Outside scope of application

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M E M O R A N D U M:

QCPCI

Date: 3.12.2012

The Crown Solicitor

Re: John Oxley Youth Centre

Exhibit number: 128

You have already provided advice to the Acting Director-General, Department of Family Services, and Aboriginal and Islander Affairs, concerning the above situation and an investigation into problems besetting the youth centre.

On 22 January 1990 I attended a meeting with Ms. Matchett and Ms. Crooke , the Personnel Manager and had further discussions concerning the issue. It appears that there is the prospect of a strike should this issue not be resolved speedily.

At the meeting I was informed that approximately fifty-five (55) people are employed at the youth centre. About thirty-five (35) of these have been interviewed by Mr. Heiner pursuant to the inquiry he was conducting. It appears he may have tape-recorded most of these interviews and there are other documents he has collected in relation to the investigation. He supplied all the material he has collected in a sealed envelope to Ms. Matchett.

I was informed that Mr. Heiner did not purport to exercise any powers whilst conducting the inquiry. He did not compel any persons to attend before him or answer questions. It appears that he approached the investigation on the basis that the first ground outlined on his terms of reference, that is "the validity of the complaints received in writing from present or former staff members and whether there is any basis in fact for those claims" subsumed all the other grounds listed on the terms of reference. It appears he viewed the inquiry as an inquiry into grievances by the staff. He intended to make findings of fact but no recommendations in his report.

That point of view does not seem to accord with the view held by the union who had supplied the various complaints more as symptoms of the problems of management than individual matters to be investigated and adjudicated upon. The current attitude of Ms. Matchett is that this issue is a management problem rather than a problem of grievances and therefore it would seem that the inquiry Mr. Heiner was conducting has not addressed the needs or desires of any of the parties who appear to be affected by it.

As you know, Mr. Heiner, by letter dated 19 January 1990

indicated that he is not prepared to continue any further with the inquiry until he has obtained written information and confirmation that his actions to date including his appointment and his authority to act are validated.

Ms. Matchet stated that at the moment her preferred option was that the inquiry conducted by Mr. Heiner not be continued and that another totally independent inquiry be instigated. She had yet to decide whether that would be by an officer from within the department or perhaps by some other officer seconded to the department or even by use of an outside consultant familiar with the area. Should there be a new inquiry, new terms of reference would be drawn up and the union may well be consulted in relation to that. Ms. Matchet desires speedy advice upon whether the inquiry can or should continue, a reply to Mr. Heiner concerning what further actions he is requested to take, advice on what to do with the material supplied from Mr. Heiner and a reply to the solicitor for Mr. Coyne and Mrs. Dutney.

Before dealing with these issues I believe that it is appropriate to look at the basis upon which Mr. Heiner was appointed. I have attempted to contact Mr. Pettigrew who conducted negotiations with Mr. Heiner, but so far have been unsuccessful and the department is unable to supply information in excess of that contained in documents already supplied.

The first issue that seems clear is that Mr. Heiner was not an officer under the Public Service Management and Employment Act 1988. Section 19 of that Act makes it clear that employment within the service shall be full-time or part-time with the approval of the Governor-in-Council, the position to which Mr. Heiner was appointed did not fit either of these descriptions. It appears that under Section 34 he was neither appointed to a position of a kind ordinarily held by a person who is not an officer under (a) or to a position of a kind ordinarily held by an officer under (b).

Paragraph (a) would seem to imply a degree of regularity of appointments to a position rather than the creation of a one-off situation such as was the case here. Even if that were so Section 34(3) indicates that a person appointed pursuant to Section 34 shall not thereby become an officer in the public service, therefore it would have been impossible to lawfully delegate any of the functions of the chief executive pursuant to Section 13 to Mr. Heiner because he was neither an officer in the department or performing the duties of an officer in the department at the time of his inquiry as Section 13 specifies.

Therefore, the only basis under this Act that I can find to authorise the appointment is the general power outlined in Section 12 of the Act which says as far as is relevant "the chief executive of a department is responsible for the efficient and proper management and functioning of the

department in accordance with this Act and every other Act that provides for matters relevant to any activity within the administration of the department and<u>is hereby authorised to do and suffer subject to this Act and such other Act</u> all such acts and things as he thinks necessary or expedient to the proper discharge of his responsibility".

Subsection 3 outlines some responsibilities and includes (j), training and development of staff; (k), discipline of staff; (l), appraisal of staff performance.

