PARLIAMENT of AUSTRALIA
THE SENATE

SENATE SELECT COMMITTEE
ON THE
LINDEBERG GRIEVANCE

Submission II

By
Kevin Lindeberg
11 Riley Drive
CAPALABA QLD 4157
Phone: 07 3390 3912 Mobile 0401 224 013 Email: kevlindy@tpg.com.au

9 November 2004

TERMS OF REFERENCE

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.

(2) That the committee consist of 7 senators, 3 nominated by the Leader of the Government in the Senate, 2 nominated by the Leader of the Opposition in the Senate, 1 nominated by the Leader of the Australian Democrats, 1 nominated by the One Nation Party.

(3) That the committee may proceed to the dispatch of business notwithstanding that not all members have been duly nominated and appointed and notwithstanding any vacancy.

(4) That:

(a) the chair of the committee be elected by and from the members of the committee;

(b) in the absence of agreement on the selection of a chair, duly notified to the President, the allocation of the chair be determined by the Senate;

(c) the deputy chair of the committee be elected by and from the members of the committee immediately after the election of the chair;

(d) the deputy chair act as chair when there is no chair or the chair is not present at a meeting; and

(e) in the event of the votes on any question before the committee being equally divided, the chair, or deputy chair when acting as chair, have a casting vote.

(5) That the quorum of the committee be a majority of the members of the committee.
(6) That the committee and any subcommittee have power to send for and examine persons and documents, to move from place to place, to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and have leave to report from time to time its proceedings and the evidence taken, and such interim recommendations as it may deem fit.
(7) That the committee have power to appoint subcommittees consisting of 3 or more of its members and to refer to any such subcommittee any of the matters which the committee is empowered to consider, and that the quorum of the subcommittee be a majority of the members appointed to the subcommittee.
(8) That the committee be provided with all necessary staff, facilities and resources and be empowered to appoint investigative staff and persons, including senior counsel, with specialist knowledge for the purposes of the committee, with the approval of the President.
(9) That the committee have access to, and have power to make use of, the evidence and records of the Select Committee on Public Interest Whistleblowing, the Select Committee on Unresolved Whistleblower Cases and the Committee of Privileges in respect of its 63rd and 71st reports.
(10) That the committee be empowered to print from day to day such documents and evidence as may be ordered by it, and a daily *Hansard* be published of such proceedings as take place in public.

-oOo-

PUBLIC NOTICE

The Senate has established a Select Committee on the Lindeberg Grievance to examine whether false or misleading evidence was given to previous Senate committee inquiries on matters raised by Mr. Kevin Lindeberg. The Committee is also examining whether any contempt was committed in relation to evidence given on the shredding of the so-called Heiner documents, in light of material that has emerged in the Dutney Memorandum, the Forde Commission of Inquiry into Abuse of Children in Queensland Institutions and any other evidence. The Committee will also be considering the implications of this matter for measures to prevent the destruction and concealment by government of information of public interest, protect children from abuse and protect whistleblowers.

The closing date for submissions is 31 May 2004.

-oOo-

COMMITTEE MEMBERS: Senator John Watson, Chairman (Lib Tas), Senator Linda Kirk, Deputy-Chairman (ALP SA), Senator Alan Eggleston (Lib WA), Senator Clare Moore (ALP Qld), Senator Santo Santoro (Lib Qld), Senator Andrew Bartlett (Dem Qld), Senator Len Harris (One Nation Qld).

-oOo-

CONTENTS

CASES CITED and/or CONSIDERED

THE MATTER FOR CONSIDERATION

The Core Elements of the Alleged Criminal Contempt Against the Australian Senate

Based on

- Mr. Robert F. Greenwood QC's 9 May 2001 submission;
- my subsequent open letter of 30 May 2003 to the Federal Parliament;
- significant new evidence unearthed by the University of Queensland's *The Justice Project*; and
- the relevant March 2004 judicial ruling in the Queensland District Court in the *R v Ensbey* case on section 129 of the *Criminal Code (Qld) 1899* and the significance of the appeal against sentence in the *R v Ensbey* to the Queensland Court of Appeal (See attached judgement *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 17 September 2004).

I submit that it is open to conclude, pursuant to section 4 of the *Parliamentary Privileges Act 1987*, that the Queensland Government wilfully conspired to:

- mislead, or with a tendency to mislead the Senate;
- improperly interfere in the discharge of the Senate's constitutional function from making full and proper findings and recommendations concerning the formulation of whistleblower protective legislation and related matters in order to cover up its own criminal conduct in the Heiner Affair and advantage itself; and
- the Criminal Justice Commission (CJC) aided and abetted in the cover-up by misleading the Senate in the same and/or associated matters, as well as advantaging itself and certain CJC officials or previously contracted CJC officials who improperly handled the Heiner Affair at a particular time.

I submit that 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 (which shall be addressed in Part A of this submission):

(a) providing to the Senate a contrived interpretation of sections 129 and 119 of *Criminal Code* (Qld) 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;
(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.

1. INTRODUCTION

1.1 Since presenting my submission-in-chief on 28 May 2004 and appearing before the Committee on 11 June 2004 at its Brisbane hearing, more evidence of significance has come to hand which the Committee should consider so that any findings it may make are soundly based.

1.2 Additional to that, two adverse submissions presented by Queensland Ombudsman and Information Commissioner Mr. David Bevan and Deputy Information Commissioner Mr. Greg J. Sorensen, dated 3 and 2 August 2004 respectively, have been placed on the public record and they warrant some comment so that the record is straight. It is my intention to answer their false assertions in another submission.

A secure sheet anchor

1.3 Readers of this submission should be mindful throughout its reading of this judicial ruling on section 129 of the *Criminal Code* 1899 in *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335. It is the secure sheet anchor from which none can move, or, to which we must constantly return:

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

1.4 Notwithstanding that my cross-examination is yet to be completed, it appears that Committee may be struggling with the fact that section 129 was so clear in its wording and intent that it

was never open for any reasonable lawyer to honestly believe or submit to the Senate that it required a judicial proceeding to be on foot before it could be triggered. That is, the interpretation put to the Senate by the Queensland Government and the Criminal Justice Commission (CJC) went beyond the limits of being "honest incompetence" or "honestly wrong" to being knowingly false and self-serving to cover up a known illegal act committed by the Executive Government of Queensland and certain senior bureaucrats in ordering and assisting in the shredding of the Heiner Inquiry documents.

1.5 The evidence is now incontestable that the interpretations of sections 129 and 119 put to the Senate were wrong, and therefore, in respect of this element of my grievance, it only remains a matter of deciding whether or not it was knowingly false when put to the Senate.

1.6 Plainly, this claim concerning the Queensland Government and CJC's interpretation of section 129 being "knowingly false" warrants close examination because the ramifications on the parties involved, if found to be true by the Senate, will be very serious indeed. The new evidence relating to this grievance strongly reinforces Mr Greenwood QC's 9 May 2001 submission in which he advised that the alleged contempt may lead to an unavoidable finding of obstruction of justice because the character of the contempt associated with the parties involved is *prima facie* serious criminal conduct.

1.7 Fortunately, we are aided in this analysis by:

- The meaning and intent of the provision itself and its setting within Chapter 6 of the *Criminal Code* (Qld), and the definition of "judicial proceeding";
- the recent findings and recommendations of House of Representatives Legal and Constitutional Affairs Committee – Inquiry into Crime in the Community – Volume 2 tabled in Federal Parliament on 11 August 2004 - Investigation into the Heiner affair;
- case law including the 17 September 2004 decision of the Queensland Court of Appeal in *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335[1]; and
- the Review to Redraft the *Criminal Code* (Qld) commissioned by the Goss Queensland Government in April 1990 and carried out by Mr. Robin S.

[1] See Addendum A

O'Regan QC to June 1992, and the Criminal Law Policy Unit[2] in the Department of Attorney-General (June 1992-March 1995).

1.8. In the first part of Submission II, I intend to examine the significance of the linkage with this Committee's terms of reference to the role played by Mr. Robin S O'Regan QC at relevant times. It shall take the form of:

- Mr. O'Regan QC's well-recognised expertise pertaining to the *Criminal Code* (Qld) and his forthright public admissions before the Senate Select Committee on Unresolved Whistleblower cases concerning his state of knowledge about my complaint; and
- Mr. O'Regan QC's 1990-92 work associated redrafting the Criminal Code, and the significance of the relevant sections[3] in the final Redrafted Criminal Code tabled in the Queensland Legislative Assembly in March and May 1995 by then Queensland Attorney-General the Hon Dean Wells.

1.9. Mr. O'Regan QC later became the CJC Chairman at the relevant time when the alleged false and misleading evidence was put by the Queensland Government and CJC to the Senate when examining the Heiner affair[4]. At two brief appearances before the Senate Select Committee on Unresolved Whistleblower Cases (SSCUWC) on 23 February 1995, Mr. O'Regan QC publicly acknowledged having read my CJC file ***before*** the SSCUWC was established and found its finding of no wrongdoing (by Messrs. Michael Barnes, Noel Nunan and Mark Le Grand) sound. He also assured the SSCUWC that this case (and others) had been investigated to "the nth degree."

1.10. At the beginning of its Brisbane hearings, Mr. O'Regan QC, as CJC Chairman, made an opening statement to SSCUWC members. Of relevance he declared:

"...I have no first-hand knowledge of the matters specified in the terms of reference. They relate to events which occurred before I came to the commission.

[2] See Queensland Legislative Assembly *Hansard* 31 March 1995 p11734.
[3] Section 204(1) – Perjury; Section 208 – Damaging evidence with intent; Schedule 5 – Dictionary – definition of "judicial proceeding"
[4] Senate Select Committee on Public Interest Whistleblowing (1994); Senate Select Committee on Unresolved Whistleblower Cases (1995)

But officers of the commission who do have such knowledge are available to assist you, and they are Mark Le Grand, the Director of the Official Misconduct Division, Michael Barnes, who is the Chief Officer of the Complaints Section, and Teresa Hamilton, who is an executive legal office with the commission.

