The Senate

Senate Select Committee on the Lindeberg Grievance

Report

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Summary

The Lindeberg grievance has its origins in the dismissal of Mr Kevin Lindeberg from his position in the Queensland Professional Officers' Association in May 1990. The grievance is inextricably linked to the Queensland Cabinet's decision to shred documents known as the 'Heiner documents' in March 1990.

Mr Lindeberg's dismissal and associated events, including the shredding of the Heiner documents, have been investigated on a number of occasions over the years by a number of different authorities. The most comprehensive report on these matters was made to the Queensland Premier and Cabinet by Anthony J H Morris QC and Edward J C Howard, Barrister-at-Law.[1] Rather than rehearse again the events and issues related to the Lindeberg grievance, the Committee recommends that report to interested persons.

As may be seen from the Committee's terms of reference, aspects of the Lindeberg grievance have previously been canvassed in four Senate inquiries. The matter has again come before a Senate committee because Mr Lindeberg claimed that deliberately misleading evidence, possibly constituting contempt of the Senate, was given to the previous inquiries.

In this inquiry Mr Lindeberg also introduced a new aspect to the grievance, namely, an allegation that the Heiner documents were shredded to cover up child abuse.

During the inquiry Mr Lindeberg made serious and wide-ranging allegations of personal and institutional incompetence and corruption. Although the Committee had serious reservations about publishing these allegations, it did so in order to ensure that Mr Lindeberg's allegations were fully aired. In accordance with Senate requirements the Committee invited the persons and institutions about whom allegations were made to respond to those allegations.

Many of the allegations and much of the evidence presented to the inquiry fall outside the Committee's terms of reference, which relate to whether false and misleading evidence was given to previous Senate committees and whether any contempt of the Senate was committed in that regard. While the second part of the Committee's terms of reference covers three broad areas of public policy, namely, the prevention of destruction and concealment of government information, protection of children from abuse and protection of whistleblowers, that part of the terms of reference is contingent on the first.

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1 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds,* 10 October 1996

In relation to the first term of reference, Mr Lindeberg specifically identified four main matters in which he claims the previous inquiries were misled. Accordingly the report focuses on these matters, which are:

(a) providing to the Senate a contrived interpretation of section 129 of the *Criminal Code (Qld) 1899* in particular, and of *Public Service Management and Employment Regulation 65* and *Libraries and Archives Act 1988*;

(b) deliberately tampering with evidence as in Document 13 by providing it to the Senate in an incomplete form in order to inflict a detriment on a witness and/or witnesses to a related Senate inquiry, and to improperly obstruct the Senate inquiry from making full and proper findings and recommendations;

(c) deliberately withholding known relevant evidence from the Senate which was in the possession and control of the Queensland Government at all relevant times revealing the crime of pack-rape and criminal paedophilia; and

(d) failing to properly disclose to the Senate the true nature of the February 1991 Deed of Settlement between Mr Peter Coyne and the State of Queensland concerning certain 'events' at the John Oxley Youth Detention Centre, which both parties agreed to never publicly disclose in exchange for the payment of taxpayers' moneys after threats were made by certain persons against State public officials to take the matter to the CJC, in particular, to investigate.[2]

In all cases, the Committee reviewed the evidence provided to this inquiry and to the four inquiries listed in the terms of reference. In that review and in its consideration of whether any contempt was committed, the Committee was guided by the advice of the Clerk of the Senate who advised that, for a finding of contempt to be substantiated, a culpable intention must be demonstrated.

In respect of allegation (a), the Committee found that the interpretations of the relevant law that were given by witnesses to previous committees were probably incorrect. However, in no case was there any evidence given that would substantiate a claim that the interpretations were intended deliberately to mislead those committees.

In respect of allegation (b) the Committee requested the Queensland Government to provide an unedited copy of Document 13 so that it would be in a position fully to test Mr Lindeberg's allegation that the document had been tampered with to inflict a detriment on a witness. The Queensland Government did not provide the document. In its absence the Committee has had to make a determination on the evidence that is available. On the basis of that evidence the committee has not been able to establish that a contempt of the Senate was committed in regard to Document 13.

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2 Mr Lindeberg, Submission no. 1, p.5

In respect of allegation (c), it was not established whether allegations of sexual abuse were made to the Heiner inquiry. The Committee therefore could not find that evidence on these matters was withheld from previous inquiries.

The evidence provided to the Committee in relation to child abuse focused primarily on the details of a particular sexual assault, the inadequacy of investigations into that assault and failure to hold anyone accountable. While the Committee is deeply concerned by the evidence that it has received, this inquiry is not the appropriate vehicle for the investigation of these matters. These matters involve criminal offences which are a matter for the Queensland legal system.

In allegation (d), Mr Lindeberg claimed that the payout and wording of the deed of settlement between Mr Coyne and the Queensland Government were intended to conceal child abuse, and that this intention was deliberately withheld from previous Senate committees. The Committee found that this allegation could not be substantiated from the available evidence.

The Committee has therefore concluded in respect of all the allegations that no contempt of the Senate was committed. These conclusions are consistent with the findings of the two Committee of Privileges inquiries into the Lindeberg grievance, which found that Mr Lindeberg's allegations of false and misleading evidence were without substance.

The Committee received little evidence in relation to the second part of the terms of reference. Nevertheless, some important issues arising from the evidence given in respect of the Lindeberg grievance have been identified and discussed in Chapter 4.

Limitation of time meant that the Committee unfortunately could not obtain an unedited copy of Document 13 nor were some prospective witnesses willing to come forward. Most of those persons are, or were at the relevant time, officers of the Queensland Government, and the Committee was reluctant to test the constitutional powers of the Senate to compel them to appear.

The Senate and its committees over the past decade have devoted significant resources to inquiring into matters raised and allegations made by Mr Lindeberg. Mr Lindeberg has had ample opportunity to make his case. Three inquiries have now been conducted into Mr Lindeberg's allegations that false and misleading evidence has been given to Senate committees, but none has been able to substantiate the allegations. The Committee suggests that there would be little point in Mr Lindeberg's pursuing his grievance further in these forums in the absence of compelling, new, relevant evidence.

Introduction

Terms of reference

On 1 April 2004 the Senate resolved that a Select Committee, to be known as the Select Committee on the Lindeberg Grievance, be appointed to inquire into and report, by 5 October 2004, on the following matters:

(a) whether any false or misleading evidence was given to the Select Committee on Public Interest Whistleblowing, the Select Committee on Unresolved Whistleblower Cases or the Committee of Privileges in respect of the matters considered in its 63rd and 71st reports; and whether any contempt was committed in that regard, having regard to previous inquiries by Senate committees relating to the shredding of the Heiner documents, the fresh material that has subsequently been revealed by the Dutney Memorandum, and Exhibits 20 and 31 tabled at the Forde Commission of Inquiry into the Abuse of Children in Queensland Institutions, and any other relevant evidence; and

(b) the implications of this matter for measures which should be taken:

(i) to prevent the destruction and concealment by government of information which should be available in the public interest,

(ii) in relation to the protection of children from abuse, and

(iii) for the appropriate protection of whistleblowers.

On 30 August 2004 the Senate extended the date for the presentation of the Committee's report to the day before the first sitting of the 41st Parliament, in effect to the 15 November 2004.

Background to the inquiry

The Select Committee on the Lindeberg Grievance was appointed on the motion of Senator Harris. The Committee is the fifth Senate committee to examine matters covered under the banner of the 'Lindeberg Grievance'.

The Lindeberg Grievance has its origins in the treatment of a whistleblower, Mr Lindeberg, and as such was first canvassed before a Senate committee in evidence to the Senate Select Committee on Public Interest Whistleblowing. Mr Lindeberg's whistleblower case and associated matters was one of several cases later considered in more detail by the Senate Select Committee on Unresolved Whistleblower Cases. It was later alleged that witnesses had deliberately provided misleading evidence to that inquiry.

These allegations, of deliberately providing misleading evidence possibly constituting a contempt of the Senate, were investigated by the Committee of Privileges in its 63rd

and 71st reports. Further allegations of misleading the Senate and possible contempt have now been made, giving rise to the current inquiry.

Conduct of the inquiry

Submissions and hearing

The Committee advertised the inquiry on 5 May 2004 in *The Australian* and on the Senate website and wrote directly to a number of stakeholders inviting submissions. Interested persons were invited to lodge submissions by the 31 May 2004, although the Committee agreed to accept several submissions after that date. Eight submissions were received and published by the Committee and are listed at Appendix 1.

As many of the persons and organisations that were in a position to assist the inquiry are, or were at the relevant times, office holders or public servants of the Queensland Government, the Committee invited the Queensland State Government to make a submission to the inquiry. The Queensland Government declined. Issues relating to this outcome are discussed in Chapter 1.

The Committee held one public hearing on 11 June 2004 in Brisbane. Three witnesses appeared before the Committee at that hearing. These witnesses are listed in Appendix 2.

The Committee had arranged another public hearing for 16 and 17 August 2004 at which it was proposed that a number of issues should be pursued with Mr Lindeberg and with other witnesses. That hearing did not occur because of the 2004 federal election. The Committee was therefore unable to complete its proposed program of public hearings and some issues could not be pursued to the satisfaction of all members of the Committee. The Committee had also sought copies of certain documents from the Queensland Government that had not been provided before the completion of this report.

Responses to evidence

During the inquiry serious allegations were made about individuals and certain organisations. The Committee considered that, had these allegations been made in another context, they could have given rise to legal action. Although the Committee had serious reservations about publishing the allegations, it decided to do so, on the basis that the Lindeberg Grievance could not be properly made out or properly investigated without publication of that material.

The Committee considered that the allegations amounted to 'possible adverse reflections' as defined in *Odgers' Australian Senate Practice.*[3] The persons and

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3 *Odgers' Australian Senate Practice*, 10th Edition, pp.435-436

organisations concerned were therefore given the opportunity to respond, in accordance with the Senate Privileges Resolutions.[4]

The responses to possible adverse reflections which the Committee agreed to publish are included in the documents tabled with this report. Some of the material contained in those responses has been used in this report.

Documents listed in the terms of reference

Three documents are specifically referred to in the Committee's terms of reference. Under the terms of reference, the Committee is required to have regard to:

> … the fresh material that has subsequently been revealed by the Dutney memorandum, and Exhibits 20 and 31 tabled at the Forde Commission of Inquiry into Abuse of Children in Queensland Institutions …

The Dutney memorandum and Exhibits 20 and 31 are copies of memoranda prepared by the then management of the John Oxley Youth Centre (JOYC) and concern the actions and competence of named subordinate staff. The Committee had major reservations about publishing the documents because they contain strong criticisms of some staff who are not directly connected with this inquiry. Given its concerns, the Committee sought the advice of the Clerk of the Senate on the matter.

The Clerk's advice, in summary, was:

> Against the minimal likely assistance to the committee's inquiry arising from the publication of the documents, there is the harm that would be done to persons referred to in the documents, and the diversion of the committee's inquiry by probable consequent disputes about the truth of those allegations.
>
> In this situation, it would appear that the advisable course for the committee is not to publish the documents but to receive and consider them for the purposes of the committee's inquiry, that is, to consider them so far as they are relevant to the question of whether misleading evidence was given. [5]

The Committee accepted the Clerk's advice and has not published the documents. The Clerk's letter of 18 May 2004 may be found at Appendix 3.

Structure of the report

Chapter 1 of this report discusses a number of procedural issues related to the terms of reference and conduct of the inquiry. Chapter 2 sets out an abridged history of the events, issues and previous inquiries associated with the Lindeberg Grievance. In Chapter 3 the Committee reports on term of reference (a), addressing the allegations

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4 Resolution 1(13) of Resolutions agreed to by the Senate on 25 February 1988, in *Odgers' Australian Senate Practice*, 10th Edition, p.573

5 Clerk of the Senate, *Correspondence*, 18 May 2004

that false and misleading evidence, possibly constituting contempt of the Senate, was provided to previous committee inquiries. Chapter 4 reports the Committee's findings regarding term of reference (b).

Evidence to the inquiry focused on part (a) of the terms of reference. The committee received only one submission that specifically related to term of reference (b). Given the evidence, and that part (b) of the terms of reference is contingent on part (a), the report focuses principally on term of reference (a).

Acknowledgement

The Committee wishes to thank all those who assisted with this inquiry.

CHAPTER 1

Procedural Issues

The reference

1.1 The Committee's terms of reference are in two parts. The first concerns a matter of privilege; the second is contingent on the first and concerns implications that arise from the Committee's consideration of the matter of privilege for the treatment of public information, protection of children and protection of whistleblowers.

1.2 Before proceeding to address the specific terms of the reference, the Committee has reported in this chapter on a number of procedural issues concerning the reference and the conduct of the inquiry.

The matter of privilege

1.3 The matter of privilege relates to whether any false or misleading evidence was given to four Senate inquiries, the Senate Select Committee on Public Interest Whistleblowing, the Senate Select Committee on Unresolved Whistleblower Cases, and the 63rd and 71st inquiries of the Committee of Privileges, and whether any contempt was committed in that regard.

1.4 This is the first time that a matter which may involve, or has given rise to any allegation of, contempt of the Senate has been referred to a committee other than the Committee of Privileges since that committee was established in 1966.

1.5 The Committee of Privileges has developed specialist expertise over the many years that it has investigated cases of possible contempt of the Senate. Its findings and recommendations have almost without exception been unanimous and have invariably been endorsed by the Senate.

1.6 No doubt for these reasons, there is an expectation that matters that may involve contempt of the Senate will be referred to the specialist Committee of Privileges. This expectation finds expression in the Privilege resolutions agreed to by the Senate in 1988. Among other things, the resolutions set out a process by which allegations raised by a Senator, or a Senate committee, are considered by the President and then may be referred to the Committee of Privileges.

1.7 The current reference, however, resulted from the Senate's agreeing to a motion moved by a Senator in the Senate chamber. There was no debate in the chamber which might have indicated the reason for this departure from precedent for dealing with matters that might involve contempt.

The Privilege Resolutions

1.8 Although there was a departure from precedent in the reference of this matter to a select committee, the Committee has nevertheless adhered to the provisions of the other Privilege Resolutions as far as possible in its conduct of the inquiry.

1.9 Privilege Resolution 3 in particular shaped the Committee's approach to the inquiry. The resolution reads as follows:

> The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:
>
> (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;
>
> (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
>
> (c) whether a person who committed any act which may be held to be a contempt:
>
> (i) knowingly committed that act, or
>
> (ii) had any reasonable excuse for the commission of that act.

Precedent and practice

1.10 In considering possible matters of contempt, the Committee of Privileges not only takes into account the above resolution, but it has established that a finding of contempt requires that a finding of a culpable intention should be proved.[1] This Committee also has been guided by that principle.

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1 See Committee of Privileges, *107th Report*, p.66 and Clerk of the Senate, *Correspondence*, 20 August 2004 (appended to this report)

False and misleading evidence

1.11 In Privilege Resolution 6, the Senate has declared, as a matter of guidance, that (among other things) the following may be treated as a contempt:

> (6) (12) A witness before a Senate committee shall not:
>
> (c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every particular.

1.12 The Committee of Privileges has inquired into several cases in which it has been alleged that the giving of false and misleading evidence may have amounted to contempt. In no case has it found that a contempt has been committed. In its 107th Report the Committee of Privileges reported that:

> Fourteen of the committee's reports in the period 1988-2002 have related in whole or in part to whether false or misleading evidence was given to the Senate or a Senate committee. Given the scope for differing interpretations of the character of evidence, it is not surprising that the committee has been unable, to date, formally to find contempt on this ground.[2]

Power to compel evidence

1.13 Many of the persons and organisations that were in a position to assist the Committee's inquiry with submissions are, or were at the relevant times, office holders or public servants of the Queensland Government.

1.14 The Committee invited the Queensland State Government to make a submission to the inquiry, but it declined to do so. The Premier of Queensland responded to the Committee's invitation as follows:

> Given the extensive examination of these issues to date, I can see no public interest in my Government being involved in yet a further inquiry. My Government has no further information or material to add to that already placed on the public record, and it will not be making a submission to the current Inquiry.[3]

1.15 The question therefore arose as to whether state government office holders or public servants could be compelled to give evidence. Although it is clear that current and former Commonwealth officials may be compelled, this may not be true of state government officials. The Committee sought the advice of the Clerk of the Senate, who advised that:

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2 Committee of Privileges, 107th Report, p.33

3 The Hon P Beattie, Premier of Queensland, *Correspondence*, 29 June 2004, p.2

> As indicated in *Odgers' Australian Senate Practice* and in advices provided to Senate committees referred to there, Senate committees have refrained from ordering state office-holders to attend and from requiring the production or examination of state documents, on the basis of a rule of comity between levels of government in a federal system.[4]

1.16 In his advice, the Clerk referred to the report of the Select Committee on the Victorian Casino Inquiry in 1996, in which there is a detailed discussion of the Senate's powers to compel evidence and the implicit limitations on those powers. That committee concluded as follows:

> As a consequence of the legal issues canvassed … and the Committee's adherence to the principles of comity, the Committee formed the view that it was inappropriate to proceed with the compelling of witnesses in circumstances in which different classes of witnesses would be subject to different rights.[5]

1.17 In light of the advice received, the relevant precedents and the likely practical difficulties, the Committee resolved not to seek to compel evidence from State Government witnesses, or from any other witnesses.

