CHAPTER 5

THE SHREDDING OF THE HEINER DOCUMENTS

Introduction

5.1 Term of reference (a) requires the Committee to give particular regard to 'the circumstances relating to the shredding of the Heiner documents, and matters arising therefrom'. The Heiner documents were the records of interview and related material gathered by retired stipendiary magistrate Noel Heiner in the course of an aborted inquiry into the John Oxley Youth Centre, Wacol, and its manager, Mr Peter Coyne, in late 1989 and early 1990; they were shredded on the order of the Queensland Cabinet on 23 March 1990.

5.2 The Committee's powers to inquire into the matter were outlined in advice provided by the Clerk of the Senate, as shown in full in Appendix 1. Briefly, they should be confined to subjects in which the Commonwealth has the power to legislate, and should not be exercised in respect of members of State parliaments or officers of State governments. In its attempt to distill the essence of the whistleblowing and related events presented to it, the Committee therefore concentrated on what it could learn to assist in the formulation of Commonwealth whistleblower protection legislation. The Committee received claim and counterclaim by protagonists in this and the other 'cases' on which it took evidence. It was never the intention of the Committee, and nor was it within its powers, to adjudicate on those cases or to bring redress to those the Committee believed had suffered unfairly. For that reason, the Committee did not seek input from every individual involved in each case. It presents the following assessments in Chapters 5 to 7 to background the lessons which it has drawn from them.

Background

5.3 On 14 September 1989, the then Director-General of the Queensland Department of Family Services, Mr Alan Pettigrew, and four of his senior officers held a meeting with Ms Janine Walker, Industrial Relations Director of the State Services Union, to discuss concerns of union members about the management of the John Oxley Youth Centre, an adolescent detention and remand facility in Wacol.[1] Those complaints by certain staff members were subsequently put in writing.[2] Such concerns would not have come as a surprise to the Department: five months beforehand, a consultant's report on the effectiveness and efficiency of youth detention centres had been highly critical of the behaviour management system at the John Oxley Centre.[3] The level of staff turnover (30 resignations in two years) was high by departmental standards and suggests that there may have been serious problems in the staff-management relationship.[4]

5.4 The departmental response was to set up an inquiry into the validity of the complaints about the management of the John Oxley Centre, and related matters. Retired stipendiary

1 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 1.

2 Submission, CJC, 15.8.95, Attachment H.

3 Submission, Cabinet Office, 31.7. 95, Document 11.

4 Submission, CJC, 15.8.95, [p. 2].

magistrate, Mr Noel Heiner, was appointed to conduct the inquiry, which commenced on 22 November 1989.

5.5 Shortly after the inquiry commenced, a State election was held on 2 December 1989 and the Goss Government came to power. The Department of Family Services was enlarged to become the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA); Ms Anne Warner was appointed its minister and Ms Ruth Matchett was appointed Acting Director-General.

5.6 As the inquiry progressed, doubts arose as to the manner in which the inquiry had been established and, in consequence, Mr Heiner's powers and indemnities. Ms Matchett sought the advice of the Crown Solicitor, Mr Ken O'Shea, concerning Mr Heiner's appointment and whether the inquiry should continue. Mr O'Shea's advices, dated 18, 19 and 23 January 1990, indicated that it was his view that Mr Heiner had been lawfully appointed, but pursuant to section 12 of the *Public Service Management and Employment Act 1988* and not the *Commissions of Inquiry Act 1954-1989.*[5] As a result, neither he nor his informants had statutory immunity from legal action for defamation. Mr O'Shea went on to recommend that, if Ms Matchett decided to terminate the inquiry, documentation gathered by Mr Heiner should be destroyed. Mr O'Shea noted, however:

> This advice is predicated on the fact that no legal action has been commenced which requires the production of those files ...[6]

5.7 Following discussions with Ms Matchett on 19 January 1990, Mr Heiner wrote to her, indicating that he was not prepared to continue with the investigation, because of his concerns about his appointment and his authority to act. Ms Matchett's response was to ask him to send the documentation he had gathered to the department, where it was sealed in his presence, without being read by Ms Matchett or departmental staff. It appears that the decision to terminate the inquiry was taken at this time, in view of the discussions Ms Matchett had with the union representatives on that day, although Ms Matchett did not formally write to Mr Heiner until 7 February 1990, indicating she did not want the inquiry to continue. In a somewhat unusual development, the sealed material was transferred to the Cabinet secretariat,[7] rather than remaining with the responsible department.

5.8 In the meantime, the Acting Director of the John Oxley Youth Centre, Mr Peter Coyne, was becoming increasingly concerned over the conduct of the inquiry and the refusal of Mr Heiner to provide him with specific details of the allegations against him.

