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QUEENSLAND CHILD PROTECTION COMMISSION OF INQUIRY

SUBMISSION ON BEHALF OF THE HONOURABLE MR DEAN MACMILLAN WELLS

INDEX

INTRODUCTION

1. On 8 May 2013, the Honourable Mr Dean MacMillan Wells ("Mr Wells") received from the Commissioner, Queensland Child Protection Commission of Inquiry ("the Commissioner") via email a letter that advised that:
   (a) "*... there is a risk of finding that the decision to enable destruction of the Heiner documents offended against ss.129, 132 and/or 140 of the Criminal Code and that such a finding might reflect unfavourably on your conduct*"; and
   (b) "*... there is a realistic possibility that I will come to the view that Cabinet's decision was inappropriate in the sense of being contrary to then existing standards reasonably expected of executive government in making public administration related standards*".

2. While Mr Wells was invited to make written submissions, he was also advised that he would not be given an oral hearing.

3. These are Mr Wells' written submissions on the issues referred to by the Commissioner in his letter received by Mr Wells on 8 May 2013.

QCPCI 3 (e)

Date: 18-06-2013

Exhibit number: 370

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SUMMARY OF SUBMISSIONS

4. Mr Wells submissions may be summaried thus:

   (a) The unambiguous and uncontradicted evidence is that Mr Wells at all times acted in good faith upon the independent advice of the Crown Solicitor;

   (b) That independent advice of the Crown Solicitor was that there was no legal impediment to the destruction of the documents in question;

   (c) At no time did Mr Wells act inappropriately in the sense of acting contrary to then existing standards reasonably expected of executive government.

BACKGROUND

5. Mr Wells appeared before the Commission on 23 April 2013[1] on summons and without being asked to do so, voluntarily provided written submissions.[2] He was examined in chief[3] and he was cross-examined at length.[4]

6. In his written submissions,[5] Mr Wells indicated that he was aware the Commissioner had heard suggestions that the destruction of the Heiner documents may have constituted an offence under the *Criminal Code*, and he gave evidence that the relevant elements of s. 129 of the *Criminal Code* were negatived by the facts of the case.

7. Mr Wells was not cross-examined on any of those matters and at no time was any suggestion put to him to the effect that his role in the actions of the Cabinet on the relevant occasion constituted a criminal offence.

8. Mr Wells acknowledges that the adverse suggestions made by the Commissioner in his letter received by Mr Wells on 8 May 2013 are very serious matters. Consequently, each of those allegations will be dealt with separately hereunder.

OFFENCES AGAINST THE CRIMINAL CODE

9. As outlined above, the Commissioner has advised Mr Wells that "*... there is a risk of a finding that the decision offended against ss. 129,132, and/or 140 of the Criminal Code*".

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[1] Transcript at pages 27-2 to 27-83.
[2] Exhibit 351.
[3] Transcript at pages 27-2 to 27-62.
[4] Transcript at pages 27-62 to 27-83.
[5] Exhibit 351 pages 6 to 8 [18]-[24].

10. However, Mr Wells has not been provided with any particulars as to how it is the Commissioner might believe that the said decision offended against the *Criminal Code*. Hence, Mr Wells is not exactly sure as to what he should address in an attempt to remove the possibility of the "*risk*" of such a negative finding becoming a reality. In these circumstances it is necessary for him to rely on intimations in the transcript to deduce the possible grounds on which the Commissioner might draw a conclusion that ss. 129, 132 and/or 140 of the *Criminal Code* have been breached. Consequently, it is necessary to address arguments which negative culpability in general terms, then attempt to also separately address arguments which negative specific allegations that might possibly be made against Mr Wells.

11. Mr Wells:
    (a) Did not see exhibits 151A and 180 prior to receiving them by email on 8 May 2013 (see sworn statement of Mr Wells attached);
    (b) States that he believes those documents were not distributed at Cabinet;
    (c) Further states that no other suggestion to the contrary has ever been put to him;
    (d) Consequently, they cannot be used by the Commissioner in support of any advice finding against Mr Wells.

12. In order to form a view that any of the sections of the *Criminal Code* had been breached the Commissioner would need to be satisfied that the three Cabinet Submissions[6] or other evidence put to witnesses established the existence of the mental elements of the offences. In this regard, intention and belief are relevant.

