

## **The Heiner Affair – the destruction of evidence**

Nothing engenders fear of crime or instils a sense of hopelessness more in any society than to have law-enforcement by double standards...<sup>1</sup>

### **Introduction**

- 2.1 As outlined in Chapter 1, the Committee came to investigate the now infamous Heiner Affair – the shredding of documents by the newly elected Goss Government in Queensland in 1990 – initially as a result of a submission provided by Mr Kevin Lindeberg.
- 2.2 The documents that were shredded allegedly contained allegations of mismanagement and child abuse at JOYC.
- 2.3 The Committee notes that aspects of the Heiner Affair have been investigated on many occasions by various government bodies and specially appointed persons, however, never exhaustively, for a variety of reasons. These reasons include limited terms of reference and limited access to evidence.
- 2.4 This Chapter draws on previous inquiries where relevant; however, the Committee considers its observations to be more complete and conclusive than those of previous inquiries. This is partly due to evidence taken from witnesses not previously called – in particular,

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1 Mr Kevin Lindeberg, *Submission 142*, p. 3.

Mr Heiner who conducted the original investigation. However, the Committee's key recommendations also result from inescapable conclusions based on newly available evidence, as well as the conviction earlier this year of a Pastor.<sup>2</sup>

- 2.5 The Committee notes that examining the shredding of the documents is inextricably linked to allegations about mismanagement and abuse at JOYC; however, in terms of commenting on the actions and inactions of the Queensland Government and various Queensland agencies, the Committee felt it necessary to separate the two issues into Chapters 2 and 3.

## **The Heiner Affair – overview of events**

- 2.6 This section provides the salient facts of the Heiner Affair. A full chronology is available elsewhere.<sup>3</sup>
- 2.7 In late 1989, staff at JOYC raise concerns in writing about the running of the facility by its manager, Mr Peter Coyne. Written complaints are made to the Department of Family Services. An inquiry into the Centre is set up by the then Minister for Family Services in the Cooper Government, Mrs Beryce Nelson MLA, who became Minister in September 1989.
- 2.8 In October 1989, the Hon Anne Warner MLA, then Opposition spokesperson on Family Services, is reported as having been called by JOYC staff who have told her one youth has been heavily sedated and another handcuffed.<sup>4</sup>
- 2.9 Retired magistrate Mr Noel Heiner is commissioned by Minister Nelson to conduct the inquiry. During the conduct of the inquiry, Mr Coyne seeks access to the evidence and the written complaints made about him and is refused.
- 2.10 Evidence is given to Mr Heiner of abuse involving the handcuffing of a child and sedating of another.<sup>5</sup>

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2 Discussed later in this Chapter.

3 *The Beginnings of Shreddergate: The Chronology of Events*, at [www.gwb.com.au/gmb/news/goss/history99.doc](http://www.gwb.com.au/gmb/news/goss/history99.doc)

4 'Teens handcuffed: MP', *The Courier-Mail* newspaper, 1 October 1989, p. 18.

5 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1677. Mr Heiner's evidence is more fully discussed in Chapter 3 of this volume.

- 2.11 Following the election of the Goss Labor Government on 2 December 1989, the Hon Anne Warner MLA becomes Minister for Family Services and Aboriginal and Islander Affairs. Ms Ruth Matchett becomes Acting Director-General of the Department of Family Services and is later appointed permanently to the position.
- 2.12 With the assistance of Mr Kevin Lindeberg, the then industrial officer of the Queensland Professional Officers' Association (QPOA), Mr Coyne continues to seek access to the complaints made against him and instructs solicitors to seek the documents on his behalf.
- 2.13 Concerns arise as to whether the inquiry had been properly established and whether Mr Heiner and witnesses to his inquiry are properly indemnified.
- 2.14 The Crown Solicitor advises that Mr Heiner and the witnesses do not have statutory immunity from legal action because of the manner in which the inquiry had been established. Further, if the inquiry were to be terminated, the evidence gathered by Mr Heiner should be destroyed provided no legal action was under way that would require the production of the material.
- 2.15 In January 1990, union representatives are advised that the inquiry is terminated and all the material gathered by Mr Heiner is sent to the Cabinet Secretariat. In February, Cabinet officially terminates the inquiry and seeks further advice from the Crown Solicitor in terms of options available to Cabinet in relation to the documents.
- 2.16 Mr Coyne, during this time, continues to seek access to the complaints about him and the inquiry documentation, through his solicitors. He is transferred from his position as manager of JOYC.
- 2.17 On 16 February 1990, the Crown Solicitor advises Cabinet that the Heiner documents were public records and hence, needed to be deposited in the State Archives or the permission of the archivist sought before they could be destroyed. Cabinet decides that destruction of the documents would be the better course of action and requests the permission of the archivist which is granted.
- 2.18 On 5 March 1990, the Cabinet officially determines that the documents should be destroyed, and this takes place on 23 March 1990. During this time, however, Mr Coyne's solicitors continue to be advised that the Department of Family Services is still awaiting legal advice.

- 2.19 During April and May, Mr Coyne continues to seek access to the original complaints against him as well as the Heiner inquiry documents. On 23 May 1990, the photocopies of the original complaints against him are shredded by the Department. Mr Coyne eventually accepts an involuntary redundancy package.
- 2.20 Mr Lindeberg begins to pursue the legality of the shredding of the documents, and argues that those responsible for the shredding have a case to answer in relation to the destruction of evidence under section 129 of the Queensland *Criminal Code Act 1899*, and possibly a number of other sections of the code. A number of leading barristers and academics support Mr Lindeberg's interpretation of the statute. Serious concerns over the shredding are also raised by the Australian Society of Archivists.
- 2.21 The then Crown Solicitor and the then Queensland Director of Public Prosecutions (DPP) maintain throughout the 1990s that section 129 does not apply as legal proceedings were not under way at the time of the shredding of the documents.
- 2.22 A number of inquiries are instituted over time by successive Queensland Governments. An investigation is undertaken by the then CJC. The Australian Senate first makes general references to the Heiner Affair in its 1994 Report, *In the Public Interest*.<sup>6</sup> An investigation of the Heiner Affair forms a chapter in a further report, *The Public Interest Revisited*, tabled the following year.<sup>7</sup>
- 2.23 The Borbidge National Party Government seeks further advice from the DPP, following receipt of the inquiry report by Messrs Morris QC and Howard in 1996. Following that advice, no further action is taken.
- 2.24 In 1998, One Nation Members of the Queensland Parliament force the tabling in the Queensland Legislative Assembly of relevant Goss Cabinet documents.
- 2.25 Mr Bruce Grundy, journalist-in-residence at the University of Queensland, together with his Journalism students through the Justice Project, begins to collect evidence of significant and apparently systemic abuse taking place at JOYC during the 1980s. He follows the fate of a then 14 year old girl who was allegedly pack-raped during a supervised outing of JOYC inmates in 1988.
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6 *In the Public Interest*, Report of the Senate Select Committee on Public Interest Whistleblowing, August 1994.

7 *The Public Interest Revisited*, Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995

- 2.26 Mr Grundy commences to publish a number of articles in *The Queensland Independent*, alleging that Cabinet was aware of abuse at the Centre at the time it decided to shred the Heiner documents. Following contact with the girl, he also alleges that the cover-up continues to this day. He also alleges that at least one further rape and other sexual abuse may have taken place at JOYC.
- 2.27 A Goss Cabinet Minister reveals in a 1999 edition of Channel NINE's *Sunday Program* that Cabinet was broadly aware that the documents contained allegations of child abuse.<sup>8</sup>
- 2.28 Following this Committee's public hearing in Brisbane on 27 October 2003, Premier Beattie issues a press release stating that the issue has been exhaustively investigated. The release states that the Goss Cabinet acted in good faith to protect whistleblowers and no formal legal proceedings had been instituted.<sup>9</sup>
- 2.29 However, on 11 March 2004, Pastor Douglas Ensbey is found guilty under section 129 of the Queensland *Criminal Code Act 1899* for destroying the diary of a child abuse victim six years prior to the girl reporting the incident to police, and the possibility of instituting legal proceedings. According to Messrs Lindeberg and Grundy, as well as a number of legal authorities on the subject, the verdict vindicates the interpretation of section 129 advocated by Mr Callinan QC at the Senate inquiry and others at varying points<sup>10</sup> but denied by successive Queensland Governments and the CJC as applicable to the shredding of the Heiner documents.

## Essential legal issues in the Heiner Affair

- 2.30 The Committee found the essential legal issues to be investigated in relation to the Heiner Affair to be as follows:
- whether the shredding of the documents constituted an offence under the Queensland *Criminal Code Act 1899* and/or constituted official misconduct by Cabinet members and/or senior bureaucrats;

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8 *Queensland's Secret Shame*, Channel NINE, *Sunday Program* Transcript, 21 February 1999.

9 The Hon Peter Beattie MP, Press Release: *Federal Liberal Inquiry Will Waste Thousands of Dollars*, 27 October 2003.

10 'Public Officials Can Still be Charged', *The Queensland Independent*, April 2003; RF Greenwood QC, Submission to Senate, 9 May 2001.

- whether the role of the State Archivist was appropriate in the decision making process; and
- whether successive Queensland Governments and government institutions have acted to cover up and protect the Goss Ministers' actions.

2.31 The Committee will consider each of these issues in turn.

## **Conduct of the Queensland Government**

2.32 The Queensland Goss Government's stated motive for the shredding of the Heiner documents at the time (and subsequently) is encapsulated by a statement made by the Hon Anne Warner in the Queensland Legislative Assembly when she was Minister for Family Services:

In January 1990, a number of doubts emerged as to the legal basis and authority for Mr Heiner's appointment and the establishment of the investigation and, hence, the way in which it was being conducted....

Advice received from the Crown Solicitor indicated that, although Mr Heiner had been lawfully appointed as an independent contractor to perform his tasks, it was clear that because of the way the investigation had been established, there was a lack of statutory immunity from, and thus exposure to, the possibility of legal action against Mr Heiner and informants to the investigation. In establishing the investigation, no regard had been given to the possibility that material gathered by Mr Heiner could be of a potentially defamatory nature...

To compound this situation further, the terms of reference given to Mr Heiner for the conduct of the investigation were general in nature and did not require him to make any recommendations as to action that ought be taken as a result of any conclusions he might reach. In fact, Mr Heiner verbally advised the acting director-general that he had not intended to make any recommendations. Therefore, the result of this investigation would have been more questions, and no answers.

Having considered the Crown Solicitor's advice and the limited value of continuation of the investigation, Ruth Matchett, the acting director-general, terminated the investigation on 7 February 1990 and directed Mr Heiner to gather and seal all documents related to the inquiries. These documents were delivered to the department's head office for safe keeping. Cabinet was advised of this action in a submission dated 12 February 1990. Sealing of the documents gathered (sic) by Mr Heiner ensured that there could be no further consideration given to the material he had gathered. Neither Ms Matchett, the acting director-general, nor I was aware of the contents of this material. Terminating the investigation was the fairest way to fix up this mess that this Government inherited in 1989. Terminating the investigation was fair to all staff involved; it was fair to Mr Heiner and it was fair in that it stopped an investigation which had a dubious legal basis and which was not going to result in any recommendations.<sup>11</sup>

2.33 Minister Warner further said that the following considerations were taken into account in reaching the decision to shred the material:

- a. the inquiry had ceased and no report would be produced, therefore there was no further need for the material.
- b. all parties involved in the inquiry would be assured that any material gathered would not be used in future deliberations or decisions. This applied to Mr Coyne as well as to all other staff members.
- c. Disposal of the material reduced the risk of legal action against any party involved such as Mr Heiner and Youth Workers employed in caring for children at John Oxley Youth Centre.<sup>12</sup>

2.34 The Government maintains that it acted lawfully in destroying the documents because its actions were based on advice by the Crown Solicitor. In accordance with that advice, Cabinet sought approval from the State Archivist to destroy the documents. Approval was granted.

