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TRANSCRIPT
OF PROCEEDINGS

THE HONOURABLE TIMOTHY FRANCIS CARMODY SC, Commissioner

MS K McMILLAN SC, Counsel Assisting
MR M COPLEY SC, Counsel Assisting

IN THE MATTER OF THE COMMISSIONS INQUIRY ACT 1950

COMMISSIONS OF INQUIRY ORDER (No. 1) 2012

QUEENSLAND CHILD PROTECTION COMMISSION OF INQUIRY

BRISBANE

..DATE 6/05/2013

Continued from 23/04/13

DAY 28

THE COMMISSION RESUMED AT 10.05 AM

COMMISSIONER: Good morning, everyone.

MR COPLEY: Good morning, Mr Commissioner. Mr Commissioner, the commission convened this morning to hear final submissions in connection with paragraph 3(e) of the order in council so it's probably appropriate to begin by announcing appearances. I appear with my learned friend Mr Woodford as counsel assisting the commission of inquiry.

COMMISSIONER: Thank you. Mr Hanger.

MR HANGER: I appear with my learned friend Mr Selfridge for the state of Queensland.

COMMISSIONER: Yes. Mr Harris.

MR HARRIS: I appear on behalf of Ms Harding and Ms Neil, Commissioner.

COMMISSIONER: Thank you. Mr Lindeberg.

MR LINDEBERG: Commissioner, appear on the authority which you have given me in lieu of Mr Bosscher not being present.

COMMISSIONER: Thank you.

MR LINDEBERG: But might I just add to that, if you don't mind, please, in that it was expected as of last night Mr Bosscher would be appearing today.

COMMISSIONER: Yes.

MR LINDEBERG: But unfortunately - perhaps you may not know, but overnight his child has fallen ill and he's potentially having an operation and he expresses apologies to the commission. But it nevertheless throws me into the water. I'm not saying I haven't been there before, but I just wanted to let you know that because today, as I understand it, we're essentially putting forward perhaps legal argument and I believe that I can - I know the case, I think, inside out, but I do think that this - decisions which are being made today in this inquiry have immense ramifications in respect of what may be found by you.

And I think it needs to be fair to you, if nobody else, that perhaps some consideration of that - you be aware of it. And whether you want to make any judgment or whether or not - I'm not saying, Mr Commissioner, that I seek a deferment, even.

COMMISSIONER: No.

MR LINDEBERG: I want to do the best by this commission, but it is something which just happened overnight. I can't tell you for certain that Mr Bosscher will be here tomorrow or the next day, maybe Thursday and Friday. So I want to put those things before you.

COMMISSIONER: All right. Thanks, Mr Lindeberg, I appreciate that. I'll bear them in mind. Yes, Mr Copley.

MR COPLEY: Mr Commissioner, during the course of the hearings about what was at that point within the ambit of paragraph 3(e) there was explored in detail the reports that were made by various teachers about the outing to the Lower Portals.

COMMISSIONER: Yes.

MR COPLEY: And two witnesses were cross-examined, I think by myself about their report, but I forgot to tender the report in each case, and so it's appropriate that the reports themselves actually be tendered. The first is a report under the hand of Mr Cooper, teacher; it's a two-page document and I tender that.

COMMISSIONER: Thank you. Mr Cooper's report will be exhibit 360.

ADMITTED AND MARKED: "EXHIBIT 360"

MR COPLEY: Thank you. It's already had removed from it any material that needed to be removed before we received it, so there's nothing to be obliterated from it.

COMMISSIONER: All right. I direct its publication in its present form.

MR COPLEY: The other report I tender is the report of Mr O'Hanley. It's dated 25 May 1988 and it's a two-page document as well. It also has had material obliterated from it before we ever received it and there's nothing else that needs to be removed from it.

COMMISSIONER: All right. Mr O'Hanley's report of 25 May 1988 will be exhibit 361 and be published in its entirety.

ADMITTED AND MARKED: "EXHIBIT 361"

MR COPLEY: Thank you. I think Mr Harris has a document he wishes to tender now.

COMMISSIONER: Yes, Mr Harris.

MR HARRIS: Thank you, Commissioner. Commissioner, I have my final submission I wish to tender to the inquiry today and then I'll seek leave to withdraw. My role in the inquiry I believe is now finished.

COMMISSIONER: Okay.

MR HARRIS: I've forwarded a copy of this to the counsel assisting - - -

COMMISSIONER: What is it, Mr Harris?

MR HARRIS: It's the final submission by myself - - -

COMMISSIONER: I see. Okay. Thank you. Have you circulated it?

MR HARRIS: I've given it to both the counsel assisting, but I haven't given it to the crown or - then I can undertake to email it to them today.

COMMISSIONER: Mr Harris's final submissions on paragraph 3(e) will be admitted and marked exhibit 362.

ADMITTED AND MARKED: "EXHIBIT 362"

COMMISSIONER: We'll provide copies to the parties, won't we, Mr Copley?

MR HARRIS: Thank you.

MR COPLEY: Well, because it's been admitted and marked as an exhibit it will be available on the web site, one would think, tomorrow morning anyway.

COMMISSIONER: Yes. Do I need to mark it as an exhibit? Is that the - - -

MR COPLEY: I think you just did, didn't you?

COMMISSIONER: Yes, but what you do, you can undo sometimes.

MR COPLEY: Well, the last time we were here and submissions were made about - - -

COMMISSIONER: I didn't, did I?

MR COPLEY: Those documents were made an exhibit.

COMMISSIONER: Were they?

MR COPLEY: Yes, that's the case, isn't it?

COMMISSIONER: Well, we may as well be consistent if there's no problem with it being marked.

MR COPLEY: Mr Harris doesn't mind if it's made an exhibit.

COMMISSIONER: Yes, okay. Well, it's going to be published in any event so we'll - I was right the first time.

MR HARRIS: Thank you, Commissioner.

COMMISSIONER: All right, Mr Harris, you want leave to withdraw?

MR HARRIS: Yes, thank you, Commissioner.

COMMISSIONER: You have the leave. Thank you very much for your help, I appreciate it.

MR HARRIS: Thank you, Commissioner.

COMMISSIONER: Mr Lindeberg.

MR LINDEBERG: Mr Commissioner, I just want to talk about tendering of documents. A couple of weeks ago I gave counsel assisting two statutory declarations which I felt were relevant, and I'll particularly be referring to one today in regard it was a statutory declaration from Mr Grundy confirming that he was the other party on that tape recording.

COMMISSIONER: Is that a disputed fact?

MR LINDEBERG: If it's not a disputed fact then perhaps it's not - - -

COMMISSIONER: You don't need to prove what's - you don't need to push against an open door, do you?

MR LINDEBERG: No, exactly. So if that's the case, well then, I understand perhaps that may be why counsel assisting hasn't mentioned it.

COMMISSIONER: Is it a disputed fact, anyone else? Doesn't seem disputed. Is it disputed, Mr Hanger? No.

MR LINDEBERG: There was on other document which - whether it can be put up now or parties to consider, or when I put it forward when I give you my final submission it may be that you may say, "Well, that's not a time for putting up documents." There is a document that I wanted to tender. It is part of a document which is already tendered. Namely it's the letter dated 8 February from Mr Berry to Ms Matchett. But what it does, it has a cover sheet on it which is to Mr Coyne and Ms Dutney showing them the document that he had sent to Ms Matchett, but it had the heading on it, Defamation. I think it becomes perhaps a relevant matter.

COMMISSIONER: I'll have a look at it, Mr Lindeberg. Thank you. Are you familiar with this, Mr Copley?

MR COPLEY: I am not familiar with it at all and would like to see it when (indistinct) finished looking at it, please.

MR LINDEBERG: I've got a copy if you want.

COMMISSIONER: Are you familiar, Mr Hanger?

MR HANGER: No. and it may also be relevant to Mr Keim, who is appearing for Ms Matchett, by the sound of it, but I'm not familiar with it.

COMMISSIONER: Defamation, that's the reference for the clients, isn't it?

MR LINDEBERG: Yes.

MR COPLEY: Presumably I haven't seen this document before because it's not a document that was ever sent to the state government. It was, as you've correctly observed, a private and confidential communication to Mr Coyne and Ms Dutney enclosing a copy of what is already an exhibit. But the cover letter - well, it speaks for itself.

COMMISSIONER: Yes.

MR COPLEY: But if it's not a document that went to - - -

COMMISSIONER: No.

MR COPLEY: - - - the state government, the first page of it didn't inform the state government of anything because they never received it.

COMMISSIONER: No, I understand. But for completeness I'll admit it.

MR COPLEY: Well, if that be the case – all right, yes.

COMMISSIONER: Yes. Are you content with that, Mr Hanger?

MR COPLEY: Would you like to see it?

COMMISSIONER: You haven't seen it.

MR HANGER: I haven't seen it, but, I mean, just from what my learned friend said, it seems absolutely logical and it's consequently irrelevant.

COMMISSIONER: Yes.

MR COPLEY: I would agree with my learned friend that it's irrelevant, but I don't want to waste time arguing against the - - -

COMMISSIONER: Yes. It will be – yes, if it has relevance it will be accorded it, if it has none, it won't be.

MR LINDEBERG: Thank you, Mr Commissioner.

COMMISSIONER: But otherwise, until I work that out, it will be exhibit 363.

ADMITTED AND MARKED: "EXHIBIT 363"

COMMISSIONER: Now, Mr Copley?

MR COPLEY: There are two other documents to tender. The commission of inquiry received an email from an individual who reckoned he knew where certain people were that the commission hadn't been able to find. He was wrong. Inquiries have been made and the results of those inquiries are contained in two further statements from Detectives Mizon and Parer and I tender - - -

COMMISSIONER: What, are you getting helpful hints from people how to conduct forensic investigations, are you?

MR COPLEY: Just to find people who apparently have information. The long and the short of it is, Mr Commissioner, that one of the gentlemen was a man that the police attached to the inquiry had approached last year at his address in Brisbane believing him to be the man they were looking for. He falsely pretended he was a different person and the police accepted his denials that he was indeed the man they were looking for in good faith and went away. They then went back as a result of this email and challenged him and he then admitted that he was in fact the man they were looking for last November, December. So it wasn't a matter of the police not being able to find that man, it was that that man was not honest with the police. The police - - -

COMMISSIONER: Is that man relevant to anything?

MR COPLEY: Well, he isn't now, because he didn't speak to Mr Heiner.

COMMISSIONER: Okay.

MR COPLEY: So that theory has gone. The idea that another man was overlooked by us because he was living in Coffs Harbour and apparently simple Internet searches could turn up that he'd won a fishing competition was a matter that had already been looked into and the results of that are in the statement. Lastly, we were helpfully told that a Mr Van Vlimmeren was now living in rural British Columbia and we could find him without too much trouble either. It turns out that that Van Vlimmeren isn't the man we were ever interested in. That man was and indeed has been resident in the Netherlands, as the police discovered last year, but the position has advanced a little further with him, in that he has now advised the police he didn't given any evidence to Mr Heiner either. So all those loose ends are now tied off.

COMMISSIONER: Okay.

MR COPLEY: I tender the statement of John Adam Mizon as one exhibit and a statement of Denise Parer as another exhibit and I'll provide a copy to the parties in a second.

COMMISSIONER: Thank you. Exhibit 364 will be Sergeant Mizon's statement and Detective Senior Constable Parer's statement will be exhibit 365.

ADMITTED AND MARKED: "EXHIBIT 364"

ADMITTED AND MARKED: "EXHIBIT 365"

MR COPLEY: Mr Commissioner, the primary purpose of this morning's proceeding was to make final submissions relevant to paragraph 3E of the order in council.

COMMISSIONER: Yes.

MR COPLEY: Before the parties make their submissions there were just a couple of matters that I wanted to draw to your attention. To make things a bit easier for you in terms of if you wish to mark the documents, I've had downloaded from the website photocopies of certain exhibits so that they're clean copies and I'll hand them up as we go. At the moment I'll hand up copies of exhibits 151, 128 and 129 – sorry, 129 and 128, in that order, because I'm going to start with exhibit 151 and work my way back up the chronological list.

COMMISSIONER: Okay, this is submissions.

MR COPLEY: Yes. They're copies that you can draw on or write on because they're just photocopies.

COMMISSIONER: Thanks. So they're working documents. I don't need to mark them.

MR COPLEY: Yes, they're copies for you. Exhibit 151 is both the cabinet decision of 12 February 1990 which was the decision to accord Mr Heiner an indemnity, or extend the policy to give Mr Heiner an indemnity, and the decision to defer consideration of the question of destruction pending the provision of a further cabinet memorandum. That's not really what we're interested in for the purposes of this submission this morning. It's more the documents that are attached to it.

COMMISSIONER: Yes.

MR COPLEY: You will see, Mr Commissioner, that on the cover sheet, which is the next three pages of the exhibit, the cover sheet document is effectively a summary of the body of the submission, which is the last pages, 4 through to 7, of the exhibit, but it's convenient to start with the cover sheet which tells you why Mr Heiner was appointed as the author of this document understood it to be. So you will see why he was - - -

COMMISSIONER: Who was the author?

MR COPLEY: The authors were Ms Crook and Ms Matchett. So this was as they understood the issues. You will see under the heading Purpose/Issues the reason or reasons why Mr Heiner was appointed, and then you will see the conclusion of the crown solicitor, that Mr Heiner was lawfully appointed, but the nature of his appointment didn't afford him any statutory immunity from legal action in relation to his involvement in the investigation. You will see that the current government policy provided, according to this document – and this document is important, because this is what apparently cabinet knew or was told, that current government policy provided for crown employees to be indemnified for costs associated with legal claims arising out of the due performance of their duties, but Mr Heiner, as he was characterised by the authors, as an independent contractor, would not be covered by the policy. So the fact he wasn't covered by that policy ties back into the purpose or the title of the memorandum, which is up the top, the provision of an indemnity to Mr Heiner from the costs of legal action which may ensue from his involvement in the investigation.

The document goes on to add that furthermore, during the course of his investigation he gathered information of a potentially defamatory nature. Now, it doesn't tell the cabinet what that information was, of course. Then it says, "In view of the crown solicitor's advice and the limited value of the investigations continuing, the acting director-general has ended the investigation and has taken

possession of all the documents." It doesn't tell the cabinet there what the limited value of the investigation continuing was, but you've heard evidence that it was because Mr Heiner decided that he wasn't going to be making recommendations, he was just going to report on the first of the eight paragraphs in his terms of reference, namely the validity of the complaints about Mr Coyne.

COMMISSIONER: Well, there was limited value at that point because they weren't going to get what they wanted.

MR COPLEY: That's right.

COMMISSIONER: Or what they'd asked for.

MR COPLEY: That's correct, and Mr Coyne was moved from the centre on 13 February. This document is compiled on 5 February, or signed on 5 February. The intention to move him wouldn't have - - -

COMMISSIONER: Made any difference.

MR COPLEY: - - - come about overnight.

COMMISSIONER: But when it did happen it didn't make any difference, according to the evidence, anyway, did it?

MR COPLEY: That's right. Then you will see over the page the objective of the submission, that extension of a policy to Mr Heiner would provide him with the indemnity from costs of future legal action which could result from his part in the investigation. What can be said about that is that the extension of the policy that covered the public servants to Mr Heiner might simply have been a step that was considered prudent to take on the off-chance that something might develop out of his investigation.

Then it says in the next paragraph that destruction of the material gathered by Mr Heiner in the course of his investigation would reduce risk of legal action and provide protection for all involved in the investigation. The crown solicitor advises that there is no legal impediment to this course of action.

That, in my submission, is a very important paragraph to bear in mind because, in my submission, it represents a summation or a distillation of the opinion of the crown solicitor, but the evidence is that the cabinet determination get the opinion of the crown solicitor. This is what they got, that destruction of the material gathered by Mr Heiner in the course of his investigation would reduce risk of legal action and provide protection for all involved in the investigation.

Now, the matter is returned to or approached in the body of the submission from page 4 onwards and you will see that in the first three paragraphs it talks about why Mr Heiner was appointed or what he was appointed to investigate, the fact that doubts arose as to the legal basis of the inquiry but that the crown solicitor concluded that his appointment was entirely valid, but that in paragraph 3 there was a lack of statutory immunity and thus exposure to the possibility of legal action against Mr Heiner and informants to the investigation because of the potentially defamatory nature of the material Mr Heiner had gathered.

In paragraph 4 it tells the cabinet effectively that the public servants are covered by the policy from 1982 and in paragraph 5 it says that it's not certain that Mr Heiner would be covered because he was an independent contractor, but because Mr Heiner had been acting in good faith, it was thought inequitable for him to be exposed to the risk of incurring costs in any future legal action which might eventuate and so it was recommended that Mr Heiner be indemnified pursuant to the same policy that indemnified public servants. Paragraph 6 said:

> Having considered the crown solicitor's advice and the limited value of continuing with the investigation, it had been decided to terminate Mr Heiner's investigation. The termination of the investigation would to some extent reduce the risk of legal action for all concerned.

It said that the fate of the material collected by Mr Heiner had yet to be determined. It had been given to the acting director-general and stored by her. It spoke in paragraph 7 of the opinion of the crown solicitor as at 5 2 as at 5 February that the material Mr Heiner had gathered did not constitute a public record and so there was no legal impediment to destruction and it distinguished the

material Mr Heiner had gathered from the material that the department had supplied to Mr Heiner and the submissions said that material should be returned to the department.

COMMISSIONER: Could I take you back to page 3 under the "Recommendation" heading (ii)?

MR COPLEY: Yes.

COMMISSIONER: Which material formed part of the official files that weren't to be destroyed at this point in time?

MR COPLEY: Well, there was evidence in the documents that Mr Heiner had requested files and records on employees and statements of policy to do with – I just can't remember now how it was expressed, but there's an exhibit where Mrs Cosgrove – there's a typewritten note where someone records that Ms Cosgrove was asking for the following documents from government files and Mrs Cosgrove evidence, "I would have done that at Mr Heiner's request."

COMMISSIONER: His material might form part of the public files only to the extent that they were public files in his possession.

MR COPLEY: Yes.

COMMISSIONER: Not any new material. We don't know what he got, but one way of reading that may be that to the extent that his material forms part of an official file it shouldn't be destroyed.

MR COPLEY: Yes.

COMMISSIONER: So far so good.

MR COPLEY: Yes.

COMMISSIONER: My question to you is: what does the evidence say about what the extent of the material that formed part of official files was and your answer, as I understand it, to me is it would only be anything that was given to Heiner from the existing official filed holdings.

MR COPLEY: That's right, and there was evidence from Mr Nix that Mr Nix provided him with certain policy documents as well. So presumably whatever documents the government itself gave to Mr Heiner they would have simply photocopied policy documents or employee records to then hand across to him.

COMMISSIONER: Yes.

MR COPLEY: So he had government records and then he had records that he had gathered or generated himself in the course of the inquiring.

COMMISSIONER: So it wanted to keep its own records but not his.

MR COPLEY: That's what this submission says, yes, "We can return our records to proper government files but his records can be destroyed at this stage because (a) they're not public records and there's no impediment to destruction and (b) the inquiry is to be ended. There's no purpose in keeping them."

COMMISSIONER: Now, who owned these records that they're talking about destroying?

MR COPLEY: Well, at this time the view was formed that the records were not public records, that they were Mr Heiner's records and he had simply given them to the government, but subsequently the - - -

COMMISSIONER: What for? What did he give them for, to hang onto or destroy?

MR COPLEY: The answer to that would have to be found in the letter that's annexed to exhibit 123 which is Mr Heiner's letter where he said he would take no further steps.

COMMISSIONER: What exhibit is this, sorry?

MR COPLEY: If you go to exhibit 123, there are two letters attached to exhibit 123. It's the second of the two letters.

COMMISSIONER: Yes.

MR COPLEY: Arguably Mr Heiner was relinquishing not just possession but also control or ownership of the documents.

COMMISSIONER: Where do we get that indication?

MR COPLEY: If you go to the letter dated 19 January, Matchett to Heiner, second-last paragraph. She may deal with them as she is advised to do. Now, there's a slight inconsistency between that paragraph and the one which precedes it because you will see there that Mr Heiner said he retained possession of each of the records of interview personally and take no further action until he'd received advice from the director-general, but you will recall that Derman Roughead gave evidence that Trevor Walsh instructed him to go out and receive a box or take a box from Mr Heiner.

COMMISSIONER: So in any event, whatever he intended when he wrote this letter, he gave over possession to the department on request.

MR COPLEY: That's right, and you will recall that in the statements I tendered last week Detective Collis informed the commission that inquiries were made with the next of kin of Mr Heiner about this story that circulates around the place that the next of kin have got the transcripts and are hanging onto them for some reason and that hypothesis was disabused in Mr Collis's statement.

COMMISSIONER: All right, so just for everybody else's information, what I'm hearing you say is that your position is that the documents that were destroyed didn't belong to Heiner, any ownership rights he had in them had been relinquished to the crown.

MR COPLEY: Yes.

COMMISSIONER: Right.

MR COPLEY: So they were the crown's documents now.

COMMISSIONER: Okay.