Intention generally

13. When Mr Wells gave evidence before the Commissioner on 23 April 2013, no one put to him any suggestion that the *Criminal Code* had been breached. Similarly, a possible reason or motive for any such possible behaviour was never suggested to him.

14. At the relevant time, Mr Wells was a member of a new Government which had only recently assumed office after 32 years in opposition. New Governments in such circumstances clearly have nothing to hide by virtue of the fact that they have not been in power for a number of years. There is no evidence to suggest that the Goss government of February 1990 had anything to hide. On the other hand, there is a great deal of evidence before the Commissioner that paints a picture of a completely different

[6] Exhibits 151, 168 and 181.

set of intentions such as intentions to govern according to law and intentions to deal with a routine but intractable administrative issue as best it could in the circumstances it had inherited from the previous Government. Consequently, it is submitted that in forming an opinion of "*whether any criminal conduct*" was involved it is necessary to reject the alternative picture of a Cabinet not acting with the intention of simply trying to govern according to law.

15. The Commissioner received the following sworn evidence from witnesses who were tested under cross examination:

- Cabinet acted on legal advice and at all times ministers believed that the options presented to them were lawful;[7]
- Every Cabinet in Australia makes its decisions on the basis that if there are legal issues they have been completely and competently scrutinised and that there is no legal impediment to acting on the options presented to them;[8]
- The relevant *Cabinet Submissions* had also been to the police. They were "*B*" submissions, not "*A*" secret submissions and Cabinet was entitled to assume that the appropriate officers had been tasked to make any enquiries thought relevant in order to brief the Minister for Police;[9]
- Cabinet is a lay forum, not a forum for the discussion of legal issues, and legal issues are not discussed in Cabinet;[10]
- Cabinets do not deviate from their legal advice. If it is proposed to take a course of action that has not been considered by the Crown Solicitor, the Attorney-General would suggest that Crown Law advice be obtained prior to such action being taken;[11]
- The documents were owned by the Crown;[12]
- The documents related to a juvenile detention centre and whether it would continue to run securely and effectively, and the resolution of the industrial situation was stated in the *Cabinet Submission* to be and was seen as "*urgent*";[13]
- The existence of the documents inflamed or had the potential to inflame the industrial situation;[14]

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[7] Transcript 27-82 lines 42-47.
[8] Exhibit 351 page 1.
[9] Transcript page 27-43 lines 1-33.
[10] Transcript page 27-21 lines 17-24.
[11] Transcript page27- 47 lines 1-13.
[12] Transcript passim.
[13] Transcript page 27-80 lines 32-47.
[14] Transcript page 27-41 lines 30-42.

- This was a Cabinet that was actively aware of industrial issues, the resolution of an industrial dispute being the objective of Cabinet;[15]
- The problem relating to the juvenile detention centre had been inherited from the previous government. The Heiner Inquiry had merely made the problem the previous government had been trying to solve much worse, and Cabinet needed a strategy to turn the clock back to before its predecessor's unsuccessful intervention;[16]
- A decision to retain the documents would have been a decision to make the government a part of the process by which damage to reputation of employees could have occurred;[17]
- Cabinet was not prepared to be part of a process which damaged the reputation of its own employees;[18]
- Indeed a decision to give the documents the additional gravitas that they would acquire by being placed on departmental files might be alleged to amount to fabricating evidence within the meaning of s. 126 of the *Criminal Code* (though the element of intent would not be present);[19]
- Cabinet did not know which of its employees were allegedly defamed and the decision was blind as to who were the propagators and who were the victims of whatever defamation the documents contained;[20]
- A few weeks before the time in question the Goss government had dissolved the Special Branch and destroyed the files it kept on the private lives of sometimes unsuspecting citizens. This was because the new Goss government was committed to the principle that governments should not keep dossiers on their own citizens;[21]
- The decision to destroy the documents in question was not about avoiding litigation but rather, it was about avoiding the outrageous course of keeping untested detractions about Cabinet's own employees on the files of government;[22]
- When Cabinet eventually learned in the second submission that a solicitor was asking for the documents, ministers made no assumption and were not told that it was for the purposes of legal proceedings for which the documents would have