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11 The Hon Anne Warner, Legislative Assembly, 18 May 1993, pp. 2870-2871.

12 The Hon Anne Warner, Legislative Assembly, 18 May 1993, p. 2871.

- 2.35 Further, successive Labor Governments have maintained, as late as 2003, that the Heiner Affair has been investigated to the 'nth degree' and nothing has been found.<sup>13</sup>
- 2.36 The conviction of Pastor Ensbey puts paid to this fiction.

### The legality of the shredding of the documents

- 2.37 Mr Lindeberg's main argument is that the decision of the Queensland Cabinet to order the shredding of the Heiner documents was illegal and the relevant public servants and Government officials should be charged with offences under the Queensland *Criminal Code Act 1899*, according to the principle of 'equality before the law'.<sup>14</sup>
- 2.38 The legal issues surrounding the shredding of the Heiner inquiry documents are complex. The primary question relates to competing interpretations of the Queensland *Criminal Code Act 1899*, and whether the Queensland Government's legal defence for shredding the documents was a valid one.

### Precondition for the shredding: pending legal action

- 2.39 As the Heiner inquiry progressed, doubts had arisen as to the manner in which it had been established, and hence, whether Mr Heiner's powers and indemnities, and the indemnities of the witnesses who had given evidence to the inquiry, were adequate.
- 2.40 At the same time, from December 1989 onwards, Mr Coyne began to seek access to the transcript of evidence gathered by Mr Heiner, as well as copies of the original written complaints against him, held by the Department.<sup>15</sup>
- 2.41 Of note is that Ms Ruth Matchett, the Acting Director-General of the Department, advised Mr Coyne in writing that there were no complaints on his personal file and that she was not aware of any other departmental file containing records of the investigation.
- 2.42 According to evidence given to the Senate Select Committee's inquiry into unresolved whistleblower cases, Mr Coyne gave evidence to Mr Heiner on 11 January 1990, and followed this with correspondence

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13 See for example, Mr Alastair Macadam, *Transcript of Evidence*, 27 October 2003, p. 1419.

14 Mr Kevin Lindeberg, *Submission 142*, pp. 6-7.

15 *The Beginnings of Shreddergate: The Chronology of Events*, at [www.gwb.com.au/gmb/news/goss/history99.doc](http://www.gwb.com.au/gmb/news/goss/history99.doc)



to Ms Ruth Matchett (on 15 and 18 January) requesting copies of the relevant documentation and was refused.<sup>16</sup> In evidence to the Committee, Mr Heiner did not think Mr Coyne appeared before him, but said that, had he been called to give evidence earlier his memory would have been more accurate.<sup>17</sup>

2.43 The Senate Select Committee's report states that Mr Heiner refused to provide Mr Coyne with the details of the allegations made against him.<sup>18</sup> Mr Heiner told the Standing Committee on Legal and Constitutional Affairs that he received a 'couple of letters' requesting copies of the transcript; he believed the decision to make these available was up to the Department: 'I could not, of course, because they were not my documents'.<sup>19</sup>

2.44 There is no doubt that the Department had been put on notice that Mr Coyne was seeking both the transcript and copies of the original written complaints made about him. He sought the assistance of Mr Kevin Lindeberg, the industrial officer of QPOA, and also instructed his solicitors to write to the Department.<sup>20</sup>

2.45 Importantly, on 19 January 1990, Mr Heiner discussed his position with Ms Matchett, and followed this with a letter of the same date. The letter records that, during those discussions, 'the question was raised as to the validity of the establishment and appointment and approval for my conducting this enquiry', and:

Following discussion this morning I have serious doubts as to the validity of the enquiry..... In view of the confusion which exists and my doubt as to the validity of my actions so far, I am not prepared to continue any further with my inquiry. ... until I have obtained written information and confirmation that my actions to date including my appointment and authority to act are validated.<sup>21</sup>

2.46 Ms Matchett's response was to request all the documentation be forwarded to the Department where apparently it was sealed without

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16 *The Public Interest Revisited*, Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, pp. 52-53, paragraph 5.9.

17 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1702.

18 *The Public Interest Revisited*, Report of the Senate Select Committee on Unresolved Whistleblower Cases, October 1995, p. 52, paragraph 5.8.

19 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1690.

20 *The Beginnings of Shreddergate: The Chronology of Events*, at [www.gwb.com.au/gwb/news/goss/history99.doc](http://www.gwb.com.au/gwb/news/goss/history99.doc)

21 *Exhibit 126*, Letter from Mr Noel Heiner to Ms R Matchett, 19 January 1990.

being read and, in what the Senate Select Committee thought a 'somewhat unusual development' forwarded to the Cabinet Secretariat. Ms Matchett did not formally write to Mr Heiner until 7 February 1990.<sup>22</sup>

- 2.47 Mr Heiner indicated to the Committee that he only forwarded the material once an assurance of indemnity had been given.<sup>23</sup> While he did not receive this in writing, the Committee notes that, shortly after the shredding occurred, *The Sun* newspaper also reported the Minister as saying that 'State Cabinet had rushed to give Mr Heiner indemnity from prosecution'.<sup>24</sup>
- 2.48 According to Mr Lindeberg, he had met with Ms Matchett (together with Ms Janine Walker of the State Services Union) on that same day (19 January) and was advised the inquiry had been terminated. Mr Lindeberg had indicated at that meeting that Mr Coyne still wanted to see the allegations made against him.<sup>25</sup>
- 2.49 Mr Coyne's solicitors had already written to the Department on 17 January 1990.<sup>26</sup> The Department had been put on notice again via a phone call to Ms Matchett's Executive Assistant on 14 February from Coyne's solicitors, followed by a letter the following day,<sup>27</sup> of Mr Coyne's intention to commence court proceedings. The request for the documents was made pursuant to Public Service Management and Employment Regulation 65.
- 2.50 Mr Lindeberg submits that 'the Queensland Government was put on notice as early as 8 February, and unquestionably on 14 and 15 February 1990' that the records might be required for court proceedings.<sup>28</sup>
- 2.51 The Committee notes that the Department was at least aware of the possibility that legal proceedings might eventuate already in late January.

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22 The Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p. 52.

23 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1682.

24 Mr Bruce Grundy, *Submission 171.2*, Attachment.

25 The Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p. 53.

26 The Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p. 53.

27 *The Beginnings of Shreddergate: The Chronology of Events*, at [www.gwb.com.au/gwb/news/goss/history99.doc](http://www.gwb.com.au/gwb/news/goss/history99.doc)

28 Mr Kevin Lindeberg, *Submission 142*, p. 11.

- 2.52 Ms Matchett had already sought advice from the Crown Solicitor regarding Coyne’s solicitors’ letters and the legality of Noel Heiner’s appointment.<sup>29</sup>
- 2.53 According to advice on 23 January 1990 from the then Crown Solicitor, Mr Ken O’Shea, to the Department of Family Services, Mr Heiner had been lawfully appointed (pursuant to the Public Service Management and Employment Act and Regulations 1988). However, neither he nor his informants had statutory immunity from legal action for defamation because the appointment was not under the Queensland *Commissions of Inquiry Act 1950*. Mr O’Shea recommended that if the inquiry were to be terminated, the documentation gathered by Mr Heiner should be destroyed, provided that no legal action which would require the production of the documentation had been commenced.<sup>30</sup>
- 2.54 According to Mr Lindeberg, the 23 January 1990 advice by the Crown Solicitor was ‘predicated on an incorrect assumption that the Inquiry’s records were Mr Heiner’s private property’. This was corrected in the Crown Solicitor’s advice of 16 February 1990,<sup>31</sup> which is discussed shortly.
- 2.55 Furthermore, according to Mr Lindeberg, when that original advice was provided, court proceedings had not been foreshadowed and hence, the question of what could be done with the records once proceedings were foreshadowed, had not been addressed.<sup>32</sup>
- 2.56 It does appear, however, that even then, the question of legal proceedings had been formally raised. According to the Crown Solicitor:

Naturally Mr Heiner is concerned about any risk of legal action which may be instituted against him for his part in the inquiry and it would appear appropriate for cabinet to be approached for any indication that should any proceedings be commenced against Mr Heiner because of his involvement in this inquiry, the government will stand behind him in

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29 *The Beginnings of Shreddergate: The Chronology of Events*, at [www.gwb.com.au/gwb/news/goss/history99.doc](http://www.gwb.com.au/gwb/news/goss/history99.doc)

30 Mr Kevin Lindeberg, *Submission 142*, p. 11.

31 Mr Kevin Lindeberg, *Submission 142*, p. 11.

32 Mr Kevin Lindeberg, *Submission 142*, p. 11.

relation to his legal costs and also in the unlikely event of any order for damages against him.<sup>33</sup>

2.57 Further, in his letter to Ms Matchett dated 19 January 1990, Mr Noel Heiner had also said:

There has been reference to legal proceedings being taken as a result of my enquiries. I believe if there is any legal action taken, the Department of Family Services and Aboriginal and Islander Affairs should take action to indemnify all my actions to date.<sup>34</sup>

2.58 It is therefore clear that, at minimum, the Department knew that there was a possibility of legal action being instituted. It is also apparent that, by 13 February 1990 at the latest, the Cabinet Secretariat which was by then in possession of the documents knew of this, because Acting Secretary to the Cabinet, Mr Stuart Tait, had written to the Crown Solicitor seeking advice as to:

what options are open to Cabinet so far as the retention or disposal of these documents is concerned and could they be obtained by way of subpoena or third party discovery should a writ be issued touching or concerning them.<sup>35</sup>

2.59 At a Cabinet meeting the previous day, Cabinet had already determined to terminate the Heiner inquiry and Ms Matchett had informed JOYC staff accordingly.<sup>36</sup>

2.60 In his response, dated 16 February 1990, the Crown Solicitor deemed that the documents 'could not be fairly described as Cabinet documents' because they did not come into existence for the purpose of a submission to Cabinet and hence a claim of Crown Privilege would have limited success.<sup>37</sup>

2.61 In addressing the question of whether the documents were in the 'possession or power' of the Crown, the Crown Solicitor revised the 23 January position with regard to the status of the documents and advised as follows:

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33 Crown Solicitor advice, quoted in The Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, pp. 58-9.

34 *Exhibit 126*, Letter from Mr Noel Heiner to Ms R Matchett, 19 January 1990.

35 *Exhibit 70*, Letter from Mr Ken O'Shea to Mr Stuart Tait, 16 Feb 1990.

36 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra p. 53.

37 *Exhibit 70*, Letter from Mr Ken O'Shea to Mr Stuart Tait, 16 Feb 1990.

