Parliament of Tasmania

Joint Select Committee

On

Ethical Conduct

"The Need for A Public Sector Independent Watchdog Commission – Yes or No?"

Submission

by

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TERMS OF REFERENCE

The Legislative Council and the House of Assembly have appointed a Joint Select Committee on the ethical conduct, standards and integrity of elected Parliamentary representatives and servants of the State with the following Terms of Reference:-

"To inquire into and report upon the issue of ethical conduct, standards and integrity of elected Parliamentary representatives and servants of the State in performing their duties with particular reference to—

(A) a review of existing mechanisms currently available to support ethical and open Government in Tasmania and the capacity to conduct independent investigations;

(B) an assessment of whether those mechanisms need to be augmented by the establishment of an Ethics Commission or by other means and if so by what means; and

(C) any matters incidental hereto."

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RECOMMENDATIONS

RECOMMENDATION 1: That the integrity tribunal be obliged to enforce the law in accordance with the democratic principle of equality before the law, and that in materially similar circumstances, the law be applied, as required, at all times, consistently and predictably against all who transgress it.

RECOMMENDATION 2: That insofar as the JSCEC may currently believe that Article 9 of the ***Bill of Rights 1689*** offers absolute privilege on the deliberations of a committee of the Tasmanian Parliament, the JSCEC might recommend that members of the parliamentary oversight committee for the integrity tribunal be liable, in the same way as are other public officials under relevant legislation, albeit only for conduct which is not honest, impartial or in the public interest and which either advantages him or herself as a member of said parliamentary oversight committee or another in the performance of those specific oversight duties, because such duties involve the administration of criminal justice.

RECOMMENDATION 3: That as integrity tribunals are required to address public sector official misconduct, political party involvement and matters arising there from may occur. Accordingly, in order that questions of real or apprehended bias are avoided as far as reasonably possible, all terms and conditions of appointment ***et al*** for integrity tribunal senior officers ought to mirror the ***Electoral Act 1992*** (Qld) Section 23 (4) which relevantly states: ***"...A person who is a member of a political party is not to be appointed as a senior electoral officer***."

RECOMMENDATION 4: That Section 7 of the ***State Service Act 2000*** (Tasmania) - State Service Principles – which states that "(1) The State Service Principles are as follows: (i) the State Service provides a fair, flexible, safe, and rewarding workplace" be amended to include "corruption-free" workplace.

RECOMMENDATION 5: That section 20 (2) of the ***Public Interest Disclosure Act 2002*** (Tasmania) –Proceedings for damages for reprisal – be amended to include "and that such action shall be reasonably funded by the Crown."

CASES CITED OR REFERRED TO

A v Hayden [1984] CLR 532;

Davies v Eli Lilly & Co [1987] 1 All ER 801

Eastern Trust Co v McKenzie, Mann & Co [1915] AC 750

Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group [2000] HCA 63

F.A.I. Ltd v Winneke (1982) 151 CLR 342;

Grant v Downs (1976) 135 CLR 674

Gouriet v Union of Post Office Workers and others [1977] 1 All ER 696

Livesey v New South Wales Bar Association [1983] 151 CLR 288

Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (1969) 1 QB 577

Ostrowski v Palmer [2004] HCA 30 (16 June 2004)

R (on the Application of Corner House Research and Others v Director of the Serious Fraud Office [2008] UKHL 60

R v Ensbey; ex parte A-G *(Qld)* [2004] QCA 335

R v Rogerson and Ors (1992) 66 ALJR 500

R v Vreones [1891] 1 QB 360

ABBREVIATIONS USED IN THIS SUBMISSION

THE AUDIT	The Rofe QC Audit of the Heiner Affair
CCC	Corruption and Crime Commission (WA)
CJC	Criminal Justice Commission (QLD)
CMC	Crime and Misconduct Commission (QLD)
ICAC	Independent Commission Against Corruption
JSCEC	Joint Select Committee on Ethical Conduct
LCAC	Standing Committee on Legal and Constitutional Affairs
PCJC	Parliamentary Criminal Justice Committee
PCMC	Parliamentary Crime and Misconduct Committee
PSME	Public Service Management and Employment
QDPP	Queensland Director of Public Prosecutions
QPOA	Queensland Professional Officers' Association
SSCPIW	Senate Select Committee on Public Interest Whistleblowing
SSCUWC	Senate Select Committee on Unresolved Whistleblower Cases

1. INTRODUCTION

1.1. In a recent public speech in April 2008 a Tasmanian politician is recorded as describing Tasmania's governance as "*Queensland of the 1970's - when cronyism, nepotism and corruption was rife*." From as far away as Queensland, the comparison may well be accurate but perhaps it is not. However, the real question I submit is how can the Parliament of a sovereign State in the Commonwealth of Australia like Tasmania ensure that in any change the principles of open and accountable government are safely secured on behalf of its people without jeopardizing other democratic values.

1.2. The implied suggestion in the April 2008 speech seems to be that Queensland is no longer in such a bad state of governance and that its current good state of governance, albeit from the distance of Tasmania, might be put down firstly to the much-needed cleansing effect of the 1987-89 Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, but secondly, and perhaps more importantly, to its standing independent "ethics" commissions, namely, the Criminal Justice Commission ["**CJC**"] and the Crime and Misconduct Commission ["**CMC**"], which began in late 1989/early 1990 and continue to this day whose roots are found in the recommendations of the 3 July 1989 Fitzgerald Inquiry Report[1].

1.3. It seems that the outcry to establish a Tasmanian ethics/integrity commission stemmed, in large part, from the recent Kons affair which involved, *inter alia*, allegations of misleading Parliament and shredding of public records. It has been driven primarily by Opposition and Independent MPs rather than by the Tasmanian Government itself, but with the recent change of Premier and his endorsement, albeit by first establishing this fact-finding inquiry, the drive now seems contagious, if not unstoppable.

1.4. Lest the Joint Select Committee on Ethical Conduct ["**JSCEC**"] believes that Queensland offers a safe template to be followed, it is respectfully submitted, out of an abundance of caution, that 21st century unicameral Queensland

[1] See Recommendation B pp372-376

ought to be closely scrutinized before the Tasmanian Parliament embraces the similar idea of a standing independent law-enforcement authority[2].

1.5. It is submitted, with all its prospective coercive powers to address official misconduct, such a body might blight the democratic process itself unless it can be truly held accountable for its actions or inactions in dealing with highly controversial political situations involving allegations of abuse of office.

