Queensland Child Protection Commission of Inquiry

3(e) Report

June 2013

Published by the

Queensland Child Protection Commission of Inquiry
www.childprotectioninquiry.qld.gov.au

This publication is available for download from the Commission's website

Disclaimer

This paper is not intended to provide legal advice, and has been prepared by the Commission only to respond to the terms of reference issued to it by the Premier of Queensland. While all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

Table of contents

Report on Term of Reference 3(e) 1
- The remit 1
- Authority to appear 4
- Inquiry fairness 4

Final 3(e) findings and recommendations 7

Part A 9
- The John Oxley Youth Centre 9
- Positions at the John Oxley Youth Centre 10
- Alleged sexual assault incident 11
- Management issues 14
- The Heiner inquiry 17
- Change of government 31
- The review 64
  - Summary of the factual context 64
  - The Lindeberg claims 65
  - Child sexual abuse in youth detention centres 65
  - The degrees and quantum of proof 67
  - Circumstantial evidence 68
  - Criminal responsibility 68
  - Cabinet liability 69
  - The position of the public servants 70
  - Potential criminal conduct 70
  - Property damage 70
  - Interfering with the course of justice 71
  - Destroying evidence 72
  - Documentary evidence 73
  - Wilfulness 74
  - Foreseeable and foreseen litigation 74
  - Actual knowledge and belief 75
  - Intention 79
  - The Minister for Families 80
  - Are the circumstances consistent with a section 129 offence having been committed? 81
  - The reasonableness issue 85
  - Recommendation 86
  - Discretionary factors 87
  - Adequacy and appropriateness 87

Part B 91
- Matters placed before the Commission 91
  - The cases of Ms Neal and Ms Harding 91
  - Submissions made by Mr Harris at the close of evidence 94

Submissions of Mr Lindeberg 94
The truth of the allegations 95
Ms Harding 96
Details of the excursion 97
Centre response to the incident 99
Ms Harding's family is contacted 104
Police are contacted 105
Management response to the incident 106
Medical examination of Ms Harding 106
Police attendance at the centre 109
The involvement of the Director-General and the Minister 114
Criticism of the police investigation 115
Assessment of the way the matter was handled by the centre and the department 126
Assertion of a cover up 126
Involvement of police at the earliest opportunity 127
No disciplinary measures taken against the excursion staff 128
The submissions of Mr Harris revisited 129
All relevant evidence available was called in relation to Ms Harding 129
Ms Neal 130
Details of the excursion 130
The allegations 130
The response by the centre manager 131
Police involvement 133
Referral to the Community of Inala Legal Service 134
Contact with Ms Neal's mother 135
Cessation of Mr McIntyre's involvement 135
Written reports 136
The handling of the allegation beyond the centre 136
Assessment of the response to the allegation 137
Points raised by Ms Neal via Mr Harris relevant to paragraph 3(e) 138
All relevant evidence available was called in relation to Ms Neal 139

Report on Term of Reference 3(e)

The remit

From 1 July 2012 I was appointed to make full and careful inquiry in an open and independent manner into Queensland's child protection system with respect to five matters set out in the *Commissions of Inquiry Order (No.1) 2012*.[1]

Paragraph 3(e) of the Order in Council originally stated:

> reviewing the adequacy and appropriateness of any response of, and action taken by, government to allegations, including allegations of criminal conduct associated with government responses, into historic child sexual abuse in youth detention centres.

However, as the evidence unfolded it became increasingly apparent that there was real doubt about whether any relevant action of, or response by the executive government to, 'historic child sexual abuse in youth detention centres' warranted investigation. Accordingly, after receiving submissions from the parties to this effect, I recommended to the Honourable the Attorney-General that consideration needed to be given to the possibility of an amendment to the Order in Council to achieve what I understood was the purpose of paragraph 3(e), namely, a review of relevant executive government responses and actions and whether they were connected to historic child sexual abuse or not.

On 4 April 2013 paragraph 3(e) of the Order in Council was amended by the *Commissions of Inquiry Amendment Order (No.2) 2013*[2] to require me to make a full and careful inquiry with respect to:

> reviewing the adequacy or appropriateness of (including whether any criminal conduct was associated with) any response of, or action taken by, the executive government between 1 January 1988 and 31 December 1990 in relation to:
>
> (a) allegations of child sexual abuse; and/or
>
> (b) industrial disputes;
>
> in youth detention centres, or like facilities.

I was assisted by Michael Copley SC and Michael Woodford of Counsel as well as a small team of seconded Queensland Police Officers led by Inspector Peter Brewer. My Associate Mr Michael Blumke was responsible for document management. Access to 3(e) information was strictly limited within the Commission to those having direct involvement to ensure security and confidentiality.

I proceeded on the basis that the ambit of the task was controlled by the requirement to 'review' and interpreted my role as being to conduct a legally non-determinative inquiry[3] which was not intended or expected to conclusively determine whether any individual had committed, or should be prosecuted for, any offence. Consequently, evidence was not gathered for the purposes of, or with a view to, criminal prosecution.

Inquiring into, reviewing, reporting and making recommendations about the revised subject matter of 3(e) involved re-examining and re-evaluating the available evidence to

[1] Exhibit 1.

[2] Exhibit 349.

[3] *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 68.

see whether any child sexual abuse or industrial dispute related response or action, including making a decision, taken by the executive government between 1 January 1988 and 31 December 1990 was inadequate, inappropriate or associated with any criminal conduct.

The only 'response or action' of executive government meeting the review criteria is the Goss Cabinet Decision No. 162 dated 5 March 1990[4] that the so-called 'Heiner documents' be handed to the State Archivist for destruction.

