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QUEENSLAND
ombudsman

3 August 2004

Mr Alistair Sands
Secretary
Select Committee on the Lindeberg Grievance
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

As discussed, please substitute the enclosed response dated 3 August 2004 for the response dated 2 August 2004 previously forwarded to you.

Please shred or return the response dated 2 August 2004.

Yours faithfully

David Bevan
Queensland Ombudsman & Information Commissioner

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3 August 2004

Mr Alistair Sands
Secretary
Select Committee on the Lindeberg Grievance
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

I refer to your letter of 29 June 2004 concerning the above Senate Select Committee and, in particular, to your invitation to respond to evidence that the Committee considers "may reflect adversely" on me.

I note that you have marked sections of the evidence that may be relevant in that regard. The evidence you forwarded to me for comment comprises the statement dated 28 May 2004, furnished to the Committee by Mr Kevin Lindeberg.

**Page 28 of the evidence**

Mr Lindeberg does not provide any meaningful particulars or evidence to support his allegation (at p.28) that, while I was the Deputy Director of the Official Misconduct Division of the Criminal Justice Commission (CJC), I may have been party to a conspiracy of CJC officials to obstruct or mislead the Senate.

At this time I do not recall what, **if any**, involvement I had in the preparation of documents and evidence referred to by Mr Lindeberg at page 28, namely, "Senate submission 106A of 24 June 1994, the February 1995 Senate submission and/or evidence in subsequent submissions and/or evidence to the Senate Committee of Privileges concerning [my] role in the legal contents and/or assertions in respect of the Heiner Affair" (p.28 of the evidence).

Mr Lindeberg's assertion (also at p.28) is that the CJC and its officers deliberately misinterpreted s.129 of the Criminal Code (Qld) "to unlawfully benefit another (i.e. the Goss Cabinet, senior bureaucrats, Crown Law legal officers and others) from facing possible criminal charges in respect of the Heiner Inquiry documents".

I deny absolutely Mr Lindeberg's assertions to the extent they refer to me.

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Furthermore, Mr Lindeberg's purported justification for including me in the list of former CJC officers (at pp.28 and 29 of the evidence) involved in the alleged conspiracy appears to be his statement (at p.74 of the evidence) that I was Mr Barnes' immediate supervisor "at all relevant times at the CJC". Mr Lindeberg's statement is substantially misleading.

As Deputy Director of the Official Misconduct Division of the CJC during the relevant period, I was operationally responsible for several investigative teams that were not part of the Complaints Section. I had little direct involvement in the day to day operations of the Complaints Section because the Chief Officer of that Section reported directly to the Director of the Division in accordance with s.2.27(4) of the *Criminal Justice Act 1989* (later reprinted as s.36(4)) that provided:

> "The Complaints Section is to be under the control and direction of the chief officer, who is to be directly responsible to the director of the Official Misconduct Division."

I have no information to support Mr Lindeberg's assertion, and no reason to believe, that any of the other CJC officers named by him, including two former Chairmen of the CJC, were guilty of any impropriety in connection with their handling of Mr Lindeberg's complaints or in providing information to any Senate Committee about the matter.

Mr Lindeberg's assertion of deliberate misinterpretation of s.129 is based substantially on the argument that the section does not honestly permit of the interpretation advanced by the CJC and its officers in submissions and evidence to the various Senate Committee hearings.

I make the following points in relation to his allegation.

Firstly, it appears that at the relevant time there was no ruling by any court on the interpretation of s.129. That in itself tends to suggest that it was a provision seldom used. In any event, those tasked with interpreting it had to do so in the absence of authority or even guidance from the courts.

Secondly, regard should be had to the sheer implausibility of Mr Lindeberg's allegation. His allegation attacks the integrity of a large number of reputable past and current public officials, including Mr Royce Miller QC. As mentioned by Mr Lindeberg, (at p.70-71 of the evidence), Mr Miller, when the Director of Public Prosecutions for Queensland, gave advice to the Borbidge Government in 1997 in which he interpreted s.129 in a contrary way to the recent decision of the District Court in Queensland in R v. Ensbey.