1.6. A great deal may depend on the accountability checks and balances put in place to avoid the potential for unfettered abuse of power by integrity authorities such as these. This may ultimately mean accountability to an all-party joint parliamentary oversight committee but as the issues under consideration shall concern the administration of 'criminal justice', it brings with it important concomitant governance matters.

1.7. It is submitted that they impinge on Article 9 of the ***Bill of Rights 1689***, procedural fairness and justiciability of such 'criminal justice' deliberations and/or decisions normally subject to:

1.7.1. respect for the doctrine of the separation of powers;
1.7.2. due process; and
1.7.3. obligations found in the United Nations Declaration on Human Rights in respect of the Convention on Civil and Political Rights to which Australia is bound as a signatory.

1.8. In that spirit, as a Queenslander, I seek to make several points relevant to the SJCEC's Terms of Reference based on my own experience as a whistleblower who has dealt with both the CJC/CMC and their parliamentary oversight committees in the so-called "Heiner affair" [a.k.a. "**Shreddergate**"] so that my lessons may be used for the public good of Tasmanians in their quest for more open and accountable government.

[2] a.k.a. e.g. the **Crime and Ethics Commission** ["**CEC**"].

1.9. If required I would be available to provide oral evidence along with my senior counsel.

KEVIN LINDEBERG

2. BRIEF BACKGROUND

The Heiner affair

2.1. My 14 December 1990 public interest disclosure ["**PID**"] to the CJC is now publicly known as the "Heiner affair." It is now much more than my initial PID, notwithstanding its elements always had the capacity to grow to its current heights - brought about by a systemic cover-up - because the 14 December 1990 PID, having concerned (a) the willful destruction of evidence, and (b) the improper disbursement of public monies, involved:

> [a] the entire (Goss) Queensland Government and certain senior bureaucrats; and
>
> [b] others issues/principles, flowing out of that shredding-of-evidence act itself, concerning government by the rule of law, *inter alia*:
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> (i) equality before the law;
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> (ii) ignorance of the law not being an excuse for the Crown;
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> (iii) impartial law-enforcement;
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> (iv) the right to a fair trial;
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> (v) probity in office of elected and appointed public officials;
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> (vi) respect for the doctrine of the separation of powers;
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> (vii) proper public recordkeeping; and
>
> (viii) protection of children in care from abuse.

2.2. A fair coverage of the details of this affair may be found in the following:

(a) Volume Two of the August 2004 Report by the **House of Representatives Standing Committee on Legal and Constitutional Affairs** [3];

(b) Volume 17, 2005 – Upholding the Australian Constitutions – The Proceedings of **The Samuel Griffith Society** which includes an opinion of its President (the late) the Right Hon Sir Harry Gibbs GCMG, AC, KBE, former Chief Justice of the High Court of Australia[4] suggesting its *prima facie* criminality;

(c) The October 1995 Report – "*In The Public Interest Revisited*" by the **Senate Select Committee on Unresolved Whistleblower Cases**, including an opinion by Mr. Ian D F Callinan QC – recently retired Justice of the High Court of Australia;

(d) The **August 2007 Judges' Statement of Concern on the Heiner affair**; [See Attachment A] and

(e) The 9 Volumes of the **Rofe QC Audit of the Heiner affair ["the Audit"]** (which would be available under certain conditions).

2.3. At its epicenter is the *prima facie* offence of destroying of evidence known to be required for judicial proceedings. The offence is captured under section 129 of the ***Criminal Code (Qld)***.[5] The Queensland Government had been placed on notice by solicitors on 8, 14 and 15 February 1990, and two public

[3] http://www.aph.gov.au/house/committee/laca/crimeinthecommunity/report/vol2chapter2.pdf; http://www.aph.gov.au/house/committee/laca/crimeinthecommunity/report/vol2chapter3.pdf

[4] http://www.samuelgriffith.org.au/papers/html/volume17/v17chap1.html

[5] Section 129 of the **Criminal Code (Qld) – destroying evidence -** provides for: "*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 three years*." Also see section 99 of the ***Criminal Code Act*** 1924 (Tas) - **suppressing evidence** – provides for: "*Any person who, with intent to mislead any tribunal in any judicial proceeding, or to pervert or defeat the course of justice, wilfully destroys, alters, or conceals any evidence, or anything likely to be required as evidence in any judicial proceeding, is guilty of a crime*."

sector trade unions[6] on 23 February 1990, of foreshadowed judicial proceedings in which the Heiner Inquiry documents were to be the central item of evidence. The Queensland Government was specifically requested not to destroy the evidence.

2.4. The Queensland Government destroyed these public records by order of 5 March 1990 while being fully aware that they were required in evidence for foreshadowed judicial proceedings, and did so for the purpose of preventing their use as evidence. At the time, those involved **knew** that the Heiner Inquiry records contained evidence about abuse of children in the care and protection of the Crown at the John Oxley Youth Detention Centre, Wacol[7].

2.5. The (expected) writ to commence the proceedings was not lodged and served on the Government because the (would-be/known) plaintiffs were assured by the Government that the documents were secure and that it was waiting for Crown Law advice on the question of access, and when the advice arrived, the plaintiffs would be informed. That was a delaying ruse. Behind this shield of deceit, the documents were secretly destroyed on 23 March 1990 while the Queensland Government already held relevant Crown Law advice/s which it claimed to be waiting for.

2.6. The relevant Cabinet submission[8] of 5 March 1990, which is now in the public domain, records the following inculpatory information of which all members of

[6] I was a public sector trade union organiser with the Queensland Professional Officers' Association ["**QPOA**"] at the time, and personally served notice on the Queensland Government on 23 February 1990. About 10 days later, I inadvertently learnt about secret plans to destroy the evidence which I challenged. I was immediately removed from the case by the QPOA General Secretary at the Families Minister's insistence, and was subsequently dismissed over my handling of the case on the grounds that I had allegedly threatened the Minister's career and that of her senior departmental officials. No such threat was made by me other than my challenge over the shredding.

[7] See (a) Channel 9's ***Sunday*** February 1999 program "*Queensland's Secret Shame*" regarding admissions by (former) Goss Cabinet Minister the Hon (Rvd) Patrick Comben; (b) Queensland Legislative Assembly *Hansard* 24 May 2006 p932 regarding admission by (former) Goss Government Attorney-General, the Hon Deane Wells MLA during a debate to establish an inquiry into the affair; and ***The Sunday Sun*** 1 October 1989.

