Parliament of Australia
House of Representatives

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO HARMONISING LEGAL SYSTEMS RELATING TO TRADE AND COMMERCE

SUPPLEMENTARY SUBMISSION

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TERMS OF REFERENCE

To inquire and report on lack of harmonisation within Australia's legal system, and between the legal systems of Australia and New Zealand, with particular reference to those differences that have an impact on trade and commerce. In conducting the inquiry, the Committee will focus on ways of reducing costs and duplication. Particular areas the Committee may examine to determine if more efficient uniform approaches can be developed, include but are not limited to:

- Statute of limitations
- Legal procedures
- Partnership laws
- Service of legal proceedings
- Evidence law
- Standards of products
- Legal obstacles to greater federal/state and Australia/New Zealand cooperation.

CASE LAW AND LAWS CITED

Anton Piller Kg v Manufacturing Processes Ltd [1976] 2 WLR 162

Antoun v The Queen; Antoun v The Queen [2006] HCA 2 (8 February 2006)

A v Hayden (1984) CLR 532

Boucher v The Queen (1954) 110 CCC 263 at p270:

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 at 4

Johnson v Johnson (2000) 201 CLR 488

Livesey v. New South Wales Bar Association (1983) 151 CLR 288

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

Patrick Stevedores Operations No. 2 Pty Ltd & Ors v Maritime Union of Australia & Ors [1998] 397 FCA (23 April 1998)

R v Ensbey; ex parte A-G (Qld) [2004] QCA 335 on 17 September 2004

R v Rogerson and Ors (1992) 66 ALJR 500

R v Selvage and Anor [1982] 1 All ER 96

R v Vrones [1891] 1 QB 360

Vakauta v Kelly (1989) 167 CLR 568 at 571

Watson ((92) (1976) 136 CLR at 262-263

Yousif v Salama [1980] 3 All ER 405

Criminal Code (Qld)

Crime and Misconduct Act 2001

Trade Practices Act 1974

"...Laws that are harsh or unfair or that are administered capriciously, engender disrespect for the law and this in turn depreciates the ability to protect the rights of individuals in providing a civil and tolerable society. A servant of the administration of the law is, I believe, the most important call there is in our society. Not all law is good or fair but all laws are better if administered by good and fair people."

Thomas Paine, in his 1791-92 pamphlet on "***The Rights of Man***."

RECOMMENDATION

That within the jurisdictional and lawful limitations applicable to each government authority and without interfering with their respective independence, harmony should be sought and exist within Australian systems of criminal justice as to the practical meaning of "the public interest", both in respect of the discretion to prosecute in individual cases and elsewhere, and should be universally applied in accordance with the desirable democratic features inherent in a criminal justice system of consistency, predictability and equality in order to maintain public confidence in our system of justice.

1. INTRODUCTION

1.1 Since finalizing my submission on 7 July 2005, new evidence has come to hand which I feel duty bound to disclose lest it be suggested or thought that I have been selective in what I put before the Committee. This duty, to be open and truthful, is particularly acute because the issue used to carry my arguments forward in addressing the Committee's terms of reference, the so-called Heiner affair, is a gravely serious matter both for the individuals adversely caught up in it, and for others who believe in the rule of law and constitutional government and who find themselves, by dint of their public office, made aware of the affair's elements and may be required to pass some judgement on it by law or public duty.

1.2 Civil society expects its laws to be clear in their wording and unambiguous in their meaning. In that regard, elected law-makers owe the community a duty to draft laws in a most diligent and careful manner. Laws ought to remedy mischief, not create it. Equally, laws ought to be applied and interpreted consistently, predictably, impartially and equally, and law-

enforcement authorities owe the community that high duty if public confidence in the administration of justice is to be maintained and not eroded.

1.3 The safeguard to this important area concerning the administration of justice - which may see a citizen, by force of law through the power of the State lose either his liberty or property - is the doctrine of the separation of powers. It provides for checks and balances on our system of government, and, by *Constitutional* authority, establishes lines of jurisdiction which must not be crossed by any arm of government for fear that it may be acting capriciously, or worse, willfully, beyond its powers and unconstitutionally. When power knows no limits, rights have no meaning, and disharmony must follow.

1.4 Denning M.R. famously said that "*Justice was rooted in confidence.*" Accordingly, I submit that harmony within our civil or criminal legal systems relies on confidence. That is, the people, "the governed," must have confidence in their elected government, "the governors"; and, importantly, "the governors" must reciprocate that confidence to "the governed" by accepting that all parties, including "the governors" themselves, shall respect the law on the basis of equality before it by and for all otherwise confidence will dissolve into distrust one for the other. In this regard, justice must be rendered impartially and free from real or apprehended bias by decision-makers.[1]

1.5 When disharmony comes into our legal system because of the law being applied unpredictably and inconsistently, in particular, by government to advantage itself or its political mates, it has the potential to greatly harm society at large. Such disharmony may undermine the prevailing Australian attitude of obedience to the law itself, respect for civil liberties and to lawful trading and commerce; and, as a knock-on effect, even out of a need to survive commercially or individually, it may encourage citizens to take the law into their own hands, and encourage traders, businesses and corporations to ignore ethics, rules and regulations to advance their own interests at the expense of public health and safety or going broke.

1.6 Respect for the rule of law within a nation underpins individual freedom, places limits on Executive power, and, relevant to this Committee's terms of reference, fosters and protects a

[1] See: *Watson* ((92) (1976) 136 CLR at 262-263; *Antoun v The Queen* [2006] HCA 2 (8 February 2006); *Vakauta v Kelly* (1989) 167 CLR 568 at 571; *Johnson v Johnson* (2000) 201 CLR 488; and *Livesey v. New South Wales Bar Association* (1983) 151 CLR 288

fair, competitive, free marketplace. Conversely, disregard for the rule of law within nations can lead to unfettered, secret, unconscionable conduct within corporations in order to get the winning edge over competitors in national or international trade. The revelations coming out of the Cole Royal Commission of Inquiry into the United Nation's Oil-for-Food Program pointedly illustrate this point. The Australian Wheat Board apparently *prima facie* paid hundreds of millions of dollars in bribes to a corrupt Iraqi regime under dictator Saddam Hussein in order to sell Australian wheat, and while it is yet to be settled, it appears that government regulatory authorities failed either to care or properly investigate the conduct despite numerous warning memorandums in the system. In that sense, I submit that it ought to be a proper consideration for the Committee if any Federal/State or Territory government within the Commonwealth – or indeed any New Zealand Government – should be found to have disregarded the restraints and responsibilities imposed by the rule of law in respect of the administration of justice, either civilly or criminally, in order to advance itself or its friends to the disadvantage of others.

2.0 THE PROSECUTORIAL DISCRETIONARY FUNCTION

2.1. Our systems of criminal justice have independent Directors of Public Prosecutions in jurisdictions throughout the Federation. It is a sound check and balance practice, and *inter alia*, acts to depoliticize the legal process as far as is practical by removing the involvement of Attorneys-Generals.

2.2. The concept of an independent Public Prosecutor finds its origins in the United Kingdom. The Public Prosecutor, above all else, is the servant of justice. It is a demanding role. It was described in the following terms by Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263 at p270:

> *"...It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained*

sense of the dignity, the seriousness and the justness of judicial proceedings."