Contempt and state government office holders

1.18 Given that it is uncertain that the Senate may compel evidence from state government office holders, an associated question arises. May the Senate make a finding of contempt against such a person? In his advice of 20 August 2004, the Clerk of the Senate gave the following opinion:

> The advices of 29 April and 7 June 2004 referred to the question of whether state officials are compellable witnesses in a Senate inquiry. A closely related question is whether any finding of contempt may be made against state officials. On one view, the rule of comity between jurisdictions in the federation, which is the basis of the practical, if not legal, immunity of state office holders from compulsion, would also entail that findings of contempt may not be made against them.
>
> Regardless of the answer to that question, any attempt to impose sanctions on state office holders for any contempt which is found would fall squarely into the area covered by the rule of comity and possible legal immunity. The committee would readily appreciate the practical difficulties of enforcing any sanction against state office holders.[6]

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4 Clerk of the Senate, *Correspondence*, 29 April, 2004, p.1 (appended to this report)

5 Senate Select Committee on the Victorian Casino Inquiry, *Compelling Evidence*, p.25

6 Clerk of the Senate, *Correspondence*, 20 August 2004, p.2

Contempt and criminal offences

1.19 During the inquiry the Committee also sought the advice of the Clerk of the Senate on the relevance of the terms of reference to any breach of section 129 of the Queensland Criminal Code. This matter is discussed in detail later in the report but, in relation to any relevance of the offence of contempt and criminal offences, the Clerk advised that:

> The act of giving misleading evidence to a Senate committee may be a contempt of the Senate, but it is not a criminal offence that can be prosecuted in the courts. The point that a breach of Section 129 of the Queensland Criminal Code is a criminal offence under the law of that state does not alter that situation. Any contempt of the Senate would still be a contempt of the Senate only, and would not have any additional element because the subject matter of the misleading evidence happened to relate to a criminal statute.[7]

Conclusion

1.20 The Committee has conducted its inquiry within the procedures determined by the Senate for the determination of possible contempts. The inquiry has been constrained, however, to the extent that the Committee may not have had access to all the relevant evidence because of the lack of cooperation from the Queensland Government and the uncertainties surrounding the compelling of evidence.

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7 Clerk of the Senate, *Correspondence*, 20 August 2004, p.2

CHAPTER 2

The Grievance

Background

2.1 The Lindeberg grievance has its origins in the dismissal of a union organiser and whistleblower, Mr Kevin Lindeberg, from his position in the Queensland Professional Officers' Association (QPOA) in 1990.[1]

Previous investigations

2.2 Mr Lindeberg's dismissal and associated events have been investigated on a number of occasions over the years by a number of different authorities, including the Queensland Criminal Justice Commission (CJC), the Queensland Parliamentary Committee on the CJC, the Queensland Auditor General, the Queensland Police Service, commissions of inquiry, the House of Representatives Standing Committee on Legal and Constitutional Affairs and committees of the Senate. Mr Lindeberg has expressed dissatisfaction with several of these inquiries, making serious allegations of incompetent and corrupt behaviour.[2]

2.3 These allegations have been strongly challenged by the persons and organisations against which they were made. For example, the Committee received correspondence rejecting Mr Lindeberg's assertions from the Queensland Police Service, which stated:

> The Service does not accept that it or its members acted inappropriately, incompetently or with malice, spite or bias, during the course of investigations into allegations raised by Mr Lindeberg nor does it accept that it or its members failed to undertake the functions given to the organisation pursuant to the *Police Service Administration Act 1990* (Queensland)…[3]

2.4 Mr Bevan, Queensland Ombudsman and Information Commissioner, also contested the allegations, stating:

> 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…were guilty of any impropriety in connection with their

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1 Mr K Lindeberg, Submission to the Senate Select Committee on Public Interest Whistleblowing, 3 December 1993, p.1

2 Mr Lindeberg, Submission no. 1, pp.61-77

3 Mr R Conder, Deputy Commissioner and Deputy Chief Executive (Operations) Queensland Police Service, *Correspondence*, 20 October 2004

handling of Mr Lindeberg's complaints or in providing information to any Senate Committee about the matter.[4]

2.5 As stated earlier in this report, responses to Mr Lindeberg's allegations which the Committee agreed to publish have been tabled with this report.

2.6 The most recent report on Mr Lindeberg's dismissal and associated events was presented by the House of Representatives Standing Committee on Legal and Constitutional Affairs in August 2004. In the context of its inquiry into the extent and impact and fear of crime within the Australian community, the House of Representatives committee inquired into the events (described by the committee as 'the Heiner affair') and reached conclusions and made recommendations based on its understanding of those events. As is the case with this Senate committee inquiry, the Queensland Government did not cooperate with the inquiry conducted by the House of Representatives committee.

2.7 It should be noted that the House of Representatives committee's terms of reference were different from, and much wider than, the reference before this committee which has been asked by the Senate to inquire into matters that might constitute contempt of the Senate.

2.8 The most comprehensive report on 'the Heiner affair' was one made to the Queensland Premier and Cabinet by Anthony J H Morris QC and Edward J C Howard, Barrister-at-Law.[5] The Committee recommends that report, which was presented to the Queensland Legislative Assembly on 10 October 1996, to persons wishing to inform themselves of the detail of the events and issues that surround the Lindeberg grievance.

2.9 A brief outline of the relevant major events and issues may be found in the sections that follow.

Major events and issues in brief

2.10 Mr Lindeberg was appointed by QPOA in late 1989 to represent the interests of a member, Mr Coyne, the then manager of the John Oxley Youth Centre (JOYC), a juvenile detention centre in Queensland. Mr Coyne was at the time involved in a dispute with the Department of Family Services about access to documents that contained allegations made by staff about his management of the centre.

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4 Mr D Bevan, Queensland Ombudsman and Information Commissioner, *Correspondence,* 3 August 2004

5 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds,* 10 October 1996

2.11 In November 1989, the then Department of Family Services had established an inquiry based on the allegations. A retired stipendiary magistrate, Mr Heiner, was appointed by the minister to conduct the inquiry. The department passed copies of the staff complaints that it had received from the Queensland State Services Union to Mr Heiner, who also gathered additional information from Mr Coyne and other staff of JOYC during his inquiry.

2.12 The Heiner inquiry was wound up on 7 February 1990 by the new Labor State Government and on 12 February 1990 Mr Coyne was seconded from his position at JOYC to head office. Subsequently, he was made redundant in February 1991, and received a payment of $27 190 over and above his normal redundancy entitlements.

2.13 Also in February 1990 Mr Coyne, through his solicitors, had written to the department to seek access to the documents in which allegations were made against him. The documents that had been submitted to, or generated by, the Heiner inquiry (the Heiner Documents) were shredded on the order of the Queensland Cabinet. The Cabinet decision was made on 5 March 1990 and the Heiner documents were shredded on 23 March. The department did not inform Mr Coyne until 22 May 1990 that it was unable to provide access to the documents because they were not in its possession or control.

2.14 The Queensland Government sought to justify its decision to shred the documents on the grounds that the people who had given information to the inquiry, including Mr Coyne, did not have immunity from legal action. There is some dispute about this, but an opinion given by the Crown Solicitor at the time suggests that the persons involved did not have absolute immunity from action for defamation.

2.15 Mr Lindeberg, on behalf of Mr Coyne, had also made representations to the department and the Minister for access to the documents. His actions in that regard led to his removal from the case by the QPOA, and were one of seven reasons given by the union for his dismissal.

2.16 Following the shredding of the Heiner documents, the original complaint documents were returned by the department to the union. Copies that had been provided to the Crown Solicitor by the department and had been returned to the department were also destroyed. These documents were shredded on 23 May 1990, the day after the department informed Mr Coyne that it was unable to provide access to the documents because they were no longer in its possession or control.

2.17 Mr Coyne and Mr Lindeberg have alleged that destruction of the Heiner documents involved a breach of one or more provisions of the Queensland Criminal Code because the Queensland Cabinet had decided to destroy the documents knowing that they were required for prospective legal

proceedings. There have also been allegations of breaches of Queensland Public Service and Management Regulations and of the Queensland Libraries and Archives Act. These allegations have consistently been denied by various Queensland State office holders and by the Criminal Justice Commission, which have given evidence to Senate committees that have inquired into the issues.

Senate committee inquiries

2.18 As stated earlier, the events and issues surrounding Mr Lindeberg's dismissal and the shredding of the Heiner documents have been the subject of several inquiries. This Committee has been asked to inquire into whether any false or misleading evidence was given to four Senate committee inquiries and whether any contempt of the Senate was committed in that regard. The relevant inquiries are as follows:

- Select Committee on Public Interest Whistleblowing (Report presented August 1994);
- Select Committee on Unresolved Whistleblower Cases (Report presented October 1995);
- Committee of Privileges (63rd and 71st reports) (Reports presented December 1996 and May 1998).

2.19 Mr Lindeberg was a witness at the first inquiry into these matters, which was undertaken by the Senate Select Committee on Public Interest Whistleblowing (PIW Committee). He submitted details of his dismissal from the QPOA and of the shredding of the Heiner documents to that committee. The Queensland Government did not co-operate with the inquiry, but the CJC, a state instrumentality, was a witness. The PIW Committee did not report specifically on Mr Lindeberg's allegations, but it recommended that the Queensland Government establish an independent investigation into unresolved whistleblower cases within its jurisdiction.

2.20 The Queensland Government did not accept the recommendation, and the Senate established another select committee, the Senate Select Committee on Unresolved Whistleblower Cases (UWB Committee), to inquire into those cases itself. The Queensland Government again refused to co-operate in the inquiry, but the CJC was again a witness.

2.21 It was from the inquiry into unresolved whistleblower cases that the two references to the Committee of Privileges arose. Mr Lindeberg alleged on two different occasions in 1996 and in 1998 that the CJC had given false and misleading evidence to the UWB Committee in relation to different matters, and that a contempt of the Senate may have been committed in that regard. These allegations were referred to the Committee of Privileges under the procedures of the Senate. The committee investigated the allegations and on

both occasions reported to the Senate that no contempt had been committed. In both reports the Committee of Privileges expressed the view that the most appropriate avenues for examination of matters of the kind referred to it are state institutions.[6]

2.22 Despite the findings of the Committee of Privileges, this Committee has again been asked to inquire into further allegations made by Mr Lindeberg that false and misleading evidence was given to the UWB inquiry, and also to the Committee of Privileges.

2.23 Mr Lindeberg made many allegations at this inquiry in respect of the evidence that was given to the earlier inquiries. Specifically, he has identified four main matters in which he claims that those inquiries were misled. These matters are as follows:

(a) providing to the Senate a contrived interpretation of section 129 of the *Criminal Code (Qld) 1899* in particular, and of *Public Service Management and Employment Regulation 65* and *Libraries and Archives Act 1988*;

(b) deliberately tampering with evidence as in Document 13 by providing it to the Senate in an incomplete form in order to inflict a detriment on a witness and/or witnesses to a related Senate inquiry, and to improperly obstruct the Senate inquiry from making full and proper findings and recommendations;

(c) deliberately withholding known relevant evidence from the Senate which was in the possession and control of the Queensland Government at all relevant times revealing the crime of pack-rape and criminal paedophilia; and

(d) failing to properly disclose to the Senate the true nature of the February 1991 Deed of Settlement between Mr Peter Coyne and the State of Queensland concerning certain 'events' at the John Oxley Youth Detention Centre, which both parties agreed to never publicly disclose in exchange for the payment of taxpayers' moneys after threats were made by certain persons against State public officials to take the matter to the CJC, in particular, to investigate.[7]

2.24 These matters are dealt with in Chapter 3 of this report.

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6 Committee of Privileges, *Further Possible or Misleading Evidence before select Committee on Unresolved Whistleblower Case: 71st Report*, p.10

7 Mr Lindeberg, Submission no. 1, p.5

CHAPTER 3

The Allegations

S 129 of the Queensland Criminal Code

Introduction

3.1 One of Mr Lindeberg's principal allegations is that Queensland State officials gave false and misleading evidence to Senate committees by knowingly adopting and maintaining a false interpretation of section 129 of the Queensland Criminal Code.

3.2 Section 129 of the Queensland Criminal Code reads as follows:

> **129 Destroying evidence**
>
> 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 for 3 years.

3.3 A detailed discussion of the possible application of section 129 of the Criminal Code to the shredding of the Heiner documents may be found in the Morris-Howard Report.[1]

The allegations

3.4 Mr Lindeberg has alleged that:

> It is open to conclude that section 129 of the Criminal Code (Qld) 1899 has been deliberately misinterpreted not only 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 shredding of the Heiner Inquiry documents (and disposal of the original complaints which prima facie falls on Ms. Matchett, certain senior public officials and certain Crown Law legal officers), but, by putting its known false and misleading interpretation, the Senate may have been wilfully obstructed from making full and proper findings and recommendations and treated with criminal contempt in order to cover up crime and advantaged the contemptor.[2]

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1 Morris and Howard, *An Investigation into Allegations by Mr Kevin Lindeberg and Allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, pp.88-96

2 Mr Lindeberg, Submission no. 1, p.28

3.5 Another witness, Mr MacAdam, a Senior Lecturer in Law at the Queensland University of Technology, stated that:

> The CJC not only reached their original clearly wrong conclusion but came to the Senate and repeated that clearly wrong conclusion. They have not sought to correct it. As far as I am aware, even to date, the new Crime and Misconduct Commission has not sought in any way to say, 'What we did back there was clearly wrong.'[3]

Interpretations of section 129

3.6 The Queensland State officials' interpretation of section 129 that was put to previous Senate committees is succinctly expressed in a memorandum written by the then Crown Solicitor, Mr O'Shea, which was tabled in the Queensland Legislative Assembly on 30 March 1995. In that memorandum Mr O'Shea commented as follows in relation to evidence given to the Senate Select Committee on Unresolved Whistleblower Cases (UWB Committee) on 23 February 1995:

> From media reports, I had the impression that Mr Callinan was submitting that Section 129 of the Criminal Code … had been infringed by the destruction of the Heiner documents …, and that there was a large body of law dealing with when a matter is 'pending'.
>
> If that had been his submission, then clearly, it would have been wrong, because never have I heard any Counsel suggest Section 129 could be contravened where the matter in which evidence may be required, is not actually pending in a court.[4]

3.7 After elaborating on his reasons for that opinion, Mr O'Shea concluded:

> In short, the law is quite clear as to when a Civil or Criminal proceeding is pending and, as no proceedings were ever commenced on behalf of Mr Coyne, no offence was committed against Section 129.[5]

3.8 The CJC interpreted section 129 in the same way, as is clear from the following exchange between a member of the UWB Committee and an officer of the CJC at a hearing of the on 29 May 1995:

> Senator Abetz – The destruction of that potential evidence, as you say, is not a criminal offence because proceedings had not been instituted.
>
> Mr Barnes – I would not expect you to accept my word for it. Mr O'Shea, the Crown Solicitor, and Mr Callinan QC say it is not a criminal offence.[6]

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3 Mr MacAdam, *Committee Hansard,* 11 June 2004, p.70

4 Crown Solicitor, Memorandum to the Minister for Justice, Attorney-General and Minister for the Arts, tabled in the Queensland Legislative Assembly, 30 March 1995, pp.1-2

5 Crown Solicitor, Memorandum to the Minister for Justice, Attorney-General and Minister for the Arts, tabled in the Queensland Legislative Assembly, 30 March 1995, p.3

6 Senate Select Committee on Unresolved Whistleblowers, *Committee Hansard,* p.697

3.9 In relation to the Crown Solicitor's opinion, Morris and Howard concluded that:

> For the reasons stated, we respectfully disagree with the Crown Solicitor's view that section 129 only applies if a book, document or other thing is destroyed, or rendered illegible, undecipherable or incapable of identification, at a time when a judicial proceeding is 'pending'.[7]

3.10 With hindsight, the view of Morris and Howard may have been correct, because a court found in 2004 that an offence under section 129 was committed despite the fact that no proceedings were pending (*R v. Ensbey)*.

3.11 Although the interpretation put forward by the CJC and the Queensland Government is therefore now in doubt, the question arises as to whether that interpretation was reasonable. In response to Mr Lindeberg's allegations, the Queensland Ombudsman, Mr Bevan, who was at the relevant time the Deputy Director of the Official Misconduct Division of the CJC, informed the Committee that:

> 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 present public officials, including Mr Royce Miller QC….
>
> 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 failed to refer 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. …
>
> I take it that even Mr Lindeberg would not suggest the Crown Prosecutor has belatedly joined the conspiracy of those who, according to Mr Lindeberg, deliberately misinterpreted 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.[8]

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7 Morris and Howard, *An Investigation into Allegations by Mr Kevin Lindeberg and Allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, p.92

8 Mr Bevan, Correspondence, 3 August 2004, pp.2-3

Previous inquiries

Senate Select Committee on Public Interest Whistleblowing

3.12 An allegation that the shredding of the Heiner documents may have been in breach of the Queensland Criminal Code was first brought before a Senate committee by Mr Lindeberg in his submission to the PIW Committee on 14 December 1993. In that submission Mr Lindeberg reported that Mr Coyne had said that a breach of the Queensland Criminal Code had occurred, but he cited sections of the Code other than section 129.[9]

3.13 The CJC in a supplementary submission to the inquiry, dated 24 June 1994, responded to that proposition by stating that the destruction of the documents was not in breach of section 129 because no judicial proceeding was underway.[10]

3.14 Mr Lindeberg returned to the subject in a letter dated 4 July 1994, in which he alleged that 'elements of the offence of "attempting to obstruct justice" (Section 140 of the Queensland Criminal Code) and/or "perverting the course of justice" (Section 132 of the Queensland Criminal Code) can be made out in respect of the shredding'.[11] Mr Lindeberg quoted the judgement of the High Court of Australia in *R v Rogerson* to indicate that an offence to pervert the course of justice may be entered into although no proceedings before a court or before any other competent judicial body are then pending or are even contemplated by anyone other than the conspirators.