[8] Tabled in the Queensland Parliament on 30 July 1998 by the Queensland Premier the Hon Peter Beattie MLA during a vote-of-confidence debate.

the Cabinet (in attendance) and certain senior bureaucrats who were part of the Cabinet process were aware of before and at the time the public records were destroyed to prevent their use as evidence. At page 2, it states:

> "***URGENCY***
>
> *Speedy resolution of the matter will benefit all concerned and avert possible industrial action.*
>
> *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."* (Underlining added)

2.7. At its least, the shredding act offended what Lord Donaldson MR said in ***Davies v Eli Lilly & Co*** [1987] 1 All ER 801 has become one of the most oft-quoted descriptions of the modern common law process of civil discovery, and remains unquestionably relevant to Australian jurisprudence if respectful of "due process." Lord Donaldson MR said*: "...The right [to discovery] is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object."*

2.8. At its worst, the 'state of things' satisfied the triggering elements needed to enliven the serious offence of obstruction to the administration of justice found in ***R v Rogerson and Ors*** (1992) 66 ALJR 500 where Mason CJ at p.502 said: *"...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..." [Also see ***R v Vreones*** [1891] 1 QB 360], and of course, the offence of destroying evidence.[9]

2.9. This was conduct which might be fairly described as a full frontal attack on the administration of justice by the executive arm of government and a major contempt of the judicial arm of government in respect of (a) discovery/disclosure, and (b) the constitutional right of the court to arbitrate, free from interference and without fear or favour, on questions of law with all available evidence.

The Integrity Commission's clearance

2.10. In its 20 January 1993 clearance of any wrongdoing regarding my PID, the CJC declared that section 129 of the ***Criminal Code*** required the judicial proceeding to be on foot before it could be triggered, and as the foreshadowed/anticipated writ had not been lodged or served at the time of the shredding of the Heiner Inquiry documents, no offence could be made out.[10]

2.11. Furthermore, in a later defence before the SSCUWC in 1995, without having sought access to verify the soundness of the relevant Crown Law advice/s[11], the CJC claimed that providing the advice was properly sought and acted upon, irrespective of whether it was "wrong-at-law", official misconduct could not be established and the matter was therefore terminated. In both cases, I objected to the CJC's view of the law and due process.

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[9] See *prima facie* criminal Counts 1, 2, 3 and 4 Volume I of the Rofe QC Audit.

[10] In respect of other elements concerning my PID, the CJC misinterpreted the ***Libraries and Archives Act 1988***, the ***Financial Administration and Audit Act 1977***, and misquoted and misinterpreted ***Public Service Management and Employment Regulation 65***. The clearance was so wrong as to be contrived as the Audit sets out in its various *prima facie* criminal counts concerning certain CJC/CMC officials approval of it at relevant times.

[11] Questions of "legal professional privilege" may have been raised by the Queensland Government against any access-claim by the CJC for these advices, but argument to overcome the privilege was available in ***Grant v Downs*** (1976) 135 CLR 674; ***Waterford v Commonwealth*** (1987) 163 CLR 54; ***Attorney-General (NT) v Kearney*** (1985) 158 CLR 500; ***O'Rourke v Darbishire*** [1920] AC 581; ***Attorney-General (NT) v Maurice*** (1986) 161 CLR 475; and ***R V Cox & Railton*** (1884) 14 QBD 153.

2.12. It was later established that one advice, dated 23 January 1990, was based on an erroneous interpretation of law, while another, dated 16 February 1990, paid no heed to the Crown's "model litigant" obligations to respect due process for the other party to the foreshadowed litigation as well as aided in a serious breach of the doctrine of the separation of powers in respect of discovery/disclosure obligations pursuant to the Rules of the Supreme Court of Queensland.

2.13. A related later Crown Law advice of 18 May 1990 aided a senior bureaucrat to knowingly obstruct the administration of justice by disposing of known evidence to another person when, at law, both the departmental CEO and Crown Law knew the public servant/plaintiff enjoyed a lawful right of access to the documents under ***Public Service Management and Employment Regulation 1988*** and was known to be seeking to enjoy that right, if necessary by a court ruling. These inculpatory facts never disturbed the CJC in its view one jot.

2.14. During its 18-year life with justice has being continually thwarted inside Queensland's jurisdiction, the affair came before the Australian Senate on several occasions. In the first instance, its lessons learnt by me up to that stage were put before the 1994 Senate Select Committee on Public Interest Whistleblowing ["**SSCPIW**"] to assist in the formulation of national whistleblower legislation. It was chaired by Tasmanian Senator Jocelyn Newman. The SSCPIW unanimously recommended that the Goss Queensland Government review the matter but it declined. The Senate then established in late 1994/early 1995 the Senate Select Committee on Unresolved Whistleblower Cases ["**SSCUWC**"] chaired by (then) ALP Tasmanian Senator Shayne Murphy. The SSCUWC's description of the shredding in its report only went so far as to say that it was *"...**an exercise in poor judgement.***"

2.15. Relevantly, in his oral submission to the SSCUWC on 23 February 1995 in Brisbane, my senior counsel, Mr. Ian Callinan QC, said this on the point of destroying known evidence which is or may be required in judicial proceedings:

> *"...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 conduct of the greatest seriousness - and much more serious, might I suggest, if done by a government."*[12]

2.16. Mr. Callinan later advised the SSCUWC on 7 August 1995 in a special submission that it was open to conclude that all the members of the Goss Cabinet may have been in *prima facie* breach of section 129 of the ***Criminal Code (Qld)***, or, in the alternative, section 132 of the ***Criminal Code (Qld)*** – conspiracy to defeat justice. He went on the advise that the CJC's 'strict narrow' interpretation of "judicial proceedings" – as in the Heiner affair and pursuant to section 119 of the ***Criminal Code (Qld)*** – was too significant to ignore.

2.17. The CJC ignored his expert advice and concern. It continued to declare that it was perfectly lawful for the Crown to destroy all known evidence up to the moment of the expected judicial proceedings being commenced.

2.18. Notwithstanding other elements of *prima facie* criminality which are set out in the Audit *in extenso*, it is submitted that these two flawed claims by the CJC, and held to for years until utterly exposed in ***R v Ensbey; ex parte A-G (Qld)*** [2004] QCA 335 of 17 September 2004 (see later on), give rise to questions of the gravest seriousness for the JSCEC to consider.

2.19. Such an examination is strongly recommended otherwise the immense havoc this "rogue" Queensland integrity tribunal has wreaked on a so-called modern 21st century system of (unicameral) government within the Commonwealth of Australia despite its checks and balances in "post-Fitzgerald Queensland", and

[12] Senate SSCUWC *Hansard* 23 February 1995 p3

also on the integrity of the two highest Federal Offices in the Commonwealth, namely the Office of the Prime Minister and (prospectively) the Office of the Governor-General[13], may go unknown in the desire to adopt it as a template for Tasmania which may place any hopes for success in doubt.