2.3. In its 1981 Report, the UK Royal Commission on Criminal Procedure stated that the prosecution system should be judged by the broad standards of fairness, openness and accountability, and efficiency:

> *"...Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted..., and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally? Is it open and accountable in the sense that those who make the decisions to prosecute or not can be called publicly to explain and justify their policies and actions as far as that is consistent with protecting the interests of suspects and accused? Is it efficient in the sense that it achieves the objects that are set for it with the minimum use of resources and the minimum delay? Each of these standards makes its own contribution to what we see as being the single overriding test of a successful system. Is it of a kind to have and does it in fact have the confidence of the public it serves?"*[2]

2.4. The Office is designed to underpin the administration of justice and public confidence in a legal process which may lead to a loss of liberty or property by separating the investigative arm of law-enforcement from the prosecutorial arm once a *prima facie* case has been established by the investigative arm. A *prima facie* case is established when the elements of the offence, as prescribed by law, have been satisfied on the facts beyond a reasonable doubt. This separation between investigator and prosecutor is designed to ensure that the exercise of State power by the investigative arm is not abused by instituting court proceedings out of possible malice or ill-will towards an accused when otherwise a case would not be advanced because of little chance of a conviction, or, because it was not in the public interest. This latter consideration of "the public interest" is commonly termed "the prosecutorial discretion."

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[2] (Cmnd 8092, Report p. 1 27-8).

2.5. The prosecutorial discretion is an independent statutory function which resides in the hands the Commonwealth/State Directors of the Public Prosecutions (DPP) alone. It does not reside in the power of the Executive, State or Federal police or various law-enforcement and regulatory authorities such as Australian Consumer and Competition Commission (ACCC)[3], Australian Securities and Investments Commission (ASIC), New South Wales's Independent Commission Against Corruption (ICAC), Queensland's Crime and Misconduct Commission (CMC), Western Australia's Corruption and Crime Commission, Therapeutic Goods Administration (TGA), or Commissions of Inquiry, like the Cole Commission of Inquiry. However, by law, it does reside in the powers of a Special Prosecutor[4] when on occasions government decides to establish such an office in extreme circumstances when the system of government itself may have been corrupted.

2.6. In my opinion, so well settled and known is this prosecutorial discretion, that if any of the above authorities were to fail to refer and decide for themselves what the public interest is or may be, at any relevant time, regarding a known *prima facie* breach of law which ought otherwise be properly referred to the DPP for independent assessment on whether or not to proceed to court, then such a decision, being a deliberate act of omission, would reasonably be, at best, an *ultra vires* exercise, or, at worse, a *prima facie* abuse of office going to obstruction justice.

2.7. The prosecutorial discretion is the raw cutting-edge of power of the State. Civil society must generally tolerate the discretion, save in exceptional circumstances where evidence of credible abuse of office – e.g. to advantage another - may be found, but even then, a remedy may be difficult to achieve. It is accepted that the exercise of power may be incorrectly perceived by the public, from time to time, to have been abused when deciding that it ***is not*** in the public interest to prosecute a certain matter, just as it may be incorrectly perceived by the public when deciding it ***is*** in the public interest to prosecute another. Nevertheless, it is an important function in maintaining law and order and confidence in the administration of criminal justice and relies entirely on the integrity of the said office holder whose continuing public acceptance in wielding such enormous power of the State, on behalf of the public, relies on the law being enforced and applied fearlessly, skillfully, consistently, predictably,

[3] See Part 5 – Consumer Protection Provisions – *Trade Practices Act 1974*
[4] The Office of the Special Prosecutor (under Mr. Doug Drummond QC) was established in Queensland flowing out of the Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct.

equally, and, ***solely*** in terms of being a sort of proof or indicator of the DPP's general competence, achieving a successful rate of conviction in the people's open courts of justice.

2.8. Regarding the conviction rate, decisions to go ahead with a prosecution where there is little likelihood of a conviction would be a waste of public moneys. Of greater concern however, such decisions could become an improper device by a corrupt prosecutor – or indeed by a government exercising improper influence on him/her - "to punish" - in a monetary sense at least - an accused knowing that he would have to spend considerable money in his defence. Further, by maliciously proceeding with a case in the courts when there is little to no chance of success, the odium of having been criminally charged and put before the courts, despite being subsequently cleared, would remain and potentially ruin reputations and lives. As Shakespeare pointed out a citizen's good deeds and reputation may be interred with his bones after being put on trial, even though he be acquitted.

2.9. However, the prosecutorial discretion is a two-edged sword. It can be abused by ***not prosecuting*** in some cases. This also has the potential to bring the legal system into significant disharmony, and ultimately, chaos when the applying principles of consistency, predictability, skill and equality are demonstrably not adhered to. This may occur in like cases, when one person is treated differently from another by being put before the courts by the Office of the DPP (after a referral by a law-enforcement authority upon a *prima facie* case being made out) because it is in the public interest, found guilty by a jury, sentenced, appealed against by the Attorney-General and DPP to the Appeal Court for an increase in sentence. In regard to the other party, the same long-standing codified criminal provision is interpreted differently and erroneously by the Office of the DPP permitting the party to escape scot-free. This abuse can be aided by a law-enforcement authority (despite the same triggering elements of the provision being satisfied and a *prima facie* case having been established) deciding for itself that it would not be in the public interest to prosecute and by not referring the *prima facie* case to the DPP thereby denies the prosecutorial discretion from being exercised as the authority knows ought to happen by law.

2.10. It was suggested in my 7 July 2005 submission that the Heiner affair was one such instance, and that the 'other party' which had willfully advantaged itself by the criminal law being applied in a contrived incorrect manner was the Queensland Government. That is, all members of the Goss Cabinet of 5 March 1990, and latterly involving the Beattie

Government, extending to various law-enforcement and other accountability authorities which had themselves aided in the cover-up. It was suggested that this unacceptable conduct involved a former Director of Public Prosecutions.

2.11. In respect of the Committee's terms of reference, I make the following recommendation:

> **That within the jurisdictional and lawful limitations applicable to each government authority and without interfering with their respective independence, harmony should be sought and exist within Australian systems of criminal justice as to the practical meaning of "the public interest", both in respect of the discretion to prosecute in individual cases and elsewhere, and should be universally applied in accord the desirable democratic features inherent in a criminal justice system of consistency, predictability and equality in order to maintain public confidence in our system of justice.**

The Public Interest Test

2.12. The Office of Director of Public Prosecutions for Western Australia has published "*A Statement of Prosecution Policy and Guidelines 2005*"[5] which relevantly sets out what it considers to be "the public interest." Similar policy documents have been produced by the Office of the Director of Public Prosecutions for New South Wales[6], Victoria[7], South Australia,[8] Queensland,[9] Tasmania[10] and the Commonwealth.[11]. In general terms, these guidelines, particularly concerning Queensland, would have existed at all relevant times in some form concerning material matter in this supplementary submission, and my earlier 7 July 2005 submission.