3.15 The PIW Committee did not address the issue in its report. The committee reported, however, that it 'remained concerned at the number of apparently unresolved whistleblower cases in Queensland' and recommended that 'the Queensland Government establish an independent investigation into these unresolved cases within its jurisdiction'. The committee referred in a footnote to the submission and evidence given by Mr Lindeberg (among others).[12]

Senate Select Committee on Unresolved Whistleblower Cases

3.16 Because the PIW Committee's recommendation was not implemented by the Queensland Government, on 1 December 1994 the Senate appointed a select committee, the UWB Committee, to inquire into unresolved Queensland whistleblower cases. The committee's terms of reference enabled it to inquire into and report on 'So much of those unresolved whistleblower cases arising from the report of

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9 Mr Lindeberg, Submission no. 74 to the Select Committee on Public Interest Whistleblowing, p.14

10 CJC, Submission no. 106A to the Select Committee on Public Interest Whistleblowing, p.3

11 Mr Lindeberg, Correspondence with the Select Committee on Public Interest Whistleblowing, 4 July 1994, pp.6-7

12 Report of the Senate Select Committee on Public Interest Whistleblowing, August 1994, p.5

the Select Committee on Public Interest Whistleblowing as the committee determines necessary to be taken into account …'[13] The terms of reference specifically included:

> the circumstances relating to the shredding of the Heiner documents, and matters arising therefrom;[14]

3.17 A significant body of evidence was submitted to that committee in relation to the shredding of the documents. The committee reported that it received claim and counterclaim by protagonists in this and in other 'cases' on which it took evidence, but that, 'It was never the intention of the Committee, nor was it within its powers, to adjudicate on those cases or to bring redress to those the Committee believed had suffered unfairly.'[15]

3.18 The Queensland Government's position, as stated by the Attorney-General, is reproduced in the report:

> Cabinet acted properly and in good faith to rectify a very difficult situation for Mr Heiner, and the staff of the Centre who had provided information to Mr Heiner in confidence.[16]

3.19 The CJC's evidence on this point was that the Crown Solicitor had advised that the material supplied to Mr Heiner could be destroyed, with the following proviso:

> This advice is predicated on the fact that no legal action has been commenced which requires the production of those files and that you decide to discontinue Mr Heiner's inquiry.[17]

3.20 When legal action may have been said to have commenced became an important issue in the committee's consideration of the legal justification for the shredding of the documents. Different positions were taken by legally qualified witnesses.

3.21 Mr Barnes of the CJC drew the committee's attention to a response made by the Crown Solicitor to submissions made to the committee by Mr Callinan QC and stated:

> [The Crown Solicitor] rejects the suggestion that the destruction of the Heiner documents could amount to an offence against section 129 of the

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13 Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.2

14 Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.v

15 Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.51

16 Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.58

17 CJC, *Committee Hansard*, Senate Select Committee on Unresolved Whistleblower Cases, 23 February 1995, p.96

> code – the section which prohibits the destruction of evidence – or that there was any conspiracy to defeat justice.[18]

3.22 Mr Barnes also stated that Mr Callinan's junior (Mr Peterson) now also seemed to accept that proposition. In a letter to the committee, Mr Peterson had written:

> There was never a submission put forward by Mr Callinan and myself that section 129 of the Criminal Code was infringed.[19]

3.23 However, in response to Mr Barnes' evidence, Messrs Callinan and Peterson, acting for Mr Lindeberg, submitted that the CJC had 'not given serious attention to the implications of destroying documents knowingly in order to avoid or render more difficult litigation. They have ignored these serious matters'. It was suggested that the relevant sections of the Criminal Code were sections 129 and 119.[20]

3.24 The UWB Committee dealt with the evidence concerning a possible breach of the Criminal Code at some length in its report. It reported that, 'The question of when the course of justice begins, and when, therefore, legal action could be said to be pending was one which was hotly debated …'[21]

3.25 The committee also reported that '… the newly-elected Labor Government consistently sought advice from its chief law officer on aspects of the [Heiner] inquiry and generally followed that advice. The Committee believes it is not appropriate to comment on the merit of that advice.'[22] The committee concluded that, 'With the benefit of hindsight … the shredding of the Heiner documents may have been an exercise in poor judgment.'[23]

3.26 Mr Lindeberg has criticised that conclusion and has submitted that this Committee should dissociate itself from it.[24]

63rd Report of the Committee of Privileges

3.27 The matter of a possible breach of section 129 was not raised in the 63rd Report of the Committee of Privileges, nor was there any specific mention made of a

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18 Mr Barnes, *Committee Hansard*, Senate Select Committee on Unresolved Whistleblower Cases, 29 May 1995, p.655

19 Mr Barnes, *Committee Hansard*, Senate Select Committee on Unresolved Whistleblower Cases, 29 May 1995, p.656

20 Messrs Callinan and Peterson, Submission to the Senate Select Committee on Unresolved Whistleblower Cases, 7 August 1995, p.3

21 Report of the Senate Select Committee on Unresolved Whistleblower Cases, pp.55-60

22 Report of the Senate Select Committee on Unresolved Whistleblower Cases, p.60

23 Report of the Senate Select Committee on Unresolved Whistleblower Cases, p.60

24 Mr Lindeberg, *Committee Hansard,* 11 June 2004, pp.14-15

possible breach of section 129 in the submissions made by the principal witnesses at the inquiry. (However, the statute was alluded to in a paper published by the Australian Association of Archivists, which was attached to Mr Lindeberg's submission.)

71st Report of the Committee of Privileges

3.28 The terms of reference for the Committee of Privileges' inquiry were as follows:

> Having regard to the documents presented to the Senate by the President on 25 August 1997, and any other relevant evidence, whether any false or misleading evidence was given to the Senate Select Committee on Unresolved Whistleblower Cases, and whether any contempt was committed in that regard.[25]

3.29 Most of the documents referred to in the terms of reference were correspondence between the Queensland Parliamentary Criminal Justice Committee (PCJC) and the President of the Senate or between the PCJC and the CJC. One significant letter dated 18 August 1997, however, was written to the President by Mr Lindeberg. In that letter Mr Lindeberg made three allegations that were subsequently reported on by the Committee of Privileges. (Mr Lindeberg also referred to seven points made in Mr Peterson's submission made of behalf of Mr Lindeberg to the 63rd inquiry on which it was alleged the UWB Committee was misled. That submission, however, did not make any specific mention of section 129.)

3.30 The three main allegations made by Mr Lindeberg were as follows: First that the CJC told the UWB Committee that Mr Lindeberg's complaints had been investigated to the nth degree, but that it had subsequently made admissions that contradicted that claim. Second, that the CJC had misled the UWB Committee by stating that the PCJC had held two independent inquiries into Mr Lindeberg's complaints. Third, that the CJC had misled the UWB Committee about the role of the State Archivist.

3.31 The CJC responded to these allegations and provided explanations that the Committee of Privileges found satisfactory. The committee found that no contempt had been committed.

3.32 Mr Lindeberg's submission to the Committee of Privileges dealt with the interpretation of section 129 in some detail.[26] He quoted long passages from the Morris-Howard Report and from evidence given and submissions made to the UWB inquiry. However, the committee did not ask the CJC to comment on section 129, and the CJC did not refer to section 129 in its evidence.

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25 Senate Committee of Privileges, 71st Report, Further Possible False or Misleading Evidence before Select Committee on Unresolved Whistleblower Cases, May 1998, p.1

26 Mr Lindeberg, Submission to the Committee of Privileges 71st Report, pp.69-89

Conclusions

3.33 The Committee, having surveyed the evidence, considers that the interpretation of section 129 which was adopted by the CJC and the Queensland Government was probably incorrect. However, the question that the Committee must address is whether the communication of that interpretation to Senate committees amounted to giving false or misleading evidence and, if it did, whether any contempt was committed in that regard.

3.34 The Committee sought guidance on this question from the Clerk of the Senate who provided the following advice:

> In the light of the Senate's and the Privileges Committee's finding in past cases of alleged misleading evidence, for a contempt to be found it would have to be established that:
>
> - the particular interpretation of the law was put to the committees
> - that interpretation was clearly incorrect and untenable
> - the witnesses concerned knew that the interpretation was incorrect and untenable
> - they put that interpretation to the committees with the intention to mislead.
>
> …
>
> If all four elements were proved, the offence which could be held to be a contempt would be established. The committee would have to be satisfied that all four elements had been established before finding that a contempt had been committed.[27]

3.35 The Committee's review of the relevant committee reports and its analysis of the evidence given to the committees that produced those reports show that the interpretation of section 129 was a major issue in only one report, namely, the report of the UWB Committee. Nevertheless, as stated above, a possibly incorrect interpretation of section 129 was put to that Senate committee. The Committee is satisfied that the first criterion for establishing whether contempt may have been committed has been established, namely, that the particular interpretation was put to a Senate committee.

3.36 In relation to the second criterion, some witnesses expressed strong views that the interpretation put forward by the CJC and the Queensland Government was clearly incorrect and untenable. While the Committee has concluded that the interpretation of section 129 put by the Queensland State authorities was probably incorrect, it considers that the interpretation made at the time of the relevant inquiries was not unreasonable, given the lack of precedent and the eminence of the lawyers who held

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[27] Mr Evans, Correspondence, 20 August 2004

that view. The Committee therefore cannot conclude that the interpretation was clearly incorrect and untenable.

3.37 In relation to the third criterion, the Committee agrees with Mr Bevan, who contended that section 129 was open to more than one interpretation until such time as a court provided some guidance. It has concluded therefore that CJC witnesses at the UWB inquiry did not knowingly put forward an incorrect interpretation of section 129.

3.38 The Committee has concluded that because criteria 2 and 3 have not been met no contempt of the Senate has been committed. For completeness, however, the Committee has also considered the evidence as it relates to the fourth criterion, that is, that those who put the incorrect interpretation to the committees intended to mislead.

3.39 At its hearing the Committee raised the issue of whether previous Senate committees had been deliberately misled with Mr MacAdam, a witness who strongly stated the view that the CJC's interpretation of section 129 was incorrect and untenable:

> Senator SANTORO—…Do you think that previous Senate committees have been deliberately misled?
>
> Mr MacAdam—Yes. I clearly believe they have been misled.
>
> CHAIR—Deliberately misled or just misled?
>
> Mr MacAdam—It is hard to say. You could look at it two ways and you could say we had on previous occasions a whole lot of honest bumblers.[28]

3.40 Mr MacAdam went on to say that in his view the interpretations given signified more than incompetence. However, he also stated that he could not say whether the interpretations given were deliberately misleading:

> I am not in a position to give hard evidence and to say that I know that the CJC deliberately mislead the Senate. It is a matter of looking at the evidence that is before you, looking at what was said originally, looking at it in the light of what has transpired.[29]

3.41 The Committee has considered the evidence. The interpretation that was put was certainly convenient for the Queensland Government in that it supported the legality of the shredding of the Heiner documents, but that of itself does not prove that the interpretation was put with the intention to mislead.

3.42 Given that the interpretation of section 129 was not as straightforward as some have suggested, and that an incorrect interpretation may well have been put in good faith, it is impossible for the Committee to conclude that there was any intention to mislead.

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28 *Committee Hansard,* 11 June 2004, p.67

29 *Committee Hansard,* 11 June 2004, p.73

3.43 The Committee finds that no contempt of the Senate occurred in relation to the interpretation of section 129 of the Queensland Criminal Code.

Public Service Management and Employment Regulation 65

3.44 Also among the 'major incidents of alleged false and misleading evidence', that Mr Lindeberg included in his submission to the Committee was the following:

> providing to the Senate a contrived interpretation of … *Public Service Management and Employment Regulation 65*.[30]

3.45 The regulation provides for:

> **'Access to an officer's file**: 65(1) At a time and place convenient to the department, an officer shall be permitted to peruse any departmental file or record held on the officer.
>
> (2) The officer shall not be entitled to remove from that file or record any papers contained in it but shall be entitled to a copy of it.'[31]

Request for documents pursuant to Regulation 65

3.46 On 8 February 1990, Mr Coyne's solicitors, citing Regulation 65, had written to DFSAIA to request copies of allegations made against him by JOYC staff through the QSSU. This was some time before the documents were returned to the QSSU and before copies of the documents were destroyed. The solicitor's letter read as follows:

> As you know we act for the above persons [Mr Peter Coyne and Mrs Ann Dutney] who wish to exercise their rights as contained in Regulation 65 …
>
> We specifically request copies of the following documents:
>
> (i) Statements of allegations made to the Department by employees appertaining to complaints against our clients and which may be the subject of Mr Heiner's enquiry; and
>
> (ii) Transcripts of evidence taken either by Mr Heiner or in respect of the complaints which specifically refer to allegations or complaints against our clients.[32]

3.47 The documents were not provided and, eventually, on 22 May 1990, the solicitor was informed that the department was unable to comply with the request because the department did not have in its control any documents of the type described.[33]

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30 Mr Lindeberg, Submission no. 1, p.5

31 Mr Lindeberg, Submission no. 1, p.55

32 Correspondence, Rose Berry Jensen Solicitors to Acting Director General, Department of Family Services and Aboriginal and Islander Affairs, 8 February 1990, p.1

33 Correspondence, Ms R Matchett, Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs, to Rose Berry Jensen Solicitors, 22 May 1990.

3.48 In its 1993 investigation of the shredding of the Heiner documents the CJC asserted that Mr Coyne was not entitled to read or copy the documents because:

> These regulations do not say that any adverse items of correspondence received about an officer have to be copied and given to him or her. That right only accrues when it is placed on 'any files or records relating to that officer' or are held on the officer's file… '[34]

3.49 That interpretation may not have properly reflected the intent of the regulation. Mr Lindeberg informed the Committee that an advice provided by the Solicitor General to the DFSAIA on 18 April 1990 read in part:

> … Mr Coyne has specifically sought to exercise his rights under Regulation 65. While it may be argued that the statements are not part of a Departmental file held on Mr Coyne, it would appear artificial to say that they are not part of a Departmental record held on him …
>
> Therefore, if a decision is made not to destroy the statements Mr Coyne would appear to be entitled to read them and to obtain a copy … [35]

3.50 Mr Lindeberg also quoted a document published by the CJC in 1999 in which the Commission suggested that would-be whistleblowers should:

> Consider lawfully obtaining copies of your personnel records on your work performance … Regulation 16(2) of the Public Service Regulations (1997) authorizes a Queensland Government employee to peruse any departmental file or record held on the employee at a time and place convenient to the Department.[36]

3.51 Mr Lindeberg stated that Regulation 16(2) finds its origins in Public Service Management and Employment Regulation 65. He argued that:

> Plainly, the CJC is advising … public sector employees to do precisely what Mr Coyne was endeavouring to do in early 1990 but which the CJC summarily dismissed by using Mr Nunan's 'limiting' interpretation which neither exists in law or in practice throughout the Queensland Public Service nor in the CJC's own 1999 publication.[37]

3.52 From all this, Mr Lindeberg concluded that:

> Instead of the CJC seeking Mr Nunan's interpretation of … Regulation 65 in 1992-93, it merely had to ask the Families Department for a copy of Crown Law's interpretation. If provided, the CJC would have discovered, according to advice provided on 18 April 1990, that Mr Coyne did have a

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34 Mr Lindeberg, Submission no. 1, p.56

35 Mr Lindeberg, Submission no. 1, p.56, quoted from correspondence, Crown Solicitor to Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs, 18 April 1990, p.2

36 Mr Lindeberg, Submission no. 1, p.56

37 Mr Lindeberg, Submission no. 1, p.56

> right to access the original complaints even when they were held away from his personal file because they were about him. This recognised right was denied him by Ms Matchett with the assistance of the Office of Crown Law.[38]

3.53 Mr Lindeberg's conclusion may or may not be correct. However, the alleged denial of Mr Coyne's legal right to the documents and the CJC's interpretation of that right are relevant in this inquiry only to the extent that the Senate may have been misled.

Evidence given to previous Senate committees

3.54 Mr Lindeberg's allegations regarding Regulation 65 have been made to previous Senate committee inquiries. In December 1993, for example, when providing evidence to the PIW inquiry, he submitted that:

> The barrister [Mr Nunan] misquotes PSME Regulation 65 … giving it a narrower interpretation not in practice throughout the Queensland Public Service, and contrary to the Crown Solicitor's advice of 30/6/89.[39]

3.55 In responding to that submission, the CJC stated that:

> These regulations give certain rights to public servants when documents relating to an officer are placed on official files or are held on an officer's file. In this case none of the Heiner documents were placed on any officer's file and the regulations therefore did not come into play.[40]

3.56 Mr Lindeberg responded to the CJC's statement as follows:

> The regulation does NOT limit access to only documents on the officer's file as the CJC is attempting to assert. It encompasses 'any departmental record or file held on the officer'.
>
> The Heiner Inquiry material was defined as 'public records'. All public records so defined have the potential to become a departmental record or file and a personal file.
>
> The Libraries and Archives Act 1988 only describes departmental records and files as 'public records'. In other words, public records and departmental records and files are legally one and the same thing.
>
> The CJC acknowledges that the Director-General took possession of the material from Mr Heiner. In doing so they immediately became legally

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38 Mr Lindeberg, Submission no. 1, p.57

39 Mr Lindeberg, Submission no. 74 to the Senate Select Committee into Public Interest Whistleblowing, Para.26.2

40 Criminal Justice Commission, Submission no. 106A to the Senate Select Committee into Public Interest Whistleblowing, p.3

> 'public records' and 'departmental records or files held on the officer'. Mr Coyne therefore had a statutory right to the material. [41]

3.57 The PIW Committee did not report on this matter, however, for reasons explained in its report, *In the Public Interest*, and noted earlier in this report.