The Heiner documents consisted of tape recordings, transcripts, and possibly a computer disc, of information given to retired magistrate Mr Noel Heiner when he was conducting a departmental inquiry into management and other issues at the John Oxley Youth Centre in 1989.

The shredding of those files generated one of Queensland's most enduring public controversies and conspiracy theories. The inclusion of 3(e) in the Inquiry's terms of reference was no doubt intended to authoritatively resolve, once and for all, distracting and divisive debate about the adequacy, propriety and lawfulness of Cabinet Decision No. 162 of 1990.

As already pointed out, the Inquiry is not intended as a substitute for the criminal justice or trial processes and it should not be seen as usurping or trespassing on the province of the Director of Public Prosecutions, the jury or the authority of the courts.

In *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[5] at 68 Stephen J said:

> The appointment of a commissioner to inquire into and report upon the commission of a crime creates no prerogative criminal court; his report can neither commit anyone nor involve those consequences which a curial finding of guilt entails. The only direct consequence of his reported conclusion that a particular person has committed a crime is that the mind of the executive is informed of his conclusion. The legal consequences are no different from those which would follow were some private person to choose to inquire of his own motion into the circumstances of a crime and then to inform the executive of his conclusions. It is only the weight which the executive is likely to attach to the two conclusions that will differ. The Commissioner's report will carry immensely more weight because it comes from one who has been selected by the executive and upon whom statue law has conferred ancillary compulsive powers and immunities to aid him in his inquiry.

Likewise, Cory J noted in *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System)*[6] at 460:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. … There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same matter.

The legal burden of displacing the presumption of innocence can only be discharged by evidence supporting guilt that is cogent enough to convince a trial court that each element of the offence has been proved to the demanding criminal standard of 'beyond

[4] Exhibit 181.
[5] (1982) 152 CLR 25.
[6] [1997] 3 SCR 440.

reasonable doubt'. Deciding whether that high threshold has been reached or not is a unique function of the criminal jury, or in some cases these days a judge alone.

My role as I perceive it to be reflects and respects that legal reality. All I can properly do is provide an informed and considered legal opinion which does not have any direct legal significance or practical consequence for anyone except, of course, potential damage to reputation which is a protectable interest under the law.

Although there is no express mention of reaching conclusions or making 'findings' in the terms of reference, that function is necessarily implied by context.

While 'adequacy and appropriateness' can be finally resolved as a historical but contestable 'fact' (or opinion) the more complex issue of whether conduct was criminal or not can only legitimately and definitively be determined at a trial conducted in the adversarial tradition by a court of competent jurisdiction according to law.

The only question for me to express any public opinion about under 3(e), therefore, is whether the evidence of criminal conduct is legally sufficient: that is, rationally and reasonably capable of supporting a finding of criminal guilt via inference when direct evidence is lacking. On that basis, there is no 'allegation' to be determined consistently with Dixon J's 'reasonable satisfaction' test in *Briginshaw v Briginshaw* (1938)[7] at 361-362 but it is a useful yardstick. Any forensic conclusions on which my legal opinion depends and any 'findings' I make in the process will therefore be reached according to the Briginshaw considerations.

It goes without saying that my opinion on a point must be rational, honestly formed and reasonably open based on evidence with some probative value and logical force.[8]

Official inquiries into instructions given for the destruction of departmental records are uncommon but not unprecedented. In 1921 Viscount Cave chaired a tribunal investigating an allegation 'of urgent public importance', namely that a Ministry of Munitions official had instructed a public servant to destroy or conceal 'vital' financial records to impede an official audit of accounts and the disputed payment of outstanding money claims by government contractors after the end of the first world war. That particular instruction was found to be nothing more than a 'hasty and foolish remark' made by a senior official with no corrupt or improper motive and promptly withdrawn before it was acted on.[9]

Two distinct bodies of evidence were taken in relation to paragraph 3(e). The first dealt with Mr Heiner's work and the events concerning the destruction of documents. I will deal with that category of evidence, including Cabinet Decision No. 162 of 1990, in Part A of this report.

The stories of two women were also placed before me in the context of executive government action or response to historical child sexual abuse in youth detention centres. I will deal with that evidence in Part B.

---

[7] (1990) 60 CLR 336.

[8] *Mahon v Air New Zealand* [1984] 1 AC 808, 820-8 21; cf *Australian Broadcasting Tribunal v Bond* 170 CLR 321, 356 (Mason CJ).

[9] Inquiry into the destruction of documents by Ministry of Munitions Officials (Cmd 1340, 1921).

Authority to appear

The following people were granted authority to appear before the inquiry, which gave them the right to cross-examine those who gave evidence.

1. Hanger QC and Mr Selfridge of Counsel to appear for the Crown in the right of Queensland[10]
2. Mr Bosscher to appear for Mr Lindeberg[11]
3. Mr Harris to appear for Ms McIntosh and Ms Farquar.[12]

Each of the parties was given an opportunity to give a final written submission and a final oral submission to the Inquiry.

Inquiry fairness

Fairness is an implied condition of a valid exercise of statutory power unless excluded by clear words.[13]

A duty to act fairly, and to accord procedural fairness in the making of administrative or executive decisions, is imposed when the outcome is likely to adversely affect 'rights, interests and legitimate expectations' of an individual 'in a direct and immediate way'.[14]

The practical content of the relevant concept of procedural fairness depends on the nature of the question to be determined and likely degree of negative impact on a legitimate interest, including reputation, especially if the decision, even a provisional one, is made in full public glare.[15]

Personal reputation is a fragile private interest which should not be damaged by condemnation or criticism in an official report of a Commission of Inquiry unless the person in jeopardy has had a full and fair opportunity to show why an unfavourable 'finding' or comment should not be made.