MR COPLEY: Though the advice in the 5 February submission didn't put it that way because at that point all prior to that point the crown solicitor's opinion was that they were simply Mr Heiner's records.

COMMISSIONER: And that seems so as a matter of law, but if he's relinquished them and given them over with no caveat as to retention or use but simply: do with them what your advice tells you to if you want to, that would seem to me to be relinquishing ownership.

MR COPLEY: Yes.

COMMISSIONER: Or any interest in their existence.

MR COPLEY: Yes.

COMMISSIONER: And if anyone wants to address that in their submissions to the contrary they get their chance.

MR LINDEBERG: During their submission, not now.

COMMISSIONER: Their submission needs to address that issue if they want to argue to the contrary.

MR LINDEBERG: Okay.

COMMISSIONER: Because that would be relevant to - who owns the documents might be relevant to the findings I make.

MR COPLEY: So returning them to paragraph 7 on page 6 of exhibit 151, we got to the point where I observed that the crown solicitor's advice at that stage was that the material gathered by Mr Heiner didn't constitute a public record, hence no legal impediment to destruction, but that this advice - meaning the crown solicitor's advice - didn't apply to the material that came off official files which should be returned.

COMMISSIONER: Yes.

MR COPLEY: Nor would it apply in the event of legal action requiring production of the material being commenced. Now, that would be quite a correct statement of law a legal action had been commenced and someone required production of the material, then whoever owned material would be liable to produce it if asked.

COMMISSIONER: Sure. Now, just taking the last issue a step further, did Mr Heiner's relinquishment of his private rights in the documents to the crown make it a public record?

MR COPLEY: Well, it was the opinion of the crown solicitor subsequently that they did become a public record.

COMMISSIONER: But not for that reason.

MR COPLEY: His view was that they had been given to a public authority as a result of a job, effectively, that the public authority had asked him to perform.

COMMISSIONER: So maybe it was for that reason.

MR COPLEY: Yes.

COMMISSIONER: Okay. And do you agree with that position? Is that right?

MR COPLEY: I don't wish to cavil with the crown solicitor's view that the documents were public records.

COMMISSIONER: But in any event you say it doesn't matter in terms of the executive government's response because they treated them as if they were public records.

MR COPLEY: They treated them as if they were their own then.

COMMISSIONER: And also applied the public record rule to them.

MR COPLEY: Yes. In my submission the characterisation of them as public records contain no particular magic or no particular significance except that if they were public records then the consent of the archivist to their disposal or the authorisation of the archivist for disposal needed to be obtained.

COMMISSIONER: Yes, they were only public in the sense that they weren't personal or private.

MR COPLEY: That's right. But there was no other great significance in the fact that they fell within the ambit of the phrase public records.

COMMISSIONER: No.

MR COPLEY: They would effectively regarded by the crown solicitor in his advice is subsequently as the property of the crown.

COMMISSIONER: Yes.

MR COPLEY: The crown's own property. The crown acquired property in those documents because Mr Heiner relinquished them to the people that had appointed him. Mr Heiner didn't want them and said, "You will do with them as you think fit."

COMMISSIONER: But nonetheless the Crown still occupies the position as the body politic acting on behalf of the community in general.

MR COPLEY: Yes.

COMMISSIONER: So whatever rights it's got, theoretically, are exercised on behalf of the public in the public interest because they're the same. It doesn't have any interest other than the public interest, does it?

MR COPLEY: No, that's probably correct, yes. Then the last paragraph of paragraph 7 says - - -

COMMISSIONER: What I guess I mean is - and I'm open to hearing about this from Mr Hanger or anyone else - is that the state acts consistently with the public interest, which means the balance of the public interest considerations on a particular topic - I mean, there will be conflicting, competing rival interests that will all be public interests, and that will include the impact on private interests.

MR COPLEY: Yes.

COMMISSIONER: But at the end of the day what the crown acts on is the balance of all the public interest considerations, including to the extent the public interest might want to protect somebody is private interests.

MR COPLEY: Yes. And of course the crown isn't an ornament, it's embodied in certain decision-makers, of course. Relevantly in this case, the cabinet. And of course the cabinet had to decide where the public interest lay.

COMMISSIONER: Yes. So if the destruction of the documents was inconsistent with the public interest it might be argued that that was an appropriate.

MR COPLEY: Yes, but if it was not inconsistent with the public interest then it would be more difficult to conclude that cabinet acted inappropriately.

COMMISSIONER: And would the question of the appropriateness or otherwise of state action be affected by beliefs, or is it an absolute? That is, if you unintentionally do something that's contrary to the public interest when you should be protecting it, it hurts just as much.

MR COPLEY: Well, if by that you mean - I think I discern from what - I submit that what you're positing to me there is that if an action unwittingly has a deleterious effect on the interests of a member of the community, can it still be regarded as an appropriate action?

COMMISSIONER: No.

MR COPLEY: No?

COMMISSIONER: What I was really thinking about was if I'm the executive government and I do an action that in fact is contrary to the public interest I didn't mean to do it, is it still inappropriate?

MR COPLEY: I have to consider that further.

COMMISSIONER: Okay.

MR COPLEY: Because I caution you against you trying to work out what was in the public interest.

COMMISSIONER: We'll come back to that because I do have to work out what is appropriate and I need a ruler.

MR COPLEY: Yes.

COMMISSIONER: I need a continuum to work that out, don't I?

MR COPLEY: Yes.

COMMISSIONER: I'll go from highly appropriate to totally inappropriate. No?

MR COPLEY: Yes. Now, in the last paragraph - can I just get you back to this exhibit 151.

COMMISSIONER: Yes.

MR COPLEY: In the last paragraph it says that, "As this material" - meaning the material Mr Heiner had gathered - "related to an investigation which ended, therefore it had no further purpose, it was recommended that all of that

material" - meaning the material Heiner had gathered - "be destroyed. Such action would remove doubts in the minds of all concerned that it remains accessible or could affect any future deliberations in relation to the management of John Oxley Youth Centre."

I've taking you to those various paragraphs in this document because when you go and look at exhibit 129 you'll see that it is a summation or a distillation of legal advice.

COMMISSIONER: Yes.

MR COPLEY: So if we go now to exhibit 129, which is - - -

COMMISSIONER: Just before we go to that, sorry, why would it remove doubts in the minds of all concerned that the destroyed documents were no longer accessible? How would I get to know about that if I was one of the people concerned?

MR COPLEY: I think you're probably asking the wrong question there.

COMMISSIONER: Right. Should you answer that one anyway and then we'll go onto the right one?

MR COPLEY: All right. Well, if the documents still exist, people might fear that those documents might affect their career.

COMMISSIONER: That's right, or might be accessible to them if they want to do something else with them.

MR COPLEY: Well, that's not what that sentence is saying. It's saying such action would remove doubts in the minds of all concerned that it remains accessible.

COMMISSIONER: To whom?

MR COPLEY: To those people who are worried about it being accessible.

COMMISSIONER: Accessed by somebody else. What about if they wanted to access them themselves?

MR COPLEY: At the time this document was prepared there - - -

COMMISSIONER: There's nobody on the horizon except - - -

MR COPLEY: Well, it depends for what purpose people wanted them.

COMMISSIONER: They're talking here of the possibility, the bare possibility of some legal action that Mr Heiner needed to be indemnified again, right?

MR COPLEY: Yes.

COMMISSIONER: So in that context documents that you are thinking about destroying might be useful – helpful to someone and hurtful to somebody else, mightn't they?

MR COPLEY: You might be investing in that paragraph a greater significance than it deserves when you know all of the facts.

COMMISSIONER: I just wonder what – and I know that this is coming from the person making the recommendation. What's being recommended is destruction.

MR COPLEY: Yes.

COMMISSIONER: One of the rationales for that that's being put by the minister making the recommendation is that people will know – it will remove any doubt in the mind of anyone concerned that they're still accessible.

MR COPLEY: Yes.

COMMISSIONER: Why wouldn't that be read naturally to mean accessible for or against any person concerned? See, if you've got my document and you tell me, "I've destroyed it now," I know for sure it's no longer accessible, don't I?

MR COPLEY: Yes.

COMMISSIONER: So any hope that I had of accessing that document is now gone, beyond doubt. You've destroyed it.

MR COPLEY: Yes.

COMMISSIONER: So why would that be a message you'd want to give to anybody who might fall in the category of being concerned?

MR COPLEY: I don't know, but this is the document the cabinet got given.

COMMISSIONER: Yes.

MR COPLEY: You have posited to me that it's capable of a number of interpretations.

COMMISSIONER: Because the response by the executive must be connected with their interpretation of the document, mustn't it?

MR COPLEY: Yes.

COMMISSIONER: So therefore reasonable interpretations, even though they might be competing, that are open, we have to have a look at, don't we?

MR COPLEY: Yes.

COMMISSIONER: So one of the ways, for example, of reading that would be, well, everybody out there at John Oxley would now know, regardless of which side of the debate they were on, the documents were not accessible anymore because they had been destroyed by cabinet.

MR COPLEY: Yes.

COMMISSIONER: Now, my initial question to you was how would they know that?

MR COPLEY: I don't know how they would know that.

COMMISSIONER: Well, let's have a look at how realistic it was to think that they would ever know that.

MR COPLEY: They could be – it's possible that they could be told that.

COMMISSIONER: I know, but unless they are told that those doubts will remain, so it must be in the mind of the person saying, "It will remove doubt," that somehow they are going to be told.

MR COPLEY: Yes.

COMMISSIONER: I'm just wondering why you would think that.

MR COPLEY: This really gets to the very problem of this whole thing, that there are people who are attempting to deal with the fallout from an inquiry that those people did not constitute, and I'm talking here about Matchett and Crook.

COMMISSIONER: Yes. They're the incoming.

MR COPLEY: That's right. Well, they were there before but they weren't involved in constituting the inquiry. So they were in the department but they weren't the people whose idea it was to - - -

COMMISSIONER: Ms Matchett has been promoted above her former boss.

MR COPLEY: That's right.

COMMISSIONER: Who did have his fingerprints on constituting it.

MR COPLEY: That's right. Then they obtain legal advice from crown lawyers.

COMMISSIONER: Yes.

MR COPLEY: They tell the crown lawyers what they feel the crown lawyers need to know. The crown lawyers then write the legal advice.

COMMISSIONER: Based on?

MR COPLEY: What they've been told or can discern. Then the authors produce this document which is their distillation or their summation or their understanding of the salient parts of the crown solicitor's advice.

COMMISSIONER: Yes, but it's with a purpose, isn't it?

MR COPLEY: It's a twofold purpose, to get Mr Heiner the indemnity he's asked for, and then secondly, to destroy the material that Mr Heiner had gathered.

COMMISSIONER: They're the two objects.

MR COPLEY: Yes.

COMMISSIONER: But the purpose is to persuade cabinet to decide to (a) indemnify and (b) destroy.

MR COPLEY: Yes, to accede to the request or the recommendation.

COMMISSIONER: This is an argumentative document, isn't it?

MR COPLEY: Yes, and what does cabinet know? Well, cabinet knows only what it reads or what it was told by Ms Warner.

COMMISSIONER: Yes, and it believes – it knows that, and what it believes is what it interprets from what it reads and is told.

MR COPLEY: If it interprets anything.

COMMISSIONER: Anything, exactly.

MR COPLEY: It would depend on where cabinet's focus was.

COMMISSIONER: Yes.

MR COPLEY: You've heard evidence from the three cabinet ministers as to where they understood the focus was, and it's very apparent that there wasn't even among those three ministers, if there evidence is accepted - - -

COMMISSIONER: That's right.

MR COPLEY: - - - a meeting of minds between even those three as to what cabinet's purpose was.

COMMISSIONER: That's right, and that's the difficulty here, because ordinarily an inquirer wouldn't listen to a person with a vested interest in telling him or her why they did something, because - - -

MR COPLEY: Why would you posit that? You're going to be listening here to people making submissions with a vested interest.

COMMISSIONER: Yes, but as witnesses, when it's their conduct that's under examination, their explanation for their conduct ordinarily wouldn't be – not in a commission of inquiry, wouldn't be part of the determinative information, would it?

MR COPLEY: Well, my submission to you is that a court receives evidence all the time from witnesses.

COMMISSIONER: Yes.

MR COPLEY: Some witnesses have an interest in the outcome of a proceeding, but that's a matter that can be taken into account, presumably – I'll confine myself to a civil trial. That's a matter that can be taken into account.

COMMISSIONER: Yes. It's part of the evidence.

MR COPLEY: The court doesn't start from the assumption, "I will not believe that witness because he has an interest in the outcome of this action."

COMMISSIONER: No.

MR COPLEY: The court doesn't put his evidence into an inferior category.

COMMISSIONER: No, I'm not talking about credibility, I'm talking about whether in reviewing or inquiring into something the person whose conduct you're inquiring into is relevant to the objective assessment of the quality of the conduct.

MR COPLEY: Well, an objective assessment can sometimes only be informed by asking the person who acted why they acted and what they acted on.

COMMISSIONER: Yes, and if we could always rely on people telling you the truth that would be the best way of finding out.

MR COPLEY: It would be, but you don't start with the assumption, or presumption, that because those people are the people whose conduct is being inquired into that, "They may not be telling me the truth."

COMMISSIONER: Yes. No, I know that.

MR COPLEY: You assess them on their merits.

COMMISSIONER: No, I'm asking do I assess it at all.

MR COPLEY: What do you mean?

COMMISSIONER: Well, I'm being asked to review whether there's any criminal conduct associated with a response by the executive government.

MR COPLEY: Yes.

COMMISSIONER: That involves making judgments about conduct, its purposes and its effect.

MR COPLEY: Forming opinions.

COMMISSIONER: Forming opinions about it.

MR COPLEY: Forming opinions about conduct.

COMMISSIONER: Yes, and then disclosing the opinion of – reporting on the opinion I've formed.

MR COPLEY: Yes.

COMMISSIONER: Do I form that opinion, is that opinion formed, by what somebody tells me about why they did something – or, sorry, why executive government did

something when they're only one of a number that constitute executive government?

MR COPLEY: Yes. Unless you find a reason for not accepting that person's evidence that evidence must assist in informing you. It's relevant evidence.

COMMISSIONER: I'm not deciding the issue, am I?

MR COPLEY: You're not, in my respectful submission, deciding anything really.

COMMISSIONER: No, I'm forming an opinion about what's open and what's not open on the evidence, aren't I?

MR COPLEY: That's right. You're not determining rights or liabilities. You're not judging guilt or innocence. You're not determining whether anybody, for example, should be committed for trial.

COMMISSIONER: No.

MR COPLEY: Anything of that nature at all.

COMMISSIONER: No.

MR COPLEY: All you're doing is providing, in my submission, your own opinion which, in my submission, is your own subjective opinion because it can't be your opinion if it's not subjective.

COMMISSIONER: It can't be yours.

MR COPLEY: That's right, or anyone else's.

COMMISSIONER: Or Mr Hanger's.

MR COPLEY: It's just your own opinion about whether there was any criminal conduct associated with a government with executive government response and/or whether their conduct was inappropriate or appropriate.

COMMISSIONER: Yes, and both of those are conclusions that have to be evidence based.

MR COPLEY: That's right.

COMMISSIONER: And they have to be reasonable and rational.

MR COPLEY: That's right, and it's not reasonable or rational, I'm sure you would agree – and maybe you didn't need to convey this to me, but it's not reasonable or rational to start from the assumption, "I won't be according great weight to that person's evidence because their conduct is the conduct that I'm scrutinising and to the extent that they said that they did everything correctly or properly I'll take that with a grain of salt."

COMMISSIONER: No, that's not the question. It's not what they did and whether they acted appropriately or properly. The question is whether the response of the executive

government was appropriate. In forming an opinion about that, do I listen to what some members of the executive government say the executive government was doing when we know they don't take a vote? They act on a discerned consensus.

MR COPLEY: I would submit to you that if you didn't allow that evidence to inform you, then you would be failing to have regard to relevant evidence. You said to me, "Do I take it into account?" You take it into account because you have got to assess it and if you accept that what they say is truthful or might be truthful, that will inform your opinion.

COMMISSIONER: Is that part of my process, deciding the credibility of witnesses in forming my opinion about whether there was any associated criminal conduct?

MR COPLEY: It could be.

COMMISSIONER: Is it?

MR COPLEY: I will give you an example. Mr Thomas said the idea for destruction came from Ms Matchett.

COMMISSIONER: All right.

MR COPLEY: Ms Matchett said, "No; no; no, that came from Mr Thomas."

COMMISSIONER: Right.

MR COPLEY: Now, you may or may not need to form an opinion about whose idea it was to posit the possibility of destruction first.

COMMISSIONER: Therefore I don't need to resolve the conflict between the two and I don't need to take it into account at all because it's an immaterial fact.

MR COPLEY: You may not because the position you might take is that, "Well, on that issue what matters is what cabinet was told. It doesn't really matter why cabinet was told it."

COMMISSIONER: Exactly; so coming back to our question here, we know what they know because it's in the documents and there is no evidence that they were told anything outside the documents, is there?

MR COPLEY: We know what they were told because it was in the documents.

COMMISSIONER: All right. They can't know any more than what they were told.

MR COPLEY: Presumably not, no.

COMMISSIONER: Okay; and there is no evidence that they did know any more than what they were told in these documents.

MR COPLEY: Yes.

COMMISSIONER: So let's take the documents as the fund of information they have.

MR COPLEY: Yes.

COMMISSIONER: Their knowledge for the purpose of the debate, but their knowledge, while it's relevant, isn't the critical question about criminal conduct, is it? The critical question is what they believed based on what they knew.

MR COPLEY: If you're thinking in terms of section 129 of the code, that is a critical element, what they believed.

COMMISSIONER: What they believed relates to what they knew but they may not be the same – they are the same states of mind, although one could include the other.

MR COPLEY: Yes.

COMMISSIONER: So coming back to my question, given all that - - -

MR COPLEY: I was just concerned from something you had said before, that you said something that might have betrayed an inclination regarding certain people's evidence as being in a less reliable category than others simply because they were arguable the subject of the amended term of reference.

COMMISSIONER: Yes. No, sorry if I - what I said could be interpreted as that. What I was always concerned about was not credibility of relevance.

MR COPLEY: Well, even judged by the standard point of relevance, what those people remember of what they thought cabinet's motivation was is relevant evidence.

COMMISSIONER: Because it's what?

MR COPLEY: Well - - -

COMMISSIONER: How would they use that probatively?

MR COPLEY: An element of the offence in section 129 is, "With intent to prevent a document being used in a legal proceeding."

COMMISSIONER: Yes.

MR COPLEY: I've used the word "purpose" instead of "intent". I could have used the word "motivation". So what a cabinet member says "our purpose" was - or my understanding of "our purpose" was, or "our intent", or "our motivation" is relevant in assessing whether there was - is potentially relevant evidence to assessing whether there was criminal conduct.

COMMISSIONER: Well, that brings us to the nub of things, then. This debate I'm having with you is for the benefit of the others who have to come after you, really.

MR COPLEY: Yes. But I haven't finished yet.

COMMISSIONER: No, I know. I'm trying to work out when it says in the term of reference, "Criminal conduct associated with a response of executive government," that doesn't mean - or it's not limited to criminal conduct by the executive, does it - is it? It just means any criminal conduct associated with the response of the executive government. So for example if - an individual could engage in criminal conduct that was associated the executive government response in the destruction of documents, couldn't it?

MR COPLEY: Well, I'm just reading the term of reference, which says you, "Review the adequacy or appropriateness of - - -"

COMMISSIONER: Yes.

MR COPLEY: Let's leave the parenthesis out for a second.

COMMISSIONER: Okay.

MR COPLEY: "Review the adequacy or appropriateness of any response of or action taken by the executive government."

COMMISSIONER: Yes, and that is the body politic. Was what the body politic did appropriate?

MR COPLEY: What cabinet did, appropriate?

COMMISSIONER: Yes.

MR COPLEY: Yes.

COMMISSIONER: I understand that one.

MR COPLEY: Yes.

COMMISSIONER: Now let's go to the parenthesis.

MR COPLEY: "Your review of appropriateness or adequacy is to also involve considering whether any criminal conduct was associated with any response or action of the executive government."

COMMISSIONER: Yes.

MR COPLEY: My submission to you therefore is that you interpret the term of reference as meaning: was the cabinet's action appropriate?

COMMISSIONER: Yes.

MR COPLEY: Was the cabinet's action in your opinion criminal?

COMMISSIONER: Is it? Can it be criminal, executive government's actions?

MR COPLEY: Yes, because executive government is made up of a number of individuals. And when I say - - -

COMMISSIONER: How do you put executive government in the dock?

MR COPLEY: When I say cabinet I fall into the same silly mistake that's been made all these years, as if cabinet is an institution - - -

COMMISSIONER: Separate from its membership.

MR COPLEY: - - - devoid from its personalities. So it would have been more correct for me to have said, "Whether there was any criminal conduct engaged in by each of the members of the cabinet."

COMMISSIONER: Each or any.

MR COPLEY: Each or any. All or any. All or any.

COMMISSIONER: All, some, or all - none, some or all.

MR COPLEY: Yes.

