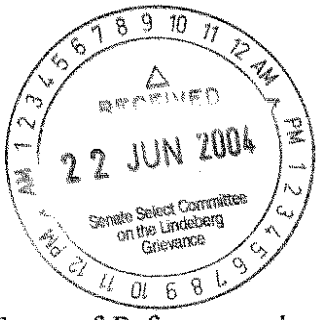
AUSTRALIAN JUSTICE
FOR ALL

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



Dear Secretary

We have acquainted ourselves of the Committee's Terms of Reference and examined relevant evidence on the Committee's webpage, and in accordance with our association's object, we wish to make the following points for consideration.

THE RULE OF LAW

The rule of law covers many aspects of law and governance but essentially it is a recognition of jurisdictional constraints on and authority of the three arms of government: the Legislature, Executive and Judiciary. Any or all are or may be at tension one with the other in terms of not infringing on their respective Constitutional rights and jurisdiction while, at the same time, constantly trying to work in harmony one with the other to ensure that the law is applied equally in the interests of peace, order and good government.

It appears to us that in the so-called Heiner affair we find many fundamental legal and constitutional rights and obligations in unsatisfactory conflict, and therefore, we believe that it is appropriate for us to make a couple of observations as Australians interested in equal justice.

THE RIGHT TO A FAIR TRIAL

Whatever the rights and wrongs of any Crown Law legal advice which the Queensland Government may have received before ordering the shredding of the Heiner Inquiry documents (and there appears to be credible doubt as to the lawfulness of the advice of 23 January 1990, let alone its relevance to an on-going changing legal position between the parties involved), it is nonsense for any one to suggest or believe that acting on such advice places any party, in this case the Queensland Cabinet, above scrutiny or any consideration that illegality may have taken place. Carrying out an action based on legal advice, which offends the law, is no defence to charges being brought. To suggest otherwise, opens the law to foolish, tainted and incompetent

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interpretations from legal minds who may be prepared to compromise their duty to the courts and the law for money, threat or personal advantage.

Section 23(3) of the *Criminal Code* makes it very clear that motive is irrelevant. In addressing the issue of "motive" the section says this: "

> *"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."*

The very existence and purpose of a Criminal Code is to make clear what actions, in this case against the administration of justice, are illegal. It's a reason for its codification. In respect of criminal responsibility, section 22 (1) of the *Criminal Code (Qld)* says this:

> *"Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence."*

We feel that proceedings and legal precedents quoted in **Ostrowski v Palmer [2004] HCA 30 (16 June 2004)** are worthy of inclusion at this point.

1. On 1 March 2000, in the Court of Petty Sessions of Western Australia at Carnarvon, George Peter Ostrowski, an officer of Fisheries WA, charged Jeffrey Ryder Palmer with an offence under reg 34 of the Fish Resources Management Regulations 1995 (WA) ("the Regulations") and s 222 of the *Fish Resources Management Act 1994* (WA) ("the Act"). The material parts of the charge alleged that Mr Palmer:

"being the holder of a commercial fishing licence, fished for rock lobster within that portion of the Indian Ocean bounded by a line starting from a point on the high water mark situated at the southwestern-most extremity of Quobba Point and extending south ... and thence generally northwesterly along the high water mark aforesaid to the starting point; contrary to Regulation 34 of the Fish Resources Management Regulations 1995 and Section 222 of the Fish Resources Management Act 1994."

Erroneous advice

2. It is irrelevant that Mr Palmer's mistake was induced by the conduct of an employee of Fisheries WA. That conduct cannot convert a mistake as to the applicable law into a mistake of fact. If a defendant knows all the relevant facts that constitute the offence and acts on erroneous advice as to the legal effect of those facts, the defendant, like the adviser, has been mistaken as to the law, not the facts.

Four cases which address this issue are Olsen v The Grain Sorghum Marketing Board; Ex parte Olsen[48], Loch v Hunter; Ex parte Loch[49], Cambridgeshire and Isle of Ely County Council v Rust[50] *and* Power v Huffa[51]. *In the first two cases each defendant*

claimed that he or she was acting on the erroneous advice of a third party - either a legal adviser or a government official - that the acts in question were legal and that this mistake amounted to a mistake of fact. In the last two cases each defendant claimed that he or she had been given lawful authority to act as charged and that this mistake likewise amounted to a mistake of fact. In each case the defendant's argument failed, the court finding that each defendant was acting under a mistake of law. Accordingly, the bare fact that the adviser or official may have been mistaken as to the state of the law does not convert the defendant's mistake into one of fact. Both the adviser or the official and the defendant operate under a mistake of law.

In respect of Heiner, the Queensland Cabinet knew the inquiry documents were being sought for judicial proceedings, and, with that state of knowledge, it then ordered their destruction to prevent their use as evidence, and shredded them. Those facts are not open to debate.

Properly applied, those actions satisfy the necessary triggering elements of section 129 of the *Criminal Code (Qld)*. Any belief or argument that the law was unclear at the time carries no weight. The provision itself and its necessary triggering elements have not changed since 1899. Furthermore, when the Queensland Government and Criminal Justice Commission put their interpretation of section 129 before the Senate in 1995, the clarity of section 129's purpose was underpinned in *R vs. Rogerson* ruled on by the High Court of Australia in 1992. In other words, there is really no excuse for such an absurd view ever being put before the Senate at the time unless another purpose existed.