Mr Miller served with distinction as a Judge of the District Court for several years before taking up appointment as the Director of Public Prosecutions. He was an experienced criminal lawyer and appellate lawyer having occupied the position of Chief Crown Prosecutor in the Solicitor-General's Office before his appointment to the Bench.

Thirdly, Mr Lindeberg's reliance upon Ensbey's case as evidence of a conspiracy is self-defeating. Although Mr Lindeberg refers to the interpretation of s.129 in that case by the learned trial judge, he fails to refer to or deal with the interpretation of s.129 advanced by the Crown Prosecutor in that case.

It is plain from a reading of the transcript that the Crown Prosecutor himself interpreted s.129 in the same way as officers of the CJC and apparently Mr Miller QC. The transcript records the Crown Prosecutor as saying:

> "... there are very real problems with count 1. That might sound strange coming from this end of the Bar table, Your Honour, but nonetheless that's what I say. Count 1 is the count under Section 129 of destroying evidence **and it seems to me, on reading Section 129, that it really presumes that there is a judicial proceeding on foot**. ..."

I take it that even Mr Lindeberg would not suggest that the Crown Prosecutor has belatedly joined the conspiracy of those who, according to Mr Lindeberg, deliberately misinterpreted s.129.

The passage quoted shows that, as recently as Ensbey's case earlier this year, lawyers continued to grapple with the interpretation of s.129.

The inescapable conclusion is that s.129 was indeed open to more than one interpretation, until such time as a court provided some guidance.

**Pages 72 to 74 - The Role of the Information Commissioner**

In September 2001, I was appointed as Queensland Ombudsman. By virtue of that appointment, I also hold the separate statutory position of Information Commissioner under the *Freedom of Information Act 1992*.

The Information Commissioner constitutes an independent review tribunal that reviews the merits of decisions by Queensland public sector agencies about access to, or amendment of, documents under the FOI Act.

Mr Lindeberg refers to several reviews conducted by the Office of the Information Commissioner in which he was the applicant for review. I do not see what relevance these matters have to the Committee's terms of reference.

In particular, Mr Lindeberg refers to a review conducted by the Office of the Information Commissioner in 1994. He suggests that I be called before the Senate "to clear the air on this segment under oath". However, as Mr Lindeberg knows, I was not the Information Commissioner at that time and I have no personal knowledge of the way the Office conducted that review.

As mentioned above, Mr Lindeberg's assertion (at page 74) that I may have had some role "in misleading the Senate" is based on his incorrect belief that I was "Mr Barnes's supervisor at all relevant times at the CJC".

Also at page 74, Mr Lindeberg refers to a ruling by the Information Commissioner on 31 May 1997. This reference occurs in a paragraph that immediately follows a paragraph referring to me as the Information Commissioner. Again, it needs to be understood that I was not the Information Commissioner in 1997 and I have no personal knowledge of the Office's handling of that matter.

Again at page 74, Mr Lindeberg refers to a review by the Office of the Information Commissioner in 2004. I have had no involvement in that review which has been conducted by my duly authorised delegate. I have been advised that my delegate's decision in that matter has recently been conveyed to Mr Lindeberg. As an independent statutory tribunal, it is not appropriate that I comment on any decision made by my Office, particularly where parties have rights of judicial review.

Once again, I emphatically deny that I have been involved in any way in providing false or misleading evidence to any Senate Committee. Furthermore, I have no information suggesting that my predecessor, Mr Fred Albietz, or any officer of the Office of Information Commissioner has been involved in providing false or misleading evidence to the Senate or in acting otherwise than strictly in accordance with their duties.

Finally, the Ombudsman is an officer of the Queensland Parliament pursuant to s.11(2) of the *Ombudsman Act 2001*. Therefore, I do not think it appropriate that I give oral evidence before the Committee.

Yours faithfully

David Bevan
Queensland Ombudsman & Information Commissioner