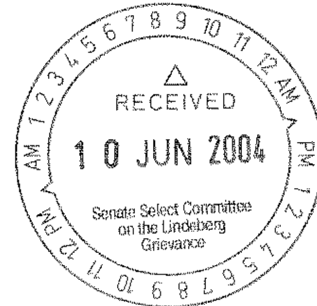
QUT
Queensland University of Technology Gardens Point Campus
2 George Street GPO Box 2434 Brisbane Qld
Phone 07 3864 2111 Fax 07 3864 1510 w
CRICOS No. 00213J ABN

9 June 2004



Mr Alistair Sands
Secretary
Select Committee on the Lindeberg Grievance
Australian Senate
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Alistair

Re: Outline of Submissions by Alastair MacAdam

Introduction

Further to our telephone conversations, I submit this outline of the submissions I will make before the Committee this coming Friday, 11 June 2004. Although, I have become involved in this matter in the course of my duties (community service obligations) at the Queensland University of Technology, Law School, I do not purport to speak on behalf of the University.

My submissions fall into the following three broad areas:

- The fundamentally flawed interpretation of s 129 Destroying Evidence of the *Criminal Code [1899][* (Qld);
- False claims that nothing has been found; and
- The failure of Queensland Government bodies to do their duty.

I believe that my submissions are particularly relevant to the term of reference of the Committee's enquiry as to 'whether false or misleading evidence was given to previous Senate committee inquiries on matters raised by Mr Kevin Lindeberg'. My submissions are also relevant to the Committee's consideration of '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 fundamentally flawed interpretation of s 129 Destroying Evidence of the *Criminal Code [1899]* (Qld)

(To assist the Committee in following the argument, extracts from the relevant legislative provisions are attached.)

In my view the original source of the problem in what has become known as 'Shreddergate', can be traced to the fundamentally flawed interpretation of

Campuses Gardens Point Kelvin Grove Carseldine

s 129 Destroying Evidence of the *Criminal Code [1899]* (Qld) that apparently was given by Mr Noel Nunan of behalf of the then Criminal Justice Commission. According to Mr Nunan, the clear words of s 129 Destroying Evidence can be read down by reference to the optional form of indictment found in the *Criminal Practice Rules 1900* (Qld). As I understand it, the consequence of this argument is that there can be no breach of s 129 if documents were destroyed before legal proceedings had been commenced; and as the Queensland Cabinet authorized the destruction of the Heiner documents when legal proceedings had been threatened but not commenced, Kevin Lindeberg's complaint could be summarily dismissed by the Criminal Justice Commission.

I say the interpretation of s 129 of the *Criminal Code [1899]* (Qld) was fundamentally flawed because it is perfectly clear that unless Parliament has authorized the amendment of an Act of parliament by a piece of subordinate (delegated) legislation, a so-called and often objected to 'Henry VIII clause', the views of the executive contained in a subsequent piece of subordinate legislation cannot possibly be of assistance in ascertaining the intention that the Parliament had in enacting the statute. See, for example, the decision of the High Court of Australia in *The Great Fingall Consolidated Ltd v Sheehan* (1905) 3 CLR 177 in which Griffiths CJ, at 185, (with whom Barton J agreed) said:

> ...I cannot assent to the argument that a regulation can be used for the purpose of construing the Statute under which it is made.

Furthermore, in *R v Rogerson* (1992) 174 CLR 268, a case concerning the disgraced New South Wales detective, Roger Rogerson, the High Court of Australia held that in respect of offences of this type – there the offence was conspiring to pervert the course of justice – that the offence could be committed even though no court proceedings had been commenced at the time of the alleged offence.

As we all know, it is common for lawyers to hold different views as to the meaning of the law. However in my opinion, the views of Mr Nunan as endorsed by the Criminal Justice Commission are so fundamentally flawed that they cannot be explained away in that manner. I have previously expressed the view that if the views of Mr Nunan were written in a first year law assignment they would be given a failing grade. I stand by that statement.