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[15] Transcript page 27-41 lines 33-43.
[16] Transcript 18 February 24-63.
[17] Transcript page 27-26 lines 34-42.
[18] Transcript page 27-40 lines 3 to 20.
[19] Exhibit 351 page 4.
[20] Transcript page 27-55 paragraph 30.
[21] Transcript page 27-33 lines 30-36.
[22] Transcript page 27-25 lines 4-10.

been required, and Mr Wells has not to this day been presented with any reason to believe that it was;[23]

- It needed to be made clear that personnel decisions were not going to be made on the basis of the Heiner documents;[24]
- The purpose of collecting the documents was to make recommendations in respect of an industrial issue. Those recommendations were now not going to be made and the process needed to be started again unprejudiced by a previous incomplete and suspect process. The documents were not only "*junk*" (misreported as "*jumped*" in the transcript) that was surplus to departmental requirements, they were actually an impediment to the fair and effective resolution of an issue that affected the efficient operation of an important corrective institution.[25]

16. In these circumstances, to make a finding that Mr Wells was engaged in some sort of criminal conduct of which intention was an element would require evidence that the above picture of a Cabinet intending to resolve an industrial issue lawfully within the framework of its legal advice was inaccurate. There is no such evidence.

Intention specifically

17. The intention of Cabinet to destroy the documents became the default position of Cabinet at the first cabinet meeting that it considered the matter.[26]

18. The intention of Cabinet in deciding to shred the documents was to resolve an industrial dispute.[27]

19. The interest of a solicitor, relayed to Cabinet the second time the matter was considered by Cabinet, was brought to Cabinet's attention too late to be a factor in the formation of the intention behind the decision.

20. The advice in the second and third *Cabinet Submissions* that a solicitor was looking for the material was not taken to mean that the solicitor was in fact looking for the material to commence a legal action in which the documents might be required as evidence.[28] Ministers were not told who the solicitor represented or when that solicitor had first

[23] Exhibit 351 paragraph 22.
[24] Exhibit 351 paragraph 13.
[25] Transcript page 27-59 line 33 to page 27-60 line 3.
[26] Exhibit 351 paragraph 19.
[27] Transcript page 27-41 line 34.
[28] Exhibit 351 paragraph 22.

expressed an interest or what he was looking for them for. As far as Ministers were aware, the solicitor might have been looking for them in order to demand an apology, or even to demand that they be shredded.

21. Similarly the note in the *Cabinet Submission*[29] that "*destruction of the material gathered by Mr Heiner will reduce the risk of legal action*" does not mean that legal action for which the documents would be required was being contemplated. It could refer to many different kinds of legal action. Cabinet's objective was to resolve an industrial situation.[30] The advice was addressed to a Cabinet made up of many members had a trade union background[31] and the context of the subsequent discussion was that of a highly inflamed industrial situation.[32]

22. It does not follow from the fact that ministers had been told that a solicitor was looking for documents that ministers should have concluded that litigation arising therefrom was a possibility. The information before Cabinet was that no legal proceeding had commenced.[33]

23. In any case, the new Goss government had no vested interest of its own in keeping the documents out of any litigation.

24. If matters arising out of the Heiner Inquiry had been litigated at that stage, the previous government and not the Goss Government would have been seen to have been responsible for the problem.[34]

Belief generally

25. Acting at all times in accordance with the legal advice provided to it, Cabinet believed and was entitled to believe that it was acting within the law, and is entitled to a clear statement that they did not commit any criminal offence of which a culpable belief is an element.

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[29] Exhibit 151.
[30] Transcript page 27-80 lines 32-47.
[31] Transcript page 27-41 lines 33-43.
[32] Transcript page 27-80 lines 32-47.
[33] *Cabinet Submission* 12 February 1990 (exhibit 151), *Cabinet Submission* 19 February 1990 (exhibit 168) and *Cabinet Submission* 5 March 1990 (exhibit 181).
[34] Exhibit 351 paragraph 20.

26. Ministers believed implicitly that because the Crown Solicitor had advised them that it was lawful to destroy the documents, it was lawful for all purposes, judicial or otherwise, and that they were not required for any legal purpose judicial or otherwise.[35]

27. Indeed, there is no evidence before the Commissioner that ministers turned their minds to legal issues at all in cabinet (except for the Attorney-General's private speculation that offences might be alleged against the government if the opposite decision, to keep the documents, had been taken). The evidence before the Commissioner is that Cabinet simply relied on Crown Law advice.

