Parliament of Australia
House of Representatives

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO HARMONISING LEGAL SYSTEMS RELATING TO TRADE AND COMMERCE

SUBMISSION

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CONTENTS

TERMS OF REFERENCE

To inquire and report on lack of harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand, with particular reference to those differences that have an impact on trade and commerce. In conducting the inquiry, the Committee will focus on ways of reducing costs and duplication. Particular areas the Committee may examine to determine if more efficient uniform approaches can be developed, include but are not limited to:

- Statute of limitations
- Legal procedures
- Partnership laws
- Service of legal proceedings
- Evidence law
- Standards of products
- Legal obstacles to greater federal/state and Australia/New Zealand cooperation.

CASES AND LAWS APPLIED, CITED OR CONSIDERED

F.A.I. Ltd v Winneke (1982) 151 CLR 342

R v Rogerson and Ors (1992) 66 ALJR 500

A v. Hayden (1984), 156 CLR 532

Arthur Andersen LLP v United States in 544 US 2005

British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased) [2002] VSCA 197

R v His Honour Judge Morley and Mellifont [1990]1 Qd R 54

Australian Communist Party v The Commonwealth (1951) 83 CLR 1

Sebel Product Ltd v Commissioner of Customs and Excise (1949) Ch 409

Davies v Eli Lilly & Co [1987] 1 All ER 801

R v Ensbey; ex parte A-G (Qld) [2004] QCA 335

Nicholas v The Queen [1998] HCA 9

Rockwell Machine Tool v EP Barrus (Concessionaires) Limited [1960] 1 W.L.R. 693

Crimes Act 1914 (Cmlth)

Libraries and Archives Act 1988

Public Records Act 2002

Crime Act 1958 (Vic)

The Constitution

The US Constitution

Constitution of Queensland 2001

Criminal Code (Qld)

Evidence Act 1977 (Qld)

1. INTRODUCTION

1.1. It is the *Constitution* which binds the States and Territories of Australia into our Federation. It is the nation's supreme legal document of basic law whose respect brings harmony to our legal systems, freedom to the people and it allows stable commerce and trade generally free from corruption. Harmony in our legal system breeds public confidence in it while disharmony breeds instability, depending on the issue at hand, the degree of disharmony and who is perpetrating it.

1.2. The *Constitution* recognizes the division of power of the three arms of government. It also limits the reach of state and federal powers. On occasions, when legislative disharmony exists between federal and state governments, the *Constitution* requires its resolution by the High Court of Australia, and insofar as any inconsistency is found, federal power must prevail over state or territory power.

1.3. While the *Constitution* does not specifically spell out the democratic notion of equality before the law within its provisions, its force and common acceptance throughout the nation is based on that principle. This is particularly so in respect of the criminal law concerning the protection of evidence in the administration of justice because it cannot be said that when the *Constitution* was adopted over 100 hundreds years ago, with the pre-existing English Common Law well rooted in the nation at the time, that the people knowingly agreed that the Crown in one State of the Federation could escape its obligation to act as the model litigant to the detriment of its State population while Australians living in another State - or Territory - enjoyed all the rights and obligations which flowed from their government functioning as the model litigant and obeying the law.

The Great Leveler

1.4 When the Australian people federated, they accepted that the *Constitution* would be the great leveler and guardian of the nation as a whole under a constitutional monarchy system of government where all citizens, corporations and governments would be equal before to law, and none above it. The right to due process of law was guaranteed.[1] In voting to federate, the

[1] Due process is also mentioned in both the Fifth and Fourteenth amendments to the *US Constitution*. It is mentioned thus: **Fifth Amendment Ratified 15 December 1791--** *No person shall be held to answer for a capital, or otherwise*

will of the nation was that any government in the new Federation could not act in an arbitrary or oppressive manner so as to deny anyone his constitutional right to be treated equally and predictably before the law.

1.5 It is no surprise that equality before the law was accepted as a given by Australians because it finds its roots in the phrase "due process of law" and this first appeared in a statute of Edward III of the year 1354. This statute, which is referred to by the title "*Liberty of the Subject*" contains the following provision:

> *"... no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law."*

1.6 This enduring over-arching force of the *Constitution* has provided a signal to everyone that Australia was to be a nation governed by the rule of law, or, at least, purported to be so. The *Constitution* obliges everyone caught up in disputes or involved in transactions to carry them out in a civil and efficacious legal manner respecting the Rules of the State and Territory Supreme Courts and High Court of the Australia. This obligation on everyone, no matter what status or financial worth, works to the benefit of all so that a fair trial may be enjoyed by equal and impartial application of the law, without interference by any party especially the Crown, while confident in the knowledge that any legal action will be overseen by an independent judiciary wherever it is brought throughout the four corners of the Federation. Former Chief Justice of the High Court, Sir Harry Gibbs GCMG AC KBE expressed our constitutional guarantee in these terms:

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infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, ***without due process of law*****;** **Fourteenth Amendment Ratified 9 July 1868 --** *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,* ***without due process of law***

"...The right to trial by jury, the right to freedom of religion, the right to freedom of interstate trade and the right that citizens of one State should not be treated adversely compared with citizens in another State, that's about it."[2]

1.7 As far back as 1885, Albert Venn Dicey created a basic understanding of what the rule of law meant under classical liberal thinking, and put it under three meanings:[3]

"...It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power... Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals."[4]

1.8 As earlier ruled by Gibbs CJ in *FAI v Winneke*[5] , *A v Hayden* again confirmed the principle of executive government not being above the law. Brennan J stated:

"...Neither ASIS nor the Minister nor the executive government could confer authority upon any of the plaintiffs to commit an offence or immunity from prosecution for an offence once committed. The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy... The principle... is that all officers and ministers ought to serve the crown according to the laws... This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies."[6]

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[2] http://www.abc.net.au/ola/citizen/eps/ep06/text06.htm#gibbs
[3] A.V. Dicey, *Introduction to the study of the law of the Constitution* (10th ed, 1959)
[4] Ibid, 202-203
[5] *F.A.I. Ltd v Winneke* (1982) 151 CLR 342 at 4
[6] *A v. Hayden* (1984), 156 CLR 532 at 579

The Crown as the Model Litigant

1.9 Governments have a clear duty to conduct themselves by the highest standards of probity and fair dealing. If they act outside the constraint of their *Constitutions*, an application to the High Court of Australia may be brought to adjudicate on the contentious matter or interpretation of law which may see its conduct or law struck down as being unconstitutional as occurred in the *Australian Communist Party v The Commonwealth*[7]. The drafters of our *Constitution* were plainly cognizant of the 1803 landmark ruling in *Marbury v Madison* which entrenched the checking and balancing role of the United States Supreme Court on the executive in interpreting the law and the *US Constitution* over 100 years before Australia federated, and one of our founding-fathers, Alfred Deakin, declared that so important was this equivalent judicial guarantee in our nation's history, that it became *'the keystone of the federal arch'* when the States federated over 100 years ago.[8]

1.10 The duty on the Crown to act as a model litigant is a high one. The Crown is the standard setter, and sets the ethical tenor of the nation. Vaisey J. in *Sebel Product Ltd v Commissioner of Customs and Excise* (1949) Ch 409 at 413 spelt it out in these terms:

> *"...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..."*

1.11 When any diminution of these 'model litigant' obligations to obey the law and to respect the doctrine of the separation of powers by any government in the Federation occurs out of roguish self-interest, it ought be contested by others, including Bar associations, law societies, legal ombudsmen, peak business organizations, constitutional, civil and criminal law academics, professional recordkeeping associations and the media because they should all have an abiding interest in good government and ought to know that such roguish conduct strikes at the heart of constitutional government by undermining public confidence in the administration of justice and civil society. A breach of constitutional law regarding due

[7] (1951) 83 CLR 1
[8] House of Representatives, *Parliamentary Debates* (*Hansard*), 18 March 1902, p. 10967

process impinging on the separate functions of the judiciary and the executive, anywhere within the Federation, must eventually disharmonize the whole legal system either directly or by ripple effect. This is especially so given the practice of all governments within the Federation to standardize and modernize laws, such as, for example, defamation, model forensics procedures and the criminal law in the form of the Model Criminal Code Officers Committee (MCCOC).

Comity throughout the Commonwealth

1.12 There ought to be comity among regulatory-enforcement authorities which are capable of taking evidence on oath bringing them within the legal scope of the definition of a "judicial proceeding" and an agreement on when relevant evidence should be preserved so that their functions may be carried out. The Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Crown – i.e. Federal, State and Territory governments and their various fair trading, industrial relations and law-enforcement instrumentalities *et al* – should have a common understanding of when their proceedings commence, or regarding the extent of their reach in terms of protecting relevant evidence *before* they commence, so that a level playing field may be applied in adjudicating disputes over trade and commence between governments, corporations and aggrieved citizens anywhere in the Federation.

1.13 This comity ought to be achievable in Australia where (a) English is the common language; (b) the common law is the common heritage of all jurisdictions; and (c) globalization and international treaties (i.e. UN *Convention on Civil and Political Rights*, the Commonwealth of Nations *Harare Declaration on civil and political rights*) create their own common demands on proper conduct in all jurisdictions. Unfortunately however, the Queensland Government has disturbed this basic common harmony hugely through its conduct in the Heiner affair.

1.14 Inevitably, unaddressed disharmony in the application of the law concerning respect for due process must affect fair trading and commerce between parties within and between the States and Territories, and internationally, especially when such a breach gives the rogue government an advantage in judicial proceedings which permits its own conduct to be placed above the law, while all others remain subservient to the law within the rogue government's constitutional jurisdiction. The notion of a level playing field in the legal system would be disrupted by the very body whose duty is to preserve and protect it.

1.15 Disharmony regarding respect for due process flowing out of the conduct by one rogue government may also impinge on joint business ventures between governments in the Federation and as between governments and private enterprise where disputes or clarification on points of law, which could involve significant financial and other burdens, may depend on the preservation of relevant public records for the court to adjudicate on. Trust would be destroyed. If permitted to be destroyed without impunity - with the (unacceptable) acquiescence of law-enforcement authorities in the offending jurisdiction - by government to advantage government in the relevant litigation, then co-operation, fair dealing and investment would dry up and bring harm to the national economy and employment. Indeed, it may even invite a spread of corruption within that jurisdiction in order to do business by counter-balancing the advantage, or be seen to be acceptable. Consequently, inconsistency in our legal systems regarding respect for due process by any one government to advantage itself ought to be the concern of all.

1.16 Respect for the rule of law requires predictability and certainty in law. Accordingly, to underpin the thrust of this submission, I cite Gleeson CJ in the *ABC's 2000 Boyer Lecture* entitled ***The Rule of Law and the Constitution***, wherein he said this:

> *"...most Australians share a belief that all persons are equal, and they're right. This is because the proposition that people are equal isn't a statement about a fact. It's an expression of an ethical principle. It reflects a value, not an observation. The source of that ethical principle may be a matter of disagreement. For some people it's based on a religious conviction that humankind was created in the image and likeness of God. For some, it's derived from an ethical system that is independent of any religious notions. For others, it's purely intuitive. Whatever the source, the value of equality before the law is deeply ingrained in our legal system and in the constitution."*[9]

This submission shall address the following points in this inquiry's terms of reference:

- Legal procedures;
- Service of legal proceedings; and
- Evidence law.