I believe it is open to conclude that the reason for such a fundamentally flawed interpretation being advanced was that other imperatives necessitated Mr Nunan finding reasons for the Criminal Justice Commission to summarily dismiss Kevin Lindeberg's complaint and absolve the Queensland Cabinet and others.

False claims that nothing has been found

Queensland Government bodies and officials, including the current Queensland Premier, Peter Beattie, have regularly made statements like:

> The matter has been investigated to the nth degree and nothing has been found.

This statement is certainly correct so far as Labor lawyers and Queensland Government lawyers are concerned. But when two independent members of the Queensland private bar, Anthony Morris QC and Edward Howard investigated the matter by simply following the paper trail, they reported (see the attached extracts from the Conclusions and Recommendations to their report) that it was open to conclude a range of serious criminal offences had been committed.

The failure of Queensland Government bodies to do their duty

Despite the seriousness of the underlying issues involved - the destruction of documents required for legal proceedings and the covering up of serious child abuse in a government institution - in my belief Shreddergate discloses a more serious problem, the failure of Queensland Government bodies to do their duty.

Before and after the Fitzgerald Inquiry, various Queensland Government bodies were established designed, at least in part, to protect citizens against excesses of the Executive Government. However, when serious allegations were made against the Executive Government, rather than doing their duty in a fair and impartial manner, they collapsed around it and protected it, generally giving spurious reasons for not fulfilling their responsibilities to the people of Queensland.

The Queensland Government bodies involved included:

- The Criminal Justice Commission
- Crown Law
- The Crown Solicitor
- The Director of Public Prosecutions
- The Attorney-General
- The Queensland Police Service
- The Ombudsman
- The Information Commissioner
- The Auditor General
- The State Archivist
- The Department of Family Services

These bodies were identified in the so-called 'one man' petition to the Queensland Parliament of Kevin Lindeberg.

Many of these bodies simply adopted Noel Nunan's fundamentally flawed interpretation of s 129 of the *Criminal Code [1899]* (Qld), as their justification for doing nothing.

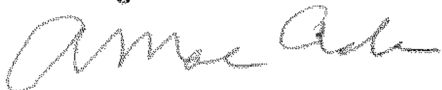
Other Queensland bodies/persons that can be added to the list include:

- The Queensland Parliament
- The Speaker
- Parliamentary Committees, particularly the Parliamentary Criminal Justice Committee and its various Chairmen, which include the current Premier, Peter Beattie
- Premier Goss, who as a member of Cabinet, was a party to the original destruction of the Heiner documents.
- The Forde Inquiry
- Premier Rob Borbidge, who started to pursue the matter, but let it drop.
- Premier Beattie, who refuses to pursue that matter, falsely claiming that the matter has been investigated to the 'nth degree', and nothing found.

Conclusion

I trust the Committee will find this outline useful. I look forward to expanding on this outline and assisting the Committee in any way I can when I appear before it.

Kind regards



Alastair MacAdam
BCom, LLB(Hons) *Qld,* LLM(Hons) *QUT*
Senior Lecturer in Law
Barrister of the Supreme Court of Queensland
Phone 07 3864 2713 (w)
07 5498 5304 (h)
0427 98 5304 (mobile)
Email a.macadam@qut.edu.au

Extracts from the *Criminal Code [1899]* (Qld) and the *Criminal Practice Rules 1900* (Qld)

Prepared for the Australian Senate Select Committee on the Lindeberg Grievance

By Alastair MacAdam

9 June 2004

The extracts are as the relevant material was worded in March 1990.

Criminal Code [1899] (Qld)

CHAPTER 16—OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

Definition of "judicial proceeding"

119. In this Chapter—

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

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.

132 Conspiring to defeat justice

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

(2) The offender cannot be arrested without warrant.

(3) A prosecution for an offence defined in this section shall not be instituted without the consent of the Attorney-General.

140 Attempting to pervert justice

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 imprisonment for 2 years.

Criminal Practice Rules 1900 (Qld)

2. Form of Statement of Offences in Indictments. The statement of the offence in an indictment may be in such of the Forms in the Schedule as is applicable to the case.