In *R v. Rogerson and Ors (1992) 66 ALJR 500* Mason CJ at p.502 says:

> *"...it is enough that an act has a tendency to deflect or frustrate a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be implemented..."*

In that sense, it appears to open up serious questions of the Senate being deliberately misled.

It also appears to us that the evidence and subsequent legal arguments advanced by Mr. Michael Barnes for the Criminal Justice Commission in respect of the state of knowledge on the part of the Queensland Cabinet and its purpose in destroying the record was most overt. It was devoid of any legal subtleties or plausibility advanced by counsel for British American Tobacco (BAT) in *McCabe* wherein, at least, the shredding was suggested to be part of the company's "document retention policy." In other words, in *McCabe*, it was activity flowing out of so-called normal in-house records management which went on daily in BAT, and goes on in other corporations

throughout Australia and the world. In *McCabe*, it was claimed to have nothing to do with the willful destruction of known evidence to protect itself from liability in anticipated court proceedings because counsel acknowledged that would have left BAT open to a probable charge of obstruction of justice.

The argument advanced that because the Queensland Government acted on legal advice no criminal conduct may be attributed to its action offers no defence to criminal charges being laid in the proper application of criminal law. For anyone to suggest that because the advice was from Crown Law as opposed to advice from a firm of solicitors in private practice would be disturbing in the extreme. It affords a level of unacceptable non-accountability to Crown Law legal officers not enjoyed by others which would be inimical to all notions of equal justice. Our association wants all lawyers to be accountable.

While one would hope that Crown Law advice is always legal and impartially constructed with the rights of all in mind, it cannot be placed beyond scrutiny otherwise it would undermine the rule of law itself. Whatever view Crown Law or the Queensland Government may have had of the relevant legal points in the Heiner affair, any and all known differences of opinion or interpretation should have been settled by the courts, especially when the Crown had been placed on notice, and not by arbitrary actions of the Executive because advice may suggest such a course is open. Advice is advice, not necessarily what the law is, and advice is only as good as the brief provided and circumstances may quickly change rendering a particular piece of earlier advice irrelevant or redundant.

This does not mean that the workings of government would grind to a halt for fear that every time government acted on advice it may be unlawful, it simply means that the law should be obeyed, and where it is breached, consequences and remedies should flow under the doctrine of equal justice. The equal application of the law places proper constraints on everyone, including the Executive itself, in a society governed by the rule of law, which, in turns, keeps us free from the actions of an oppressive Executive.

Added to this, there is an undoubted higher level of obligation on the Crown to be lawful in all things, and to avoid crime, because we look to the Crown as the so-called "model litigant." It sets standards of probity and fair dealing.

This, of course, makes the Heiner affair so important. A civilized society simply cannot function if the Crown is permitted to knowingly destroy evidence to prevent its use in anticipated/pending

judicial proceedings just because it thinks to may be doing the right thing. Our society is based on individual rights. To afford the Executive such unilateral shredding powers breaches the doctrine of the Separation of Powers.

Of major concern in this matter is a more pernicious dimension to the shredding; which is that we now know that the shredded material touched on the abuse of children in State care. And those in authority in government were aware of this.

Any suggestion that section 129 of the *Criminal Code (Qld)* was unclear at the time it was interpreted and given in the evidence to the Senate by the Queensland Government and Criminal Justice Commission (the Commission) bears little scrutiny. By inverting their argument that section 129 requires a judicial proceeding to be on foot, it makes the administration of justice unworkable. No government could be held to account; no court could do justice. All known evidence would be destroyed out of self-interest instead of being preserved in the interests of justice.

In our view, the Senate may have unfortunately misunderstood the true significance of the evidence put by the Queensland Government and Commission on this legal point at an earlier time, but it was unquestionably wrong, and could never have been credibly put because its logic is patently absurd. In other words, it appears open to suggest that this incorrect interpretation put to the Senate was done for a misleading purpose to achieve a beneficial outcome for those putting it. The facts of the Heiner affair compellingly reveal the nexus. In that sense it had to be deliberate, and the shame is that the Senate did not reject it at the time as an insult to its intelligence and standing, let alone to the law itself. This Grievance offers the Senate an opportunity to revisit and correct the record.

Our association suggests that it is open for the Senate to find that it was deliberately misled, and, as its twin limb to such a finding, the Senate should publicly disavow its earlier view that the shredding of the Heiner Inquiry documents was *"...an exercise in poor judgement."* We say this in light of the *State of Queensland vs Douglas Ensbey* in which section 129 was found to have been breached, and because section 39 of the *Crimes Act 1914 (Cwlth)* mirrors section 129. That is, the criminal law concerning offences against the administration of justice throughout the Commonwealth of Australia, similarly worded and with similar intent, must be applied equally in materially similar circumstances, and for the Senate to suggest that Executive Government may engage in *"...an exercise in poor judgement"* ***without penalty*** while another Australian citizen ***is punished***, reeks of double standards too serious to contemplate or stand. We agree with Mr.

Greenwood QC's 9 May 2001 submission to the Senate on this point in which he described the Senate's position as untenable.

While any finding of contempt in the Lindeberg Grievance will have to be dealt with by the Senate as a whole, our association believes that the Constitutional demands of equal justice should apply when serious contempt such as this may be committed. Notwithstanding the Senate may be bound by the provisions of the *Parliamentary Privileges Act 1987*, this does appear to be a very serious *prima facie* contempt warranting appropriate penalty otherwise there will be no incentive for witnesses appearing before the Senate to tell the truth, the whole truth and nothing but the truth.

Yours faithfully

Alan Randle – Vice President

20/06/04