5.9 Mr Coyne gave evidence to Mr Heiner on 11 January 1990, without legal representation and without knowing the exact details of the complaints against him, although he did have the benefit of a summary page of allegations which a member of the inquiry staff had inadvertently given him.[8] He wrote twice to Ms Matchett, on 15 and 18 January 1990, seeking copies of the documentation associated with the Heiner inquiry and relating to himself,

5 Attorney-General's statement, 21.2.95, Attachments [1-3].

6 Attorney-General's statement, 21.2.95, Attachment [3], p. 2.

7 Attorney-General's statement, 21.2.95, p. 16.

8 Submission, Mr Peter Coyne, p. 3.

but this was refused.[9] It appears that his initial concerns were twofold: the possibly defamatory nature of the allegations against him; and a fear for his future within the Department.[10] He approached his union, the Queensland Professional Officers' Association (QPOA), for assistance. QPOA industrial officer, Mr Kevin Lindeberg, initially handled the case. Mr Lindeberg asserts that on 19 January 1990 he, with the State Services Union representative, Ms Janine Walker, attended a meeting with Ms Matchett at which she informed them that the Heiner inquiry had been terminated and that she had taken possession of the inquiry records. Mr Lindeberg told the Committee that at that meeting, he indicated that his member, Mr Coyne, still wanted to see the allegations made against him. A letter from the QPOA to Ms Matchett, dated 29 January 1990, complained that Mr Coyne was being denied natural justice in the matter.[11]

5.10 Mr Coyne's concerns were such that he approached a firm of solicitors, Rose Berry and Jensen, to seek access to the original complaints against him and to the evidence pertaining to those complaints taken by Mr Heiner. Mr Ian Berry first wrote to Ms Matchett on 17 January 1990, complaining of a denial of natural justice. Mr Coyne's understanding was that Ms Matchett's Executive Officer, Mr Trevor Walsh, responded by telephone, indicating that the Acting Director-General was seeking legal advice.[12] Some three weeks later, on 8 February 1990, Mr Berry again wrote to Ms Matchett on the matter, citing Regulation 65 of the *Public Service Management and Employment Act 1988* as Mr Coyne's authority to access the documents. Mr Berry followed up with a phone call to Mr Walsh, on 14 February 1990, in which he conveyed his client's intention to commence court proceedings to gain access to the documents; he confirmed this in writing to her on 15 February 1990. The court proceedings were envisaged, at this stage, 'in view of the fact that against the wishes of our client [Mr Coyne] he has been seconded to another section'.[13]

5.11 On 13 February 1990, Ms Matchett visited the John Oxley Youth Centre, informed the staff that the Heiner inquiry had been terminated, and of the reasons for that termination. She also informed Mr Coyne that he was to be transferred henceforth to Head Office for a special project, and suggested that any staff who wished to have any unresolved issues considered should do so through standard grievance procedures.[14] The Committee notes that no staff availed themselves of this opportunity.

5.12 Administratively speaking, the problem of what to do with the Heiner documents remained. On 13 February 1990, Mr Stuart Tait, then Acting Cabinet Secretary, sought advice from the Crown Solicitor on 'what options are open to Cabinet so far as retention or disposal of these documents is concerned and could they be obtained by way of subpoena or third party discovery should a writ be issued touching or concerning them'.[15] Mr O'Shea's reply, dated 16 February 1990, advised that, as the documents were public records and that the provisions

9 Submission, Mr Peter Coyne, p. 7.

10 Submission, CJC, 15.8.95, p. 4.

11 Submission, Mr Kevin Lindeberg, 25.1.95, Attachment 3.

12 Submission, Mr Peter Coyne, p. 8.

13 Submission, CJC, 15.8.95, Attachment B.

14 Attorney-General's statement, 21.2.95, p. 16.

15 Attorney-General's statement, 21.2.95, Attachment [4], p. 1.

of the *Libraries and Archives Act 1988* would therefore be invoked, the documents would need to be deposited in the State Archives, or the permission of the State Archivist sought before they could be destroyed. His reply further suggests that the documents would probably not attract Crown privilege.

5.13 On the basis of this advice, Cabinet decided that the better course was to dispose of the records. Mr Tait sought the advice of the Crown Solicitor on the suitability of a draft letter to the State Archivist, Ms Lee McGregor, specifically because the Government did not wish to be seen to be pressuring her.[16] The letter, as sent on 23 February 1990, informed the Archivist that 'The Government is of the view that the material, which I understand includes tape recordings, computer discs and hand-written notes, is no longer required or pertinent to the public record' and sought her urgent advice as to whether the records could be destroyed.[17] Mr Tait did not mention that there had been a specific threat of legal action based on the documents; he did, however, acknowledge that:

> During the course of the investigation, questions were raised concerning the possibility of legal action against Mr Heiner and informants to the investigation because of the possibly defamatory nature of the material gathered.[18]

5.14 Ms McGregor replied on the same day, stating that she and another staff member had examined the records and were satisfied that they were not required for permanent retention; she gave approval for their destruction.[19]

5.15 On 5 March 1990, armed with advices from the Crown Solicitor and the State Archivist, the Cabinet determined that the Heiner documents should be destroyed; on 23 March 1990, this was done.[20]

5.16 Mr Coyne, meanwhile, had been seconded to Head Office to the Division of Protective Services and Juvenile Justice and tasked to assess the department's response to children in need. On paper at least, this appears to have been a serious project: by the beginning of April, Mr Coyne had produced an elaborate five-stage project plan proposal;[21] by the end of June, when Ms Matchett inquired on progress, a discussion paper on stage one had been completed.[22] In August, Mr Coyne's secondment was extended for a further six months.