In the case of any offence in respect of which no form is given in the Schedule, the statement shall be, as nearly as may be, in accordance with the analogous Form in the Schedule; and, if there is no such Form, it shall be sufficient to state the offence in the words of the Code or other Statute under which the indictment is presented.

No. 83.—DESTROYING EVIDENCE.

Section 129.

Knowing that a certain book [*or* deed (*or as the case may be*)], namely, a ledger (*or as the case may be*), was [*or* might be] required in evidence in an action then pending in the Supreme Court of Queensland between one E.F. and one G.H. (*or as the case may be*), wilfully destroyed the same [*or* wilfully rendered the same illegible (*or* undecipherable *or* incapable of identification)], with intent thereby to prevent it from being used as evidence in the said action (*or &c.*).

Report to

THE HONOURABLE THE PREMIER OF QUEENSLAND

and

THE QUEENSLAND CABINET

of

AN INVESTIGATION INTO ALLEGATIONS by MR KEVIN LINDEBERG

and

ALLEGATIONS by MR GORDON HARRIS and MR JOHN REYNOLDS

Anthony J.H. Morris Q.C.
Barrister-at-Law
13th Level
MLC Centre
239 George Street
Brisbane, Qld 4000

Edward J.C. Howard
Barrister-at-Law
13th Level
Quay Central
95 North Quay
Brisbane, Qld 4000

PART IV: CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS IN RELATION TO THE LINDEBERG ALLEGATIONS

1. For the reasons set out in Part II of this Report, and based on the evidence to which we have obtained access in the course of our investigation, we are of the view that the following conclusions are open in respect of Mr. Lindeberg's allegations.

Criminal Offences

2. It is open to conclude that Section 129 of the *Criminal Code* was breached by an officer or officers of the Department of Family Services, to the extent that they were involved in:

   2.1 The destruction of the Heiner documents; and

   2.2 The destruction, on 23 May 1990, of photocopies of certain statements which had originally been furnished to the Department of Family Services by the Queensland State Service Union on 10 October 1989.

3. It is open to conclude that Section 132 and/or Section 140 of the *Criminal Code* was breached by an officer or officers of the Department of Family Services, to the extent that they were involved in:

   3.1 The destruction of the Heiner documents; and

   3.2 The destruction, on 23 May 1990, of photocopies of certain statements which had originally been furnished to the Department of Family Services by the Queensland State Service Union on 10 October 1989.

4. It is open to conclude that an officer or officers of the Department of Family Services breached Section 55(1) of the *Libraries and Archives Act 1988*, by their conduct in:

   4.1 Returning to the Queensland State Service Union, on 22 May 1990, original statements which had been furnished to the Department by the QSSU on 10 October 1989; and

   4.2 Destroying photocopies of those statements on 23 May 1990.

5. It is open to conclude that an officer or officers of the Department of Family Services breached sub-section 92(1) of the *Criminal Code*, by:

   5.1 Their failure, in the period 18 January 1990 to 23 May 1990, to accede to Mr. Coyne's lawful requests to inspect records held by the Department on himself in accordance with Regulation 65 of the *Public Service Management and Employment Regulations*;

   5.2 Their conduct in returning such documents to the Queensland State Service Union on 22 May 1990, with the intended consequence of preventing Mr. Coyne from exercising his rights under Regulation 65; and

   5.3 Their conduct in causing the destruction of photocopies of the same documents on 23 May 1990, with the same intended consequence.

6. It is not open to conclude that any such offences were committed by the Crown Solicitor, or by any officer of the Crown Solicitor's Office.

7. In view of the fact that we have been denied access to relevant Cabinet documents, we are unable to express a view - one way or the other - as to whether any such offences may have been committed by any member of State Cabinet in the period February to May, 1990.

Official Misconduct

8. It is open to conclude that "official misconduct", within the meaning of ss.31 and 32 of the *Criminal Justice Act*, was committed by an officer or officers of the Department of Family Services, in:

   8.1 Denying Mr. Coyne's lawful right, under Reg.65 of the *Public Service Management and Employment Regulations*, to peruse and obtain copies of departmental files and records held on Mr. Coyne, and in responding to him and his representatives in a way which was "not honest" for the purpose of achieving delay pending the disposal of those documents;

   8.2 Returning statements to the Queensland State Service Union on 22 May 1990; and

   8.3 Destroying photocopies of those statements on 23 May 1990.

9. It is not open to conclude that any such "official misconduct" was committed by the Crown Solicitor, or by any officer of the Crown Solicitor's Office.