[9] http://www.abc.net.au/rn/boyers/stories/s988164.htm

1.17 This submission's mainspring is this Committee's August 2004 findings and recommendations regarding its investigation into the so-called Heiner affair as part of its national inquiry during 2003-04 into crime in the community. It is tied to the significance of *British American Tobacco Australia Services Limited v Cowell* (as representing the estate of Rolah Ann McCabe, deceased) [2002] VSCA 197 (6 December 2002), and *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 cases about respect for the administration of justice particularly concerning the protection of evidence. They combine to bring together the worlds of trade, commerce and criminality.

2. CONSISTENCY AND PREDICTABILITY UNDERPIN LEGAL HARMONY

2.1. In *Davies v Eli Lilly & Co* [1987] 1 All ER 801 Lord Donaldson MR gave what has become one of the most oft-quoted descriptions of the modern common law process of civil discovery[10] used in our legal system throughout Australia. He said:

> *"...The right [to discovery] is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object."*

Respect for the Doctrine of the Separation of Powers

2.2. An essential ingredient in our legal systems is respect for the doctrine of the separation of powers. In *Nicholas v The Queen* [1998] HCA 9 (2 February 1998) Gaudron J at 111 spelt out this principle:

> *"...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*

[10] Also see Megarry,J. *in Rockwell Machine Tool v EP Barrus (Concessionaires) Limited* [1960] 1 W.L.R. 693

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."

2.3. It is also well recognized and settled at law that obstruction of justice may occur before curial proceedings commence. *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..."

2.4. *British American Tobacco Australia Services Limited v Cowell* (as representing the estate of Rolan Ann McCabe, deceased) [2002] VSCA 197 (6 December 2002) addressed the issue concerning the protection of evidence. However, the case was highly coloured by Eames J extraordinary ruling of summarily dismissing the defendant's normal right to offer up a defence before judgement. Instead, after hearing evidence about the destruction of evidence from the plaintiff, the jury was empanelled by Eames J to award compensation, which was reached at $700,000. The Victorian Court of Appeal overturned the decision and ruled on the matter of preservation of evidence thus:

"...As indicated at the outset, 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, 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. ... 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."

2.5. In the recent overturning of obstruction of justice conviction imposed on auditors Arthur Anderson in the famous Enron collapse in the United States, Rehnquist CJ in *Arthur Andersen LLP v United States* in 544 US 2005 at pp11-12 said this as an important rider:

> *"...the Government relies heavily on §1512(e)(1), which states that an official proceeding need not be pending or about to be instituted at the time of the offense.. It is, however, one thing to say that a proceeding .need not be pending or about to be instituted at the time of the offense, and quite another to say a proceeding need not even be foreseen. A .knowingly . . . corrup[t] persaude[r]. cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."* (Underlining added)

2.6. In both cases, the respective corporations had in place "documentation retention policies" which, in large measure, provided the basis for relief in the appellant courts from earlier obstruction of justice charges and/or a finding in damages. It was found that the existence and consistency in recordkeeping practices in regard to retention and destruction became a key feature, and, although both cases saw the shredding machines continuing to operate overtime, albeit in conformity to their respective document retention policies, it offered sufficient reason concerning "normal" conduct instead of "conspiratorial/obstructionist" conduct to overturn earlier court findings on the basis that corporations (and governments and individuals) are free to dispose of records as 'normal housekeeping'. Whereas, had an *ad hoc* destruction occurred, with a state of mind existing at the relevant time showing that it was known about the relevance of the documentation to a foreseen or foreshadowed/anticipated judicial proceeding, then both judgements may not have been reversed.

2.7. In *McCabe*, Eames J suggested that the document retention policy employed by British American Tobacco Australia (BATA), was, to all intents and purposes, a strategic shield

used to destroy documents, under the pretext of an "innocent intention", when they were known to have a legal value for would-be claimants at some future time. It was taken to believe that the shredded records would have shown an awareness inside BATA of the known adverse effects of smoking on their customers from in-house medical and scientific studies, and their destruction had denied Mrs. McCabe an opportunity to prove her case thereby undermining her right to a fair trail.

Harmonising Recordkeeping Standards

2.8. What emerges is the need for legislative harmony in recordkeeping standards and codes of conduct amongst the Australian recordkeeping community in order to protect and harmonize due process and the discovery/disclosure Rules of the Supreme Courts within the Federation. This, in turn, makes the Heiner affair highly relevant because of what has been placed on the public record by the Queensland Government, the Criminal Justice Commission (CJC) and the Australian Society of Archivists concerning what really is the proper role of the State Archivist under the *Libraries and Archives Act 1988,* now replaced by the *Public Records Act 2002.*[11]

2.9. The CJC claimed before the Senate in 1995 when taking evidence on the Heiner affair that the "legal value" of public records was none of the archivist's business when appraising them for destruction or retention, and that her sole consideration was their "historical value." Neither the Queensland Government nor the CJC/CMC has recanted this view. However, it has been hotly contested as being wrong by the archives community throughout the Australia and the world. In fact, recordkeeping law must underpin due process in terms of the preservation of records required for a legal purpose, not operate as a threat to it as stands in the Heiner affair.