COMMISSIONER: So to that extent when ministers come and give evidence, they're talking about their own position - - -

MR COPLEY: Yes, so we give it - - -

COMMISSIONER: - - - but is it relevant, what they say, to anybody else's position? That's where I started in this question.

MR COPLEY: Well, it's been alleged that cabinet was engaged in a conspiracy.

COMMISSIONER: Yes.

MR COPLEY: And if there's a conspiracy there must have been, according to the alleger, some meeting of minds.

COMMISSIONER: All right, so it's relevant for the conspiracy question.

MR COPLEY: Yes.

COMMISSIONER: But is it relevant to any other criminal conduct?

MR COPLEY: Well, it's relevant to whether or not the intention of the person who joined in the decision was to - - -

COMMISSIONER: Of the person, yes - - -

MR COPLEY: - - - was to achieve.

COMMISSIONER: But not of any other person unless you've got Tripodi or something helping you out.

MR COPLEY: You mean by people outside the cabinet room when you talk about other persons.

COMMISSIONER: No, I mean - I'm just trying to work out the executive government could be liable as a body - sorry, could act - its conduct could be criminal, but the liability for that criminal conduct would be several. It would be borne by each member of cabinet.

MR COPLEY: Yes.

COMMISSIONER: Not by the corporate body itself. Right?

MR COPLEY: Right.

COMMISSIONER: And to prove any criminal conduct was associated with the cabinet response you'd have to prove all the elements of an offence against each and every member you alleged to have committed that conduct, wouldn't you?

MR COPLEY: Yes.

COMMISSIONER: And apart from - leaving conspiracy aside for the moment because it's got different evidentiary consequences - to prove that you would rely on what somebody said about their own intention but not what they said about somebody else's.

MR COPLEY: That's right.

COMMISSIONER: That's all I wanted to know.

MR COPLEY: Okay. Now, I want to go from paragraph 7, second paragraph of exhibit 151, back to exhibit 129, which is the letter that Mr O'Shea signed but which Mr Thomas largely drafted for him and was sent to Ms Matchett, and it's clear from the sequence in which the cabinet submission develops its points, when compared to the sequence of things discussed in this document, that Matchett and Crook were drawing largely upon this document in formulating the cabinet submission.

You'll see in the first two paragraphs - we'll just say it's Mr O'Shea is the author - Mr O'Shea wrestled with whether or not Mr Heiner had been lawfully appointed and his conclusion at the start of paragraph 2 was that he had been lawfully appointed under a particular provision of particular act and that no other statute then extant justified the appointment. Then in the next paragraph headed The Next Question Is, Mr O'Shea tackled the issue of whether the inquiry can or should continue.

It could continue because there was no legal impediment to the continuation of the inquiry but the question of whether it should continue involved, he said, "A number of other considerations which might cause you, Ms Matchett, to conclude that no useful purpose would be served in continuing an inquiry that can continue." And you will recall that I asked Mr Thomas, "Why did this advice stray into the area of policy?"

Because you'd agree, Mr Commissioner, that when the crown solicitor starts talking about whether it should continue, that's a policy issue for her, not a legal issue for the crown solicitor. But Mr Thomas's evidence was that his impression was that she desired assistance on that issue. And so then the paragraph beginning, "It would seem" is a paragraph devoted to offering an opinion about whether the

inquiry should continue, "That it was unlikely to satisfy any of the people affected by it and it seems it's gone astray from its inception."

Now, the crown solicitor and Mr O'Shea could only have known that information or formed that conclusion from things they were told by Ms Matchett. And amongst other things, they received a copy of Mr Heiner's letter which said, "I thought paragraph 1 of my eight terms covered the whole field. That's all I was ever investigating or looking at." So if that's what Mr Heiner thought when the previous director-general had set him up to investigate eight things, that his only concentrating on the first of the eight, then it's a small step to conclude for a lawyer that the thing seems to have gone astray right from the beginning. So the better course, meaning it's a matter - - -

COMMISSIONER: What, in the sense that was doing what he wasn't asked today?

MR COPLEY: Well, he was only doing it - - -

COMMISSIONER: He wasn't doing what he was asked to do.

MR COPLEY: He was only doing an eighth of what he was asked to do. The inquiry was meant to go six weeks, according to the letter of appointment; it was going to cost $3000; he was going to investigate eight things.

By 11 January the inquiry had got to – or 12 January, had got to interviewing its last witness, namely Mr Coyne. Mr Coyne then is presenting himself to Ms Matchett's office very, very upset and distraught about the last question Mr Heiner asked him, which last question, you will recall, had nothing to do with - - -

COMMISSIONER: Any of the eight topics.

MR COPLEY: - - - any of the eight topics bar the first one.

COMMISSIONER: Yes, okay.

MR COPLEY: So Mr O'Shea said the better course would be to advise him that although he was lawfully appointed, there's no good purpose to be served by asking him to continue and that his services are no longer required. Mr O'Shea obviously thinks that Mr Heiner has failed to appreciate the ambit of his task and that after having interviewed all those people and got to the point where he was about to write a report there's no point in continuing with the report from Mr Heiner because it's only going to deliver you one-eighth of what government wanted from Mr Heiner. Mr O'Shea said it was natural that Mr Heiner might be concerned about any risk of legal action and so it was appropriate for cabinet to be approached about giving him effectively an indemnity in relation to legal costs and also in the unlikely event of any order for damages against him.

Then the letter points out something, namely that the witnesses that appeared before Mr Heiner didn't enjoy any statutory immunity. Now, that's a fact, but the witnesses would have been covered by the 1982 policy which the writer doesn't refer to at that point, presumably because he's not asked about that, but he does enclose it at the end of the letter as being a document that she might like to be aware of.
Moving back to that paragraph where it talks about how those witnesses wouldn't be immune from suit or legal action for defamation, it goes on to say that - - -

COMMISSIONER: Sorry, just looking at that, it just seems to be slightly off key there. The fact that the informants had no statutory immunity didn't affect the character of what they said as defamatory or not.

MR COPLEY: No.

COMMISSIONER: But it's written as though I does.

MR COPLEY: Yes.

COMMISSIONER: It's either defamatory or its not, and if you've got a defence to it doesn't make it undefamatory. It's still defamatory, it's just you've got a defence to it.

MR COPLEY: If you're even immune from suit it doesn't make it not defamatory.

COMMISSIONER: No, but the way this reads is that, "Mr Heiner's informants have no statutory immunity from suit for defamation in carrying out these duties, although they would appear to have qualified privilege, therefore it seems that some of the material which has come into his hands may be regarded as defamatory."

MR COPLEY: One didn't follow from the other. It was either defamatory or it wasn't.

COMMISSIONER: Yes, so "therefore" is a bit out of place.

MR COPLEY: Yes.

COMMISSIONER: Anyone got one of these?

MR COPLEY: Yes.

COMMISSIONER: Okay.

MR COPLEY: It goes on to say, "The material is now in your hands and if you decide to discontinue I would recommend that as it relates to an inquiry which has no further purpose the material be destroyed." For what purpose, Mr Commissioner? To remove any doubts in the mind – doubt in the minds of persons concerned that it remains accessible or could possibly affect any future deliberations concerning the management of the centre.

COMMISSIONER: I see. That's where that came from.

MR COPLEY: Or the treatment of any staff at the centre. You will recall the similarity in phrasing between what cabinet's told and this, and this is where this has probably come from. So the crown solicitor says, "This material can be destroyed, because if you destroy it it will" – and I'm paraphrasing – "allay any concerns that it is accessible." Perhaps the "or" could even be characterised as an "and", "Could possibly affect future deliberations concerning management of the centre or" – the second "or" would only be an "or", you would think, "the treatment of any staff at that centre." So they're the reasons for destruction.

"However," says the next paragraph, "you can't go destroying anything that came from government files. You've got to return that to the government files." That's

not controversial. We needn't spend any more time on that. Then the advice says, "This advice is predicated," based on, assumes, "the fact that no legal action has been commenced which requires the production of the files and that you decide to discontinue the inquiry." It refers to the letter of 17 January and we've looked at that letter numerous times. It is incontrovertible that that letter wasn't threatening legal action against anybody for what they said at the inquiry, it was a letter saying, "You need to take steps to accord our clients procedural fairness at this inquiry. If you don't take the steps that are in your power, Ms Matchett, to have Mr Heiner accord that procedural fairness, you'd agree with me," says the writer, "that I could go to the Supreme Court and I'd have a pretty good basis for getting a declaration," presumably, "to that effect, but you don't need to do that, Ms Matchett. You can just instruct Mr Heiner to proceed accordingly."

COMMISSIONER: So that's really the answer to my earlier question then, it seems, read in context, that when Mr O'Shea and then Ms Matchett and the minister are saying the material – or, sorry, destroying the material would remove any doubt in the minds of persons concerned that it remains accessible, is linked to that letter that Mr O'Shea suggests be sent to Mrs Dutney and Mr Coyne telling them that the investigation is over and all the documents have been destroyed.

MR COPLEY: Yes.

COMMISSIONER: So they were the ones he had in mind, at least, although, see, he says – he refers to removing doubt from the minds of persons concerned.

MR COPLEY: Yes.

COMMISSIONER: Now, persons concerned to him appears, to me, anyway, at this stage, to be Ms Dutney and Mr Coyne.

MR COPLEY: Yes.

COMMISSIONER: But then when cabinet gets the submission it's not persons concerned, it's all persons concerned.

MR COPLEY: That's right. That's right. There's been, in my submission - - -

COMMISSIONER: An expansion.

MR COPLEY: Or another way of putting it, a gross oversimplification of the advice of the crown solicitor. It was reduced down and concepts were melded together and then given to cabinet.

COMMISSIONER: That's why I asked you before why would all persons – how would all persons concerned get to know, but when you trace it back clearly the persons concerned that Mr O'Shea had in mind would get to know because he was going to write him a letter, or Ms Matchett was going to write them a letter.

MR COPLEY: Yes. Well, it hadn't occurred to me to answer you that way. I thought you were really asking me in the abstract.

COMMISSIONER: Yes. No, I was – I'm probably not as familiar with these background documents as you are so I'm – and because we're working backward – because we're working forwards to back - - -

MR COPLEY: I could have worked from the original advice from Mr Thomas to Mr O'Shea, then to the cabinet, but that seemed to be the logical - - -

COMMISSIONER: Yes. No - - -

MR COPLEY: Because what is logical is what cabinet knew.

COMMISSIONER: Now, just going back to the advice, page 2, when he says in the second-last full paragraph, "This advice is predicated on the fact that no legal action has been commenced"."

MR COPLEY: Yes.

COMMISSIONER: Now, if he's giving advice as a lawyer, should he in hindsight have turned his mind to the question of not only litigation that had been commenced but litigation that was likely?

MR COPLEY: That would depend upon what the crown solicitor's understanding of the law was is the answer.

COMMISSIONER: Yes.

MR COPLEY: It's not a very helpful answer but that's the answer.

COMMISSIONER: No, let's have a look at it. In the context of this case, should the crown solicitor have been alert to the fact that 129 didn't concern itself with extant legal proceedings but with potential or likely legal proceedings?

MR COPLEY: There was at that time no judicial interpretation, as far as I'm aware, certainly in any reported decision of the Queensland Court of Criminal Appeal of that provision.

COMMISSIONER: I know, but even if there subsequently was, it only declares what the law always was rather than making it.

MR COPLEY: That is the theory.

COMMISSIONER: Yes, that's what we are brought up to believe, Mr Copley. I mean, is that a flaw in the advice looking at it now from here?

MR COPLEY: It arguably is.

COMMISSIONER: Because the crown solicitor is looking at what legal impediments there are and that's arguably an impediment if there is a section in the Criminal Code that says you can't destroy documents that we now know with the benefit of Ensbey means believing that litigation is likely. He didn't have the benefit of Ensbey I know.

MR COPLEY: No, he didn't.

COMMISSIONER: Nonetheless, it was a consideration, it seems on the face of it, given that the law was that Ensbey

says it was at the time, that he maybe should have turned his mind to in telling cabinet what was impeded by law and what wasn't in connection with destroying documents.

MR COPLEY: Yes, you can't destroy any document that you know or that you believe is or might be required in any reasonably possible judicial proceeding in the future.

COMMISSIONER: He didn't tell cabinet that.

MR COPLEY: No, but at the time he wrote this advice the only letter that had come in was the letter of 17 January and the terms of which I have just mentioned before.

COMMISSIONER: And it hadn't commenced any legal proceedings so it answered that question. There were no legal proceedings commenced.

MR COPLEY: No.

COMMISSIONER: The letter that he then goes on to refer to was only asking for the documents to be preserved for a purpose other than – he says other than defamation proceedings.

MR COPLEY: That's right, "The purpose for preservation is so that my client can write answers to or provide evidence to rebut the allegations that he believes have been made against him." So the crown solicitor says, "Well, there'll be no problem here because if you destroy it, these people won't need to be worrying about having to rebut it. They won't need to be concerned that it might be held on a file and will affect their future career prospects in the government because it will have been destroyed," and there wasn't to be any secrecy.

COMMISSIONER: And they won't know that they had been defamed either.

MR COPLEY: The crown solicitor didn't know that they had been defamed.

COMMISSIONER: No, I know, but if they had been, destroying the documents would mean they wouldn't get to know.

MR COPLEY: Strictly speaking, destroying the documents would remove the best available evidence of the defamation.

COMMISSIONER: But it would remove the defamation itself too, wouldn't it?

MR COPLEY: No; no, it wouldn't, would it, because let us assume that the defamation was the last question that Mr Heiner put to Mr Coyne?

COMMISSIONER: Yes.

MR COPLEY: I note again Mr Coyne is not here anxiously in any way concerned about his legal rights, but that's, of course, another mystery. Mr Coyne would have evidence that that question or that allegation was made about him and that evidence would be because Mr Heiner asked him the question.

COMMISSIONER: That's right. So Mr Heiner if it was defamatory would be a publisher of the defamatory statement.

MR COPLEY: To Mr Coyne, yes.

COMMISSIONER: Coyne, but obviously Mr Heiner was getting it from somewhere else and so - - -

MR COPLEY: Hang on; he either got it from somewhere else or he simply made it up. I'm not suggesting for a moment that he made it up but he's not alive to tell us.

COMMISSIONER: No, but let's assume that the probability is he got it from one of his informants.

MR COPLEY: Yes.

COMMISSIONER: Now, Mr Coyne, having been asked that question and assuming no doubt that it wasn't being made up by Mr Heiner, would very much like to know the identity of the person or persons who said that.

MR COPLEY: Yes.

COMMISSIONER: So then in destroying the documents that Mr Heiner had that recorded the identity of that person or persons Mr Coyne would never know the identity of the defaming party.

MR COPLEY: No, he could know it. It goes too far to say he would never know. It would make it considerably harder for him.

COMMISSIONER: Okay.

MR COPLEY: To find out he would have to interrogate Mr Heiner as to where he obtained that information from.

COMMISSIONER: Right, but more importantly it would also destroy the defamatory statement because all Mr Heiner would be doing would be repeating the gist of it.

MR COPLEY: I would submit to you that it would destroy the best evidence of the defamatory statement. There would still be evidence available the defamatory statement was

made and that would be obtained from Mr Heiner, that he was told this or "This was asserted to me by witness X or witness Y"

COMMISSIONER: Yes.

MR COPLEY: It would make it harder.

COMMISSIONER: Yes, especially if Mr Heiner was a defendant and you wouldn't know who to sue anyway, would you? Without the documents you wouldn't - - -

MR COPLEY: You would have to appropriately serve - - -

COMMISSIONER: You would have to get pre-action discovery - - -

MR COPLEY: That's right; make it a lot harder.

COMMISSIONER: - - - which is hard to get.

MR COPLEY: Make it a lot harder, but, in my submission, it just goes too far to say it would obliterate.

COMMISSIONER: No, fair enough; I take your point.

MR COPLEY: That's my only point.

COMMISSIONER: Yes, it's a valid one.

MR COPLEY: That's all. So the crown solicitor didn't urge any secrecy.

COMMISSIONER: Do you want this?

MR COPLEY: It's all right. You can hand onto it.

COMMISSIONER: I can have it, thanks.

MR COPLEY: Didn't urge any secrecy about this. He said:

> *I note that the solicitor's letter of 17 January requests that they be allowed to have copies of the allegations. However, that's related to the continuation of the inquiry which is to be ended. Therefore, it is my recommendation that the solicitors be advised it has been ended, no report has been prepared and that all documentation relating to the material has been destroyed -*

and he said, "I enclose a draft letter to this effect," and then if you look further into exhibit 129, you will see the draft letter that the crown solicitor prepared dated 23 January 1990 which would have been at least a timely response to Mr Berry's letter saying all the material except what had come from government files has been destroyed.

COMMISSIONER: Why?

MR COPLEY: In an effort to avoid bias in any future inquiry.

COMMISSIONER: Was that the real reason?

MR COPLEY: You will recall Mr Thomas's evidence that Ms Matchett was speculating about the possibility of a further inquiry.

COMMISSIONER: Yes, I know and then they talk about that in the letter, "When you have identified somebody, let us know who it is and we will have a look at how he or she should be appointed," but really to say – and this letter never got sent anyway, did it?

MR COPLEY: Unfortunately, no.

COMMISSIONER: If it had got sent and I read it and I was Mr Berry, I would think that the reasons the documents were destroyed was to avoid biasing a future inquiry as opposed to removing any doubt that the documents were accessible to the persons concerned.

MR COPLEY: Or could possibly affect future deliberations. If the documents are still around they, as Mr Thomas said, could have found their way to a second or subsequent inquirer and then - - -

COMMISSIONER: But that's what I mean. It was only half the reason that is in the letter, isn't it? It's an alternative reason but it's not the only one and it's not the only one that went to cabinet, because cabinet got both reasons.

MR COPLEY: But the point again is the crown solicitor writes this document and what cabinet gets told doesn't come from the crown solicitor, it comes from people interpreting what the crown solicitor has said.

COMMISSIONER: Why did Ms Matchett say she'd never sent that letter of 23 January?

MR COPLEY: Because she took the view – the adjective she used was that it was prudent, as I recall it, for cabinet to be asked what they should do with the documents. She wasn't comfortable in making the decision herself. You will recall Mr Thomas's evidence that it was a mystery to him why the documents needed to go to cabinet. He said this inquiry hadn't been constituted by the previous cabinet. There was no requirement in law for it to be a matter to bother the new cabinet with, and certainly that evidence must be both – must be honest and accurate insofar as Mr Thomas is concerned if he's drafting a letter dated 23 January making no secret of the fact to Mr Berry that these documents have been destroyed, "Therefore your clients have got nothing to worry about. These documents aren't going to affect their careers whether there's a new inquiry instituted or not."

COMMISSIONER: At that stage the letter from Mr Berry was focused on their careers rather than anything else.

MR COPLEY: That's right, and at that stage Mr Coyne knew - when that letter was sent on 17 January 1990 Mr Coyne knew about the besmirching of his character that he may have believed or may have been entitled to believe some person had engaged in, because the question had been asked of him by Mr Heiner on 11 January.

COMMISSIONER: All right, so that would put my mind at ease if I got that letter.

MR COPLEY: Sorry?

COMMISSIONER: If I got that letter that would put my mind a bit at ease, wouldn't it?

MR COPLEY: If you were Mr Coyne or Mr Berry?

COMMISSIONER: Yes.

MR COPLEY: Well, you'd say to your client, "Look, the problem is solved here. You don't have to rebut any of these allegations anymore. They've ended the inquiry, they've destroyed the documents. Heiner is not going to make a report."

COMMISSIONER: Well, that's a problem - - -

MR COPLEY: That's a problem.

COMMISSIONER: - - - that's being dealt with, but it might not be their problem. It might not be the problem, or the only problem. They might still be upset that it was said at all.

MR COPLEY: They might be, but the fact is they knew – he knew, he knew it had been said by 11 January.

COMMISSIONER: Yes, and they might be upset that their forum for contradicting it had now been pulled from under them.

MR COPLEY: Well, they wanted the inquiry to proceed. He wanted the inquiry to proceed.

COMMISSIONER: I know.

MR COPLEY: Because he believed he could rebut the allegations.

COMMISSIONER: I know, and now he's left in no doubt that he can't do that.

MR COPLEY: That's right. He can't rebut the allegations.

COMMISSIONER: In that forum.

MR COPLEY: Yes, because there's no need to. There will be no findings adverse to - - -

COMMISSIONER: No need from the government's point of view.

MR COPLEY: That's right, because they're not – that's quite correct.

COMMISSIONER: But what about from his perspective or Ms Dutney's perspective? They might have had a need to rebut it.

MR COPLEY: No correspondence came from any solicitor along those lines, Mr Commissioner. That is simply an indisputable fact. He's known about this since 11 January. He doesn't know these documents are destroyed until he reads it in The Sun on April 11, 1990.

COMMISSIONER: So until then he's got no reason – he thinks they're still around, accessible.

MR COPLEY: Possibly. Possibly, or what is he concerned about? Why does he want the documents?

COMMISSIONER: I don't know.

MR COPLEY: Well, if you look at the terms of the letters that are written he wants the documents to rebut the allegations.