Select Committee on Unresolved Whistleblower Cases

3.58 The report of the UWB Committee dealt with the facts of the shredding as they were then known. The facts included that Mr Coyne's solicitor had sought access to complaints of JOYC staff in February 1990 under PSME Regulation 65 and that the Queensland Cabinet was aware of that when it decided to shred the Heiner documents.

3.59 In its report presented in October 1995, the committee made an interesting observation in relation to Regulation 65. Having noted that Mr Coyne's solicitor had requested access to the allegations under Regulation 65, the Committee reported that:

> In so far as the Committee has been able to determine, no advice was received from the Crown Solicitor on the interpretation of regulation 65 and it is plausible to conclude that after the documents had been destroyed, Ms Matchett decided that such advice was no longer required.[42]

3.60 The committee did not know that Ms Matchett had written to the Crown Solicitor on 19 March 1990 asking for advice about the treatment of the letters of complaint submitted by the Queensland State Service Union to the former Director-General of the Department of Family Services. Those letters were not destroyed with the Heiner documents, although copies of them may have been.

3.61 The Solicitor General provided his advice of 18 April 1990 in response to that letter. As stated earlier, the Crown Solicitor advised that if the documents were not destroyed in accordance with the Libraries and Archives Act, Mr Coyne would be entitled to access them under Regulation 65.

3.62 On 8 May 1990 Ms Matchett informed the Crown Solicitor that she did not intend to take the matter to Cabinet and that she intended to return the letters to the union. She asked for assistance in drafting letters to the unions and to Mr Coyne's solicitors based on her intention. The Crown Solicitor's draft to go to the solicitors was to the effect that the department could not comply with the request under regulation 65 because it did not have the documents in its possession. The letter the department sent to the solicitors on 22 May 1990, however, did not make any reference to regulation 65. (The letter was inaccurate in any event because the copies returned by the Crown Solicitor to the department on 18 April were not destroyed until 23 May 1990.)

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41 Mr Lindeberg, Correspondence with the Senate Select Committee on Public Interest Whistleblowing, 4 July 1994, p.9

42 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, p.60

3.63 The UWB Committee was highly critical of Ms Matchett's actions in relation to Mr Coyne's request for access to the documents. The committee stated that it regarded 'her final advice to the solicitors as late as 22 May 1990 as unacceptable and reflecting bureaucratic ineptitude at best or deliberate deceit at worst'.[43] Mr Lindeberg stated to this Committee that 'If all the evidence had been provided, it is open to suggest that the Senate may have taken an even sterner view of her deceptive conduct …'[44]

3.64 It is of course impossible to say now what another committee may have made of Ms Matchett's actions had it known what is now known.

Committee of Privileges

3.65 Why wasn't all the evidence provided to the UWB Committee? It should be remembered that the CJC was the only Queensland instrumentality that was a witness at that committee's inquiry and that the CJC was not purporting to represent the Queensland Government. The CJC could only provide evidence that was within its own knowledge.

3.66 It seems clear that the CJC did not know of the Crown Solicitor's advice of 18 April 1990. The Commission informed the Committee of Privileges that it was not aware of that advice (and some later advices) and the committee accepted that statement. A document submitted in evidence by Mr Lindeberg, which was written by Mr Barnes of the CJC to his superiors on 11 November 1996, provides a further indication that the CJC did not know about the advices. It reads, in part, as follows:

> When considering Mr Lindeberg's complaint previously, we were not aware that the original letters of complaint were returned to the union nor that further photocopies of them were destroyed the following day.[45]

3.67 The Committee also finds persuasive the argument put by the CJC in its submission to the Committee of Privileges on 16 August 1996, namely:

> As part of its function, from time to time the Commission relies upon information from those who might be described as 'whistleblowers'. Consequently, in this respect, it had an interest, at least equal to the Senate's own, in the subject matter of the Senate Select Committee's inquiries. Having shown the Senate the courtesy of attending upon its Committee hearings, in pursuit of its important inquiry relating to the position of whistleblowers, the Commission had no reason whatsoever to give other than full and candid information by way of assistance. Had the Commission

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43 Senate select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, p.61

44 Mr Lindeberg, Submission no. 1, p.57

45 Memorandum from Mr Barnes to the Director, OMD, Criminal Justice Commission, 11 November, 1996, p.8

> wished to obstruct the Senate, then its officers need not have attended the hearings at all.[46]

Conclusion

3.68 This still leaves the problem of the interpretation of regulation 65 that was adopted by the CJC and was repeated by the CJC to the UWB Committee. As Mr Grundy stated, the report prepared for the CJC by Mr Nunan did not even quote the regulation correctly.[47] Why this occurred is a matter for conjecture. At the UWB Committee hearings in Brisbane the CJC referred to its heavy workload and limited resources, and particularly to the backlog of cases of which the Lindeberg complaint was only one.

3.69 Whatever the reason, there is no evidence that would allow the Committee to conclude that the CJC's view about regulation 65 was intended deliberately to mislead the UWB Committee and to interfere with its ability to report accurately to the Senate. In the circumstances, it is not possible to find that a contempt of the Senate has been committed.

The role of the State Archivist

The allegations

3.70 Mr Lindeberg has claimed that the CJC misled the previous Senate committees by providing a contrived interpretation of the *Libraries and Archives Act 1988 (Qld)*.[48]

3.71 Mr Lindeberg has highlighted as relevant Section 52 of the Act, which obliged public authorities to:

> (a) cause complete and accurate records of the activities of the public authority to be made and preserved; and
>
> (b) take all reasonable steps to implement recommendation of the State Archivist applicable to the public authority concerning the making and preservation of public records. (underline added).[49]

3.72 Also relevant is Section 55, which related to the protection of public records. This section, which has since been amended, read as follows:

> 55.(2) On receipt of a notice referred to in paragraph (a) of subsection (1) [notice of intention to dispose of public records other than by depositing

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46 Criminal Justice Commission, Submission to the Senate Committee of Privileges, 16 August 1996, p.4

47 Mr Grundy, *Committee Hansard*, 11 June 2004, p.83

48 Mr Lindeberg, Submission no.1, p.5

49 Mr Lindeberg, Submission no.1, p.37

> them with the State archives], the State archivist or a person acting on his behalf may–
>
> (a) enter and examine any place wherein the public records are held and—
>
> (i) give directions for the purpose of gaining practical access to the public records to any person he finds there;
>
> (ii) inspect the public records;
>
> (iii) take possession of the public records or such of them as in his opinion should be preserved in the Queensland State Archives;
>
> (b) by notice in writing given to the person in possession of the public records, direct the person to deposit them with the Queensland State Archives in accordance with directions stated in the notice;
>
> (c) **if he thinks fit**, authorise the disposal of the public records.[50] [emphasis added]

3.73 The context of Mr Lindeberg's claim is that the Office of Queensland Cabinet acted deceptively when requesting the state archivist's approval to destroy the Heiner documents.[51] In his view, the Cabinet should have informed the archivist that a possible legal claim for the documents was known to exist.[52]

3.74 Mr Lindeberg alleges that the failure to inform the state archivist was in breach of the *Libraries and Archives Act 1988*, the *Public Service Management and Employment Act 1988* and the *Criminal Justice Act 1989*, and constituted official misconduct on the part of those involved.[53] This allegation was contested by the CJC in a number of Senate committee inquiries, which led Mr Lindeberg to allege that the Commission deliberately misinterpreted the role of the state archivist under the *Libraries and Archives Act 1988* in its evidence to those inquiries.[54]

Pervious Senate inquiries

3.75 Witnesses gave evidence on the role of the state archivist to each of the four inquiries covered by the Committee's terms of reference. In the PIW and UWB Committee inquiries, Mr Lindeberg commented on the role of the state archivist to dispute the CJC's finding that no official misconduct had been committed by the Cabinet. In the Committee of Privileges inquiries Mr Lindeberg claimed that the CJC's views about the role of the archivist given to earlier inquiries were deliberately misleading.

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50 *Libraries and Archives Act (Qld) 1988*

51 Mr Lindeberg, Submission no. 1, p.37

52 Mr Lindeberg, Submission no. 1, p.43

53 Mr Lindeberg, Submission no.1, pp.37-42

54 Mr Lindeberg Submission no. 1, pp.5, 43

3.76 The relevant evidence given to the committees and the conclusions reached by those committees are summarised below.

Select Committee on Public Interest Whistleblowing

3.77 Mr Lindeberg first brought his views regarding the role of the state archivist before a Senate committee in his submission to the PIW Committee. He submitted that:

> The State Archivist must satisfy him/herself that "those public records" do not represent any "LEGAL VALUE" to anyone before giving approval to shred.[55] (Original emphasis)

3.78 In his submission Mr Lindeberg referred to the finding of the CJC's second investigation into the shredding of the Heiner documents, namely, that no official misconduct had occurred. Mr Lindeberg quoted correspondence from the CJC following that investigation, stating its view of the role of the state archivist:

> There is no offence of misleading the State Archivist and under the Act he or she would appear to have an almost unfettered discretion to decide which public records should be preserved and which records can be destroyed. Therefore I can see no breaches of this Act.[56]

3.79 Mr Lindeberg disputed the CJC's finding that no official misconduct had occurred, and submitted that the CJC should not have considered the *Libraries and Archives Act 1988* in isolation from other Acts such as the *Criminal Justice Act 1989*. He again asserted that there was a 'fundamental requirement on all Archivists to ensure that any "public record" does not have any legal value before authorising its destruction'.[57]

3.80 In supplementary submissions to the PIW Committee, the witnesses restated their positions and continued to disagree about alleged breaches of the Act. The CJC reiterated its view as follows:

> [The Archivist] was, of course, free to make any enquiries as to any interests that other parties may have had in the documents. There is no suggestion that the Archivist was actively misled by the Cabinet Secretary or any other person with knowledge of the documents. There is therefore no apparent breach of that act.[58]

3.81 Mr Lindeberg again disputed the CJC's view, and stated:

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55 Mr Lindeberg, Submission no. 74 to the Select Committee on Public Interest Whistleblowing, p.13

56 Mr Lindeberg, Tabled document, Select Committee on Public Interest Whistleblowing, p.3

57 Mr Lindeberg, Submission no. 74 to the Select Committee on Public Interest Whistleblowing, p.29

58 Criminal Justice Commission, Supplementary submission no. 106A to the Select Committee on Public Interest Whistleblowing, p.3

> There is every suggestion on the evidence that the State Archivist was actively misled as to the status of the material.[59]

3.82 The PIW Committee did not report on Mr Lindeberg's allegations. Rather, as previously noted that committee recommended that an independent investigation be established by the Queensland Government to inquire into a number of unresolved whistleblower cases in that State.[60]

Select Committee on Unresolved Whistleblower Cases

3.83 Evidence given to the UWB Committee regarding the role of the state archivist generally restated the views already put to the PIW Committee. Mr Lindeberg again asserted that the Queensland Cabinet's failure to inform the state archivist about a potential legal claim for the Heiner documents constituted official misconduct. He reviewed the actions of several officials he considered culpable, including the Premier, Attorney-General and other Cabinet Ministers, the Cabinet Secretary and the Minister for Family Services and Aboriginal and Islander Affairs.[61]

3.84 In its submission, the CJC repeated its view that no official misconduct had occurred:

> Contrary to Lindeberg's assertion, there is no statutory duty cast on anybody to provide any specific information to the Archivist about the documents.
>
> In these circumstances, it is the Commission's view that no criminal offence or disciplinary offence of official misconduct was committed by those who communicated with the State Archivist.[62]

3.85 Focusing more specifically on the role of the state archivist during the committee's hearings, Mr Barnes of the CJC stated his interpretation as follows:

> The archivist's duty is to preserve public records which may be of historical public interest; her duty is not to preserve documents which other people may want to access for some personal or private reason. She has a duty to protect documents that will reflect the history of the state. Certainly she can only preserve public records, but there is no commonality necessarily between public records and records to which Coyne and other public

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59 Mr Lindeberg, Correspondence to the Committee on Public Interest Whistleblowing, 4 July 1994, p.8

60 Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest,* August 1994, p.5

61 Mr Lindeberg, Submission to the Select Committee on Unresolved Whistleblower Cases, 25 January 1995, pp.15-19, 48-50

62 Criminal Justice Commission, Submission to the Senate Select Committee on Unresolved Whistleblower Cases, 1 February 1995, p.30

> servants may be entitled to access pursuant to regulations made under the Public Service Management and Employment Act.[63]

3.86 Mr Lindeberg disputed this view, and it became the focus of his and other witnesses' submissions to subsequent inquiries. In a 'submission in reply' to the UWB Committee Mr Lindeberg stated:

> The Libraries and Archives Act 1988 while offering the State Archivist what may be deemed as a wide discretion on what may be destroyed, under statutory law interpretation she has no right to "read down" that discretion to only consider a public record's historical value against and in spite of other public interest considerations (eg legal, informational, data values) which pertain to such records under active consideration for destruction.[64]

3.87 The UWB Committee did not report specifically on the role of the archivist under the *Libraries and Archives Act 1988*. Rather, it reported on the actions of the then Acting Cabinet Secretary and Queensland Archivist as follows:

> …the other precondition for their [the Heiner documents] legal shredding was that the approval of the State Archivist was sought and obtained…this was met, though it must be stated that aspects of the process are open to question. In correspondence to the State Archivist in which her approval to shred the documents was sought, the Acting Cabinet Secretary did not specifically mention that the documents were being sought for possible legal action. He did, however, allude to the fact that legal action was a possibility, given the nature of the material gathered. As the State Archivist followed the Government approach that it was inappropriate for officers of the executive government to provide any assistance to the Committee and declined its invitation to give evidence, the Committee is unable to determine whether her decision to approve the shredding might have been varied, had she been specifically informed that one potential litigant did in fact exist'.[65]

Committee of Privileges 63rd report

3.88 The Committee of Privileges in its 63rd report focused on whether the CJC withheld crown solicitor's advices and other documents from previous Senate inquiries. As such, it did not inquire into the role of the state archivist. However, the matter was raised in evidence to the inquiry. Mr Lindeberg's submission set out seven incidents in which he alleged the CJC misled the UWB Committee. One of these

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63 Mr Barnes, *Committee Hansard,* Senate Select Committee on Unresolved Whistleblower Cases, 23 February 1995, p.108

64 Mr Lindeberg, Response to the Senate Select Committee on Unresolved Whistleblower Cases, 3 July 1995, p.52

65 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p.59

incidents concerned the 'Criminal Justice Commission's declaration on the alleged proper role of the Queensland State Archivist'.[66]

3.89 In the submission, Mr Peterson (acting for Mr Lindeberg) argued that over time the CJC had given conflicting interpretations of the role of the state archivist. Mr Peterson submitted that the interpretation put to Mr Lindeberg, following the CJC's second investigation into the shredding, stated that the archivist had an 'almost unfettered' discretion when appraising public records. He contrasted this view with Mr Barnes's evidence to the UWB Committee, which indicated that the archivist had a narrow discretion concerning only 'historical value'.[67]

3.90 Mr Peterson cited a number of professional archivists and authoritative sources who disputed the CJC's interpretation of the role of the state archivist.[68] He also informed the committee that the Queensland State Archives had released guidelines on document appraisal, which refuted Mr Barnes' view. Mr Peterson quoted the following section of the guidelines:

> Appraisal may be defined as "the process of determining the value and thus the disposition of records based on their administrative, legal, or fiscal use; their evidential and informational or research value; their arrangement; and their relationship to other records."[69]

3.91 Consistent with its terms of reference, the Committee of Privileges did not ask the CJC to address the allegation that it had provided contradictory and misleading evidence about the role of the state archivist.