However, as Lord Denning MR pointed out in *re: Pergamon Press Ltd*[16], once the requirements of fairness have been met the public interest demands that a report of an investigative body is made with 'courage and frankness … keeping nothing back'[17].

Public consideration of past conduct, especially of those in positions of power, is, therefore, a heavy responsibility.

Accordingly, on 8 May 2013, I wrote to the surviving members of the 1990 'executive government' in the following terms:

> … having regard to the information Cabinet had on 5 March 1990, including exhibits 151, 168, 181 and some or all of 151A and 180, there is a risk of a finding that the decision to enable destruction of the Heiner documents offended against ss129, 132 and/or 140 of the *Criminal Code* and that such finding might reflect unfavourably on your own conduct.

[10] Exhibit 4.
[11] Exhibit 5.
[12] Exhibit 2; Exhibit 3.
[13] *Applicant VEAL of 2002 v The Minister for Immigration* (2005) 225 CLR 88, [10].
[14] *Kioa v West* (1985) 159 CLR 550, 584 (Mason CJ), 632 (Deane J).
[15] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
[16] [1971] 1 Ch 338.
[17] Re Pergamon Press Ltd [1971] 1 Ch 338, 400.

> … in addition, or alternatively, 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 the then existing standards reasonably expected of executive government in making public administration related decisions.
>
> You may wish to address me about the contextual meaning of 'appropriate' in 3(e), the correct standard to be applied in the circumstances and whether the consensus decision by Cabinet on 5 March 1990 to hand over the Heiner documents to the State Archivist for destruction met that standard.

Submissions were received from lawyers acting on behalf of the Honourable Wayne Goss, the Honourable Paul Braddy, the Honourable Keith De Lacy and the Honourable David Hamill (Burns SC and Ms Rosengren),[18] the Honourable Terrance Mackenroth (Sciaccas),[19] the Honourable Anne Warner (Byrne QC)[20] and the Honourable Dean Wells (O'Gorman SC).[21]

Ms Warner, Minister for Family Services at all relevant times, Mr Wells, the Attorney-General at all relevant times, and former Minister for Environment and Heritage Mr Pat Comben also gave evidence in public hearings.[22]

[18] Exhibit 369.
[19] Exhibit 371.
[20] Exhibit 372.
[21] Exhibit 370.
[22] Section 14A(1) of the *Commissions of Inquiry Act 1950* provides that no statement or disclosure made by any witness in answer to any question shall be admissible in evidence against that witness in any civil or criminal proceeding.

Final 3(e) findings and recommendations

The following findings and recommendations have been reached by considering all relevant evidence presented to me during the Inquiry process which is identified in Part A.

Issue 1:

Whether there is any evidence suggesting that Cabinet Decision 162 of 1990 was a response of, or action taken by, the executive government in relation to child sexual abuse allegations in a youth detention centre or like facility.

Finding

There is no factual basis logically supporting a reasonable suspicion or rational belief that it was.

Speculation or suggestions to the contrary are scandalous, disingenuous and groundless.

Recommendation

It is recommended that the findings and reasons in this report be published.

Issue 2:

Whether any criminal conduct was associated with any response of or action taken by the executive government between 1 January 1988 and 31 December 1990 in relation to industrial disputes in youth detention centres or like facilities.

Finding

The relevant executive government action or response under this heading is Cabinet Decision No. 162 of 1990.

The potential criminal conduct associated with that executive government response or action is the shredding of the Heiner documents on 23 March 1990.

The available evidence is legally sufficient, as it stands, for a jury to find that in resolving to hand the Heiner documents over to the State Archivist for destruction the Premier and each participating Cabinet Minister meant to ensure that they could not be used in evidence if required in an anticipated judicial proceeding.

Therefore, strictly as a matter of law, each of them is at risk of being convicted of an offence against section 129 of the Criminal Code for their role in making Cabinet Decision No. 162 of 1990.

However, the same body of evidence is also capable of supporting competing inferences that are probably equally consistent with innocence.

Consequently, a guilty jury verdict would be liable to be quashed on appeal for unreasonableness on the basis of the argument that the benefit of a reasonable doubt fairly open on the whole of the evidence should have been given to the Premier and Cabinet.

In any event, the balance of policy and public interest considerations, including the lapse of time, does not favour a criminal justice response.

Recommendation

It is recommended that Issue 2 be referred to the Director of Public Prosecutions to consider whether a prosecution is warranted as a matter of law and in the overall public interest.

Issue 3:

Whether the executive government failed to act 'adequately or appropriately' in making Cabinet Decision No. 162 on 5 March 1990.

Finding

Even if it is properly characterised as the honest but ill-advised act of a newly-elected government Cabinet Decision No. 162 of 1990 caused the destruction of public records which from a governance and public administration perspective fell short of the relevant standard of appropriateness; that is, 'fit and proper'. This is because apart from being *prima facie* unlawful it had the tendency and, whether intended or not, the practical effect of:

- prejudicing or frustrating right to information rights and potential litigation interests, and
- bringing executive government in Queensland into disrepute sparking an intractable public controversy for over 23 years.

Recommendation

It is recommended that the findings and reasons in this report be published.

Part A

The John Oxley Youth Centre

Section 30 of the *Children's Services Act 1965* provided that the Governor in Council might, by Order in Council, establish institutions to provide for the care, protection, education, treatment, training, control and welfare of children in care. On 18 December 1986 the Governor in Council established an institution at Wacol that was to be known as the 'John Oxley Youth Centre'.[23] The centre opened on 17 February 1987.[24]

At this time, the Children's Services Act defined a child to mean a person under or apparently under the age of 17 years. However, a child also included persons aged 17 or older who might have been lawfully dealt with, or had been dealt with by a court, on the basis that the person was a child. Under the Children's Services Act an institution such as the John Oxley Youth Centre was capable of accommodating a person 17 years or older because a child in care was defined to include a person, whether a child or not, who was in the care and protection, or in the care and control, of the director of the Department of Family Services (the director).