28. In such circumstances, Ministers, including Mr Wells, were entitled to rely on:
    (a) The general terms of the Crown Solicitor's advice to the effect that the chosen course of action was lawful in all respects; and
    (b) The belief of Ministers, including Mr Wells, that what they were doing was lawful.

29. It is submitted that these factors the mental element in all the offences alleged.

Belief specifically: the Ensbey argument

30. It has been suggested that the advice of Crown Law on which Cabinet acted was incorrect to the extent that that advice to Cabinet was to the effect that it was lawful to destroy the documents so long as no proceeding that may have required the documents had actually been commenced while the decision of the Court of Appeal in *R v Ensbey*[36] ("the *Ensbey's Case*") interpreted s. 129 of the *Criminal Code* to mean that it was not necessary for the person in question to know that the relevant document would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence but rather, it was sufficient that the person believed that it might be required in evidence in a possible future proceeding.[37]

31. The Crown Solicitor was obviously unaware of this view of s. 129 because *Ensbey's Case* had not been decided at the time the Crown Solicitor provided the advice in question.

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[35] Exhibit 351 paragraph 23.
[36] [2005] 1 Qd R 159.
[37] Per Davies JA at 161 [15] and Jerrard JA at 165 [43]-[44] and 166 [47]-[48].

32. However, the argument apparently continues that ignorance of the law is no excuse[38] with the result that although Cabinet believed on legal advice that it was lawful to destroy the documents because no judicial proceeding had been commenced, that legal advice was incorrect and therefore, technically, they were in breach of the law.

33. It is submitted that the present matter before the Commissioner should be distinguished from *Ensbey's Case* because in the present matter the Cabinet was acting on legal advice and this negatives the mental element of the offence. Whether the legal advice was right or wrong is irrelevant, because the offence involves a subjective test. Belief is an element of the offence under s. 129, which is that the person "*knowing something is or may be needed in evidence in a judicial proceeding, damages it*". Cabinet believed that no judicial proceeding had been commenced and that the documents were not needed for any legal purpose whatsoever, judicial or otherwise, and they had this belief because that was the legal advice they had received.[39]

34. In any event, even if (which is vehemently denied) Ministers were acting with an intention to destroy evidence and in so doing were acting in ignorance of the true meaning of the relevant law (which is not conceded), s. 22(b) of the *Criminal Code* provides a defence in any case to the allegation of destroying evidence because, after stating that ignorance of the law is no excuse, it provides, "*But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.*" Acting on legal advice is evidence both of an honest claim of right and of an absence of intention to defraud.

35. It is also submitted that *Ensbey's Case* has no bearing on the allegation relating to s. 140 of the *Criminal Code* (attempting to pervert the course of justice) because s. 4 of the *Criminal Code* makes "*intending to commit an offence*" part of the definition of "*attempting*". A person cannot intend to commit an offence by doing something you believe is lawful.

36. A finding that *Ensbey's Case* applied in these circumstances would be a finding that a statutory provision[40] could lead to absurd consequences. If the Commissioner was to find that, notwithstanding that Cabinet acted on the advice of Crown Law, Ministers were in breach of a law in respect of which belief was an element, such a finding would

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[38] Section 22 of the *Criminal Code*.
[39] Transcript page 27-22 lines 1-10, Exhibit 351 page 7.
[40] Section 129.

stand as a precedent for the proposition that Ministers acting in good faith on legal advice could nevertheless be prosecuted if their legal advice was wrong. This would be a major blow to the system of Westminster Cabinet Government in Australia because it would mean that Cabinets would be unable to rely on their legal advice and *Cabinet Submissions* would require a new section detailing whether, if the legal advice is subsequently found to be, wrong, Ministers could be liable for an offence. This would mean that decisions that would otherwise be taken, including decisions required in the public interest, would no longer be taken, not for good policy reasons, but just to protect Ministers from allegations of committing an offence they never intended to commit. This cannot be what the legislature intended s. 129 of the *Criminal Code* to mean. The legal maxim *ut res magis valeat quam pereat* applies. Statutes should not be read so as to have absurd consequences.

37. It should also be appreciated that the Ensbey argument relies on a factual proposition that Cabinet's intention was to destroy evidence relevant to an anticipated legal action. However, there is no such evidence before the Commissioner. But even if there was such evidence, it is submitted that the Ensbey argument is incorrect in so far as it stands for the proposition that cabinet committed a technical breach of the law because its legal advice was incorrect.