2.13. The Western Australia Guidelines says:

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[5] http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf
[6] http://www.odpp.nsw.gov.au/Guidelines/Guidelines.html
[7] http://www.opp.vic.gov.au/CA256F7000755DC3/page/Prosecutorial+Guidelines?OpenDocument&1=20-Prosecutorial+Guidelines~&2=~&3=~
[8] http://www.dpp.sa.gov.au/03/prosecution_policy_guidelines.pdf
[9] http://www.justice.qld.gov.au/odpp/pdfs/guidelines.pdf
[10] http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines
[11] http://www.cdpp.gov.au/Prosecutions/Policy/Part2.aspx

"THE PUBLIC INTEREST

23. Where a *prima facie* case exists, a prosecution should only proceed where a second test is satisfied, namely whether a prosecution is in the public interest.

Evaluation of the Public Interest

Reasonable prospects of conviction

24. It is not in the public interest to proceed with a prosecution which has no reasonable prospect of resulting in a conviction. The term "conviction" in this *Statement* includes, where the context permits, an acquittal on account of unsoundness of mind.

25. If the prosecutor considers that, on the available admissible evidence, there is no reasonable prospect of conviction by an ordinary jury properly instructed, then unless further prompt investigation will remedy any deficiency in the prosecution case, the prosecution should be discontinued.

26. The evaluation of prospects of conviction is a matter of dispassionate judgment based on a prosecutor's experience and may, on occasions, be difficult.

27. However, this does not mean that only cases perceived as 'strong' should be prosecuted. Generally, the resolution of disputed questions of fact is for the court and not the prosecutor. A case considered 'weak' by some may not seem so to others. The assessment of prospects of conviction is not to be understood as an (sic) usurpation of the role of the court but rather as an exercise of discretion in the public interest.

28. A preconception as to beliefs which may be held by a jury is not a material factor. Juries can be presumed to act impartially.

29. The evaluation of the prospects of conviction includes consideration of –

(a) the voluntariness of any alleged confession and whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence;

(b) the likelihood of the exclusion from the trial of a confession or other important evidence in the exercise of a judicial discretion. In the case of an alleged confession, regard should be given to whether a confession may be unreliable having regard to the intelligence of the accused, or linguistic or cultural factors;

(c) the competence, reliability and availability of witnesses;

(d) matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness. Regard should be given to the following:

(i) Has the witness made prior inconsistent statements relevant to the matter?;

(ii) Is the witness friendly or hostile to the defence?;

(iii) Is the credibility of the witness affected by any physical or mental impairment?;

(e) the existence of an essential conflict in any important particular of the State case among prosecution witnesses;

(f) where identity of the alleged offender is in issue, the cogency and reliability of the identification evidence;

(g) any lines of defence which have been indicated by or are otherwise plainly open to the defence;

(h) inferences consistent with innocence; and

(i) the standard of proof.

30. Evaluation of the prospects of conviction will generally not have regard to -

(a) material not disclosed to the prosecution by the defence;

(b) notification of a defence which purports to rest upon unsubstantiated assertions of fact;

(c) assertions or facts upon which a defence or excuse are based which are contentious, or rest on information which would not, in the opinion of the prosecutor, form the basis of credible cogent evidence.

Other Relevant Public Interest Factors

31. Despite the existence of a *prima facie* case and reasonable prospects of conviction, it may not be in the public interest to proceed if other factors,

singly or in combination, render a prosecution inappropriate. These factors include -

(a) the trivial or technical nature of the alleged offence in the circumstances;

(b) the youth, age, physical or mental health or special infirmity of the victim, alleged offender or a witness;

(c) the alleged offender's antecedents;

(d) the staleness of the alleged offence including delay in the prosecution process which may be oppressive;

(e) the degree of culpability of the alleged offender in connection with the offence;

(f) the obsolescence or obscurity of the law;

(g) whether a prosecution would be perceived as counter-productive to the interests of justice;

(h) the availability or efficacy of any alternatives to prosecution;

(i) the lack of prevalence of the alleged offence and need for deterrence, either personal or general;

(j) whether the alleged offence is of minimal public concern;

(k) the attitude of the victim of an alleged offence to a prosecution;

(l) the likely length and expense of a trial if disproportionate to the seriousness of the alleged offending;

(m) whether the alleged offender has cooperated in the investigation and prosecution of others or has indicated an intention so to do;

(n) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;

(o) the likely effect on public order and morale;

(p) whether a sentence has already been imposed on the offender which adequately reflects the criminality of the circumstances;

(q) whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle, is remote.

32. Against these factors may be weighed others which might require the prosecution to proceed in the public interest. These include -

(a) the need to maintain the rule of law;

(b) the need to maintain public confidence in basic constitutional institutions, including Parliament and the courts;

(c) the entitlement of the State or other person to criminal compensation, reparation or forfeiture, if guilt is adjudged;

(d) the need for punishment and deterrence;

(e) the circumstances in which the alleged offence was committed;

(f) the election by the alleged offender for trial on indictment rather than summarily;

(g) the need to ensure consistency in the application of the law.

Irrelevant Factors

33. The following matters are not to be taken into consideration in evaluating the public interest

(a) the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender (except where this is an element of the offence);

(b) the possible political consequences of the exercise of the discretion;

(c) the prosecutor's personal feelings concerning the alleged offender or victim;

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision."

Queensland DPP's "Public Interest" Guidelines

2.14. Of particular relevance to the issue of harmony in our legal systems, and to the Heiner affair, "the public interest" criteria has been set out by the Queensland Office of the Director of Public Prosecutions, and is as follows:

"THE DECISION TO PROSECUTE

The prosecution process should be initiated or continued wherever it appears to be in the public interest. That is the prosecution policy of the prosecuting authorities in this country and in England and Wales. If it is not in the

interests of the public that a prosecution should be initiated or continued then it should not be pursued. The scarce resources available for prosecution should be used to pursue, with appropriate vigour, cases worthy of prosecution and not wasted pursuing inappropriate cases.

It is a two tiered test:-

(i) is there sufficient evidence?; and

(ii) does the public interest require a prosecution?

(i) **Sufficient Evidence**

- A *prima facie* case is necessary but not enough.
- A prosecution should not proceed if there is no reasonable prospect of conviction before a reasonable jury (or Magistrate).

A decision by a Magistrate to commit a defendant for trial does not absolve the prosecution from its responsibility to independently evaluate the evidence. The test for the Magistrate is limited to whether there is a bare *prima facie* case. The prosecutor must go further to assess the quality and persuasive strength of the evidence as it is likely to be at trial.

The following matters need to be carefully considered bearing in mind that guilt has to be established beyond reasonable doubt:-

(a) the availability, competence and compellability of witnesses and their likely impression on the Court;

(b) any conflicting statements by a material witness;

(c) the admissibility of evidence, including any alleged confession;

(d) any lines of defence which are plainly open; and

(e) any other factors relevant to the merits of the Crown case.