What the law says

Section 129 of the *Criminal Code (Qld)*

2.20. The CJC, as Queensland's premier law-enforcement authority, claimed that as section 129 of the ***Criminal Code (Qld)*** had not been judicially ruled on, it was open to a range of interpretations without giving rise to a suspicion of dishonesty on its part, and particularly on those lawyers who arrived at the (flawed) view, or on those who subsequently accepted it as sound. Despite its interpretation being constantly challenged by me, and other respected senior counsel, it was satisfied with its interpretation. The fact that it cleared the entire (Goss) Queensland Cabinet and certain senior bureaucrats of serious criminality was purportedly neither here nor there.

2.21. It made this claim despite the High Court's July 1992 binding ruling in ***Rogerson*** that an offence may be committed against the administration of justice before curial proceeding commence. In fact, case law existed back as far as 1891 in ***Vreones*** [1891] 1 QB 360 affirming this point of law, as well as others in between in ***R v Sharp*** (11) (1938) 1 All ER 48; ***R v Selvage and Anor*** [1982] 1 All ER 96; ***The Queen v Murphy*** (1985) 158 C.L.R. 596.

2.22. In an opinion on section 129 in 2003, former Appeal and Supreme Court Justice the Hon James Thomas AM advised the University of Queensland School of Journalism newspaper, ***The Weekend Independent***, that while many laws were arguable, section 129 was not because it plainly connoted "futurity."

2.23. In 2003, Queensland law-enforcement authorities charged and later successfully prosecuted in 2004 a Baptist pastor under section 129 of the

[13] See ***The Sunday Telegraph*** 10 August 2008 p94 Piers Akerman "*Heiner affair casts doubt on Bryce*."

Criminal Code (Qld) for materially similar shredding conduct. In fact, the incriminating circumstances were less clear in the pastor's case, in terms of "a state of knowledge", than in the Heiner affair. **Importantly, section 129 was applied as the CJC claimed it could not be**.

2.24. The pastor attempted to destroy the 'evidence'[14] some 6 years **before** the relevant judicial proceedings commenced. After being found guilty, the DPP and Queensland Attorney-General appealed the leniency of the sentence because of the seriousness of the crime against the administration of justice and sought to have him jailed as a deterrent to others who might seek to act likewise.

2.25. Before the matter was sent to trial in the District Court, counsel for the accused made an application to the DPP[15] to have their client relieved of the charge under section 129 due to its earlier application in the Heiner affair when it was deemed to need judicial proceedings being on foot before it could triggered. The application was rejected. The DPP stating that section 129 plainly connoted "futurity", citing ***Rogerson***, and that it was in the public interest to prosecute their client.

2.26. At the Appeal, while neither the Crown nor counsel for the pastor took issue concerning the interpretation of section 129 used to convict, the Appeal Court unanimously ruled on it to demonstrate its clarity. For example, His Honour Davies JA in ***R v Ensbey*** relevantly said:

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[14] The pastor guillotined into strips some three pages of a girl's diary in which she recount an improper relationship with an adult, both of whom were parishioners in his church. He posted the strips back to the girl's parents. Some 5 years later the girl went to the police with a complaint against the adult who, when challenged, admitted his guilt and was summarily dealt with by the court. The guillotined strips were not probative in the court case but the police subsequently charged the pastor over his earlier shredding conduct because it was an attempt to obstruct justice in respect of a future court action when he ought to have reasonably known was a "realistic possibility."

[15] In November 1995 and on 6 January 1997 the (then) DPP, Mr Royce Miller QC, had endorsed the CJC's (erroneous) interpretation as being correct in the Heiner affair, but his successor, Ms Leanne Clare, rejected his interpretation which was subsequently unanimously confirmed in the Queensland Court of Appeal in September 2004, as it was in the Queensland District Court by the sentencing judge, His Honour Judge Samios.

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

2.27. His Honour Justice Jerrard demonstrated its clarity even more emphatically by referring to the wording in the offence of perjury in the sister provision of section 123 of the ***Criminal Code (Qld)*** which plainly stated that it was an offence to lie ...*to institute a judicial proceedings*." On the plain reading of **Chapter 16 of Offences Against the Administration of Justice** in the ***Criminal Code (Qld)*** Justice Jerrard demonstrated that the definition of "judicial proceedings" under section 119, had to include a judicial proceedings not yet on foot but one within the contemplation (as a realistic possibility) or real knowledge of the doer [i.e. the shredder or/and the perjurer] and as consistency in application of definitions had to apply, "judicial proceedings" could not be fettered in section 129, when it was unfettered in section 123.

2.28. It is submitted however that the CJC's interpretation section 129 was simply untenable and not honestly open to the CJC's view. If its triggering depended on whether the particular judicial proceedings was on foot, the CJC was declaring that all the elements of the offence could be present, that is, a party, including the Crown, in possession of known or suspected evidence, after being placed on notice by solicitors or anyone of impending/foreshadowed judicial proceedings in which those (held/controlled) documents were to be the central item of evidence, could immediately destroy them for the specific purpose of preventing their use in those expected proceedings just so long as the expected writ had not been lodged and served. Not only would such (so-called) legal conduct introduce and encourage "a world without evidence", it would have crippled the sister provisions in the ***Criminal Code (Qld)*** of attempting to defeat justice and/or

conspiracy to defeat justice, because the shredder could point positively to section 129 as an exculpatory umbrella to such willful destruction-of-evidence conduct done by anyone, including even sworn officers of the court.

2.29. The CJC's interpretation, in simple terms, turned section 129 on its head. It encouraged the destruction of evidence instead of prohibiting it. It would have turned every lawyer into a potential co-conspirator (presumably with clients) against the administration of justice with impunity. It is open to suggest that the drafter of the ***Code***, Sir Samuel Griffith, one of Australia's greatest jurists, would have been horrified at such a perversion of section 129's purpose.

2.30. It is little wonder why Mr. Callinan warned the Senate (and by their presence, also the CJC and the Queensland Government) at the SSCUWC Brisbane hearing on 23 February 1995 that the CJC's 'strict narrow' interpretation of "judicial proceedings" was too significant to ignore, but ignore it they did, to their own *prima facie* corrupt advantage as well as to others, such as the 5 March 1990 Goss Cabinet and certain senior bureaucrats.

