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

28 July, 2004

Dear Secretary,

I should be grateful if the following observations and submissions could be placed before the Select Committee at its next appropriate sitting. I do not wish to address the Committee in person, but am content to have my submissions placed before them in this written form

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I read the Proof Copy of Hansard dated 11 June of this year, containing the transcription of your proceedings on that day, with mounting concern for the future, in Queensland, of that principle of "The Rule of Law" which requires that each 'legal person' be equally accountable before the law for actions which they have taken. My concern arises from what seems to have been an assumption made during questions put to Mr Lindeberg himself that the actions of the then Queensland Government when shredding the "Heiner documents" were in some way less reprehensible if they followed advice given by government-employed lawyers to the effect that it was lawful to carry out the shredding.

You will no doubt be fully aware already of the provisions of Section 22(1) of the Queensland Criminal Code, to the effect that "*Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence . . . .* ".

There appears also to be an abundance of legal opinion before the Committee to the effect that what was done with the Heiner documents constituted a criminal offence under each of Ss.129 and 140 of the same Code, and I wish to add my name to the growing list of those who believe this to have been the case. The issue which I also seek to address is whether, in committing such offences, those who did so were somehow absolved from liability because they had obtained (presumably in advance) legal advice from their own public service lawyers to the effect that what they were proposing to do was lawful.

Such a state of affairs would have serious implications for the application of The Rule of Law, given a very recent decision by our own High Court in a case originating from Western Australia, s.22 of whose Criminal Code contains provisions identical to those of s.22 of Queensland's Criminal Code. This is hardly surprising, given that the W.A. Code was based on the original Griffith Code for Queensland, but it does allow for direct comparison between

what the High Court has recently said in connection with W.A. law, and the position under Queensland law.

The case in question was that of *Ostrowski v Palmer*[1], and it concerned an appeal from the original finding of a local magistrate that P had committed an offence under a State Act regulating the fishing industry when he fished for rock lobsters in a prohibited area. The ground of his appeal was the promising one that prior to setting out to fish, P had sought advice from officers from the relevant Government department, and had been supplied by them with a set of documents which, while it identified some areas in which rock lobster fishing was unlawful, did not include the area which became the subject of the charge. P was subsequently seen by Departmental officials checking and resetting his pots in the prohibited area, and they made no attempt to prevent him, or to advise him that his actions were unlawful. He was nevertheless convicted, even though, in convicting him, the magistrate was forced to concede that P *"has acted entirely honestly and in my view reasonably throughout"*.

In ultimately confirming that the magistrate had been correct to find P guilty, the High Court re-confirmed both the importance and the stark severity of the principle that "ignorance of the law is no excuse", even quoting the observation of Professor Glanville Williams[2] that it is frequently the only knowledge of the law which some people possess.

Despite the natural sympathy which one might extend to someone in P's position, who has done everything within his power to remain within the law, the High Court experienced no difficulty in distinguishing between the "legal" misunderstanding which affords no defence in law (i.e. whether or not it was lawful to fish for rock lobsters at that location) and any "mistake of fact" (such as whether or not that location was among the prohibited ones), which would provide a defence.

Having identified the "elements" which had to be proved before anyone might be found guilty under the law in question, the High Court noted that P had been under no factual mistake about any one of them. In the words of Gleeson CJ and Kirby J[3], *"He knew he had a commercial fishing licence; he knew he was fishing for rock lobsters; and he knew where he was fishing. What he did not know was that there was a regulation prohibiting his conduct. He was fishing where he intended to fish; he did not know there was a law against it"*.

By analogy with the facts of the Heiner documents, one might equally argue "They knew that they possessed them; they knew what they contained; they knew that they were shredding them; they knew that a legal action was pending. What they now allege was that they did not know there was a law against shredding those papers in those circumstances".