I have previously delivered advice to the Acting Director-General of the Department of Family Services and Aboriginal and Islander Affairs to the effect that the documents in question were not ‘public records’ within the meaning of the Libraries and Archives Act 1988. This advice was given on the premise that Mr. Heiner was engaged to prepare a report and that whilst his report once produced might have been a public record in terms of Section 5(2) of the Libraries and Archives Act 1988, the documents and papers produced by Mr. Heiner prior to the submission of his report were not public records...

Having reviewed this matter further, and in light of the circumstance that Mr. Heiner has now delivered up to the Crown the documents, I think that the better view is that the documents are within the possession or power of the Crown and accordingly are public records within the meaning of the Libraries and Archives Act 1988...

Once it is concluded that the documents are more than likely in the possession or power of the Crown, it seems that in accordance with Section 5(2) of the Libraries and Archives Act 1988, the documents fall within the definition of ‘public records’. In that case, Section 55 of the Libraries and Archives Act 1988 is relevant in that the documents may only be disposed of by depositing them with the Queensland State Archives, or by obtaining the consent of the State Archivist to the disposal of the documents or after receiving notice in writing of an intention to dispose of the documents, the State Archivist has not within a period of two months exercised his power to take possession of the documentation.

2.62 With regard to Mr Tait’s question concerning whether the documents could be obtained by way of subpoena or third party discovery, Mr O’Shea had this to say:

If then, for example, anyone suspects he or she was defamed in any of the material produced by Mr Heiner, were to commence an action against him in respect thereof, the plaintiff would, no doubt, at a fairly early state in the action, seek an order for third party discovery of the material pursuant to Order 35 Rule 28 of the Rules of the Supreme Court.<sup>38</sup>

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38 *Exhibit 70*, Letter from Mr Ken O’Shea to Mr Stuart Tait, 16 Feb 1990..

2.63 According to Mr Lindeberg, this demonstrates that:

there is no doubt that members of the Executive Government and the Office of Crown Law were fully aware that the records, in their possession and control whose fate they were deciding, were relevant to a foreshadowed judicial proceeding; and both parties knew would be discoverable pursuant to the rules of court of the Supreme Court of Queensland once the (expected) writ was filed and/or served, and that any argument claiming 'Crown privilege' put forward by the State of Queensland would fail under the circumstances.<sup>39</sup>

2.64 The evidence presented to the Committee confirms that both the Department and the Cabinet had been put on notice that Mr Coyne intended to initiate legal proceedings.

2.65 The Senate Select Committee found that:

Given that the Crown Solicitor had deemed the Heiner documents to be public records, the precondition for their shredding to be legal were that they were not required for pending legal action and that the State Archivist had given her approval.<sup>40</sup>

2.66 While the Senate had misgivings concerning the manner in which the approval of the State Archivist had been sought, it concluded that the Government had 'consistently sought advice from its chief law officer ... and generally followed that advice... it is not appropriate to comment on that advice.'<sup>41</sup>

2.67 Having more evidence before it, however, this Committee deems it appropriate to comment on the advice received, particularly given that acting on legal advice does not absolve one from potential liability with regard to actions based on that advice.

### **The meaning of section 129 of the Queensland *Criminal Code Act 1899***

2.68 According to Mr Lindeberg, because solicitors had served notice of foreshadowed court proceedings in which the Heiner documents would have been required, the destruction of the records obstructed

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39 Mr Kevin Lindeberg, *Submission 142*, p 27.

40 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 56.

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

justice and those responsible should be charged at minimum under section 129 of the Queensland *Criminal Code Act 1899* and/or section 132 (conspiring to defeat justice) and section 140 (attempting to pervert justice).<sup>42</sup>

2.69 Section 129 of the Queensland *Criminal Code Act 1899* states:

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 with hard labour for 3 years.

2.70 Given there is no dispute that Mr Coyne had signalled his intention to pursue legal action, the central question centres on the interpretation of ‘pending legal action’.

2.71 As previously mentioned and further elaborated on in Chapter 3, Mr Heiner took evidence of at least two examples of abuse. This also means that a number of other people – and, most importantly, the victims of abuse – may have wished to commence action at some time in the future. Those potential litigants would have required the evidence collected by Mr Heiner.

2.72 According to the Queensland Government, an action has to be underway in a judicial proceeding in order to be said to be ‘pending’. For this interpretation of section 129, reliance is placed on Form No. 83 of the Criminal Practice Rules 1900 (Qld) and section 119 of the Queensland *Criminal Code Act 1899* which defines ‘judicial proceeding’.

2.73 Form No. 83 of the Criminal Practice Rules 1900 relates to an indictment for an offence against section 129. The section (as it stood at the time) reads as follows:

Knowing that a certain book [or deed (or as they 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 EF and one GH (or as the case may be), wilfully destroyed the same or wilfully rendered the same illegible (or undecipherable or

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42 Mr Kevin Lindeberg, *Submission 142*, p. 12. Mr Lindeberg also believes section 92(1) Abuse of Office to be relevant.

incapable of identification), with intent thereby to prevent it from being used as evidence in the said action (or as the case may be).<sup>43</sup>

- 2.74 The definition of 'judicial proceeding' in section 119 of the Queensland *Criminal Code Act 1899* is as follows:

'judicial proceeding' includes any proceeding had or taken in or before any court, tribunal, or person, in which evidence may be taken on oath.<sup>44</sup>

- 2.75 Mr Noel Nunan, on contract to the CJC, reviewed Mr Lindeberg's allegations in August 1992.<sup>45</sup> Mr Lindeberg was advised of his findings on 20 January 1993 by Mr Michael Barnes, the CJC's Chief Complaints Officer. With regard to section 129 of the Queensland *Criminal Code Act 1899*, the CJC found that:

the decision to destroy the records was made by Cabinet after approval was obtained from the State Archivist. As no judicial proceeding was underway at the time of the destruction of the documents, I am of the view that no member of Cabinet has committed the criminal offence referred to.<sup>46</sup>

- 2.76 When it appeared before the Senate Select Committee in 1995, the CJC re-stated the view that because no course of justice was actually under way, justice had not been interfered with.<sup>47</sup> Indeed, in its submission to the Senate, the CJC said, with regard to section 129 that:

No judicial proceedings had or have ever been commenced in which the Heiner documents would have been relevant. Coyne, the QPOA and the QTU had at various times prior to the destruction of the documents indicated that they were considering legal action to gain access to the documents, which they claimed they were entitled to see pursuant to the PSM&E Regulations...

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

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43 *Exhibit 107*.

44 *Exhibit 107*.

45 Mr Kevin Lindeberg, *Submission 142*, p. 19.

46 *Exhibit 70*, Letter from Michael Barnes to Mr Lindeberg, 20 January 1993.

47 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 56.



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...

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.<sup>48</sup>

- 2.77 When the Senate investigated the issue in 1995, it did not have access to the Cabinet minute that recommended the destruction of the documents. That minute, signed by the then Minister Anne Warner, was tabled in the Queensland Parliament on 30 July 1998 by Premier Peter Beattie. Indeed, the Cabinet minute from Minister Warner clearly spells out this interpretation – while representations had been received, no formal legal action had been instigated. The clear implication is that it would be the better course of action to destroy the documents prior to a formal action commencing.
- 2.78 According to the minute, dated 27 February 1990:
- Representations have been received from a solicitor representing certain staff members at the John Oxley Youth Detention Centre. These representations have sought production of the material referred to in this Submission. However, to date, no formal legal action seeking production of the material has been instigated.<sup>49</sup>
- 2.79 The Committee notes that the submission appears to confirm Cabinet was aware of the issue already prior to 27 February – reference is made to an earlier submission (Submission No. 00100) which had recommended destruction of the material. The Cabinet had deferred the decision to 'enable other options to be explored'.<sup>50</sup>

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48 CJC submission to 1995 Senate inquiry, Volume 2, pp. 26-27, see Justice Project website at <http://www.eastes.net/justice/content/WhatTheCJCSaid.asp>

49 **Exhibit 70**, Cabinet Submission 00160 – Materials gathered by Mr N.J. Heiner during the course of his investigation into certain Matters at the John Oxley Youth Centre.

50 **Exhibit 70**, Cabinet Submission 00160 – Materials gathered by Mr N.J. Heiner during the course of his investigation into certain Matters at the John Oxley Youth Centre.

- 2.80 Later opinions, given by the Crown Solicitor and then by the DPP, Mr Royce Miller QC, supported the argument that section 129 did not apply because legal proceedings were not under way.
- 2.81 In a memorandum to the Queensland Attorney-General, provided to the Senate Select Committee in 1995 and later tabled in the Queensland Parliament, the Crown Solicitor again argued that, for the purposes of section 129 of the Queensland *Criminal Code Act 1899*, a proceeding is not pending until it has been filed in the Court, no matter how many threats might be made of a proceeding commencing.<sup>51</sup>
- 2.82 Similarly, the DPP, writing to the then Shadow Attorney-General Mr Denver Beanland MLA on 28 November 1995, quoted Form No 83 relating to an indictment for an offence against section 129 and supported the CJC's view:
- It is my view that there must be on foot a legal proceeding before this section is cable (sic) of application. The closing words of the body of the section namely 'with intent thereby to prevent it from being used in evidence' clearly indicate that there must at the time the action is undertaken by the alleged culprit an impending proceeding.<sup>52</sup>
- 2.83 According to Mr Lindeberg, the DPP 'took the same view when asked to act in this matter by the then Shadow Attorney-General the Hon Denver Beanland who wrote in light of Mr Callinan QC's opinion on the matter in his special submission to the Senate'.<sup>53</sup> Mr Callinan QC's opinion is discussed later in this Chapter.
- 2.84 This interpretation of section 129 has been relied upon by successive Governments, even to the end of 2003 as is evident from Premier Beattie's press release:

On 5 March 1990 the Goss Cabinet was informed that representations had been received from a solicitor representing certain staff at the centre. At that time, no formal

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51 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, pp. 56-7.

52 Copy of letter on The Justice Project website, refer: <http://www.eastes.net/justice/content/Miller2.asp>

53 Mr Kevin Lindeberg, *Submission 142*, p. 19.

legal proceedings had been instituted, nor was any legal action subsequently instituted.<sup>54</sup>

- 2.85 None of the comments by the Queensland Government have addressed the question of whether the Minister and Cabinet were aware of the evidence of abuse at the time.
- 2.86 A number of academics and eminent jurists have disputed this Queensland Government's interpretation of section 129 of the Queensland *Criminal Code Act 1899*.
- 2.87 According to Senior Lecturer in Law at the Queensland University of Technology, Mr Alastair MacAdam, the Crown Solicitor's reliance on optional form No. 83 of the criminal practice rules from 1900, clause 2 is untenable:
- The argument advanced is that that optional form goes to knowing that a certain book – or a ledger, as the case may be – was or might be required in evidence in an action then pending in the Supreme Court. The argument was that, because that uses the words 'action then pending', if you have not commenced the proceedings there can, therefore, be no offence. It seems to me that that argument is spurious, to say the least, because it purports to use a piece of delegated legislation to read down the clear words of section 129.<sup>55</sup>
- 2.88 Mr MacAdam further argues that:
- To have a situation where you could use, after the event, delegated legislation to read down the clear words of the act is just not in any way a tenable argument.<sup>56</sup>
- 2.89 In fact,
- it goes even further than that: the criminal practice rules make it clear that this is an optional form of indictment.<sup>57</sup>
- 2.90 The Committee recognises that, if there are two possible constructions of a statute, it has been seen to be acceptable to apply the construction that is in favour of the subject.
- 2.91 Mr MacAdam, however, pointed out that:

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54 The Hon Peter Beattie MP Press Release, 'Federal Liberal Inquiry Will Waste Thousands of Dollars', 27 October 2003.