Ignorance of the law

Acting on erroneous Crown Law advice

2.31. It is submitted that the proposition advanced by the CJC that so long as the Queensland Government sought advice and acted on it, irrespective of its erroneous "at law" status, exculpated those involved in the illegal shredding act because the CJC could not overcome the absence of suspected official misconduct [i.e. a lack of honesty, impartiality and public interest] warrants outright rejection. It profoundly undermines government by the rule of law, and permits the Crown and its employees to claim ignorance of the law as an excuse. Such a proposition places government above the law.

2.32. In ***Eastern Trust Co v McKenzie, Mann & Co*** [1915] AC 750 at 759 the Privy Council said: "…*It is the duty of the Crown and of every branch of the Executive to abide by and obey the law … it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it*."

Any notion that the Crown may be excused for breaches of the law through ignorance, especially the criminal law, strikes at the very heart of democracy when such an excuse is not available to "the governed." Acting on erroneous advice which breaches the criminal law may go to mitigation in sentencing, but it would be contrary to the public interest and maintaining confidence in government and the administration of justice were it to be used as an excuse for not prosecuting public officials (elected or appointed) just because they could point to advice from Crown Law.

2.33. Furthermore, the application of the prosecutorial discretion to advantage the executive arm of government is proscribed in the public guidelines applied by Directors of Public Prosecution ["**DPP**"] throughout the Commonwealth of Australia. It is therefore submitted that the discretion to investigate/review exercised by integrity tribunals concerning potential 'criminal justice' issues in the public sector ought not be in discord with the DPP's otherwise it invites the application of the law by double standards. It is submitted that the Heiner affair is an exemplar par excellence of double standards at work.

2.34. In ***Ostrowski v Palmer*** [2004] HCA 30 (16 June 2004), Callinan and Heydon JJ, concerning a matter of ignorance of the law involving a Western Australian crayfisherman who acted on advice provided by the Western Australian Government Fisheries Department, relevantly said this *"…A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it…*"

2.35. McHugh J in ***Ostrowski*** said at 52 *"…If a defendant knows all the relevant facts that constitute the offence and acts on erroneous advice as to the legal effect of those facts, the defendant, like the adviser, has been mistaken as to the law, not the facts."* ; and at 41*: "…At common law, and in my opinion under the* ***Criminal Code****, once the prosecution proves in relation to a strict liability offence that the defendant knew the facts that constitute the actus reus of the offence, that is, all the facts constituting the ingredients necessary to make the act criminal, the defendant cannot escape criminal responsibility by contending that he or she did not understand the legal consequences of*

those facts."; and at 59 said: *"…for the purposes of s 24 of the* ***Criminal Code****, it is irrelevant whether the mistake of law is induced by incorrect information obtained from an official government body or from any other third party or is induced by any other form of mistaken factual understanding. Thus, in any situation where a person's mistaken belief as to the legality of an activity is based on mistaken advice, that person would not have a defence under s 24. To find otherwise would expand the scope of the defence in s 24 to an unacceptable extent. It would also undermine the principle that ignorance of the law is no excuse."*

An absence of good faith and transparency

2.36. In this matter, it is beyond doubt that the Queensland Government did not act in an open and transparent manner at any stage. Deception pervaded its every move. If it genuinely believed that it was lawful to destroy evidence before an expected judicial proceedings commenced, it ought to have informed the other party of its intentions instead of pretending otherwise. On 19 March 1990, the Queensland Government wrote to the plaintiff's solicitors indicating that it was **still waiting** for Crown Law advice when it had already decided to destroy the evidence on 5 March 1990 to prevent its use in the foreshadowed judicial proceedings.

2.37. In the leading English case of ***Attorney-General v. Times Newspaper Ltd.*** [1973] 2 All ER 54 concerning unhindered access to court, Lord Diplock stated: "...*The due administration of justice requires first that all citizens have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly, that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to*

undermine the public confidence that they will be observed is contempt of court."

2.38. At each stage the Queensland Government knew the facts and what it intended to do. The (triggering) facts of section 129 of the ***Criminal Code (Qld)*** are admitted and therefore any exculpation of the crime cannot rely on "mistake of fact."

2.39. Behind the scenes, the Queensland Government sought urgent approval on 23 February 1990 from the State Archivist to dispose of the Heiner Inquiry records on the known false pretext, as set out in a letter from the Cabinet Secretary to the State Archivist, that they were ***"....no longer required or pertinent to the public record***" when Cabinet was aware that these public records were being sought by solicitors to access at the time, to be achieved either out of court or by court ruling. The State Archivist approved their destruction on the same day.[16]

Unacceptable silence

2.40. The State Archivist was later confronted directly by the would-be plaintiff on or about 16 May 1990 concerning the existence of the (Heiner Inquiry) documents and their requirement as evidence in court. She refused to confirm that she had authorized their destruction on 23 February and aided in their destruction on 23 March 1990 by supplying a senior archivist to shred them.

2.41. On the (recorded) urging to say nothing by a Families Department senior official who himself was aware of their legal status and who had himself supervised the secret shredding on 23 March 1990 with the senior archivist, the State Archivist remained silent for the rest of her career while her professional colleagues throughout the world went into uproar.

2.42. In a guideline produced by the State Archivist - ***Queensland State Archives Disposal Authority Form (QSA-TS-026****) - inter alia* it set out the scope of a legal disposal of public records under section 55 of the ***Libraries and***

[16] See *prima facie* criminal Counts 24, 25 and 26 Volume III of the Rofe QC Audit.

Archives Act 1988*.** It relevantly stated that: Public records must not be disposed of if they are required: (i) for any civil or criminal court action which involves or may involve the State of Queensland or any agency of the State; or (ii) because the public records may be obtained by a party to litigation under the relevant **Rules of Court**, whether or not the State is a party to that litigation; or (iii) pursuant to the ***Evidence Act 1977. [Underlining added]

2.43. Notwithstanding it is currently unknown what may have transpired in telephone conversations between the State Archivist and the Cabinet Secretary, it is beyond doubt that this appraisal process was both abused and unlawfully applied. In respect of the CJC's conduct, it never interviewed the State Archivist at any stage in this matter.

2.44. In the meanwhile, the CJC publicly misstated an archivist's statutory role by claiming before the SSCUWC on 23 February 1995, that the sole business of a State archivist was to determine the "historical" value/status of a document under sentence while its "legal" value/status rested elsewhere. This view flew in the face of its own proper understanding of the State Archivist's role as earlier put in a CJC submission [Number 13] on 26 November 1991 to the **Electoral and Administrative Review Commission** when formulating "Archives Legislation."