I repeat that the commission wishes to be constructive. We have nothing to hide. We support genuine whistleblowers. They deserve the support of the community and the protection of the law. However, if it appears that this inquiry is being conducted not to assist in the development of whistleblower legislation but to reinvestigate cases already investigated to the nth degree, to score political points or to publicise ancient grievances against the commission, I assure you our cooperation will certainly be withdrawn."[5] (My underlining)

1.11 Mr. O'Regan QC's took the opportunity to make another brief oral submission to the SSCUWC on 23 February 1995:

"...I come now to the submission made by Mr. Lindeberg, and my colleague Mr. Barnes will address that in greater detail. All I wish to do is to respond to something which was said about me personally by Mr. Lindeberg. He called into question the assertion in my preliminary statement that I had no first-hand knowledge of this matter and he referred to an incident in which Mr. Nunan telephoned him. What Mr. Lindeberg omitted to say was that that incident occurred many months after the conclusion of the investigation. I was as (sic) the CJC then but I had no part in the investigation at all. It would be a pity if the committee were misled by that. Indeed, the first time I heard the name Lindeberg was when Senator Warwick Parer, who is a friend of mine of many years standing, rang me in December 1992, shortly after I had taken up my position at the CJC, and asked if I would look at the Lindeberg matter. I did. I read the file; I have studied the file in detail. I conferred with Mr. Barnes and other officers who had first-hand knowledge of the matter. I rang him up and said that I could not see any basis for a reinvestigation. That is how I came to know anything

[5] Senate *Hansard* Senate Select Committee on Unresolved Whistleblower Cases 23 February 1995 pp 5-6.

about the Lindeberg matter. I note that it was Senator Parer who moved for the establishment of this committee..."[6] (My underlining)

Disingenuous hair-splitting

1.12 While it may be factually accurate that he never personally interviewed relevant witnesses allowing him to make the claim that he had no *"...first-hand knowledge of the matter"*, it was simply not open for him - or anyone else for that matter - to claim that he was unaware of the Heiner affair and against whom the shredding allegation was made and that sections 129 and 119 were centrally relevant given his own forthright admission to the SSCUWC that he had personally studied my file[7], and had done so in detail.

1.13 Arguably, he was engaging in a hair-splitting exercise which both confused and, more importantly, avoided the real issue of the interpretations of sections 129 and 119, and other possible alternate sections, such as 132 and 140[8]. I suggest that it was disingenuous on his part, and obviously, equally open to suggest highly detrimental to the Senate Committee's commission and right to be told the truth.

1.14 However, Mr. O'Regan QC had left a beaten path behind him like a bullock in a field of wheat. Hubris may have overtaken him when appearing before the Senate. This extraordinary path, fortuitously laid down by the review the *Criminal Code* (Qld) with Mr. O'Regan QC at its helm and assisted by others, one of whom was CJC General Counsel Mr. Marshall Irwin[9], and through to the tabling of the *Criminal Code Bill* in the Queensland Parliament in March and May 1995, is most illuminating in retrospect.

1.15 By examining the redrafted clauses for the offence of destroying evidence and, in particular, the definition of "judicial proceeding", we are given a glimpse back in time showing that what both sections 129 and 119 meant ***was* never in doubt at any stage.**

---

[6] Senate *Hansard* Senate Select Committee on Unresolved Whistleblower Cases 23 February 1995 p87.
[7] See Lindeberg Exhibits 19, 25, 26, 27, 29,30, 36, 37 to Senate Select Committee on Unresolved Whistleblower Cases 1995
[8] Section 132 of *the Criminal Code* 1899 – conspiracy to obstruct justice; Section 140 of the *Criminal Code* 1899 – attempt to obstruct justice
[9] Now Chief Stipendiary Magistrate of Queensland. Mr. Irwin was CJC General Counsel when the CJC appeared before the 1994 Senate Select Committee on Public Interest Whistleblowing and the 1995 Senate Select Committee on Unresolved Whistleblower Cases.

1.16 Consequently, it can be seen with certainty that what was presented to the Queensland Parliament around the same time in 1995, stands in stark contrast against what both the Goss Queensland Government and CJC presented to the Senate as being honestly-held evidence. The contradictory positions are stark. ***Both positions on the same sections at the same time cannot be right. However, unlike that presented to the Senate, the position presented to the Queensland Parliament was correct.***

The Right to Consistency and Predictability

1.17 Given that the interpretations of sections 129 and 119 are no longer available to those opposing who put them to the Senate because of *Ensbey* and that their only defence is that they were either "honestly incompetent" or "honestly wrong" at the time – even "bumbling incompetence" as Mr. MacAdam generously suggested in his bracket of evidence to the Committee on 11 June 2004 - ***they should have been equally "honestly incompetent", "honestly wrong" or "bumbling incompetent" with the same provisions at the same time when presenting them to the Queensland Parliament in order to maintain consistency. But, they were not.***

1.18 Just as the Queensland Parliament was provided with consistency in respect of sections 129 and 119 of the *Criminal Code* (Qld) and with the Draft (O'Regan/Wells) Criminal Code in 1995, the Senate was entitled to that same consistency, but it did not happen.

1.19 Consequently, it can be reasonably held that the inconsistency reveals a known lie.

1.20 The inconsistency simply cannot be explained away. Any extenuation by claiming to have been "honestly wrong" or even the more professionally belittling description of being "honestly/bumbling incompetent" which those involved, of necessity, must now grasp, evaporates. Instead, the inconsistency reveals deliberately dishonest, self-serving interpretations of sections 129 and 119 of the *Criminal Code* (Qld) specifically applied in the Heiner affair – a.k.a. *Shreddergate* - from the beginning and, compelled to repeat to the Senate years later when by necessity they had to defend themselves again which they had not foreseen at the beginning.

1.21 Arching forward to 17 September 2004, the Queensland Court of Appeal in *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 confirmed the correctness of my interpretation of sections 129 and 119. In simple terms, Queensland's highest court ruling sealed the fate of the long-running lie and its advocates. At the same time, the judgment exposed the gross deceit of those who either provided it or failed to correct it at all relevant times, but especially, for the purposes of this Committee's task, before it was presented in evidence to the Senate, and, even afterwards.

1.22 The Queensland Court of Appeal reinforced my position even further in *Ensbey* by looking beyond the offence of destruction of evidence to that of "perjury" against the administration of justice. The term "judicial proceeding" in section 123 unequivocally connotes one which is in anticipation or contemplation. In other words, if the term "judicial proceeding" were limited to past or present proceedings, and not one yet on foot - as the Queensland Government and CJC had the Senate believe in 1995 - it would disarm the serious offence of perjury as expressed in section 123.

1.23 It is therefore open to conclude that no reasonable lawyer, properly briefed, could ever entertain such an odd view of the law if wishing to apply it honestly and impartially. For those involved in the Heiner affair on the Queensland Government and CJC side, given their past and present positions as lawyers, barristers and Magistrates, let alone some being QCs, we can say with some certainty that they were, as a minimum, all graduates in law and reasonable lawyers in whom the courts and the people could have some confidence. Consequently, it would be reasonable to believe that all should have understood their prime obligation of obeying the discovery/disclosure Rules of the Supreme Court of Queensland, and apply the rudiments of statutory interpretation such as the legal meaning of the oft-used word "includes" when interpreting legislation such as section 119.

An ever-increasing conga line

1.24 In short, any reasonable person, including Senators, would be entitled to believe that lawyers for the Queensland Government and CJC had a certain level of professional expertise well beyond the basic elements of law we are dealing with here. Consequently, as

no defence in ever entertaining such a perverse view of the law is reasonably available, it is therefore open to suggest that another motive, well beyond incompetence, ignorance or bumbling, must have driven them everytime the Heiner affair came up for consideration or review, turning it into a virtual ever-increasing conga line where one step out of place by anyone tripped up everyone.

1.25 When one sees their rogue view against the backdrop of a pattern of unethical behaviour well set out whenever dealing with the Heiner affair, and one knows that relevant case law such as *R v Murphy, R v Selvage, R v His Honour Judge Morley and Mellifot* [1990] 1Qd R 54, *R v Vrones* and *R v Rogerson* existed at the time, while knowing that the flip-side of clearance meant serious unprecedented criminal charges being laid against the Executive Government of Queensland and others, it is open to suggest that deliberate corrupt conduct may have taken place here to advantage another.

1.26 Out of necessity when the Senate unexpectedly came into the picture in 1994 and beyond, I suggest that the 'corrupt line' had to be held, which, in turn, meant false and misleading evidence had to be used to keep a lid on all the serious wrongdoing which those involved never thought would reach beyond Queensland's borders where their reign of abuse was complete, and a proper investigation could be constantly thwarted.

2. THE SIGNIFICANCE OF THE REDRAFTING OF THE *CRIMINAL CODE (QLD) 1899* BY MR. ROBIN S. O'REGAN QC AND OTHERS

2.1 The significance of this bracket is that around the same time in 1995 the Senate was being told by the Queensland Government and CJC that section 129 required a judicial proceeding to be on foot to trigger it, and that the definition of "judicial proceeding" pursuant to section 119 was fettered to exclude a proceeding not yet on foot, the Queensland Parliament was being told the very opposite when new legislation was introduced to up-date the 1899 *Criminal Code.*

2.2 As good fortune would have it, the redraft of the Criminal Code gives ***hard form*** to the correctness of our interpretation which over this relevant period was always downplayed and presented as an exchange of legal views - as may occur between lawyers and academics - on

the aforesaid sections wherein one side or the other could be right, so, at best, we should agree to disagree and go our merry way without imputing bad motives to anyone.

2.3 It is necessary to paint a full canvas to appreciate this submission's significance. A mural is required to appreciate the context of the fine point of the picture. I believe that this circuitous route involving the redrafting of the Criminal Code has become quite important. However, I make no concession whatsoever that sections 129 and 119 were ever open, at any stage, to an interpretation which differed from *Ensbey*; and other relevant case law (e.g. *R v Rogerson, R V Selvage, R v Murphy* and *R v Vrones*), all of which was available ***before*** the CJC (or the Queensland Government) ever considered the elements of this affair under the provisions of the *Criminal Justice Act 1989* and *Criminal Code* 1899.

2.4 Arguments adduced by anyone to mitigate against a finding of contempt by suggesting that a fresh understanding or insight of the relevant sections may be at play here, that is, to suggest those who came to the Heiner affair in 1990, 1993, 1994, 1995 and beyond did not know better then but would now, in 2004, have a better understanding of the law, are spurious in the extreme. In Queensland, we are dealing with a codified criminal law, not its evolution, and the intent and meaning of these sections were always clear since 1899.

2.5 If, in fact, the CMC were to concede to the Senate that it may have or did get my matter wrong, the Commission, or another appropriate authority like a Special Prosecutor given that the CMC is constrained from acting having become a protagonist, can get it right now in 2004 because there are no statute of limitations applicable to the suggested criminal offences.