COMMISSIONER: But, see, one thing that has always concerned me is this, and I know that some of the witnesses dealt with it, but we're talking about – the documents are talking about the interests of all concerned.

MR COPLEY: Yes.

COMMISSIONER: I know that's not what the crown solicitor said, but that is what - - -

MR COPLEY: The cabinet document, you mean? The cabinet submission?

COMMISSIONER: Yes.

MR COPLEY: Yes.

COMMISSIONER: Cabinet would be looking at the interests of all concerned because it's got to weigh the public interest. It's got to find out where the balance is.

MR COPLEY: Yes.

COMMISSIONER: One of the purposes that's in the submission that would be served by destruction is that it would let everybody concerned know that the documents were no longer accessible.

MR COPLEY: Yes. Now, by concerned, I just posit, does it mean concerned because they're worried or concerned because they're connected to the centre?

COMMISSIONER: Or concerned because they were the objects of the statement.

MR COPLEY: Worried.

COMMISSIONER: Yes.

MR COPLEY: Yes, it's capable of two interpretations, that expression.

COMMISSIONER: Yes, but we know also that Mr Coyne and Ms Dutney want to have their opportunity to respond to these allegations.

MR COPLEY: That's right.

COMMISSIONER: In order to do that they want to know what they are.

MR COPLEY: That's right.

COMMISSIONER: They want the documents preserved until they get their chance.

MR COPLEY: That's right, and they want the inquiry to continue, was their evidence.

COMMISSIONER: That's right.

MR COPLEY: They wanted this inquiry to go on.

COMMISSIONER: Apart from anything else, what they want, so far as we can tell, is for the documents not to be destroyed.

MR COPLEY: Yes.

COMMISSIONER: They want them to remain accessible.

MR COPLEY: Yes.

COMMISSIONER: Now, they don't know until 11 April that that isn't the case.

MR COPLEY: That's correct. That's quite correct, yes. That was Mr Coyne's evidence.

COMMISSIONER: That's right. So there's no reason on the evidence for him to believe that those documents that he wants preserved and to remain accessible to him are in jeopardy of being destroyed until he reads it in The Sun, is there?

MR COPLEY: No, there isn't.

COMMISSIONER: So why would he write saying – or get his solicitor to write saying, "Preserve those documents that I've got no reason to believe are in danger of being destroyed"? He wouldn't, would he?

MR COPLEY: Well, his solicitor did indeed make a phone call of that nature.

COMMISSIONER: Okay, maybe that – but even if he did, my question is why would you expect Mr Coyne to write and say, "Don't destroy the documents. I want to use them – I might want to use them in litigation," if he's got no reason to believe that they're going to be destroyed.

MR COPLEY: On 14 February 1990 at 10.20 am Ian Berry telephoned Trevor Walsh, "Seeking an assurance from you" – the "you" was Ms Matchett – "that the documents relating to the Heiner inquiry will not be destroyed."

COMMISSIONER: Right, okay, so Mr Berry did that.

MR COPLEY: Yes.

COMMISSIONER: It seems like an appropriate thing for a solicitor to do.

MR COPLEY: You said to me that they would have no reason to suspect that the documents would be destroyed.

COMMISSIONER: That's right.

MR COPLEY: Well, they must have had a reason to suspect if the solicitor was ringing, looking for that assurance.

COMMISSIONER: It might be just belts and braces.

MR COPLEY: Mr Commissioner, the inescapable fact of the matter is no legal action for defamation was instituted.

COMMISSIONER: Yes, I know that.

MR COPLEY: Notwithstanding a concern that these documents might be destroyed, and when Mr Berry rang seeking an assurance from Ms Matchett that they wouldn't be destroyed Mr Walsh said, "You'll have to put that in writing." Would that not ring alarm bells for the solicitor? "They won't just accept it that I've phoned and told them, they want it in writing."

COMMISSIONER: What the solicitor would think, "Ah, because they advised me to put it in writing they might be going to destroy it without telling me."

MR COPLEY: That's right. And so then the solicitor did put it in writing the next day, 15 February. "We refer to our telephone conversation with Trevor Walsh on the 14th. Mr Walsh did indicate to the writer" - meaning Mr Berry - "of his intention to communicate with you" - Ms Matchett -

> *to advise of our intention to commence court proceedings in view of the fact that against the wishes of our client he has been seconded to another section.*

That move being only after a discussion with Mr Heiner.

COMMISSIONER: So that was his reason to believe the movement.

MR COPLEY: Presumably, yes. "We request your response" - because you'll see he was moved on the 13th, this is a letter on the 15th - "we request your response together with your response to our letter of 8 February within 48 hours."

COMMISSIONER: How did they go with that?

MR COPLEY: They didn't get a response. They didn't get a response but they didn't respond either. Looking at the matter objectively, if you were concerned about bringing a proceeding for defamation you would have very real concern about your prospects of success when you're not getting the assurance you want about the preservation of the documents.

If you were fair dinkum about bringing an action for defamation, admittedly you might have years to do it under whatever statute of limitations obtained, but there was a real and urgent necessity to do something in the light of these circumstances, yet nothing was done. That is an inescapable fact.

COMMISSIONER: That nothing was done, yes, I know.

MR COPLEY: Nothing was done.

COMMISSIONER: But what's debateable is how urgent it was to do anything. I mean - - -

MR COPLEY: Well, it must have - - -

COMMISSIONER: - - - the question is how likely was it that these documents would get destroyed in the meantime if they didn't do anything?

MR COPLEY: Mr Commissioner, there must have been a subjective fear that they were likely to be destroyed because your solicitor then rings seeking an assurance they won't be and he's told to put it in writing.

COMMISSIONER: And he did, and nobody responds to him.

MR COPLEY: No.

COMMISSIONER: So - - -

MR COPLEY: Nobody responds. "Goodness, that's not a good sign," the solicitor and client might think.

COMMISSIONER: Well, you might think that or you might think, "Surely they'd tell us if they were going to do it when they know that we've made the phone call, we've written the letter just like they asked us to. Surely they wouldn't just go ahead and do it and not tell me." Wouldn't that be an option?

MR COPLEY: But compare even what the assurance was with what is put in writing. The assurance is, "We want you to keep those documents." "You've got to put that in writing," he's told.

COMMISSIONER: Yes.

MR COPLEY: What comes is:"

> *Mr Walsh did indicate to the writer of his intention to communicate with you to advise of our intention to commence court proceedings with a view to the fact that against the wishes of our client he's been seconded to another section.*

COMMISSIONER: Yes.

MR COPLEY: The court proceedings relate to an industrial dispute relations issue to do with secondment.

COMMISSIONER: But, see, you wouldn't be that - yes, I know. It wouldn't be clear-cut to them that these documents were capable of being lawfully destroyed any more than it was apparent to Ms Matchett, because Ms Matchett had to go - to clarify that she had to get the advice to the crown solicitor.

MR COPLEY: It's not relevant whether they were capable of being lawfully destroyed.

COMMISSIONER: No.

MR COPLEY: What's relevant is that there was an apprehension or a fear that was so great that a telephone

call was made seeking a personal assurance that they wouldn't be. That's what's relevant in my submission.

COMMISSIONER: Yes. No, I was just thinking about your submission that there should have been some follow-up after that letter in light of - or an even greater sense of anxiety or agency when that letter wasn't responded to. And in thinking about: well, how would you respond to that? One of the things you would take into account would be: well, how likely is it that the government would destroy what might arguably are public documents at this point?

MR COPLEY: Well, feeding into that likelihood would be that you have known, if you were Mr Coyne, that ever since the end of November when you got back from holidays they have consistently refused to give him access to those letters of complaint from the union members. He had been asking for those since about 29 November, not getting them.

COMMISSIONER: Yes, that's right. But come February, still not destroyed either. They went destroyed until - - -

MR COPLEY: Level of concern has increased and now to a fear that they might be going to be.

COMMISSIONER: Why? What happened? What changed?

MR COPLEY: I don't know.

COMMISSIONER: Nothing, except he got moved from his job.

MR COPLEY: Yes.

COMMISSIONER: Okay.

MR COPLEY: And, I mean, to an extent this is off the point because cabinet doesn't know about the sorts of things any more than cabinet knew that as late as 2 March Mr Coyne was telling people, "I don't want to involve legal action in this. I don't want to get solicitors involved. I want to sort it out without lawyers." Cabinet doesn't know that either.

COMMISSIONER: No.

MR COPLEY: What cabinet knows is, as you said ages ago this morning, what cabinet has been told. In fact, that's probably the reason why I never asked Mr Coyne, "What in truth was your intention regarding - - -"

COMMISSIONER: Because it didn't matter.

MR COPLEY: Beg your pardon?

COMMISSIONER: Because it didn't matter.

MR COPLEY: It arguably didn't matter, and if he'd been honest is the answer probably would have been, "I don't really know because I made statements that conflicted with each other at various points through the process up until I found out that the documents had been destroyed." But it arguably didn't matter if one was looking at the response of executive government. But can I just get back now to exhibit 129 and point out that the crown solicitor urged effectively a letter being quite straightforward with the solicitor, straight off saying, "These documents have been destroyed."

COMMISSIONER: Yes.

MR COPLEY: And the reasons why. Now, to understand what lay behind the crown solicitor's paragraph where he spoke about:

> *The material can be destroyed to remove any doubt in the minds of people concerned that it remains accessible or could affect future deliberations or of the treatment of staff.*

To understand that you need to go back another document, to exhibit 128.

COMMISSIONER: Right.

MR COPLEY: Which of course Ms Matchett and Ms Crook didn't get, let alone cabinet. And if you go to the fourth page of exhibit 128 in the second paragraph you see a little bit more about what lay behind that advice. It's says halfway through, "If the inquiry is terminated the new documents" - which means Mr Heiner's documents -

> *become unnecessary and may well contain defamatory matter. As no legal action has been commenced concerning those documents I believe the safest course would be the immediate destruction of those documents to ensure confidentiality and to overcome any claim of bias if such documents somehow become available to any new investigation.*

COMMISSIONER: Yes. So there are two reasons there but they're different from the other two reasons, although one is common. So contaminating future deliberations is there - - -

MR COPLEY: Yes.

COMMISSIONER: - - - and bias is there, but this is to preserve confidentiality and not really related to accessibility.

MR COPLEY: Yes.

COMMISSIONER: And you would be preserving confidentiality for the benefit of whom?

MR COPLEY: Presumably at least for the benefit of the people who have had nasty things said about them because nobody will get to read it on their file.

COMMISSIONER: Or the people who are saying the nasty things.

MR COPLEY: Possibly too. So I just thought it helpful for you this morning just to bear in mind the source of the advice to cabinet and how the way in which the advice was expressed changed and was linked.

COMMISSIONER: It was conflated really.

MR COPLEY: Linked to defamation in that cabinet submission, whereas if you go back and look at what was originally behind the advice, it was to ensure a future inquiry wasn't biased; to preserve confidentiality.

COMMISSIONER: They were unnecessary.

MR COPLEY: They were unnecessary and then, of course, the people that are drafting the advice or the submission for the cabinet – I will just find that again. In paragraph 7, "To date no such action has been initiated," meaning a defamation action. There has been a distillation down of a number of concepts into the cabinet submission by people who were not lawyers, doing their best no doubt - I'm not suggesting they were doing anything other than their best – to try to convey to their minister the effect of the legal advice, but did they accurately convey it? Was the crown solicitor's legal advice as fulsome as it could have been?

I mean, these are all matters that are easy to look at with the benefit of hindsight, but we return to where we started this morning which is that on the evidence cabinet only knows what cabinet is told. Now, I would just like to also remind you that exhibit 151A was prepared for Ms Matchett and I will hand up a copy for you.

COMMISSIONER: Thanks.

MR COPLEY: Now, in working out what cabinet knew, as I recall the evidence – and this will have to be checked – Ms Warner's evidence was, "Yes, these were speaking notes for me. I probably spoke to them or I may have spoken to them," but she did not testify that she read everything out in this document, but what did Ms Warner know, Mr Commissioner? She knows that certain statements were supplied to the director-general Mr Pettigrew, if you read the entry for 10/10/89, which you're not reading.

COMMISSIONER: Sorry, Mr Copley, what did you want me to read?

MR COPLEY: I want you to read the entry for 10/10/89.

COMMISSIONER: Yes.

MR COPLEY: Ms Warner is told, "The statements have been supplied to you personally on the understanding that they will not be circulated widely." So Ms Warner is told, "Well, an inquiry was constituted as a result of information provided by members of the union and those people provided that information to Mr Pettigrew on a certain condition."

COMMISSIONER: So that might be your confidentiality concern.

MR COPLEY: It could be, yes. Ms Warner knows that Mr Heiner was appointed to undertake in 13/11/89 investigation of staff complaints at John Oxley Youth Centre. He was appointed to do effectively eight times the size of that, but that's how it's been summarised there for her. Then in early December concern is expressed by senior officers and managers and other staff regarding the direction of the inquiry. Complaints focused on the breadth of natural justice because those who believed allegations had been made against them were not given written advice.

It talks about, to use a modern expression, I think, the disconnect in the next paragraph between what the union thought was going to be investigated and how the inquiry was actually being done and in the last paragraph broader issues such as staff training, safety and the nature of management at the centre didn't appear to be under close examination by Mr Heiner.

COMMISSIONER: Yes.

MR COPLEY: Then 17/1/1990 certain staff in the first paragraph had indicated to the acting director-general their intention to take civil action against informants to the inquiry.

COMMISSIONER: Just remind me about where that comes from.

MR COPLEY: Where does that come from?

COMMISSIONER: Yes.

MR COPLEY: Yes, that's a very good question because it presumably can't be a reference to the letter of 17 January because that was an action going to be taken against either Mr Heiner or the government to enforce natural justice.

COMMISSIONER: Yes.

MR COPLEY: In the evidence there is a notation – if you just give me a moment, I will find it. I'm just looking for an exhibit that's dated 16 January. It's a handwritten note in Mr O'Shea's handwriting and Mr Thomas gave evidence about the content of it. I think it could be exhibit 109. I have just misplaced my copy of it, I'm sorry, but do you have the exhibits there? Perhaps if I just have that book of exhibits, I might be able to turn it up pretty quickly.

COMMISSIONER: Sure. Mr Selfridge has got it, thanks, exhibit 110.

MR COPLEY: If you could just have a look at this handwritten note, Mr Commissioner. This might inform possibly that summation for 17 January. When I said to you before that it couldn't relate to the letter of 17 January maybe I've looked at that too much as a lawyer might, because the development occurs on 17 January, but anyway, if you look at this file note, 16/1/1990, Mr O'Shea is writing, "I rang Ruth Matchett back, November 1989 inquiry, John Oxley Youth Centre, staff complaints. QSSU complaints. Noel Heiner, retired SM. 13/11/89, broad terms of reference. Appointed by DG of the time by letter. Question put to him whether he was having a sexual relationship with a member of the staff. POA up in arms. I advised her to write to Mr Heiner saying not clear on what basis he was appointed. Would he please advise."

So in answer to your question what civil action against informants to the inquiry, I cannot assist you any more on the evidence beyond pointing to the letter of 17 January and that comment by Ms Matchett about the question that was asked.

COMMISSIONER: That notation there about the question by the crown solicitor, was that what he was told by Ms Matchett? Is that the evidence?

MR COPLEY: Well, it seems so, because it's the crown solicitor's file note and Mr Thomas wasn't a party to the conversation. It would make sense to think that it was something that Ms Matchett had told Mr O'Shea, because Ms Matchett testified that she'd had that meeting late in the afternoon with Mr Coyne after he'd been interviewed by Mr Heiner where he was very upset and distressed about the last question that he was asked. I'd have to check Ms Matchett's evidence on this point again to see if she was asked that, but if she said that it was probably based on something – the fact the question had been asked would have come from Mr Coyne.

COMMISSIONER: Yes, okay.

MR COPLEY: The assertion that certain staff had indicated to the acting director-general their intention to take civil action against the informants to the inquiry is probably to be confined to whatever Mr Coyne said to Ms Matchett. So apparently an intention to take it but not taken.

COMMISSIONER: Yes.

MR COPLEY: Then it sets out below that the crown solicitor's advice, then whoever writes this document to the minister persists with this notion that the inquiry wasn't properly constituted. You will see on the top of the third page, "It is clear that because the establishment

of the inquiry had no firm legal basis." Now, unless they were getting advice from some source other than the crown solicitor, Mr Thomas testified before you that having concluded that the inquiry could be constituted under section 12 of the Public Sector Management and Employment Act he never ever subsequently wavered from that opinion in anything he said to Ms Matchett.

So where this notion comes in that the inquiry didn't have a proper legal basis isn't clear, unless an explanation could be that it's emerging of a merging of legal advice with political considerations or a value judgment by the writer that because Mr Heiner and the witnesses weren't immune from suit the inquiry therefore had no firm legal basis. Then it says, "Any report flowing from it will have no appropriate standing." That's just, with respect to the writer, nonsense. The report would simply be a report. It would have the status or standing it deserved according to the merit of it and the scholarship that went into it.

"If it were to be prepared it would contain defamatory material;" where that comes from it's not clear, "which would further inflame staff-management relationships." Well, that's probably a fair enough assumption. Then it says about how the underlying concerns of the staff haven't been addressed by Mr Heiner. "No useful purpose can be served by him continuing, therefore the director-general advised him that he wouldn't be continuing," and the minister's told that the acting director-general has kept the unions informed.

COMMISSIONER: When did Mr Coyne get transferred?

MR COPLEY: He got told he was being moved on 13 February, which was the day after the decision to defer consideration. So all I'd perhaps say for the moment is here we have a situation in which the minister is being asked to take and agrees to take a matter to cabinet seeking authority to destroy in circumstances where there was no legal requirement for cabinet to have to make a decision about it but it was thought prudent. Whether it was from a political or social standpoint or just from a public service management standpoint, it was thought prudent that cabinet should be asked to consider it.

The subsequent advices to cabinet which are exhibits 168 and 181 were never as full or complete as the first one. So they didn't clear anything up but perhaps to this extent they didn't muddy the waters any. In case you're referred to them later, I'll hand up clean copies of exhibits 168 and 181, and I'll also give you a copy of exhibit 180 which I'll speak to in just a second, which is on top.

COMMISSIONER: Thank you. Yes, I've got them, thanks, Mr Copley. Do you want me to look at 180?

MR COPLEY: This was a document given to Ms Warner. She did not say that she read all of it out to the cabinet. She may have referred to parts of it, she may not have. She couldn't remember now. So exhibit 180 and exhibit 151A are documents the contents of which cabinet might have been informed of some of the contents, it's just not possible to know how. So it would be not safe to proceed on the basis cabinet was told everything that was in exhibits 151A and 180. They were possibly told all of it, they were possibly told some of it. So it was really just for the sake of completeness that I wanted to give you those documents.

Paragraph 8 says:

> *Correspondence received from solicitors representing two staff members seeking production of certain documents, including the material gathered by Mr Heiner. Correspondence referred to crown solicitor for advice; interim responses sent; no final commitment given; will depend on cabinet's decision in relation to the fate of the material; (b) similar requests received from the QTU in relation to one of its members.*

And then it says this, Mr Commissioner:

> *In both cases it would appear that concerns stem from a belief that the material gathered by Mr Heiner is being used as part of the decision-making process in the department. This has not been so.*

So if Ms Warner read that and if Ms Warner read that out to cabinet, then that would arguably have engendered a belief or a conclusion or a knowledge that "These documents aren't being sought for legal purposes. These people are after these documents because they think they're going to adversely effect the careers of these public servants down the track but if we destroy them, then they won't".

Now, that's a speculation by me because we don't know what Ms Warner actually - Ms Warner can't remember what she out from this document, but to the extent that the document is as it is, it's not consistent with engendering a belief on the part of the cabinet or reinforcing any belief. It doesn't constitute very good evidence that cabinet destroyed knowing or believing the documents were required for a legal action. In fact it points to the contrary if cabinet was told it.

COMMISSIONER: Paragraph 8 refers to the two bits of correspondence from the solicitor and the union.

MR COPLEY: Yes.

COMMISSIONER: In both those cases it appears to the writer that the concerns expressed in each of them stem from the fear that defamatory material might be going to be used to make a decision about Mr Coyne and Mr Dutney. Is that the way to read it?

MR COPLEY: You have put the words "defamatory material" into it.

COMMISSIONER: I have.

MR COPLEY: It's not there.

COMMISSIONER: No.

MR COPLEY: But I don't object to you doing so.

COMMISSIONER: No, because it's clear on the overall context that that's what the reference is to.

MR COPLEY: Yes.

COMMISSIONER: Whether it's adverse or defamatory or what, the adjective doesn't matter.

MR COPLEY: No, and is not the writer saying effectively, "What better way to allay those concerns? Put those concerns to bed once and for all by simply destroying this material"?

COMMISSIONER: Yes, but again, "If I had been told what was in 3C as well as eight, I would know that destroying them reduces the exposure to risk of legal action for everyone."

MR COPLEY: Yes, but you would also, of course, knowing about risks, bear in mind that it's not – a person doesn't commit an offence simply because he apprehends that there's a risk that something might be required. He only commits an offence if the other elements are proven under 129 if he knows, that is, he believes.