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[1] [2004] HCA 30 (16 June 2004)
[2] "Textbook of Criminal Law", 2nd ed (1983) at 451
[3] *ibid*, para. 6

My point simply is that whether they knew of the illegality of what they were doing or not, they knew what they were doing, and the context in which they were doing it, and it makes no difference to their guilt that they may or may not have been given certain advice by their own lawyers.

It is of crucial constitutional importance that governments at all levels be held accountable in the same way as private individuals, given that the principle upheld by s.22 has been authoritatively described[4] as *"the working hypothesis on which the rule of law rests in British democracy"*. If a commercial fisherman doing his utmost to comply with the law can be penalised to the tune of $27,000[5] as the result of erroneous advice given to him by public servants whose task it was to "keep him right", then it would be a sad day for the rule of law in Queensland if its elected government were allowed to hide behind "advice" given to it by its own legal advisers in order to justify the suppression of information which it did not wish to become public.

I am aware, in this context, of the suggestion that the advice given by government lawyers consulted in connection with the proposed shredding of the Heiner documents was in some way "tailored' to suit the needs of the Cabinet of the day. I express no opinion on this one way or the other, but I am bound to observe that such a practice would only be encouraged were it to be the case that in order to evade their legal obligations, ministers of the Crown need only arrange for suitably worded legal advice to appear on their desks.

I have seen only one document in which a senior law officer expressed an opinion on the legality or otherwise of the shredding of the Heiner documents. It was issued long after the event, but nevertheless it does not inspire confidence in the quality of the legal advice received at the time of the shredding, should it be representative of it.

I refer to the letter dated 28.11.95 from the then Director of Public Prosecutions for Queensland, Royce Miller QC, to the then Shadow Attorney-General Denver Beanland. I do not have sight of the original letter from Mr. Beanland to the DPP dated 9.11.85 which prompted Mr Miller's reply, and this could be crucial to any question of whether or not that reply was sufficiently comprehensive.

I note that Mr Miller, in his letter of 28 November, based his advice on the wording of Indictment Form 83. This seems to require (as its wording implies) that before anyone may be prosecuted under S.129, there be "an action then pending in the Supreme Court" at the time when a document is either destroyed, or at least rendered incapable of being read. I assume that there was no such "action pending" in the Supreme Court at the time of the behaviour complained of in respect of the Heiner documents. On that basis, Mr Miller appears to have concluded that a criminal charge could not be brought for destroying the documents to which Mr Beanland's letter referred.

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[4] by Lord Justice Scott in the English case of *Blackpool Corporation v Locker* [1948] 1 KB 349 at 361, quoted with approval by Gleeson CJ and Kirby J in *Ostrowksi v Palmer*.

[5] as Mr Palmer was, in addition to being ordered to pay $2000 in costs

However, Form 83 does not reflect the law as it actually is, or indeed was in 1995, with regard to the destruction of evidence. The correct law is to be found in s.129 of the Queensland Code, which states, in substance, that it is an offence to destroy etc. any document which "is or may be required in evidence in a judicial proceeding", with intent to prevent it being so used.

There are two significant ways in which Form 83, as quoted in Mr Miller's letter, and s.129, differ. The first is the more obvious one that the offence as described in s.129 does not require that the case be one which was destined for the Supreme Court. Given the restricted de facto jurisdiction of that Court to matters involving homicide and serious drug offences, it would clearly be a defective law <u>were</u> it so limited.

The second is the more important one that the wording of s.129 is not capable of supporting an inference that the "judicial proceeding" must already be "on foot" (to use Mr Miller's words) when the document is, inter alia, destroyed, before an offence may be committed. A moment's reflection confirms that this would be a most unfortunate interpretation, since it would result in a situation in which a person could escape all legal liability for destroying vital evidence against him, provided that he did so prior to any charges being laid.

Put another way, if Mr Miller's interpretation were correct, we would be faced with a circular situation in which there could be no action "on foot" for the very reason that the evidence which would have supported such an action has been destroyed, and <u>therefore</u> the person destroying it cannot be charged, even under s.129. It is unlikely that Parliament had such a possibility in contemplation when s.129 was enacted.