Summary

38. It is submitted that the foregoing means that there is simply no evidence, or at least insufficient evidence, before the Commissioner to enable him to find that the decision to enable destruction of the Heiner documents offended against ss. 129 and/or 132 and/or 140 of the *Criminal Code*.

THE "*APPROPRIATENESS*" TERM OF REFERENCE

39. The Commission's letter of 8 May also invites Mr Wells to address the Commission as to the contextual meaning of "*appropriate*" in the terms of reference.

The meaning of "*appropriate*"

40. Mr Wells respectfully adopts the suggestion which Counsel Assisting offered to the Commission on 6 May 2013 to the effect that guidance could be found from the 2010 Commission of Inquiry investigating the conduct of former Canadian Prime Minister Mulroney. In that Inquiry. Oliphant J made findings of "*inappropriateness*" on the basis of *written* ethical guidelines that were in place and subscribed to by the

participants at the time. In finding that former Prime Minister Mulroney had acted inappropriately in respect of matters relating to alleged secret commissions paid to him in respect of the purchase of Airbuses by a Crown corporation Oliphant J said in his Executive Summary:[41]

> *"Simply put, Mr.Mulroney, in his business and financial dealings with Mr.Schreiber, failed to live up to the standard of conduct that he had himself adopted in the 1985 Ethics Code."*

41. It is submitted that should the Commissioner wished to follow the precedent of the Oliphant Inquiry, it would be necessary to base a finding of inappropriateness on something similar to a set of written guidelines that had been explicitly adopted by the Government of 1990, or by which the government of 1990 had bound itself, that precluded the then Government from making the decision they then made.

42. There were at the time no such Guidelines. The *Cabinet Handbook*[42] was published later. Indeed, Mr Wells suggested under cross-examination that its provisions as to what matters should come to Cabinet may have been drafted in the light of Cabinet's early experience of matters (including the Heiner documents) that could have been handled without the attention of cabinet.[43] In any case those guidelines would not necessarily have precluded Cabinet considering the matter because of the "*any other matter*" provision.

43. It is further submitted that if the Commissioner wish to follow the precedent of the Oliphant Inquiry, the test of appropriateness relates to the codes and procedures of the time, not those of the present. In this regard it is also submitted that the Commissioner should have regard to the evidence of Mr Wells, who, when asked whether "*looking in hindsight*" there were more appropriate courses of action, replied that the new government was in the process of implementing the recommendations of the Fitzgerald Inquiry but was still of necessity operating with the machinery of government of the pre Fitzgerald era.[44] The Commissioner can take from this that the terms of the *Fitzgerald Report* did not yet represent the procedural environment of the time but rather represented standards that the new Government saw itself as being in the process of implementing.

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[41] At page 51.
[42] A draft of which was shown to Mr Wells in cross-examination.
[43] Transcript pages 27-51 to 27-52.
[44] Transcript page 27-83 lines 1-26.

44. It is therefore submitted that any finding of "*inappropriateness*" should not be made from the stand point of procedures which the Goss Government implemented later in its term of office, but from the standpoint of machinery of government which they had inherited from their predecessor and which, after 32 years in opposition and seven working weeks in Government, had not yet reformed.

45. It is further respectfully submitted that there is no evidence before the Commissioner that satisfies the test of *written* guidelines *in place at the time* and to which those whose conduct is under examination were committed.

The law regarding reflections on reputation

46. In the event that the Commissioner finds some document which he considers meets the test applied in the Oliphant Inquiry, or for other reasons come to the conclusion that there are grounds on which he can plausibly report that Cabinet conducted itself "*inappropriately*", natural justice / procedural fairness requires that the grounds on which it is proposed to make such a report and the facts and circumstances on which such a report would rely should be disclosed to Mr Wells whose reputation could be injured by such a report.[45] Any such disclosure should be made to him in sufficient time for him to make a submission controverting the suggestion. While the opportunity to make submissions on the meaning of "*inappropriate*" is appreciated, Mr Wells is presently unable to controvert some proposition to the effect that he had conducted himself "*inappropriately*" at this time because he can merely guess at what proposition he needs to controvert. This does not constitute a "*full and fair opportunity to show why a finding should not be made*".