2.6 It is a fact that the application of the *Criminal Justice Act 1989* always worked in conjunction with the *Criminal Code* 1899, just the *Crime and Misconduct Act 2001* now does in 2004. In other words, at any time, legal officers working in the CJC/CMC's engine room of the Official Misconduct Division would have been obliged to have had a good working knowledge of the *Code*, and, of necessity, in respect of any proposed changes which government may have been considering, notwithstanding such changes could not apply until Parliament approved them, and they were brought into effect by the Governor's final consent at a Governor-in-Council meeting.

2.7 As the facts reveal, it should be no surprise to learn that the CJC's General Counsel Mr. Marshall Irwin played a significant role in redrafting the Code.

2.8 Certainly I am not suggesting that the Goss Queensland Government's election promise to review the *Criminal Code* (Qld) was misplaced, or even undesirable because since its enactment in 1899 some of the offences relating to a previous era were no longer relevant in the late 20th century such as inciting mutiny, defaming foreign princes, challenging to fight a duel, aiding pirates, committing bigamy, or pretending to exercise witchcraft or tell fortunes. Arguably, a review of the Griffith Criminal Code was long overdue. However, in respect of offences against the administration of justice, it was a quite different matter. Those provisions were and remain the building blocks of all criminal justice systems throughout the civilised world. They enjoyed comity and reflection in sister-penal legislation throughout the Commonwealth of Australia and in various nations across the globe. In short, they were time-tested and true to their intent and purpose in 1990 just as they were in 1899, and, for that matter, are now in 2004.

2.9 The Commonwealth Government has moved positively in this direction with the establishment of a Model Criminal Code, to be used as a general guide, which the Standing Committee of Attorneys-General[10] monitor and work on from time to time.

2.10 When handing the finished Draft Criminal Code to then Queensland Attorney-General the Hon Dean Wells, Mr. O'Regan QC paid particular tribute to Mr. Marshall Irwin's contribution. In his final 18 June 1992 letter[11] to the Queensland Attorney-General, he said this (in part):

> *"...The Committee also wishes to acknowledge the very considerable assistance given by Mr. Marshall Irwin, General Counsel to the Criminal Justice*

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

[11] See Report to Queensland Attorney-General on the Draft Criminal Code – Supreme Court of Queensland Library.

Commission, and Mr. Peter Svensson, Legal Consultant, Office of the Attorney-General."

2.11 Later, when Queensland Attorney-General the Hon Dean Wells MP first tabled the Redrafted Criminal Code on 31 March 1995, he extended the tribute to those who had worked on the Code in his Department after receiving it from Mr. O'Regan QC on 18 June 1992. Of relevance, Mr. Wells paid this tribute in the Queensland Legislative Assembly:

> *"...With respect to the final phase of consultation, I would like to thank the Chief Stipendiary Magistrate, Mr. Stan Deer, who made available the invaluable experience of Jim Herlihy, SM, as he now is. I am also particularly grateful to my Criminal Law Policy Unit, headed by Gary Hannigan and assisted by Margaret Laurence, David Groth, Soraya Ryan and Carolyn Naylan. I must also thank the Director of Public Prosecutions, Mr. Royce Miller, QC, for the time and positive contributions he gave to this draft. I would also like to thank my successive directors-general Barry Smith and Brian Stewart, for their advice and willingness to devote resources to this enormous task, plus the many other lawyers in my department who have had involvement in the drafting of this code. For the actual physical drafting of the new code, the Government is indebted to the Office of Parliamentary Counsel himself, John Leahy, as well as Peter Drew, David Connolly, Susan Larson and Ian Larwell."*[12]

2.12 In terms of the common understanding and acceptance which the Queensland Government hoped the new code would be greeted with by the Queensland people, it is worth noting the following sentiments expressed by Mr. Wells in his 1995 tabling speech:

> *"...The end result of the hundreds of thousands of exchanges of ideas on this code is that we have a code for all Queenslanders. It is not a code for the prosecution. It is not a code for the defence. It is not a code just for men. It is not a code just for women. It is not a code for criminals. It is not a code for saints. It is a code for the whole community, with its paramount importance being the*

[12] See Queensland Legislative Assembly *Hansard* 31 March 1995 p11734

protection of the Queensland community. It is a code for the reasonable man and the reasonable woman."[13]

No dissent over key Heiner legal provisions

2.13 Mr. O'Regan QC subsequently expressed some public concern about a number of textual matters and the drafting process by which the Draft Criminal Code tabled by Mr. Wells was written, but, he did not, to my knowledge, challenge the key (Heiner) provisions concerning (a) destruction of evidence; (b) perjury; or (c) the definition of "judicial proceeding" – and why would he?

2.14 In other quarters, there was considerable disquiet about the final Draft Criminal Code causing considerable debate in the Queensland Parliament, the media, civil liberties and amongst the legal fraternity. Generally speaking, it was not greeted favourably raising concern about possibly legalising back-door euthanasia, pandering to political correctness, giving strength to uncorroborated evidence, undermining the right to be heard by a jury etc.[14] Ironically, during a major debate on the Draft Criminal Code on 15 June 1995, the Member for Nicklin the Hon Neil Turner MP[15] raised the Heiner affair, section 129 and the admissions made by Mr. Barnes during his bracket of evidence to the SSCUWC in Canberra on 29 May 1995. Messrs. Callinan QC and Peterson, a little time later, provided a special supplementary submission dated 7 August 1995 to the SSCUWC suggesting that those Barnes admissions going to the Goss Cabinet's state of knowledge and intent in shredding the Heiner Inquiry documents were sufficient to enliven section 129, or, in the alternate, section 132. Importantly, they also forewarned the Senate about the CJC's strict narrow interpretation of section 119 as being too significant to ignore.

2.15 At this juncture the Queensland Court of Appeal judgement in *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 becomes highly relevant. It should ring the alarm bells because its unanimous verdict blocks off all arguing points about whether or not the definition of section 119 of the *Criminal Code* (Qld) – "judicial proceeding" – was ever capable of being ***limited***

[13] ibid
[14] See Debate Queensland Legislative Assembly *Hansard* 15 June 1995
[15] Queensland Legislative Assembly *Hansard* 15 June 1995 p12618. Mr. Turner was formerly a member of the all-party Parliamentary Criminal Justice Commission (10 November 1992 – 30 May 1995) when Mr. O'Regan QC was CJC Chairman.

in its application, over and above any other arguments presented in my submission-in-chief of 28 May 2004, my oral evidence and submissions presented by senior QUT law lecturer Mr. Alastair MacAdam, and Associate Professor David Field of the Law Faculty at Bond University.

Queensland Government's Claim

2.16 In its first submission[16] to the SSCUWC dated 21 March 1995, the Queensland Government, through advice provided by its Crown Solicitor, made the following claims (at pages 2 and 3) when referring to the definition/notion about "judicial proceedings" and when they commence:

> *"...All the threats in the world to commence a Civil proceeding (or a Criminal one) do not make it pending, for the purposes of Section 129 of the Criminal Code"*
>
> and
>
> *"...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."*

2.17 Importantly, it should be noted that this submission was signed by the Crown Solicitor[17] on 21 March 1995 and tabled in the Queensland Parliament on 30 March 1995 by the Queensland Attorney-General the Hon Dean Wells MP, ***the day before he first tabled the Draft Criminal Code.***[18]

2.18 In its second submission to the SSCUWC dated 31 July 1995, the Queensland Government supplied numerous exhibits/documents - including the infamous tampered Document 13 under examination by this Committee - together with Document 24 which was a

[16] See Volume 1 Queensland Government – Submissions, Supplementary Submissions and Other Written Material Authorised to be Published – Senate Select Committee on Unresolved Whistleblower Cases.
[17] The late Mr. Kenneth O'Shea
[18] See Table Register Queensland Legislative Assembly No 6075 31 March 1995

memorandum from (the late) Mr. O'Shea, Queensland Crown Solicitor, to the Hon Dean Wells, Minister for Justice, Attorney-General and Minister for the Arts addressing another bracket of evidence put to the SSCUWC by my junior counsel Mr. Peterson on 5 May 1995.

2.19 Of relevance to this bracket, the Crown Solicitor states this in Document 24 at page 2:

> *"...I accept the submission that a breach of Section 129 of the Code was not directly addressed by Mr. Callinan, and it is gratifying to note that neither I nor anyone else is accused of a breach of Section 129 of the Criminal (the destruction of evidence Section), although I must say I would have been much happier if the word "directly" had not appeared in Mr. Peterson's submission.*
>
> *It should be noted however that, if there had been any breach of the Criminal Code by destruction of the Heiner Documents, then obviously, that would have been the Section which was breached."*

2.20 Mr. O'Shea went on further at page 4:

> *"...I cannot see how Mr. Coyne had any entitlement, whether under the Public Service Regulations or otherwise, to see them – unless he had actually commenced litigation, and there were relevant on discovery – and, of course, he never did commence litigation."*

And at page 8, Mr. O'Shea says this:

> *"...As I said in my previous memorandum, Section 129 applies only when proceedings are pending...*

2.20 For the purposes of this submission and its following chapter dealing with the significance of the redrafted Criminal Code, it should be noted that Mr. O'Shea wrote to the Hon Mr. Wells, as Attorney-General and Minister for Justice on 23 May 1995, ***the day <u>before</u> he tabled the final draft of the Criminal Code on 24 May 2004*** which plainly made nonsense of Mr. O'Shea's assertions about a judicial

proceeding needing to be on foot before section 129 could be triggered because one cannot interpret section 129 without looking to section 119.

Criminal Justice Commission Claim

2.21 In its February 1995 submission to the SSCUWC, the CJC made these assertions about sections 129 and 119 at page 27:

> "...The Commission received advice on this matter from Mr. Noel Nunan, at that time in practice at the private bar, and it was his view that "judicial proceeding" as used in the section refers to proceedings on foot at the time of the destruction. This view is consistent with the definition of judicial proceeding contained within section 119 of the Queensland Criminal Code which states that:
>
> > *The term "judicial proceeding" includes any proceeding had or taken in or before any court, tribunal or person in which evidence may be taken on oath.*
>
> As no judicial proceedings were on foot when these documents were destroyed no breach of that section could occur. The section also requires that the person who destroys evidence ***knows*** that the evidence may be required, and destroys it to prevent it from being used in evidence. In the Commission's view, the section is clearly not applicable in the present case." (Underlining done by the CJC).[19]

2.22 By way of demonstrating a further insight into Mr. Barnes' thinking in respect of section 119, I refer to a "highly protected" internal CJC memorandum, dated 11 November 1996, written by him to Mr. Le Grand, Director of the Official Misconduct Division and on-forwarded to then CJC Chairman, Mr. Frank Clair in response to the October 1996 Morris/Howard Report. None challenged the following. Relevantly it says this on page 4:

> *"...Nor do the authors refer to section 119 of the Criminal Code which defines "judicial proceeding" for the purposes of the offences under consideration. That*

[19] Volume 2 – Criminal Justice Commission – Submissions, Supplementary Submissions and Other Written Material Authorised to be Published – Senate Select Committee on Unresolved Whistleblower Cases 1995.

definition is framed entirely in the present tense which, in my view, supports the contention that proceedings must have commenced for an offence under section 129 to be made out.