(ii) **Public Interest Criteria**

If there is sufficient reliable evidence of an offence, the issue is whether discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Discretionary factors may include:-

(a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a 'technical' nature only;

(b) the existence of any mitigating or aggravating circumstances;

(c) the youth, age, physical or mental health or special infirmity of the alleged offender or a necessary witness;

(d) the alleged offender's antecedents and background, including culture and ability to understand the English language;

(e) the staleness of the alleged offence;

(f) the degree of culpability of the alleged offender in connection with the offence;

(g) whether or not the prosecution would be perceived as counter-productive to the interests of justice;

(h) the availability and efficacy of any alternatives to prosecution;

(i) the prevalence of the alleged offence and the need for deterrence, either personal or general;

(j) whether or not the alleged offence is of minimal public concern;

(k) any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;

(l) the attitude of the victim of the alleged offence to a prosecution;

(m) the likely length and expense of a trial;

(n) whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(o) the likely outcome in the event of a conviction considering the sentencing options available to the Court;

(p) whether the alleged offender elected to be tried on indictment rather than be dealt with summarily;

(q) whether or not a sentence has already been imposed on the offender which adequately reflects the criminality of the episode;

(r) whether or not the alleged offender has already been sentenced for a series of other offences and what likelihood there is of an additional penalty, having regard to the totality principle;

(s) the necessity to maintain public confidence in the Parliament and the Courts; and

(t) the effect on public order and morale.

The relevance of discretionary factors will depend upon the individual circumstances of each case.

The more serious the offence, the more likely that the public interest will require a prosecution.

Indeed, the proper decision in most cases will be to proceed with the prosecution if there is sufficient evidence. Mitigating factors can then be put to the Court at sentence.

(iii) Impartiality

A decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines. It must never be influenced by:-

(a) race, religion, sex, national origin or political views;

(b) personal feelings of the prosecutor concerning the offender or the victim;

(c) possible political advantage or disadvantage to the government or any political group or party; or

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

3. NEW INSIGHTS

3.1. At Point 3.23 in my submission of 7 July 2005, I set out an answer provided to the Queensland Parliament by Queensland Premier the Hon Peter Beattie on 14 June 2005. Of relevance to this supplementary submission, I refer to the following part of his answer:

> (4) Mr. Lindeberg's ***misconceived assertions regarding the interpretation of section 129 of the Criminal Code***, by the Criminal Justice Commission, and Office of the Director of Public Prosecutions, were contained in his letter to Her Excellency of 21 October 2003, and in subsequent correspondence addressed to me. **(Emphasis added by author)**

3.2. In response to my letter of 6 July 2005, on behalf of Mr. Beattie, his Chief of Staff, Mr. Rob Whiddon, said the following on 5 August 2005 in respect of the above Point 4:

> *"Finally, as with all Questions on Notice, the Premier sought to respond to Question on Notice No 643 fairly and accurately. It is apparent from Mr. Miller QC's advice in 1997 that the conclusion he reached with respect to "wrongdoing" in the Heiner case would have been the same even if he had accepted the "wider" view of section 129. Accordingly, the "clearance", as you describe it, was therefore not based on an allegedly erroneous interpretation.*
>
> *As you have been previously advised, the best legal advice available at the time of the decision was taken to destroy the Heiner materials, was that there was no breach of section 129 of the Criminal Code."*

3.3. The Queensland Government now holds to two positions. Firstly, that even if section 129 of the *Criminal Code* had been properly interpreted by the then DPP, Mr. Royce Miller QC, ***Mr. Beattie himself submits*** that Mr. Miller would have decided that it was not in the public

interest to prosecute. Secondly, while acknowledging that section 129 had been incorrectly interpreted as shown in the Queensland Court of Appeal's binding rule on section 129's proper interpretation in *R v Ensbey*[12] (which was sufficient for the Queensland Police Commissioner Robert Atkinson to inform the Leader of the Opposition on 10 May 2005 that the case *"...may have to be revisited"*), Mr. Beattie has ***arrogated unto himself*** what ***he says*** a proper law-enforcement authority, i.e. the DPP or police, should and/or would do in light of the new circumstances associated with these criminal allegations. In both cases, Mr. Beattie is acting well outside his authority as a Minister of the Crown.

3.4. In respect of the Crime and Misconduct Commission's (CMC) response to letters of 5 and 20 July 2005 from the Hon Lawrence Springborg, Leader of the Opposition, regarding the Heiner affair's unresolved status, particularly in the wake of the *Ensbey* case ruling, CMC Chairman Mr. Robert Needham relevantly said on 26 July 2005:

> *"...As I pointed out in my previous letter, the exercise of the discretion by the DPP in 1997 clearly was not based solely, if at all, on a legal interpretation now shown to be wrong by the Ensbey decision. Rather, it is apparent that Mr. Miller QC considered more general policy issues in reaching his decision not to take the matter further. That was an exercise of discretion properly open to Mr. Miller at the time and is not affected by the Ensbey decision."*

3.5. In his earlier letter of 5 July 2005, Mr. Needham had informed Mr. Springborg, who had requested that the affair be revisited after being advised by Police Commissioner Atkinson on 10 May 2005 that such a request be made of the CMC, that it would not be a justifiable use of CMC resources (i.e. **its view of "the public interest")** pursuant to section 46 of the *Crime and Misconduct Act 2001* because of:

(a) its staleness;

(b) the previous consideration of the matter by the DPP;

(c) the numerous and extensive inquiries already conducted into the matter since 1991;

(d) the lack of utility of proceedings so long after the events in question for conduct taken on the advice of the Crown Solicitor (although it is

[12] *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 on 17 September 2004

acknowledged that mistake of law is no defence to a criminal offence it may be relevant to the exercise of the discretion to prosecute).

3.6. It is submitted that the aforesaid CMC reasons do not hold weight either in fact or law, and are scandalous.

3.7. In respect (a) the alleged "staleness," it ought be noted that from the outset, in 1990, I suggested that section 129 of the *Criminal Code* may have been breached, and remained constant in this view for 16 years, or in the alternate, sections 132 or 140 of the *Criminal Code*. In short, **the alleged staleness was of the CJC/CMC's own making, not mine**.

3.8. During this period, I held to the correct interpretation and suggested that it had been knowingly contrived to advantage another[13] centering on certain parties at the CJC. I was supported in my interpretation of section 129 by eminent senior counsel Mr. Ian Callinan QC (now a Justice of the High Court of Australia) and others – all well versed in the criminal law - such as former Chief Justice of the High Court of Australia, The Right Honourable Sir Harry Gibbs GCMG, AC, KBE, retired Queensland Appeal and Supreme Court Justice the Hon James Thomas AM QC, Messrs. Robert F. Greenwood QC and Anthony Morris QC.

3.9. Section 34(d) of the *Crime and Misconduct Act 2001* defines "*the public interest*" in these terms:

(d) **Public interest**

- the commission has an overriding responsibility to promote public confidence—
  - in the integrity of units of public administration and
  - if misconduct does happen within a unit of public administration, in the way it is dealt with
- the commission should exercise its power to deal with particular cases of misconduct when it is appropriate having primary regard to the following—
  - the capacity of, and the resources available to, a unit of public administration to effectively deal with the misconduct

[13] See Section 87 of the *Criminal Code* – official corruption.

- the nature and seriousness of the misconduct, particularly if there is reason to believe that misconduct is prevalent or systemic within a unit of public administration
- any likely increase in public confidence in having the misconduct dealt with by the commission directly.