10. In view of the fact that we have been denied access to relevant Cabinet records, we are unable to express any conclusion as to whether such "official misconduct" may have been committed by any member of State Cabinet in the period February to May, 1990.

Payment to Mr. Coyne

11. It is open to conclude that the payment of $27,190.00 to Mr. Coyne in February 1990:

   11.1 Was illegal; and

   11.2 Involved the commission of an offence under section 204 of the *Criminal Code*, by the Minister and an officer or officers of the Department of Family Services who participated in the making of that payment.

12. It is not open to conclude:

   12.1 That any other offence was committed by the Minister, or by any officer of the Department of Family Services, in connection with the making of that payment;

   12.2 That any offence was committed by the Crown Solicitor, or any officer of the Crown Solicitor's Office, in connection with the making of that payment; or

   12.3 That any offence was committed by Mr. Coyne, or by any person acting on his behalf, in connection with his seeking and receiving that payment.

13. The first reason is that, in conducting our investigation and preparing our report, we have had no access to Cabinet documents. For the reasons previously mentioned, we make no criticism of the fact that the current Leader of the Opposition, Mr. Beattie, declined his consent to our inspecting relevant Cabinet documents. However, Mr. Beattie's decision has had the consequence that we are unable to resolve the question whether members of State Cabinet may have committed criminal offences, or may have committed "official misconduct" within the meaning of the *Criminal Justice Act*, by their participation in the decision to destroy the Heiner documents. The objective facts are well-established: State Cabinet did resolve, on 5 March 1990, to destroy the Heiner documents. What is not established - and what Mr. Beattie's decision (perfectly proper though it was) has prevented us from establishing - is whether members of State Cabinet may have known, at the relevant time, that judicial proceedings were then being threatened by Mr. Coyne and his representatives; and whether Cabinet members may have intended, at the time, that the destruction of the Heiner documents would prevent their being used in evidence in such proceedings. As matters stand, that issue can only be resolved by a public inquiry, which has access to relevant Cabinet documents, and which can take testimony from members of State Cabinet who participated in that decision on 5 March 1990.

14. The other highly relevant consideration is that, in conducting our investigation and preparing our report, we have not heard from any of the individuals who are potentially implicated in the commission of criminal offences or "official misconduct", in their own defence. For that reason, we have expressed our conclusions very carefully. We have not expressed, and we have specifically refrained from expressing, any conclusion that any person committed any criminal offence, or that any person committed "official misconduct" within the meaning of the *Criminal Justice Act*. The view which we have expressed, where appropriate, is that - having regard to the evidence obtained by us in the course of our investigation - it is "open to conclude" that criminal offences or "official misconduct" were committed. In other words, from the evidence which we have seen, there is a *prima facie* case of such offences and "official misconduct" having been committed. To take the matter any further, principles of natural justice would necessarily require that individuals be given the opportunity to speak in their own defence, and to challenge the testimony adduced against them, before any ultimate findings are made. In saying that it is "open to conclude" either that a particular individual has committed a criminal offence, or that a particular individual is guilty of "official misconduct", we do not (of course) exclude the possibility that each of those individuals will be able to answer the evidence which is *prima facie* consistent with their guilt. Either by challenging the evidence adduced against them, or by offering evidence in their own defence, it is perfectly conceivable that such individuals will be able to satisfy a public inquiry of their innocence; or, at the very least, create a sufficient doubt such that, in the final analysis, it is no longer open to reach a conclusion of guilt. In the interests of fairness, we strongly feel that all such individuals should be given the opportunity to answer the evidence presented in this report.

Evidence Sufficient to Support Criminal Proceedings or Proceedings for "Official Misconduct".