The Sallmann Report for the Victoria Government

2.10. Following the *British American Tobacco Australia Services Limited v Cowell* judgement, the Victoria Government Attorney-General the Hon Rob Hulls MP commissioned Professor Peter Sallmann, Victoria Crown Counsel, to draw up fresh provisions for its *Crime Act 1958 (Vic)* and to examine the current law, procedures and practices of discovery in the conduct

[11] See Section 13 – Disposal of Public Records.

of civil litigation in Victoria. It centred on the mischief inflicted on due process by the destruction of known evidence ***before*** the judicial proceedings commence. He handed down his Report in May 2004. He recommended, *inter alia*, that a similar provision to section 39 of the *Crimes Act 1914* (Cwlth) be adopted, to which the following words might be added:

> *"...whether proceedings are in progress or are to be or may be commenced at a later date."*

2.11. Professor Sallmann also recommended that penalties be imposed under the professional conduct of legal practitioners regarding those who advise their clients to destroy documents ***before*** anticipated proceedings commence and/or how to avoid discovery/disclosure Rules by inappropriate warehousing be open to disciplinary proceedings. It is understood penalties in this area, in effect going to respect for due process, have been adopted by the Standing Committee of Commonwealth Attorneys-General, which, of relevance to this submission, included the Queensland Government and all its Crown legal officers, and are plainly being breached in terms of the unresolved Heiner affair.

2.12. Notwithstanding that there are legal arguments and propositions in the Sallmann Report with which I cavil, it ought to be noted that the *Ensbey* case in Queensland was not fully settled at the time it was completed. Therefore, even though Victoria does not have a codified criminal law as Queensland and Western Australia do, and Professor Sallmann had to address the issues within his own jurisdiction, the subsequent ruling by the Queensland Court of Appeal in *Ensbey* in September 2004 may well have influenced his recommendations in a slightly different way. This is because section 39 of the *Crimes Act 1914*[12] , which he cites, finds its origins in section 129 of the *Criminal Code* (Qld) – together with section 119 - upon which the *Ensbey* case was brought and settled. That is, in this area of respecting the administration of justice concerning protection of evidence, the definition of the term "judicial proceeding" and whether it can be "unfettered" or "fettered" in its interpretation, is the central point of argument. It was ruled that "if" and "when" it is in the contemplation of the doer – i.e. the destroyer of the evidence and/or document/s – it is the real triggering point, and not whether

[12] Section 39 of the *Crimes Act 1914* ***(Cwlth)*** states: *"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, intentionally destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, shall be guilty of an offence. Penalty: Imprisonment for 5 years."*

the plaint/writ has been signaled, filed or served by another. In short, the judicial proceeding did not have to be on foot.

2.13. It is quite clear that if a judicial proceeding has to be on foot before it can be triggered - i.e. having a plaint/writ filed and served – in respect of section 129 of the *Criminal Code* (and arguably in other jurisdictions[13] where the provision is mirrored like the Commonwealth, New South Wales, Western Australia and the Northern Territory), it must follow that section 129 provides legitimacy in respect of a "***proactive***" destruction-of-evidence mode of conduct by a party. It would invite open assault on all evidence just so long as the expected writ has not been served. This, in turn, must undermine the sister administration of justice offences of obstruction of justice and a conspiracy to pervert the course of justice because section 129 could be looked to as a positive authority to destroy known evidence just so long as the expected writ was not filed or served.

A World without Evidence

2.14. It would inevitably introduce a "world without evidence" across the Federation. It would make a wasteland of evidence. In any so-called civil society like Australia actively permitting, by law, lawyers, governments and parties to anticipated and/or expected judicial proceedings to deliberately destroy known evidence to prevent its use in those proceeding just so long as the expected writ has not been served, reduces the administration of justice to a nonsense. It would turn the civil act of putting the other party "on notice" by phone call, meeting or letter into an immediate signal to destroy all relevant evidence. It would turn the civil act of actually serving the other party with the writ/plaint, into an act of cunning ambush to stop otherwise lawful destruction-of-evidence conduct up to the second of the writ/plaint being placed in the other party's hand. It would reduce the *Constitution* and its guarantees of a fair trial, free trade and commerce for all Australians to meaningless notions.

The Evidence Acts are as follows:

- Commonwealth and ACT: *Evidence Act 1995.*
- NSW: *Evidence Act 1995.*
- Victoria: *Evidence Act 1958.*

[13] Tasmanian criminal law legislation may be fairly said to have been "influenced" by the Griffith *Criminal Code.*

- Queensland: *Evidence Act 1977.*
- WA: *Evidence Act 1906.*
- SA: *Evidence Act 1929.*
- Tasmania: *Evidence Act 1910.*
- NT: *Evidence Act 1939* and *Evidence (Business Records) Interim Arrangements Act 1984.*

2.14 All of the above Acts make reference to the term "judicial proceeding." As I am referring to Queensland's *Evidence Act 1977*, we can reasonably draw all these Acts together for the purposes of making this submission relevant to the Committee's terms of reference.

2.15 Section 39 of the *Evidence Act 1977* (Qld) - *Judicial proceedings for the purposes of the Criminal Code* – specifically cites Chapter 16 of the *Criminal Code* which deals with offences against the administration of justice. Section 39 provides for:

> *"Proceedings wherein a person gives or is required to give any testimony (either orally or in writing) pursuant to an order under section 37 shall be a judicial proceeding for the purposes of the Criminal Code, chapter 16 whether or not the testimony is given or required to be given on oath or under any other sanction authorised by law."*

2.16 In codifying the offences against the administration of justice in Chapter 16 of the *Criminal Code*, section 129 of the *Criminal Code* – 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."*

2.17 The sister provision of section 123, concerning the offence of perjury, provides for:

> *"Any person who in any judicial proceeding, or for the purpose of* ***instituting*** *any judicial proceeding, knowingly gives false testimony 9 touching any matter which*