55 Mr Alastair MacAdam, *Transcript of Evidence*, p. 1417.

56 Mr Alastair MacAdam, *Transcript of Evidence*, p. 1417.

57 Mr Alastair MacAdam, *Transcript of Evidence*, p. 1417.

It is perfectly clear that unless Parliament has authorized the amendment of an Act of parliament by a piece of subordinate (delegated) legislation... 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.<sup>58</sup>

2.92 Furthermore, Mr MacAdam referred the Committee to the High Court's decision in *R v Rogerson and Ors* (1992), where the High Court held that the offence (in that case it was conspiring to pervert the course of justice) 'could be committed even though no court proceedings had been commenced at the time of the alleged offence'.<sup>59</sup>

2.93 Mr MacAdam also told the Committee that the High Court in that case ruled against reading down clear words of an Act by delegated legislation as a method of interpretation. The Committee accepts the High Court interpretation in *R v Rogerson and Ors* (1992) 66 ALJR 500, where Mason CJ says at page 502:

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.<sup>60</sup>

2.94 A further problem with optional form 83 being used to read down clear words is that it refers to action then pending in the Supreme Court of Queensland. According to Mr MacAdam, we would have 'an absolutely ludicrous result' if the form could be used to read down section 129 if the action were pending in a different court.<sup>61</sup>

2.95 Mr MacAdam believes that the views expressed by Mr Noel Nunan on behalf of the CJC are 'so fundamentally flawed that they cannot be explained away in that manner'.<sup>62</sup>

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58 Mr Alastair MacAdam, *Submission 4* to the Senate Select Committee on the Lindeberg Grievance, p. 2. Mr MacAdam points to for example the decision of the High Court in *The Great Fingall Consolidated Ltd v Sheehan* (1905) 3 CLR 117 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 a Statute under which it is made'.

59 Mr Alastair MacAdam, *Submission 4* to the Senate Select Committee on the Lindeberg Grievance, p. 2.

60 Mason CJ, quoted in Kevin Lindeberg, *Submission 142*, p. 19.

61 Mr Alastair MacAdam, *Transcript of Evidence*, p. 1417.

62 Mr Alastair MacAdam, *Submission 4* to the Senate Select Committee on the Lindeberg Grievance, p. 2.

2.96 In its advice to Mr Lindeberg in 1993, the CJC also referred to section 119 and noted that:

No ‘judicial proceeding’ was ever instituted by Mr Coyne or anyone else with respect to the Inquiry records. Certainly legal proceedings were threatened by Mr Coyne’s solicitors but none were ever instituted.<sup>63</sup>

2.97 Section 119 of the Queensland *Criminal Code Act 1899* is as follows:

In this chapter - ‘judicial proceeding’ includes any proceeding had or taken in or before any tribunal, or person, in which evidence may be taken on oath.<sup>64</sup>

2.98 Mr MacAdam told the Committee that the argument advanced is that because judicial proceeding is defined as ‘had or taken’, the implication is that proceedings must be in existence.<sup>65</sup> In other words, because Mr Coyne’s solicitors had not actually filed a writ, proceedings could not be considered to have been under way.

2.99 Mr MacAdam pointed out that this would be an incorrect reading of a legal definition, because the definition is said to ‘include’ something:

In circumstances where ‘means’ is used, that is an exhaustive definition – it means what is in the definition and nothing else; ‘includes’, the general position’ means what is in the definition plus the ordinary meaning of the word. It seems to me that the reason why ‘includes’ has been added to this definition is just to make clear that it is not restricted to court proceedings; it is restricted to tribunals, to any persons and maybe to commissions of inquiry where evidence can be taken on oath.<sup>66</sup>

2.100 According to Mr Ronald Peterson, a barrister, and Mr Ian Callinan QC, now a Justice of the High Court, the CJC’s ‘narrow/strict interpretation of “judicial proceeding” is too significant to ignore’.<sup>67</sup> Mr Callinan QC told the Senate Unresolved Whistleblower Cases Committee in 1995:

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63 *Exhibit 70*, Letter from Mr Michael Barnes to Mr Kevin Lindeberg, 20 January 1993.

64 *Exhibit 107*.

65 Mr Alastair MacAdam, *Transcript of Evidence*, p. 1417.

66 Mr Alastair MacAdam, *Transcript of Evidence*, p. 1418.

67 Mr Ian Callinan and Mr RD Peterson, *Correspondence*, Senate Select Committee on Unresolved Whistleblower Cases, 7 August 1995, p.3.

The course of justice, when it begins to run, is a matter that has been much debated in the court and there is a serious open question about when the course of justice does begin to run in cases. .. The real point about the matter is that it does not matter when, in technical terms, justice begins to run. What is critical is that a party in possession of documents knows that those documents might be required for the purposes of litigation and consciously takes a decision to destroy them. That is unthinkable. If one had commercial litigation between two corporations and it emerged that one of the corporations knowing or believing that there was even a chance that it might be sued, took a decision to destroy evidence, that would be regarded as a conduct of the greatest seriousness – and much more serious, might I suggest, if done by a government.<sup>68</sup>

2.101 According to Mr Callinan QC, in its investigation, the CJC relied on Mr Lindeberg's assertion that there were going to be defamation proceedings when:

as they say, perhaps there may not be going to be defamation proceedings. The real point on any view of this matter, is that legal proceedings that were threatened would inevitably involve necessary recourse to the documents. The document ought not, for that reason, to have been destroyed.<sup>69</sup>

2.102 The proceedings by Mr Coyne:

would either be defamation or proceedings by way of prerogative writ or judicial review to get access to the documents. So, in either case, those documents were critically important and critically relevant to any proceedings that Mr Coyne might take.<sup>70</sup>

2.103 On 30 March 1995, the Crown Solicitor tabled a further opinion in the Queensland Legislative Assembly, in response to the submission to the Senate by Mr Callinan QC and Mr Peterson, and the subsequent

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68 Mr Ian Callinan, Senate Unresolved Whistleblower Cases Committee, *Transcript of Evidence*, 23 February 1995, p. 39.

69 Mr Ian Callinan, Senate Unresolved Whistleblower Cases Committee, *Transcript of Evidence*, 23 February 1995, p. 39.

70 Mr Ian Callinan, Senate Unresolved Whistleblower Cases Committee, *Transcript of Evidence*, 23 February 1995, p. 39.

oral evidence to the Senate.<sup>71</sup> According to additional evidence from Mr Callinan QC and Mr Peterson, that opinion by Mr O’Shea:

clearly misses the fundamental point that the Crown, being a ‘model litigant’ both actual and imminent must not be party to destroying documents for the purposes of the Public Service Regulations. It ignores Mr Coyne’s letters.

...There are certainly rules of law that prohibit the destruction of evidence once proceedings are issued but the real issue that was missed was the proposition that the Government was aware that a prospective litigant wanted the document preserved and gave due notice through the Department of Family Services. All relevant documents that are in the system have not been disclosed.

...Mr O’Shea alludes to the fact that if one acted reasonably, fairly and in accordance with common sense that the law would vindicate one’s actions. The simple fact is that by seeking to destroy these documents, the Crown removed a prospective litigant of his rights. This cannot in any true sense of the word be in accordance with our democratic principles.<sup>72</sup>

2.104 The CJC had also argued that the documents belonged to the Crown, to which Mr Callinan QC had responded that it:

does not matter to whom they belong; the real point is that they were documents that might be required for litigation.<sup>73</sup>

2.105 The Committee notes that the advice of the Crown Solicitor of 16 February 1990 clearly spelt out that the documents were not the Cabinet’s property, but were public documents. Yet the same Crown Solicitor appears to have different view of the documents in 1995, when he told the Senate inquiry that there was no basis for any allegation of criminal responsibility under section 132 of the Queensland *Criminal Code Act 1899*:

I can only wonder how it can be seriously suggested that a Government’s destruction of its own property in accordance

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71 Attorney-General’s Statement to The Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, p. 52.

72 Mr Ian Callinan and Mr RD Peterson, *Correspondence*, Senate Select Committee on Unresolved Whistleblower Cases, 5 May 1995.

73 Mr Ian Callinan, Senate Unresolved Whistleblower Cases Committee, *Transcript of Evidence*, 23 February 1995, p. 39.

with a Statutory regime which permitted its destruction (the *Libraries and Archives Act 1988*), in order to keep faith with and protect a retired Magistrate and witnesses misled by the actions of a previous Government could constitute a case of Conspiracy... [the shredding] represented a reasonable, fair and commonsense approach to a difficult problem not of the Government's making.<sup>74</sup>

2.106 According to Mr Petersen and Mr Callinan QC:

Mr O'Shea infers that the right to destroy documents is a personal one, this is inconsistent with his earlier advice that the documents were public records. The right to destroy public records must be scrutinised closely and dealt with properly. The legal significance of this is clearly overlooked.<sup>75</sup>

2.107 On 7 August 1995, Mr Peterson and Mr Callinan QC provided a further opinion following evidence by Mr Michael Barnes from the CJC to the Senate on 29 May 1995. Mr Barnes had made it clear that the Queensland Cabinet and various government officials were aware that the documents were required for future litigation:<sup>76</sup>

it is clear that Cabinet made a decision to destroy the documents knowing full well that Coyne wished access to them. It may be that Cabinet made that decision to destroy the documents on the basis that, in its view, the public interest in protecting the people who gave evidence before Heiner outweighed Coyne's private interest in having access to them.<sup>77</sup>

2.108 According to Mr Peterson and Mr Callinan QC:

It is evident that the Criminal Justice Commission failed to appreciate the considerable implication of cabinet's decision

74 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 57.

75 Mr Ian Callinan and Mr RD Peterson, *Correspondence*, Senate Select Committee on Unresolved Whistleblower Cases, 5 May 1995.

76 The Senate Select Committee had come to the same conclusion, pointing out that when the Cabinet decided on 5 March 1990 to shred the Heiner documents, it knew that the documents were being sought by Mr Coyne with legal action in mind, even though no writ had been served. Both Ms Matchett and her executive assistant, Mr Trevor Walsh, had been aware of Mr Coyne's desire to obtain the documents through letters and phone conversations. Ms Matchett presumably briefed her minister (the Hon Anne Warner) on the matter prior to the Cabinet discussion.

77 Mr Michael Barnes, *Transcript of Evidence*, Senate Select Committee on Unresolved Whistleblower Cases, 29 May 1995, p. 655.



to shred documents when litigation is being foreshadowed by a party who is the subject of the relevant documents.<sup>78</sup>

2.109 Mr Barnes had:

conceded that the shredding of the documents was undertaken to avoid defamation proceedings or at least to make their prosecution practically impossible.<sup>79</sup>

### **Official misconduct and the rights of a prospective litigant**

2.110 The CJC had also told the Senate inquiry that its investigation into the shredding was specifically to determine whether any official misconduct had occurred. According to Mr Le Grand of the CJC, it was not up to the CJC to arbitrate between different legal claims, but it had to determine whether the advices had been properly derived.<sup>80</sup>

2.111 The CJC found no evidence that when the Government decided to shred the documents it had any reason to believe it was acting unlawfully. The Committee notes that the CJC in effect avoided the question of the legality of the shredding.