5.17 Mr Coyne asserted to the Committee that the 'special project' on which he was working was not a serious task and that he spent his days travelling for three hours to do nothing in the Brisbane office.

5.18 The position of manager of the John Oxley Youth Centre was upgraded and advertised. Mr Coyne applied, was interviewed, was chosen by the selection panel but was

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16 Submission, Cabinet Office, 31.7.95, Document 9.

17 Submission, Cabinet Office, 31.7.95, Document 9, Attachment, p. 2.

18 Submission, Cabinet Office, 31.7.95, Document 9, Attachment, p. 1.

19 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 9.

20 Attorney-General's statement, 21.2.95, p. 17.

21 Submission, Cabinet Office, 31.7.95, Document 19.

22 Submission, Cabinet Office, 31.7.95, Document 21.

rejected by Ms Matchett. In so doing, she outlined the other factors she had had to take into account when considering the appointment: matters of departmental convenience and efficiency; the best interests of all concerned; the composition of staff at a particular work location and the workability of such a staff team.[23]

5.19 Some discussions took place between the Director-General and the union concerning Mr Coyne's future but no job materialised, despite Mr Coyne's written agreement not to pursue any issues relating to his previous employment at the John Oxley Centre.[24] Events took their toll on Mr Coyne, who became very stressed and accepted what he described as an involuntary redundancy package plus a payment sought by the QPOA on his behalf for 'various unpaid work-related matters', which amounted to $27,190.[25]

5.20 In another twist in the Heiner documents saga, Mr Lindeberg, the QPOA officer who had initially represented Mr Coyne's case to Ms Matchett and the minister, was dismissed on 30 May 1990, reinstated, then dismissed again on 7 August 1990. One of the numerous reasons given by the QPOA for Mr Lindeberg's dismissal was his handling of the Coyne case. According to Mr Lindeberg, the then General Secretary of the union, Mr Don Martindale, removed Mr Lindeberg from the case in mid-March 1990 because Minister Warner refused to deal with him, claiming he was threatening her career.[26]

Investigations of the matter

5.21 Mr Lindeberg has raised the matter of the shredding of the Heiner documents with a number of agencies, including the Criminal Justice Commission (CJC) (twice), the Electoral and Administrative Review Commission, the Commission of Inquiry into the Activities of Particular Queensland Unions (the Cooke Inquiry) and the Queensland Police Service.[27]

The whistleblowing claims

5.22 Mr Lindeberg makes two principal allegations with regard to the Heiner documents case:

- that the decision of the Queensland Cabinet to order the shredding of the Heiner documents was illegal; and
- that the redundancy payment to Mr Peter Coyne was illegal.

Mr Lindeberg also alleges that his activities in support of Mr Coyne were one of the factors which contributed to his dismissal by the QPOA.

23 Submission, Cabinet Office, 31.7.95, Document 23.

24 Submission, Mr Peter Coyne, p. 14.

25 Submission, Mr Peter Coyne, p. 15.

26 Submission, Mr Kevin Lindeberg, 25.1.95, p. 13.

27 Submission, Mr Kevin Lindeberg, 25.1.95, pp. 4-7.

Discussion

5.23 The difficulties with the Heiner inquiry stem from the way in which it was set up. Had Mr Heiner been appointed by the Governor in Council under the terms of the *Commissions of Inquiry Act 1954-1989*, he would have had the power to subpoena witnesses and examine them under oath and absolute privilege would have applied to anything said or tendered. It appears, however, that Mr Heiner was appointed pursuant to s. 12 of the *Public Service Management and Employment Act 1988*, and thus his informants had no statutory immunity from suit or action for defamation.

5.24 Ms Matchett was clearly within her legal rights to halt the Heiner inquiry and to transfer Mr Coyne, whatever the merits of those decisions may have been. The decision to transfer the Heiner documents to the Cabinet Office appears unusual, but was not illegal. It must be remembered that the Goss Government had been in office for approximately two months at this stage, after some 32 years in Opposition, and there would not have existed amongst the new ministers any residual experience of certain Cabinet and ministerial procedures. In addition, the Crown Solicitor had recommended that Cabinet consider whether to indemnify Mr Heiner, were legal action to be brought against him.

5.25 Given that the Crown Solicitor had deemed the Heiner documents to be public records, the preconditions for their shredding to be legal were that they were not required for pending legal action and that the State Archivist had given her approval.