While the authors refrain from making any findings of guilt in relation to Cabinet on the basis that they are unaware of the state of knowledge of these ministers concerned, memoranda from Matchett to Warner strongly suggest that the knowledge which Messrs Morris and Howard deem sufficient to inculpate the departmental officers involved was shared by the politicians who gave the order to shred the Heiner documents." (My underlining)

2.23 It is relevant to repeat here, that Messrs. Morris QC and Howard interpreted sections 129 and 119 in the same way as both the Queensland District Court and the Queensland Court of Appeal ruled in *R v Ensbey.*

Queensland Court of Appeal Ruling

2.24 His Honour Jerrard JA said this at 46 - 48:

> "...The definition of "judicial proceeding" provided in s 119 of the *Code* is an inclusive definition, and includes any proceedings "had or taken in or before any court, tribunal or person, in which evidence may be taken on oath". That inclusive definition suggests a proceeding on foot or completed, but the term is used in chapter 16 of the *Code* in differing ways. In s 123, dealing with the offence of perjury, it is provided:
>
> > "Any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called '**perjury**'".

> The term "judicial proceeding" as used therein includes a proceeding which is in contemplation only. By way of contrast in s 119B, dealing with retaliation against a judicial officer, juror, witness or member of the family of one of those, the term is used to describe a proceeding in which something has already been lawfully done by a juror or witness, and accordingly a proceeding which has occurred or is still taking place.
>
> Since the term is used in different ways in chapter 16, and since s 129 should not be unduly restricted in its ambit, the judicial proceeding referred to in s 129 in which an offender knows that the relevant book, document, or other thing is or might be required in evidence, should be understood to include a judicial proceeding which the offender knows, or believes on reasonable grounds, may occur. An alleged offender might know, for example, that a complaint and a summons had issued or that the person suspected had been arrested, and thus that criminal proceedings were already on foot; or that a complaint had been made to the police, or that the intending complainant said he or she would report a matter to the police, in which case criminal proceedings would be foreshadowed." (My underlining)

2.24 It is indisputable that the operative word in properly interpreting section 119 is the word "**includes**." To place the emphasis on the words "*had or taken in or before*" is simply wrong. Its "inclusive" meaning of including anticipated, foreshadowed and contemplated judicial proceedings is axiomatic in permitting section 123 – perjury – to be triggered. The term cannot be unfettered in its scope in section 123, and then fettered in another such as section 129. Statutory interpretation does not work that way. Uniformity must prevail. Inconsistency in application and a lack of predictability brings the law into disrepute.

2.25 In short, those who adopted the "fettered" interpretation of section 119 had to know by the simple reading of section 123 that their interpretation was wrong. Definitions have to be applied consistently. It is basic statutory interpretation knowledge and practice which

strongly reinforces Mr. MacAdam's 27 October 2003 assertion[20] to the House of Representatives Legal and Constitutional Affairs Committee on this point when appearing before it as part of its crime in the community inquiry and examination of the Heiner affair, that if any first-year law student were to put such a view in an assignment paper, he would "low fail" that student.

2.26 Jerrard JA in *Ensbey*, by citing the wording in respect of the offence of perjury, firmly exposed the legal nonsense embraced and promoted by the Queensland Government and its legal advisers and CJC in the Heiner affair, and exposed its aberrant self-serving character put to the Senate. Jerrard JA boxed them in.

2.27 In this matter, we are dealing with experienced criminal law lawyers used to operating in the wide world of rigorous, test-tested interpretations of the criminal code where cases, at a threshold-level, should never stand or fall on incorrect interpretations of penal provisions involving rudimentary understanding of statutory interpretation. The need for diligence in these circumstances goes without saying. In the balance may be a person's liberty, fortune and reputation, or permitting real crime and *prima facie* criminals – not fictitious crime or make-believe wrongdoers in university law school moot courtrooms – to escape justice. In the balance also is the administration of (criminal) justice demanding of all those who are law-enforcement practitioners to exercise consistency and diligence in applying the criminal law so that the community may enjoy reasonable confidence in the justice system. The people are entitled to expect that the Crown, in all its various emanations, will not to stand by or promote insupportable, unarguable interpretations of the criminal code which sees politicians and senior bureaucrats escape justice on the one hand, while, at the same time, for the same conduct, happily apply the same provision properly to a minister of religion with all the vigour the Crown can muster to send him to jail because of the seriousness of the crime.

2.28 And, into that potboil, comes the Senate's reputation. I submit that by deliberate design in the provision of false and misleading evidence, the Senate has become an unwitting accomplice to the Queensland Government's (and CJC) double standards in the application

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

of criminal law. The Senate has had its prestige used as a 'clearance-come-laundering house', affording respectability to conduct, which, had the truth been told or known to the Senate at relevant times, it would have been seen for what it always was: corruption of the highest order – and doubtless, the Senate would have reported accordingly in its findings, perhaps in the same manner as the House of Representatives Legal and Constitutional Affairs Committee did by recommending criminal charges against all members of the Goss Cabinet of 5 March 1990 pursuant to section 129[21] – having no choice out of respect for equality before the law - in Volume Two of its August 2004 report into *Crime in the community: victims, offenders and fear of crime.*

3. THE CONSTANT STATE OF INCRIMINATING KNOWLEDGE AS MAY BE ESTABLISHED IN THE REDRAFTING OF THE QUEENSLAND CRIMINAL CODE

3.1 Fortuitously, as previously said, the redrafting of the *Criminal Code* 1899 left an indelible fingerprint on the parliamentary record in the form of prospective legislation which I suggest, in a matter as serious as this touching on possible criminal contempt findings, ought to carry considerable weight in the Committee's considerations.

3.2 Working backwards, when the **final draft** of the Criminal Code was tabled in the Queensland Parliament on **24 May 1995** by Queensland's Attorney General the Hon Dean Wells, the relevant sections in offences against the administration of justice said as follows below. **The recasting of the wording for the definition of "judicial proceeding" should be especially noted:**

Damaging evidence with intent

Section 208. A person who knows anything is, or may be, needed in evidence in a judicial proceeding must not damage it with intent to stop it being used in evidence.
Maximum penalty—7 years imprisonment.

[21] See Recommendation 2 page xvi.

Schedule 5 - Dictionary

"judicial proceeding" includes a proceeding in which evidence may be taken on oath.

3.3. When the **second draft** of the Criminal Code was first tabled in the Queensland Parliament by Mr. Wells on **31 March 1995**, the relevant sections read as follows:

Damaging evidence with intent

Section 194. A person who knows anything is, or may be, needed in evidence in a judicial proceeding must not damage it with intent to stop it being used in evidence.

Maximum penalty—7 years imprisonment.

Schedule 5 - Dictionary

"judicial proceeding" includes any proceeding had or taken in or before any court, tribunal or person, in which evidence may be taken on oath.

3.4 When the **first draft** of the Criminal Code was handed to Mr. Wells on **18 June 1992** by Mr. O'Regan QC, the relevant sections said the following:

Damaging evidence with intent

Section 151. A person who knows anything is, or may be, needed in evidence in a judicial proceeding must not damage it with intent to stop it being used in evidence.

Maximum penalty—7 years imprisonment.

Schedule 5 - Dictionary

"judicial proceeding" includes any proceeding had or taken in or before any court, tribunal or person, in which evidence may be taken on oath.

3.5 However, when the Borbidge Queensland Government reviewed the Redrafted Criminal Code in 1996[22], and decided not to proceed with it, it ***remained*** with the 1899 *Criminal Code* which existed during the Heiner period and permitted Pastor Douglas Ensbey to be found guilty in 2004 for destroying a record some 5 to 6 years ***before*** the relevant judicial proceeding commenced. The relevant sections are as follows:

Section 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.

Section 119 - Definition

"judicial proceeding" includes any proceeding had or taken in or before any court, tribunal or person, in which evidence may be taken on oath.

The Significance of the Recasting of the Words

3.6 To appreciate the significance of the recasting of the words defining "judicial proceeding", it is necessary to look at section every which way but loose. That is, to turn the words inside out, and upside down and consider the relevant legal consequences. In doing so, it becomes obvious, on one side of the ledger concerning the Queensland Parliament, that both the Queensland Government (and the CJC) had to know that the definition, as set out in section 119, meant exactly the same as the "unfettered" definition put to the Queensland Parliament on 24 May 1995; while, at the same time, on the other side of the ledger concerning the Senate, that the countervailing view suggesting that it was "fettered" was a nonsense argument deliberately false in intent and put to suit a self-serving end relating to the Heiner affair where no wrongdoing had to be found.

[22] Chaired by former Supreme and Appeal Court Justice the Hon Peter Connolly QC, and assisted by Ms. Julie Dick SC and criminal law lawyer Mr. Michael Quinn.

What can be reasonably deduced:

A. The words which the Queensland Government and CJC, in particular, declared to the Senate to be key in interpreting section 119, namely "*had or taken in or before*", were capable of being deleted without altering the meaning of the term "judicial proceeding" because they were not the key interpretative factor, whereas the word "***includes***" was;

B. The definition as it was submitted on 24 May 1995 was never in doubt as to its "unfettered" scope so long as the word "includes" remained, thereby allowing the superfluous words of "*had or taken in or before*" to be deleted without any concern that relevant provisions would be invalidated, or rendered ambiguous and incapable of safe application;

C. If, however, the words "*had or taken in or before*" were key in interpreting section 119, that is, they connoted a "past and/or present" but ***NOT*** an anticipated/future proceeding, then the definition put the Queensland Parliament on 24 May 1995 – which was undoubtedly unfettered – ***changed significantly*** its reach to include a future/anticipated judicial proceeding - and yet there was no comment to that effect by the Queensland Attorney-General or others (including Mr. O'Regan QC) involved in the development of the redraft;

D. However, if such a view as C existed, it meant that an action specified to be an offence in respect of perjury, pursuant to section 123, namely "*...for the purpose of* ***instituting*** *any judicial proceeding*", ***could not be made out*** because of the **conflicting** interpretation of section 119 which (allegedly) ***did not*** include a proceeding not yet on foot;

3.7. The only conclusion reasonably open is that the unfettered scope sections 129 and 119, and their various equivalents put before the Queensland Parliament during this redraft period, was never in doubt. **All knew it**. Accordingly, because of their clarity, they were never provisions which caused debate save that during the redrafting of section 119 – between March and May 1995 - superfluous words were reasonably and safely deleted. The fact that no public or parliamentary fanfare or controversy centred on these sections or doubt ever

cast over their meaning during this 5-year period when the Code was hotly debated and the subject of immense close scrutiny by numerous legal officers in the Queensland Department of Justice and Attorney-General (in which the Office of Crown Law is found) and many other experienced lawyers, including Messrs. O'Regan QC and Irwin, allows one to submit that the contradictory view of their meaning put to the Senate when applied in the Heiner affair, over this same period, had to be known to be false and misleading and well beyond any description of being "honestly wrong", "honestly incompetent" or "bumbling incompetent" or whatever because they were not consistently either right or wrong when dealing with the same sections at the same time.