2.45. As stated, the CJC's misinterpretation of the ***Libraries and Archives Act 1988*** and misrepresentation of an archivist's role in a democracy outraged the international community of archivists, turning this affair into one of the 14 great shredding scandals of the 20th century which is now taught in universities throughout the world[17]. To reiterate, throughout this unprecedented furore, the State Archivist remained silent permitting her role

[17] US published academic book "**Archives and the Public Good - Accountability and Records in Modern Society**" Edited by Professor Richard Cox (University of Pittsburgh) and Assistant Professor David Wallace (Michigan University). First published in 2002; "**Archives: Recordkeeping in Society**" Charles Sturt University. 2005. Editors Professor Sue McKemmish, Michael Piggott, Barbara Reed and Frank Upward.

to be unrelentingly abused by the CJC as it pertained solely to the Heiner affair.

2.46. There are other aspects to this affair set out in the Audit which shall not be covered in this submission due to time constraints, and in an effort to be brief. The following recommendations find their basis in the unethical and *prima facie* criminal conduct engaged in by certain public officials, not all CJC/CMC officials, to keep a lid on this sordid affair. The Audit is currently under investigation by the Parliamentary Crime and Misconduct Committee ["**PCMC**"] and therefore it may be wise to wait on its findings insofar as this submission stands now.

3. ISSUES OF ACCOUNTABILTY FOR INTEGRITY TRIBUNALS

3.1. While it is suggested that what is occurring in Queensland regarding the PCMC concerning my 14 February 2008 application for review under the ***Crime and Misconduct Act 2001*** may prove to be a national litmus test of accountability between the Parliament and these 21st century independent watchdog tribunals which operate in various jurisdictions throughout the Commonwealth of Australia, a number of concerns have arisen which the JSCEC might wish to consider if it decides that Tasmania should go the way of Queensland, New South Wales and Western Australia, and the Commonwealth and establish a similar integrity tribunal.

3.2. I shall speak briefly to the following recommendations:

RECOMMENDATION 1: That the integrity tribunal be obliged to enforce the law in accordance with the democratic principle of equality before the law, and that in materially similar circumstances, the law be applied, as required, at all times, consistently and predictably against all who transgress it.

3.3. It is submitted that the definition of "official misconduct" [i.e. an act by a public official which is not honest, impartial or in the public interest] whose eradication shall form the basis for creating an integrity tribunal in Tasmania,

ought not be used as a shield to prosecute any public official because it would tend to undermine government by the rule of law, in particular the democratic principle of equality before the law whereby it may permit as an excuse ignorance of the law for a public official when, in materially similar circumstances, such an excuse is not available to a citizen when investigated by the police.[18]

RECOMMENDATION 2: That insofar as the JSCEC may currently believe that Article 9 of the *Bill of Rights 1689* offers absolute privilege on the deliberations of a committee of the Tasmanian Parliament, the JSCEC might recommend that members of the parliamentary oversight committee for the integrity tribunal be liable, in the same way as are other public officials under relevant legislation, albeit only for conduct which is not honest, impartial or in the public interest and which either advantages him or herself as a member of said parliamentary oversight committee or another in the performance of those specific oversight duties, because such duties involve the administration of criminal justice.

3.4. This recommendation will be doubtless highly contentious and may not be welcome or possible without undermining the supremacy of Parliament within Tasmania's bicameral democratic system of government. It touches on matters of justiciability which are normally open in a democratic society in respect of the administration of 'criminal justice.'

3.5. The parliamentary oversight committee, with the (recommended) assistance of a legally qualified Parliamentary Commissioner and/or Inspector (as operates in Queensland and Western Australia respectively), shall undoubtedly have the authority to order the review of a matter which it may consider warrants being done after the integrity tribunal has made its

[18] ***Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group*** [2000] HCA 63 (7 December 2000); ***Patrick Stevedores Operations No. 2 Pty Ltd & Ors v Maritime Union of Australia & Ors*** [1998] 397 FCA; ***Valente v. Her Majesty the Queen*** [1985] 2 S.C.R. 673; ***Clunies-Ross v The Commonwealth*** (1984) 155 CLR 193; and ***Gouriet v Union of Post Office Workers and others*** [1977] 1 All ER 696.

decision. However, as found in the Heiner affair, the issue may be highly political in character because of the alleged wrongdoers involved, and any adverse findings may have very significant party-political or government-of-the-day consequences.

3.6. Dealing specifically with 'criminal justice" principles here, it is the undoubted right of either the complainant or the accused, in a free society, to have an impartial decision-maker[19], and where that decision-maker, as under the ***Crime and Misconduct Act 2001***, may abuse his/her by improperly advantaging another or him/herself, punishment may properly occur for said abuse. Indeed, government by the rule of law may demand it.

3.7. The introduction of an integrity tribunal held accountable to Parliament on behalf of the people by an all-party parliamentary oversight committee will fail if party-political considerations [i.e. bias/lack of impartiality] prevail over the obligation to be honest in deliberations no matter how politically unpalatable the outcome may be.

3.8. In the current on-going deliberations on my legal team's documents lodged on 14 February 2008 with the PCMC, all but one member of the PCMC has previously voted one way or the other on the floor of the Queensland Legislative Assembly in respect of establishing a public inquiry into the Heiner affair. In short, they have already displayed their attitude towards this matter[20], albeit where political bias is expected and accepted, but which, in the interests of truth and government by the rule of law, ought especially play no part in the PCMC's deliberations. This potentially presents a troubling situation where double standards may be acceptable.

3.9. Consequently, to ensure integrity, if a decision is made on party-political considerations inside the PCMC to knowingly thwart the ends of justice, ought such a decision be or remain non-justiciable just because of Article 9 of the

[19] See ***Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*** (1969) 1 QB 577 at p599; ***Livesey v New South Wales Bar Association*** [1983] 151 CLR 288 at 294-294; ***Vakauta v Kelly*** (1989) 167 CLR 568 F.C. 89/040; and ***Reg. v. Watson; Ex parte Armstrong*** (1976) 136 CLR 248, at pp 258-263.

[20] It is nevertheless fair to say that neither the Rofe QC Audit nor the August 2007 Judges' Statement of Concern were not in existence at the time of the last vote in May 2006.

Bill of Rights 1689, when, if made by the executive or judicial arms of government it would not only be rightly justiciable and reviewable, but such obstructionist conduct may be punishable at law being captured, *inter alia*, by section 87 of the ***Criminal Code (Qld)*** as "official corruption" or the relevant provision of the ***Crime and Misconduct Act 2001***.