5.26 The question of when the course of justice begins, and when, therefore, legal action could be said to be pending was one which was hotly debated by various witnesses before the Committee. Mr Lindeberg alleged that, because a firm of solicitors had served notice of foreshadowed court proceedings in which the Heiner documents would have been required, the destruction of those records obstructed justice.[28] The CJC responded that no course of justice had been interfered with, because none was underway.[29] Mr Ian Callinan QC, for Mr Lindeberg, contributed to the debate:

> I am not suggesting or making any submission as to any final view which should be taken of the law with respect to perversion of the course of justice ... Let me assume for present purposes in favour of the CJC that the commission got the law right on the matter ... It is not the end of it whether Mr Lindeberg's allegation in legal terms is precisely correct. What is also critically important is whether there may have been some official misconduct, falling short of criminal conduct, and that is not even explored.[30]

5.27 In a memorandum to the Queensland Attorney-General by the Crown Solicitor, subsequently tabled in the Queensland Parliament and provided to the Committee, the legal aspects of the matter were outlined. In his memorandum, Mr O'Shea stated:

> There is an abundance of authority to show that a civil action or proceeding is not pending until the originating proceeding (Writ, Summons or Motion) has

28 Submission, Mr Kevin Lindeberg, 25.1.95, p. 3.

29 Submission, CJC, February 1995, p. 27.

30 Evidence, p. 40.

> been filed in the Court ... All the threats in the world to commence a Civil proceeding (or a Criminal one) do not make it pending, for the purposes of Section 129 of the Criminal Code.[31]

5.28 Mr O'Shea further stated that, in his view, there was no basis for any allegation of criminal conspiracy under section 132 of the Queensland Criminal Code:

> I can only wonder how it can be seriously suggested that a Government's destruction of its own property, in accordance with a Statutory regime which permitted its destruction (the *Libraries and Archives Act 1988*), in order to keep faith with and protect a retired Magistrate and witnesses misled by the actions of a Minister or her Department in a previous Government, is capable of constituting a case of Conspiracy.[32]

In Mr O'Shea's opinion, the shredding of the documents 'represented a reasonable, fair and commonsense approach to a difficult problem, which was not of the Government's making'.[33]

5.29 Messrs Callinan and Peterson propounded the model litigant argument:

> The simple fact is that, by seeking to destroy these [Heiner] documents, the Crown has removed a prospective litigant of his rights. This cannot in any true sense of the word be in accordance with our democratic principles.[34]

5.30 When the Queensland Cabinet took its decision to order the shredding of the Heiner documents on 5 March 1990, it did so knowing that the documents were being sought by Mr Coyne with legal action in mind, even though no writ had been served. Both Ms Matchett and Mr Trevor Walsh, her executive assistant, were aware of Mr Coyne's desire to obtain the documents. In his advice to Ms Matchett dated 23 January 1990, the Crown Solicitor stated:

> in a letter of 17 January 1990 Messrs Rose, Berry and Jensen, solicitors for Mr Coyne and Mrs Dutney request that they be allowed to have copies of all allegations and evidence taken to date. However, such request is related to the continuation of the inquiry which is now to be halted, therefore it is my recommendation that the solicitors for Mr. Coyne and Mrs. Dutney be advised that the inquiry has been terminated, no report has been prepared, and that all documentation related to the material collected by Mr Heiner has been destroyed.[35]

In correspondence to Ms Matchett dated 15 February, Mr Ian Berry stated that in his telephone conversation with Mr Walsh of the previous day, Mr Walsh indicated his intention of advising Ms Matchett of Mr Coyne's intention to commence Court proceedings.[36] It could

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31 Attorney-General's statement, 31.3.95, Attachment, p. 2.

32 Attorney-General's statement, 31.3.95, Attachment, p. 5.

33 Submission, Cabinet Office, Document 24, p. 10.

34 Submission, Mr RD Peterson, 8.5.95, [p. 2] .

35 Attorney-General's statement, Attachment [3], p. 2.

36 Submission, Mr Peter Coyne, Attachment 15.

be expected that Ms Matchett would brief her minister on the matter before the Cabinet discussion and that Minister Warner would convey the information to her Cabinet colleagues.

5.31 The Attorney-General's statement in the Queensland Parliament confirmed that the decision to shred the Heiner documents was taken by the Cabinet in the knowledge that they were being sought by Mr Coyne with legal action in mind.

> Before making its decision on 5 March 1990, Cabinet was informed that representations had been received from a solicitor representing certain staff at the Centre. However, while these representations had sought production of the material, no legal action had been instituted (nor was any legal action subsequently instituted).[37]

5.32 Mr Michael Barnes, of the CJC, posited the following explanation for the Cabinet decision to shred the documents:

> It is clear that cabinet made the decision to destroy the documents knowing full well that Coyne wished access to them. It may be that cabinet made that decision to destroy the documents on the basis that, in its view, the public interest in protecting the people who gave evidence before Heiner outweighed Coyne's private interest in having access to them. As it raises no issue of official misconduct, we can only speculate.[38]

5.33 The Government view, as stated by the Attorney-General, was that 'Cabinet acted properly and in good faith to rectify a very difficult situation for Mr Heiner, and the staff of the Centre who had provided information to Mr Heiner in confidence'.[39] He went on to say:

> The prevention of the 'publication' of material which had been improperly gathered had to be addressed.
>
> All reasonable steps were taken to ensure that the material could not be used detrimentally or otherwise regarding the future work prospects of all participants. This included Mr Coyne. The interests of natural justice had been served.[40]

5.34 A more pragmatic explanation for the destruction of the documents can be inferred from the Crown Solicitor's advice of 23 January 1990 to Ms Matchett:

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

37 Attorney-General's statement, 21.2.95, p. 7.

38 Evidence, p. 655.

39 Attorney-General's statement, 21.2.95, pp. 6-7.

40 Attorney-General's statement, 21.2.95, p. 17.

> government will stand behind him in relation to his legal costs and also in the unlikely event of any order for damages against him.[41]

5.35 The most plausible explanation for the shredding of the documents was to protect the public purse from the expenses of litigation. If in so doing, the rights of an individual (Mr Coyne) were negated, as he and others assert, some would argue that they were sacrificed for a reason.

5.36 Given that the Crown Solicitor had indicated that the Heiner documents were public records,[42] the other precondition for their legal shredding was that the approval of the State Archivist was sought and obtained. As indicated above, this was met, though it must be stated that aspects of the process are open to question. In correspondence to the State Archivist in which her approval to shred the documents was sought, the Acting Cabinet Secretary did not specifically mention that the documents were being sought for possible legal action. He did, however, allude to the fact that legal action was a possibility, given the nature of the material gathered.[43] As the State Archivist followed the Government approach that it was inappropriate for officers of the executive government to provide any assistance to the Committee and declined its invitation to give evidence, the Committee is unable to determine whether her decision to approve the shredding might have been varied, had she been specifically informed that one potential litigant did in fact exist. Her decision was apparently made within a few hours of receiving the voluminous material on 23 February 1990, which suggests that her examination of it must have been cursory indeed. The shredding itself was not performed with undue haste: Cabinet approved the shredding on 5 March 1990; the shredding took place on 23 March 1990.

5.37 The CJC's inquiry into the shredding was specifically to determine whether any official misconduct had occurred. Mr Le Grand summed up the CJC's position as follows:

> it is clear on the face of the legal advices and the correspondence that the Crown Solicitor was engaged in a bona fide attempt to resolve a difficult legal and practical problem. It is not for the Commission to arbitrate between competing legal claims. What the Commission had to determine was whether the advices were properly derived. In our submission, there is not a scintilla of evidence to indicate that when the Queensland Government decided to shred the documents it had any reason to believe that it was acting unlawfully. It had cognisance of, and was acting in accordance with, legal advice provided to it by the Crown Solicitor.
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> In those circumstances, there was no possibility of establishing that the members of the Cabinet had committed a criminal offence, nor as a consequence could they be guilty of official misconduct. At this point the Commission had discharged its function.[44]

41 Attorney-General's statement, 21.2.95, Attachment [3], p. 2.

42 Attorney-General's statement, 21.2.95, Attachment [4], p. 4.

43 Submission, Cabinet Office, 31.7.95, Document 9.

44 Submission, CJC, 13.8.95, pp. 2-3.

5.38 The Committee concludes that the Heiner inquiry, as constituted, was an inappropriate method to deal with the situation that pertained at the John Oxley Youth Centre. It agrees with the Crown Solicitor's opinion that the matter was one 'that should be dealt with departmentally by a senior, experienced officer'.[45] Given that the inquiry did take place, albeit with unclear powers and diffuse aims, it appears to have been conducted without the usual regard to notions of natural justice for all participants. In the circumstances, and without commenting on the merits or otherwise of his conduct as manager of the John Oxley Youth Centre, the Committee acknowledges that Mr Coyne was placed in an extremely difficult situation.

5.39 The Heiner inquiry took place during a period of considerable change in Queensland. The Committee notes that, regardless of its motives, the newly-elected Labor Government consistently sought advice from its chief law officer on aspects of the inquiry and its related documentation, and generally followed that advice. The Committee believes it is not appropriate to comment on the merit of that advice. It notes, however, that the shredding appears to have been a pragmatic solution to a difficult problem. With the benefit of hindsight, the Committee considers that the shredding of the Heiner documents may have been an exercise in poor judgment. Greater consideration ought to have been given to alternative approaches to resolving the problems associated with the inquiry. In particular, the Committee considers more heed should have been given to the 'Crown as model litigant' notion: it might have been more appropriate for the Queensland Government to have retained the documents for a certain period to allow for their production, if required, in legal action.