3.8. In short, the inconsistency reveals the deceit.

When Caution and Diligence are Required

3.9 I submit that before the CJC presented its February 1995 submission to the SSCUWC in which sections 129 and 119 were covered, the CJC, out of caution and diligence, would or should have sought its General Counsel's assurance on its legal soundness, notwithstanding the CJC was repeating its earlier findings about my complaint, as laid down on 20 January 1993 by Messrs. Michael Barnes and Noel Nunan.[23] In this matter, Mr. Irwin was CJC General Counsel up to and just beyond the time the Commission provided its February 1995 submission.

3.10 It is quite possible, however, that Mr. Irwin never saw the February 1995 submission at any stage and therefore he may not be tainted by the incorrect interpretations of the relevant provisions of the *Criminal Code* (Qld). If that is so, then it would not be open to conclude that any first-hand culpability may attach to his conduct, but given his prominent involvement in redrafting the *Criminal Code* (Qld), and the constant public debate in the media and various Parliaments, going on about the proper interpretation of section 129 of the *Criminal Code* (Qld) in respect of the Heiner affair, it raises other questions about how such a rogue interpretation being fostered by Messrs. Barnes, Nunan and Mr. Le Grand was allowed to stand.

[23] See Lindeberg Exhibit 36 to Senate Select Committee on Unresolved Whistleblower Cases 1995

3.11 In fulfilling his "legal" watchdog role as CJC General Counsel, I believe that it was always open to Mr. Irwin to correct the public record, preserve the Commission's integrity and maintain public confidence in its honesty and independence, not unless other factors prevented or dissuaded him from speaking out. These are questions which this Committee may want answers to in the fullness of time, but, in my opinion, when a Special Prosecutor is inevitably appointed by Queensland authorities to examine this affair at some future time, Mr. Irwin may have some considerable explaining to do, let alone Messrs. Barnes, Nunan, Le Grand, O'Regan QC and Clair.

3.12 However, while Mr. Irwin's first-hand involvement in this matter remains unclear, the same cannot reasonably be said of Mr. O'Regan QC. It is not unreasonable to submit that his approval of CJC's submission to the SSCUWC was sought and obtained ***before*** being sent to Canberra. Given the organisational structure of the CJC, it would have been incautious, if not inconceivable, that it was despatched, at a minimum, with only CJC Chief Complaints Officer Mr. Barnes' knowledge and approval, insofar as the Heiner affair was concerned being its author, as he was accountable to others, and the Commission's reputation was on the line.

3.13 Within the CJC's organisational structure, it is strongly open to also conclude that Mr. Le Grand, Director of the Official Misconduct Division, at all relevant times, was fully aware of the so-called legal basis upon which no official misconduct or criminal conduct was found in my complaint. I submit that he cannot claim ignorance of the interpretations of sections 119 and 129, then or now.

3.14 In regard to Mr. Bevan's state of knowledge, both as Chief Complaints Officer and later the Deputy Director of the Official Misconduct Division, in light of the assertions in his letter of 3 August 2004 to the Committee, it shall be addressed in another submission because his fingerprints are on my CJC file also **before** Mr. Barnes became the Chief Complaints Officer.

4. THE ROLE OF THE LEGAL AND ADMINISTRATIVE POLICY UNIT OF THE QUEENSLAND OFFICE OF THE CABINET

4.1. According to the 1994/95 Annual Report[24] of the Queensland Office of the Cabinet[25] (at pages 14 and 15), the Legal and Administrative Policy Unit (LAPU) advised the Queensland Government on both the Criminal Code and the SSCUWC in that period. While it is not absolutely certain, it appears that this Unit may have been responsible for the compiling or co-ordinating of the statement which was tabled in the Queensland Parliament by the Queensland Attorney-General the Hon Dean Wells MP, and subsequently sent to the SSCUWC on 21 February 1995 under the signature of Mr. John Mickel[26], Private Secretary to (then) Queensland Premier the Hon Wayne Goss MP.

4.2. The first Director-General of the Office of the Cabinet, Mr. Kevin Rudd[27] stood aside in December 1994 and Dr. Glyn Davis[28] took up the post from 9 January 1995. It is therefore open to conclude that both those Directors-General, in that post, were aware that the SSCUWC was coming back to look into the Heiner affair as it was established in early December 1994, and arguably, they both may have taken a close interest at all times, and perhaps still do.

4.3. Plainly, someone in this Office, notwithstanding the instruction coming from the Queensland Premier the Hon Wayne Goss MP himself, or possibly either Mr. Rudd or Dr. Davis, instructed LAPU to examine cases relevant to SSCUWC's terms of reference; and it is a matter of public record that "the shredding of the Heiner documents" was specifically mentioned in those terms.

4.4. At page 7 of the aforesaid statement, the following is said concerning the Heiner affair:

---

[24] See Queensland Legislative Assembly Table Register - No 408 2 November 1995
[25] Established by Order in Council from 1 July 1991
[26] Mr. Mickel took over the Seat for Logan City on the retirement of the Hon Wayne Goss, and is now the Beattie Government's Minister for Energy.
[27] Mr. Rudd MP is currently the Federal Member for Griffith, and the Opposition Spokesperson for Foreign Affairs. Prior to becoming Director-General of the Queensland Office of the Cabinet, he was the Principal Private Secretary to Queensland Premier the Hon Wayne Goss, and beforehand when Mr. Goss was Leader of the Opposition. Mr. Rudd was part of the ALP "transition into government" team in late 1989/90.
[28] Currently Vice-Chancellor of Griffith University, and to take up the Vice-Chancellorship of University of Melbourne from January 2005

"...Before making its decision on 5 March 1990, Cabinet was informed that representations had been received from a solicitor representing certain staff at the Centre. However, while these representations had sought production of the material, no legal actions had been instituted (nor was any legal action subsequently instituted).

Mr. Lindeberg's complaints about this matter were investigated by the CJC which found no basis to suspect official misconduct by members of the Cabinet, and the public servants who destroyed the documents, had a right to do (sic) because the approval of the State Archivist had been obtained and Crown Law had advised that those who had given evidence to Mr. Heiner did not have immunity from defamation action usually applying to such inquiries. In particular, the CJC also found that as no judicial proceeding had been instituted at the time of the destruction of the documents, no member Cabinet had acted contrary to law. While proceedings had been threatened by Mr. Coyne's solicitors, none was ever formally instituted. No breach of the Criminal Code had therefore occurred, as claimed by Mr. Lindeberg." [29] (My underlining)

4.5 While remembering what the Queensland Government put forward to the Senate, I wish to return again to his Honour Judge Samios of the District Court of Queensland and his ruling, which was subsequently accepted, without demur, ***by all parties*** in the Queensland Court of Appeal in *R v Ensbey*, ***including the State of Queensland***.

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

[29] See Volume 1 – Queensland Government – Submissions, Supplementary Submissions and Other Written Material Authorised to be Published – Senate Select Committee on Unresolved Whistleblower Cases 1995.

4.6 The arguments put forward by those in authority in the Heiner affair stand in stark contrast to the above judicial ruling on a criminal provision which has stood unchanged since 1899. The question must be put to them: How could they honestly get it so wrong, so often and for so long in the face of credible opinions to the contrary from imminent senior counsel like Messrs Callinan, Greenwood, and Morris? It is reasonably open to conclude that another improper motivation always drove them because of the huge political/constitutional problem waiting on the other side of the coin, and consequently, by failing to apply the law honestly, impartially and in the public interest, they arguably acted corruptly.

Misinterpretation of the law & Acting on Legal Advice

4.7 In *R v Cunliffe* [2004] QCA 293, McMurdo P, McPherson JA, Mackenzie J state this:

> *"...Misinterpretation of the law equates to ignorance of the law and is not an excuse:* See *Ostrowski v Palmer* and see also *Olsen & Anor v The Grain Sorghum Marketing Board; ex parte Olsen & Anor."*

4.8 Although it is long-settled at law that acting on legal advice which turns out to be wrong is no defence from charges for the illegal act being brought against the doer, quite recently in *Ostrowski v Palmer* [2004] HCA 30 (16 June 2004), the issue of ignorance of the law was addressed again. Mr. Palmer, a crayfisherman, who acted on legal advice provided by the Western Australia Department of Fisheries regarding a fishing area, found himself being charged because the advice he received from the Crown was wrong. He appealed his conviction to the High Court of Australia. His guilt was confirmed. Callinan and Dreydon JJ ruled as follows at 85 in finding a guilty verdict against Mr. Palmer even though he was diligent in obtaining advice before acting:

> *"....it is the task of this Court to apply the law by answering the question whether the respondent should be regarded merely as having been ignorant of the law, an excuse which s 22 of the Code would deny him, or whether he had an honest and reasonable, but mistaken, belief in the existence of a state of things which if they had in fact existed would have meant that he was not criminally responsible. The question is an important one. A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own*

often self-serving understanding of the law as an excuse for breaking it, however relevant such matters might be to penalty when a discretion, unlike here, in relation to it may be exercised." (My underlining)

4.9. In this matter, we have Executive Government of Queensland claiming that because it acted on Crown Law advice, it should be afforded protection from the law. **This then becomes a profoundly important question which I submit that this Committee cannot avoid answering. In my opinion, it is a watershed moment for the Senate.**

4.10. Just as the criminal law applied to Queensland Minister of religion and to the Western Australian crayfisherman (not to forget former Stipendiary Chief Magistrate Di Fingleton's conviction[30]) over their respective actions despite both acting on advice which reflects the Heiner affair but where (in Heiner) the potential wrongdoers are Queensland Ministers of the Crown, can our system of government based on the rule of law under our *Constitution* treat those Cabinet Goss Ministers (and certain senior bureaucrats) any differently and still claim to be democratic?