2.112 However, Mr Callinan QC found that, even in terms of investigating potential official misconduct, the CJC's investigation fell short:

Let me assume for present purposes in favour of the CJC that the commission got the law right on the matter. That is not the end of it. It is not the end of it whether Mr Lindeberg's allegation in legal terms is precisely correct. What is also critically important is whether there may have been some official misconduct, falling short of criminal conduct and that is not even explored.<sup>81</sup>

2.113 This argument is based on the notion of the model litigant. The CJC had advised the Senate that Cabinet decided to destroy the Heiner documents, knowing that Mr Coyne had requested access to them.<sup>82</sup>

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78 Mr Ian Callinan and Mr RD Peterson, *Correspondence*, Senate Select Committee on Unresolved Whistleblower Cases, 7 August 1995, p. 2.

79 Mr Ian Callinan and Mr RD Peterson, *Correspondence*, Senate Select Committee on Unresolved Whistleblower Cases, 7 August 1995, p. 3.

80 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 41.

81 Mr Ian Callinan, *Transcript of Evidence*, Senate Unresolved Whistleblower Cases Committee, 23 February 1995, p. 40.

82 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 58.

The Committee notes also that the CJC would have been aware that the shredded documents contained evidence of child abuse.

2.114 Mr Michael Barnes, from the CJC, thought that the Government may have decided that

the public interest in protecting the people who gave evidence before Heiner outweighed Coyne's private interest...it raises no issue of official misconduct.<sup>83</sup>

2.115 It is this very admission of judging the public versus the private interest that, according to Mr Callinan QC and Mr Peterson, raises the question of misconduct:

by seeking to destroy these [Heiner] documents, the Crown has removed a prospective litigant of his rights. This cannot in any true sense of the word be in accordance with our democratic principles.<sup>84</sup>

2.116 Indeed, Mr Callinan QC argued that, even though a defamation case might be almost impossible to prove without the documents, destroying the documents 'does not mean the defamation case goes away'. But of course, destroying the documents can then be considered an obstruction of justice.<sup>85</sup>

2.117 According to Mr Lindeberg, Mr Coyne:

had a legal right to access the records pursuant to *Public Service Management and Employment Regulation 65*, and sought to enjoy that right or have that right affirmed by a court ruling. The Queensland Government **was aware** of that right at all times, and Crown Law accepted that right of access in its advice to government but never told Mr Coyne.<sup>86</sup>

2.118 Mr Lindeberg also told the Committee that he was merely representing his member's interests – while Mr Coyne may have been considering defamation proceedings:

My sole interest was not defamation; my sole interest was the upholding of the Public Service Management and

83 Mr Michael Barnes, quoted in Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 58.

84 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 57.

85 Mr Ian Callinan, Senate Unresolved Whistleblower Cases Committee, *Transcript of Evidence*, 23 February 1995, p. 40.

86 Mr Kevin Lindeberg, *Submission 142*, p. 10. Author's emphasis.

Employment Act. Mr Coyne had a right to access those documents under regulation 65. More particularly, he had a right to test that in a court without interference.<sup>87</sup>

- 2.119 The Committee was also advised that, not only did the Government remove Mr Coyne's rights, it failed to advise him of its actions until after the shredding:

The Queensland Government informed the would-be litigants (i.e. Mr Coyne and two trade unions) on 16 February and 19 March that its position was “*interim*” and that the Crown Solicitor was still considering the question of access, and once that advice was received, they would be informed. **They were not informed until 22 May 1990 after the Heiner records had been clandestinely disposed of.**<sup>88</sup>

- 2.120 It should be noted that that advice of 22 May 1990 was provided by Ms Ruth Matchett. The Committee concurs with the Senate inquiry's judgement that delay in providing the advice can be regarded as 'unacceptable and reflecting bureaucratic ineptitude at best or deliberate deceit at worst'.<sup>89</sup>
- 2.121 The Committee concurs that the actions of the Government in shredding the documents may constitute official misconduct by depriving an individual (Mr Coyne) of his rights as a prospective litigant and not informing him of the fact. It is indeed a curious rationale to deny Mr Coyne access to documents on the basis that legal proceedings were not under way, when the likelihood of them ever being under way would be slim because the documents required were destroyed.
- 2.122 Mr Lindeberg's contention that 'the ordinary punter in the street would know this is ludicrous'<sup>90</sup> certainly has merit.

### The conviction of Pastor Douglas Ensbey

- 2.123 The opinion of the 'ordinary punter' was vindicated on 11 March this year, when Pastor Douglas Ensbey was found guilty under section 129 of the Queensland *Criminal Code Act 1899* for destroying pages from the diary of a child sex abuse victim required in a judicial

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87 Mr Kevin Lindeberg, *Transcript of Evidence*, 27 October 2003, p. 1449.

88 Mr Kevin Lindeberg, *Submission 142*, p. 11. Author's emphasis

89 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 61.

90 Mr Kevin Lindeberg, *Transcript of Evidence*, 16 March 2004, p. 1667.

proceeding. Of particular significance is the fact that the shredding occurred some *five years prior* to the girl reporting the incident to police, and a further year before the perpetrator was brought to justice.

2.124 Mr Lindeberg told the Committee that the current DPP had submitted to the Court that at the time the Pastor guillotined the diary,

it was beyond reasonable doubt that he knew that the document would be required in a judicial proceeding (and any prospective police investigation) and in destroying the document, he breached section 129.<sup>91</sup>

2.125 At the time of Mr Lindeberg's first submission to the Committee, the Pastor had only been committed for trial; Mr Lindeberg submitted then that whether or not the Pastor would be found guilty was less relevant. Critically relevant was the fact that his alleged criminal conduct was put before the court under section 129, or alternatively, section 140:<sup>92</sup>

if it is good enough to charge a Minister of religion and put him before the Magistrates court for committal pursuant to section 129 of the *Criminal Code (Qld)*, why shouldn't Ministers of the Crown in Heiner be treated equally for the same, if not more serious, conduct?<sup>93</sup>

2.126 Following the committal for trial of the Pastor, Mr Lindeberg had submitted to the Committee that the issues could no longer be seen as 'simple academic difference between lawyers'. Rather, the question now was whether the lawyers advising the Government 'got it plainly wrong' or whether it was deliberate which would amount to abuse of office and conspiracy to pervert the course of justice.<sup>94</sup>

2.127 Further, it shows that the proposition put forward by the CJC, Noel Nunan and Crown Law that judicial proceedings had to be commenced to trigger section 129 was 'always legal nonsense'.<sup>95</sup> On balance, the Committee concurs with this view.

2.128 The Committee notes Pastor Ensbey was indicted under section 129, but Form No 82, not 83 which is what the Queensland Government

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91 Mr Kevin Lindeberg, *Submission 142*, p. 22.

92 Mr Kevin Lindeberg, *Submission 142*, p. 22.

93 Mr Kevin Lindeberg, *Submission 142*, p. 22.

94 Mr Kevin Lindeberg, *Submission 142.1*, p. 8.

95 Mr Kevin Lindeberg, *Submission 142*, p. 23.

used in its defence of the Heiner documents shredding. The Committee was informed by Mr MacAdam that, as the Ensbey trial took place in March 2004 after the replacement of the *Criminal Practice Rules 1900* (Qld), the optional form of indictment used was rule 82, which is the new form of the Criminal Practice Rules 1999 (Qld). According to Mr MacAdam, the form of indictment was a mere matter of procedure'.<sup>96</sup>

- 2.129 However, the alleged destruction of the documents occurred in 1996 and Ensbey therefore needed to be prosecuted in accordance with the law at the time (i.e. prior to the amendments to the Criminal Practice Rules). Interestingly, the Committee notes that:

What the defence and somewhat surprisingly the prosecution both sought to argue was that form 83 of the Criminal Practice Rules 1900 (Qld), which were the rules in existence in 1996, could be used to read down the clear words of s 129 of the Criminal Code [1899] (Qld).<sup>97</sup>

- 2.130 Judge Samios however rejected this argument and, on 8 March 2003, had this to say:

I am not persuaded at this stage that the form, as it may have appeared at that point in time, can govern the construction of the section... The section is wide enough to cover the potential for a proceeding to arise in the future, and that there may be a view of the facts – and it would be a matter for the jury whether they would draw the inference – that the intention was to ensure that there would never be a proceeding.<sup>98</sup>

- 2.131 It appears that, a few days later, the position of the prosecution may have changed – Mr Lindeberg advised the Committee that when putting final arguments to the Magistrate on 11 March 2003:

the Crown Prosecutor argued that section 129 **did not require** a judicial proceeding to be on foot to trigger it, and, in the alternate, stated that an attempt to pervert the course of justice could occur before curial proceedings commenced, and cited *R v Rogerson*.<sup>99</sup>

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96 Mr Alastair MacAdam, *Submission 184*, pp. 1-2.

97 Mr Alastair MacAdam, *Submission 184*, pp. 2.

98 Mr Alastair MacAdam, *Submission 184*, Attachment.

99 Mr Kevin Lindeberg, *Submission 142.1*, p. 9.

- 2.132 This lends further credence to the view by Mr Ian Callinan QC when he argued in August 1995 that the CJC's narrow interpretation of 'judicial proceeding' is too significant to ignore.
- 2.133 The Committee notes that the current Attorney-General of Queensland has actually appealed the sentence on the basis it is not severe enough for the crime that has been committed.<sup>100</sup>
- 2.134 The Committee concurs with Mr Lindeberg's contention that:
- Put bluntly, the DPP ran my legal argument and that of Messrs Callinan QC, Morris QC and Greenwood QC (in Heiner) against this citizen, which has been scoffed at for over a decade by the Queensland law-enforcement authorities, including the Goss and Beattie Queensland Governments.<sup>101</sup>
- 2.135 Mr Lindeberg put his submission in the following terms:
- All I am suggesting is that it be put before a court of law so that the citizens can make up their own mind.... the fact is that when you get sufficient prima facie evidence – as there plainly is here... - if we are all equal before the law, it should be put before the courts.<sup>102</sup>
- 2.136 The Committee considers that the reasoning that charges cannot be brought under section 129 of the Queensland *Criminal Code Act 1899* against those responsible for the shredding because legal proceedings were not under way was always open to question in interpretation. It has now been confirmed that it was never a valid contention.

## The role of the State Archivist

- 2.137 The Crown Solicitor's advice of 16 February 1991 required the Cabinet to seek the permission of the Archivist prior to the destruction of the documents. According to the Queensland Government and the CJC, since this approval was sought in line with the Crown Solicitor's advice, the Cabinet acted appropriately.

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100 *Exhibit 136*, Form 391 – Notice of Appeal by Attorney-General, *The Queen v Douglas Roy Ensbey*, 25 March 2004.

101 Mr Kevin Lindeberg, Submission 142.1, p. 9. The arguments by Morris QC and Greenwood QC will be covered later in this chapter.