15. The third criterion which our Terms of Reference require that we consider is:

> "The likelihood that evidence brought to light by such an inquiry, together with evidence already available, will be sufficient to support:
>
> "(i) Criminal proceedings against any person; or

20. Notwithstanding that our Terms of Reference require us to have regard to that criterion, we feel that it is inappropriate - in fairness to the individuals concerned - to express any view as to whether it is likely that any proceedings would result either in a conviction, or in a finding of "official misconduct". We construe sub-clause 3(d) of our Terms of Reference as applying in a negative sense, so that, if we were of the view that it was unlikely that any conviction or finding of "official misconduct" would result, that would be a relevant factor in recommending against a public inquiry. We feel that it is sufficient, for present purposes, to say that the likelihood of proceedings of the kind referred to in sub-clause 3(c) of our Terms of Reference resulting in either a criminal conviction or a finding of "official misconduct" is not so slight or remote that we should recommend that there be no public inquiry.

Public Interest

21. The fifth criterion which we are required to consider under our Terms of Reference is:

> "The public interest in ensuring that allegations of the seriousness of those referred to in sub-clauses 2(a) and 2(b) of these Terms of Reference be adequately scrutinised and dealt with;"

In our view, this is the most compelling factor in recommending the establishment of a public inquiry.

22. The allegations which have been the subject of our investigation and of this report are not new allegations. Specifically, with regard to Mr. Lindeberg's allegations, they go back more than six years. They have been the subject of investigation by the Criminal Justice Commission; they have been reviewed by two Senate Select Committees; and they have attracted a great deal of media attention. And yet, for more than six years, they have remained unresolved.

23. Even after our present investigation was established, there were those in the community who were quick to suggest that the issues under investigation had already been fully and thoroughly examined, and that there was no point in reviewing these matters. For example:

23.1 In the *Courier-Mail* newspaper of 9 May 1996, a report appeared under the heading "CJC HEAD BRANDS INQUIRY WASTEFUL", which attributed the following remarks to the Chairman of the Criminal Justice Commission, Mr. Clair:

> "However, Mr. Clair said the matters had been the subject of several inquiries already.
>
> "'The most recent was the Senate Select Committee on Unresolved Whistleblower Cases of October 1995,' he said.
>
> "'This inquiry alone distracted senior officers of the commission from their primary responsibilities over many months in order to compile numerous submissions and attend committee hearings on five separate days, including a trip to Canberra.
>
> "'The present probe is a waste of scarce resources much better used in the fight against organised crime and official corruption.

"'Surely the time has come to call an end to this review process - its purpose has long since been exhausted.'"

23.2 Similarly, in Mr. Beattie's letter to Mr. Borbidge of 20 May 1996, the Leader of the Opposition said:

"The particular allegations have been the subject of exhaustive independent investigation by the Criminal Justice Commission and other bodies."

24. We have no doubt that both individuals - Mr. Clair and Mr. Beattie - honestly believed that the matters the subject of our investigation had previously been exhaustively and independently scrutinised. We make no criticism of their scepticism in respect of our investigation. Nonetheless, we imagine that the results of our investigation must surely shake their confidence in the exhaustiveness of - we say nothing as to the independence of - previous investigations.

25. In our view, the public of Queensland has a right to know why it has taken six years to bring to light some of the more startling evidence contained in this Report. Perhaps the most obvious example, although it is only one of many, is the evidence showing that on 23 May 1990, photocopies of statements, originally obtained by the Department of Family Services from the QSSU, were destroyed by Mr. Smith of Ms. Matchett's office - the day after Mr. Coyne, his solicitors, and his union (the POA) had each been solemnly assured by Ms. Matchett that the Department "does not have in its possession or control any documents in the nature of complaints leading to the investigation", and that "there is none of the abovementioned class of documents on any file or record of my Department which relates to Mr. Coyne". So far as we have been able to ascertain:

25.1 The Criminal Justice Commission either did not discover, or overlooked, the fact that photocopies of statements had been destroyed on 23 May 1990;

25.2 That fact was not revealed at any of the proceedings of either Senate Select Committee; and

25.3 Despite intensive efforts by Mr. Lindeberg to obtain access to relevant documents under the *Freedom of Information Act*, the particular document disclosing the destruction of those statements on 23 May 1990 has never been made available to Mr. Lindeberg, or to anyone else outside the Department of Family Services.