Accountability and the Legal Profession

4.11 It ought not be forgotten that lawyers have special legal and ethical obligations as practitioners. The Attorney-General of Victoria, the Hon. Rob Hulls MP, announced a review of the key features of the *Legal Practice Act 1996* in June 2000. In May 2001, the Victoria Office of the Ombudsman said the following in its submission[31] to the issue paper which is highly relevant here concerning the duty on lawyers to the courts and law:

> *"...Lawyers do have duties to the courts and to the law, to clients and to fellow practitioners but they also have the privileges associated with their profession. Lawyers are integral to the administration of justice and are placed in positions of great trust by the community. Just because they have these duties and privileges does not mean that they should be less accountable than other professions."*

[30] Currently the subject of an appeal to the High Court of Australia to be heard in 2005. However, the appeal is not on the point of law regarding acting on legal advice but rather one of immunity from prosecution under the *Magistrates Act. R v Fingleton* [2003] QCA 266; CA No 177 of 2003, 26 June 2003

[31] http://www.legalombudsman.vic.gov.au/publications/Discussion%20May2001.PDF

4.12 At the heart of this professional duty, in societies governed by the rule of law, is that for justice to be done according to law, evidence is needed and should be actively preserved. More than most, lawyers, as officers of the court, are in the front line of that duty to preserve evidence, and when advising clients on the formulation of so-called "document retention policies", their overriding consideration ought to be given to the interests of the law rather than looking for ways and means to dispose of embarrassing records or things for private sector clients or governments. The right to equality under the law does not just apply to the aggrieved but to the accused as well[32], and that is why Rules of Discovery/Disclosure exist. It is another reason why parliaments have even extended the "need-for-evidence" principle to permit unexpected search warrants, properly obtained by lawful authority, being served on persons whom it is believed may dispose of vital evidence in their possession or control to render nugatory the ends of justice. The irony in this affair is that it is the State, not some well-known criminal or thug, ridding itself of embarrassing evidence to thwart the ends of justice.

4.13 On the other hand, where civility exists and parties engage counsel, the Executive, Legislature and the Judiciary, have laws binding them, under the heading of offences against the administration of justice and the contempt Rules of the Supreme Court, wherein known or suspected documents or things required in evidence may not be wilfully destroyed to prevent their use in those anticipated proceeding and **a party does not even have to be placed on notice**. In *Ensbey*, it confirmed that the obligation to preserve evidence occurred when there was a "realistic possibility", and consequently, it is unarguable in this matter that sections 129 and 119 were well and truly relevant and triggered.

4.14 It is therefore open to suggest that the insupportable misinterpretations of sections of 119 and 129, first fostered and constantly promoted by the CJC, would have been known by the lawyers on LAPU - if not, by necessity and independence, even reviewed as between lawyers – and, apparently accepted without demur, or so it seems. The very wording of their submission (seen in the wake of *Rogerson* and *Ensbey* where obstruction of justice issues may be triggered by the presence of a mere "tendency to obstruct" being sufficient

[32] See *Bunning v. Cross* (1978) 141 CLR 54; *Reg. v. Sang* (1980) AC 402.

to incriminate) is sufficient to inculpate them in offences relating to official misconduct, obstruction of justice, destruction of evidence, and arguably, placing themselves into treacherous arena of professional misconduct going to *prima facie* contempt of court[33] which could lead to their disbarment[34]. While this may seem excessive at first glance, in the Heiner affair, we are dealing with legal officers of the Crown who should know better, and at all times, must obey the law and avoid crime as lawyers have been struck off the roles for far less.

4.15 In this regard, should the Committee find contempt, it may wish to make some comments to either or all of the following:

(a) the Hon Paul de Jersey AC QC, Chief Justice of the Supreme Court of Queensland;
(b) the Hon Rod Welford MP, Queensland Attorney-General and Minister for Justice; or
(c) the Hon Phillip Ruddock MP, Commonwealth Attorney-General

about the role of Crown legal officers in Queensland offering such advice, contrary to all notions of fair dealing standards expected of the Crown as the model litigant[35], which did not avoid such serious contempt. Put simply, someone should have objected, but apparently no one did. Consequently, someone should be held to account in order to restore public confidence in our legal system and avoid any repeat of this abuse.

The Doctrine of the Separation of Powers

[33] Arguments range in this offence as to whether it is possible to engage in contempt of court on the steps of court as opposed to being inside the court. But plainly a deliberate action by any lawyer advising a client to destroy known evidence ***before*** anticipated judicial proceedings commence to prevent their use in those proceedings is intolerable, and became the focus of considerable debate in the famous *McCabe vs BATAS* case.
[34] See *Scott v Handley* (1999) FCA 404
[35] *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383-384

4.16 I submit that the doctrine of the Separation of Powers[36] cannot be easily ignored under these circumstances. The Committee would appreciate that the doctrine rests securely at the centre of our society guarding against excesses of government and abuse of power by any arm of government one against the other, or one against the citizen. Its ideals are entrenched in our *Constitution*. It requires that each arm of government respect the other's function and rules. While tension exists between them all from time to time, any outright assault by one against the other in its own cause ought always be assiduously avoided.

4.17 The wilful destruction of documents – in this case "public records" – by order of the Executive (and, here, with the subsequent concurrence of the Legislature by various majority votes of MPs on the issue when presented for debate on the floor of the Queensland Legislative Assembly calling for a public inquiry because of the alleged unlawfulness of the shredding and related matters) to prevent their use as evidence in a judicial proceeding, plainly interferes with judicial independence. That is, it is for the courts alone to decide independently what is and what is not relevant evidence in order that justice may be done, and it is not open to any party, particularly the Executive or the Legislature, to unilaterally decide for themselves such a fundamental issue impacting on the administration of justice.

4.18 In this regard, the archives profession plays a vital role in protecting records with a known evidentiary or legal value, over and above their historical, administrative or data values, from unlawful disposal.

4.19 Without parliamentary privilege being respected, freedom of speech and parliamentary democracy would fail; without Rules of Discovery/Disclosure being respected, the Judiciary's function would fail; without impartiality, honesty and diligence being respected by the Executive in the exercise of its function, government fails and becomes oppressive. Liberty of the individual is gravely threatened in such circumstances. In this

[36] Central to the modern development of separation of powers as a theory of government is Baron de Montesquieu (1689- 1755). See 13 September 1993 – Queensland Parliament - Paper to the Australasian Study of Parliament Group (Queensland Chapter) by Associate Professor Gerard Carney of the Law Faculty Bond University *"Separation of Powers in the Westminster System"*.

matter, an outright bold assault has occurred by the Queensland Executive and Legislature against the Queensland Judiciary, and the Senate ought not be party to it.

4.20 Consequently, I respectfully submit that the Committee may recommend to the Senate, if (a) contempt is found, or (b) a *prima facie* criminal offence is found in these matters against the Judiciary's function without contempt of the Senate being found, that in order to restore public confidence in our system of government, that the Senate express an apology or deep regret to the relevant Judiciary over its previous acceptance in an official report[37] of the Senate that the wilful destruction of documents to prevent their use as evidence in a judicial proceeding could be accepted by the Senate as" *...an exercise in poor judgement*" instead of being recognised as a *prima facie* offence against the administration of justice. The Senate may wish to assure the Judiciary that appropriate steps have been taken to correct such a serious contempt of the Judiciary's *Constitutional* function by recognising, in the Senate's findings in this matter, what the law demands of such conduct in the face of such admissions of culpability made before the Senate.

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

9 November 2004

11 Riley Drive
Capalaba Queensland 4157
Email: kevlindy@tpg.com.au

[37] "*The Public Interest – Revisited*" – Report of the Senate Select Committee on Unresolved Whistleblower Cases – October 1995 – Point 5.39

ADDENDUM A

SUPREME COURT OF QUEENSLAND

CITATION:	***R v Ensbey; ex parte A-G (Qld)*** [2004] QCA 335
PARTIES:	**R** v **ENSBEY, Douglas Roy** (appellant) **R** v **ENSBEY, Douglas Roy** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 94 of 2004 CA No 79 of 2004 DC 1857 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 June 2004
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, Davies and Jerrard JJA concurring as to the orders made, Williams JA dissenting in part
ORDER:	**1. Appeal against conviction dismissed** **2. Sentence appeal by Attorney-General dismissed**
CATCHWORDS:	CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE - OTHER OFFENCES - where the appellant was convicted of destroying evidence pursuant to s 129 *Criminal Code* (Qld) - where the appellant was a pastor who became aware of an inappropriate sexual relationship occurring between a child and adult parishioner - where the appellant had in his possession the diary of the child which documented her activities with the adult parishioner - where the appellant was asked to return the diary notes to the family and returned them shredded and illegible - where the appellant submits that there were two reasonable hypotheses open to the jury as to his intention in destroying the diary and that he ought to have received the benefit of the doubt - whether it was reasonably open to the jury to conclude the appellant's intention

was not to prevent it being used as evidence in a court case - whether appeal against conviction should be allowed

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - APPLICATIONS TO INCREASE SENTENCE - OTHER OFFENCES - where the respondent was sentenced to six months imprisonment, wholly suspended, with an operational period of two years - whether the sentence imposed is manifestly inadequate in the circumstances.

Criminal Code 1899 (Qld), s 129

Knight v The Queen (1992) 175 CLR 495, applied
R v Fingleton [2003] QCA 266; CA No 177 of 2003, 26 June 2003, cited
R v Rogerson (1992) 174 CLR 269, cited
R v Selvage & Anor [1982] 1 All ER 96, cited
R v Vreones [1891] 1 QB 360, considered

COUNSEL: R V Hanson QC, with G P Long, for Ensbey
S G Bain for the Crown

SOLICITORS: Dibbs Barker Gosling for Ensbey
Director of Public Prosecutions (Queensland) for the Crown

[1] **DAVIES JA:** On 11 March 2004 the appellant was convicted in the District Court of the offence that between 31 May 1995 and 1 July 1996 he, knowing that written diary notes might be needed in evidence, wilfully rendered them illegible or indecipherable with the intention of preventing them being used in evidence. He was sentenced to six months imprisonment, wholly suspended, with an operational period of two years. These are an appeal against his conviction and an appeal by the Attorney-General against his sentence. It is convenient to refer to the appellant in the conviction appeal, Mr Ensbey, as the appellant in discussing both appeals.