102 Mr Kevin Lindeberg, *Transcript of Evidence*, 27 October 2003, p. 1443.

2.138 However, while the Cabinet certainly wrote to the State Archivist, Ms Lee McGregor, Mr Lindeberg stated that the Cabinet:

did not provide all the known relevant information about the records. That is, information concerning the legal claims on the records was withheld, and she was deliberately misled into believing that no one wanted the records, let alone as evidence for a judicial proceeding.<sup>103</sup>

2.139 According to Mr Lindeberg, the Queensland Government is using the Archivist's approval as a 'shield' from charges over its decision to destroy the records:

plainly it was, and remains, the obligation of the applicant to properly and honestly inform the State Archivist of all relevant information concerning public records (ie. beforehand) when seeking to have them destroyed.<sup>104</sup>

2.140 Indeed, Crown Law and Cabinet together had agreed on the content of a letter to Ms McGregor, seeking her urgent approval to shred the documents but 'withholding the known information that the records were required for anticipated court proceedings.'<sup>105</sup>

2.141 Ms McGregor replied on the same day, indicating her satisfaction that the documents were not required for permanent retention and giving her approval for destruction.<sup>106</sup>

2.142 It was over two months later, on 16 May 1990, that, according to Mr Lindeberg, Ms McGregor was made aware by Mr Coyne that 'the records she had approved for destruction on 23 February 1990 were, in fact, required for foreshadowed court proceedings'.<sup>107</sup> When Ms McGregor sought advice from the Department, she was instructed to advise Mr Coyne to contact the Department or the Office of Crown Law.<sup>108</sup> Mr Lindeberg also states that:

In her 30 May 1990 internal report on the matter, the State Archivist acknowledged reading the Heiner records before authorising their disposal on the basis that they had no

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103 Mr Kevin Lindeberg, *Submission 142.1*, p. 17.

104 Mr Kevin Lindeberg, *Submission 142.1*, p. 17. See for eg. Premier Beattie's statement to parliament, 15 May 2003.

105 Mr Kevin Lindeberg, *Submission 142*, p. 11.

106 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 54.

107 Mr Kevin Lindeberg, *Submission 142*, p. 11.

108 Mr Kevin Lindeberg, *Submission 142*, p. 11.

permanent value and noted that some of the contents were of a defamatory nature concerning the management of the Centre.<sup>109</sup>

2.143 Significantly, Mr Noel Nunan did not interview the State Archivist in his investigation of the shredding of the documents in 1992-1993 on behalf of the CJC.<sup>110</sup> The Committee is not aware whether she was interviewed by any other inquiry.

2.144 The Committee concurs with the earlier findings of the Senate Select Committee that, while the Queensland Government in strict interpretation adhered to the law in seeking the State Archivist's permission prior to the destruction of the documents, aspects of this process were open to question, in particular:

- in correspondence with the State Archivist, it was not specifically mentioned that the documents were sought for possible legal action, but it was alluded to that legal action was a possibility;
- the State Archivist's examination of the material would have been cursory, given that her decision was apparently made within a few hours of receiving the voluminous material.<sup>111</sup>

2.145 Mr Callinan QC drew attention to the potential implications when he posed the question:

Why was the state archivist not informed that the documents might be required for the purposes of litigation? There may or may not have been a necessity to inform the state archivist, in strict legal terms, in order to enable her to exercise her discretion, but it is unthinkable, had this lady been informed that there was even the possibility of litigation, that she would have authorised the destruction of the documents.<sup>112</sup>

2.146 In a further submission to the Senate inquiry of 1995, Mr Peterson also refers to the CJC's evidence to the Senate Select Committee with regard to the State Archivist. The CJC had told the Senate that:

The archivist's duty is to preserve public records which may be of historical public interest; her duty is not to preserve

109 Mr Kevin Lindeberg, *Submission 142*, p. 12.

110 Mr Kevin Lindeberg, *Submission 142*, p. 21.

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

112 Mr Ian Callinan, *Transcript of Evidence*, Senate Unresolved Whistleblower Cases Committee, 23 February 1995, p. 41.



documents which other people may want to access for some personal or private reason. She has a duty to protect documents that will reflect the history of the state. Certainly she can only preserve public records, but there is no commonality necessarily between public records and records to which Coyne or other public servants may be entitled to access pursuant to regulations made under the Public Service Management and Employment Act.... the fact that people may have been wanting to see these documents – and there is no doubt that the government knew that Coyne wanted to see the documents – does not bear on the archivist’s decision about whether these are documents that the public should have a right to access forevermore, if necessary. That is the nature of the discretion that the archivist exercises. The question about whether people have a right to access these documents I properly to be determined between the department, the owner of the document and... the people who say they have got that right. That is nothing to do with the archivist, so I suggest to you that the fact that was not conveyed to the archivist is neither here nor there. That has no bearing on the exercise of her discretion.<sup>113</sup>

2.147 According to Mr Peterson, this statement:

clearly overlooks the fact that public records should not be shredded with haste particularly when it could avoid foreshadowed litigation of whatever description.... The natural implication from the CJC’s submission ... is that the State Archivist has almost unfettered discretion to destroy public records. This view is indefensible and clearly misguided.

....[it ] represents a real threat to the security of evidence (in this case public records) required in foreseeable and foreshadowed litigation. It is also at odds with the Crown’s duty to be a model litigant.<sup>114</sup>

2.148 It is pertinent to note the view of the Australian Society of Archivists’ opinion on the matter. The Society did not make a submission to the Committee; however it did make a submission to the Senate Select

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113 Quoted by R D Peterson, *Correspondence*, Senate Select Committee on Unresolved Whistleblower Cases, 26 May 1995, pp. 1-2.

114 R D Peterson, *Correspondence*, Senate Select Committee on Unresolved Whistleblower Cases, 26 May 1995, p. 2.

Committee on the Lindeberg Grievance and is also quoted extensively by Mr Lindeberg in his submissions to this Committee.

- 2.149 The Society has publicly and on a number of occasions rejected the view of the State Archivist's role as propagated by the CJC.<sup>115</sup>
- 2.150 Mr Chris Hurley is the former General Manager of the New Zealand Archives and former State Archivist of Victoria. Commenting on the Queensland Electoral and Administrative Review Commission (EARC)'s push that Queensland's archives system needed to be upgraded, Mr Hurley had this to say:
- Can anyone suppose, as CJC would apparently have us believe, that EARC's concern was for the lack of an adequate *historical* record?<sup>116</sup>
- 2.151 In terms of the shredding itself, Mr Hurley judged that '[T]he CJC's contention that there is no evidence of criminal intent is dubious to say the least'.<sup>117</sup> In 1999, the Society issued a position paper on the Heiner Affair and 'roundly criticised the misleading evidence provided by the CJC to the Senate Select Committee on Unresolved Whistleblower Cases in 1995'.<sup>118</sup>
- 2.152 Indeed, the shredding of the Heiner documents is featured as one of the world's worst shredding and archives scandals of the 20<sup>th</sup> century in a major academic work published in 2002.<sup>119</sup>
- 2.153 The Committee was concerned about the knowledge held by the State Archivist at the time, and particularly the fact that she may have failed in her duty after the initial shredding occurred. As Mr Lindeberg told the Committee, if Ms McGregor would have been informed that the documents might be required for legal action she 'would not have given the approval to shred those documents'. However, she did:

find out about this on 16 May 1999, when Mr Coyne wrote to her about the Heiner documents and wanted to know if they had been shredded, because he told her they were being required for court. Instead of the archivist owning up to the fact that she had authorised their destruction on the basis that

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115 See for example Australian Society of Archivists, *Submission 2* to the Senate Select Committee on the Lindeberg Grievance.

116 Quoted by Mr Kevin Lindeberg, *Submission 142*, p. 32.

117 Quoted by Mr Kevin Lindeberg, *Submission 142*, p. 33.

118 Mr Kevin Lindeberg, *Submission 142*, p. 33.

119 Mr Kevin Lindeberg, *Submission 142*, p. 32.

no-one wanted them, she contacted the department and they told her to keep her mouth shut.<sup>120</sup>

- 2.154 The Committee agrees with the position taken by the Australian Society of Archivists that:

If government archivists are to engage in their role as a key agent of public accountability, then they require appropriate statutory independence from political or other improper interference in the discharge of their responsibilities to appraise the public record.<sup>121</sup>

- 2.155 The Society noted that, unlike the comparable legislation of New South Wales:

The provisions of the *Libraries and Archives Act 1988* (QLD) did not provide the State Archivist with any level of protection from political or bureaucratic interference in disposal decisions.<sup>122</sup>

- 2.156 The Committee notes that the independence and impartiality of the Queensland State Archivist have now been recognised under section 27(1) of the *Public Records Act 2002* (Qld).<sup>123</sup>

## Treatment of the Heiner Affair by successive governments

- 2.157 According to Premier Peter Beattie, the Heiner Affair has been investigated to the 'nth degree' and nothing has been found. The Committee has received evidence that this is untrue on both counts.

- 2.158 Commenting on some of the inquiries that were held following the shredding, Mrs Beryce Nelson had this to say:

some of those inquiries that were held in that period also felt a need to protect ministers. I think there was the need to protect. They knew they had made a wrong decision in

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120 Mr Kevin Lindeberg, *Transcript of Evidence*, 27 October 2003, p 1441.

121 Australian Society of Archivists, Submission 2 to the Senate Select Committee on the Lindeberg Grievance, p. 5.

122 Australian Society of Archivists, Submission 2 to the Senate Select Committee on the Lindeberg Grievance, p. 5.

123 Australian Society of Archivists, Submission 2 to the Senate Select Committee on the Lindeberg Grievance, p. 5.

destroying the documents and that meant they were collectively legally responsible...<sup>124</sup>

- 2.159 The Queensland Government has maintained that the Heiner Affair has been the subject of a number of inquiries, including inquiries by two Senate Select Committees, the CJC, the Parliamentary Criminal Justice Committee, the Electoral and Administrative Review Committee, the Auditor-General (twice), Connolly and Ryan, and Messrs Morris QC and Howard.<sup>125</sup>
- 2.160 According to Messrs Lindeberg, Grundy and MacAdam, each of these inquiries was limited and/or hamstrung in its investigations. Mr Lindeberg has provided the Committee with significant evidence about each investigation and a full review of each is beyond the scope of this Chapter. However, the Committee notes the following salient points:
- in the case of the CJC's investigation in particular, Mr Lindeberg argues that its own conduct must come under independent review; it is a protagonist in the matter.<sup>126</sup>
  - the Committee found the claim that the issue had been exhaustively investigated questionable given that two of the people central to the Heiner Affair have never been called to give evidence: Mrs Beryce Nelson, who established the inquiry,<sup>127</sup> and Mr Heiner, after whom the affair is named. Indeed, Mr Heiner told the Committee:
 

What amuses me is that there have been seven inquiries into my inquiry and this is the first time I have ever been called.<sup>128</sup>
  - as far as this Committee is aware, other central figures, such as the archivist, Ms McGregor, and the Director-General of the Department of Family Services, Ms Ruth Matchett, have never been called to give evidence, nor for that matter have relevant Cabinet Ministers. This is regrettable, especially since the passage of time after an event inevitably affects the capacity of subsequent investigations of that event. As Mr Heiner told the Committee:

124 Mrs Beryce Nelson, *Transcript of Evidence*, 18 June 2004, p. 1796.

125 The Hon Peter Beattie MP, 'Federal Liberal Inquiry Will Waste Thousands of Dollars', 27 October 2003.

126 Mr Kevin Lindeberg, *Transcript of Evidence*, 27 October 2003, p. 1355.

127 Mrs Beryce Nelson, *Transcript of Evidence*, 18 June 2004, p. 1784.

128 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1693.