Prima Facie Executive Government Wrongdoing – A Whistleblowing No-Go Zone

3.10. The fact that the CMC, duty bound to maintain public confidence in the integrity of government, can so easily and summarily dismiss this matter now has major ramifications on whistleblowing in Queensland, and potentially throughout Australia. Its position ought to also concern the business community, government and society at large.

3.11. In other words, a whistleblower may (properly) make a public interest disclosure (PID) involving Executive Government obstructing the administration of justice, and in doing so risk his/her career, livelihood and financial security, personal safety, and family security and harmony, be correct at law in terms of the PID act being a *prima facie* breach of the *Criminal Code*, only to have the CMC claim that it is not in the public interest to charge those involved. That abuse of the exercise of the prosecutorial discretion, **despite public guidelines,** can result in the law meaning one thing for a citizen and something else for elected and appointed public officials.

3.12. Put simply, who would want to blow the whistle under such circumstances where such palpable disharmony exists? Must all would-be whistleblowers effectively know which way "a prosecutorial discretion" shall fall before reporting a clear breach of the law? In short, a whistleblower is now being required to put him or herself inside the mind of the 'independent' Public Prosecutor before making a PID to ensure that it will be taken seriously and investigated fully and fearlessly to safeguard against being left high and dry by law-enforcement authorities like the CMC or DPP. Such a requirement would stop all PIDs and dry up a major source of information on suspected official misconduct in government for the CMC and police overnight because, the Heiner template, in terms of the exercise of prosecutorial discretionary function, in the eyes of the CMC at least, places Ministers of the Crown and public servants above the law because it is not in the public interest to charge them.

3.13. In respect of (d) at Point 3.5, it is well settled that acting on legal advice which is a mistake at law is no excuse or defence, and therefore, in taking such a view, the CMC is, in effect, placing the conduct of Executive Government and Crown legal officers above the law. It gives an unchallengeable value to incorrect legal advice emanating from Crown Law which ordinary lawyers in private practice or in-house corporate lawyers do not enjoy under the rule of law. Nor should they. It appears that as long as Crown Solicitor's advice is sought and then acted upon, any subsequent offence thereupon committed is immune to prosecution, at least in the Heiner matter.

3.14. The CMC's claim in (d) at Point 3.5 about the Goss Cabinet having allegedly acted on Crown Solicitor's advice would be relevant *"...to the exercise of the **discretion to prosecute**"* is false and misleading. It would be a ***mitigating factor at sentencing*** a guilty party, and the CMC ought to know this.

3.15. In evidence on the Heiner affair before the Senate Select Committee on Unresolved Whistleblower Cases in 1995 and in a written submission to the Senate Select Committee on the Lindeberg Grievance dated 14 September 2004, former CJC Director of the Official Misconduct Division (now lawyer in private practice) Mr. Mark Le Grand, advised that *"...it was not the role of the CJC to arbitrate between competing legal claims. What the Commission had to determine was whether the advices were properly derived."* Such a view is contrary to the rule of law and all notions of democratic constitutional government and portrays an ill-placed deference to the actions of Executive Government and advice from Crown Law. He suggests that erroneous advice, providing it has been sought normally by any government of its (Crown) legal advisers, overrides the law properly stated and required to be obeyed by all. In respect of the *Criminal Code*, it does not provide for opting out by the government or its advisers, quite the contrary. This twisted understanding of the rule of law espoused by Mr. Le Grand, which I have had to tolerate for 16 years at the hands of Mr. Le Grand and other CJC/CMC and public officials – mostly lawyers - was summarily rejected by the High Court in June 2004 in *Ostrowski*, and ought not now be tolerated by the public, legal fraternity, business community, or especially this Committee of our Federal Parliament. To be clear however, the High Court's ruling in *Ostrowski* was nothing new.

3.16. The other former CJC official who was much more central than Mr. Le Grand in the handling[14] of my allegations at all relevant times, was Mr. Michael Barnes[15], as CJC Chief Complaints Officer. In his last public statement on 18 September 2004 on the Heiner matter to the Senate Select Committee on the Lindeberg Grievance, he also made some remarkable statements which are relevant to (a) respecting the rule of law; and (b) a common understanding of what "the public interest" means in relation to the prosecutorial discretionary function in the criminal justice system.

3.17. Relatively Mr. Barnes said:

> *"...Surely governments must be free to take and act on such (Crown Solicitor's) advice. Even if Mr. Lindberg's (sic) claim that the shredding was unlawful has any substance how could action be taken against the Goss Government for acting in accordance with its legal advice?"*

I suggest that his deference to the actions of Executive Government and advice from Crown Law is most alarming because it starts from the incorrect premise that neither government nor Crown legal advisers can do wrong at law which flies absolutely in the face of the democratic notion that no one is above the law. In any society governed by the rule of law, not Executive decree, the actions of governments are either legal or illegal, and when cast into doubt as being illegal involving suspected official misconduct via an allegation to a law enforcement authority, they must adjudicated on it as a matter of law. It appears that this misplaced deferential view existed at all relevant times, and it must be said, in the public interest in 2006, that if Mr. Barnes holds such a view, now as a Magistrate and State Coroner, duty bound to investigate deaths of persons in questionable/reportable circumstances (which may, from time to time, impinge on the conduct of government and the running of detention centres[16]), he seems to lack the independence and impartiality required to perform his public duty in the public interest according to law. His suitability for office must be in doubt and public confidence obviously endangered.

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[14] The other central figure was (then) barrister Mr. Noel Nunan (at the time an ALP member/activist and former work colleague/associate of then lawyer in private practice Mr. Wayne Goss at the Caxton Street Legal Service) who was subsequently elevated to the Magistracy by the Goss Queensland Government in 1994. His assignment to investigate my allegations involving Premier Goss and members of his Cabinet, according to Mr. Barnes, was *"...purely by chance...."*

[15] Currently the State Coroner of Queensland and Magistrate.

[16] See Parts 2 and 3 *Coroners Act 2003*

3.18. Mr. Barnes' view, when put together with an alleged statement from (then) barrister Mr. Noel Nunan (contracted on a *pro temp* basis by the CJC to investigate my allegations in 1992), to Mr. Peter Coyne on 11 August 1992 at CJC Headquarters when they first met, pinpoints the blockage in Queensland's system of justice which I have experienced and fought against for 16 years in my search for justice:

> *"...There will be absolutely no solace in this matter for you or Mr. Lindeberg. This is a complaint against the Cabinet."*[17]

It was the same Mr. Nunan, on the following day at CJC Headquarters on 12 August 1992 who, when interviewing me after being confronted with the facts, asked:

> *"...What do you want me to do, charge the entire Cabinet with criminal conspiracy for perverting the course of justice?"*[18]

My answer was in the affirmative if the law demanded it.