The appeal against conviction

[2] The undisputed facts relevant to the appeal are as follows. From August 1994 to about June 1995 B, a married man of 29, interfered sexually with S a child of 14. Both were parishioners of the Sandgate Baptist Church.

[3] In April or May 1995 Mr Meteyard an associate pastor of the church received information that B had been conducting an improper relationship with S which included sexual contact. Some time shortly after that, together with Mr Paroz, a youth pastor in the church, he went to the Rs' home where they had a discussion about the matter with Mr and Mrs R and S. During the course of that discussion he mentioned that he had heard that S had kept a diary of her activities with B. Mrs R conducted a search for the diary and it was produced. Mr Meteyard and possibly Mr Paroz perused the diary.

[4] When they returned to the church Mr Meteyard and Mr Paroz discussed what had occurred with the appellant who then arranged a meeting between those three and B. When confronted with the accusations B admitted to having been in a sexual relationship with S.

[5] The following morning the appellant and Meteyard returned to speak to the Rs and told them that the allegations were true and that B had confessed to a continuing sexual relationship with S. The Rs were plainly upset, especially Mrs R. The appellant said that he would oversee what should be done next. When they were leaving the appellant said he would keep the diary for the time being and left with it.

[6] Thereafter Mr and Mrs R were uncertain as to how to deal with the matter and looked to the appellant for direction as to what to do. Their concern was, understandably, solely for their daughter's welfare. The appellant told them:

1. that it was not necessary to go to the police; that the matter could be dealt within the church; and that he had received legal advice about this;
2. that if they took the matter to court the diary notes would be incriminating against S and could be used against her to make her look bad; that she'd "be ripped to shreds in the Court"; and that if they went to court they "didn't have a leg to stand on".

This advice was given some time after B had admitted to having been in a sexual relationship with S.

[7] After thinking about the matter the Rs accepted the appellant's advice. There was a meeting between B, his wife, Mr and Mrs R, S and the appellant at which B apologized for his conduct and when asked why he did it said "I don't know". B was then punished within the church by being suspended for a time and being required to undergo counselling.

[8] By the end of 1995 Mr and Mrs R had become dissatisfied with what they saw as the lack of support for them within the church in consequence of the events I have described. They left the church in December.

[9] In the following year they decided to seek the return of S's diary notes which were still in the appellant's possession. In April Mrs R mentioned to Mr Meteyard that they had never got the diary notes back and that they would like them back. Mr Meteyard said that he would tell the appellant that and he did so. Not having received them back, in June Mrs R rang the appellant and asked for them back. He asked why and she said "I just want them back". He said "What do you want to do with them?" and she repeated that she just wanted them back. These or similar questions and answers were repeated a number of times. Mrs R said "It took a lot of coercing to be able to get them back. I just had to harp and harp to say, 'I just want them back'". He eventually agreed to send them back.

[10] About a week later the Rs received a brown envelope in which was contained the diary notes, shredded, accompanied by a letter from the appellant. The letter included the following:

> "Enclosed, as requested, are the diary pages. You will notice that they are in a form that will quickly facilitate your desire to close this issue. I sincerely hope that this, in fact, does that."

It is plain that the diary notes were shredded by the appellant after the telephone conversation which I have related.

[11] In March 2001 S made a formal complaint to the police about B's conduct. B was charged, confessed and pleaded guilty to offences involving that conduct.

[12] The principal question sought to be argued by the appellant in this appeal is whether a reasonable jury ought to have found that an inference consistent with innocence was open on the evidence. If they ought to have so found they ought to have given the appellant the benefit of the doubt necessarily created by that circumstance: *Knight v The Queen* (1992) 175 CLR 495 at 503.

[13] The appellant submits that there were two reasonable hypotheses open on the evidence as to his intention in destroying the diary. One was, it is conceded, an intention to prevent it being used in evidence in a court case. The other was, it is submitted, an intention to bring finality to the matter, for the benefit of all involved, with no thought as to a court case. The principal question in issue, consequently, is whether the second of those suggested hypotheses, or some variation of it, was an inference that was reasonably open on the evidence.

[14] Before turning to that question it is necessary to say something briefly about the construction of s 129 of the *Criminal Code* which created the offence of which the appellant was convicted.

The elements of that offence are relevantly:

1. knowing that any document may be required in evidence in a judicial proceeding;
2. wilfully rendering it illegible or indecipherable;
3. with intent thereby to prevent it from being used in evidence.

[15] Mr Hanson QC who appeared with Mr Long for the appellant, conceded in the course of argument that "knowing" in this context meant "believing" because of the word "may". It was incongruous, he conceded, to talk about knowing that something may happen. In my opinion his concession was correctly made. It was not necessary that the appellant knew that the diary notes would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence at the time the offence was committed. It was sufficient that the appellant believed that the diary notes might be required in evidence in a possible future proceeding against B, that he wilfully rendered them illegible or indecipherable and that his intent was to prevent them being used for that purpose.[38]

[16] Mr Hanson QC therefore accepted as correct the following direction of the learned trial judge:

> "Now, here, members of the jury, the words, 'might be required', those words mean a realistic possibility. Also, members of the jury, I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence. There does not have to be something going on in this courtroom for

[38] There is no authority directly on point. But the offence of attempting to pervert the course of justice, both at common law and under statutory provisions may be committed notwithstanding that curial proceedings are no more than a possibility: *R v Rogerson* (1992) 174 CLR 268 at 277.

someone to be guilty of this offence. If there is a realistic possibility evidence might be required in a judicial proceeding, if the other elements are made out to your satisfaction, then a person can be guilty of that offence."

[17] Mr Hanson QC also conceded that, if B was prosecuted, the diary notes might be required in evidence. They would plainly have been admissible under s 93A of the *Evidence Act* 1977 and the prosecution may have tendered them under that section. Moreover they may have been used in evidence in other ways.

[18] I return then to the question whether it was reasonably open to the jury to conclude that his intention in destroying the diary notes was to bring finality to the matter, for the benefit of all involved, with no thought as to a court case. I do not think it was.

[19] It was plain to all concerned, including the appellant, from the earliest discussions, that there were two and only two possible actions which could be taken in respect of B's conduct. One was to attempt to resolve the matter, to the satisfaction of the parties, especially of S as guided by her parents, within the church by some church process. The other, which could plainly arise if it was not so satisfactorily resolved within the church, was by a formal complaint to the police.

[20] From the outset, the former was the action strongly favoured by the appellant. Put another and more relevant way, the appellant was plainly determined from the outset to discourage the Rs from going to the police. After B had confessed to interfering with S the appellant told Mrs R that if they took the matter to court S would be "ripped to shreds" and that they "didn't have a leg to stand on". That was plainly wrong. And it must have been apparent to the appellant by then that B, having confessed his guilt, would be unlikely to contest the matter in court.

[21] By the time of the telephone conversation which I have related between Mrs R and the appellant, the Rs had left the church because of their dissatisfaction with what they saw as lack of support which they had received when compared with the support which B and his family had received from the church. And in that conversation Mrs R was insistent about return of the diary notes. It is difficult to think of any logical reason for Mrs R's insistence other than that she was contemplating the possibility that a complaint might be made to the police. It is equally difficult to accept that the appellant's persistence in inquiring why she insisted on return of the diary notes and his reluctance to give them back had any basis other than his recognition that that was why she wanted them back.

[22] The view that the reason for his persistent inquiry and his apparent reluctance to return the notes was his recognition that the Rs might require them for the purpose of a possible prosecution is strongly supported by the fact that, after that conversation and before returning the diary notes, he shredded them. He could reasonably have thought that his shredding of them prevented them from being used for the only purpose for which they could reasonably be used, namely in the course of possible future court proceedings in respect of B's offences. And in my opinion it would not have been reasonably open to the jury to conclude, on the above evidence, that he shredded them for any purpose other than preventing them from being so used.

[23] This is further supported by the opening paragraph of his letter. In it he said that his purpose in shredding the notes was to "quickly facilitate your desire to close this issue". The only way in which it would not have been closed would have been if S, guided by her parents, had chosen to take the matter to the police. It would not, in my opinion, have been a reasonable inference for the

jury to accept that, in that passage in his letter, the appellant was speaking of closure in any context other than by not taking the matter further by going to the police.

[24] For those reasons I do not think it would have been reasonable for the jury to conclude that the appellant's intention in returning the diary in shredded form and in writing his letter was to bring finality to the matter with no thought as to a court case. On the contrary, as I have indicated, his intention could only have been, by preventing the diary notes from being used in evidence, to facilitate the Rs' desire to accept what had occurred as closure of the issue.

[25] For those reasons, in my opinion, the appeal against conviction must be dismissed.

The appeal against sentence

[26] In sentencing the appellant the learned sentencing judge accepted, as he was obliged to by the jury's verdict, that the appellant knew that the diary notes might be needed in evidence and wilfully rendered them undecipherable with the intention of preventing them from being so used. But because the appellant did not give evidence the learned sentencing judge did not and could not have reached any conclusion as to the appellant's motive in doing what he did; whether he thought it was in the best interests of all concerned including S or whether, as suggested by the Attorney here, he did it to protect the church. Similarly this Court cannot speculate upon the appellant's motive for his conduct.

[27] There is no doubt that this offence is a serious one. But one factor which distinguishes this case from others involving this or the alternative offence of attempting to pervert the course of justice is that the appellant had nothing to gain personally from his conduct. Usually offences of this kind are committed by a person who has committed another offence, or a person closely associated with that person, in order to prevent the prosecution or conviction of that person. As already mentioned, it should not be inferred his motive was other than that he thought finality within the church was best for all concerned.

[28] The learned sentencing judge also relied on the fact that the appellant was otherwise of unblemished character. That may be of little importance where an offender has committed an offence of this kind in order to prevent his being found guilty of another criminal offence. But as I have already said that was not this case and consequently his otherwise exemplary character is also a relevant factor.

[29] The seriousness of the offence was appropriately recognized by the sentence of six months imprisonment. It was not contended by the Attorney that a higher sentence should have been imposed. The sole question on sentence was whether it should have been wholly suspended.

[30] On that question minds may differ. It would have been open to the learned sentencing judge to require a period of actual custody to be served. On the other hand, because of personal factors I have mentioned, I do not think that it was outside the range of a sound discretion to wholly suspend the sentence.

[31] I would accordingly dismiss the appeal against sentence.