Under the Act, a child was deemed to be in need of care and protection if, among other things, that child did not have a parent or guardian who exercised proper care over the child, he or she was neglected, exposed to physical or moral danger, fell in with bad associates, or was likely to fall into a life of vice or crime. A child could be placed in the care and protection of the director upon the application of a parent or guardian and upon the director's satisfaction that the child was in need of care and protection. A child could also be placed in the care and protection of the director upon application made by a departmental officer or a police officer to the Childrens Court and if that court was satisfied that the child was in need of care and protection. The director was empowered to release any child in care from the operation of an order made by the Childrens Court.

A child was deemed to be in need of care and control if he or she was likely to fall into a life of vice or crime, could become addicted to drugs, was exposed to moral danger or appeared to be uncontrollable. A departmental officer, a police officer or a parent or guardian could apply to the Childrens Court for an order that a child be committed to the care and control of the director. The court could, if satisfied that the child was in need of care and control, order that the child be committed to the care and control of the director. Additionally, a court exercising criminal jurisdiction could, upon a conviction of a child for any offence, order that the child be committed to the care and control of the director for up to two years. A child could be discharged from care and control by the Minister for Family Services in any case other than if that child was committed to care and control upon conviction. In cases of that type only the Governor in Council could order that the child be discharged.

This brief description of the legislative arrangements in place in the late 1980s assists in understanding the composition of the group of children housed at the John Oxley Youth Centre, hereafter referred to as 'the centre'. By October 1989 it was established that the centre catered for boys aged 10 to 15 years and girls aged 10 to 17 years who had been committed to the care and control of the director upon conviction for offences, girls on remand for offences, girls subject to care and control applications, boys committed to orders for care and control, and children who, from time to time, could not be

[23] Exhibit 57.
[24] Exhibit 77.

accommodated at the Westbrook Youth Centre or at the Sir Leslie Wilson Youth Centre.[25] A report prepared in February 1989 for the Department of Family Services[26] described the centre as follows:

> John Oxley Youth Centre has a small population of younger boys and girls, many of whom are in residence for several months. It attempts to intervene comprehensively with individual youth to overcome delinquent behaviour at an early stage. It has normalisation as a goal, where conditions and expectations are made as close as possible to those which would apply in a normal environment for youth.

The report contrasted the way the centre operated in comparison with the Westbrook Youth Centre and the Sir Leslie Wilson Youth Centre:

> Westbrook Youth Centre has a large population of older male youths, some of whom spend a long period at the centre. It emphasises employment or working skills in groups so that youth are better able to cope with life in employment outside the centre. The level of intervention is not as comprehensive as at John Oxley.
>
> Cleveland Youth Centre has a small population of younger boys and girls, most of whom are resident for short periods. It attempts to provide youth with learning experiences which will help them to re-integrate in the community. Intervention is not as comprehensive as at John Oxley, and the capacity to work with larger groups is much less than at Westbrook.
>
> Attempts to make efficiency comparisons between the centres is therefore meaningless. John Oxley must be the most expensive centre because it attempts to do more with each youth. Conversely, Westbrook must be the cheapest because so much of the activity can be carried out with groups of youth (sic).

Positions at the John Oxley Youth Centre

Mr Terry McDermott was the first manager of the centre. When this position became vacant Mr Peter Coyne applied and was appointed on 24 March 1988.[27]

Upon completing grade 12 Mr Coyne had attended the University of Queensland where he obtained a degree in Social Work. Thereafter he obtained employment with the Department of Family Services. For a period of five years he worked as a child care officer at the Ipswich office of the Department of Family Services. In that role he investigated cases of suspected child abuse and/or neglect. After a brief period as an acting supervisor of the office he applied for and was appointed, in late 1986 or early 1987, as the supervisor of the Inala office of the Department of Family Services. On his own admission Mr Coyne had a limited understanding of juvenile justice compared to child protection at the time of his appointment as the manager of the centre. He asserted, and I accept, that he was appointed to the position of manager after submitting to a merit selection process.

Mr Coyne's recollection was that at the time of his appointment most of the children accommodated at the centre were there pursuant to care and control orders made upon convictions for offences. Mr Coyne was a member of the Professional Officers Association, which was a body that provided industrial assistance to those members of the public service who had technical or professional qualifications. The Queensland State Service Union catered for other public servants.

[25] Exhibit 77.
[26] Exhibit 59.
[27] Exhibit 58.

Evidence presented to me showed that in October 1989 there were 55 staff employed at the establishment;[28] this included youth workers, senior youth workers, principal youth workers, teachers, a psychologist, a nurse, domestic workers and administrative officers. Mr Coyne was assisted by a deputy manager who at the time was Ms Jenny Foote. In late 1988 Ms Anne Dutney became the deputy manager and remained in that role until some time after Mr Coyne left the centre. Among other duties, youth workers of all ranks were required to maintain security at the centre; that included rostered shift work to cover 24 hours per day, 7 days per week. Many of the youth workers were members of the Queensland State Service Union.

For many years, it has been asserted that Cabinet Decision No. 162 1990 enabled the destruction of material which contained 'evidence' of child sexual abuse at the centre. The assertion has been based on an incident which occurred near a stream known as the 'Lower Portals' near Mount Barney. A detailed examination of the evidence concerning the incident, and the manner in which it was dealt with can be found in Part B of this report. For the purposes of this section it is sufficient to set out the relevant facts and circumstances in a briefer form.