Committee of Privileges 71st report

3.92 Unlike the earlier inquiries, the Committee of Privileges in its 71st report specifically considered the allegation that the CJC misled the UWB Committee about the role of the state archivist. Mr Lindeberg's evidence to the committee primarily restated his submissions to previous inquiries. He again cited authoritative sources, including the Australian Society of Archivists and Mr Hurley, a former Australian representative on the International Council on Archives, who disagreed with Mr Barnes' interpretation of the role of the archivist.[70]

3.93 Mr Lindeberg also referred in his submission to two reports not previously mentioned with respect to this allegation. First, he raised the CJC's submission to the Electoral and Administration Review Commission's 1991 review of archives legislation. Mr Lindeberg claimed that this submission revealed that 'the CJC always

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66 Mr Peterson, Submission to the Senate Committee of Privileges, 5 September 1995, p.23

67 Mr Peterson, Submission to the Senate Committee of Privileges, 5 September 1995, p.24

68 Mr Peterson, Submission to the Senate Committee of Privileges, 5 September 1996, pp.24-25

69 Mr Peterson, Submission to the Senate Committee of Privileges, 5 September 1996, p.25

70 Mr Lindeberg, Submission to the Senate Committee of Privileges, 7 January 1998, pp.17-19

knew what the proper role of the archivist was'.[71] Second, Mr Lindeberg quoted passages from the Morris-Howard Report, which suggested that the archivist's approval for the disposal of the Heiner documents did not over-ride relevant sections of the Criminal Code.[72]

3.94 The CJC rejected the allegation that its officers had provided misleading evidence to previous committees, stating:

> This allegation is based upon differences of opinion about the legal interpretation of the statutory role of the State Archivist. Even if Mr Barnes was completely mistaken in his view about the role of the State Archivist, his expression of an opinion on the topic could never amount to false and misleading evidence.[73]

3.95 The Committee of Privileges concurred with the CJC's view that:

> …the expression of a genuinely-held legal opinion about the statutory role of the State Archivist, even if wrong, could never amount to providing false or misleading evidence.[74]

3.96 Accordingly, the Committee concluded that no contempt had been committed.

The current inquiry

3.97 Mr Lindeberg has again alleged that the CJC deceived previous Senate committees concerning the role of the State Archivist.[75] However, there is little new in the information that he has provided. Mr Lindeberg has again disputed Mr Barnes' interpretation of the role of the State archivist, asserting that it 'reduces the State/Federal Archivist's function to an impossible farce'.[76] He has again quoted the interpretations given by CJC officers at different times in different forums, asserting that the interpretations are contradictory.[77] The Australian Society of Archivists (ASA), in its submission has again disagreed with Mr Barnes' view of the role of the archivist and has supported the assertion that CJC officials have taken inconsistent positions at different times.[78]

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71 Mr Lindeberg, Submission to the Senate Committee of Privileges, 7 January 1998, p.14

72 Mr Lindeberg, Submission to the Senate Committee of Privileges, 7 January 1998, p.16

73 Mr Clair, Correspondence to the Senate Committee of Privileges, 16 March 1998, p.6

74 The Senate Committee of Privileges, 71st Report, *Further Possible False or Misleading Evidence Before Select Committee on Unresolved Whistleblower Cases,* May 1998, p.9

75 Mr Lindeberg, Submission no. 1, p.41

76 Mr Lindeberg, Submission no. 1, p.41

77 Mr Lindeberg, Submission no. 1, pp.39-41

78 Australian Society of Archivists, Submission no. 2, p.2

3.98 However, even if the CJC's view put to the previous inquiries is held to be incorrect, it does not inherently follow that this interpretation was deliberately contrived to mislead the Senate. Mr Barnes informed the Committee that:

> I now believe the decision to shred … the "Heiner documents" was wrong for two reasons:-
>
> - The general presumption is that public records of any import should be retained unless they …have no historical or personal value. In view of the circumstances in which the "Heiner inquiry" was commenced and discontinued it is likely that these exceptions could not be met.
> - The hundreds of thousands, if not millions, or dollars of public funds that have since been spent examining all aspects of that shredding could have been spent far more productively. It is in my view a matter of significant public concern that such expenditure continues.[79]

3.99 Mr Barnes also stated that:

> I can not be sure that everything I have said on the numerous occasions I have responded to Mr Lindeberg's allegations is completely accurate or even that all of the legal opinions I have expressed accord with the most authoritative sources on all relevant points. I am absolutely certain, however, that I have never deliberately misled the Senate or any other inquirer.[80]

3.100 The Committee did not receive any evidence which would show that Mr Barnes' interpretation at previous inquiries was not genuinely held. The only new evidence submitted by Mr Lindeberg in relation to role of the state archivist concerns the authority of the Queensland Cabinet to seek the archivist's approval for the shredding. Mr Lindeberg has asserted that:

> It is open to conclude that the Office of Cabinet was acting beyond its authority, *ultra vires*, that is unlawfully, when seeking to have the Heiner Inquiry documents destroyed because the records were always in the ownership of Ms. Matchett pursuant section 12(3)(r) of the *Public Service Management and Employment Act 1988.* All parties ignored this obligation (on her) to"…*maintain proper (departmental) records".*[81]

3.101 Mr Lindeberg claimed that 'the CJC appears to have overlooked' this matter.[82]

3.102 While the new evidence might contribute further to a view of the legality or propriety of the shredding, it does not support Mr Lindeberg's allegation that the CJC

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79 Mr Barnes, *Correspondence*, 18 September 2004, p.1

80 Mr Barnes, *Correspondence*, 18 September 2004, p.3

81 Mr Lindeberg, Submission no.1, p.42

82 Mr Lindeberg, Submission No. 1, p.42

knowingly provided false and misleading evidence regarding the role of the state archivist.

The Libraries and Archives Act

3.103 While different views on the role of the state archivist under the *Libraries and Archives Act 1988* have been stated and reiterated at previous Senate inquires, little reference has been made to the provisions of the Act. The Act did not specifically define the factors to be considered by the archivist before authorising disposal of public records. It is plausible therefore that different views regarding the role of the archivist could genuinely be held.

3.104 In its submission to the Committee, the Australian Society of Archivists (ASA) noted that criteria for appraising public records, including business needs, organisation accountability and community expectations, have now been formally recognised in the *Australian Standard on Records Management*.[83]

Conclusion

3.105 The UWB Committee established through its inquiry that the actions of the then Acting Cabinet Secretary and State Archivist, in seeking and authorising approval for the destruction of the Heiner documents, were open to question. Mr Lindeberg asserted in this inquiry that breaches of the *Libraries and Archives Act 1988*, the *Public Service Management and Employment Act 1988* and the *Criminal Justice Act 1989* may have occurred. The Committee has not made a judgement on this matter because it is not its role to pursue the UWB Committee's findings further or to investigate allegations of unlawful activity.

3.106 The only relevant aspect of the allegation is that the CJC deliberately misinterpreted the role of the state archivist. Disagreements about the role of the state archivist have now been aired and reiterated before five Senate committees. While there is evidence to suggest that some of the views put to previous inquiries were incorrect, no new evidence has been provided to show that these opinions were not genuinely held. The Committee therefore agrees with the Committee of Privileges' previous findings on this matter, and concludes with regard to this allegation that no contempt has been committed.

Document 13 and the alleged rape file

The allegations

3.107 Mr Lindeberg and other witnesses alleged that the Queensland Government misled the Senate by providing a document, identified as 'Document 13', in an altered form and by failing to provide evidence of the rape of a resident minor at the JOYC. Mr Lindeberg submitted that:

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83 Australian Society of Archivist, Submission no. 2, p.3

> …this alleged criminal contempt, going to a possible conspiracy to defeat justice, took the material form in the following major incidents of alleged false and misleading evidence…
>
> (b) deliberately tampering with evidence as in Document 13 by providing it to the Senate in an incomplete form …
>
> (c) deliberately withholding known relevant evidence from the Senate …revealing the crime of pack-rape and criminal paedophilia.[84]

Previous Senate inquiries

3.108 Mr Lindeberg's allegations in respect of Document 13 and sexual abuse at the JOYC are new to this inquiry. The allegations were not raised in submissions to the Committee of Privileges and were not considered in that Committee's 63rd and 71st reports. Neither were the allegations raised with the PIW or UWB inquiries, but Document 13 was submitted to the UWB inquiry by the Queensland Government. The Queensland Government was not a witness at that inquiry but did submit copies of some documents. This Committee's consideration of whether previous Senate committees were misled in relation to these documents is therefore confined to that inquiry.

3.109 The UWB Committee did not refer to Document 13 or its contents in its report. Mr Lindeberg assumes that this was an oversight.[85]

3.110 Mr Lindeberg's allegation relates to the form in which Document 13 was provided to that Committee:

> The fact that the Senate may not have properly considered Document 13 at the time, or in its report "*The Public Interest Revisited*", is not the central issue here. The issue turns on what the Senate asked and why it was sent in its known incomplete/tampered state.[86]

What is 'Document 13'?

3.111 Document 13 was provided to the UWB Committee by the Director-General of the Office of the Queensland Cabinet. The document is in the form of a memorandum, signed by Mr Coyne, in which he reported on the disruptive behaviour of three JOYC residents and described an incident that occurred at the Centre on 26 September 1989. The incident involved the handcuffing of three residents in the Centre's secure yard, with two of the residents remaining handcuffed overnight.

3.112 The version of Document 13 provided to the UWB Committee was not complete. Only pages three to five were provided, and the names of the children

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84 Mr Lindeberg, Submission no. 1, p.5

85 Mr Lindeberg, *Committee Hansard,* p.36

86 Mr Lindeberg, Submission no. 1, p.50

mentioned in the document had been edited. The following note was included to explain these deletions and alterations:

> Parts of this document have not been released to protect the identity of the children involved. The original of this document contains the full names, dates of birth and court history information. Names handwritten on this copy are not the actual names of the children.[87]

3.113 Mr Lindeberg has alleged that the Queensland Government altered Document 13 for reasons other than those presented to the UWB Committee. He claims that the altered document was designed to:

- inflict a detriment on Mr Coyne, and by association, himself (Mr O'Neil made a similar claim of detriment by association);[88]
- isolate such detriment to Mr Coyne, by withholding from the UWB Committee that the document was addressed to Mr Coyne's manager; and
- obstruct the Committee from making full and proper findings.[89]

3.114 These allegations are considered in turn below.

Detriment to Mr Coyne and Mr Lindeberg

3.115 Document 13 provides evidence that Mr Coyne ordered the use of handcuffs to restrain children at the JOYC. It could be thought that Mr Coyne's actions, admittedly in a very difficult situation, were extreme and unwarranted and possibly illegal. Certainly the Forde Commission was of that view.[90] Mr Lindeberg has asserted that this being the case the document was provided to the UWB Committee in order to discredit Mr Coyne and also himself. Mr Lindberg stated:

> That document, as far as I know, came out of the blue. I am saying that it came to you for a deliberate purpose—that is, to discredit Mr Coyne before your inquiry and, by association, me because I was perceived to be protecting a prima facie child abuser.[91]

3.116 Document 13 was one of 24 documents provided to the UWB Committee by the Director-General of the Office of the Queensland Cabinet. It is evident that the documents were provided in reply to an invitation from that Committee to respond to evidence provided during the inquiry. The Director-General's covering letter to the UWB Committee stated:

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87 Response to the Senate Select Committee on Unresolved Whistleblower Cases, 31 August 1995, Document 13

88 Mr O'Neil, Submission no. 5, p.3

89 Mr Lindeberg, Submission no. 1, pp.51-52

90 Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions, May 1999, p.172

91 Mr Lindeberg, *Committee Hansard,* 11 June 2004, p.23

> I refer to your letter of 11 May 1995 and to recent public hearings of the Committee.
>
> The attached information is forwarded to your Committee in response to certain issues raised in evidence at the hearings.[92]

3.117 In broad terms, documents 1-9 covered correspondence between the Department of Family Services and the Crown Solicitor; documents 11-15 related to management at the JOYC, including behaviour management problems, the above mentioned handcuffing incident and complaints by staff; documents 16-23 concerned Mr Coyne's secondment and the department's decision not to fill the position of manager at the JOYC; and document 24 addressed specific evidence raised by Mr Lindeberg's lawyers.

3.118 While it may be that Document 13 was not specifically requested by the committee, it is a person's prerogative to provide additional information and documentation to a committee, as a number of witnesses have chosen to do during this inquiry. Such information or documentation may well be submitted to support the arguments of the submitter, but this does not make them inherently false or misleading.

3.119 It is plausible that in the view of the Queensland Government, the documents were provided to assist the UWB Committee by clarifying issues covered during the Committee's public hearings. Such issues included the circumstances giving rise to the Heiner inquiry and the department's treatment of Mr Coyne.[93] For example, at the UWB Committee's hearing of 29 May 1995, the following exchange occurred:

> CHAIR – … I want to deal with before Heiner—before we get to Heiner. It would seem to me that Heiner came about because of something.
>
> Mr Barnes – Certainly.
>
> CHAIR – I would not have thought that the department would have said that, on the basis of somebody saying something, there is a need to have an inquiry of that nature. Nor do I think that the previous minister would have set up the inquiry based on some almost hearsay claim. I would have thought that there would had to have been a series of events that led to the setting up of the Heiner inquiry.
>
> Mr Barnes – I can well understand your expectation in that regard. All I can tell you is that Heiner arose out of – as far as we can ascertain – a single meeting on 14 September 1989… I accept entirely what you are saying – that one would have expected a more gradual build up to that – but the

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92 Glyn Davis, Director-General Cabinet Office, Response to the Senate Select Committee on Unresolved Whistleblower Cases, 31 August 1995

93 Senate Select Committee on Unresolved Whistleblower Cases, *Committee Hansard*, 5 May and 29 May 1995.

> commission is not aware of any more of a gradual build-up because that is something that did not concern the commission.[94]

3.120 The Director-General's covering letter to the UWB Committee tends to indicate that several of the attached documents were intended to provide evidence of the build up to the Heiner inquiry. The Director-General said:

> Document 11 is an extract from an independent report on Detention Centres which shows problems with behaviour management at JOYC. Throughout 1989 there were a number of incidents which received wide spread media attention…
>
> Document 13 gives Mr Coyne's account of an incident on 26 September when 3 children, 2 girls aged 12 and 16 and a boy aged 14, were handcuffed to the tennis court fence in the secure yard at John Oxley… Mr Coyne's report illustrates that incidents on 22, 23, 24 and 25 September were the lead up to the incident of 26 September 1989…
>
> Two days after this incident, on 28 September, Mr Pettigrew visited JOYC and met with staff at the changeover of shifts, announced an independent investigation and requested that complaints be confirmed in writing.[95]

3.121 The Queensland Government may have considered Document 13 as valid evidence, giving context to the establishment of the Heiner inquiry and justifying the Department's treatment of Mr Coyne. As such, while Document 13 may well reflect negatively on Mr Coyne, this does not substantiate Mr Lindeberg's allegation that the provision of the document in an altered form was an act of 'criminal contempt, going to a possible conspiracy to defeat justice'.[96]

3.122 In the absence of any supporting evidence, it is difficult to agree with the speculation that Document 13 was designed to discredit Mr Lindeberg and Mr O'Neil by association. If that was the Queensland Government's intention, it does not seem to have worked. The UWB Committee reported that:

> The Committee believes that Mr Lindeberg raised the allegations that he did in good faith. Mr Lindeberg is to be commended for bringing to the attention of authorities the matter of the Heiner documents.[97]

Failure to show Mr Coyne was informing his manager

3.123 Mr Lindeberg has alleged that the altered form in which Document 13 was provided to the UWB Committee was designed to isolate the document to Mr Coyne.

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94 Select Committee on Unresolved Whistleblower Cases, *Committee Hansard*, Monday 29 May 1995, p.668

95 Glyn Davis, Director-General Cabinet Office, Response to the Senate Select Committee on Unresolved Whistleblower Cases, 31 August 1995

96 Mr Lindeberg, Submission no. 1, p.5

97 Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.63

Mr Lindeberg stated that evidence to the Forde inquiry, showed that the original memorandum was addressed to Mr Coyne's manager in the Department of Family Services.[98]

3.124 Mr Lindeberg argued that a complete version of Document 13 would have provided the UWB Committee with a different view of the incident detailed in the document. He stated:

> …its complete form, while not lessening the unacceptability of Mr. Coyne's handcuffing exploits against children, would have broadened the blame both in accepting the handcuffing or failing to curtail his illegal activities.[99]

3.125 The Committee accepts that removing the address information from Document 13 was not necessary to protect the identity of the children mentioned in the document. However, it does not inevitably follow that such information was deliberately removed or that its removal was intended to isolate the document's content to Mr Coyne. As Document 13 came to the UWB Committee from the Director-General of the Office of Cabinet, it is evident that the document had been submitted to the department and had been read by persons other than Mr Coyne. Presumably the UWB Committee would have reached that conclusion; public servants do not write memoranda to themselves.

3.126 Even if the Committee were to conclude that the address on the memorandum had been deleted deliberately, on the basis of the available evidence the alleged motive for removing the address information from Document 13 must be speculative.

Obstructing the Committee's findings

3.127 Mr Lindeberg informed the Committee that:

> In my opinion, in withholding those two pages [of Document 13] from the Senate in 1995, the Queensland Government obstructed the Senate Select Committee on Unresolved Whistleblower Cases from comprehensively considering the matter.[100]

3.128 Mr Lindeberg has speculated that if the UWB Committee had been provided with a complete version of Document 13 that would have opened up a new range of questions for the Committee to ask and report on.[101]

3.129 As previously mentioned, the UWB Committee did not consider Document 13 or its contents in its report. In accordance with its terms of reference, the UWB Committee concentrated on 'what it could learn to assist in the formulation of

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98 Report of the Commission of Inquiry into the Abuse of Children in Queensland Institutions, May 1999, p.170 in Mr Lindeberg, Submission no.1, p.51

99 Mr Lindeberg, Submission no.1, p.51

100 Mr Lindeberg, Submission no.1, p.51

101 Mr Lindeberg, *Committee Hansard,* 11 June 2004, p.35

Commonwealth whistleblower protection legislation'.[102] There is no evidence to suggest that receiving Document 13 in an altered form obstructed those considerations.