Had I been approached closer to when it occurred, my memory would have been excellent.<sup>129</sup>

- contrary to Premier Beattie’s assertion that none of the inquiries ‘found anything’, the Morris/Howard Report *did* find something, but this was never acted upon.

## The Morris/Howard Report

2.161 Messrs Morris QC and Howard were commissioned by the Borbidge Government to investigate the allegations made by Mr Lindeberg. The terms of reference were limited to examining the ‘paper trail’; they could call no witnesses.<sup>130</sup>

2.162 Mr MacAdam told the Committee:

Premier Beattie constantly says... that the Heiner matter has been investigated to the nth degree and nothing has been found. That is patently untrue. He seems to keep saying it as though it were a religious mantra and, if he says it often enough, people will believe him. ...The Morris-Howard report, just by looking at the documents, has found that there is a likelihood of some criminal offences having been committed and that others warranted further investigation.<sup>131</sup>

2.163 Mr Grundy did not know why the Borbidge government limited the inquiry that way, but he had this to say:

at the end of the process [Morris and Howard] recommended a full, public, open inquiry on the basis that there was prima facie evidence of numerous breaches of the criminal law. ...The myth has grown that this matter has been investigated to the nth degree, because that has been the spin: ‘We had Morris and Howard.’<sup>132</sup>

2.164 When Messrs Morris QC and Howard conducted their investigation, the then Leader of the Opposition, Mr Beattie, denied access to the Cabinet documents at the time of the shredding. Messrs Morris QC and Howard were therefore unable to ‘resolve the question whether members of State Cabinet may have committed criminal offences or

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129 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1694.

130 Mr Bruce Grundy, *Transcript of Evidence*, 27 October 2003, p. 1402.

131 Mr Alastair Macadam, *Transcript of Evidence*, 27 October 2003, p. 1419

132 Mr Bruce Grundy, *Transcript of Evidence*, 27 October 2003, p. 1402.

may have committed “official misconduct”’.<sup>133</sup> However, their report finds that ‘it is open to conclude’ that officers of the Department of Family Services breached sections 129, 132 and/or 140 by destroying the Heiner documents and destroying the photocopies of the original complaints on 23 May 1990.<sup>134</sup>

- 2.165 It is reasonable to conclude that Messrs Morris QC and Howard would have found similarly in relation to the conduct of the Queensland Cabinet, had they been aware of Cabinet’s knowledge of Mr Coyne’s intended legal action.
- 2.166 Further, crucial observations made by Messrs Morris QC and Howard support Mr Lindeberg’s contention of the CJC as a protagonist in the affair. Messrs Morris QC and Howard criticise the CJC’s conduct of the initial investigation and comment that there is cause for concern in relation to the ‘exhaustiveness – to say nothing as to the independence – of the Commission’s investigation into this matter.’<sup>135</sup>
- 2.167 Following the establishment of the Morris/Howard inquiry, the then CJC Chairman, Mr Clair, was quoted as saying:
- 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.<sup>136</sup>
- 2.168 Mr Grundy advised the Committee that once Messrs Morris QC and Howard had completed their report with its recommendations, the matter was referred to the DPP, but the advice has never been made public. A press release from Premier Borbidge does not mention section 129:

We do not know what the DPP said, because we have never seen anything more than a press release from the Premier. So

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133 Mr Anthony Morris QC and Mr Edward Howard QC, *Report to The Honourable 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*, 1996.

134 Mr Anthony Morris QC and Mr Edward Howard QC, *Report to The Honourable 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*, 1996.

135 Mr Anthony Morris QC and Mr Edward Howard QC, *Report to The Honourable 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*, 1996.

136 *The Courier-Mail* newspaper, 9 May 1996; quoted in Mr Anthony Morris QC and Mr Edward Howard QC, *Report to The Honourable 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*, 1996.

the final outcome of all of that is still... in limbo... I have called on the government to release the DPP's advice to the Premier because we would like to know what he said specifically about section 129.<sup>137</sup>

...We know what Mr Borbidge said in his press release, which took seven months to arrive, and that the outcome of that was that there was no full and public open inquiry, as had been recommended by Morris and Howard, and there were no prosecutions.<sup>138</sup>

2.169 Apparently the DPP, Mr Miller QC, questioned whether the public interest was being served in pursuing the matter, which, according to Mr Grundy:

is an interesting observation, but it has got nothing to do with the prosecution of the law.<sup>139</sup>

2.170 Mr Lindeberg told the Committee that the Borbidge Government did nothing about the advice received from the DPP. According to Mr Lindeberg, this may be because:

it was a government that, it was alleged, did inquiry after inquiry after inquiry, and around that time they had the infamous Connolly-Ryan inquiry going on... The Connolly-Ryan inquiry was to look into the effectiveness of the CJC. It was a committee that went for some considerable time and was shut down by a Supreme Court Justice on the basis of bias by one of the commissioners.<sup>140</sup>

2.171 There is conjecture as to what was included in the DPP's advice. Mr Lindeberg told the Committee he was aware of the contents of the advice and that it:

repeats the business that you can destroy documents up to the moment of a writ being served. It also places great emphasis on what cabinet knew. We know what cabinet knew. Cabinet knew the documents were required for court. It did not make any view about an inquiry other than it said that there is a great deal of time and effort being expended on it and may it is time to put it all to bed.<sup>141</sup>

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137 Mr Bruce Grundy, *Transcript of Evidence*, 27 October 2003, pp. 1402-3.

138 Mr Bruce Grundy, *Transcript of Evidence*, 27 October 2003, p. 1413.

139 Mr Bruce Grundy, *Transcript of Evidence*, 27 October 2003, p. 1413.

140 Mr Kevin Lindeberg, *Transcript of Evidence*, 27 October 2003, p., 1444

141 Mr Kevin Lindeberg, *Transcript of Evidence*, 27 October 2003, p., 1444

- 2.172 Mr MacAdam, on the other hand, thought that the DPP had ‘recanted from his first erroneous decision and agreed with Tony Morris that that provision could not be used to read it down.’<sup>142</sup>
- 2.173 The Committee believes that, particularly in light of inconsistent opinions as to the content of the advice, it would be appropriate to have that advice made public. Given the Ensby indictment, it would be helpful to know whether the DPP in 1996 did still adopt the original view that a legal proceeding had to be under way, or whether opinion had already changed on that matter.

### Recommendation 1

- 2.174 **That the Queensland Government publicly release the 1996 advice on the Morris/Howard Report provided by the Director of Public Prosecutions to the then Borbidge Government.**

### Protection of the executive government

- 2.175 The Morris/Howard Report was the only investigation of the Heiner Affair by two independent barristers. The remainder were investigations (albeit partial or limited ones) by government bodies. According to Mr MacAdam, perhaps the most serious concern of the Heiner Affair is that:

in this particular matter, where it is alleged that very senior people have committed moderately serious criminal offences, all the bodies that are established to protect us against the excesses of executive government have failed. Rather than carry out their duty in an independent manner ... they have collapsed around the executive government and said that the executive government can do no wrong.<sup>143</sup>

- 2.176 The role of the CJC is again of particular concern to the Committee. However, equally, it is noted that Mr Lindeberg has approached every government agency capable of – and indeed obliged to – investigate his complaints with very limited success.
- 2.177 The Committee also notes, for instance, that in the DPP’s letter to the then Shadow Attorney-General Denver Beanland of 28 November 1995, the DPP stated that the complaint should be directed to the CJC, because the DPP is not an investigative agency. It

142 Mr Alastair MacAdam, *Transcript of Evidence*, p. 1427.

143 Mr Alastair MacAdam, *Transcript of Evidence*, 27 October 2003, p. 1418



is the CJC that summarily dismissed Mr Lindeberg's complaint in 1993.<sup>144</sup>

2.178 Mr MacAdam had the following to say on the matter:

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.<sup>145</sup>

2.179 Mr MacAdam concurs with Mr Lindeberg that the following Queensland Government bodies are involved and that 'many of these bodies simply adopted Noel Nunan's fundamentally flawed interpretation of section 129 of the Queensland *Criminal Code Act 1899*, as their justification for doing nothing':

- the CJC
- Crown Law
- the Crown Solicitor
- the DPP
- the Attorney-General
- the Queensland Police
- the Ombudsman
- the Information Commissioner
- the Auditor-General
- the State Archivist
- the Department of Family Services.<sup>146</sup>

2.180 Mr MacAdam further believes that the following can be added to the list:

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144 A copy of the letter can be found on the Justice Project website, at <http://www.eastes.net/justice/content/Miller2.asp>.

145 Mr Alastair MacAdam, *Submission 4* to Senate Select Committee on the Lindeberg Grievance, p.3.

146 Mr Alastair MacAdam, *Submission 4* to Senate Select Committee on the Lindeberg Grievance, p. 3-4. See also Mr Kevin Lindeberg, *Submission 142*, p. 19, footnote 22.

- 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 the matter, falsely claiming that the matter has been investigated to the 'nth degree', and nothing found.<sup>147</sup>

2.181 On the evidence presented to it, it is the Committee's contention that allegations concerning the conduct by these agencies and individuals in relation to the Heiner Affair may raise ineptitude and/or serious issues of official (and possibly criminal) conduct. The Committee concludes therefore that detailed investigations are best undertaken by a special prosecutor. A recommendation detailing the tasks for a special prosecutor follows in Chapter 3.

### Was the Heiner inquiry properly set up?

2.182 As noted earlier in this Chapter, the putative justification for the aborting of the Heiner inquiry and subsequent shredding of the material was the lack of indemnity for Mr Heiner and the witnesses resulting from the defective establishment of the inquiry.

2.183 Mr Lindeberg, however, told the Committee that the Heiner inquiry had been lawfully established, and that its records were

**always** public records pursuant to section 5(2) of the *Libraries and Archives Act 1988*. The witnesses were known to be covered by qualified privilege; and that the State had

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147 Mr Alastair MacAdam, *Submission 4* to Senate Select Committee on the Lindeberg Grievance p. 4.

accepted any liability flowing out of consequential court proceedings.<sup>148</sup>

- 2.184 It is clear that Mr Heiner had doubts about his appointment. He told the Committee that he never had presented a report, but, that during the process of preparatory work for the report, he had wanted to check the terms of his appointment:

I satisfied myself that my appointment was not as I thought it was. I thought I was acting in an inquiry on behalf of cabinet, where of course I would have the authority of cabinet behind me and indemnification for any report I put in. I found out – or I thought I found out – that it was an appointment by or through the Department of Family Services.<sup>149</sup>

- 2.185 Mr Heiner told the Committee that he had wanted to put into his report:

the facts of my appointment and what it involved – what it entailed, and what I could do and could not do – and I arrived at the conclusion that I did not know what it was all about or who appointed me or under what authority they appointed me or what indemnification or protection anybody had.<sup>150</sup>

- 2.186 He had been concerned about his own protection, as well as that of those who came before him, having previously assumed that:

we were all protected in the same way as witnesses are in a court case or the magistrate sitting on the bench is – that we had all the protection of a court for anything they wanted to volunteer. I was not satisfied that this was the case.<sup>151</sup>

- 2.187 He told the Committee that he believed his appointment was ‘completely aboveboard’:

I thought originally that I was working as part of an inquiry on behalf of cabinet and that I had all the protection of an inquiry under cabinet, and I was not satisfied by my own personal inquiries before I made the report that that was so.<sup>152</sup>

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148 Mr Kevin Lindeberg, *Submission 142*, p. 10.