3.19. Mr. Nunan went on to clear the Goss Cabinet of any wrongdoing in respect of the shredding and related matters in his findings of 20 January 1992. His findings were subsequently agreed to by Messrs. Le Grand and Barnes and others including CJC/CMC chairmen, such as Messrs. Robin S O'Regan QC, Frank Clair and Brendan Butler SC. Mr. Nunan, *inter alia* incorrectly interpreted section 129 of the *Criminal Code*, and misquoted and misinterpreted the key *'access to any departmental file or record held on the officer'* regulation at issue, *Public Service Management and Employment Regulation 65.*

3.20. The Committee ought to be reminded that former Queensland Supreme and Appeal Court Justice the Hon James Thomas advised *The Independent Monthly* in April 2003 that while many laws were arguable, section 129 was so unambiguous in its wording as to be ***unarguable*** in terms of embracing "futurity." Since 20 January 1993, the aforesaid lawyers, stemming from Messrs. Barnes and Nunan, wanted me, let alone the public and legal fraternity, even after *Rogerson's* ruling in July 1992, to believe that it was perfectly legal to

[17] Senate Select Committee on Unresolved Whistleblower Cases Senate *Hansard* 5 May 1995 p545.
[18] See Tabled Paper No 2596: Point 103 *the Lindeberg Petition* tabled in the Queensland Legislative Assembly on 27 October 1999

destroy any document or thing known to be real or foreseeable evidence in an anticipated judicial proceeding up to the moment of the expected writ being filed and served to prevent its use in those proceedings. In effect, they wanted me, and others to believe, that such conduct would not lead to "a world without evidence."

3.21. As late as 3 August 2004 in a submission to the Senate Select Committee on the Lindeberg Grievance, former Deputy Director of the CJC's Official Misconduct Division and current Queensland Ombudsman, lawyer Mr. David Bevan, advanced the following proposition after suggesting that lawyers had *"...to grapple with the interpretation of s.129"* until *Ensbey* came along:

> *"...The inescapable conclusion is that s. 129 was indeed open to more than one interpretation, until such time as a court provided some guidance."*

3.22. I strongly suggest that Mr. Bevan's proposition is disingenuous. It is readily accepted that the courts are the final arbiters on the interpretation of law. It is also accepted that interpretations which are sometimes wrong can be made in good faith, and can be overturned by higher courts without those involved being in any way blameworthy. However, laws are generally written to be clearly understood by the layman, especially criminal law. Queensland's *Criminal Code* had the benefit of being drafted by Sir Samuel Griffith, a renowned supreme draftsman of simple English.

3.23. Section 129 of the *Criminal Code* – destruction of 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."*

3.24. Contrary to being left in the dark as Mr. Bevan claims, the legal authorities cited by the Queensland Court of Appeal in *Ensbey* dated back to 1891 in *R v Vrones* and 1982 in *R v Selvage.* The leading Australian authority, *R v Rogerson*, was decided in July 1992, some 6

months ***before*** the CJC handed down its definitive findings on my allegations on 20 January 1993. For any reasonably competent lawyer to suggest that he could, with the authority of law, knowingly advise a client to get in quick and destroy all the known relevant evidence in the client's possession in order to prevent its known or anticipated use as evidence in an expected/imminent judicial proceeding is simply not credible because it would inevitably lead to the destruction of all evidence. To also advise a client that the same shredding conduct could be lawfully carried out to defeat relevant discovery/disclosure Rules of the Supreme Court would be to place the parties in *prima facie* contempt of court, and see the lawyer place himself in grave jeopardy of being struck off. The justice system would grind to a halt, and the rule of law would be reduced to disharmony and chaos. A lawyer's first duty to the court and to obey the law would become a meaningless oath.

3.25. Plainly, section 129 was specifically included in Queensland's *Criminal Code* by Australia's foremost jurist and first Chief Justice of the High Court of Australia Sir Samuel Griffith to prevent such mischief, not create or encourage it, and its purpose was adopted by its people through an Act of Parliament in 1899.

3.26. For legal practitioners like Messrs. Barnes and Bevan to suggest that our legal system had to wait until the *Ensbey* case came along to clarify purportedly reasonably competent legal minds on an area of law so fundamental to our legal system was always an insult to my intelligence, let alone, I suggest, to Sir Samuel Griffith's formidable expertise in crafting legal provisions and to his deep understanding about what was needed to protect the administration of justice. It was never virgin legal territory where any old legal opinion could do and say what it wanted and then expect respect from all just because the legal minds expressing the view sat inside the CJC and Office of the Director of Public Prosecutions, because it was never accepted in our courts, Parliament or within the commonsense of the public at large for close on 100 years.

3.27. As it was always an unarguable provision, it gives rise to the unavoidable conclusion that it was a contrived interpretation to advantage another, which just happened to be the entire Goss Cabinet of 5 March 1990 and certain public officials who held the same state of knowledge as parties to the offence under section 7 of the *Criminal Code* (Qld).

The Heiner Shredding in Legal limbo

3.28. While Mr. Barnes now believes that the shredding ought not to have occurred, he still fails to address the fundamental issue of whether or not it was a *prima facie* breach of the law. For him, it sits in "legal limbo" as if nothing ever depended or depends on it, when in reality, it had and still has the potential to create an unprecedented constitutional crisis in government. While societies do expect that their governments will act morally and ethically, the issue upon which governments are held to account, at the end of the day, is whether or not their conduct is within the rule of law. Governments are not held to account over some moral and/or ethical code, desirable though that may be. In general terms, if governments act in accordance with the law, as enacted through the people's Parliament after fair and free elections, ethical and moral conduct ought to follow.

3.29. Of further relevance, Mr. Barnes made the following telling comments concerning the shredding decision. Firstly, he said:

> *"...The decision to shred the "Heiner documents" has caused harm to no-one other than Mr. Lindeberg and those caught up in his obsessive pursuit of the issues he has vociferously ventilated for over a decade..."*

Writing as a judicial officer, this comment is most disturbing I submit. First and foremost, the shredding unquestionably "harmed" the administration of justice because the documents were known to be required in evidence in a judicial proceeding. His indifference, as a sworn judicial officer to protect the administration of justice and *ipso facto* the decision-making processes of judicial officers to decide what is or is not relevant evidence in judicial proceedings when access is being contested by the parties but instead leaving it up to them to decide for their own self-serving purpose, is alarming because the ends of justice may be defeated. His indifference to the possibility that the truth may be withheld from the courts is equally alarming. I submit that once it was known that the documents were required, they ought to have been preserved because they were protected at law, with the relevant law being in place, at the time, for nearly 100 years at least. As to whether or not Mr. Barnes, or indeed the Queensland Government itself thought that the foreshadowed judicial proceeding had any substance is totally irrelevant because as Queensland was a fully functioning

constitutional monarchy democratic State within the Commonwealth, duty bound to uphold the *Constitution*, any citizen (e.g. Mr. Coyne) or any organization (e.g. two registered trade unions like the Queensland Professional Officers' Association and Queensland Teachers' Union) had their democratic right to test their claim "of access" to those documents in court. The law provided for citizens and corporations to exercise their democratic and legal entitlements without interference from another upon pain of punishment.

3.30. Secondly, the Heiner Inquiry documents were contemporaneous, probative evidence of what was going on behind the walls of the John Oxley Youth Detention Centre around that period which either the Queensland Government, police, CJC/CMC, State Industrial Relations Commission, commission of inquiry, staff or abused children could have used in evidence in any relevant disciplinary or judicial proceeding at some foreseeable time, and ought therefore have been preserved. Consequently, Mr. Barnes continues to misstate what the real elements are relating to the alleged offences involved in the Heiner affair.