The rape file

3.130 The Committee received evidence that a JOYC resident was raped by other residents during an outing from the centre on 24 May 1988. A number of documents relating to the incident, including reports by JOYC staff and management, Department of Family Services' reports and police and medical reports were provided to the Committee.[103]

3.131 Witnesses alleged that evidence of the assault was deliberately withheld from the UWB Committee. Mr Grundy, for example, asserted that if the Queensland Government had considered Document 13 relevant to the UWB inquiry, then the department's file on the rape should also have been provided.[104] Mr Lindeberg asserted that the rape evidence should have been submitted because of its supposed link to the Heiner inquiry. He asserted that:

> …we also now know that the Queensland Government, by act of omission, withheld the relevant departmental file on the May 1988 pack-rape from the Senate Select Committee on Unresolved Whistleblowers Cases. It is open to conclude that the Queensland Government must have known that it came under investigation by the Heiner Inquiry too.[105]

3.132 However, the witnesses admitted that there was no conclusive evidence to show that the rape incident was reported to Mr Heiner. Mr Lindeberg stated:

> While it is speculative…it is reasonable to suggest that the anonymous whistleblower may have decided to bide his or her time until circumstances arose which allowed the [pack-rape incident] to be raised again. That opportunity appears to have come in the shape of the Heiner Inquiry… It is therefore open to suggest that the unknown Youth Worker disclosed the pack rape to Mr Heiner as a public interest disclosure…[106]

3.133 Witnesses drew the Committee's attention to submissions to the House of Representatives Standing Committee on Legal and Constitutional Affairs (LCA Committee) inquiry into crime in the community, regarding the content of the Heiner documents. The LCA Committee reported, however, that evidence presented to it about the contents of the Heiner documents was 'sketchy and inconsistent'.[107] The

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102 Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995

103 Mr Grundy, Submission no. 3, attachment A.

104 Mr Grundy, Submission no.3, p.7

105 Mr Lindeberg, Submission no. 1, p.12

106 Mr Lindeberg, Submission no. 1, p.54

107 House of Representatives Standing Committee on Legal and Constitutional Affair, *Crime in the Community: victims, offenders and fear of crime*, Volume Two, August 2004, p.73

LCA Committee stated that the passage of time since the Heiner inquiry had a major influence on the quality of the evidence it received.

3.134 Mr Heiner, in evidence to the LCA Committee, recalled taking evidence on two instances of alleged child abuse, one relating to a child being handcuffed and the other to a child being sedated.[108] He did not recall taking evidence on the rape incident and stated, 'I vehemently deny anybody having spoken to me about a pack-rape'.[109]

3.135 On the other hand, Mr Roch, a former youth worker at the JOYC, believed he had given evidence to Mr Heiner about the rape incident as well as the disposal of the documents.[110] The LCA Committee reported that it had found a number of gaps and inconsistencies in Mr Roch's evidence, including that evidence about the rape and the disposal of the Heiner documents could not have been provided together.[111]

3.136 The LCA Committee concluded that it was 'unable to reconcile the differing accounts regarding evidence of the pack-rape that were given to the Heiner inquiry'.[112] That committee commented that:

> The Committee does not question the evidence of sexual abuse and bureaucratic inaction at JOYC, and indeed the fact that 'everyone at the Centre knew about it'. It does not follow conclusively, however, that Mr Heiner was informed about this.[113]

3.137 Evidence provided to this inquiry regarding the rape incident primarily focussed on the occurrence of the assault, inadequacy of the official response and lack of redress for the victim, rather than the alleged misleading of the Senate. For example, Mr Grundy said:

> As far as I am aware none of these matters was brought to the attention of the Senate in 1995. Whether they should have been is not for me to judge. I do know, however, that nothing has been done to put these wrongs against the girl to rights…[114]

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108 Mr Heiner, House of Representatives Standing Committee on Legal and Constitutional Affairs *Committee Hansard*, 18 May 2004, p.1677

109 Mr Heiner, House of Representatives Standing Committee on Legal and Constitutional Affairs *Committee Hansard*, 18 May 2004, p.1688

110 Mr Roch, House of Representatives Standing Committee on Legal and Constitutional Affairs *Committee Hansard*, 18 May 2004, p.1635

111 House of Representatives Standing Committee on Legal and Constitutional Affair, *Crime in the Community: victims, offenders and fear of crime*, Volume Two, August 2004, p.74

112 House of Representatives Standing Committee on Legal and Constitutional Affair, *Crime in the Community: victims, offenders and fear of crime*, Volume Two, August 2004, p.75

113 House of Representatives Standing Committee on Legal and Constitutional Affair, *Crime in the Community: victims, offenders and fear of crime*, Volume Two, August 2004, p.76

114 Mr Grundy, Submission no. 3, p.10

Conclusions

3.138 Allegations that the Heiner documents were shredded to cover up child abuse at JOYC were not made to previous Senate inquiries. They have now been made years after the events investigated by the committees and are speculative. Mr Le Grand, in response to Mr Lindeberg's allegations said that, 'this development is known to those who practise in criminal law as "recent invention".[115]

3.139 In any event there is no evidence to support the allegation that the Senate was deliberately misled in relation to evidence revealing the crime of pack-rape and criminal paedophilia.

3.140 The Committee has also concluded in relation to the Queensland Government's submitting an edited version of Document 13 to the UWB Committee that there is no evidence that this was done for any sinister reason. The reasons given for the edits seem reasonable, firstly because there was no reason for publishing the names and records of the persons involved and secondly because the fact that the memorandum came from the Premier's Department demonstrates that it had been received by persons in DFA.

3.141 Even if the Committee had concluded otherwise there would remain two difficulties in relation to the finding of contempt. First, the Queensland Government was not a witness at the inquiries. Second, the Clerk of the Senate advised the Committee that:

> A closely related question is whether any finding of contempt may be made against state officials. On one view, the rule of comity between jurisdictions in the federation, which is the basis of the practical, if not legal, immunity of state office holders from compulsion, would also entail that findings of contempt may not be made against them.[116]

3.142 In the absence of any substantive evidence to support the allegations, the Committee cannot conclude that the UWB Committee was misled in relation to 'Document 13' and the rape file. It finds that no contempt was committed in that regard. Nevertheless, the nature of the evidence submitted in relation to these allegations is very disturbing and is addressed later in the report under term of reference (b)(ii).

Deed of Settlement

3.143 Mr Lindeberg's fourth 'major incident' in the alleged contempt of the Senate is the failure of the Queensland authorities to disclose the 'true nature' of the deed of settlement entered into between the Queensland Government and Mr Coyne. Mr Lindeberg submitted that the Queensland authorities misled the Senate by:

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115 Mr Le Grand, *Correspondence*, 14 September 2004, p.8

116 Mr Evans, Clerk of the Senate, Correspondence, 20 August 2004

> (d) failing to properly disclose to the Senate the true nature of the February 1991 Deed of Settlement between Mr Peter Coyne and the State of Queensland concerning certain "events" at the John Oxley Youth Detention Centre, which both parties agreed to never publicly disclose in exchange for the payment of taxpayers' moneys after threats were made by certain persons against State public officials to take the matter to the CJC, in particular to investigate.[117]

The allegation

3.144 In his submission Mr Lindeberg quoted from a letter written by the late Mr Greenwood QC, who was acting for Mr Lindeberg, that the wording in the Deed of Settlement:

> '*... the events leading up to and surrounding his relocation from the John Oxley Youth Detention Centre*' was about or could be argued to cover incidents of alleged child abuse in the period before the Heiner Inquiry was established.[118]

3.145 Mr Lindeberg's submission reviews the events leading up to the signing of the Deed of Settlement and states that certain QPOA officials threatened departmental officials that they would take the 'entire saga' of the JOYC to the CJC (and other bodies) unless certain moneys were paid. Mr Lindeberg concludes that, because the department agreed to pay money that Mr Coyne was not entitled to, the department demonstrated that it had a vested interest in gagging everything and keeping past embarrassments in-house.[119] He made the following allegation:

> …it is therefore open to conclude that public officials (and others) involved in the Deed of Settlement's wording knew that the word 'events' was a necessary conspiratorial euphemism for 'incidents concerning the abuse of children in care'. It was seen to be an essential guarantee to legally bind all parties (particularly from the Crown's perspective after Mr Coyne had threatened to go to the media about his treatment and sudden secondment) to silence in order to protect themselves so that the truth of what had happened at the Centre under Mr Coyne's management and who knew about it was never publicly revealed.[120]

Previous inquiries

3.146 The only Senate inquiry in which the deed of settlement was examined was that conducted by the UWB Committee, although Mr Lindeberg made a submission to the PIW Committee in 1993 which included the following information:

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117 Mr Lindeberg, Submission no. 1, p.5

118 Mr Lindeberg, Submission no. 1, p.44

119 Mr Lindeberg, Submission no. 1, p.46

120 Mr Lindeberg, Submission no. 1, p.47

> On 10/1/91 a meeting occurs between the Department and QPOA. Union threatens to take 'the Coyne Case' to the CJC on the grounds of official misconduct over the shredding and Mr Coyne's treatment unless (i) the Department discloses details of the job interview for Manager of the JOYC; or (ii) makes it financially worthwhile for Mr Coyne to leave as he was considering purchasing a delicatessen…
>
> Mr Coyne is paid an 'additional' $27,190 to his normal redundancy payment. He is required to sign a Crown Solicitor's settlement deed to remain silent. He was unaware of that stipulation before collecting what he thought was his 'entitlement'. Under duress he signs.[121]

3.147 The PIW Committee did not report on the matter, but the UWB Committee in its inquiry into the shredding of the Heiner documents reported on the payment as follows:

> The CJC outlined the matter as follows. Minister Warner had approved the payment on 7 February 1991 as a special payment under section 77 of the *Financial Administration and Audit Act 1977*. The relevant regulation authorised ministers to make special payments up to $50 000. While such a delegation had been agreed by Cabinet in late 1990, it did not receive the approval of the Governor in Council until June 1991 and hence the payment to Mr Coyne was illegal.[122]

3.148 The UWB Committee was aware that the payment was unlawful because it was told as much by the CJC, and it reported that the appropriateness of a payout by way of compensation was questionable.[123] The committee was also obviously aware of the existence of a deed of settlement and must have been aware of at least some of its details because it reported that the deed contained a confidentiality clause.[124]

3.149 The payment to Mr Coyne was investigated by Morris and Howard who were also concerned about its appropriateness. Although they found that no charge other than that relating to the technical illegality of the payment could be sustained, and that no charges against persons involved in making the payment could be sustained under the Criminal Code, they went on to say that:

> … it is open to conclude that 'official misconduct' within the meaning of s.32(1) of the Criminal Justice Act was committed by officers of the

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121 Mr Lindeberg, Submission no. 74 to the Senate Select Committee on Public Interest Whistleblowing, pp.17-18

122 *The Public Interest Revisited*, Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.62

123 *The Public Interest Revisited*, Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.62

124 *The Public Interest Revisited*, Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p.61

> Department of Family Services (including the Minister) as regards negotiating and making the payment of $27,190.00 to Mr Coyne … [125]

3.150 As regards the technical illegality, Morris and Howard found that it was open to conclude that an offence was committed under section 204 of the Criminal Code because the payment involved an unlawful application of public money.[126] As was noted in their report:

> There is no doubt that the payment of $27 190.00 to Mr Coyne was unlawful. This was the view reached by the Crown Solicitor on 3 June 1993.[127]

Motives for the payout

3.151 Morris and Howard's explanation of the likely motive for the payment to Mr Coyne was:

> The more obvious motive for the agreed 'special payment' to Mr Coyne was, it might be thought, to buy his silence in respect of the Department's conduct, and particularly the Department's conduct relating to the destruction of the Heiner documents.[128]

3.152 They concluded that the real impropriety of the payout related to the fact that the payment was made for an ulterior motive, namely, to buy Mr Coyne's silence.[129] After discussing other possible (and defensible) motives that contributed to DFSAIA officials agreeing to the payment, Morris and Howard concluded as follows:

> But in our view it is open to conclude that the same individuals were fully conscious of the fact that they had acted dishonourably, and perhaps

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125 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, p.140

126 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, p.131

127 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, p.131

128 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, p.130

129 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, p.141

> illegally, over the destruction of the Heiner documents, the returning of the statements to the QSSU, and the destruction of photocopies of those statements. … In our view, it is open to conclude that those individuals allowed their own personal interests to guide them in deciding on the disbursement of $27,190.00 of public funds, and accordingly acted in away which can be characterised as involving substantial impropriety.[130]

3.153 It is interesting that Morris and Howard, although they were aware of allegations of child abuse at JOYC,[131] did not suggest that covering these up was a motive for making the (illegal) payment to Mr Coyne. For his part, Mr Coyne informed the UWB Committee that he wanted the department to pay because he had been treated badly.

3.154 Mr Coyne also told the committee that the deed of settlement included a provision that he was not allowed to canvass any of the issues surrounding his relocation from JOYC at Wacol to Brisbane, or the events leading up to or surrounding the relocation with any other officer, etc. He queried why a deed of settlement was needed if there was no connection between his relocation and the Heiner inquiry.[132]

3.155 Plainly, at the time that he gave evidence to the UWB Committee Mr Coyne did not consider that the relevant provision in the deed of settlement related to any incident of child abuse. Mr Lindeberg's assertion, however, is that the payout was intended to conceal child abuse, and that this was deliberately withheld from Senate committees, thus hindering them in their role. He stated that:

> Had you [Senate committees] known that within that deed of settlement the events concerned the abuse of children, you would have made better findings about it.[133]

Conclusions

3.156 Neither Mr Coyne nor Morris and Howard seem to have considered that the Deed of Settlement was intended to buy Mr Coyne's silence in regard to incidents of child abuse. Neither did Mr Lindeberg, until relatively recently.

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130 Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, p.142

131 See Attachment A, Anthony Morris QC and Edward Howard, *Report to the Honourable the Premier of Queensland and the Queensland Cabinet of An investigation into allegations by Mr Kevin Lindeberg and allegations by Mr Gordon Harris and Mr John Reynolds*, 10 October 1996, 10 October 1996.

132 Mr Coyne, *Committee Hansard,* Senate Select Committee on Unresolved Whistleblower Cases, p.541

133 Mr Lindeberg, *Committee Hansard,* 11 June 2004, p.30

3.157 Mr Lindeberg's allegation that the words of the Deed of Settlement, namely, 'the events leading up to and surrounding his relocation from the John Oxley Youth Detention Centre' were about or could be argued to cover incidents of alleged child abuse was not made to previous Senate inquiries. The explanation for the confidentiality clause in the deed that he gave to the UWB Committee, for example, was that it was intended to cover up the shredding.[134]

3.158 The allegation regarding the Deed of Settlement seems to be based on Mr Lindeberg's assertion that the Heiner documents were destroyed to cover up allegations of child abuse. As the Committee concluded earlier, little is known of what was in those documents, and it is possible only to speculate. It is possible to speculate, as Mr Lindeberg has done, about the reasons for the department insisting on Mr Coyne's signing a Deed of Settlement which included a clause requiring his silence, but there is no evidence to support any such speculation.

3.159 It is not clear in any event in what way the Senate may have been misled. The UWB Committee was aware of the Deed of Settlement and commented on it. The committee may or may not have been aware of all its provisions, but it seems far-fetched to suggest that the 'true nature' of the deed, whatever that may be, should have been disclosed to that committee.

3.160 The Committee cannot conclude that the Senate was misled in any particular in relation to the Deed of Settlement and therefore finds that no contempt has been committed.

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134 Mr Lindeberg, Submission to the Senate Select Committee on Unresolved Whistleblower Cases, *Submissions, Supplementary Submissions and other Written Material Authorised to be Published, Volume 3,* p.42

CHAPTER 4

Term of reference (b)

4.1 The second part of the terms of reference require the Committee to inquire and report on the implications of part (a) for measures which should be taken:

> (i) to prevent the destruction and concealment by government of information which should be available in the public interest,
>
> (ii) in relation to the protection of children from abuse, and
>
> (iii) for the appropriate protection of whistleblowers.

4.2 Evidence to the inquiry focused on part (a) of the terms of reference. The Committee received only one submission, from the Australian Society of Archivists, which specifically related to part (b). Nevertheless, the Committee has identified from the material before it a number of specific issues arising from the Lindeberg Grievance relevant to each part of term of reference (b). These issues are discussed in this chapter.

(i) prevent the destruction and concealment by government of information which should be available in the public interest

4.3 The Australian Society of Archivists (ASA) highlighted in its submission several specific issues arising from the shredding of the Heiner documents relevant to the protection and availability of government information. These were:

- The importance of good recordkeeping practices, underpinned by sound frameworks and systems;[1]
- The importance of fully informed document appraisal and disposal practices, governed by sound records disposal authorities;[2] and
- The importance of impartiality and statutory independence for government archivists.[3]

Recordkeeping

4.4 The ASA stated that to prevent incidents such as the shredding of the Heiner documents, organisations need to put in place sound procedures for managing their records:

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1 Australian Society of Archivists, Submission no. 2, p.3

2 Australian Society of Archivists, Submission no. 2, pp.5-6

3 Australian Society of Archivists, Submission no. 2, p.5

> The implementation of sound recordkeeping procedures, based upon Australian and International best practice, prevent the destruction and concealment of records and the information they contain.[4]

4.5 The ASA stated that agreed principles for good recordkeeping are promoted in the Australian Standard/International Standard ISO 15489 – 2002: *Records Management*.[5] The National Archives of Australia (NAA) has endorsed this standard for use by all Commonwealth agencies.[6] The NAA has also published a manual compliant with the standard to help agencies develop and implement sound recordkeeping practices. The manual is titled *DIRKS (Designing and Implementing Recordkeeping Systems) – A Strategic Approach to Managing Business Information*.[7]

4.6 The relevant authority in each State and Territory has also endorsed the standard as the best practice model for recordkeeping.