COMMISSIONER: They are talking in 3C about statutory immunity when there is really no need because there is the indemnity policy.

MR COPLEY: That's right.

COMMISSIONER: Which nobody seems to be alert to at this point but it does emerge at the cabinet submission.

MR COPLEY: But Mr Thomas knew of the policy.

COMMISSIONER: Yes.

MR COPLEY: Mr Thomas said he knew of the policy and he enclosed a copy of the policy to Ms Matchett, yet Mr Thomas recommended destruction knowing of the policy and his reasons for destruction, in my submission, had nothing to do with so far as he was concerned destroying or defeating any legal actions.

COMMISSIONER: Probably not.

MR COPLEY: No, yet I make the point again his advice becomes refined or distilled down to the way it is put in section 151.

COMMISSIONER: That's the thing about rival intentions and purposes and objectives. He is just a lawyer being asked for his legal opinion.

MR COPLEY: Yes.

COMMISSIONER: Then later on they are asked to make some recommendations to an acting director-general on some policy issues. He then gives the minister some information and then the minister takes the submission to cabinet in which she's pushing a particular action.

MR COPLEY: Yes, but that's all I wish to say for the moment, thank you.

COMMISSIONER: Ok, thanks, Mr Copley. Mr Hanger?

MR HANGER: Our instructions are to make no submissions on the shredding of the documents, Mr Commissioner.

COMMISSIONER: Okay. What about legal propositions?

MR HANGER: In terms of legal propositions I'm prepared to answer questions that you direct at me.

COMMISSIONER: Can you just tell me who your client is for the purposes of 3E? I'm assuming that it includes the current executive.

MR HANGER: Yes.

COMMISSIONER: To what extent does it include the executive government in 1990?

MR HANGER: I don't have instructions from the executive government of 1990 and I said to you some time ago I would not be acting for the members of cabinet at that time.

COMMISSIONER: Now, if there was as prospect of an adverse finding in relation to the executive government's response in 1990, is there any procedural step that would need to be done that hasn't yet been done to ensure fairness?

MR HANGER: I would imagine that you would have to give the people who appeared in respect of the ministers the right to make a submission to you.

COMMISSIONER: Have you got those letters that we sent to the ministers, Mr Copley? Are they tendered?

MR COPLEY: I don't have a copy here, but all of them were tendered and if you give me the last folder, I will be able to turn at least a representative one up.

MR HANGER: Pursuant to your conversation with my learned friend Mr Copley before, one would expect a formal notice to each of the ministers at the time, although we have only heard from several of them.

COMMISSIONER: But you don't want to make any submissions to me about the facts.

MR HANGER: No, my instructions are not to make submissions. On the law the only case I wanted to refer to was Ensbey which you're obviously familiar with.

COMMISSIONER: Yes, but I may not understand it.

MR HANGER: It's not easy, but it seems to have two propositions that, as I see it, emerge from it. One is that the word "believe" is put in as an interpretation of the section and I think that's what the head note of the case reads, but there's a second proposition there, as I see it, that if there are several intentions, the crown must negative all those that are completely innocent.

COMMISSIONER: Yes, of course. But that - as long as there's a blameworthy intent, that's sufficient if you can - or are you saying to me you have to negative all other possibilities other than a blameworthy intent?

MR HANGER: That's my reading of Ensbey.

COMMISSIONER: You can't have concurrent ones. You can't have - - -

MR HANGER: It's my reading of it, although it's not entirely clear, but that's my reading of it, yes.

COMMISSIONER: So if I've got one innocent and one guilty one, the innocent cancels out the guilty.

MR HANGER: Yes. No-one specifically says that in Ensbey, but it seems to be - - -

COMMISSIONER: But it's a logical - - -

MR HANGER: Conclusion.

COMMISSIONER: Well, they probably didn't because they didn't need to in that case.

MR HANGER: It seems to me a logical conclusion from what the court said.

COMMISSIONER: It would be obiter, though, because - see, unlike here - - -

MR HANGER: Yes, it would be obiter.

COMMISSIONER: - - - in Ensbey he was given the documents to protect, not to destroy.

MR HANGER: True.

COMMISSIONER: They weren't his to destroy.

MR HANGER: No, he was told to - I don't know if he was given them to protect, either. He was given them because he was the local pastoral carer.

COMMISSIONER: Yes. But he didn't own them.

MR HANGER: No.

COMMISSIONER: Did the crown own these ones, the Heiner ones? Do you - - -

MR HANGER: I accept the discussion that took place between you and my learned friend on that once Mr Heiner

gave them back. I mean, the ramifications of this sort of thing are interesting insofar as draft judgments are public records. You might recall - - -

COMMISSIONER: Yes, they are.

MR HANGER: Yes. And we got into trouble in the Connolly Ryan inquiry for asking somebody to retain these records. It was probably a perfectly proper request.

COMMISSIONER: Yes, that's right. Do you want to have a look at this letter, Mr - this is exhibit 355, we sent to the former cabinet ministers.

MR HANGER: Excuse me while I read it, I haven't seen it.

COMMISSIONER: Yes, not at all.

MR HANGER: Again, I don't act for these people, but my suggestion to you would be if you were proposing to make an adverse finding against them you should tell them so. I mean, at least that's - - -

COMMISSIONER: Does that apply to the appropriateness as well as the associated criminal conduct that might be open?

MR HANGER: Yes, because either one of them affects their reputation. I mean, it's one thing saying, "We're hearing evidence, do you want to make an appearance," is distinct from saying, "I should tell you I'm proposing to make a finding against you or there's a possibility of that."

COMMISSIONER: Yes. Now, the term of reference requires me to - the structure of the term of reference is a little infelicitous, but I'm to inquire into - actually, I'm to, "Make full and careful inquiry into the child protection system in Queensland," with respect to 3(e), "Reviewing the adequacy or appropriateness, including whether any criminal conduct was associated with any response" - et cetera. Do you have any submissions to make to me about the meaning of the word "reviewing" in that context?

MR HANGER: No, but I was concerned when in the dialogue with Mr Copley you gave me the impression that you may be extending this down to public servants such as Ms Matchett. I would suggest that your mandate doesn't go as far as that, fairly clearly.

COMMISSIONER: Well, then that does sort of take us to that. What do you say is included in the phrase, "Whether any criminal conduct was associated with any response?"

MR HANGER: It's only a response of the executive government.

COMMISSIONER: That's the response, but what about the criminal conduct associated with it? Is that only by the members of the cabinet, or could it be criminal conduct of somebody else that was associated with that response? For example, I get you to do something, you're my innocent agent, I get you to do something criminal for my benefit - you're my unwitting agent - have I committed criminal conduct associated with yours?

MR HANGER: Let me bring it to this case: I mean, take out the parenthesis and you're looking at reviewing the appropriateness of cabinet's conduct. It may be cabinet's conduct, as we were considering before, in relation to the offences that have been committed by other people. But there's just no suggestion here of cabinet's conduct in relation to offences by others - other than we're investigating a sexual matter.

COMMISSIONER: But see, that's what I mean about the structure. You're right, it says "appropriate" is directed to cabinet.

MR HANGER: Yes.

COMMISSIONER: But does the word "associated" extend it beyond cabinet or criminal conduct?

MR HANGER: No.

COMMISSIONER: Okay. What about "adequacy"? In the context of the evidence that we have here, is that something I need to concern myself about - adequacy of it?

MR HANGER: Of course you must concern yourself with adequacy, but it's the adequacy of cabinet's response.

COMMISSIONER: Yes. So it's the adequacy of cabinet. Is there any evidence - is there any suggestion that it was inadequate in any respect, as opposed to inappropriate?

MR HANGER: As a matter of law I don't see it adds anything to the word "appropriate".

COMMISSIONER: Okay.

MR HANGER: If it was inadequate it was inappropriate; if it was adequate, it was appropriate.

COMMISSIONER: What gauge do I use to measure the appropriateness or adequacy of executive government responses?

MR HANGER: Well, the appropriateness or adequacy would probably be different from any criminal matter under section 129.

COMMISSIONER: Yes.

MR HANGER: But I suppose it can only be a yardstick of yourself looking at matters at the relevant time, not with hindsight, which is hard.

COMMISSIONER: Is there a model cabinet - the perfect model of the modern cabinet?

MR HANGER: I'm sure that no-one in the world would say there was. No. No, it's - - -

COMMISSIONER: Is there a standard that cabinet - standard of conduct that executive governments are expected to meet?

MR HANGER: Hard to say, other than acting honestly, bona fides.

COMMISSIONER: In the public interest.

MR HANGER: Probably. That one's a hard one.

COMMISSIONER: In the overall public interest.

MR HANGER: Well, who determines that other than the executive government?

COMMISSIONER: I suppose whoever is determining how appropriate what they did was.

MR HANGER: Well, it's getting into the realm of philosophy, isn't it, but obviously what is in the public interest differs with whether you're in this party or that party.

COMMISSIONER: "Appropriate" is a very politive term, isn't it?

MR HANGER: Yes, that's right.

COMMISSIONER: That's why I'm asking whether there's an objective standard for me to use rather than a purely subjective assessment.

MR HANGER: The objective standard can only be bona fides and determined according to principles of law, bona fide action.

COMMISSIONER: It would have to be competent too, wouldn't it?

MR HANGER: I suppose so, yes. One can't take it beyond the words of – you know, and using legal terminology, bona fide, good faith, according natural justice and - - -

COMMISSIONER: Utmost good faith, maybe.

MR HANGER: All right, I'll go along with that, utmost good faith.

COMMISSIONER: Now, getting back to review, does that imply, that word – then in paragraph 5 I'm directed to make a full and faithful report and recommendations on the subject matter, which includes 3E, to the premier. So taking the words "inquiry", "review", "report" and "recommendations" together in the scheme of the term of reference, does that make it plain or imply necessarily that I'm required to make forensic findings?

MR HANGER: No. By forensic findings you mean – do you think there may be a breach of section 129, or something of that nature?

COMMISSIONER: Yes – well, see, this is the way I conceive of my role, and this is an opportunity for you to set me straight if I'm wrong, but I'm appointed to give the current executive, your client, my informed and considered opinion, having done what they asked me to do, which is to make a full inquiry and review of the evidence that's been presented to me. So they want to know what I think, don't they?

MR HANGER: Yes.

COMMISSIONER: They want to know, among other things, whether I think - - -

MR HANGER: They acted adequately or appropriately.

COMMISSIONER: Yes, and also whether any criminal conduct was associated with their responses. So how do I avoid – how do I comply with adequacy and appropriateness and skip a couple and get around the associated criminal conduct question.

MR HANGER: Well, I suppose in the end whether there was any prosecution is a matter for the Director of Prosecutions, but you may - - -

COMMISSIONER: That's right. The only one who cares about my opinion is your client.

MR HANGER: Yes. Perhaps that's - - -

COMMISSIONER: Presumably because they will put more store in what I think than they might put in somebody who stumbles in off the street.

MR HANGER: Yes. Excuse me. Yes, as my learned junior has pointed out to me, it may be that in relation to criminal conduct the question is whether there's any prima facie case there, and it's for others to determine whether anything happens.

COMMISSIONER: What does prima facie mean to me?

MR HANGER: Such that committal proceedings would be successful.

COMMISSIONER: That a jury could but would not necessarily convict.

MR HANGER: Yes.

COMMISSIONER: But the evidence would be sufficient to meet the criminal standard, that is, it would be capable of meeting the criminal standard if accepted by a jury. Would that be the test?

MR HANGER: Well, that's a possible interpretation of it when you say what does prima facie mean, and I used the term "prima facie".

COMMISSIONER: In the sense that Cross uses it.

MR HANGER: Yes.

COMMISSIONER: Well, he uses it in two senses, but you mean prima facie in the second sense, I think, that is, that it's capable of, but not necessarily.

MR HANGER: Yes.

COMMISSIONER: All right. Okay, I think that's all I really - - -

MR HANGER: Well, as I say - - -

COMMISSIONER: Yes. No, thanks, Mr Hanger. I appreciate it.

MR HANGER: - - - my instructions were to make no submissions so I've just answered the questions as best I can.

COMMISSIONER: I understand that you are retained on the basis of being instructed and that you have a professional duty to comply with your instructions. Yes, Mr Copley?

MR COPLEY: I just want to go back to your term of reference and you talked about standards, what standard should apply.

COMMISSIONER: Yes, to appropriateness.

MR COPLEY: Yes. Well, you're not the first commissioner who has had to consider appropriateness.

COMMISSIONER: That's good to know.

MR COPLEY: Yes. My inquiries - - -

COMMISSIONER: How did the other one fare?

MR COPLEY: Well, I don't know how his report was received, but I'll tell you a little bit about it. In a commission which was called the commission of inquiry into certain allegations respecting business and financial dealings between Karlheinz Schreiber and the Right Honourable Brian Mulroney who was a former prime minister of Canada a commissioner by the name of Oliphant was required to answer about 17 questions. Two of the questions concerned whether conduct allegedly engaged in by Mr Mulroney was appropriate, in the case of one question, generally, and in the case of another question, "Considering his position as a current or former prime minister and member of parliament." So appropriateness was the yardstick in connection with two of these 17 questions.

Before answering those questions, Commissioner Oliphant thought it necessary to identify what he called the norms and standards to be applied to determine whether conduct was appropriate. Now, it seems that Canadian case law concerning the Inquiries Act of 1985 required that the person the subject of any inquiry was entitled to know the standard on which he was to be judged and that stating the

standard for the first time in a report would breach the duty of procedural fairness.

COMMISSIONER: I'm pretty late too then.

MR COPLEY: Well, not necessarily. It depends what findings you have in mind. Canadian case law might also have established that to develop a standard after the conduct in question had occurred would also breach procedural fairness. By that I mean a standard developed with the benefit of hindsight, but I don't understand enough about Canadian law to be sure of that. That was really something that I drew from Commissioner Oliphant's ruling which I've brought over. I'll just hand up to you this document. I'm sorry, I didn't bring a copy, but I'll provide one later, because I wasn't actually intending to go down this path this morning. It's called appendix 9-1, standards ruling. It doesn't need to be made an exhibit. Commissioner Oliphant ruled at paragraph 59 of that document that the standard to be applied was one operative at the time the conduct in question occurred, not a standard developed by hindsight, as he put it.

COMMISSIONER: So it's a contextual standard, not a fixed standard.

MR COPLEY: Yes. Now, that has some relevance in this case because this conduct occurred so long ago.

COMMISSIONER: You wouldn't expect that standards of conduct of prime ministers and executive governments would vary a lot.

MR COPLEY: Mr Commissioner, there was no Integrity Act.

COMMISSIONER: Do you need one? I know we have got one, but do you really need one?

MR COPLEY: That's not for me to comment on. They have passed it. There was no Public Sector Ethics Act.

COMMISSIONER: That doesn't mean there was no public sector ethics.

MR COPLEY: I'm just pointing out – you will understand why I'm referring to this.

COMMISSIONER: Yes, I know, but I'm thinking out aloud in response to what you provoked me to do.

MR COPLEY: Okay. Mr Mulroney – he may have been judge – sorry, Mr Oliphant – he may have been a judge. I'm not sure. I will call Commissioner Oliphant – said that he would employ an objective standard at paragraph 58. He said he intended to be guided by the standard that Mr Mulroney had set for himself and his ministers when Mr Mulroney was Prime Minister. During that time Mr Mulroney had caused to be published or promulgated an ethics code for public office holders and a paper entitled "Guidance for Ministers".

The ethics code asserted that public office holders in Canada had an obligation to act in a manner that would bear the closest possible scrutiny. So Commissioner Oliphant said that he intended – and you can read this at paragraph 61. He intended to determine on an objective basis whether Mr Mulroney in his dealings conformed with the highest standards of conduct, conduct that objectively is so scrupulous that it can bear the closest possible scrutiny.

Due to the degree of trust and confidence that he considered that the Canadian public had "imposed" - was his word – in their prime minister, cabinet and members of parliament the public was "entitled to expect" exemplary conduct from such people: see paragraph 45. He also considered that various statutes might inform his understanding about what inappropriate or appropriate conduct was and that's why I mentioned the Integrity Act and the Public Sector Ethics Act, neither of which were there in 1990.

Now, you may recall that Mr Hanger put these questions to Ms Warner, and I will just read them out. He said:

> *Ms Warner, I think your government came in just afternoon the Fitzgerald Commission had finished?---Yes.*
>
> *I take it, as I think you've made clear, you were very concerned about doing what was the right thing?---Yes.*
>
> *Yes, in the kind of area that Fitzgerald was looking at?* ---Yes.
>
> *And you thought – and the thought of destroying documents troubled your cabinet and you looked at it very carefully?---Yes.*
>
> *Gave it careful consideration?---Yes.*
>
> *And after careful consideration you thought that the best thing would be – it would be desirable if the documents were destroyed?---Yes, the only solution.*

So simply because my learned friend had mentioned the Fitzgerald Commission of Inquiry, I thought it might help to see whether or not the Fitzgerald Report had had much to say about what's expected of a cabinet.

COMMISSIONER: Did it?

MR COPLEY: Mr Fitzgerald's report was provided on July 3, 1989 so that's roughly contemporaneously in the scheme of things with the events we're concerned with and he wrote at pages 125 to 126 this:

> *The modern practice in Queensland is for individual ministers and even cabinet to make detailed decisions which routinely arise in the course of public administration.*

I would submit that that rather bore upon some questions that you asked of the cabinet ministers about, "What were you doing considering this machinery thing, this practical matter?" yet Mr Fitzgerald said in July 3, 1989:

> *The modern practice in Queensland is for individual ministers and even cabinet to make detailed decisions which routinely arise –*

routinely arise –

> *in the course of public administration.*

Maybe it's necessary to bear in mind that you're dealing with a state cabinet, not a federal cabinet here. He went on:

> *Apart from contracts the Queensland government issues or approves land grants, mining tenements, property rezonings and makes a myriad of other decisions which have financial and social significance. These decisions often entail a choice between rivals and involve competing considerations.*

Of course here there were competing considerations at work for the cabinet. Mr Fitzgerald said that that was commonplace in 1989. He said:

> *The involvement of cabinet in these details creates a number of significant complications. The most serious complication is that it involves the blurring of the boundary between the formulation and the implementation of policy.*

So this wasn't a policy decision that was being formulated. He went on – and this is how I would summarise what he said. He said that apart from reminding parliamentarians

that they should ensure that political considerations did not intrude in arriving at decisions on specific matters his report, in my reading of it, didn't articulate how cabinet should consider matters or what matters it should confine its consideration to.

What could be drawn from that arguably is that in 1989 if you were looking for a standard – and I'm not saying that this should be the standard that should be applied, but if Ms Warner wanted to, as Mr Hanger put to her, do the right thing in the kind of area that Fitzgerald was looking at, perhaps a consideration is in terms of appropriateness judged by the standards of the day: did partisan political considerations intrude into the decision cabinet made, because it would seem, if Mr Fitzgerald was a standard setter at that time, that that was a yardstick that he would regard as one by which you could measure the appropriateness of a cabinet decision?

COMMISSIONER: That is, if they did, it would be inappropriate.

MR COPLEY: That is something that could be drawn from his report, yes. I looked at the Fitzgerald Report because Commissioner Oliphant said that legislative standards can inform an understanding of what's appropriate or what's inappropriate and there was a dearth of legislation to look at at that time. So assisted by my learned friend's reference back to that seminal document, it occurred to me that if you were looking for something that might have stated a standard in 1989-90, then perhaps it was what was said in the Fitzgerald Report.

COMMISSIONER: That's really a negative standard, isn't it? It's what not to do rather than the standard to reach. I mean, this is what would breach the standard rather than identifying how high the standard was or its content.

MR COPLEY: If you regard the word as "adequate appropriateness" as influenced by the other word "adequacy" because it says "adequacy or appropriateness of" – if a response is adequate enough, then it's appropriate, isn't it?

COMMISSIONER: I don't know.

MR COPLEY: "Adequacy" means the state, according to the Macquarie Dictionary, or quality of being adequate, sufficient for a particular purpose.

COMMISSIONER: Yes.

MR COPLEY: "Adequate" means equal to the requirement of the occasion, fully sufficient, suitable or fit.

COMMISSIONER: Yes, my purpose might be to achieve some criminal object which I do achieve very effectively by the means I adapt to achieve it, but that doesn't make it right.

MR COPLEY: No, but you posited to me, "What I was drawing from the Fitzgerald Inquiry was really just a standard about what was inappropriate. It didn't tell you about what was appropriate," and I responded by saying, "Well, the word 'appropriate' in this Order in Council is coupled with the word which precedes as 'adequacy' and it says - - -"

COMMISSIONER: Disjunctively though something could be adequate without being appropriate, couldn't it?

MR COPLEY: Look, Mr Commissioner, it just says "reviewing the adequacy or appropriateness of".

COMMISSIONER: Yes.

MR COPLEY: So it could be that in answer to the question that you asked which was a bit philosophical that you needn't be concerned about the difference between something which is not inappropriate and something that's positively appropriate.

COMMISSIONER: Yes.

MR COPLEY: That's the point I want to make.

COMMISSIONER: I see, yes.