149 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1675.

150 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1679.

151 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1679.

152 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1679

- 2.188 Mr Heiner referred the Committee to the letter he had written to Ms Matchett on 19 January 1990 querying his appointment, following discussions earlier that day with Ms Matchett about the 'validity of the establishment and appointment and approval' for his conducting the inquiry.<sup>153</sup>
- 2.189 In the letter, Mr Heiner advised that:
- In view of the confusion which exists and my doubt as to the validity of my actions so far, I am not prepared to continue any further with my inquiry... I am therefore ceasing from now to continue any further with the matter until I have obtained written information and confirmation that my actions to date including my appointment and authority to act are validated... There has been reference to legal proceedings being taken as a result of my enquiries. I believe if there is any legal action taken, the Department... should take action to indemnify all my actions to date.<sup>154</sup>
- 2.190 Mr Heiner confirmed to the Committee that he had had no knowledge 'any legal proceedings either commenced, about to commence or otherwise' up until that time of discussions with Ms Matchett.<sup>155</sup>
- 2.191 Further, he advised that he never received a written reply to his letter; he was telephoned by an officer of the Department and told that Cabinet had indemnified him, as well as the people who had given evidence. However he was also told that Cabinet had decided that the inquiry was to be aborted and he was required to send everything back to the Department.<sup>156</sup> Mr Heiner agreed with the aborting of the inquiry because 'at that time it was the only thing that could have been done to protect me and anybody who volunteered to come before me.'<sup>157</sup>
- 2.192 The Committee notes that, given Mr Heiner had been advised that indemnity was in place, the question of defamation proceedings would have had less relevance. Once indemnity was provided, none of Mr Heiner's records could be used in evidence if any proceedings were brought, and hence there would be no need to shred the

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153 *Exhibit 126*, Letter from Mr Noel Heiner to Ms Ruth Matchett, 19 January 1990.

154 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1681

155 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1681.

156 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1681.

157 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1674.

documents. As noted in paragraph 2.51. *The Sun* newspaper, a month after the shredding, had reported Minister Warner as stating that Mr Heiner had indeed been given indemnity from prosecution.<sup>158</sup>

2.193 The Committee further notes that if Mr Heiner were indemnified, there must have been a Cabinet document demonstrating this, or otherwise Mr Heiner had been misled.<sup>159</sup>

2.194 Mr Heiner further clarified that, to claim he was concerned about defamation action was going ‘one step too far’:<sup>160</sup>

I was concerned about my appointment. I was concerned about the people who were told at the start that they did not have to give evidence if they did not want to – it was all volunteers – but if they did give evidence they would have the protection of a witness in a court case to fall back on if something happened. But at no time did I believe that any legal proceedings were pending or about to take place. I just wanted indemnification for everybody.<sup>161</sup>

2.195 On the other hand, Mrs Beryce Nelson, who instituted the Heiner inquiry while Minister for Family Services categorically stated that:

I was, and remain satisfied that the inquiry I set up did not place either the person running it, or the people who gave evidence to it, at any risk.<sup>162</sup>

2.196 She told the Committee that she had directed that her inquiry into JOYC be structured to avoid criticism of ‘length, expense and lack of outcomes of some inquiries’. Mrs Nelson advised that Mr Pettigrew, the then Director-General of the Department of Family Services, had obtained legal advice to the effect that:

a ministerial inquiry could be established which would provide ample protection for both witnesses and the person conducting the inquiry. Further, if it became necessary to move to a full inquiry under the Commissions of Inquiry Act, this could be done by way of extension via a cabinet minute

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158 ‘Labor blocks secret probe’, *The Sun*, 11 April 1990, p. 1.

159 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1683.

160 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1692.

161 Mr Noel Heiner, *Transcript of Evidence*, 18 May 2004, p. 1692.

162 *Exhibit 115*, Signed statement by Mrs Beryce Nelson, 14 May 1998, p. 3.

without the need to go back and repeat work already done by the initial ministerial inquiry.<sup>163</sup>

- 2.197 Mrs Nelson disputes the response (quoted earlier in this Chapter) given by the Hon Anne Warner to the question asked in Parliament in 1993 that there was a lack of statutory immunity from the possibility of legal action.<sup>164</sup>
- 2.198 Mrs Nelson wanted to:
- set the record straight in terms of dispelling the myth that was perpetuated at that time that the inquiry had not been fully and properly established and therefore had to be wound up and that the evidence had to be destroyed. That was simply not correct.<sup>165</sup>
- 2.199 She told the Committee that she had felt it inappropriate to establish a full commission of inquiry 'because it was too close to a state election'.<sup>166</sup> It was more appropriate to 'initiate a shorter term inquiry to give us preliminary findings so that there was room for an incoming government.... to establish a full commission of inquiry'.<sup>167</sup>
- 2.200 Mrs Nelson advised the Committee that she believed the advice to Mr Heiner that the inquiry had not been properly constituted was 'an absolute red herring' and 'a diversionary tactic to get the whole thing shut down and hidden away.' Mr Heiner should have been provided with 'a quite specific statement of reassurance that his inquiry was properly established – which it was.'<sup>168</sup>
- 2.201 She states that she has reason to believe that Mr Heiner approached Minister Warner in early January 1990 with a request to bring the inquiry under the Queensland *Commissions of Inquiry Act 1950*, which Mrs Nelson believes could have been achieved via Cabinet minute.<sup>169</sup>
- 2.202 The Committee finds that, on balance, there may have been some potential issues in relation to the setting up of the Heiner inquiry, possibly relating to the pressure the National Party Government was under to address the alleged problems at JOYC in the climate of an

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163 *Exhibit 115*, Signed statement by Mrs Beryce Nelson, 14 May 1998, p. 3.

164 The Hon Anne Warner, Answer to Question on Notice, 18 May 1993, Legislative Assembly Hansard, p. 2869.

165 Mrs Beryce Nelson, *Transcript of Evidence*, 18 June 2004, p. 1784.

166 Mrs Beryce Nelson, *Transcript of Evidence*, 18 June 2004, p. 1784.

167 Mrs Beryce Nelson, *Transcript of Evidence*, 18 June 2004, p. 1784.

168 Mrs Beryce Nelson, *Transcript of Evidence*, 18 June 2004, p. 1789.

169 *Exhibit 115*, Signed statement by Mrs Beryce Nelson, 14 May 1998, p. 4.

approaching election. However, the Committee agrees with Mrs Beryce Nelson's assessment that, even if there had been problems with the way the inquiry had been set up:

[Heiner and the witnesses] could quickly and easily have been given complete protection, made effective retrospectively if necessary.<sup>170</sup>

2.203 The Committee notes that Mr MacAdam agrees with Mrs Nelson's assessment – he has argued that, if the papers were shredded because Noel Heiner and his witnesses had not been properly indemnified, legislation could easily have been passed retrospectively to validate Mr Heiner's appointment.<sup>171</sup>

2.204 Mr Callinan QC also posed the question:

If the government was concerned about the people who had given evidence to Mr Heiner or about Mr Heiner's own position, why did the government not pass, as it could have done, a two sentence statute, simply declaring that Mr Heiner should be deemed to have had all the powers, authorities and protection of a commission of inquiry, and that those who gave evidence before him or submitted documents to him were to be similarly protected? One could draft the legislation in five minutes.<sup>172</sup>

2.205 On balance, therefore, the Committee considers that arguments that the documents were shredded to protect Heiner and the witnesses from potential legal action are somewhat spurious.

2.206 The Senate inquiry had concluded that the most plausible explanation for the shredding of the documents was to protect the public purse from the expenses of litigation. Accordingly, the rights of an individual (Mr Coyne) were negated and some would argue, sacrificed for a reason.<sup>173</sup>

2.207 Other possible motives for the shredding will be discussed in detail in the following Chapter.

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170 *Exhibit 115*, Signed statement by Mrs Beryce Nelson, 14 May 1998, p. 5.

171 Mr Alastair MacAdam, *Transcript of Evidence*, 27 October 2003, p. 1420.

172 Mr Ian Callinan, Senate Unresolved Whistleblower Cases Committee, *Transcript of Evidence*, 23 February 1995, p. 41.

173 Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, October 1995, Canberra, p. 53.

## Conclusion

- 2.208 The Committee finds that that there is sufficient evidence to conclude that the Labor Government, in deciding to shred the Heiner documents, has a case to answer under the Queensland *Criminal Code Act 1899* for destroying evidence required in legal proceedings. It is open to conclude that the Government's actions - and possibly those of government departments and agencies - were illegal, but equally importantly, immoral.
- 2.209 While the Committee is cognisant of the fact that there may have been competing interpretations of section 129 of the Queensland *Criminal Code Act 1899* at the time of the shredding of the documents, on balance, the evidence shows that destruction of evidence that may be required in legal proceedings is an indictable offence.
- 2.210 The Committee's main finding in this Chapter therefore relates to the interpretation of that section. On the evidence provided, the Committee finds that the indictment (and then conviction) of an ordinary citizen on the charge of destruction of evidence demonstrates conclusively that previous interpretations of the sections put forward by the Government, the Crown Solicitor, the DPP and the CJC are not justifiable.
- 2.211 Further, the Committee does not accept as a valid defence the argument that the Cabinet (or officers of the Department of Family Services) is absolved of blame because it acted on legal advice. While the Committee accepts that, once a charge is brought, the prosecution would need to establish intent, acting on legal advice is not an argument against an indictment to proceed with a prosecution.
- 2.212 The Committee makes the following recommendation bearing in mind that:
- while certain Cabinet documents concerning the decision to shred the Heiner inquiry documents are now publicly available, the actual discussions in respect of the decision-making process at Cabinet level would most likely not be admissible in evidence; and
  - the Federal Government has no jurisdictional power in this area.



## Recommendation 2

### 2.213 Given that:

- it is beyond doubt that the Cabinet was fully aware that the documents were likely to be required in judicial proceedings and thereby knowingly removed the rights of at least one prospective litigant;
- previous interpretations of the applicability of section 129 as not applying to the shredding have been proven erroneous in the light of the conviction of Pastor Douglas Ensbey; and
- acting on legal advice such as that provided by the then Queensland Crown Solicitor does not negate responsibility for taking the action in question.

**the Committee has no choice but to recommend that members of the Queensland Cabinet at the time that the decision was made to shred the documents gathered by the Heiner inquiry be charged for an offence pursuant to section 129 of the Queensland *Criminal Code Act 1899*. Charges pursuant to sections 132 and 140 of the Queensland *Criminal Code Act 1899* may also arise.**

2.214 The Committee also considers that officers of the Department of Family Services and the CJC at the time of the shredding of the documents have failed to do their duty and may have a case to answer under sections 132 and 140 of the Queensland *Criminal Code Act 1899*. The conclusion that potential offences under these sections may have occurred forms the basis for a recommendation in Chapter 3.