47. The damage to reputation that would flow from a finding of inappropriateness would be considerable. Such a finding would damage the reputations of 18 former Cabinet Ministers and there can be no doubt that such a finding would be widely published in the mainstream media. This would mean that in the case of Mr Wells, many people would no longer remember him as the Attorney-General who introduced, among others, the *Freedom of Information Act*, the *Judicial Review Act*, the *Peaceful Assemblies Act*, the *Penalties and Sentences Act* and the *Anti-Discrimination Act* but rather, he would be remembered by many only in terms of a negative finding by the Commissioner.

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[45] In *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11 Mason CJ, Dawson Toohey and Gaudron JJ said *"And, as recently as 1990, Brennan J said in Annetts that: "Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made."*

Consequently, if any specific finding of "*inappropriateness*" is being contemplated, former Ministers, including Mr Wells, should have the opportunity to respond to it in its specific formulation.

48. In the absence of the production of a relevant code or procedure, the facts and circumstances do not meet the test deployed by the Oliphant Inquiry, and ministers are entitled to a statement by the Commission that there is no basis in law for a finding that the cabinet decision was inappropriate.

The manner and form of a finding on appropriateness

49. The Commissioner should not go beyond the Oliphant Test and he should merely report that there is no basis in law for a finding of inappropriateness.

50. Mr Wells does not necessarily seek a finding that the decision was the preferable decision in all the circumstances. Such a finding is not even the role of the Court. The doctrine of the separation of powers lies behind the unwillingness of Courts to stand in the shoes of executive decision makers and make a decision on its merits. Such decisions are seen by courts as matters for the executive arm of government, the stuff of political debate: the kind of issue that voters, (who elect politicians but not judges), might want to have a say in. In plain terms the Australian judiciary is meticulous to avoid getting mired in politics. Thus Australian courts are assiduous to preserve the separation of powers between the judiciary and the executive. It is not for the judge to stand in the shoes of the executive decision maker. In *Murrumbidgee Groundwater Preservation Society v Minister for Natural Resources*[46] Chief Justice Spigelman said[47] *"the legality/merits dichotomy is at the heart of Australian administrative law, and the boundary between the two is policed more rigorously in this country"*

51. As to the specific role of Mr Wells as Attorney-General, during his cross-examination Mr Wells had it put to him repeatedly that as Attorney-General he could have given legal advice to Cabinet which might have qualified or enhanced the advice of the Crown Solicitor,[48] or even that he could have gone to cabinet with a second opinion.[49] However, there is also evidence before the Inquiry that the convention throughout Australia is that the Attorney-General does not go into Cabinet as a legal advisor.[50] A

[46] (2005) NSWCA 10.
[47] At 127.
[48] Transcript passim.
[49] Transcript page 27-11 to 27-12.
[50] Exhibit 351 page 1.

finding by the Commissioner that this convention should have been departed from would have alarming consequences. Frequently, in Queensland and interstate, non-lawyers become Attorney-General. The most recent instance in Queensland was between 1996 and1998 (Mr Denver Beanland). The list of non-lawyer Queensland Attorney-General who held office before that is a very long one. The prospect of non-lawyers sitting in Cabinet and offering second opinions, possibly off the cuff in the rough and tumble of cabinet debate, to trump the considered opinion of the Crown Solicitor, is one the Commissioner should not entertain. Mr Wells has given evidence that by convention Australian Cabinets are merely administrative and policy and forums and they are not forums in which legal speculation and legal debate occur and that a submission does not even get into the cabinet bag unless cabinet is assured that there are no outstanding legal issues.[51] He gave further evidence that as a consequence of this convention that in over a decade as a minister he was not aware of a single case where cabinet went against Crown Law advice.[52] This is a convention which is manifestly a useful part of our constitutional environment and should not be disturbed by any finding of the Commission.