Alleged sexual assault incident

On 19 May 1988 Mr Robert O'Hanley and Mr Gordon Cooper, teachers at the centre, submitted a proposal to the centre's review team which included Mr Coyne. The proposal was that seven children should be taken for a bush walk in the Mount Barney National Park on 24 May 1988. The children to be taken on the outing and the staff that were to accompany them were identified in the proposal. The review team approved the proposal and on 24 May 1988 seven children, including Annette Harding who was then aged 14 years and 3 months, three teachers, a psychologist and a youth worker went on the excursion. During the course of the outing most of the children left the sight of the staff. Four boys did abscond but were apprehended by the police later that evening. The other children, including Ms Harding, were returned to the centre. Following their return from the outing Mr Coyne was informed that staff members suspected that Ms Harding may have been sexually assaulted. When Mr Coyne went to Ms Harding's room he saw that she was asleep and did not wake her.

On 25 May 1988 Ms Jennifer Foote spoke with Ms Harding and asked if she had any sexual contact with any of the boys while on the outing. She assured Ms Harding that if anything of a sexual nature had occurred she would not be in any trouble but that the boys would be spoken to. Ms Harding said that no sexual contact had occurred. At some stage during the morning of 25 May 1988 Mr Mark Freemantle, a youth worker, questioned some of the boys who had gone on the outing. Mr Freemantle was told that two boys, then aged 14 years and 7 months and 14 years and 8 months, had sexual intercourse with Ms Harding while three boys watched and masturbated. By 11.00 am that day Mr Coyne became aware of what Mr Freemantle had been told and after speaking with the boys concerned Mr Coyne spoke with Ms Harding after lunch. She told Mr Coyne that she had intercourse with two boys the previous day and gave him the names of those boys. She stated that no force was used but that she felt that she had been under a lot of pressure from the boys. When asked if she wanted the boys to be charged by the police Ms Harding said that she did, although Mr Coyne noted that she 'tentatively said yes'.[29] At about 1.50 pm Mr Coyne informed Mr Ian Peers, the then Executive Director (Youth Support) in the department, about the situation as he was

[28] Exhibit 77.
[29] Exhibit 242.

responsible for all youth detention centres. Later that afternoon Ms Harding was moved to another part of the centre.

Following a meeting on 26 May 1988 between Mr Coyne and the review team, Mr Coyne resolved to contact Ms Harding's mother and two calls were made but she could not be reached. She rang the centre at 6.45 pm and Mr Coyne was contacted. He telephoned her back, told her about the incident and arranged for her to visit the centre the following day. Mr Coyne suggested that Mrs Harding ring her daughter which occurred at 8.00 pm.

On 27 May 1988 Ms Foote spoke with Ms Harding again and made her aware that some boys had made statements about what had occurred on the outing. Ms Harding told Ms Foote that she had intercourse with two boys on the outing. Ms Harding was informed that her mother was expected to attend at the centre that day and that she could speak with her. Ms Harding told Ms Foote that she had spoken to her mother the night before and had told her what had happened. At 12.30 pm Mr Coyne and Ms Foote met with Mrs Harding and they discussed the incident. Mrs Harding then spoke with her daughter alone. When Mr Coyne and Ms Foote returned they were told that a complaint would be made to the police about four of the boys. The fifth boy was not involved according to Ms Harding. The third and fourth boys were aged 14 years and 4 months and 14 years and 6 months.

Although there was a Juvenile Aid Bureau at Inala, Mr Coyne contacted Inspector David Jefferies, the officer in charge of the Brisbane Juvenile Aid Bureau. Mr Coyne felt that the nature of the matter warranted the attention of police who he believed were very experienced in child abuse and child sexual assault matters. Ms June West, a youth worker, conveyed Ms Harding to the Mater Hospital that day where she was examined by a paediatrician, Dr Maree Crawford. Dr Crawford found no evidence of trauma to the child's genitals. Inspector Jefferies arranged for Detective Sergeant Janelle Podlich, the officer in charge of the Ashgrove Juvenile Aid Bureau, and Plain Clothes Constable Sue Tomsett to attend the centre. They arrived at about 9.20 am on Saturday, 28 May 1988. Prior to their arrival Ms Harding had been told that the police intended to speak with her and that she could have a member of the staff present for support. Ms Harding chose to have Ms Lorraine Hayward, a youth worker, present at the meeting.

The meeting between the police and Ms Harding commenced and after some discussions the police left the room when Ms Harding said that she was unsure about what she wanted to do. She told Ms Hayward that she was concerned about how long any case would take to go through the courts and she said that she had received threats from other children. Ms Hayward, in a report dated 28 May 1988,[30] said that she and the police, as well as another youth worker, Mr Rudolf Peckelharing, all assured Ms Harding that all appropriate steps would be taken to ensure her safety at all times. Ms Harding decided that she did not wish to make an official complaint and signed a statement to that effect.[31]

[30] Exhibit 244.
[31] Exhibit 253.

On 30 May 1988 Mr George Nix, a Deputy Director-General, advised Mr Allan Pettigrew, the Director-General of the Department of Family Services, that Ms Harding did not wish to make a complaint mainly because the court processes could take between six and twelve months and because some other children had teased her and threatened her. Mr Nix advised that Mr Coyne had spoken with those he considered had been teasing or threatening Ms Harding. Mr Nix advised that:

> … one particular staff member (that they have had a lot of trouble with) was saying that there had been a cover-up and a whitewash. Peter Coyne is having a talk to him this afternoon together with other staff where they will be advised that the complaint has been investigated properly and that all the information has been passed on. [32]

Although Mr Coyne testified that he could not recall now whether someone had said that there had been a 'cover-up' and, if they did, who said it, he was adamant that the matter had not been covered up.[33] He testified that he did indeed go about the centre and tell the youth workers that the focus needed to be upon Ms Harding and her care, that discussions about rumours could be overheard by the children and so such discussions were to be kept to a minimum, and that the staff needed to be mindful of not allowing the boys involved to know what information the centre possessed. Mr Coyne's instructions in this regard were sensible. However, it seems that some of the staff decided for themselves that the matter had been covered up.