MR COPLEY: You wouldn't want to, in my submission, detain yourself too long over the gulf between not inappropriate and something being appropriate.

COMMISSIONER: Yes.

MR COPLEY: If it's adequate, if it's sufficient, if it's apt or suitable, then it's arguably appropriate for the terms of this Order in Council.

COMMISSIONER: But "appropriate" means proper rather than sufficient, doesn't it?

MR COPLEY: Well, the dictionary says it means suitable or proper.

COMMISSIONER: Bit of both.

MR COPLEY: Well, the dictionary mustn't have perceived any difference between suitable or proper.

COMMISSIONER: Except in the context, I suppose.

MR COPLEY: Yes. Now, the Criminal Justice Act had been assented to on 31 October 1989 and the provisions of that concerning official misconduct commenced on 4 November 1989, so if Commissioner Oliphant is correct and you can have regard to the legislative standards to work out what's appropriate, then it might be relevant to look at the definition of official misconduct, which my note of the statute, since repealed, is that it was defined to mean:

> *Conduct that adversely affected or could have adversely affected directly or indirectly be honest and impartial discharge of functions or the exercise of powers of a unit of public administration; conduct that was not honest or impartial; or conduct that involved a breach of trust or the misuse of information; and in any such case could constitute a criminal offence or a disciplinary breach that provided reasonable grounds for dismissal.*

And the legislative assembly and the executive council fell within the ambit of the definition "a unit of public administration". There was no - as I said - Integrity Act or Public Sector Ethics Act, but there were of course provisions in the Criminal Code, one of which we've discussed today. Now, being mindful of what Mr Fitzgerald said about the range of matters that cabinets routinely considered in the late 1980s, you have nevertheless raised on a number of occasions with people whether the destruction of the documents was a proper matter for cabinet to consider.

You asked Ms Warner about this - and I'll just read the transcript reference into the record, day 24, page 28.5 - you posited the question: why was it that government's or cabinet's responsibility to protect staff from liability defamation? She said that it would have been a breach of faith the staff to have failed to preserve confidentiality of the information that they had provided when they provided, then understanding that it would be kept confidential.

I've paraphrased her answer. It's perhaps not so much the answer that's relevant at the moment, it is the fact you asked this question. Mr Comben stated an obvious fact, he said, "Cabinet determine what issues it would determine." He considered that it was appropriate that cabinet consider the issue, although a little earlier, at page 72 line 20 on day 24 he said, "This was almost a technical decision which didn't sit comfortably," were his words.

Bearing in mind the Canadian aversion to relying on hindsight, you can recall that Mr Comben said that aided by hindsight he did not know now why it was cabinet's job to consider the issue of construction; he pointed to the limited corporate experience of both cabinet and the senior

ranks of the public service at that time, though it could be said that the absence of such experience in the senior ranks of the public service was the fault - if that's the right word - of the executive government that came to power after the election interest to replace those who had been there with new people.

You asked Mr Wells, the former attorney-general, why cabinet consider the matter at all when he appeared on page 8 line 25. He said that Ms Warner wanted cabinet's advice about what to do. He said cabinet thought it right to assist her due to what he called the principle of cabinet solidarity. He said that some of the members of cabinet asked why the issue had been brought before them. Mr Wells said to you that his was a new government, no one was as surefooted as they were later and they did not know then what that usually considered. He said at page 52 line 10 that cabinet was still discerning what types of matters should consider.

So I just thought I'd tell you about the Canadian commission and the test of appropriateness and the yardstick that that Canadian commission adopted.

COMMISSIONER: And is it right?

MR COPLEY: Well, I don't understand that those rulings were appealed insofar as I could check, but it's not as easy to find your way around the Canadian legal environment as you might think, and indeed much is influenced by the Charter of Rights and Freedoms when it comes to Canadian law.

COMMISSIONER: Do you say that's a standard I should apply here?

MR COPLEY: Well, my submission is that you wouldn't look at it with the benefit of hindsight, no.

COMMISSIONER: Or by otherwise applied Mr Oliphant's approach?

MR COPLEY: Well, it would be more appropriate to apply the subjective standard of what is your opinion, because that's what the executive government is asking for, they're asking your opinion.

COMMISSIONER: Informing my opinion would a look at Mr Tait's cabinet handbook?

MR COPLEY: Well, that was explored somewhat with Mr Wells and it seems that that handbook wasn't promulgated until 1992.

MR .....: That's correct.

COMMISSIONER: Yes. It was under development for a while.

MR COPLEY: It was under development.

COMMISSIONER: But it might reflect the standards of the time even though, taking the point with Mr Oliphant, you don't use hindsight, but just because something is passed the day after the event you're looking at, doesn't meant to say that it doesn't - - -

MR COPLEY: No, it was close enough in time.

COMMISSIONER: Yes. So what did it say about what cabinet should and shouldn't do?

MR COPLEY: AS I recall it, it said that there were eight areas that cabinet would normally trouble itself with, but that wasn't to say that there was nothing - that wasn't to suggest that cabinet didn't have the power and authority to consider any matter it thought appropriate to consider.

COMMISSIONER: I think that's probably right, isn't it?

MR COPLEY: Well, it certainly would seem to accord with Mr Fitzgerald's understanding of the range of things cabinet was considering.

COMMISSIONER: Sure. It would accord with the cabinet's understanding that it could choose what matters it would deal with and those that it wouldn't.

MR COPLEY: Yes.

COMMISSIONER: But normally you wouldn't even be asked to deal with something like destroying documents.

MR COPLEY: No, and that's probably why Mr Comben said that it was something of a technical nature.

COMMISSIONER: Yes. No, okay, thanks - - -

MR COPLEY: So I'm not particularly - I just wanted to inform you about the fact that a Canadian Commissioner had had to wrestle with the concept of appropriateness and how would he judge it. Maybe it was easy for him because he was able simply to look at the standards of conduct that that prime minister had promulgated during his time in office.

COMMISSIONER: He had a spirit level.

MR COPLEY: That's right, provided by the subject of his inquiry.

COMMISSIONER: Which is very helpful.

MR COPLEY: Which you probably don't really have here.

COMMISSIONER: No. Well, did he express a personal opinion? Is that how he dealt with it? Like, having applied the objective ruler did he express a personal - did he reach a conclusion as to whether or not the conduct fell on or below the standard?

MR COPLEY: I haven't actually gone to look at the report to find that out.

COMMISSIONER: Okay. All right. Thanks, Mr Copley. Mr Lindeberg, do you want to start now?

MR LINDEBERG: I'd like to start just for a few minutes if you don't mind, Mr Commissioner.

COMMISSIONER: Yes, not at all.

MR LINDEBERG: Because a lot of things have been said this morning which I'd like to challenge.

COMMISSIONER: Okay.

MR LINDEBERG: But also I was hoping to make a little bit of a flowing presentation, but I accept that you like to intervene, which is your right. And to the extent that anything that's been flowing here this morning, hasn't been, and consequently a lot of points have been made which I'm trying to meld them all together against the background that I've suddenly been thrown into the pond, because there are a couple of points I strongly want to contend. I'm aware of the time, but I would like to commence.

I have my final written submission here. I don't know whether it's going to be challenged, but I would make this point, that things have accelerated a little bit since 1 March, I think it was, where we put broad submissions in regard to whether or not the cabinet needed to be called and whether or not the threshold of child sexual abuse had been reached. Consequently there were letters sent out to politicians and members of cabinet said they wouldn't attend, and so forth.

You may recall I said that submission was not the final submission. I think it's fair to say you agree with that. I would like to hand up my final submission. I've got copies here for counsel - for other people - to tender for your consideration, and then I want to speak to that submission.

COMMISSIONER: Okay.

MR LINDEBERG: Do you want to look at - what do I do? I've got four copies here.

COMMISSIONER: I think you should distribute it and we'll have a look at it. Should we look at it over lunch and then when we come back we'll - - -

MR LINDEBERG: Well, it's up to you. I mean, I'm open. I've made this submission in good faith which I believe puts forward the propositions we believe are appropriate here.

COMMISSIONER: Why don't I absorb it over the lunch break.

MR LINDEBERG: It's 90 pages.

COMMISSIONER: Yes.

MR LINDEBERG: I'm sorry, you're a fast reader.

COMMISSIONER: 90 pages, Mr Lindeberg - - -

MR LINDEBERG: Yes, but I think the first part of it is - abut the first 40 pages is the one which will be relevant here to start with.

COMMISSIONER: I'll devote myself to the first 40 pages over egg and lettuce.

MR LINDEBERG: Because the point is that we do not retreat from our proposition that there is evidence of child sexual abuse in the documents. We certainly do not retreat that there was evidence of child abuse in the documents - ie, the handcuffing - but we are aware that because of the amended term of reference that particular threshold is not seen to be a matter which is particularly concerning you in relation to how you make a decision about the lawfulness or otherwise of the shredding.

COMMISSIONER: Well, it's still - - -

MR LINDEBERG: But it does go to the colouring of what people should have known in relation to there being the prospect of realistic future judicial proceedings because of the continuing existence of the Heiner inquiry documents.

COMMISSIONER: But 3(e) as amended still requires me to look at the evidence and assess the response to allegations of child sexual abuse.

MR LINDEBERG: I understand that, but this morning hasn't been dealt with child sexual abuse. I don't know whether counsel - - -

COMMISSIONER: I think it's because last time I said I'll assume that unless anyone wants to supplement what they've previously said on that issue, I'll take what you've previously said as your final word on it. Didn't I say that when we adjourned last time?

MR LINDEBERG: I thought the way it was, that we would put in submissions and then we would come along to argue that proposition.

COMMISSIONER: I didn't make any directions - - -

MR LINDEBERG: If I'm wrong in that then I stand corrected.

COMMISSIONER: Yes. My recollection is that I didn't make any directions about the final submissions or its format, but I thought I did say that I just really want to hear about 3(e)(ii) rather than (i) except any new material, that if you have anything new to add, then otherwise I'd take the submissions as having already been made.

MR LINDEBERG: It becomes relevant insofar as the documents have been variously described from junk to evidence of misconduct and therefore evidence of defamation.

COMMISSIONER: Yes.

MR LINDEBERG: And to that extent we would suggest that there are legal implications upon them being called misconduct and being defamation. But even to the extent that they have been described as junk, what has been in my view fatally overlooked is the fact that they were public records; but in particular, departmental public records. And that's a matter which I would like - - -

COMMISSIONER: You want to develop after lunch?

MR LINDEBERG: To the extent that I'm picked out, I'm happy to wait for after lunch.

COMMISSIONER: All right, thanks, Mr Lindeberg. Yes, Mr Copley.

MR COPLEY: I'm just standing up to adjourn.

COMMISSIONER: Just seeing me out, are you? Okay.

THE COMMISSION ADJOURNED AT 1.04 PM UNTIL 2.30 PM

COMMISSIONER: Mr Lindeberg?

MR LINDEBERG: Thank you, Mr Commissioner. Commissioner, before I go into discussing my submission I just wanted to make a couple of points in terms of there was debate before in relation to what is appropriate government, or words to that effect. From where I stand, might I say, what is appropriate government is government by the rule of law, and that means that ignorance of the law is not available to the executive government, including if it acts on erroneous advice. I say that as a member of the community at large, because when the cabinet door shuts we expect the decisions that are going on in there are in accordance with the law.

I think, if I can say, as a broad heading, there are essentially two fundamental flaws that I think have, dare I say, crippled the government in relation to this particular matter and how it has evolved into what it is now. That is that in the very first instance when the original complaints were handed over to Mr Pettigrew they failed to understand that they became public records, and in particular departmental public records. A lot flowed from that.

The second thing is the fatal flaw, absolutely fatal flaw, that caused the problem, is found in exhibit 180, where it reads that in regard to the application for these particular documents where it says, "Correspondence received from solicitors representing two staff members seeking production of certain documents concerning material gathered by Mr Heiner. Correspondence referred to Crown Law for advice. Interim responses sent. No final comment received. Will depend on cabinet's decision in relation to the fate of the material." Now, what happened there was, in my view, the cabinet's desire overtook what the law required, because there were legal demands on these documents which the cabinet were considering to destroy.

The third one – I said two. The third point is that fundamental reach of regulation 65 in regard to this matter. When you're talking about 129, it states that the ruling is that a reasonable person is supposed to have a realistic – to have a realistic – has to know that there is a realistic possibility of the documents that he or she is destroying will be required in future judicial proceedings. Now, in regard to these things, in relation to seeking access to these documents pursuant to a regulation, if it was contested, and nevertheless, it could have been contested, and I'll go to that, the matter of defamation would have all been settled in a judicial proceedings. There was a prospect of a judicial proceeding. They had that knowledge at the time they destroyed these documents because they knew lawyers were seeking access to them and that was part and parcel of the reason why letters went in.

Now, the point about Mr Coyne's – there's been a lot of comment about Mr Coyne's threatened defamation. Well, it wasn't really a – I mean, I handed this document up, but there was certainly talk about defamation, but, and this is significant, what happened in the defamation situation with Mr Coyne was that the reach of regulation 65 had for him – it permitted him to access these documents via a regulation without actually serving a writ up front to get them under discovery, the point being that – and it was settled in the second advice to the cabinet of 16 February, that Mr Heiner was accepted to be an agent of the government and as he worked and received documents he was receiving public records but specifically departmental public records, because he was contracted to do the job by the Department of Family Services under section 12 of the Public Service Management and Employment Act, which by their continuing existence meant that Mr Coyne, being an officer of the department, had a legal right to access these documents. If it was contested, well, then he had a right ultimately to go to the court for a judicial review on the matter.

I can't point necessarily quickly to the particular exhibit but it's in my submission, Mr Commissioner, that Mr Coyne did make the point that regulation 65 did not refer specifically to his personal file. It was a departmental record or file. It may be worthwhile to read that particular – if it's necessary, to read that particular provision in, because it doesn't talk about – it talks about, "Any departmental record or file held on the department." As my submission points out, the particular interpretation of regulation 65 which was got by Mr Pettigrew in June was instigated by Mr Coyne because he wanted to understand its reach. So he always knew its potential reach. He knew it extended beyond a personal file.

So that I suggest to you that there was always that state of knowledge, because public servants, in particular those who work in industrial relations, understand these matters and how they function, and the person who headed up the department of industrial relations in that department was Ms Sue Crook. That document existed from June of 1988 and that's why Mr Coyne was testing it. My submission points out the history to that which – I'm not necessarily sure it's relevant but I do think it's important that you understand the background history to that, because effectively what was going on here was exactly – in terms of keeping these documents away from Mr Coyne who made an application to them was a return to the bad old days when they were keeping secret files on people.

As long as the documents were held there was an arguable case that regulation 65 captured them. Moreover, when you go through the crown solicitor's advice of 18 April where it addressed this particular issue, notwithstanding it's

about the complaints, but the letter of 8 February sent in by the lawyer captured two matters. It was the extracts of the Heiner inquiry documents relating to the clients that he was representing, that's Mr Coyne and Ms Dutney, but also access to the original complaints. Crown Law recognised that to keep them away from Mr Coyne would have been an artificial device and he had a right of access to them which was not given to him.

The other thing that has been mentioned by counsel assisting is the – and I think it was all a mystery to us as to why this matter ever went across to cabinet in the first place and, further to that, why the documents were ever transferred across to the cabinet.

Now, in reading the cabinet submission of 5 February – sorry, signed off on 5 February. A close reading of it will show that the documents were kept in a secure place in the Department of Family Services in a box unopened, et cetera. Well, the point being in relation to shredding these documents, if it was going to involve the office of cabinet or the cabinet, what was the need to send the box across with the submission? Why? Of course when the evidence was adduced - I think it was Mr Littleboy or Mr Tait – they suddenly materialised.

They did not go across with the actual cabinet submission. They went across beforehand, a number of days before, and I suggest to you that the reason they went across was triggered by the letter that Mr Berry sent in seeking access to these documents pursuant to regulation 65 and the purpose for them to go across to the cabinet secretary was to allow the department to say, "We did not have any of these in the department," when in fact they had been transferred across the department as a device to defeat regulation 65 because the next thing we see is cabinet – the letter, I think, is dated the 13th from Mr Stuart Tait to the crown solicitor saying, "What's going to happen if a writ comes in? Will these documents be protected under cabinet confidentiality or crown privilege?"

I suggest to you that the reason for that was, the purpose – and it's even stated in the statement by Mr Wells that Ms Warner admitted, "If we held the documents in our department, the public servants may have a right to see them." So it was a device to defeat a law that was in place, in particular regulation 65, because the documents did not have to be on the person's personal file as long as they were held on the officer. I don't think anybody in this place will dispute that the documents related to Mr Coyne's conduct at the centre related to him and Ms Dutney and potentially others.

The other relevant point on this is that it wasn't just Mr Coyne and Ms Dutney who were seeking access to the documents, but so was Ms Mersiades and, for that matter, so was the POA as a general principle to support its members and it was on the point of regulation 65 because there's no indication, according to the letter from the Teachers' Union, let alone from us, that we were seeking the documents to assist somebody in a defamation action. That was never the purpose of the union to assist a public servant in a defamation action. Our duty stopped up to the

point that regulation 65 was fulfilled. What Mr Coyne or Ms Mersiades did with the documents afterwards – that was their business. That was their business. Our duty was to ensure that the law was complied with.

COMMISSIONER: What did regulation 65 require to be done?

MR LINDEBERG: Thank you, Mr Commissioner. This is a relevant point in regard to perhaps holding documents on defamation and what have you. Regulation 65 became triggered upon a request, whereas regulation 46 – there is a triggering in it if the documents are detrimental. Now, that's not to say these documents were not detrimental. Under 46 you're obliged to see them so that you can make a comment. Regulation 65 is a broad one. Whether they hadn't thought the thing through in terms of the ramifications of it we don't know, except that's what the law says, "access to any departmental record or file held on the department".

There was a graduation in this understanding of the access under regulation 65 because in the first instance the reason why the crown solicitor was arguing about the documents being got rid of was that there was a view that they were Mr Heiner's personal records. They weren't, according to the final view. As in law or proceedings, you would know circumstances change because and advice today in accordance with the facts as you understand them can change tomorrow if a solicitor or something calls to change matters around.

That's what happened in this case, particularly in this case when there was a specific request by lawyers which arguably in the mind of the department must have upped the ante, and then, of course, as this says in here at exhibit 180, similar requests by the Queensland Teachers' Union and the POA – and I can prove that on the exhibit that went to Ms Matchett dated 1 March where it flowed out of a meeting I had where we were also seeking access to these documents.

These documents under this particular regulation were the lifeblood of public servants and therefore unions to enforce and I suggest to you that when there is clear indication that unions have an interest and an interest to take the matter to court to enforce the regulation, I don't think you can treat it as any common Harry walking up and down the streets.

It has to be accepted, in my view, that when a matter of an access to a document under law is being contested or being sought after, there has to be in the mind of a public official who is the employer that this matter may end up in judicial proceedings. When you see the letters from the

Teachers' Union, albeit that it was after the shredding, where they said, "We haven't got documents. We now may have to institute legal proceedings," it's a manifestation that they knew that there was a future judicial proceedings in place if access was not given because what is clear is that when they say in exhibit 180 "Interim response sent", the interim response was that Crown Law is still considering the matter.

Now, under those circumstances if you're dealing with the government, why would you go down to court and lodge a writ just to secure them? Surely if you're dealing with government, the model litigant, people acting honestly and impartially, when they say they are still considering the matter, why shouldn't we believe them? Instead we know now by the evidence adduced that other things were going on that were behind the scenes. They knew basically from the 12th that there was a course of action going to see that the documents were going to be destroyed.

Now, in regard to future judicial proceedings the fact that the documents existed, continued to exist, and being departmental public records meant that there was the prospect of a future judicial proceedings to get them if this application to see them under regulation 65 by exchange of letters and meetings did not work.

The other dimension of the documents is what was in them, and that opens up other prospective future judicial proceedings in defamation, or given that we say that the evidence contained evidence of - it's been admitted by Mr Wells that they say it contained evidence of misconduct; those documents were open to be sent to the CJC because although Mr Counsel Assisting talked this morning about me CJC Act, in point of fact he spoke to my benefit, if I might suggest, because the official misconduct division certainly was in place at the time, but I think you'll find that the complaints section wasn't.

COMMISSIONER: Why would the CJC be a judicial proceeding?

MR LINDEBERG: Because it can take evidence under oath.

COMMISSIONER: It can.

MR LINDEBERG: According to section 119.

COMMISSIONER: I know, but that's when it is acting when it's conducting a hearing.

MR LINDEBERG: Yes.

COMMISSIONER: But not - the body itself isn't a judicial proceeding; proceeding is what they do, not what they are.

MR LINDEBERG: Well, Mr Commissioner, I don't have section - yes, maybe I do. I think - - -

COMMISSIONER: Are you going on to say - as I understand it you say two things: you say while the Heiner documents continued to exist that cabinet believed that there was a realistic possibility of judicial proceedings (a) to resolve any contest under regulation 65; defamation action by either or both Dutney and Coyne; and are you saying now the third possibility is judicial proceedings under the Criminal Justice Act?