*is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called '**perjury**'".* (Underlining added)

The Unfettered Definition of Judicial Proceeding

2.18 His Honour Davies JA in *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335, in confirming Pastor Ensbey's guilty verdict, recited the initial ruling by His Honour Judge Samios in the Queensland District Court when giving a ruling to the jury on section 129's proper interpretation. It provides the breadth of section 129 of the *Criminal Code's* "unfettered" reach in respect of judicial proceedings:

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

2.19 His Honour Jerrard JA, in the same case, sealed everything in his ruling at 46 – 48 by looking more deeply into other offences in Chapter 16 of the *Criminal Code*:

"...The definition of "judicial proceeding" provided in s 119 of the Code is an inclusive definition, and includes any proceedings "had or taken in or before any court, tribunal or person, in which evidence may be taken on oath". That inclusive definition suggests a proceeding on foot or completed, but the term is used in chapter 16 of the Code in differing ways. In s 123, dealing with the offence of perjury, it is provided:

> *"Any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony*

*touching any matter which is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called '**perjury**'".*

The term "judicial proceeding" as used therein includes a proceeding which is in contemplation only. By way of contrast in s 119B, dealing with retaliation against a judicial officer, juror, witness or member of the family of one of those, the term is used to describe a proceeding in which something has already been lawfully done by a juror or witness, and accordingly a proceeding which has occurred or is still taking place.

Since the term is used in different ways in chapter 16, and since s 129 should not be unduly restricted in its ambit, the judicial proceeding referred to in s 129 in which an offender knows that the relevant book, document, or other thing is or might be required in evidence, should be understood to include a judicial proceeding which the offender knows, or believes on reasonable grounds, may occur. An alleged offender might know, for example, that a complaint and a summons had issued or that the person suspected had been arrested, and thus that criminal proceedings were already on foot; or that a complaint had been made to the police, or that the intending complainant said he or she would report a matter to the police, in which case criminal proceedings would be foreshadowed." (My underlining)

2.20 To reiterate, the operative word in interpreting section 119 properly is "**includes**." The 'inclusiveness' of the term embraces anticipated, foreshadowed and contemplated judicial proceedings in the mind of the doer. The offence of perjury (i.e. section 123) may be committed by the doer even though the relevant judicial proceeding has not commenced because of the words in the provision ***"...to institute."*** It connotes futurity. The term plainly cannot be unfettered in its scope in section 123, and then, fettered in its sister section 129 using the same definition. Statutory interpretation does not work that way. Inconsistency in application and any lack of predictability, brings the law into disrepute, and, in respect of this Committee's terms of reference, key concern in respect of legal systems, must bring disharmony.

2.21 In short, those who adopted the "fettered" interpretation of section 119 in the Heiner affair had to reasonably know by the simple reading of section 123 that their interpretation was wrong at all times.

2.22 Although contested by the Member for Denison the Hon Duncan Kerr MP when he heard evidence on the Heiner affair in Brisbane on 27 October 2003 as a member of this 2003/04 Committee, this is basic statutory interpretation knowledge and practice. It strongly reinforces what senior QUT law lecturer Mr. Alastair MacAdam's asserted on 27 October 2003 in his evidence. Mr. MacAdam suggested[14] that if any first-year law student were to put such an erroneous view about judicial proceedings in an assignment paper, he would "low fail" that student. Now, in wake of *Ensbey*, I feel sure that the Hon Mr Kerr MP, a respected senior counsel and officer of the court, would readily acknowledge his 2003 view of the law was misconceived.

2.23 Jerrard JA in *Ensbey*, by citing the wording in respect of the offence of perjury, compellingly exposed the legal nonsense embraced and promoted by the Queensland Government and CJC in the Heiner affair, but which is ***still being embraced*** by them, even after a judicial ruling, which gives the spur to this submission.

2.24 I respectfully submit that by not recanting (and, of necessity, correcting) this known misinterpretation, it exposes a serious disharmony between Queensland's legal system, insofar as it concerns Queensland Ministers of the Crown and senior bureaucrats and the rest of Australia concerning respect for due process involving the protection of evidence which is too compelling to ignore. I suggest that Jerrard JA has boxed everyone in.

2.25 The people, and legal fraternity, are entitled to expect that the Crown, in all its various emanations, will not stand by or promote insupportable, unarguable interpretations of the criminal code which sees politicians and senior bureaucrats escape justice on the one hand,

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[14] See House of Representatives Legal and Constitutional Affairs Committee – Crime in the Community Inquiry - *Hansard* 27 October 2004 – p1417: *"... So it seems to me that the view that was expressed—that this should be used to read down the clear words—was, indeed, ludicrous. I had actually said that, if it were written in a first-year law assignment as reasons for the conclusion, you would end up with a low fail."*

while, on the other hand, for the same conduct, happily apply the same provision properly to a minister of religion with all the vigour the law permits. It turns the criminal law – i.e. as part of the legal system - into an instrument of sectional oppression.

2.26 As the term "judicial proceeding" in section 119 of the *Criminal Code* embraces both civil and criminal proceedings, the ability of the Queensland Government to destroy proactively relevant documents for any trade or commerce civil proceedings with impunity stands like a rogue bull in the middle of the road of normal, civil conduct between parties in legal dispute. The Queensland Government's failure to address the wrongs of the Heiner affair brings with it distrust in and great disharmony to our nation's legal system, and flies in the face of the recently restated norms of conduct in legal matters by Lord Donaldson MR in *Davies v Eli Lilly & Co* [1987] 1 All ER 801.