Some examples of this are given below:

- Mr Michael Roch, a youth worker, testified that he had no direct knowledge about what had happened to Ms Harding and was not present on the outing and never spoke with her about it. Nevertheless, he testified that 'We all felt it was being put under the carpet … we all felt it was being hushed up. Don't talk about it. We'll handle it'.[34] Mr Roch agreed that the involvement of the child's mother by the centre would not have been consistent with what he believed but he said, 'I didn't know that at the time.'[35]
- Mr George McAulay was another youth worker employed at the centre in May 1988. About a fortnight after Ms Harding returned from the outing, which he believed was an outing to Slaughter Falls, Mr Coyne had a meeting with staff. No mention was made to staff that the police had been advised about what had occurred. No mention was made of any medical examination of the child. Mr Coyne's 'failure' to inform staff of these matters confirmed Mr McAulay's view that those steps had not been taken because had they been taken then the staff would have known of them. He believed that the incident had been 'covered up'.[36]

The evidence also demonstrates that Mr Coyne brought the matter to the attention of Mr Peers and Mr Nix and that the latter brought it to the attention of Mr Pettigrew. Mr Pettigrew brought it to the attention of the Minister for Family Services on 30 or 31 May 1988.[37]

No charges were laid against the boys because the police who interviewed Ms Harding took the view there was no official complaint to investigate.[38]

---

[32] Exhibit 246.
[33] Transcript 3(e), 11 December 2012 [p26: line 35].
[34] Transcript 3(e), 13 December 2012 [p15: lines 5-15].
[35] Transcript 3(e), 13 December 2012 [p15: lines 20-21].
[36] Exhibit 276 [p3: para 7].
[37] Exhibit 247.
[38] Transcript 3(e), 29 January 2013 [p73: line 3].

Management issues

On 9 November 1988 in excess of 30 youth workers of all ranks and some ancillary staff met with Mr Peers at the centre. According to a written report[39] the meeting had been organised by Mr Roch and other youth workers who had allegedly experienced difficulties with the management of the centre and 'in particular, with the manager, Mr Coyne'.[40] Among the problems raised were issues with rosters, over-time, training and uncertainty about management expectations of youth workers. Other problems were alleged to be 'accusations by children about staff' and that the centre 'seems different from other Centres in philosophy and approach and is more demanding than other Centres'.[41] One of the causes of some of the problems was said to be that 'Some youth workers retain old ways'.[42] Mr Peers is said to have observed that it was 'evident that problems existed among youth workers with management'.[43]

Mr Edward Clarke, a Department of Family Services industrial officer, testified that after Mr Coyne began as manager it became apparent that he was seeking to discipline some staff over their work practices. That in turn led to unions who represented staff engaging with the department about issues at the centre. Mr Clarke's perception was that both Mr Peers and Mr Nix remained supportive of Mr Coyne. Between 1 January 1923 and 17 July 1988 the public service in Queensland was subject to the *Public Service Act 1922*. Regulation 152 of the *Public Service Regulations of 1958*, made pursuant to that Act, provided that:

> **152. Reports to be noted by officers.** Before any report detrimental to the interests of an officer is recorded on the official files and records relating to that officer such report shall be brought under the notice of that officer and initialled by him.

The *Public Service Management and Employment Act 1988* and the *Public Service Management and Employment Regulation 1988* came into effect on 18 July 1988. Regulation 46 effected significant changes in that it provided a public servant with both the right to a copy of any document that could be reasonably considered to be detrimental to that officer's interests and with the right to make a written response to the contents of any such document.

Regulation 46 was as follows:

> **46. Reports to be noted by officers.** A report, item of correspondence or other document concerning the performance of an officer which could reasonably be considered to be detrimental to the interests of that officer, shall not be placed on any official files or records relating to that officer unless the officer has initialled the document and has been provided with –
>
> (a) a copy of the document;
>
> and
>
> (b) the opportunity to respond in writing to the contents of the document within 14 days of receipt of the copy.
>
> When an officer responds in writing, the response shall also be placed on the official file or record. Where an officer refuses to initial a document, it may nevertheless be placed on the file or record but the refusal shall be noted.

[39] Exhibit 87.
[40] Exhibit 87.
[41] Exhibit 87.
[42] Exhibit 87.
[43] Exhibit 87.

Regulation 65 of the Public Service Management and Employment Regulation was as follows:

> **65. Access to officer's file.** At a time and place convenient to the department, an officer shall be permitted to peruse any departmental file or record held on the officer.
>
> The officer shall not be entitled to remove from that file or record any papers contained therein but shall be entitled to obtain a copy thereof.

These provisions, which conferred new rights on public servants, played a significant role in the events which led to Mr Heiner's decision that he would not proceed further with the preparation of a report. The impact that provisions of this nature might have had on departmental procedures was clearly a matter of concern to the department.[44] For example, on 20 June 1989 a letter[45] was sent on Mr Pettigrew's behalf to the Crown Solicitor, Mr Ken O'Shea, which sought advice about the feasibility of the department creating other files which could be kept from scrutiny by public servants, notwithstanding regulations 46 and 65. On 30 June 1989 Mr O'Shea sent a letter[46] to Mr Pettigrew advising that regulations 46 and 65 could not be circumvented by the creation of other supposedly confidential files. Further correspondence[47] on related issues passed between Mr Pettigrew and Mr O'Shea up until 27 September 1989.