MR LINDEBERG: I raise that. I raise that because of the acknowledgement by Mr Wells in one of my questions: where did he get that information from? Arguably he would have got that information from Ms Warner, and where did she get that - well, there is contested testimony, I suppose, in relation to what did Ms Warner know was in the documents? She basically claimed that she didn't know about the handcuffing of children to fences. She claims she didn't. She gave evidence under oath; maybe that's for the Commissioner to make a decision on that.

But there were complaints against the management of the centre in terms of the way he was running the thing which could have went to misconduct against Mr Coyne leading to disciplinary processes and/or dismissal and/or potential

criminal charges. And there was - and then this is the point I make - I was going to make - I make it at point 213 in my submission, the obligation to refer all suspected official misconduct to the CJC, which falls on, I admit, principal officers of a unit of public administration, which cabinet ministers are not but Ms Matchett was. I don't have the definition of 119 but I think it refers to a person or body who has the authority to take evidence on oath.

COMMISSIONER: I don't think it would be a judicial proceeding, it's an administrative body.

MR LINDEBERG: Yes, but it has the authority to take evidence on oath. That's the final definition of it. It's the same with - you'll find under - I believe that the office of the auditor-general and the office of the information Commissioner, I think you'll find - - -

COMMISSIONER: But I've got power to take evidence on oath and I've used it, but I'm not a judicial proceeding, I'm an executive proceeding, aren't I? Any lawyers in the room, aren't I?

MR COPLEY: Mr Commissioner, it would be better if Mr Lindeberg just got on and suck to his main points instead of opportunistically just grabbing onto a bit of evidence from Mr Wells which he then takes out of context and now claims that there might have been proceedings in the CJC. That's the first time we've heard of this. He'd be better if he just focused on his submissions, say where the evidence is, instead of giving his submissions about the LAW, which are based on his understanding of the LORE.

COMMISSIONER: I think that's a no.

MR LINDEBERG: Yes, well, that's a cute point. What I'm pointing out is the definition of 129 talks about knowing, the person knowing - - -

COMMISSIONER: Yes.

MR LINDEBERG: - - - a future judicial proceedings. And to the extent that having knowledge about the contents of the documents may ought to then have caused people to treat them in a particular way. At one minute they're saying they're junk and on the other side they're saying they involve misconduct. We know from evidence here that Mr Heiner took evidence about children being abused by being handcuffed to fences. We know that. It's open for your - - -

COMMISSIONER: No, when you say "we know that", I see you said that early on in your submission. How do we know? Where's the evidence that tells us that?

MR LINDEBERG: In the evidence that was adduced. I have it in the - I suppose if you have to rule on it, but I think at my submission at point 8 I've cited - I'm trying to find it, but it's at page 7 of my submission.

COMMISSIONER: Yes.

MR LINDEBERG: One of the complaints that Mr Heiner had was about children being handcuffed to fences.

COMMISSIONER: How do we know that? How do we know that that was in the documents that were destroyed?

MR LINDEBERG: Well, in the evidence that was adduced by these various people at particular times; my recollection is that Mr Lannen said he remembered talking about the handcuffing.

COMMISSIONER: Yes, look, that's okay, but we still have to focus on the belief of cabinet to get anywhere near - - -

MR LINDEBERG: I understand that, but I'm saying that there was, according of Mr Wells, within the cabinet a knowledge that the documents contained evidence about misconduct which even if they shredded them, those people who were making those allegations could take them to the CJC later on or whatever. Now, what Mr Copley has raised this morning is that - and I'm not sure whether he went that far - but he was talking about the official misconduct division coming into place - correct me if I'm wrong - around November 1989.

My researchers say that the complaints section didn't come into being until April of 1990. Now, the particular provision under the act talks about referring matters to the complaints section, not to the official misconduct division of the CJC. Now, whether there's a significant difference, I suppose what the law says, the law says. But nevertheless our submission is that the documents, given the contents of what was in them and whether or not - I don't know whether just what I said before, whether you necessarily agree that because of what these people said, that there was clearly evidence of children being handcuffed to fences in the documents, because this inquiry for its early period was calling witness to find out whether there was evidence of child sexual abuse.

COMMISSIONER: Yes.

MR LINDEBERG: Right? And I'm saying that that type of thing, the contents of public records or departmental records of what's going on at a youth detention centre are not documents which any responsible government can turn a blind eye to, I suggest, if it goes to the welfare of

children, let alone if there are public servants out there who are engaging in particular conduct which may be misconduct going to their being disciplined or sacked or charged.

COMMISSIONER: Okay. Mr Lindeberg, can I ask you a question: can you go to page 4 of your document, please. I'll ask you a question about what you mean in paragraph 11, the last two lines. You talk about the legal debate about what 129 meant or didn't mean at any particular point in time. What do you mean when you say the successive governments adamantly refused to correct their demonstrable mistake of law in the Heiner affair after Ensbey?

MR LINDEBERG: Even after Ensbey.

COMMISSIONER: Yes. Well, how could they have corrected it?

MR LINDEBERG: Well, by reviewing.

COMMISSIONER: Reviewing what?

MR LINDEBERG: Reviewing my complaints.

COMMISSIONER: I see, and this goes to your complaint to the CJC.

MR LINDEBERG: Yes.

COMMISSIONER: All right. Can I ask you, you see 1.3 on page 5 you quote from Jerrard J in Ensbey.

MR LINDEBERG: Yes.

COMMISSIONER: What the judge says is that section 126, which is an associated section to 129, he's talking about the common law said in 126 it's the equivalent of common law. You could apply it where there was a reasonable possibility foreseen – that's actually foreseen by, and which arose out of facts known to the accused. What facts did the cabinet know or any particular member of cabinet which would have given rise to the belief of the reasonable possibility that there would be a judicial proceeding in which these documents might be needed.

MR LINDEBERG: Well, I suggest it's on page 2 where it talks about lawyers seeking access to these documents.

COMMISSIONER: All right, so (1) is lawyers were seeking access to them.

MR LINDEBERG: Yes, and the particular wording that no formal proceedings have yet been commenced, or – I'm sorry, I'm trying to find the – I've got it in the submissions somewhere.

COMMISSIONER: Yes, I've seen that. That's highlighted in italics just in case I missed it. So what does that say to me, or what should it say to me, do you say?

MR LINDEBERG: Well, I'm saying to you that there is a knowledge that once formal proceedings – formal proceedings – commenced, that the documents in the possession of the cabinet will be open to discovery.

COMMISSIONER: So what I should interpret from what – that the cabinet, or some of them, which is going to be a problem identifying which of them, but interpreted the document or the phrase "no formal proceedings" as meaning there's no formal proceedings on foot, but that's catered for. There might be soon and you need to act urgently to deal with the likelihood.

MR LINDEBERG: Yes.

COMMISSIONER: Is that right?

MR LINDEBERG: Yes. I mean, what I'm – I'm placing emphasis on the word "formal".

COMMISSIONER: Yes.

MR LINDEBERG: In terms of the commencement.

COMMISSIONER: That's a key word, because it's formal as distinct from informal, which you take to mean prospective as opposed to actual. Foreseen or foreseeable or forecast or predictable.

MR LINDEBERG: The reality is, I would suggest to you, that something which is informal, in other words, somewhere where a letter is sent to say the government or a party talking about a particular thing, arguably is informal, but it's forewarning you.

COMMISSIONER: Yes.

MR LINDEBERG: It can easily lead to a formal step.

COMMISSIONER: That's what - - -

MR LINDEBERG: And what I'm saying is - - -

COMMISSIONER: - - - a reasonable minister would have interpreted phrase to mean written in a cabinet submission, that there's no formal proceedings on foot but you can be sure that there might be.

MR LINDEBERG: Yes, and I relate that to Ensbey, in that he was expected to know that the documents that he was guillotining would be required at a future time because he was a reasonable person, and I suggest to you that members of cabinet should be deemed to be reasonable people who should have that state of – you know, should have that reasonable type of knowledge, particularly when you're talking about formal.

COMMISSIONER: Okay.

MR LINDEBERG: I mean, to me it takes it to that extra level, because when people talk about legal action, I mean, that could even mean formal, but I think the fact that they're talking about formal and the fact that they have got the letter saying, "We are seeking access to these" – and where every parent has to go to court to get them - - -

COMMISSIONER: In that context a reasonable cabinet minister paying attention or having read that document would have realised that – or would have believed that while there were no formal proceedings on foot, there were proposed proceedings.

MR LINDEBERG: Exactly.

COMMISSIONER: Or possible proceedings.

MR LINDEBERG: Exactly.

COMMISSIONER: That's why "formal" is there, because it draws a distinction to their notice between actual and proposed.

MR LINDEBERG: Might I allay that up with - - -

COMMISSIONER: Is that what you're saying?

MR LINDEBERG: Yes, I am saying that, and may I allay that up with the fact that cabinet by that time had had the advice, the crown solicitor's advice, of the 16th which talks about that once a writ is served the documents will have to be handed over because the cabinet confidentiality does not attain to these particular documents. Well, even if they – well, they say it didn't, but even if it did I think the advice says the discovery thing would probably become - - -

COMMISSIONER: Now, the formal proceedings, or that phrase, pertains to what?

MR LINDEBERG: Well, you see, I suggest - - -

COMMISSIONER: To the reasonable cabinet minister.

MR LINDEBERG: Yes, it does.

COMMISSIONER: Reasonably attentive one.

MR LINDEBERG: Well, might I respectfully suggest, Mr Commissioner, you move into dangerous territory where you say that cabinet ministers don't read their cabinet submissions. I mean, it may well be true - - -

COMMISSIONER: I didn't say that.

MR LINDEBERG: No, I'm not saying that, but I'm – well, no, forgive me, I'm not - - -

COMMISSIONER: But in order to have a belief engendered by this you've got to read it.

MR LINDEBERG: Exactly.

COMMISSIONER: Okay.

MR LINDEBERG: As a person who is dealing with the government at the time, you would expect cabinet ministers to read their cabinet submissions. I think that's a reasonable thing to suggest.

COMMISSIONER: A perfectly reasonable expectation, but can you go back to my question? The cabinet minister who read this would have interpreted "no formal proceedings on foot" to mean there might not be any formal proceedings but potentially there are what sort of proceedings?

MR LINDEBERG: Well, there are proceedings advanced – being put forward by the lawyer.

COMMISSIONER: Yes.

MR LINDEBERG: Now, in the case the lawyer has specifically made reference to seeking access pursuant to the documents pursuant to regulation 65.

COMMISSIONER: So a 65 proceeding.

MR LINDEBERG: Yes.

COMMISSIONER: Regulation 65, administrative review. Is that it?

MR COPLEY: Sorry, where is regulation 65 in this cabinet submission? This is what cabinet knew, apparently .

COMMISSIONER: Yes. No, it's not there.

MR COPLEY: It's not there. Sorry, I thought it must have been there - - -

MR LINDEBERG: No. I mean - - -

MR COPLEY: - - - because he asserts cabinet knew about regulation 65 proceedings.

COMMISSIONER: No.

MR LINDEBERG: No, the commissioner asked me what – I mean - - -

COMMISSIONER: I'm just asking you what proposed proceedings should the cabinet minister have believed were – or potential proceedings, given that there were no formal judicial proceedings. He should have expected that regulation 65 might be tested.

MR LINDEBERG: Yes.

COMMISSIONER: That is, a refusal of access under 65 by Mr Coyne.

MR LINDEBERG: Yes.

COMMISSIONER: Based on what?

MR LINDEBERG: And Ms Dutney.

COMMISSIONER: Okay, based on what? Why would they draw that conclusion? See, you've got to always bring it back to a belief.

MR LINDEBERG: I understand.

COMMISSIONER: Okay, good.

MR LINDEBERG: The only lawyer who was seeking access to these documents was Mr Berry.

COMMISSIONER: Yes.

MR LINDEBERG: As far as it's been adduced in this commission of inquiry. Now, I - - -

COMMISSIONER: Which means that as far as I'm concerned he is the only one.

MR LINDEBERG: I understand. Thank you. Now, it is true that it does not say what the judicial proceedings – what the proceedings are which may be coming into existence, but Ms Warner has admitted that she knew that Coyne was seeking access to the documents.

COMMISSIONER: Yes.

MR LINDEBERG: Mr Coyne was seeking access to the documents via his lawyer through regulation 65.

COMMISSIONER: All right. I understand what you say and then there's also the defamation and maybe the CJC, but who do you put in the dock in your scenario? Who do you charge with an offence against section 129 of the members of the cabinet who were there at the cabinet meeting on 5 February or whenever they made the decision?

MR LINDEBERG: Are you asking me which particular minister?

COMMISSIONER: Yes, because the section says "any person".

MR LINDEBERG: Yes.

COMMISSIONER: Does that include cabinet?

MR LINDEBERG: Well, this may go back to the – the only way to establish an offence under 129 which is essentially an individual offence may be that you have got to ask each and every cabinet minister in terms of what he or she understood.

COMMISSIONER: Which can't be used in evidence against them if it's incriminating.

MR LINDEBERG: Yes, but the other thing is there may have been – and by the wording of that "cabinet ministers acting in combination", being more than one, a conspiracy.

COMMISSIONER: Hang on; let's just tease this out a little bit before we get too far away. If I call someone to give evidence and ask them what they believe, they will tell me something. It will either incriminate them or exonerate them or they can't remember. The first one can't be used in evidence against them in a court of law. The other two are irrelevant because one will be self-serving. It's not irrelevant but it's inadmissible unless they want to give evidence in their own defence and to do that you have got to have at least a show-cause situation by the evidence that you have got in your possession. o let's assume that that's what we're trying to do here to identify whether or not any and which member of the 1990 cabinet has got to show cause as to what they believed. So now you tell me what your show-cause case is.

MR LINDEBERG: I mean, I'm not sure whether we're leading to – notwithstanding you haven't made a final judgment, whether we're leading to a perfect crime, one having been committed and nobody can be held accountable because we can't differentiate at a meeting like that who knew what and so forth.

COMMISSIONER: That was always going to be a problem with this section, wasn't it?

MR LINDEBERG: You mean 129?

COMMISSIONER: Yes, because it's an individual offence. It's not a corporate offence.

MR LINDEBERG: Our position, as expressed, insofar as you haven't taken, to my knowledge, any notice of it in these proceedings – I'm not saying you should – is that in the audit which was presented up in the recusal, albeit the way it's expressed, it goes to individual cabinet ministers under 129 and then in the alternative in the conspiracy. So, I mean, it's not as if we haven't gone through and said it's one or the other.

COMMISSIONER: I haven't read the audit, but can you tell me now what you say are what I call evidentiary facts that would lead to a conclusion that an offence under section 129 has been committed by some person?

MR LINDEBERG: In the first instance we would suggest to you that there is sufficient knowledge to inculpate Minister Warner.

COMMISSIONER: Yes.

MR LINDEBERG: Now, I can't say any of the others because – I mean, the ones who said – well, let me put it this way, commissioner: if one is to inculpate – suggest that there's sufficient evidence to inculpate Ms Warner, your letter that went out to the cabinet ministers said that they could either attend or rely on the evidence of Ms Warner.

COMMISSIONER: Nobody put it to Ms Warner that they had committed an offence under 129 or any other offence of the Criminal Code.

MR LINDEBERG: Are you suggesting then that when she was in the witness box, one should have put that to her?

COMMISSIONER: Well, I must say it's usually how you do it. If you want to be fair to someone and you're going to say that they did something against the criminal law, you generally put it on them while they're there rather than when they have left the room. You usually do it when they're in the room and they have got a chance to defend themselves or explain themselves. It's normally how it's done. I'm not saying you had to do it, but if you're going to make a submission to me that she has committed a criminal offence, don't you think someone should have asked her, given that we asked her a lot of questions? That's what I said to you very early in these proceedings.

MR LINDEBERG: I remember what you said.

COMMISSIONER: Remember my terms of reference used to be "investigate the allegation of" and I asked, "Who's making it?" and then I said, "If you're willing to wound, you've got to be prepared to strike"?

MR LINDEBERG: I hear what you say.

COMMISSIONER: I said that to your lawyer, didn't I, and I made it clear that you can't – it's not an ace in the hole. You can't keep it up your sleeve and then use it to strike someone from behind if you haven't put it to them upfront because at the very least it makes it look to me that you're not confident in your position because if you were, a confident person would put bluntly what the truth was to the person. As you said in one of your submissions, she was entitled to confront her accuser. Who is her accuser?

MR LINDEBERG: Now, Mr Commissioner, you may say you wanted the specific words put to Ms Warner about breaching the law.

COMMISSIONER: I would have thought the way you would have done it might be, "When you voted to destroy these documents, you believed based on these four or five things and could have had no other belief than they would be required in the future for legal proceedings, but you went ahead and did it anyway."

MR LINDEBERG: I went as far as indicating - to go to state of mind that Minister Warner had at the time she took the decision to shred it. I asked her the question did she read and know and understand the particular section, the one under urgency in the cabinet submission, before she took the decisions.

COMMISSIONER: Yes.

MR LINDEBERG: I took that to that to mean that she had the necessary elements in her mind at the time she took the order to destroy the documents.

COMMISSIONER: Perhaps a fairer question would be not, "Did you understand it?" but "What did you understand by it?"

MR LINDEBERG: Is it not reasonable to suggest that she's a reasonable person and when she reads formal judicial - - -

COMMISSIONER: Perfectly reasonable persons can come to opposite conclusions on the same body of evidence and neither be right nor wrong.

MR LINDEBERG: The Baptist minister thought he was doing okay but he was found guilty.

COMMISSIONER: There is no point saying to someone, "Did you understand that?" because you don't know what they understood. You only know what you understand so if you really want to find out what somebody understands, you ask them, "What do you understand by that?" and then they will tell you and then you can tell whether they actually understand it or they only think they do. Do you see the difference?

MR LINDEBERG: I understand, commissioner.

COMMISSIONER: What do you understand by what I just said?

MR LINDEBERG: Sorry, did you just ask me a question?

COMMISSIONER: Yes, I asked you what understood.

MR LINDEBERG: What I understood when I asked that question?

COMMISSIONER: No.

MR LINDEBERG: I'm sorry, I missed that last point.

COMMISSIONER: You said you understand what I was saying and I'm asking: what did you understand?

MR LINDEBERG: I suppose the point that you're saying is that for failing to put the question the extra step.

COMMISSIONER: What should I interpret from that?

MR LINDEBERG: I think that one of the interpretations was that - I took it in my mind at that time was that she understood what a reasonable person would understand and she went ahead and destroyed the documents. Now, in regard to my next step on that was that that was going to be addressed in my final submissions. I felt that I had got out of her what I needed to satisfy the state of knowledge of her to satisfy at least 129. I mean, at that point in time, Mr Commissioner, it hadn't been resolved whether or not all the cabinet ministers should be called. I mean, what I found out, you know, when we came back was that letters had gone out - - -

MR COPLEY: That had absolutely nothing to do with it, who else was going to be called. The witness was here. She was available to be cross-examined and she was cross-examined as seen fit.

COMMISSIONER: To be fair, though, to Mr Lindeberg, he didn't have a legal duty to do it, did he?

MR COPLEY: Well, it's not a court of law.

COMMISSIONER: No.

MR LINDEBERG: Exactly.

MR COPLEY: But we were admonished and lectured in the submissions sent in in March about the duty - the duty of the commission to accord procedural fairness and right of people accused to face their accusers. We were reminded of that. It didn't occur when Ms Warner was here and of course none of that seemed to occur when Mr Wells was here either, where things were put to him. But nevertheless the position is this, where it's not a Jones v Dunkel situation, it's not a criminal trial; it's not a Browne v Dunn situation.

COMMISSIONER: No, it's just my opinion, and it might have been helped if I clearly knew unambiguously what everybody's position was.

MR COPLEY: And what you posited to Mr Lindeberg which he did not answer was:

> *Would it be permissible for me to infer, Mr Lindeberg, that your failure to put that demonstrated a lack of confidence in the strength of the allegation because it wasn't put?*

That's the question to put to him which he never answered and it speared off to all of this now.

COMMISSIONER: It doesn't matter, it was a rhetorical question.

MR LINDEBERG: I'm happy to answer that question.

COMMISSIONER: Okay.

MR LINDEBERG: I don't retreat from any of the accusations that I've put forward.

COMMISSIONER: But that's the point.

MR LINDEBERG: Nothing that's been put forward here in my view.

COMMISSIONER: That's my point, Mr Lindeberg, you didn't put in too many accusations at all.

MR LINDEBERG: Well - - -

COMMISSIONER: I'm saying to you you haven't put in enough, not too many.

MR LINDEBERG: Well, the opportunity to call other witnesses, for instance, the former premier, notwithstanding that he's since said his health is not the best, wasn't - - -

MR COPLEY: The former premier hasn't said anything about his health at all.

COMMISSIONER: Yes.

MR COPLEY: We'll just correct the record about that.

MR LINDEBERG: I'm sorry, I was - - -

COMMISSIONER: Sit down, Mr Lindeberg.

MR COPLEY: The former premier has not said anything, so it's very, very important for people at the bar table who have been given the privilege of having the right to appear or authority to appear, to make submissions that are at least - if not legally accurate - at least factually accurate.