There is analogous High Court authority for my interpretation of s.129 which I will deal with below in the context of S.140 of the Queensland Criminal Code. For reasons which follow, I respectfully concur with the interpretation of the law in this area given by Mr McAdam, who has already made submissions to the Committee.

It would also appear, from the decision of the now DPP, Mrs. Clare, to instigate a s.129 charge against Pastor Ensbey, that the current DPP interpretation of that section accords with mine.

Any conflict in wording between s.129 and Form 83 – even in 1995 – should have been resolved in favour of s.129, which should have been regarded as the <u>fons et origo</u> of the applicable law. This much flows from s.564(3) of the Code, which states that it is sufficient for an indictment that it "describe an offence in the words of this Code". In short, it is not necessary that the offence be as described in Form 83, provided that it is as described in s.129. This point was confirmed judicially by the Queensland Court of Appeal in *R v His Honour Judge Morley and Mellifont*[6], where there had been a conflict between the wording of s.123 of the Code (which deals with perjury) and the

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[6] [1990] 1 Qd R 54 at 56

indictment count in a perjury trial which had been based on Form 79. The Court observed that "*. . . it is the formulation of the offence in the Code which must prevail*".

As I indicated above – and I must emphasise once again – I am not advised whether or not, in his letter of 9 November, Mr. Beanland sought full advice from Mr Miller on the whole of the applicable law in the Heiner matter, or simply restricted his request to advice relating to s.129. For this reason, none of the observations which follow must be interpreted in any way as being critical of the failure of Mr Miller's letter of 28.11.95 to refer to s.140 of the Queensland Criminal Code.

The fact remains, however, that the conduct complained of in the "Shreddergate Affair", as it has become known, was essentially no different from that in the current Pastor Ensbey case. This being the case, then s.140 of the Code ("attempting to pervert justice") is – and was – equally applicable to both cases, and Mr Miller's letter does not deal with that aspect of the shredding of the Heiner documents.

In the leading High Court decision of *Rogerson*[7], it was held that "attempting to pervert the course of justice" encompasses anything which "has a tendency to impair the capacity of a court to do justice". In that particular case, it was held to be "attempting to pervert the course of justice" to perform actions which deflect the police from prosecuting a case, or even "adducing evidence of the true facts". Chief Justice Mason, in that case, gave the following ruling[8];

> "*It is well established at common law and under cognate statutory provisions that the offence of attempting or conspiring to pervert the course of justice at a time when no* [court] *proceedings are on foot can be committed*".

He quoted, as his authority for that statement, the earlier High Court ruling in *R v Murphy* (1895) 158 CLR 596, at 609, which specifically referred to s.140 of the Queensland Code as having this interpretation.

Shorn of all the legal jargon, what this means, in my respectful opinion, is that in respect of the Heiner documents, a prima facie case would seem to have existed for the laying of charges under both s.129 and s.140 of the Criminal Code. You will appreciate, however, that in both cases I am basing a legal opinion on the barest of factual information.

Be that as it may, I am obliged to respectfully disagree with the advice given in 1995 by Mr Miller. If Mr Miller's view was shared by officers of the then CJC, then I am also obliged to respectfully disagree with them. As already indicated, my interpretation of the law accords with Mr. MacAdam's.

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[7] (1992) 174 CLR 268
[8] at p.277

I am obliged to add that for some nine years between 1991 and 2000 (which period obviously encompassed most of the relevant time-frame for the Heiner matter) I was the Solicitor for Prosecutions for Queensland, working in the Office of the DPP in a direct reporting position to Mr Miller. I was never consulted on any of these matters; had I been, then my advice would have been as above. I distinctly recall, however, that all officers within the DPP were constantly exhorted by Mr Miller to "keep up to date" with the law. On the assumption that he followed his own advice, Mr. Miller would almost certainly have been aware of the authorities of *R v His Honour Judge Morley and Mellifont* and *Rogerson* when he wrote his letter of 28.11.95.

Yours sincerely,

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