On 28 August 1989 Mr Daniel Lannen, a youth worker, wrote to Mr Pettigrew[48] and complained that he had been asked by Mr Coyne to show cause why his salary increment should not be withheld and why his probationary period should not be extended. Mr Lannen claimed that he had never been told that his work performance was unsatisfactory. He asserted that he had been 'victimised' and that other staff at the centre were then experiencing similar problems. Mr Lannen said that he was at that point considering an alternative career.

By 12 September 1989 the Queensland State Services Union had received complaints about Mr Coyne from Mr Lannen, Mr Roch, Mr David Smith and Ms Mariana Pearce.[49] Mr Smith and Ms Pearce were also employed as youth workers at the centre. That day Ms Janine Walker, the Queensland State Services Union Director of Industrial Services, wrote to Mr Pettigrew.[50] After referring to the meeting between staff and Mr Peers on 9 November 1988 and citing the union's understanding of Mr Lannen's difficulties, Ms Walker sought a meeting to discuss those matters. The meeting took place on 14 September 1989. Those persons in attendance included Mr Pettigrew, Mr Nix and Ms Walker. A note or minute,[51] probably made by Mr Pettigrew's secretary,[52] recorded that Ms Walker raised 'specific' issues. They included that Mr Coyne had allegedly telephoned Mr Lannen's house and told Mr Lannen's wife that her husband might face a legal action initiated by Mr Coyne, that Mr Coyne had threatened other youth workers that he might take defamation action against them and that a total of six youth workers had complained to the Queensland State Services Union about management at the centre. It was noted that the union sought an inquiry into 'management/staff relationships' at the centre and that to assist any inquiry the union was willing to provide 'specific' details of incidents between management and staff. It was noted that

[44] Transcript 3(e), 31 January 2013 [p55: line 45 – p56: line 15].
[45] Exhibit 60.
[46] Exhibit 61.
[47] Exhibits 63; Exhibit 70.
[48] Exhibit 62.
[49] Exhibit 64.
[50] Exhibit 65.
[51] Exhibit 66.
[52] Transcript 3(e), 13 February 2013 [p25: line 25].

Mr Pettigrew decided 'that an investigation into the operations of the … Centre would be held' and that the investigation would consider the 'issues raised by the Queensland State Service Union'.

Exhibit 66 demonstrates that it was Mr Pettigrew's decision that an investigation should be held. At the date this decision was taken Mr Craig Sherrin was the Minister for Family Services.[53] Mr Coyne was advised of Mr Pettigrew's decision on or about 18 September 1989.[54]

Ms Walker testified that she informed Mr Pettigrew that the view of the Queensland State Services Union was that there needed to be a review of the management of the centre rather than an inquiry into specific incidents at the centre. Mr Smith, the Queensland State Services Union delegate for the staff of the centre, set about identifying workers prepared to make signed statements detailing problems with Mr Coyne.[55] Even before the end of September some workers, who were also Queensland State Services Union members, had written to the union[56] asserting that those who were complaining about Mr Coyne were in the minority among the staff employed at the centre.

On 29 September 1989 Mr Frederick Feige, a youth worker and a member of the Australian Workers Union,[57] wrote to Mr Pettigrew. The letter[58] undoubtedly made plain to Mr Pettigrew that, whilst there was tension between staff and management at the centre, there were staff members who were supportive of Mr Coyne.

On 10 October 1989 Ms Walker wrote to Mr Pettigrew. She pointed out that the Queensland State Services Union had received not just complaints about Mr Coyne's style of management but also letters which were supportive of Mr Coyne. Her letter enclosed statements which the union had obtained from nine youth workers employed at the centre. In view of the consideration that the statements contained what she said were 'serious allegations' the statements were:

> For that reason…supplied to you personally on the understanding that they will not be circulated widely.[59]

As will be seen below, the condition on which the statements were provided was to have a significant impact on how Mr Heiner conducted his investigation.

Ms Walker testified that the provision of the statements on that condition reflected an earlier conversation she had with Mr Pettigrew during which she told him that Queensland State Services Union members were willing to participate in a process provided that they were 'protected from retribution.'[60] She understood that the statements would not be confined to Mr Pettigrew's attention because she knew that he intended to appoint someone to conduct an investigation and that person would need to consider the contents of the statements. The statements[61] were either undated or dated 3 or 8 October 1989, apart from one which was signed 'very concerned'.[62] The

---

[53] Exhibit 280.
[54] Exhibit 66 (handwriting); Transcript 3(e), 22 January 2013 [p32: lines 30-50].
[55] Exhibit 67.
[56] Exhibits 67A; Exhibit 68.
[57] Transcript 3(e), 7 December 2012 [p46: line 40].
[58] Exhibit 71.
[59] Exhibit 72.
[60] Transcript 3(e), 24 January 2013 [p34: line 25].
[61] Exhibits 72B – 72J.
[62] Exhibit 72H (now known to have been provided by Ms Jane Thirnbeck, a youth worker).

statements bore signatures of youth workers. All of the writers were critical of various aspects of Mr Coyne's management. The author of the letter signed 'very concerned' was critical of the decision to handcuff some children and of a decision to give medication to a child in order to subdue violent behaviour.