3.10. It is submitted that if 21st century governance of public administration is to accept these watchdog tribunals which see members of the legislative arm of government [i.e. law-makers] involving themselves in 'criminal justice' decision-making, then Article 9 of the ***Bill of Rights 1689***, enacted over 400 years ago, needs modernizing as suggested.

RECOMMENDATION 3: That as integrity tribunals are required to address public sector official misconduct, political party involvement and matters arising there from may occur. Accordingly, in order that questions of real or apprehended bias are avoided as far as reasonably possible, all terms and conditions of appointment *et al* for integrity tribunal senior officers ought to mirror the *Electoral Act 1992* (Qld) Section 23 (4) which relevantly states: *"...A person who is a member of a political party is not to be appointed as a senior electoral officer*."

3.11. It is submitted that the CJC officials who initially provided the deeply flawed clearance regarding my PID, i.e. Messrs Michael Allen Barnes[21] and Noel Francis Nunan[22], were politically compromised from the outset because of

[21] Now Queensland's State Coroner and Magistrate. Mr Barnes was a personal friend of Mr Nunan's. He was recommended to review certain cases by contract – i.e. a pro-tempore CJC official under the ***Criminal Justice Act 1989*** - one of which was mine and which happened to be allocated to Mr. Nunan according to Mr Barnes "*...purely by chance*." When I later discovered Mr. Nunan's close involvement as an activist in the ALP and former working associate with Mr Wayne Goss at the Caxton Street Legal Service and protested, I was publicly accused of "McCarthyism" by Mr. Barnes in an official February 1995 CJC Report to the SSCUWC. Also see *prima facie* criminal Count 30 Volume III of the Rofe QC Audit.

[22] Mr. Nunan after providing a clearance for the Goss Government on 20 January 1993 was elevated to the Magistrate's Bench in 1994 where he still serves. It is submitted that his close association ought to have been declared to me before he reviewed my PID in August 1992. It was arguably sufficient at law to cause him to disqualify himself in order to protect the integrity of the decision-making process. [See ***Livesey v New South Wales Bar Association*** [1983] 151 CLR 288 at 294-294; ***Vakauta v Kelly*** (1989) 167 CLR 568 F.C. 89/040; and ***Reg. v. Watson; Ex parte Armstrong*** (1976) 136 CLR 248, at pp 258-263.] In

their known associations with either the Queensland Association of Labor Lawyers or the Australian Labor Party ["**ALP**"] respectively. Neither declared these associations to me.

3.12. It is submitted that given the strong possibility that PIDs may involve party political allegations of wrongdoing, or impinge on party-political and/or governmental considerations touching on Ministers of the Crown, it is critically important that all questions of potential bias be avoided. Just as our democracy has seen fit to discriminate against party-political activists in electoral matters, it is suggested that corruption in government, which may lead to tyranny and a denial of basic rights, ought to demand a similar discrimination on those who wish to serve in these high-powered integrity tribunals so that the law is upheld by them without fear or favour.

RECOMMENDATION 4: That Section 7 of the *State Service Act 2000* (Tas) - State Service Principles – which states that "(1) The State Service Principles are as follows: (i) the State Service provides a fair, flexible, safe, and rewarding workplace" be amended to include "corruption-free" workplace.

3.13. It is submitted that a "corruption-free workplace" guarantee ought to be legislated as an industrial/human right for Crown employees because it underpins good governance principles within the Commonwealth of Australia. It ought to be adopted within all Australian jurisdictions under the *Constitution*. This recommendation may find further authority and justification in Australia's international obligations under the UN Human Rights International *Convention on Civil and Political Rights*.

3.14. The idea that the "Crown" must legislate for whistleblowers to protect such employees (or a citizen as the case may be in certain circumstances) from

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September 1993, I received an unsolicited phone call from him in which he repeated called me "*a pathetic bastard*" and threatened to sue me for defamation if I persisted in claiming that he was not impartial in performing his review task. The CJC subsequently dismissed my complaint over this "threatening-a-witness" phone call declaring it a private matter and that he was never "*…a CJC officer*." Also see *prima facie* Count 34 Volume IV of the Rofe QC Audit.

reprisal as a consequence of making a PID appears illogical, if not even bizarre. It is open to be seen as a glaring reason why there is so much public disillusionment in government because at its core and motivation a PID may be reasonably described as "**a non-violent act of disclosure to enforce and/or ensure compliance with the law by the Crown**" and any whistleblower ought, by a matter of natural function of government, be guaranteed protection just as police officers or soldiers normally are in carrying out their sworn duties honestly and lawfully.

3.15. Its perplexing aspect is that there is a binding duty in a society governed by the rule of law - well founded in case law[23] - on the Crown and every branch of the Executive to always comply with the law, and therefore, for any government to provide such a visible sign of addressing an apparent 'non-protection deficiency' by the introduction whistleblower protection legislation, the Crown/government itself is confirming that any reprisal might be otherwise carried out against a whistleblower with impunity, even by the Crown itself against one of its own employees who was only trying to ensure, by honouring his/her public duty, that the Crown behaved as the law requires and the people expect it to.

3.16. It is submitted that if a public official is forced to blow the whistle to rectify a breach of the law or certain conduct which may be placing public safety in jeopardy, it must arguably give rise to a breach of contract of employment on the part of the Crown, and consequently such breach ought to be open to remedy in the courts at the Crown's expense.

RECOMMENDATION 5: The section 20 (2) of the *Public Interest Disclosure Act 2002* (Tas) –Proceedings for damages for reprisal – be amended to include "and that such action shall be reasonably funded by the Crown."

[23] See ***A v Hayden*** [1984] CLR 532; ***F.A.I. Ltd v Winneke*** (1982) 151 CLR 342; and ***R (on the Application of Corner House Research and Others0 v Director of the Serious Fraud Office*** [2008] UKHL 60

3.17. It is submitted that as the Tasmanian Parliament has already wisely recognized the right of an "accredited" whistleblower to take an action in damages against any person who causes a detriment against him/her due to the PID, it ought to take the next logical step and fund it.

3.18. This new right would find its moral authority in the aforesaid suggested amendment to the section 7 of the ***State Service Act 2002.*** **[See Recommendation 4]**

3.19. Given the legislative framework already in place, it is submitted that the allocation of sufficient taxpayers funds be authorized by a special sub-committee under the ***Ombudsman Act 1978*** – by appropriate amended to said Act - chaired by an independent retired judicial officer, supported by four other respected members of the community, including the Ombudsman him/herself.

3.20. The sub-committee would not involve itself in the running of the case as it may breach the doctrine of the separation of powers, being in some instances action against the State of Tasmania itself for breach of contract. The sub-committee would be obliged to be accountable to Parliament under the umbrella of the ***Ombudsman Act 1978*** through an annual report and appearances before relevant Estimates hearings.