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

27. If a public inquiry achieves nothing else, we would hope and expect that a public inquiry would recommend steps and procedures to ensure that allegations of the seriousness of those made by Mr. Lindeberg are, in the future, adequately scrutinised and dealt with.

Long Term Benefits

28. The final criterion which our Terms of Reference require us to take into account is:

> "The likelihood that any such inquiry will result in long-term benefits for the State of Queensland, either by:
>
> "(i) Proposing mechanism for the prompt and satisfactory resolution of similar allegations in future cases; or
>
> "(ii) Identifying and proposing solutions for structural problems within the administration of justice in Queensland, which have allowed these allegation to remain unresolved."

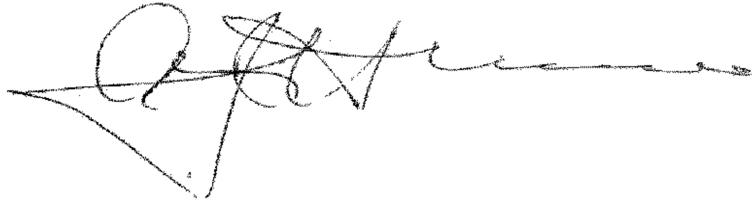
29. It would be inappropriate for us to pre-empt any proposals or recommendations which may be made by a person conducting a public inquiry, if one is established. However, it seems to us that, in any such public inquiry, there are a number of issues which may require to be addressed.

30. One such issue is the adequacy of the Criminal Justice Commission's investigation of Mr. Lindeberg's allegations. As that question is ~~not within our Terms of Reference, we do not propose to comment beyond observing that, in~~ light of the evidence secured in the course of our investigation, there must be serious doubts as to the adequacy or competence of the Criminal Justice Commission's investigations into the same issues.

31. The fact that relevant evidence escaped the attention of two separate Senate Select Committee inquiries is also a matter of some concern. Whilst the Criminal Justice Commission - in our respectful view, very properly - participated fully in the inquiries conducted by the Senate Select Committees, the fact is that the then Queensland Government declined to do so. One can understand, and accept, that there are very compelling reasons why the government of a State should decline to participate in an inquiry conducted by a House of the Federal Parliament. But, considerations of "State rights" aside, if a matter is regarded by a House of the Federal Parliament as being of sufficient public importance to justify applying its own time and resources towards an investigation of that matter, one might be forgiven for thinking that a State government - and particularly a State government which has nothing to hide - would welcome the assistance of a Federal Parliamentary authority to resolve matters of public concern. It may be that a public inquiry will recommend that, in future, a somewhat different attitude should be taken by the Queensland Government where a House of the Federal Parliament invites the assistance of the Queensland Government in seeking to resolve matters of public interest and concern.

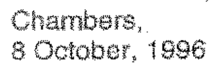
32. Again, whilst it is not a matter coming within our Terms of Reference, we are also somewhat alarmed to discover that - notwithstanding substantial efforts by Mr. Lindeberg to obtain access to relevant documents under the *Freedom of Information Act* - some of the more significant documents appear to have remained concealed in the files of the Department of Family Services. Again, the most obvious example is Mr. Smith's notation dated 23 May 1990, relating to the destruction of photocopies of statements originally obtained from the Queensland State Service Union. That notation is made on a letter from Mr. O'Shea to Ms. Matchett dated 18 April 1990, which in turn bears a stamp reading "FOR LEGAL INSTRUCTION". Presumably, the letter itself was withheld under the *Freedom of Information Act*, because it contained legal advice from the Crown Solicitor to the Acting Director-General of the Department of Family Services. But, whilst there may have been justification for withholding the letter itself, it does not appear to us that

38.2 The Terms of Reference of such an inquiry.



ANTHONY J.H. MORRIS Q.C.

EDWARD J.C. HOWARD



Chambers,
8 October, 1996