3.31. *Patrick Stevedores Operations No. 2 Pty Ltd & Ors v Maritime Union of Australia & Ors* [1998] 397 FCA (23 April 1998) Wilcox, von Doussa and Finklestein JJ of the Federal Court of Appeal said this about the rule of law:

> *"..The business of the Court is legality. Just as it is not unknown in human affairs for a noble objective to be pursued by ignoble means, so it sometimes happens that desirable ends are pursued by unlawful means. If the point is taken before them, courts have to rule on the legality of the means, whatever view individual judges may have about the desirability of the end. This is one aspect of the rule of law, a societal value that is at the heart of our system of government."*

A tendency to obstruct is sufficient

3.32. Mr. Barnes also makes this claim:

> *"...The suggestion that evidence of child abuse was destroyed or lost when the documents were shredded is complete nonsense. The records of any*

such allegation made to Mr. Heiner could not have been admitted in any civil or criminal proceedings that sought to prove that such abuse had occurred. On the other hand, if people who appeared before Mr. Heiner had such evidence they could and still can given (sic) to the appropriate law enforcement authorities. Nothing that was done to the "Heiner documents" in any way impacted upon that."

The destruction-of-evidence offence in *Ensbey* case related to the actual "attempt" to obstruct justice, not whether it was a successful or otherwise because the guillotined documents were not necessary in proving the child abuse offence. The accused had admitted his guilt of child abuse and had been summarily dealt with by the courts after the shredding. The guillotined strips of the victim's diary were posted back to her mother by Pastor Ensbey, and some 6 years ***later*** she handed them over to the police as proof of his obstructionist act. It was the fact that Pastor Ensbey knowingly destroyed them at a time when he would have 'reasonably suspected that they would or might be required' in any police investigation that later convicted him. In short, his act just had "a tendency" to obstruct justice. The case law authority for conviction was *R v Rogerson and Ors* (1992) 66 ALJR 500 wherein Mason CJ at 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..."

3.33. The fact is that Mr. Heiner did take evidence concerning the maltreatment of children, including questions concerning the alleged pack-rape of a female minor in May 1988 which certain staff alleged had been cover-up by the management of the Department.[19] The allegation of improper handcuffing of children at the Centre was one of the specific written complaints he was required to investigate. It is beyond question that the Goss Government's Minister for Family Services and Aboriginal and Islander Affairs the Hon Ann Warner ***knew*** about the handcuffing at the time the Heiner Inquiry evidence was ordered destroyed because she had earlier made admissions to that effect in the media. One of the other reasons why the Goss Cabinet ordered the destruction of the gathered material was to ensure that its

[19] See August 2004 Report by the House of Representatives Standing Committee on Legal and Constitutional Affairs "*Crime in the Community: victims, offenders and fear of crime*" Point 3.47 and Footnotes 84 and 85.

contents could not be used against the careers of the staff at the Centre. Some nine years later, the Forde Commission of Inquiry into the Abuse of Children in Queensland Institutions found that the excessive handcuffing incident at the Centre was illegal but that Inquiry had been denied the benefit of the contemporaneous information contained in the Heiner Inquiry material, even, at the time, when it was reasonably foreseeable or suspected by members of the Goss Cabinet, or certainly Minister Warner alone, that such information could be later required.

3.34. As to the inadmissibility of the evidence, Mr. Barnes cites no authority to support his claim, but that aside, the material itself was the issue at law to be contested in a judicial review, and consequently, to suggest that the shredding had no "impact" under such known circumstances is wrong. It ought to be noted that all the Heiner Inquiry documents were comprehensively destroyed in a shredder and disposed of upon the order of Executive Government, not guillotined into strips and posted back to Mr. Coyne, State Archives or the abused children as occurred in the *Ensbey* case.

4. THE RULE OF LAW vs EXECUTIVE DECREE

4.1. The rule of law does not defer to the demands of Executive Government but rather Executive Government defers to the demands of the rule of law otherwise such a society would have totalitarian form of government where Executive decree reigns supreme.

4.2. Deane J in *A v Hayden*[20] clearly ruled that Executive Government was not above the law, wherein he said:

> *"...neither the Crown nor the Executive has any common law right or power to dispense with the observance of the law or to authorise illegality."*

4.3 I submit that the CMC's position is and always has been untenable. It places the Commission in fundamental breach of its statutory obligations under the *Crime and Misconduct Act 2001.* It stands starkly against the CMC's statutory duty to eradicate official

[20] *A v Hayden* (1984) CLR 532; (Also see Gibbs CJ in *F.A.I. Ltd v Winneke*(1982) 151 CLR 342 at 4)

misconduct in government in an honest, impartial manner and "in the public interest." Moreover, it is a position which flies in the face of the High Court's ruling in *Ostrowski.*[21]

4.4 Callinan and Heydon JJ in *Ostrowski,* in finding a guilty verdict against Mr. Palmer, a small businessman and crayfisherman from Western Australia, who **obtained advice from the Crown[22] - which happened to be wrong at law - and then acted on it** , said:

> *"...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..."*

4.5 If the CMC's 'Heiner position' were to be adopted and if Mr. Palmer were either a Queensland Minister of the Crown or a Queensland public servant, no charges would have been brought against him.

4.6 It ought therefore be noted, that on the one hand Police Commissioner Atkinson is suggesting that in light of the *Ensbey* decision, the Heiner matter *"...may have to be revisited",* while on the other hand, Mr. Needham is suggesting that the *Ensbey* ruling does not matter because the prosecutorial discretion involving "the public interest", purportedly exercised properly by the former DPP, overrides a serious prima *facie* breach of the *Criminal Code.* **This disharmony is highly injurious to public confidence in the criminal justice system.**

4.7 The CMC view was held despite the Queensland Court of Appeal ruling on Pastor Ensbey's destruction-of-evidence conduct, as an ordinary citizen not holding a Crown position of trust or being legally trained, and in far less serious obstruction of justice circumstances insofar as obstruction of justice goes, being described, in his ruling, in the following manner by Williams J in *Ensbey* at 39:

> *"...The destruction of evidence is, in my view, a serious offence which calls for a deterrent sentence and that would usually necessitate the offender serving an actual period in custody."*

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[21] *Ostrowski v Palmer*[2004] HCA 30 (16 June 2004)
[22] Western Australian Government's Department of Fisheries.

4.8 It ought also be particularly noted that legal counsel for Pastor Ensbey specifically requested of the current DPP, Ms. Leanne Clare, that their client be relieved of the charge under section 129 because (a) of the interpretation used by her predecessor Mr. Miller QC in the Heiner matter, and (b) it would not be in the public interest to proceed. In her response dated 6 November 2003, Ms. Clare summarily dismissed the application. She correctly advised that section 129 captured "futurity" by citing *Rogerson*, and declared that the (shredding) allegation was serious and that it **would be in the public interest to prosecute** him, presumably taking into account the public guidelines set out earlier in this supplementary submission.