2.27 I believe that Professor Sallmann's recommendation to the Victorian Attorney-General in May 2004 that the additional words be added (as set out previously) - presumably for clarification purposes which in itself is no bad legislative thing - was not necessary in wake of the Queensland Court of Appeal's decision in *Ensbey,* moreover, they even may tend to confuse the proper interpretation of section 39 of the *Crimes Act 1914* and the similarly worded provision in the New South Wales and the Northern Territory jurisdictions.

3. ALL AUSTRALIAN LEGAL SYSTEMS ARE MISCONCEIVED ACCORDING TO THE QUEENSLAND GOVERNMENT

3.1. In April 2005, former Chief Justice of the High Court of Australia the Right Honourable Sir Harry Gibbs GCMG AC KBE considered the elements of the Heiner affair. He advised me that those involved in the shredding of the Heiner Inquiry documents were, at least, in *prima facie* breach of the law (i.e. section 129 of the *Criminal Code*).[15] He advised that the interpretation adopted by the Queensland Government and CJC regarding section 129 was erroneous. At the time, Sir Harry was considered one of Australia's foremost experts on interpreting the Griffith *Criminal Code.*

[15] See May 2005 edition of *The Independent Monthly*

3.2. Including three Queensland Court of Appeal Justices Davies, Williams and Jerrard JJA, these eminent counsel and jurists have properly interpreted section 129 ***before and since*** *Ensbey*:

- High Court of Australia Justice Ian Callinan, former Queensland Supreme and Appeal Court Justice James Thomas, Messrs. Anthony Morris QC, Robert F. Greenwood QC and current Queensland DPP, Ms. Leanne Clare.

3.3. In respect of Mr. Callinan QC, in 1995, he advised the Senate that the CJC's (erroneous) *"...strict narrow interpretation of judicial proceeding was too significant to ignore"*; while, in 2003, Justice Thomas advised that section 129 ***was never open*** to such a "fettered" view because it connoted futurity. He suggested that it was not even arguable. In light of Jerrard JA's insightful interpretation in *Ensbey*, both Messrs. Callinan and Thomas were perfectly correct in their earlier views.

3.4. Now, in the knowledge of the Queensland Court of Appeal's September 2004 decision in *Ensbey*, this Committee may look with confidence to the key recommendation (No 2) of this Committee's August 2004 Report into the Heiner affair as being perfectly sound. It relevantly said:

Recommendation 2

Given that:

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

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

3.5. It is a matter of concern that instead of all ALP members of this Committee resigning *en masse* before the tabling of the Committee's August 2004 Report into the Heiner affair, they did not hand down a dissenting minority report with legal arguments suggesting why criminal charges should not be brought against members of the Queensland Cabinet of 5 March 1990. This assumes, of course, that they could find sound legal arguments contrary to what the majority found in reaching their findings and recommendations. It therefore seems reasonable to suggest that they could not find credible legal arguments to mount and consequently no report was possible without turning the law and due process on its head, that is, they would have had to embrace disharmony. So, instead of joining with the majority, they appear to have allowed party political considerations to outweigh their sworn public duty as elected Members of Parliament to report on their parliamentary activities, and resigned *en masse*, but claiming other reasons for doing so.

Appeal to Her Excellency the Queensland Governor and the Queensland Government

3.6. On 21 October 2003, the State Governor exercised her constitutional discretion to be informed and sought a report from the Beattie Government on the Heiner affair following my putting the affair before Her Excellency on 13 October 2003. Her request was not publicly known at the time. In my letter, the following matters of legal and constitutional concerns relevant to the *Constitution of Queensland 2001* were put:

- the committal of Pastor Douglas Ensbey for his destruction-of-evidence conduct pursuant to sections 129 and/or 140 of the *Criminal Code* was highlighted;
- the erroneous interpretation of section 129 being used by law enforcement authorities to afford findings of no wrongdoing being found against Ministers of the Queensland Crown and senior bureaucrats involved in the shredding of the Heiner Inquiry documents and related matters; and

- the upcoming inquiry into the affair to be conducted by the House of Representatives Legal and Constitutional Affair Committee.[16]

3.7. The Queensland Government decided to delay its report to Her Excellency until the Ensbey trial was settled. By setting this condition, the Queensland Government by its own motion, made the Ensbey trial outcome relevant to the Heiner affair insofar as the interpretation of section 129 was concerned.

3.8. On 20 September 2004, I placed another submission before the State Governor including this Committee August 2004 Report into the Heiner affair and the Queensland Court of Appeal's judgement in *Ensbey.* All confirmed my long-held contention concerning the interpretation of section 129 to be correct, but, now, with the binding endorsement of Queensland's highest judicial authority.

Double Standards on Full Display

3.9. On 25 March 2004, an application to the Queensland Court of Appeal to have the six-month fully suspended jail sentence increased against Pastor Ensbey was advanced Queensland's Attorney-General the Hon Rod Welford MP. He claimed that the sentence was manifestly inadequate because of the seriousness of his crime. Importantly however, the perverse character of the appeal was that it was done on the back of "my" interpretation of section 129 of the *Criminal Code* which both the Queensland Government and CJC rejected concerning Ministers of the Crown and senior bureaucrats involved in the shredding of the Heiner Inquiry documents done for the stated reason of preventing their use as known evidence in a judicial proceeding.

3.10. This appeal was settled on 17 September 2004. I immediately put its significance to the State Governor on 20 September 2004 while still unaware that Her Excellency had requested a report on the matter from the Queensland Government nearly a year earlier, and was still waiting for it.