Appraisal processes

4.7 The ASA advised that one of the fundamental accountability issues raised by the 'Heiner Affair' is the basis on which government archivists give approval to destroy official records.[8] The evidence given by the ASA suggests that the appraisal process resulting in the destruction of the Heiner documents was inadequate:

> The disposal decision made by the State Archivist in relation to the Heiner material was an ad hoc decision. It was a decision made in a short time frame. It was also made in the absence of a records disposal authority. Records disposal authorities (containing disposal rules and policies) when applied by archivists to records, produce consistent disposal outcomes. Sound appraisal regimes, consisting of records disposal authorities, appraisal criteria, and disposal rules and policies should be put in place to support … appraisal process[es] that are open to public scrutiny and are understood and accepted.[9]

4.8 The *DIRKS* manual issued by the NAA gives Commonwealth agencies detailed guidance on the steps required to develop adequate record disposal

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4 Australian Society of Archivists, Submission no. 2, p.4

5 Australian Society of Archivists, Submission no. 2, p.4

6 Australian National Archives, *Archives Advice 58, Australian Standard for Records Management AS ISO 15489*, July 2002

7 National Archives of Australia, 2003, *DIRKS–A Strategic Approach to Managing Business Information, Part 1*

8 Australian Society of Archivists, Submission no. 2, p.9

9 Australian Society of Archivists, Submission no. 2, p.6

authorities.[10] It is designed to prevent the ad hoc appraisal of individual records, as was the experience with the Heiner documents.

4.9 The NAA has also specified three areas that it expects Commonwealth agencies to take into account when considering maintaining or disposing of records. These are:

- business needs;
- the requirements of organisational accountability; and
- community expectations.[11]

4.10 Of particular relevance, given the Heiner experience, the NAA states that it expects Commonwealth organisations to maintain records if:

> • it is reasonable to believe that the records may be required for a judicial proceeding; and
>
> • destruction or disposal would compromise existing or future claims in relation to the rights and entitlements of persons with whom the organisation or its predecessors has dealt, where those rights and entitlements are known or projected at the time of appraisal.[12]

4.11 Further, the NAA states:

> We will not knowingly authorise disposal, and existing authorities should not be implemented, while formal processes are in train or pending to see or use the records concerned.[13]

Statutory independence

4.12 The ASA acknowledged in its submission that not all government documents can be retained for the public record, and said that the responsibility for determining which public records should be kept rests with the archivist.[14] As such, the ASA argued that to prevent inappropriate destruction of government documents, the independence of government archivists from political or other interference should be guaranteed.[15]

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10 National Archives of Australia, 2001, *DIRKS–A Strategic Approach to Managing Business Information, Appendix 8 – Procedures for developing a records disposal authority in the Commonwealth*

11 National Archives of Australia, *Why Records are Kept: Directions in Appraisal,* www.naa.gov.au/recordkeeping/disposal/why_keep/expectations.html

12 National Archives of Australia, *Why Records are Kept: Directions in Appraisal,* www.naa.gov.au/recordkeeping/disposal/why_keep/expectations.html

13 National Archives of Australia, *Why Records are Kept: Directions in Appraisal,* www.naa.gov.au/recordkeeping/disposal/why_keep/expectations.html

14 Australian Society of Archivists, Submission no. 2, p.5

15 Australian Society of Archivists, Submission no. 2, p.5

4.13 The ASA noted that the provisions of the *Libraries and Archives Act 1988 (Qld)*, in force at the time of the Heiner inquiry did not provide such protection.[16] However, the ASA recognised that this issue has since been addressed, as the independence of the Queensland State Archivist was established under the *Public Records Act 2002 (Qld)*. The Act states:

> The archivist and the staff of the archives are not subject to the control or direction of a Minister or a department in relation to making decisions about the disposal of public records.[17]

Committee comments

4.14 The Committee agrees with the ASA's view that good recordkeeping is fundamental to government accountability. In the Committee's view, the shredding of the Heiner documents was an undesirable course of action, representing substandard recordkeeping and archival practices. Considering the angst that the shredding continues to generate some fourteen years later, and the significant time and resources that have been devoted to the matter by the protagonists and others involved in various investigations, the Committee adds it support to the findings of the UWB Committee:

> Greater consideration ought to have been given to alternative approaches to resolving the problems associated with the [Heiner] inquiry.[18]

4.15 However, the Committee notes that legislative reform in the relevant jurisdiction, and the endorsement of recordkeeping standards and best practice guidelines since the time of the Heiner inquiry have addressed the specific issues raised in evidence.

(ii) in relation to the protection of children from abuse

4.16 No recommendations for reforms to prevent child abuse were submitted to the Committee. The material received by the Committee in relation to child abuse primarily concerned the details of a sexual assault on a resident of the JOYC, the inadequacy of investigations into that case and failure to punish those culpable for the assault. The Committee emphasises that it does not have a judicial role and cannot adjudicate on particular cases.

4.17 Nevertheless, the evidence received by the Committee suggests serious failures by those with a duty of care to children detained in the JOYC in the late 1980s and early 1990s. Existing documents indicated that physical abuse of children

16 Australian Society of Archivists, Submission no. 2, p.5

17 Public Records Act 2002 (Qld), section 27(1), quoted in Australian Society of Archivists, Submission no. 2, p.5

18 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p.60

occurred,[19] and submissions and correspondence to the inquiry detailed sexual abuse.[20]

4.18 The material received by the Committee points to several systemic deficiencies in the operation of the JOYC at the time, including:

- Inadequate complaint mechanisms and protection for complainants;
- Inadequately trained staff and underperforming staff;
- Deficient supervisory and management practices;
- Deficient departmental oversight and response to identified issues; and
- Inadequate monitoring of compliance with regulations and legislation.

4.19 Submitters argued that information available in the Queensland media prior to the Heiner inquiry indicated that the relevant Queensland ministers for family services knew about child abuse at the JOYC.[21] Submitters posited that the Heiner inquiry took evidence on such abuse, and argued that had the Heiner inquiry been permitted to report, later instances of abuse may have been prevented.[22] Submitters also stated that by shredding the Heiner documents, not only had the abuses been covered up, but evidence which may have been used by victims in later court actions had been destroyed.

4.20 As discussed in Chapter 3, whether allegations of sexual abuse were covered in the material gathered by the Heiner inquiry has not been established. The Committee also received differing views as to whether the shredding of the Heiner documents obstructed potential court actions. Mr Lindeberg presented the view that the Heiner documents would have formed admissible evidence:

> The [Heiner] documents could also have been used for the children who were abused as probative contemporaneous records for their court proceedings.[23]

4.21 On the other hand, in correspondence to the Committee, Mr Barnes stated that the Heiner documents would not have been admissible:

> The suggestion that evidence of child abuse was destroyed or lost when the documents were shredded is complete nonsense. The records of any such

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19 Mr Morris QC and Mr Howard, *An Investigation into Allegations by Mr Kevin Lindeberg and Allegations by Mr Gordon Harris and Mr John Reynolds,* October 1996, Attachment A; Exhibits 20 and 31 to the Forde Commission of Inquiry, made available to the Committee; Director-General, Queensland Cabinet Office, Response to the Senate Select Committee on Unresolved Whistleblower Cases, 31 August 1995, Document 13

20 Mr Grundy, Submission no. 3 and attachments

21 Mr Lindeberg, Submission no. 1, p.15

22 Mr Grundy, Submission no. 3, p.10

23 Mr Lindeberg, *Committee Hansard,* 11 June 2004, p.55

> allegation made to Mr Heiner could not have been admitted in any civil or criminal proceedings that sought to prove that such abuse had occurred. On the other hand, if people who appeared before Mr Heiner had such evidence they could and still can give [it] to the appropriate law enforcement authorities. Nothing that was done to the "Heiner documents" in any way impacted upon that.[24]

Committee comments

4.22 Regardless of the legal status of the Heiner documents, and whether or not the Heiner inquiry covered allegations of sexual abuse, the Committee concurs with the view that had the alleged abuses been thoroughly investigated earlier, future incidents may have been averted. The same may be said of institutional child abuse in all jurisdictions.

4.23 In relation to Queensland, it may be that the shredding of the Heiner documents was genuinely motivated by the need to protect Mr Heiner and other witnesses from possible defamation. It remains unclear however, as to why the Goss Labor government did not establish a fresh inquiry, properly constituted under the appropriate act, into matters to do with the John Oxley Youth Centre. Similarly, it remains an unanswered question as to why the Queensland National government in 1996 did not accept the recommendation of the Morris-Howard report that a public inquiry be conducted to investigate matters of concern arising out of Mr Lindeberg's allegations. Such inquiries may have provided an avenue for the investigation of the abuses which have now come to light.

4.24 The Committee has identified from the submissions and documents received several systemic issues contributing to the occurrence of child abuse at the JOYC around the time of the Heiner inquiry. The Committee notes that these issues have been identified in previous inquiries along with recommendations for reform. In particular, the Commission of Inquiry into Abuse of Children in Queensland Institutions (Forde inquiry) made wide ranging recommendations for reforms in legislation, policy and practice to prevent institutional child abuse.[25] The Committee draws attention to the recommendations made by that inquiry, along with relevant national inquiries which have recommended measures to assist in reparation for past victims of child abuse.[26]

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24 Mr Barnes, *Correspondence*, 18 September 2004, p.2

25 Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions, May 1999

26 See Human Rights and Equal Opportunity Commission (HREOC), *Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, April 1997; Senate Community Affairs References Committee, *Lost Innocents: Righting the Record, Report on Child Migration*, August 200l; Senate Community Affairs References Committee, *Forgotten Australians, A report on Australians who experienced institutional of out-of-home care as children*, August 2004

(iii) for the appropriate protection of whistleblowers

4.25 As noted in Chapter 2, the Lindeberg Grievance has its origins in the treatment of a whistleblower, that is, of Mr Lindeberg who was dismissed by the QPOA. The grievance first came before the Senate in the form of a submission to the PIW Committee, and was later aired more thoroughly before the UWB Committee. Perhaps indicating the extent to which the nature and substance of the Lindeberg Grievance has shifted over time, this Committee received scant evidence relating to whistleblowing, and no recommendations for measures which should be taken for the protection of whistleblowers.

4.26 The sole submission received by the Committee relating to whistleblowing, from Mr McMahon, focussed on the specific experience of the submitter and its parallels with the Lindeberg case.[27] Mr McMahon's case was among those investigated by the UWB Committee. While it is beyond the terms of reference of this inquiry to again review Mr McMahon's case, from the evidence received two issues are broadly relevant to term of reference (b). These are: the need to effectively protect whistleblowers acting across jurisdictions, in this case a State public servant disclosing breaches of a Commonwealth law by other State public servants; and the importance to whistleblower cases of preservation and access to relevant documents.[28]

4.27 These two specific issues were also identified and considered by the UWB Committee. In relation to jurisdictional issues that committee was concerned to ensure there were no 'gaps' in the legislative protection afforded to whistleblowers.[29] In relation to the destruction of evidence, the UWB Committee noted its appreciation of the difficulties created for whistleblowers, but considered the solutions raised by witnesses, including reversing the onus of proof, or lowering the legal standard of proof, were inappropriate.[30]

4.28 The PIW Committee report made several recommendations for the protection of whistleblowers, including that:

> …the practice of whistleblowing should be the subject of Commonwealth legislation to facilitate the making of disclosures in the public interest and to ensure protection for those who choose so to do.[31]

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27 Mr McMahon, Submission no.6

28 Mr McMahon, Submission no.6

29 Report of the Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p.33

30 Report of the Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p.20

31 Report of the Senate Select Committee on Public Interest Whistleblowing, *In The Public Interest*, August 1994, p.xiv

4.29 While no Commonwealth whistleblowing legislation has been enacted, every state and the Australian Capital Territory has passed whistleblowing legislation.

4.30 Bills relating to the protection of whistleblowers in the Commonwealth jurisdiction have been introduced into the Senate on a number of occasions. In June 2001, Senator Murray introduced the *Public Interest Disclosure Bill 2001*. This Bill was referred to the Senate Finance and Public Administration Legislation Committee (F&PA Committee) which concluded as follows:

> … the Committee recommends that the Public Interest Disclosure Bill 2001 [2002] not proceed in its current form. Nevertheless, the Committee recognises the need for separate legislation addressing the matter of whistleblowing and supports the general intent of the Bill.[32]

4.31 In December 2002 Senator Murray introduced another bill, the *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002,* which he said sought to refine the 2001 bill by addressing the issues raised in the F&PA Committee's report.[33] In Senator Murray's view the new bill 'seeks to meet the pressing need to provide protection for those who speak out against corruption and impropriety'.[34]

Committee comments

4.32 It is apparent from the evidence received that that the treatment of whistleblowers is no longer a central concern of the Lindeberg Grievance and the limited material submitted gives rise to no new recommendations in relation to the protection of whistleblowers. As such, should the Senate wish to initiate reforms in this area, the recommendations of previous Senate committee inquiries, including the need for Commonwealth legislation, could be revisited.

Conclusion

4.33 The Committee reiterates that its second term of reference is contingent on the first – that is, the specific implications arising from the matter of contempt. Given this, and the nature of the submissions received, the Committee's investigation of the issues and reforms required in relation to term of reference (b) has inevitably been limited. Where possible, the Committee has identified specific implications arising from the Lindeberg Grievance. Should the Senate consider that the issues raised warrant further investigation, it could of course refer the matters in term of reference (b) to the relevant Senate standing committees for comprehensive inquiries.

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32 Senate Finance and Public Administration Legislation Committee, *Public Interest Disclosure Bill 2001 [2002]*, September 2002, p.1

33 Senator Andrew Murray, *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002: Second Reading Speech*, 11 December 2002.

34 Senator Andrew Murray, *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002: Second Reading Speech*, 11 December 2002.

Senator John Watson
Chair

Dissenting Report

By Senator Santo Santoro

Senator for Queensland

With regret, I am unable to agree with the findings of this Committee, and specifically, I do not believe that the Committee is in a position to find that no contempt of the Senate was committed and that there is no basis for reconstituting the Committee and concluding this inquiry in a timely, but comprehensive, manner.

There have been a number of Commonwealth and State inquiries into the events leading up to, and following from, the decision of the Queensland Cabinet in March 1990 to destroy the "Heiner documents".

The issues central to these inquiries are many and varied, but strike at the heart of good and honest government and the proper administration of criminal and child protection laws.

The Heiner inquiry was established by the then Queensland Government in 1989 to investigate issues relating to the treatment of children in the John Oxley Youth Centre. Shortly after that inquiry was established, there was a change of government (in December 1989), and soon thereafter the inquiry was finalised. The documents generated by that inquiry were subsequently shredded by a decision of the Queensland Cabinet.

The reasons for that decision being made, the legal ramifications that flowed from it, and the treatment of the central players, including Mr Lindeberg, have been matters of public controversy in Queensland for more than a decade.

Despite a number of inquiries, it is fair to say that many serious issues remain unresolved.

If that were all that was involved, serious though these issues are, there would, no doubt, be little to enliven the jurisdiction of the Senate. However, the Senate established two select committees into public interest whistleblowing, and serious allegations were made that the Queensland Criminal Justice Commission gave false and misleading evidence to the second of the inquiries (the Select Committee on Unresolved Whistleblower Cases). These allegations are set out in Chapters 2 and 3 of the Report.

The Senate Committee of Privileges subsequently dealt with those allegations in December 1996 and May 1998.

This Committee was set up to fully and finally deal with Mr Lindeberg's allegations. If the Senate had thought that there was nothing further in those allegations, and that they had been fully and properly investigated by previous inquiries, then it would not have agreed to establish this Committee.

Clearly one cogent reason for establishing this Committee was a desire to ensure that there was closure on these allegations.

If that was the fundamental purpose underpinning the establishment of this Committee, then this Committee has not achieved the objective set by the Senate.

Fundamentally, my concern is that this Committee has only partially carried out its work, and yet purports to make findings which could only be made at the conclusion of a full and proper inquiry. I am not in a position, on the basis of the limited evidence that has been submitted, to sign off on findings that could only be made when due process has been given to Mr Lindeberg and others, and after due and diligent inquiry is made of the evidence submitted.

My concerns are as follows:

(a) The Committee only convened one public hearing, on 11 June 2004 in Brisbane. The Committee has only heard from three witnesses.

(b) The Committee agreed to convene a further public hearing for 16 and 17 August 2004, but this hearing was deferred due to the pending federal election;

(c) Mr Lindeberg, and other witnesses, who were due to appear before the Committee at its August hearings, were not given sufficient additional opportunity to present further material or to respond to questions that may be posed.

From the outset, members of the Committee were of the view that several days of hearings were required to fully explore the matters before the inquiry. At the Committee's public hearing on the 11 June 2004 Committee members indicated that they were keen for Mr Lindeberg to continue his testimony in order to further explore the issues raised.

These comments provide a clear indication that there were outstanding matters to pursue and that the process of evidence gathering was not complete.

Further, at the conclusion of his appearance at that hearing Mr Lindeberg indicated to the Committee that "There are other things I would like to say". Contrary to the claim in the majority report that Mr Lindeberg has had ample opportunity to make his case, he was not afforded the opportunity to state his case fully before this inquiry; and

(d) The Committee wrote to the Queensland Government on 11 August 2004 requesting a copy of the unedited version of Document 13, which is central to this inquiry, but, to date, the Queensland Government has not responded.

The committee undertook to receive Document 13 in camera to protect the identity of the children identified in the document (assuming they were named in it), and had suggested to the Queensland Premier that much of the speculation surrounding the document might be addressed if the committee were able to inspect the document in its entirety. That is, if Document 13 had been edited originally to protect the children named in it, providing the committee with the opportunity to verify this point and report on it would have laid to rest the "theories" that circulate about its content.

Central to the establishment of the Heiner inquiry were allegations of the mistreatment of children in detention. Much of the alleged "cover up" of material, or of misleading evidence, relates to how people in authority in Queensland dealt with children at risk and in government care.

This Committee was established to inquire into matters germane to a contempt of the Senate, but that of itself does not adequately express or highlight the human dimension of the Lindeberg grievance, and why this matter has not gone away, but has remained a matter of ongoing public debate and individual anguish (for many) in Queensland.