4.9 It ought also be noted that in 1997, *inter alia* in his advice, aside from incorrectly interpreting the key section 129 of the *Criminal Code* and incorrectly giving predominance to the Form of the Indictment Schedule (No 83) over the *Code* itself at the outset of his advice – all of which would have arguably coloured his mind - Mr. Miller QC ***did not*** have access to the relevant February and March 1990 Cabinet documents which are now available, nor was he aware that evidence of abuse of children was being knowingly destroyed by the Goss Cabinet. It reasonably follows, because section 129 was not triggered in his mind, he did not and could not fairly or properly consider exercising his prosecutorial discretion to not prosecute anyone when no *prima facie* offence had, to his mind, been shown to exist.

4.10 Furthermore, when the Heiner matter was recently brought to the CMC's attention in 2005 by the Leader of the Queensland Opposition, new evidence attended the matter which arguably rendered any reference to or reliance on the January 1997 Miller QC advice redundant because it was considered against certain fact circumstances at that time which painted an incomplete picture because not all the facts were then known and available. In other words, in 2005, with new compelling evidence, the matter required fresh consideration by Ms. Clare, not the CMC. Any reasonably competent lawyer who understood and respected due process, such as Messrs. Needham and Beattie, let alone Queensland's premier law-enforcement authority, the CMC itself, ought to have known that which makes their respective conduct inexcusable, and, consequently, questionable.

Acting Beyond Power

4.11 The key point is this: In the Heiner affair, dealing solely with the order by the members of the Goss Cabinet of 5 March 1990 and the subsequent act of shredding documents known to be required in evidence in a foreshadowed/anticipated judicial proceeding - and leaving aside the subsequent cover-up and other associated *prima facie* offences – the facts are not in dispute. This is about mistake of law, not mistake of fact. A *prima facie* case unquestionably exists because the triggering elements have been satisfied. Having reached that point in the criminal justice process, **the responsibility of whether or not the matter should proceed to court, legally lies with the DPP not the CMC or Premier Beattie.**

Obstruction of Justice

4.12 Indeed, there is compelling evidence on the public record suggesting that both the CMC and Premier Beattie have a vested interest in this matter not proceeding because of inculpatory conduct on both their parts going back over many years to affect a cover-up. By improperly interfering with due process in a criminal matter at law in 2005, it is open to suggest that their conduct may represent deliberate obstruction of justice involving official corruption designed at keeping the case away from the current DPP, or a Special Prosecutor to advantage themselves and others.

4.13 It is reasonable to suggest that it would not be open for the current DPP, Ms. Clare, on the one hand to suggest that the law and the public interest demand that Pastor Ensbey go to trial in the District Court, and then all the way to the Queensland Court of Appeal to have his sentence increased because of the seriousness effect of his criminal conduct on the administration of justice, but, on the other hand, suggest that those involved in the Heiner affair ought not be treated equally, and should escape scot-free.

4.14 It is open to suggest that in Queensland, at least, considerable disharmony in our legal system exists because of the double standards relating to the unresolved Heiner affair. It arguably brings our legal system into considerable disrepute. It reasonably follows I suggest that if one government in the Commonwealth of Australia can willfully ignore due process to advantage itself, other governments may quickly follow. Not only are human rights and

civil society placed in jeopardy through the 'Heiner experience', but the business community may quickly find itself in a similar position of grave disadvantage if legal action against the State is contemplated, necessary or unavoidable.

The Necessity to Use Anton Piller Orders

4.15 The perversity of the Heiner affair, just in respect of the protection of known/foreseeable evidence and respecting the discovery/disclosure Rules of the Supreme Court of Queensland, may mean that applications for Anton Piller orders[23] become more commonplace and may have to be activated every time an individual or business finds itself in legal action against the so-called "model litigant", namely the Queensland Government or its various agencies and authorities. It may be the only way in which some semblance of public confidence and order may be sustained so that the courts can put a break on abuse of Executive power or see that justice is done by ensuring that all relevant evidence - in this case, public records – are secured and made available for judicial consideration instead of going through a government shredder.

4.16 The English Court of Appeal in *Yousif v Salama* [1980] 3 All ER 405 said the following:

> *"...The court had a discretion to grant an Anton Piller order to enable the preservation of a document which did not itself form the subject matter of the action, where (per Lord Denning MR) the document was the best possible evidence and the plaintiff genuinely feared that the defendant would destroy it prior to hearing of the action, or (per Donaldson LJ) there was a very clear prima facie case leading the court to fear that the defendant would conceal or destroy essential evidence and that to do so would deprive the plaintiff of any evidence on which to put forward his claim and so frustrate the process of justice, or (per Brightman LJ) there was prima facie evidence that essential documents were at risk...."*

[23] Anton Piller orders emanated out of English common law. (See 1976 *Anton Piller KG vs Manufacturing Processes Limited*). An *ex parte* application may be made of the court to seek unheralded legal entry to the other party's premises to search and seize documents relevant to a legal action because the applicant has a justifiable belief that they may be otherwise destroyed. An extremely high threshold of proof must be provided to the courts. Such legal 'raids' have to the undoubted potential to become a "vacuum clearing exercise" and may place legal professional privilege in considerable jeopardy which normally concern the courts greatly, and therefore are rarely granted. The orders are oversighted by an independent supervisory solicitor. It is a highly controversial legal device brought about because of a lack of trust and breakdown in the administration of justice. An Anton Piller order was recently used against Kazaa and Sharman Networks in Australia by application from the Australian Record Industry Association (ARIA).

4.17 **I submit that harmony in our legal system will never exist if such a fundamental difference of opinion by law-enforcement authorities stands concerning what "the public interest" means.** The CMC's view is, I submit, too fundamentally wrong to ignore because any allegation of improper conduct by any party, including the business community, concerning the Queensland Government and its agencies, would come under the CMC's jurisdiction for investigation pursuant to the *Crime and Misconduct Act 2001*, and, in that sense, the Heiner affair's 1990 template is still in operation in 2006. In my submission, it has a ripple effect on constitutional government and the rule of law in Queensland, and because of national and international trade and business, has the potential to affect other jurisdictions in the Commonwealth, let alone our nation's international standing regarding trust, openness and transparency in the age of globalization.

4.18 I respectfully remind the Committee that Gaudron J in *Ebner v The Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* [2000] HCA 63 (7 December 2000) warned of the need to maintain public confidence in our legal system at 81-82 said:

> *"...Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system. Because State courts are part of the Australian judicial system created by Ch III of the Constitution and may be invested with the judicial power of the Commonwealth, the Constitution also requires, in accordance with Kable v Director of Public Prosecutions (NSW), that, for the maintenance of public confidence, they be constituted by persons who are impartial and who appear to be impartial even when exercising non-federal jurisdiction. And as courts created pursuant to s 122 of the Constitution may also be invested with the judicial power of the Commonwealth it should now be recognised, consistently with the decision in Kable, that the Constitution also requires that those courts be constituted by persons who are impartial and who appear to be impartial.*
>
> *It follows from what has been written that, in my view, Ch III of the Constitution operates to guarantee impartiality and the appearance of impartiality throughout the Australian court system."*

I am prepared to appear before the Committee and give evidence under Oath.

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