5.40 Whether the shredding was inappropriate or not, one aspect of the matter certainly was. The decision to shred the documents was taken by Cabinet on 5 March 1990;[46] on 19 March 1990 Ms Matchett was still writing to Mr Coyne stating that 'the matters [Mr Berry, Mr Coyne's solicitor] has raised are still the subject of ongoing legal advice'.[47] It was not until 22 May, and some six weeks after the destruction of the documents had been blazoned across the front page of *The Sun* newspaper,[48] that Ms Matchett formally advised Mr Coyne's solicitors that the Heiner documents the solicitors were seeking on Mr Coyne's behalf had been destroyed.[49] In her 19 March memorandum to Mr Coyne, Ms Matchett did not indicate the specific matters which were the subject of ongoing legal advice. She did, however, go on to indicate that as the Heiner inquiry had ceased and as no report was to be prepared, she considered that 'a number of the issues raised in your memoranda are no longer current'. Mr Coyne's solicitor had based his request for access to allegations against his client on Regulation 65 of the *Public Service Management and Employment Act 1988*, which relates to an officer's right to peruse any departmental file or record held on the officer. In so far as the Committee has been able to determine, no advice was received from the Crown Solicitor on the interpretation of regulation 65 and it is plausible to conclude that after the documents had been destroyed, Ms Matchett decided that such advice was no longer required.

45 Attorney-General's statement, 21.2.95, Attachment [1].

46 Attorney-General's statement, 21.2.95, p. 17.

47 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 12.

48 Submission, Mr Kevin Lindeberg, 25.1.95, Exhibit 15.

49 Submission, Mr Peter Coyne, Attachment 18.

5.41 Nevertheless, at 19 March, Ms Matchett was in possession of sufficient information to have responded more helpfully to Mr Coyne and to his solicitors. The Committee regards her final advice to the solicitors as late as 22 May 1990 as unacceptable and reflecting bureaucratic ineptitude at best or deliberate deceit at worst.

5.42 Some witnesses before the Committee have questioned the legality of the payment to Mr Coyne of $27,190 over and above what he was entitled to receive as a termination settlement. The Department advised the CJC that Mr Coyne and the QPOA jointly raised the issue of Mr Coyne's entitlement to reimbursement of the additional costs incurred by him as a result of his secondment; and after many meetings, a negotiated settlement for a special payment to Mr Coyne was reached.[50] The amount of $27,190 included payment for the following: compensation for unpaid overtime; cost of changing telephone number; additional train travel expenses; payment for work performed during leave; reimbursement for additional travelling time; loss of on-call allowance; loss of extra week's leave; and telephone rental call reimbursement.[51]

5.43 Current and former union representatives criticised such a payment, with Mr Lindeberg claiming it was a fraud concocted to get rid of Mr Coyne.[52] That it was an unusual payment is possibly supported by the fact that Mr Coyne was required to sign a deed of settlement. Mr Barnes of the CJC argued, however, that such deeds were normal commercial practice.[53] In any event, Mr Coyne accepted the payment as settlement of all claims against the department arising out of his relocation from the John Oxley Youth Centre to Brisbane; and he agreed to a confidentiality clause.

5.44 During its public hearing in Brisbane on 5 May 1990, the Committee questioned Mr Coyne at length about the special termination payment. He indicated that he had given the broad details to his union, which undertook the negotiations with the department on his behalf. He described the resulting $27,190 as 'pretty generous' but also added:

> One thing with this was that ... it was not really the money; it was the fact that I had been treated so badly, and I was going, and I wanted to dig my toes in and make it difficult and at least make them pay in some respect.[54]

5.45 With the benefit of hindsight, the Committee believes that the 'Coyne case' could have been better handled. Whether or not Mr Coyne was responsible for the staff unrest at John Oxley Youth Centre, the setting up and the conduct of the inquiry into the Centre resulted in a great deal of stress for all concerned. The fact that Ms Matchett announced the sudden removal of Mr Coyne to a special project at the same time as she informed staff of the termination of the inquiry was particularly unfortunate. Ms Matchett's stated reasons for moving Mr Coyne, according to her speech notes for the occasion, were that it was in his own best interests, and in the interests of the Centre and the Department.[55] Despite this, the

50 Submission, CJC, 15.8.95, Attachment H (letter Matchett-Bingham 30.11.92)

51 Submission, CJC, February 1995, p.33.

52 Evidence, p. 21.

53 Evidence, p. 661.

54 Evidence, p. 542.

55 Submission, Cabinet Office, 31.7.95, Document 16.

temporal link between the cessation of the Heiner inquiry and Mr Coyne's removal from the John Oxley Centre was such that, whether or not there was a causal relationship in fact, one would be perceived. As Mr Coyne put it, 'people believed that, underneath it, I had done something wrong'.[56] In the circumstances, it might have been expected that the Department would feel obliged to ensure that Mr Coyne received ongoing counselling and supervisory support. This apparently did not occur. Whether or not a financial payout by way of compensation was appropriate is questionable; its legality, however, is another matter.