52. In this context it is worth remembering the following comments of Bowen CJ (and former Commonwealth Attorney-General):[53]

> *"It is to Cabinet that the highest decisions of policy affecting Australia are brought. Often the questions arising involve intense conflict of interests or of opinion in the community. In Cabinet these conflicts have to be resolved. Decisions have to be taken in the public interest, notwithstanding that the lives, interests and rights of some individual citizens may be adversely affected by the decision.*
>
> *This is not to say that Cabinet should decide matters without considering all relevant material. But there are recognised channels for communicating arguments or submissions. Each Minister has the support and advice of a department of State. Representations may be made to the relevant department or in appropriate cases to the Minister. Every citizen has access to a local member of Parliament or a senator in the particular State, who can assist in the advancement of the individual citizen's point of view. The prospect of Cabinet itself, even by delegation, having to accord a hearing to individuals who may be adversely affected by its decisions, is a daunting one. It could bring the proceedings of Cabinet to a grinding halt.*
>
> *After a decision of Cabinet is made it may require for its implementation an Act of the Parliament or a decision of a particular Minister or of the Governor-General in Council. There is generally further scope for submissions or representations at some stage even after a Cabinet decisions, and always scope for political action.*

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[51] Transcript page 27-21 lines 17-24, Exhibit 351 page 1.
[52] Exhibit 351 page 1.
[53] *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218 at 225 LL 22-48.

In the present case it would, in my view, be inappropriate for this court to intervene to set aside a Cabinet decision involving such complex policy considerations as does the decision of 16 September 1986, even if the private interest of the respondents was thought to have been inadequately considered. The matter appears to my mind to lie in the political arena."

CONCLUSION

53. Mr Wells agrees with the following comments of the Commissioner:

(a) "*... there is no evidence that (Cabinet) were told anything outside the documents*";[54] and

(b) Cabinet "*... can't know any more than what they were told*".[55]

54. Cabinet's objectives:

(a) Were described thus:[56]

"Objective of Submission

Extension of the abovementioned policy to Mr Heiner will provide him with indemnity from the costs of future legal action which could result from his part in the John Oxley Youth Centre investigation.

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."

(b) There is no evidence that Cabinet ever departed from that objective.

55. The learned Counsel Assisting was correct when he stated:[57]

"MR COPLEY: ... 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.

This 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 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

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[54] Transcript page 27-27 lines 40-41.
[55] Transcript page 28-27 lines 43-44.
[56] Exhibit 151 at page 2.1.
[57] Transcript page 28-10 line 22 to page 28-11 line 14.

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."

56. It is submitted that no adverse findings can be made against Mr Wells because:

(a) As submitted by Counsel Assisting, at the relevant time, Cabinet was acting on Crown legal advice as interpreted by "... *people who are attempting to deal with the fallout from an inquiry that those people did not constitute*";[58]

(b) The relevant decision was not taken outside the realm of appropriate decisions in circumstances where Cabinet was working on the assumption that:

(i) The speedy resolution of the matter "... *will benefit all concerned and avert possible industrial unrest*";[59]

(ii) Parties consulted included the Crown Solicitor, the Queensland State Service Union and the Queensland Professional Officers Association;[60]

(iii) No specific objections had been raised to the proposed course of action;[61]

(iv) It was "... *expected that the course of action will be acceptable to the majority of the parties involved*".[62]

Yours faithfully

P.P Wall

DAN O'GORMAN
Chambers
24.05.13

[58] Transcript page 28-22 lines 1-5.
[59] Exhibit 151at page 2.3.
[60] Exhibit 151 at page 2.5.
[61] Exhibit 151at page 2.6.
[62] Exhibit 151at page 2.9.

Further submission to the Inquiry

On May 8 2013 I received an email from the Inquiry suggesting that I May wish to make written submissions as to why the Commission should not make a finding that cabinet breached the Criminal Code on 12 or 19 February, or 5 March 1990. Among the attachments were two documents being exhibits 151A and 180. I do not believe that I have ever seen those documents before, and further I am confident that I have not. Although it was 23 years ago, I retain a strong visual and auditory image of Anne Warner making her presentation in cabinet on February 12 (I marked it well because it was the first time a Minister had come to cabinet with an intractable problem) and I am confident that the documents were not distributed at cabinet and that the decision of cabinet was made without ministers having any other documents before them other than the cabinet submission. For completeness it was the usual practice, rarely departed from, for ministers to have before them only one document per agenda item, that being the submission. The rationale was that the submissions were supposed to contain everything ministers needed to know in order to decide the issue. The only documents I received in the email attachments and which I recognised as having seen before were the three cabinet submissions

Dean Wells
16 May 2013

S Powell
SUSAN P POWELL
16/05/2013