Kevin Lindeberg
11 Riley Drive
CAPALABA QLD 4157
18 August 2008

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ATTACHMENT A

The Hon Peter Beattie MLA
Queensland Premier
Executive Building
80 George Street
BRISBANE QLD 4000

Dear Premier

THE HEINER AFFAIR - A MATTER OF CONCERN

We, the undersigned legal practitioners formerly on the Bench, currently at the Bar or in legal practice, seek to re-affirm our sworn duty to uphold the rule of law throughout the Commonwealth of Australia and to indicate our deep concern about its undermining as the unresolved Heiner affair reveals.

We believe that it is the democratic right of every Australian to expect that the criminal law shall be applied consistently, predictably and equally by law-enforcement authorities throughout the Commonwealth of Australia in materially similar circumstances. We believe that any action by Executive Government which may have breached the law ought not be immune from criminal prosecution where and when the evidence satisfies the relevant provision.

To do otherwise, we suggest would undermine the rule of law and confidence in government. It would tend to place Executive Government above the law.

At issue is the order by the Queensland Cabinet of 5 March 1990 to destroy the Heiner Inquiry documents to prevent their use as evidence in an anticipated judicial proceeding, made worse because the Queensland Government knew the evidence concerned abuse of children in a State youth detention centre, including the alleged unresolved pack rape of an indigenous female child by other male inmates.

The affair exposes an unacceptable application of the criminal law by *prima facie* double standards by Queensland law-enforcement authorities in initiating a successful proceedings against an Australian citizen, namely Mr. Douglas Ensbey, but not against members of the Executive Government and certain civil servants for similar destruction-of-evidence conduct. Compelling evidence suggests that the erroneous interpretation of section 129 of the *Criminal Code* (Qld) used by those authorities to justify the shredding of the Heiner Inquiry documents may have knowingly advantaged Executive Government and certain civil servants.

This serious inconsistency in the administration of Queensland's *Criminal Code* touching on the fundamental principle of respect for the administration of justice by proper preservation of evidence concerns us because this principle is found in all jurisdictions within in the Commonwealth as it sustains the rule of law generally.

The Queensland Court of Appeal's binding September 2004 interpretation of section 129 in *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 exposed the erroneous interpretation that the (anticipated/imminent) judicial proceeding had to be on foot before section 129 could be triggered.

We are acquainted with the affair* and specifically note, and concur with, (the late) the Right Honourable Sir Harry Gibbs GCMG, AC, KBE, as President of *The Samuel Griffith Society*, who advised that the reported facts represent, at least, a *prima facie* offence under section 129 of the *Criminal Code* (Qld) concerning destruction of evidence.

In respect of the erroneous interpretation of section 129 adopted by Queensland authorities, we also concur with the earlier 2003 opinion of former Queensland Supreme and Appeal Court Justice, the Hon James Thomas AM, that while many laws are indeed arguable, section 129 was never open to that interpretation.

Section 129 of the *Criminal Code* (Qld) – destruction of evidence – provides that:

> *"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 three years."* (Underlining added).

It concerns us that such an erroneous view of section 129 was persisted with for well over a decade despite the complainant, supported by eminent lawyers, pointing out the gravity of their error consistently since 1990 when knowing its wording and intent were so unambiguous, with authoritative case law available for citing dating back as far as 1891 in *R v Vreones.*

Evidence adduced also reveals that the Queensland Government and Office of Crown Law ***knew***, at the time, that the records would be discoverable under the Rules of the Supreme Court of Queensland once the expected writ/plaint was filed or served. With this knowledge, the Queensland Government ordered the destruction of these public records before the expected writ/plaint was filed or served to prevent their use as evidence.

Such scandalizing of these disclosure/discovery Rules by the Executive also concerns us. So fundamentally important is respect for these Rules that the Judiciary's independent constitutional functionality depends on it.

Under the circumstances, we suggest that any claim of "staleness" or "lack of public interest" which may be mounted now by Queensland authorities not to revisit this matter ought to fail. Neither the facts, the law nor the public interest offer support in that regard. However, should such a claim be mounted, we suggest that it would tend to be self-serving and undermine public confidence in the administration of justice and in government itself knowing that the 2004 *Ensbey* conviction, taken by the same Queensland Crown, did not occur until some 9 years ***after*** the relevant destruction-of-evidence incident.

This affair encompasses all the essential democratic ideals. The right to a fair trial without interference by government and the right to impartial law-enforcement, to say nothing of respecting the rule of law itself rest at its core. Respecting the doctrine of the separation of powers and our constitutional monarchy system of democratic government are involved.

We believe that the issues at stake are too compelling to ignore.

We suggest that if the Heiner affair remains in its current unresolved state, it would give reasonable cause for ordinary citizens, especially Queenslanders, to believe that there is one law for them, and another for Executive Government and civil servants.

We find such a prospect unacceptable.

We urge the Queensland Government to appoint an independent Special Prosecutor as recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its August 2004 Report (Volume Two - Recommendation 3) following its investigation into the affair as part of its national inquiry into "*Crime in the community: victims, offenders and fear of crime*".

Such an independent transparent process we believe will restore public confidence in the administration of justice throughout the Commonwealth of Australia, more especially in Queensland.

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The Hon Jack Lee AO QC – Retired Chief Judge at Common Law Supreme Court of New South Wales

……..

Dr Frank McGrath – Retired Chief Judge Compensation Court of New South Wales

…….

Alastair MacAdam, Senior Lecturer, Law Faculty, QUT Brisbane, and Barrister-at-law

……..

The Hon R P Meagher QC - Retired Justice of the Supreme and Appeal Court of New South Wales

……

The Hon Barry O'Keefe AM QC, Retired Justice of the Supreme Court of NSW, former ICAC Commissioner

……

Mr Alex Shand QC

…….

The Hon David K Malcolm AC CitWA, former Chief Justice of Western Australia

CC: Her Excellency the Honourable Quentin Bryce AC, Governor of Queensland
The Hon Lawrence Springborg MLA, Leader of the Queensland Opposition
The Hon Paul de Jersey AC, Chief Justice of the Supreme Court of Queensland
The President, Queensland Bar Association
The President, Queensland Law Society

* (For details see Mr. Kevin Lindeberg's article recently published in Volume 17 of *The Samuel Griffith Society's* book "*Upholding the Australian Constitution.*" http://www.samuelgriffith.org.au/papers/html/volume17/v17contents.htm)

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