[16] It might be noted that this (publicly unknown) request of the Beattie Government from Queensland's Head of State occurred just several days ***before*** the Legal and Constitutional Affairs Committee came to Brisbane, and yet Premier Beattie still saw fit to ridicule the inquiry on the day of its arrival, describing it as *"....a political stunt."*

3.11. On 15 October and 20 November 2004 the same facts and fresh materials were placed before the Queensland Premier the Hon Peter Beattie MP by me. I called on him, as the first Minister of the State, to respect the rule of law. I requested that the Queensland Government appoint an independent Special Prosecutor to investigate the affair in order to restore public confidence in the administration of justice and government.

3.12. It ought to be noted that ***Recommendation 3*** of this Committee's August 2004 Report (see page xvi) into the Heiner affair said this:

> *That a special prosecutor be appointed to investigate all aspects of the Heiner Affair, as well as allegations of abuse at John Oxley Youth Centre that may not have been aired as part of the Heiner inquiry and may not have been considered by the Forde or other inquiries.*
>
> *That this special prosecutor be empowered to call all relevant persons with information as to the content of the Heiner inquiry documents, including but not necessarily limited to:*
>
> - *Public servants at the time, including staff of the then Department of Family Services, the Criminal Justice Commission, Queensland Police, and the John Oxley Youth Centre;*
> - *Relevant union officials*
>
> *That the special prosecutor be furnished with all available documentation, including all Cabinet documents, advices tendered to Government, records from the John Oxley Youth Centre and records held by the Department of Family Services, the Criminal Justice Commission and the Queensland Police.*

3.13. I suggested to Premier Beattie that his Oath of Office sworn before the Queensland Governor obliged him to respect the rule of law irrespective of political consequences. In the context of this Inquiry, it might be said that I requested Premier Beattie to bring harmony to our legal system on the most basic feature guaranteed under the *Constitution*, namely, that the law be applied equally.

3.14. On 17 December 2004, Premier Beattie dismissed my submissions claiming that my allegations had been *"...exhaustively investigated"*, and that the Queensland Government would not appoint a Special Prosecutor. He ***knew*** that the clearance was based on an erroneous interpretation of section 129 of the *Criminal Code*. At this time, the report requested by Her Excellency had not been furnished to her.

3.15. In the meantime, fresh evidence became available showing that on 13 October 2003 the legal team for Pastor Ensbey made an application to Ms. Leanne Clare, Queensland's Director of Public Prosecutions, to have their client relieved of the destruction-of-evidence charge brought under section 129 of the *Criminal Code* on the basis of its earlier November 1995 interpretation by former DPP, Mr. Royce Miller QC, when considering it in the context of the Heiner affair. Mr. Miller QC had advised that a judicial proceeding had to be on foot before it could be triggered, and that the Form of the Indictment Schedule (No 83) dictated the meaning of the *Criminal Code*. Ms. Clare rejected the application. She advised that the form of the words embraced "futurity" and cited *Rogerson* as the leading authority. It is now beyond doubt that Ms. Clare's view was correct, and, at best, Mr. Miller QC's was "misconceived."

3.16. It is relevant to point out that Mr. Miller QC was unquestionably wrong at law concerning the claim that the Schedule dictated the meaning of the Code as *R v His Honour Judge Morley and Mellifont* [1990]1 Qd R 54 at 56 had earlier rejected that notion by ruling that the *Criminal Code* must prevail over the Schedule. He ought to have known that.

3.17. Mr. Miller QC gave a second opinion on the alleged wrongdoing in the Heiner affair in January 1997 in the wake of the serious findings and recommendations in the Morris QC and Howard Report. Messrs. Morris QC and Howard were appointed by the (Borbidge) Queensland Government to investigate the substance of my allegations surrounding the shredding of the Heiner Inquiry documents and related matters. They were restricted to an "*on the papers*" investigation. In their October 1996 Report, they recommended that charges could be brought against those involved in the shredding of the Heiner Inquiry documents pursuant to section 129, or, in the alternate, either sections 132 or 140 of the *Criminal Code*.

They recommended a public inquiry be established because of the seriousness of the alleged wrongdoing associated with my allegations.

3.18. It is the same Mr. Tony Morris QC who is currently conducting the Commission of Inquiry into the Bundaberg Hospital, having been appointed by the Beattie Government because of his fierce independence and legal competence. Back in 1996, Messrs. Morris QC and Howard said these words in their report concerning the Heiner affair, as the facts were known at that time, at page 215:

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

3.19. The Morris/Howard Report findings and recommendations were based on an accurate interpretation of section 129. They were subsequently undermined by then DPP, Mr. Miller QC, when he again erroneously interpreted section 129 in his January 1997 advice to the Borbidge Queensland Government. ***I know this to be true because I have read the advice.*** By way of underpinning this assertion, the Queensland Opposition has also informed Premier Beattie on 19 May 2005 that Mr. Miller QC's (January 1997) interpretation is contrary to the Queensland Court of Appeal's binding ruling in *R v Ensbey,* and that the Opposition had no objection for a copy of the advice being forwarded to the Queensland Governor.

3.20. I remind the Committee that **Recommendation 1** in its August 2004 Report says this:

That the Queensland Government publicly release the 1996 (sic) advice on the Morris/Howard Report provided by the Director of Public Prosecutions to the then Borbidge Government.

3.21. As pointed out earlier, the Right Honourable Sir Harry Gibbs, in his capacity as President of *The Samuel Griffith Society*, considered these same facts set out in my paper to its 17th Annual Conference held at Coolangatta on 9 April 2005, and he advised me on 15 April 2005 that a *prima facie* offence of the *Criminal Code* (i.e. section 129) at least existed.