5.46 It does appear, and the CJC acknowledges it to be the case, that the payment was technically illegal.[57] The CJC outlined the matter as follows. Minister Warner had approved the payment on 7 February 1991 as a special payment under section 77 of the *Financial Administration and Audit Act 1977*. The relevant regulation authorised ministers to make special payments up to $50,000. While such a delegation had been agreed by Cabinet in late 1990, it did not receive the approval of the Governor-in-Council until 13 June 1991 and hence the payment to Mr Coyne was illegal. When the department discovered this, it sought Crown Law advice as to its options; the option the department elected to follow was to treat the payment as a loss.[58]

5.47 The matter of Mr Lindeberg's dismissal from his position with the Queensland Professional Officers' Association is addressed by the Committee within the context of the Heiner documents study because Mr Lindeberg asserts that it was his handling of the Coyne case that was used as one reason to dismiss him.[59] Briefly, Mr Lindeberg represented Mr Coyne's interests in the initial stages, when the latter was seeking access to the complaints against him. Mr Lindeberg points out that his involvement was not to assist Mr Coyne in any private defamation action but out of a union concern to clarify the interpretation of Regulation 65 of the *Public Service Management and Employment Act 1988*.[60]

5.48 In so far as it has been able to determine, the Committee believes that the department was being somewhat disingenuous in replying to Mr Coyne's solicitor that there was no 'departmental file or record' held on Mr Coyne. The QSSU written complaints to the department about Mr Coyne were generated before the Heiner inquiry began. Even if the Heiner material could be classified as not belonging to the department, it is unlikely that Mr Heiner received the originals of documents, therefore some material should have been available for perusal.

5.49 Mr Lindeberg was, he alleges, removed from the Coyne case by the union general secretary Mr Don Martindale because Minister Warner complained about Mr Lindeberg's handling of it. He alleges he was removed because he 'knew too much' when he inadvertently found out from Ms Matchett's private secretary that the documents were going to be shredded; his assertion to the Committee was that the union was trying to ingratiate itself with the new Government and was prepared to turn a blind eye to the shredding so long as

56 Evidence, p. 536.

57 Submission, CJC, February 1995, pp. 33-4.

58 Submission, CJC, February 1995, pp. 33-4.

59 Evidence, p.10.

60 Evidence, p. 13.

Mr Coyne was 'looked after'.[61] However, the Committee recognises the right of a union to replace a more junior officer with a more senior one, for the purposes of negotiations.

5.50 Mr Lindeberg's dismissal from his union position shortly thereafter has the appearance of victimisation. Mr Martindale advanced seven reasons for it, including the complaint from Minister Warner that Lindeberg's handling of the Coyne case was 'inappropriate and overconfrontationalist'.[62] The other six matters ranged from the relatively trivial to the highly significant, if true: that Mr Lindeberg lacked basic industrial knowledge, for example. Mr Martindale also alluded to Mr Lindeberg's employment history with the QPOA, some aspects of which have come to the attention of the Committee. Mr Lindeberg alleged to the police that a credit union ballot had been rigged; he further alleged that superannuation payments had been inappropriately made. The Committee is not in a position to reach a conclusion on Mr Lindeberg's dismissal and notes that other bodies have investigated this matter.[63]

5.51 As so often seems to be the case in whistleblower 'retribution' matters, the employer can, as the QPOA did,[64] generally point to past instances of unsatisfactory conduct on the part of the employee, which cumulatively might warrant dismissal. Most employers in the 1990s are not naive and have ready access to legal advice. They are unlikely to fall into the trap of linking a dismissal to a specific whistleblowing act or group of acts, particularly so if their motives are improper. Proving the contrary to the satisfaction of an investigatory body is extremely difficult.

5.52 The Committee believes that Mr Lindeberg raised the allegations that he did in good faith. Mr Lindeberg is to be commended for bringing to the attention of authorities the matter of the Heiner documents.

Implications for proposed Commonwealth whistleblower protection legislation

Definition of whistleblower/whistleblowing

5.53 The definition of 'whistleblower' at the outset is not easy to frame. In the course of the Heiner documents matter, the Government statement suggested that the 'real' whistleblowers in the case were the John Oxley Youth Centre workers who had complained about their manager, Mr Coyne. Mr Coyne did not regard himself as a whistleblower, and hence eligible for 'protection', even though he clearly regarded the shredding as wrongdoing. He nominated Mr Lindeberg as the 'real whistleblower in the case'.

5.54 As discussed in Chapter 2, the SSCPIW favoured a broad definition of 'whistleblowing'. In analysing the Heiner documents case, it is useful to consider how the definition of whistleblowing would need to be framed in order to bring the players under whistleblower protection. If a whistleblowing disclosure must be motivated by notions of

61 Evidence, pp. 15-16.

62 Submission, CJC, February 1995, pp. 15-16.

63 See, for example, *Fourth Report of the Commissioner Appointed to inquire into the activities of particular Queensland Unions*, and submission, CJC, February 1995, pp. 17-18.

64 Submission, CJC, February 1995, pp. 15-16.

public interest, then in this case the complaint that Mr Coyne chastised a member of staff for coming to work in pyjamas,[65] would probably not qualify as whistleblowing. Whether the actions complained of constituted 'significant' wrongdoing is difficult to determine.

5.55 Even Mr Lindeberg's motives could perhaps be called into question by a strictly legalistic interpretation of 'predominantly motivated by the public interest', as it could, for example, be asserted that he was merely seeking revenge on an organisation - the QPOA - which had dispensed with his services. It could be argued that the shredding of improperly obtained information was not an act of significant wrongdoing but, indeed, a public service. If the shredding were deemed to be a wrongdoing, it is hard to see how, once done, it could be undone.