[32] **WILLIAMS JA:** I will not repeat in these reasons factual matters which are set out in the reasons for judgment of Davies JA, which I have had the advantage of reading.7

[33] I would add to that narrative the following. Meteyard, who described himself as an associate pastor at the Sandgate Baptist Church, was called to give evidence for the prosecution. He visited Mrs R on learning that she and the other members of the family had decided to resign from the church. During that conversation Mrs R observed that "we've never got the diary back and we'd like it back". Meteyard replied that he "didn't realise that" and undertook to inform the appellant that the Rs would "like the diary back". He then said that about a week later he told the appellant of that and received the reply to the effect of, "Oh, did she?" or "Oh, did they?" Within a few days after that Meteyard received a phone call at home in which the appellant told him "that he had torn the diary up into small pieces and he was going to return it to the Rs in that form". The appellant read to Meteyard the letter he had written to the Rs to go "with fragments of the diary".

[34] Mrs P H Richards, who worked in a voluntary capacity in the office of the church, also gave evidence for the prosecution. She observed the appellant using the guillotine in the office and because of the way he was using it she observed, "Oh, you obviously don't want anyone to read that". Her evidence went on: "He told me it was S's diary that he was – that [Mrs R] had asked for it back and that that's how he was sending it back." She also recalled that he said "that it would incriminate S more if he sent it back in its proper state."

[35] There is no doubt that the shredding of the diary took place immediately following the phone call between Mrs R and the appellant, details of which are set out in the reasons of Davies JA.

[36] The appellant had no property in the diary and he had no right to destroy it regardless of whether or not it was potential evidence in legal proceedings. Prima facie his conduct constituted the offence of wilful damage to property (see s 460 and s 469 of the Criminal Code).

[37] I agree for the reasons given by Davies JA that there was ample evidence before the jury upon which the appellant could be convicted of the offence created by s 129 of the Code.

[38] The conduct of the appellant was appalling. In my view it was an aggravating circumstance that he was a minister of religion and in a sense a position of trust existed between him and the lawful owners of the diary. He has shown no remorse and is not entitled to have the appropriate sentence mitigated because of a timely plea of guilty. It is said he is unlikely to re-offend in similar circumstances, but that is probably only because he is not likely to again be in a similar position.

[39] The only mitigating factor in the appellant's favour is that he has no previous criminal convictions. But that is of relatively minor significance when the court is dealing with a serious offence against the administration of justice. Whilst it is true that the appellant did not stand to benefit personally by his conduct (a feature often present in offences of this nature) that cannot be allowed to deflect attention from the serious nature of offences of this type. The destruction of evidence is, in my view, a serious offence which calls for a deterrent sentence and that would usually necessitate the offender serving an actual period in custody.

[40] In my view a sentence of six months imprisonment makes due allowance for the appellant's previous good character whilst operating as an appropriate deterrent sentence. The decision of this court in *R v Fingleton* [2003] QCA 266 supports such a sentence. There the offender was found guilty after a trial of an offence in the broad category of interference with the

administration of justice and was of previous exemplary character. The court imposed a sentence of six months imprisonment.

[41] In my view the sentence imposed at first instance here was manifestly inadequate because it failed to reflect the gravity of the offence and failed to take into account the aspect of general deterrence. I would allow the appeal of the Attorney-General to the extent of deleting the provision that the sentence of six months imprisonment be wholly suspended for an operational period of two years.

[42] The orders I would make are as follows:

> 1. In CA No 94 of 2004 – appeal dismissed
> 2. In CA No 79 of 2004 – allow the appeal to the extent of setting aside that part of the sentence which ordered that the sentence of imprisonment be wholly suspended for an operational period of two years.

[43] **JERRARD JA:** In this appeal I have had the advantage of reading the judgments of Davies JA and Williams JA, in which the relevant facts are carefully described. I have come to the conclusion that their Honours are correct in holding that it was open to the jury to convict Mr Ensbey of an offence against s 129 on the facts established in evidence.

[44] This is so even though there were no judicial or criminal proceedings either on foot, announced, or foreshadowed at the time he tore up the diary pages. On whatever day he did that, nothing had been said to inform him that Mr or Mrs R, or S, had decided that a complaint would be made to the police, and S did not report Mr B's misconduct to police until five years later.

[45] A judicial proceeding itself can be very short. Had Mr B been tried on a plea of not guilty, the hearing may well have ended within two days. It would therefore unduly confine the offence legislated for by s 129 of the *Criminal Code* to require that a judicial proceeding be on foot for that offence to be capable of being committed. A judicial proceeding will usually be shorter than a criminal proceeding, using the latter expression to describe the chain of events normally begun either by the issue of a complaint and summons or by an arrest and charge, which proceeding will usually end either by verdict or plea (and, where appropriate, sentence) in a court of competent jurisdiction subject to appeal; or by a charge being withdrawn in that court. For an offence of the sort ultimately alleged against Mr B, such criminal proceedings would normally involve two judicial proceedings, one being a committal hearing in a Magistrate's Court and the other a hearing in the District Court.

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

> "Any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony 9 touching any matter which is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called '**perjury**'".

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

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

[49] A more difficult matter for appropriate application of the section is where, as in this case, not even criminal proceedings are on foot or foreshadowed, let alone judicial proceedings, at the time the potential evidence is destroyed. There is authority at the common law, however, approving the application of the associated offence of fabricating evidence, provided for by s 126 of the *Code*, to a situation in which there was no judicial proceeding on foot, and only the reasonable possibility, foreseen by and which arose out of facts known to the accused, that one might occur in the future.

[50] Section 126 provides:

> "(1) Any person who, with intent to mislead any tribunal in any judicial proceeding –
>
> (a) fabricates evidence by any means other than perjury or counseling or procuring the commission of perjury; or
>
> (b) knowingly makes use of such fabricated evidence;
>
> is guilty of a crime, and is liable to imprisonment for 7 years".

In *The Queen v Vreones* [1891] 1 QB 360 Mr Vreones was convicted of an offence described therein by Lord Coleridge CJ at page 366 as the misdemeanour of attempting, by the manufacture of false evidence to mislead a judicial proceeding which might come into existence; and by Pollock B at page 368 as "an indictment for a fraud or cheat at common law"; and described 90 years later in *R v Selvage & Anor* [1982] 1 All ER 96 by the Court of Appeal at page 102 as an offence of attempting by the manufacture of false evidence to mislead a judicial tribunal. The relevant facts were that Mr Vreones had been appointed by sellers of wheat as a superintendent to take samples from a cargo of wheat shipped from the Black Sea to buyers in England. The contract contained a provision that in the event of a dispute arising out of the contract of sale it should be referred to two arbitrators, and in accordance with the contract and with the custom of merchants at the port of Bristol at which the wheat arrived, samples were taken from it and sealed with the seals of the buyer and seller. These were given into the custody of Mr Vreones and taken by him to his lodgings, and ought to have been forwarded to the offices of the London Corn Trade Association. Instead, Mr Vreones tampered with those samples by artfully removing the wheat, cleaning it, and replacing it, all without breaking the seals, so as to produce a very much better quality sample. This was done with the motive that in the case of any dispute arising, the

purchaser might be defeated by the production of the good wheat before any arbitrators who might be appointed.

[51] No arbitrators were in fact appointed, and nor had the purchaser take any steps to appoint them, because the samples provided to Mr Vreones for delivery to the Corn Trade Association were found on comparison to be so superior to the samples taken when the contract was entered into, and to all the other samples taken by either or both parties, and to the bulk of the cargo, that it was regarded as pointless proceeding to arbitration. Nevertheless, he was convicted of an offence as variously described in the judgments quoted.

[52] The decision may provide a picture of the development of the offence of attempting to pervert the course of justice, which is consistent with the citation of it in *The Queen v Murphy* (1985) 158 CLR 596 at 609, and from it in *Meissner v The Queen* (1995) 184 CLR 132 at 141 in the joint judgment of Brennan, Toohey and McHugh JJ at 141, and by Deane J at 148. The description given in *R v Selvage* of the charge in *R v Vreones* does reflect the wording of the *Criminal Code* in s 126, and so applied would justify a conviction for fabricating evidence where the judicial proceeding intended to be misled by that fabricated evidence never in fact took place, and was always only a possibility, albeit realistic, on the known facts.

[53] In *R v Selvage* itself the Court of Appeal limited the circumstances in which the offence of attempting to pervert the course of justice could be committed to those where the course of justice must have been embarked on in the sense that proceedings of some kind were in being, or imminent, or investigations which could or might bring proceedings about were in progress.[39] *R v Vreones* was described in *R v Selvage* as "close to if not on the very boundary itself of the offence of perverting the course of justice", and on the description given in *R v Selvage* of the limits of the offence of attempting to pervert the course of justice, that observation was accurate. But the offence charged in *R v Vreones* was different, as the Court of Appeal itself recognised in *R v Selvage*.

[54] The judgment in *The Queen v Vreones* is a leading case, cited in the joint judgment of the High Court in *The Queen v Murphy* for the proposition that at common law an attempt to obstruct the course of justice was a punishable misdemeanour. It is accordingly appropriate to follow it. Applying the logic of the decision to a charge of destroying evidence, as opposed to a charge of fabricating it, there is no need for the prosecution to establish more than the possibility, known to or believed in by the accused on reasonable grounds, that a judicial proceeding would occur, those reasonable grounds being matters shown to exist to the knowledge of the accused. On that construction the appellant was properly convicted.

[55] I do not think anything follows from the manner in which the offence provided for in s 140, that of attempting to pervert the course of justice, was amended by Act No 77 of 2003. As originally enacted s 140 read:

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

[39] A wider view was taken by the High Court in *The Queen v Rogerson* (1992) 174 CLR 268 by Mason CJ at 277-278, Brennan and Toohey JJ at 281-282 and 283-284, and Deane J at 294-295. On that wider view, a police investigation need not have even commenced, provided that the accused contemplated the possibility that one might, when doing the act allegedly intended to frustrate or defeat the course of justice

[56] In 2003 the section was amended to read:

> "A person who attempts to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime. Maximum penalty – 7 years imprisonment".

The explanatory note to the amending Act informs that the amendment made was to remove the necessity for the prosecution to prove that no other offence in the *Criminal Code* applied before a person could be convicted of attempting to pervert the course of justice. While the section as originally drafted conveyed the inference that the offences described elsewhere in that chapter also described ways of perverting or attempting to pervert the course of justice, the opposite did not follow; the Crown did not and does not now have to prove that the material facts necessary to establish an offence against s 129 also establish an offence of attempting to pervert the course of justice, although they almost invariably would.

[57] I agree with what Davies JA has written regarding the appeal against sentence, and accordingly agree that each of the respective appeals against conviction and sentence should be dismissed.