It is this general power to administer the department that is called into force to authorise the appointment of Mr. Heiner. The appointment would seem to fit within the description of an act the chief executive thinks necessary or expedient for the proper discharge of the responsibility for training and development or appraisal of staff performance. If that is not the case, then the only other option for lawful appointment is to rely on the general power of the Crown to engage services except where regulated by legislation.

There is one further option which arises for consideration which is under Section 9 of the Family and Youth Services Act 1987, which states "The permanent head may enter into contracts for services with such persons having qualifications and experience appropriate to the proper discharge of the contracts as he thinks fit with a view to those persons acting as his agents in giving effect to this Act or the Children's Services Act." It would seem to strain the last words of the Section to interpret the purposes of either of the Acts to be the management of the facilities rather than providing assistance to children and families. Therefore, I believe the better view would not support the appointment of Mr. Heiner pursuant to Section 9 of that Act and delegation of powers to him under Section 10 of that Act.

In summary, I believe the appointment of Mr. Heiner is a lawful exercise of the power of the chief executive under Section 12 of the Public Service Management and Employment Act in dealing with one of the responsibilities of the chief executive, however, it would appear that the services that Mr. Heiner is providing or may provide are no longer in keeping with the wishes of the chief executive and in fact there may well have been a misunderstanding underlying the basic inquiry from its very inception. Therefore, in my opinion, the most appropriate course is to indicate to Mr. Heiner that the chief executive does not wish him to carry his investigation on any longer and that his services are terminated. While it would be possible to redraft his terms of reference, I do not believe this would be appropriate for the delicate state of affairs as they now exist.

Naturally as some of the material that Mr. Heiner has

received is of defamatory nature he is concerned about his legal position and I think it is most reasonable that an approach be made to cabinet by the Acting Director-General that an indemnity for any legal costs etc. be extended to Mr. Heiner. I believe the success of any such legal action to be a very unlikely prospect, nevertheless that may be small comfort to Mr. Heiner. Mr. Heiner would have qualified privilege in relation to any action for defamation against him in this matter.

The material that Mr. Heiner has supplied to Ms. Matchett should, in my opinion, be sorted into those documents which were originally in the possession of the department and those which have been created as a process of this inquiry. If the inquiry is terminated the new 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 confidentially and to overcome any claim of bias if such documents somehow became available to any new investigation.

Mr. Heiner is no doubt concerned that he has put significant amount of work into a difficult investigation which has come to naught. I suggest that he be advised that he is not required to carry on the investigation but he be thanked for his services and informed that an approach will be made to cabinet to obtain an indemnity for him.

The solicitors for Mr. Coyne and Mrs. Dutney have written to the chief executive requesting an opportunity to examine and cross-examine evidence presented before the inquiry so far as it concerns allegations against their clients and to allow for either of them to have copies of all allegations and evidence taken to date including copies of tapes used in recording the evidence.

As these matters all relate to the inquiry which I suggest should be terminated, I do not believe there would be any impropriety in destroying the material gathered by that inquiry without affording these people an opportunity to view the material. Further, I believe the solicitors should be advised that the inquiry has been terminated and the material collected at the inquiry has been destroyed.

Another option would be for the solicitors to be advised that the inquiry has been terminated and the material will be destroyed within a limited time. I do not favour such a course because it can only generate further problems in an already confused situation.

As regards any new appointment, obviously this will have to be done with all due speed given the expectations that were raised and the discontent which can be expected to bubble over from the cessation of this inquiry. It may be better to discuss the practicalities of appointing a

replacement investigator once a particular person has been identified, be they within or outside the department. However, I believe that the terms of reference of this new enquiry should be drafted to concentrate on the general area of management rather than specific allegations of misconduct and ill-feeling in the John Oxley Youth Centre.

I have attached draft letters to the Acting Director-General, Mr. Heiner, and Messrs. Rose, Berry and Jensen, solicitors for Mr. Coyne and Mrs. Dutney, and I recommend that advice be supplied to the Acting Director-General in terms of that letter.

(B.J. Thomas)
Senior Legal Officer
Appeals and Advocacy Branch

23 January 1990

BK Crown Solicitor

Re our discussion concerning the Libraries & Archives act I have examined the legislation & am of the opinion that it contains no prohibition on destruction of any tapes, transcripts or documents created by Mr Heiner as part of his investigation. If he had progressed to submitting a report that would be a "public record" but I do not believe his working papers, no matter how comprehensive fall within the meaning of "public record" in s 5(2) of the act.

23/1/90

Ian Thomas

I agree generally with your views. Proceed as discussed.

CROWN SOLICITOR
23. 1. 1990

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