MR LINDEBERG: With respect, my understanding is - and I don't want to make any aspersions against a former premier - the letter that was handed up which I didn't see - - -

COMMISSIONER: Let's just deal with Ms Warner because she was here.

MR LINDEBERG: Yes.

COMMISSIONER: Let's deal with who was here rather than who wasn't. And Ms Warner was here because I summonsed to appear because I wanted to hear from the minister who was trying to persuade other ministers to a particular course of action and I would have thought that the prime mover - if anyone had the intent or the belief or the wilfulness it would have been her. That's what she was here. And Mr Wells was here because he was the attorney-general of the day. And those who were injured, the game goes along regardless.

MR LINDEBERG: Well, I'm suggesting, Mr Commissioner, that the question I put to Ms Warner in regard to her, say, knowledge at the time of the order to destroy the documents was sufficient for her to know that those documents would be required for a future judicial proceedings.

COMMISSIONER: And you say she was given every opportunity she needed to defend herself against an obvious accusation of criminality, and she was represented by senior counsel

and she's been afforded whatever procedural fairness she's entitled to in the circumstances, do you?

MR LINDEBERG: No, I'm not going to be foolish enough to accept that in terms of what - that she had a right, I accept that. And to the extent that I could have taken my questions further, I accept that. And of course the circumstances in which I find myself are one of being a layperson in terms of knowing how far you have to push it because the issue of how far you push it depends. You can destroy what you made above, was that I felt that when I asked that question, that I had got confirmation that she had in fact read the cabinet submission.

COMMISSIONER: Indeed.

MR LINDEBERG: And to the extent that what she read and she understood, and then she went ahead and participated in destroying the documents, in my view was sufficient. Now, I need to take it further and say, "Therefore you committed an offence," because in my view having that state of knowledge was sufficient to trigger 129.

COMMISSIONER: Well, I suppose what you're saying is that having read it, you couldn't interpret it any other way.

MR LINDEBERG: Particularly, if I may say, in regard to whether everything turns on a particular word, although I don't think it necessarily does. "No formal legal proceedings" was that Ms Warner had knowledge of the cabinet submission and it recognised that once a writ was served, that the documents would be discoverable.

COMMISSIONER: Is Ms Warner the high water mark? I mean, did she have, on the evidence, the most knowledge of any minister in the room?

MR LINDEBERG: Well, that's the point. We're not sure, are we, because we haven't been able to cross-examine Mr Goss, who was instructing Mr Tait what to do. Now, what state of mind Mr Tait - - -

COMMISSIONER: Well, we had Mr Tait.

MR LINDEBERG: I know that. I understand that. But it may have been that he was carrying out the instructions. But whether or not - - -

COMMISSIONER: He told us what he was told.

MR LINDEBERG: I understand that.

COMMISSIONER: Okay. So why do we need Mr Goss to tell us anything else? We've had the other party to the conversation and none of them put it to him that he was mistaken or confused, unreliable.

MR LINDEBERG: The difficulty we all have - we all have - is that none of this was in the cabinet room and we don't know how the forces of those cabinet meetings took place, who was the dominant party and who wasn't. And in regard to Ms Warner, obviously she had an information train which was better than other ministers because this submission came to her, she'd obviously, one would suggest, be talking to Ms Matchett about what was the state of play when we went in there.

It wasn't necessarily the fact that, say, the Minister for Industrial Relations (indistinct) Primary Industries would have had the same knowledge, but what they all had in terms of expecting them to read it was that they knew that lawyers were seeking access to these documents but no formal proceedings had yet been instigated.

COMMISSIONER: So taking your position in respect of Ms Warner to its logical conclusion, if she couldn't have understood anything else from the document other than that there was legal proceedings possible in the future, then all members of cabinet who read it would have had to reach the same conclusion.

MR LINDEBERG: That's what I'm suggesting.

COMMISSIONER: Now your next problem would be proving who ran it, wouldn't it? Or do you say it can be safely assumed that everybody ran it?

MR LINDEBERG: I believe you can say that. I mean, I don't know whether we get down to the - we may have to, whether somebody was in the toilet - but nevertheless that hasn't been raised. But everybody as far as I know - as far as I know because I haven't seen it - all the 18 cabinet ministers were in attendance at the time. Right? I mean, the question of what is a reasonable man what is a reasonable cabinet minister, one expects that cabinet ministers read the cabinet submissions because they're not walking in their cold, they have their documents released a couple of days beforehand and therefore one would expect and hope that in a civilised society like ours, that they would be reading what is in the cabinet submissions, otherwise what is it there for?

COMMISSIONER: What are they there for?

MR LINDEBERG: Indeed.

COMMISSIONER: All right, so that's - I'm just trying to understand your case, that's all. So that is it's reasonable to assume they all read it and they all interpreted it the same way because it's not capable of any other interpretation other than a belief that judicial proceedings are realistically possible in the Ensby sense. All right?

MR LINDEBERG: Yes.

COMMISSIONER: So is there anything else, any other aspect that I should be mindful of in forming my opinion?

MR LINDEBERG: I think, Mr Commissioner, that there is no opening for you to suggest that this was in any way an abstract question. For instance, what I'm talking about is when the cabinet secretary wrote to the crown solicitor, I think it's on 13 February, seeking advice in relation to what is likely to happen if a writ is served, and it was then on the notation that after - it was plainly about the Heiner inquiry documents, and the only person who was agitating them through lawyers was Mr Coyne. The fact that the cabinet submission talked about a better view of the law being that they weren't Mr Heiner's private documents, that they were public records, I think it all goes to show that the person who was agitating for these via the lawyers was Mr Coyne.
These; submission number 80 again, are the – I think it's been said that this was material that the minister had to which she would have spoken in cabinet, but, I mean, again - - -

COMMISSIONER: She said she spoke to some of it, couldn't remember which.

MR LINDEBERG: Yes, I know, but, I mean, in it it plainly talks about unions seeking the things as well. To suggest that, you know, the whole thrust of this thing was to prevent the documents falling into the hands of people for a range of reasons; one was to prevent defamation action, and the only person who was indicating that perhaps were two people, Ms Dutney and Mr Coyne, but the other one was the unions were seeking access to these documents because we had a right to see them pursuant to regulation 65 irrespective of what the public servant who then read them may have wanted to use them for.

COMMISSIONER: So just so, again, I understand what is the only way of reading this document for a cabinet minister, is that they would have concluded that there was a realistic possibility of judicial proceedings to test regulation 65, denial of access, or defamation proceedings? Which one? Or wouldn't they have differentiated?

MR LINDEBERG: I don't think, you know, one should rule out the other, because they both are judicial proceedings.

COMMISSIONER: Yes.

MR LINDEBERG: The fact that lawyers are seeking access to them and they talk about no formal proceedings, because - - -

COMMISSIONER: There could have been at least those two.

MR LINDEBERG: Because, I mean, the argument might run that because – if Mr Coyne, for instance, was threatening defamation, as has – I think it's been admitted, the fact that the documents were ultimately shredded, if that was the purpose, it didn't defeat the defamation, all it did, it made it more difficult to prove, but because of the unique position in which Mr Coyne found himself, being a public servant and dealing with departmental public records, it opened up the lawful access to these documents via regulation 65 which arguably he should have got as a matter of course, but if it was going to be contested – and certainly the teachers and the POA said we would enforce it, because it was a regulation of importance. So the documents could have been accessed that way and should not have been therefore destroyed.

COMMISSIONER: But what 65 allowed you to do was have a look at what was there and take a copy of it if it was a departmental file or record held on the officer.

MR LINDEBERG: Yes.

COMMISSIONER: Now, how were the Heiner documents going to qualify as a departmental record held on Mr Coyne or Ms Dutney?

MR LINDEBERG: Because they plainly were about him. The investigation was into the management of the centre, the complaints were about him, and therefore that's how it opened up.

COMMISSIONER: So held on the officer - - -

MR LINDEBERG: Means about him.

COMMISSIONER: Means "concerning" or "about" or "affecting".

MR LINDEBERG: Yes.

COMMISSIONER: Or "referring to".

MR LINDEBERG: Yes, and, you know, I just make the point, because it has been argued in other places that the interpretation – that such an interpretation was so wide that basically public servants could end up seeing

everything, but that's not the case at all. There has to be a request and Mr Coyne made the request and lawyers made the request and unions made the request.

COMMISSIONER: Does that come from the use of the word "permitted", that in order to be permitted you've got to ask?

MR LINDEBERG: Yes. I make the point that regulation 46, which I think talks about personal files, but anything detrimental, this takes the issue a step further.

COMMISSIONER: Whether it's favourable or unfavourable you can have a look at it.

MR LINDEBERG: That's right, and I say that the case of – albeit that that's the beginning of it, the case of Wickstead v State of Queensland exposed the mischief then regulation 65 corrected it. I don't know, commissioner, whether I need to go further in regard to that, whether you have certain questions to ask me; that you want to ask me.

COMMISSIONER: No, I'm - - -

MR LINDEBERG: Because, I mean, one of the difficulties one is always confronted in this inquiry is the definition of government, because, you know, government gets things fed into it – I mean, government as in executive government. Whether I need to address the issue of child sexual abuse being in the documents or whether you're prepared to decide that upon the papers - - -

COMMISSIONER: I'm content to do that, but if you want to draw my attention to something specifically or you've - - -

MR LINDEBERG: I think, with respect, I've set it out pretty comprehensively in the material, because we certainly say that there are two witnesses.

COMMISSIONER: Yes.

MR LINDEBERG: I'm sure that you understand the argument that I'm saying, that just because - - -

COMMISSIONER: Ms Parfitt and Mr Roch?

MR LINDEBERG: Yes, and just because there were two as opposed to a whole tribe - - -

COMMISSIONER: Yes, it's not a numbers game.

MR LINDEBERG: No, and we say that Ms Parfitt in particular was highly reliable, but backed up by Mr Roch, and therefore, to that extent, this is not just a simple matter, we suggest – I suggest, that we're shredding

evidence just about public servants. It also had other aspects in it which has a history of this matter beyond, you know, the circle of the Heiner affair, going to the Forde inquiry and all that type of thing, and I carried it there because of the content of those particular documents.

The other thing that I feel I need to put on the record is that the position of Crown Law, the representative of the state of Queensland, in regard to the position of the mischief, if one might say, notwithstanding the mischief of delays that were taking place in regard to giving Coyne access to the documents, because I think it must be noted that – and I said from the beginning, one of the fatal, fatal flaws in this matter is that Crown Law did not apply its mind at the particular point in time to regulation 65. It said, "Let cabinet make its decision first." Under those circumstances that has horrendous ramifications on my view of the law, because the chronology of events is that before, or as part of, the process when they were making decisions to destroy these documents Crown Law also knew that there was the claim on these documents by the solicitors as of 8 February.

They deemed to say as of - I think the evidence is the 22nd but it's reflected in here, "Let's wait to see what cabinet wants to do." What about the rights of Mr Coyne in that situation? Why should they be subservient to the wishes of the cabinet? Why shouldn't he have a legal right to access these documents? What makes it worse is that then they go on and recognise that Mr Coyne had a right to see the documents under regulation 65 the original complaints and in the evidence Mr Bosscher adduced of Mr Thomas he did admit that when the documents were shredded, Coyne had a right to see the documents under regulation 65.

COMMISSIONER: One of the intriguing things about this is that you're fighting for the rights of Mr Coyne and he's not here defending himself.

MR LINDEBERG: Commissioner, with respect, it's - - -

COMMISSIONER: You seem to put more store in them than he does.

MR LINDEBERG: I lost my job over trying to preserve the documents. I mean, I can't talk about that here because - - -

COMMISSIONER: You just did.

MR LINDEBERG: I know, but you put the proposition, "Why isn't Mr Coyne here?"

COMMISSIONER: Yes, and you told me why you were here.

MR LINDEBERG: But Mr Coyne was here for a number of years with me on this particular issue, but the fact is that this matter has grown in terms of - - -

COMMISSIONER: Anyway, you say your interest in it is that you were the association representative acting on his behalf to preserve the same documents that at that time he was interested in preserving and both of you were defeated by the destruction.

MR LINDEBERG: Yes, but what is also relevant in terms – there were assurances being made by the department and it says "responses sent". The position is interim, thinking about it. Now, under the circumstances, I mean, are we not talking about dealing with reasonable people, dealing with the government, the crown, the model litigant? The crown is saying, "We're still seeking advice."

COMMISSIONER: "We'll get back to you."

MR LINDEBERG: Yes, "We'll get back to you," and in the meantime we now find out that behind the scenes all these other things are going on and we don't know about it.

COMMISSIONER: Again I'm still focused on the executive government.

MR LINDEBERG: I appreciate that, but, as I said before, one of the difficulties in this - albeit that we have had people beyond the executive here to answer questions on the thing, but your focus has been what the executive knew and it may lead a train, although I don't think so in terms of what I said earlier that the plain reading of that notification in there about no formal legal proceedings – any reasonable person should know that those documents ought not there be destroyed, at least held onto, is that there are things that had changed but, nevertheless, the fundamental – in regard to what the cabinet knew, but the fundamental point remained that cabinet acted on erroneous advice and under the Criminal Code ignorance of the law is no excuse for cabinet ministers, or at least that's what ordinary people like I think. I was just going to say one final thing.

COMMISSIONER: Yes, Okay.

MR LINDEBERG: I feel I have to make the point. I think it's important for this commission to get acknowledgment from Crown Law in a submission that its original position was erroneous at law. I don't think it's good enough for cabinet – for people advised by Crown Law – and I do know and I can only say as a matter of fact without wishing to necessarily impugn Crown Law doesn't change from when one government comes in. It acts in continuum but on the basis that it always acts lawfully.

COMMISSIONER: Except that Crown Law aren't represented here.

MR LINDEBERG: The advice that came forward from the State of Queensland in relation to the earlier submissions - - -

COMMISSIONER: The State of Queensland is represented but not - - -

MR LINDEBERG: Yes, I know, the crown solicitor.

COMMISSIONER: Yes, that's right, but they don't have a speaking part here.

MR LINDEBERG: But they're advising, instructing.

COMMISSIONER: That's right, but they don't have a speaking part.

MR LINDEBERG: But the speaking part the emanates here comes out of the instructions from Crown Law.

COMMISSIONER: That's right, about what are relevant matters to me. Instructions aren't the same as – Crown Law being right or wrong, how is that relevant to anything I have to determine?

MR LINDEBERG: Only to the extent, commissioner, that in terms of, as you may have seen in my submission, there is a chronology of events in terms of - albeit from me, whatever notice you take of that, given that it hasn't been in the witness box - - -

COMMISSIONER: Given that I'm just expressing an opinion to the executive government, if my opinion was that Crown Law was wrong and it's relevant to say so, I will and I don't need a concession or a denial to do that, do I? No, I don't. You put them on notice and I think procedural fairness has been extended if I do say something like that.

MR LINDEBERG: I hear what you say. I just make the point from my position in terms of the shredding of the Heiner documents. As an ordinary person, when these documents were shredded under these circumstances, I found it to be improper.

MR COPLEY: It's absolutely irrelevant. It's absolutely irrelevant what he found as an ordinary person. He's not here as an ordinary person. He's here because he's got authority to appear ostensibly because he reckons he lost his job somehow out of all of this and if he's looking for some sort of concession from Crown Law, this isn't a truth and reconciliation commission.

MR LINDEBERG: Commissioner, I haven't finished my point.

MR COPLEY: So can we just get on with it?

MR LINDEBERG: I haven't finished my point.

COMMISSIONER: Yes, Mr Lindeberg.

MR LINDEBERG: My only point to you is this: that I'm talking about the reasonable person who reads things.

COMMISSIONER: Yes, I understand. You're making a submission that you are the reasonable person and the way you took the way things happened was that you would submit to me that I should find it was inappropriate because a reasonable person would find that and you know that because you are one.

MR LINDEBERG: Bless you; thank you very much.

COMMISSIONER: No, that was saying that was your submission.

MR LINDEBERG: Look, my final point to the thing was that this matter has – you know, you asked at the very beginning of this commission, "What is the Heiner affair? What is the Heiner affair?" and I have mentioned it in my submission. If it's driven by anything, it's driven by the preservation of evidence and that turns on the interpretation argument in 129. For years, including with Mr Coyne, I was told that you could destroy everything providing judicial proceedings hadn't commenced.

Now, I'm saying to you that any person on the street knows that that's rubbish. To the extent that the cabinet ministers, the centre of power arguably in the state, can have solicitors do what they did, unions do what they did, have it in a submission saying, "Lawyers are seeking access to these," and no formal proceedings have yet commenced and they take that – and then in the face of that they go and destroy the documents to reduce the risk of legal action. I suggest to you that that's sufficient to find them in prima facie breach of 129 and/or 130 under the Criminal Code.

COMMISSIONER: You better tell me about 130 though.

MR LINDEBERG: To the extent that if they all read it and they understood what that meant, it's 18 people sitting around a tale agreeing to do what they did.

COMMISSIONER: But for a conspiracy it's a combination of two or more.

MR LINDEBERG: What about 18?

COMMISSIONER: Yes, but just being in the same room with someone doesn't make you in combination with them.

MR LINDEBERG: But it has been accepted here it was a consensus decision.

COMMISSIONER: No, the decision was – you have got to prove the belief – was a consensus belief.

MR LINDEBERG: The belief was that they were shredding the documents to reduce the risk of legal action.

COMMISSIONER: Yes, but why does that make a conspiracy? They would have all been doing it for that reason, you say, because they couldn't have reached any other interpretation on plain words.

MR LINDEBERG: That's right.

COMMISSIONER: They can all act independently of each other and - - -

MR LINDEBERG: Look, that's the extraordinary uniqueness of this situation of never before, I think, has a cabinet faced such a situation. Now, I'm just saying to you that to me, one would expect that each cabinet minister read the documents. A reasonable person would understand formal proceedings - ie, lodging of the brief is about to happen, "Oh, let's shred the documents to prevent them being used in evidence."

COMMISSIONER: Now, the only evidence I've got about the POA asking for the documents is the exhibit of Ms Warner's speaking notes, isn't it?

MR LINDEBERG: No. Well, Commissioner, it involves the submission, and, look, I'm sorry, I'm talking off the top of my head, but there is a submission dated - an exhibit dated 1 March which went in from the POA.

COMMISSIONER: To cabinet, I mean, the one to cabinet. Have I got any evidence that cabinet was told the POA was after it?

MR LINDEBERG: I understand what you say, where it talks about the Teachers Union. You see, why I'm hesitating, Commissioner, is I don't want to abuse the process, but I was pointing towards that particular exhibit, which is an exhibit where it talks about - - -

COMMISSIONER: 151(a) I thought was the one where - - -

MR LINDEBERG: Yes. No, I understand that, but I'm saying to you that the fact - well, while we're on that point, might I say that in regard to - and I've said this in my submission - that the notion that the POA ever agreed to any course of action which led to the destruction of the documents is simply not true.

MR COPLEY: Well, that's evidence, but it's not sworn to.

MR LINDEBERG: I appreciate - - -

COMMISSIONER: Was that put to any of the witnesses, though?

MR LINDEBERG: No.

COMMISSIONER: Because was anyone challenged on the record in the document that said that none of the unionists were dissatisfied or something like that?

MR LINDEBERG: I've got to be honest with you and say no, it wasn't.

COMMISSIONER: Yes, okay.

MR LINDEBERG: I mean, you can go on the evidence, but to suggest that given what the POA was up to, to suggest that - sorry, Commissioner, I appreciate it hasn't been tested in the witness box.

COMMISSIONER: Yes. No, I think we should leave that, because the only time I thought the POA was mentioned was in 151(a) - 110, is it?

MR COPLEY: 110, sir.

COMMISSIONER: Yes, 110.

MR COPLEY: Conversation between Matchett and O'Shea.

COMMISSIONER: Matchett and O'Shea, is it?

COMMISSIONER: Yes, dated 16 January - - -

MR LINDEBERG: There's also the - and again, I drop my head, I'm not sure whether the meeting that took place in January with the unions appeared with Ms Matchett off the record, but I'm not sure just off the top of my head whether that's a record of the meeting from State Service Union - - -

COMMISSIONER: Just on the documents, what was there to be known by the cabinet didn't include that the POA was after the same documents that Mr Berry was after, does it?

MR LINDEBERG: No.

COMMISSIONER: They didn't have any information about the POA.

MR LINDEBERG: The POA's position certainly was that. I don't think, Commissioner, that - I think I covered the ground.

COMMISSIONER: All right. Thanks, Mr Lindeberg.

MR LINDEBERG: Thank you, Mr Commissioner.

COMMISSIONER: Thank you for your help. Anything from you, Mr Copley?

MR COPLEY: No, Mr Commissioner.

COMMISSIONER: All right. Mr Selfridge?

MR SELFRIDGE: No, thank you, Mr Commissioner.

COMMISSIONER: In that case I'll close the public hearings in respect of paragraph 3(e) subject to any future development that requires otherwise and I will consider the matter. Thank you very much for your help everybody. I appreciate it. It's been a long, arduous journey and I've been helped by all of you. Thank you.

THE COMMISSION ADJOURNED AT 4.01 PM