A Potential Constitutional Crisis

3.22. All these facts, judicial rulings and opinions were put before the Governor of Queensland and Premier Beattie. It was suggested by me that all the elements of a potential constitutional crisis were present in the Heiner affair, especially if the Queensland Government declined to address the matter. On 24 May 2005, Her Excellency informed me that she had received the Queensland Government Report, considered it, and had decided that no action, pursuant to her reserve powers, was warranted. I have since requested that this Report be made a public document lest the integrity of the Office of the Governor be indelibly tainted given the compelling nature of the evidence showing that Her Excellency's Government was placing itself beyond the reach of the law, and persisting to do so.

Declaration in the Queensland Parliament Regarding Due Process

3.23. An answer was provided to the Queensland Parliament by Premier Beattie on 14 June 2005 – which delayed this submission from being presented earlier - to a Question on Notice put by the Independent Member for Gladstone Mrs. Liz Cunningham MP. This is what was asked, and the answer provided was:

QUESTION:

(1) Has the Governor's request of 21 October 2003 for the report from the Queensland Government on the Heiner affair been complied with, if not, why not?

(2) What date did the Crown Solicitor provide the Attorney-General with a report on the matter?

(3) Why did the Queensland Government delay its report to the Governor pending the outcome of *R v Ensbey* when section 129 of the *Criminal Code* was never open to a different interpretation made in the case?

(4) Has he been informed in correspondence from Mr. Kevin Lindeberg that the Criminal Justice Commission and Office of the Director of Public Prosecutions based their findings of no wrongdoing in respect of the destruction of the Heiner Inquiry documents on an erroneous interpretation of section 129 of the *Criminal Code*?

ANSWER:

(1) Yes.

(2) 2 March 2005.

(3) In his letter to Her Excellency of 21 October 2003, Mr. Lindeberg specifically sought to contrast the position of the Queensland Government over the Heiner inquiry with the approach taken in the Ensbey case (then before the District Court). In order to provide a comprehensive report to Her Excellency on the issues raised by Mr. Lindeberg, it was considered prudent to delay the provision of the advice until that matter (i.e. Ensbey) had been finally resolved.

(4) Mr. Lindeberg's ***misconceived assertions regarding the interpretation of section 129 of the Criminal Code***, by the Criminal Justice Commission, and Office of the Director of Public Prosecutions, were contained in his letter to Her Excellency of 21 October 2003, and in subsequent correspondence addressed to me. **(Underlining added)**

3.24. It is now beyond dispute that the Queensland Government, the Office of the Director of Public Prosecutions, and the Office of Governor of the State of Queensland ***know*** that the clearance of no wrongdoing in this matter, involving Queensland Ministers of the Crown and senior bureaucrats, stand on the law being erroneously applied. They also know that while Ministers of the Crown and senior bureaucrats escaped justice by section 129 being erroneously interpreted in their case, a citizen had the same provision applied to its full

extent under Queensland's legal system to have him branded a criminal and (attempt) to have him sent to jail.

3.25 For the record, Pastor Ensbey was subsequently dismissed by the Baptist Church, and now drives a truck.

3.26 Of relevance to this Committee's terms of reference, the Premier of Queensland, as leader of a State Government in the Federation, by making this claim to Queensland's Parliament – and its people, indeed, to the world – that "my" interpretation - which is the same as the Queensland Court of Appeal - is "misconceived", is claiming that he knows the criminal law, and the demands of the legal system, better than the Queensland Court of Appeal concerning the respect for due process touching on the protection of evidence to ensure a fair trail. I suggest that such a claim brings great disharmony to legal systems throughout the Federation in respect of:

(a) legal procedures;
(b) service of legal proceedings; and
(c) the *Evidence Act*

3.27 The Queensland Government, while plainly in flagrant breach of the doctrine of the separation of powers, is claiming that everyone else in respect of the aforesaid elements of legal systems, including Queensland's highest judicial authority, is wrong except itself. I respectfully submit that the claim is simply too serious to ignore by this Committee in its report because of the open nature of the legal term "judicial proceeding." That is, regarding a "judicial proceeding", it is equally unlawful to willfully destroy records required for civil proceedings concerning trade, commerce and disputes, just as it is for criminal proceedings.[17]

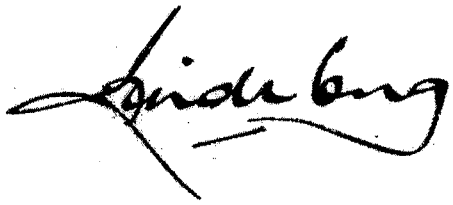
3.28 Furthermore, it ought to be noted in the aforesaid answer, particularly in the wake of *McCabe* and what SSCAG recommended contingent upon it, that the Report on this matter which went to the Queensland Governor sometime in May 2005 went initially through the

[17] It ought not be forgotten that in the Heiner Inquiry documents was known evidence about the abuse of children held in care and custody at the John Oxley Youth Detention Centre. One of the victims – a pack-rape victim - is currently suing the Queensland Government for damages flowing from a breach of duty of care. It is open to suggest that those involved in the order to destroy the records would have reasonably known that the gathered material would have provided contemporaneous probative evidence in a future judicial proceeding.

hands of (a) Queensland's Attorney-General; and (b) Queensland's Crown Solicitor. Both are pre-eminent Crown legal officers. Presuming these "Crown legal officers" also believe that "my" interpretation – and the Queensland Court of Appeal's – of section 129 of the *Criminal Code* is misconceived, then both may be in fundamental breach of lawyers professional standards and their respective first duty to the courts.

3.29 This, if correct, represents untenable disharmony in our nation's legal system, and simply must be addressed.

I am prepared to appear before the Committee and give evidence under Oath.



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