5.56 Another definitional problem centres on the words 'official misconduct' which is so often the 'significant wrongdoing' complained of. In evidence to the Committee, the CJC outlined how 'official misconduct' was defined in s.32 of the Criminal Justice Act and in paragraphs 4.18-4.22 above, the Committee considered the implications of such a definition. As Mr Barnes pointed out, elected office-holders cannot readily be disciplined, so to be found guilty of official misconduct, the conduct in question must be capable of amounting to a criminal offence.[66]

Standard of proof

5.57 If we accept that Mr Lindeberg's complaints were made in good faith, the next question to consider is the standard of proof required both to uphold his complaint and to show that he was victimised by his employer for blowing the whistle. In neither case was it likely that the accepted standard of 'beyond reasonable doubt' could be met. Even if circumstantial evidence were to be accepted to show victimisation, it is unlikely that the employer's countervailing argument that Mr Lindeberg was an unsatifactory employee in other respects could be totally discounted. As the CJC has pointed out after five years of experience with whistleblower protection, 'the reality [is] that it is very difficult to show that dismissal or demotion (which are commonly complained about forms of victimisation) have occurred because of whistleblowing'.[67]

5.58 Mr Coyne's case also highlights the difficulty of proving causality in 'punitive transfer' cases. While neither the Committee nor Mr Coyne regard him as a whistleblower, he was inextricably involved in a whistleblowing case and was transferred to an employment situation not of his seeking and which ultimately so distressed him that he left the Service. Mr Coyne believes he was punitively transferred;[68] the CJC does not.[69] The temporal sequence of events - Ms Matchett transfers Mr Coyne to Head Office on the very day she announces to staff at the John Oxley Centre that the Heiner inquiry is terminated - inevitably suggests an association between the two events and one which is not favourable to Mr Coyne. However, proving causality is difficult.

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65 Evidence, p. 532.

66 Evidence, p. 657.

67 Correspondence, CJC, 14.3.95, p. [2].

68 Evidence, pp. 531-2.

69 Evidence, p. 650.

Coverage of the private sector

5.59 Mr Lindeberg's initial complaints about his dismissal were not investigated by the CJC on the grounds that the QPOA was not a 'unit of public administration' in terms of the CJC Act. His case highlights the question as to whether Commonwealth whistleblower protection legislation should cover private sector employees, given the differing legislative obligations on employees in the public and private sectors.

Investigative delays and multiple investigative fora

5.60 Following the CJC's refusal to investigate his complaint about his dismissal by the QPOA, Mr Lindeberg took that matter up with the Cooke inquiry. He continued to pursue with the CJC the one strand of his complaint that was within jurisdiction, namely Minister Warner's involvement with the Heiner documents. He also took his complaints to the Electoral and Administrative Review Commission and, later, to various Senate committees. When advised that in the CJC's view, no official misconduct was involved, he complained to the PCJC about the investigation and continues to debate with the Commision its findings. None of the various investigative segments was particularly protracted: the CJC's first assessment took five and a half months, for example. But by taking aspects of his complaints to different agencies simultaneously, Mr Lindeberg probably lessened his chances of a speedy resolution, or indeed any resolution at all.

5.61 No investigative agency likes to 'share jurisdiction', with good reason. Where more than one agency is involved, there can be no assurance that each is operating from the same informational base and there is an understandable tendency on the part of agencies to wait for one to conclude its investigation before another reports, to reduce the possibility of contradictory findings. The Committee understands and to some extent sympathises with Mr Lindeberg's desire to have the differing strands of his complaints handled expeditiously. However the very real problem remains that overlapping jurisdictions present major difficulties, not to mention the cost to the public purse of multiple fora investigations.

Confidentiality of complainants/complaints

5.62 The Committee notes that the original complainants in the Heiner documents case, whether or not they could be described as whistleblowers, made their complaints in confidence. Yet, as the John Oxley Youth Centre was not a large workplace, and as, apparently, unrest had been simmering for some time, it could be assumed that everyone involved was well aware of who was making complaints, and of the tenor of those complaints. In paras 2.57-2.60 above, the Committee considered the ramifications for Commonwealth whistleblower protection legislation of open or closed hearings. If, on the one hand, proceedings had been conducted more openly, it is unlikely that the shredding would ever have taken place. On the other hand, if the complainants had been required to make their complaints more openly, it is unlikely that some of them would have done so and thus any hint of defamation would have been avoided.

Media involvement

5.63 Compared with some whistleblowing cases, the protagonists have not involved the media to any great extent. Articles broadly critical of the shredding of the Heiner documents have appeared in the print media from time to time. Most publicity on the Heiner documents issue has been generated by questions and statements in both the federal and the Queensland Parliaments. This of course is a legitimate way for whistleblowers to draw attention to their cause, though rarely is a politician provided with sufficient hard facts to enable him or her to reach a conclusion on the objectivity of the information supplied.