of the Heiner documents …

In this case, whether legal proceedings are underway or not is not an issue.

For instance, six judges of the High Court of Australia unanimously agreed in *The Queen v. Murphy* that … at common law, and under the statutory provisions of Queensland, New Zealand and Canada, an attempt made to pervert the course of justice when no curial proceedings of any kind have been instituted, is an offence … A similar position was taken by the High Court in The *Queen v. Rogerson*.

Which would appear to mean that the law is as the current DPP applied it in the case of the citizen four weeks ago. It's just that it wasn't applied that way a decade ago when politicians and high-level bureaucrats were involved.

What is also troubling about this matter is the reality that almost no one, apart from one whistleblower and a couple of brave souls at QUT, did anything about it.

Now a citizen is before the courts.

So who do you believe? Is it OK to destroy material up to the point of a legal proceeding being on foot, or isn't it?

Do you believe the High Court? Or the former DPP? Or the present DPP?

It would be as well to know because the penalty for getting it wrong could land you a few years in jail.

— Bruce Grundy