I am disappointed that this Committee has sought to rule off this matter having not completed its inquiry. I am disappointed because the findings of the Committee will not be the final word in the Heiner inquiry debate, and, in fact, this half completed inquiry will only fuel the debate that there has been an ongoing “cover up”.

My dissent from the findings of this Committee should not be read as an endorsement of any of the allegations of Mr Lindeberg, or giving implicit support to a finding that there has been a contempt of the Senate.

However, I do not believe that Mr Lindeberg and other potential witnesses have been given procedural fairness by this committee, and I do not believe there is any proper basis for its findings.

I dissent, because in my view, this Committee has not followed proper process and its findings are founded on an inadequate base of evidence.

I would respectfully recommend that this Committee be reconstituted and complete its task, not just so that the Lindeberg Grievance is dealt with finally, but so that the important human and constitutional issues underpinning this Grievance are fully and fairly ventilated.

ATTACHMENT:

1. ***Hansard Hearing transcript of where Committee members raised the prospect of calling Mr Lindeberg again to reappear before the Committee.***

SANTO SANTORO
Senator for Queensland
15 November 2004

Attachment 1

Recalling Mr Lindeberg to re-appear at a hearing

The prospect of recalling a witness (Mr Lindeberg) is recorded in several places throughout the transcript of the Committee's public hearing. Relevant excerpts are quoted below, along with the page reference.

Senator HARRIS—I will cease my questions to Mr Lindeberg at this point but request the committee that I have the ability to recall Mr Lindeberg at some later date. (p.39)

Senator SANTORO—Mr Lindeberg, I have prepared about 160 questions that I want to put to you, but I think we are going to run out of time. Like Senator Harris, I would like to reserve my right to ask the committee to consider your recall at a later date. (p.43)

ACTING CHAIR (Senator Kirk)—I call the committee to order. We are going to continue with evidence from you, Mr Lindeberg. Senator Santoro will resume questioning. He has indicated to me that he has a few more questions. Then we will proceed to Mr MacAdam. The committee has not made a decision as yet but it seems most likely that we will need to ask you to come back before the committee at some stage. (p.54)

Senator SANTORO—I only have a few more questions pertaining to the role of the archivist but then I have a series of questions regarding the deed of settlement in relation to document 13, the role of the Criminal Justice Commission, the role of Mr Michael Allan Barnes, the role of other individuals and the Queensland Police Service and the role of the Office of Crown Law. So I have quite a number of other questions. But, as you have indicated, it is probably best if we afford courtesy to the other witnesses here today and then we should discuss in committee whether or not we recall Mr Lindeberg, whom I would be very keen to keep on talking with—through the chair and the committee, of course. But I have just a few more questions just to finish on the role of the archivist. Then, if you wish, maybe we could go on to other witnesses or I could keep on going. (pp.54-55)

Mr Lindeberg—Is there a prospect that I may still be called for further questions in relation to this particular matter?

ACTING CHAIR—Yes, there is the prospect, but it is something that the committee has to deliberate upon.

Mr Lindeberg—There are other things I would like to say. Thank you very much; I appreciate it.

ACTING CHAIR—Not today, if that is what you mean.

Mr Lindeberg—No, I appreciate that. I defer to other people today. Thank you very much for your time. (p.60)

Additional Statement by Senator Andrew Bartlett

The protection of whistleblowers and the integrity of our political and public systems has long been a key concern for me and for the Australian Democrats. The actions of government must be accountable and our accountability and review mechanisms must be the subject of review themselves. Senate inquiries into matters such as the Lindeberg Grievance are important for that reason, even if in this case, the findings are not conclusive. The process of opening up our public institutions, inquiring into whether there has been a miscarriage of justice and seeking the evidence is as important as the findings themselves.

As well as participating in this Inquiry, I have a long-standing exposure to the issues examined by this inquiry. At the time of the two Senate Select Committees on whistleblower issues, I was on the staff of Senator John Woodley, who was a member of both of those Inquiries, and I followed much of the evidence at that time. Based on the evidence before this and previous inquiries, it is my view that the decision to order the shredding of the documents in question was clearly wrong. However, this is a separate matter to the focus of this Inquiry, which predominantly dealt with the matters of contempt of the Senate. On these matters, I agree with the findings of the report.

I wish to make these additional comments because the opportunity should not be missed to emphasise the seriousness of child sexual and physical abuse and the widespread failure of Governments at both state and federal level to recognise that seriousness.

This matter is raised in the second term of reference of the Inquiry. However, for reasons which the report outlines, these were not able to be dealt with by the inquiry and, as a result, in the findings.

Term (b) the implications of this matter for measures which should be taken:
...
(ii) in relation to the protection of children from abuse

Mr Lindeberg has brought these new allegations because of concerns that evidence about child abuse including pack-rape and criminal paedophilia was withheld from the Senate in previous inquiries. Whilst the report acknowledges disturbing information about child abuse at John Oxley Youth Centre (JOYC), given that the main focus of the Inquiry was around the narrow matter of contempt and that almost all the evidence focussed on this, it was not appropriate to make recommendations regarding measures that can be taken to protect children from abuse.

The fact that it was not feasible for the Inquiry to address the issue of child abuse in any depth should not be misrepresented as a lack of interest by the Committee in this issue. Whilst it was asserted that a main reason for the shredding of the documents

was to cover up the sexual assault of a young girl, there is insufficient evidence to determine if there is any substance to this.

The document shredding which generated the long saga covered by this and previous Senate Committee reports may not have had anything to do with a desire to cover up evidence of child sexual assault. It is only because of the pursuit of this saga over so long that the incidents of assault came to light, along with the total failure to properly address it. Sadly, one reason why it is possible there was no intention to cover up this incident is because incidents such as the sexual assault of a young girl in state care are so common and unremarkable that it might not merit sufficient individual attention to warrant such an act. Incidents such as those alleged to have occurred have regularly been ignored or dealt with in a peremptory manner in the past without the need to involve Cabinets in document shredding.

I have previously called for a Royal Commission into Child Abuse to heal victims' suffering and impose adequate standards on all institutions that care for children. This call has also been regularly made by other Australian Democrat Senators and other advocates in the community. A Royal Commission would provide a major opportunity to investigate the actions of the past, protect children in the future, and assist victims and families to move forward. Such a Commission could include instances of abuse at JOYC and other institutions.

Only a Royal Commission provides the real prospect of addressing the issues that need to be dealt with in a comprehensive way, across all states and all different organisations – government and non-government – that have failed so terribly and continually over so many years.

The fact that delving into this matter has uncovered allegations of very serious child abuse provides yet another clear argument for a Royal Commission to enable all these matters to be properly dealt with once and for all.

Senator Andrew Bartlett
Australian Democrats

Appendix 1

Submissions Received

1.	Mr Kevin Lindeberg
1a.	Mr Kevin Lindeberg (Supplementary Submission)
2.	Australian Society of Archivists Inc
3.	Mr Bruce Grundy
4.	Mr Alastair MacAdam
5.	Mr Des O'Neill
6.	Mr Greg McMahon
7.	Australian Justice & Reform Inc
8.	Mr David Field

Appendix 2

Public Hearings

Friday 11 June 2004 – Brisbane

Mr Kevin Lindeberg

Mr Alastair MacAdam

Mr Bruce Grundy

Appendix 3

Clerk's Advice of 29 April 2004

Clerk's Advice of 18 May 2004

Clerk's Advice of 20 August 2004

AUSTRALIAN SENATE

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hc/let/14244

29 April 2004

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

Dear Mr Sands

DOCUMENTS IN POSSESSION OF STATE AUTHORITIES

Thank you for your letter of 28 April 2004, which seeks advice on the power of the committee to gain access to, and order the production of, documents in the possession of the Queensland government and its departments.

The power to require the attendance of witnesses and the power to require the production or examination of documents are not separate powers, but the same power. Historically, orders to produce documents were invariably subsidiary parts of orders for witnesses to attend: witnesses were ordered to attend and to produce documents as part of their attendance. If witnesses are not required to give oral evidence they are ordered to produce documents without necessarily attending, as a concession to the convenience of the witnesses. Similarly, where the required documents are voluminous or difficult or inconvenient to transport, witnesses may be ordered to make them available for inspection as an alternative to producing them, again as a concession to the witnesses' convenience. The power is sometimes generically described as the power to compel evidence, to make it clear that it includes these two facets. Any limitation which applies to the power to summon witnesses, therefore, applies equally to the other aspect of the power, the power to compel the production or examination of documents.

As indicated in *Odgers' Australian Senate Practice* and in the advices provided to Senate committees referred to there, Senate committees have refrained from ordering state office-holders to attend and from requiring the production or examination of state documents, on the basis of a rule of comity between levels of government in a federal system. This acknowledged limitation of practice may have a legal basis, as was advised to the Select Committee on the Victorian Casino Inquiry in 1996; if the matter were ever adjudicated it might be held that the Constitution imposes an implied limitation on the powers of Senate committees to compel evidence from state authorities.

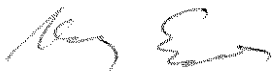
There is also the matter of applying an effective remedy in case of a refusal by a state authority to comply with a Senate committee subpoena. In practice, there is no effective remedy, other than to bring the matter by one means or another before the High Court for adjudication, which would be a lengthy process unlikely to facilitate the particular inquiry in question. A state government contesting the power of the Senate to require the attendance of state office-holders or the production or examination of state documents would be likely to raise also the question of possible limitation of the inquiry power to matters within the legislative competence of the Commonwealth, which would greatly complicate and extend the litigation.

Generally speaking, state statutory authorities are not an exception to the rule; although they may have some measure of independence from the state executive government, they are still part of the apparatus of the state as a polity.

For these reasons, Senate committees have always been advised to proceed by way of invitation when seeking state office-holders as witnesses or state documents, and committees have always followed that advice. I would give the same advice to this committee.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely



(Harry Evans)

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hc/let/14259

18 May 2004

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

Dear Mr Sands

TREATMENT OF COMMITTEE DOCUMENTS

Thank you for your letter of 13 May 2004, in which the committee seeks advice on the treatment of documents which have been provided to the committee. I hope that the following observations will be of some help to the committee.

The terms of reference provided by the Senate to the committee on 1 April 2004 require the committee to determine whether any false or misleading evidence was given to various Senate committees, having regard to specified matters, including three of the documents provided to the committee. The committee is also required, having determined that question, to report on any implications for measures which should be taken in relation to the destruction or concealment by government of information, and the protection of children and whistleblowers. The committee is not required to determine whether statements made in the documents are true, or to make findings about the principal subject matter of the documents, the conduct of staff of the John Oxley Youth Centre. Essentially, the committee is to determine whether, in the light of the existence of those documents and the state of knowledge of relevant persons of the existence of those documents, false or misleading evidence was given.

That being the responsibility of the committee, there would seem to be little or no justification for the publication of the three documents in question. The publication of evidence which is submitted to a Senate committee has two purposes: to allow the public to see the evidence available to the committee on the basis of which the committee made its conclusions and recommendations; and to allow persons who may have other relevant evidence to respond to matters contained in the original evidence. Neither of those purposes would seem to be served by the publication of the documents in question. Such publication would communicate to the public allegations which were made in the documents about the conduct of staff at the John Oxley Youth Centre. The truth of those allegations would be the

focus of responses, not the questions of who knew of the existence of the documents and how this should have affected evidence given to other Senate committees.

It is just possible that publication of the documents might result in some relevant evidence being discovered. For example, some former officer of a Queensland government department, knowing, because of their publication, of the contents of the documents, might be able to provide evidence that the contents of the documents were made known to other relevant office-holders. This would appear to be fairly unlikely.

The publication of the documents might be thought to have greater justification in the context of the three matters in respect of which the committee is to consider appropriate measures. In particular, paragraph (1)(b)(ii) requires the committee to consider measures for the protection of children from abuse, and that might at first sight seem to require a finding of whether abuse occurred in the John Oxley Youth Centre and who was responsible for it. An appropriate reading of that part of the terms of reference, however, would seem to require the committee to draw its recommendations from the treatment of the documents by government agencies rather than the truth of the allegations. To inquire into the truth of the allegations and to receive evidence about them in that context would also appear to be a diversion of the committee's inquiry.

The inappropriateness of publishing the documents is well demonstrated by the obligation under the rules of the Senate which would then be created, for the committee to allow responses to the allegations contained in the documents. Committees have followed the interpretation that they are not obliged to seek responses to allegations in evidence unless the allegations are to be considered as central to their inquiries. Even in that circumstance, however, publication of such evidence (by the committees, rather than by other persons) greatly strengthens the moral obligation to seek responses. If the committee published the documents in question it would therefore be proper for the committee to write to each person adversely reflected on in the documents and invite their responses. That process would not be relevant to the committee's task, which is to determine whether misleading evidence was given. Responses to the allegations contained in the documents would not throw any light on relevant persons' knowledge of their existence.

Against the minimal likely assistance to the committee's inquiry arising from the publication of the documents, there is the harm which would be done to persons referred to in the documents, and the diversion of the committee's inquiry by probable consequent disputes about the truth of those allegations.

In this situation, it would appear that the advisable course for the committee is not to publish the documents but to receive and consider them for the purposes of the committee's inquiry, that is, to consider them so far as they are relevant to the question of whether misleading evidence was given. It should be possible for the committee to convey in its report the relevance of the documents to its inquiry without disclosing the contents of the documents.

The foregoing relates mainly to the documents known as the Dutney memorandum, and the two memoranda signed by Mr Peter Coyne, known as exhibits 20 and 31 to the Forde Commission. One of the other documents is a press item which has already been published, and the remaining document is the letter dated 9 May 2001 to the then President of the Senate by Mr R.F. Greenwood QC. In so far as the latter document discloses the contents of the three crucial documents, it should similarly not be published, and there would appear to be no

advantage to the committee's inquiry in publishing the remainder of it, as it consists only of Mr Greenwood's advice and opinions.

The interpretation of the committee's inquiry offered here is necessarily based on an incomplete knowledge of any other evidence available to the committee. I would be pleased to discuss these observations if that would assist the committee.

Yours sincerely

(Harry Evans)

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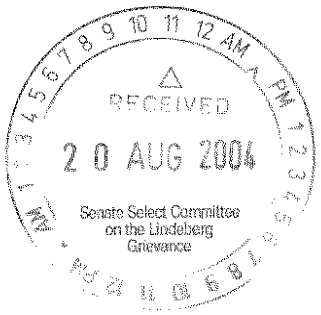

20 August 2004

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

Dear Mr Sands

COMMITTEE'S TERMS OF REFERENCE AND QUEENSLAND CRIMINAL CODE, SECTION 129

Thank you for your letter of 19 August 2004, in which the committee seeks advice on how section 129 of the Queensland Criminal Code relates to its terms of reference, and, in particular, the question of whether misleading evidence was given to Senate committees.

The committee's terms of reference require the committee to determine whether any false or misleading evidence was given to Senate committees in relation to what has become known as the Heiner documents matter, and whether any contempt was committed in that regard.

In several reports on cases of alleged misleading evidence, the Senate Privileges Committee has taken the view that a contempt should not be found unless it is established that the witnesses concerned intended to mislead by their evidence. In other words, giving false or misleading evidence is not a strict liability offence, and a culpable intention is necessary to constitute the offence. The Senate, by endorsing the findings of the Privileges Committee, has supported this view. The most recent report of the Privileges Committee on a case of alleged misleading evidence was the committee's 119th report, presented on 3 August 2004. The Privileges Committee found that there was no evidence that Telstra officers, in providing apparently contradictory information, had intended to mislead, and therefore that no contempt should be found. The Senate endorsed the findings of the committee on 5 August 2004.

The allegation of misleading evidence, as made in the submission to the committee by Mr Lindeberg, is, in essence, that Queensland state officials put to Senate committees an interpretation of the law of Queensland, as contained in Section 129 of the Queensland Criminal Code, which was untenable and which they knew to be incorrect, and thereby they misled the Senate committees.

In the light of the Senate's and the Privileges Committee's findings in past cases of alleged misleading evidence, for a contempt to be found it would have to be established that:

- the particular interpretation of the law was put to the committees
- that interpretation was clearly incorrect and untenable
- the witnesses concerned knew that the interpretation was incorrect and untenable
- they put that interpretation to the committees with the intention to mislead.

In the terminology of the law, the first two elements are the *actus reus*, the facts constituting the offence, and the last two elements are the *mens rea*, the culpable state of mind necessary to constitute the offence.

If all four elements were proved, the offence which could be held to be a contempt would be established. The committee would have to be satisfied that all four elements had been established before finding that a contempt had been committed.

There are some additional points which should be mentioned.

The act of giving misleading evidence to a Senate committee may be a contempt of the Senate, but it is not a criminal offence which can be prosecuted in the courts. The point that a breach of Section 129 of the Queensland Criminal Code is a criminal offence under the law of that state does not alter that situation. Any contempt of the Senate would still be a contempt of the Senate only, and would not have any additional element because the subject matter of the misleading evidence happened to relate to a criminal statute.

The advices of 29 April and 7 June 2004 referred to the question of whether state officials are compellable witnesses in a Senate inquiry. A closely related question is whether any finding of contempt may be made against state officials. On one view, the rule of comity between jurisdictions in the federation, which is the basis of the practical, if not legal, immunity of state office holders from compulsion, would also entail that findings of contempt may not be made against them.

Regardless of the answer to that question, any attempt to impose any sanction on state office holders for any contempt which is found would fall squarely into the area covered by the rule of comity and possible legal immunity. The committee would readily appreciate the practical difficulties of enforcing any sanction against state office holders.

I hope that these observations may be of some use to the committee. Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

(Harry Evans)