The Heiner inquiry

On 17 October 1989 Mr Pettigrew wrote a memorandum[63] to the Honourable Beryce Nelson who, as at 25 September 1989, had been appointed Minister for Family Services.[64] He informed her that after meeting with Ms Walker on 14 September 1989 he had given a commitment that there would be an investigation of any complaints put to him in writing. He referred to his visit to the centre on 28 September 1989, during which he had told the staff of his intention to have an independent investigation of complaints if they were 'confirmed in writing'. He advised the Minister that this proposal had been acceptable to both the management and staff. He stated that the Queensland State Services Union had submitted nine letters of complaint against Mr Coyne and that he proposed to recommend that an investigation should be conducted by the previous Childrens Court Magistrate, Mr Viv Gillingwater. Mr Pettigrew made a notation at the foot of the memorandum that the 'Minister is very sympathetic'. He also wrote in shorthand, which Mr Nix testified as saying, 'Will be able to have by next Monday'.[65]

Mrs Nelson testified that she wanted a 'ministerial inquiry' rather than what she called 'a departmental review'. She said that a ministerial inquiry would 'give it the power of cabinet.' She said that she 'reported it to Cabinet so that it had the Cabinet legs'.[66] Her belief was that once someone advised Cabinet of something then the report would have to go to Cabinet, that any investigation could not be ended by the department.[67] She asserted that the inquiry was to be a 'preliminary investigation' and that 'the plan' was to have 'a full commission of inquiry' if the investigator found there was 'substance to the allegations'.[68]

Mrs Nelson's understanding of the nature of the allegations was that they included children absconding and committing offences whilst at large, some staff not performing their duties satisfactorily and not being held accountable for their performance. It was also understood that that some children were forced to engage in sexual activities by other children, that illicit drugs and prescription drugs had been brought into the centre by staff and children and that some staff had physically and sexually abused some children.[69] The Collective Minutes of Proceedings at the Cabinet Meeting of 23 October 1989[70] noted that:

> The Honourable the Minister for Family Services indicated that an investigation was to be conducted into the operations of the John Oxley Youth Centre.

Mrs Nelson testified that Mr Pettigrew obtained legal advice from somewhere other than the Crown Solicitor's Office concerning the inquiry.[71] Mr Nix said that it was his impression that Mr Pettigrew had sought legal advice about the inquiry but did not know

[63] Exhibit 73.
[64] Exhibit 281.
[65] Transcript 3(e), 13 February 2013 [p30: lines 1-20].
[66] Transcript 3(e), 24 January 2013 [p88: lines 30-40].
[67] Transcript 3(e), 24 January 2013 [p90: lines 20-25].
[68] Transcript 3(e), 24 January 2013 [p90: lines 25-35].
[69] Exhibit 285.
[70] Exhibit 76; Exhibit 76A.
[71] Transcript 3(e), 24 January 2013 [p99: lines 20-30].

whether this was from a source other than the Crown Solicitor's Office.[72] Searches of the records of that office tend to suggest that the advice was not sought.[73]

Mrs Nelson's understanding of the scope of the proposed inquiry may not have been an understanding shared by her department. For example, the briefing note, probably prepared by Mr Peers,[74] for the Minister's visit to the centre on 26 October 1989 stated as follows:

> Current Significant Issues:
>
> Several unions representing staff have raised with the Honourable the Minister issues involving:
>
> - personal safety of staff;
> - the adequacy of staffing;
> - the physical structure of the Centre and its amenities;
> - staff training;
> - the role of the Centre (now taking highly disturbed children and those on remand).
>
> The Queensland State Service Union has also made representations on behalf of several staff who have claimed that management has discriminated against them.
>
> The Director-General is initiating a process for independent investigation of these concerns. [75]

The list of issues referred to in this briefing note had indeed been raised with the Minister by Mr Laurie Gillespie, the General Secretary of the Queensland State Service Union, in a letter dated 18 October 1989.[76]

Mr Nix said that Mr Pettigrew contacted the Chief Stipendiary Magistrate to discuss who might be available to conduct the inquiry. The Chief Stipendiary Magistrate suggested someone who in turn suggested that the recently retired magistrate, Mr Noel Heiner, might be available to assist. Mr Nix and Mr Pettigrew met with Mr Heiner at 10.00 am on 27 October 1989. Thereafter Mr Nix assisted Mr Pettigrew to prepare draft terms of reference for the inquiry.[77] Mr Nix and Mr Pettigrew met with Mr Heiner again on 31 October 1989 at 2.00 pm. At this meeting Mr Nix gave Mr Heiner a copy of the *Code of Conduct for Officers in the Public Service*, a copy of a file which contained all memoranda issued to staff at the centre, draft position descriptions for the various categories of youth worker roles and a list of administrative and procedural memoranda.[78] The significance of the fact that this information was provided to Mr Heiner is that it assists with understanding the department's perception of the issues it expected Mr Heiner would have to confront.

On 1 November 1989 Mr Pettigrew wrote to the Minister[79] about their discussions regarding an inquiry into 'the complaints and union representations in respect of' the centre. After referring to the two meetings with Mr Heiner and his willingness to

[72] Transcript 3(e), 13 February 2013 [p48: lines 5-30].
[73] Exhibit 357.
[74] Transcript 3(e), 22 January 2013 [p36: line 30].
[75] Exhibit 77.
[76] Exhibit 74.
[77] Transcript 3(e), 13 February 2013 [p34: line 5].
[78] Transcript 3(e), 13 February 2013 [p34: line 20]; Exhibit 78.
[79] Exhibit 80.

undertake the inquiry Mr Pettigrew asked the Minister to approve the terms of reference which were attached to the memorandum. The terms of reference were as follows:

> DRAFT TERMS OF REFERENCE FOR THE INVESTIGATION OF COMPLAINTS BY CERTAIN MEMBERS OF STAFF AT JOHN OXLEY YOUTH CENTRE
>
> ---
>
> To investigate and report to the Honourable the Minister and Director-General on the following:
>
> 1. 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.
> 2. Compliance or otherwise with established Government policy, departmental policy and departmental procedures on the part of management and/or staff.
> 3. Whether there is a need for additional guidelines or procedures or clarification of roles and responsibilities.
> 4. Adequacy of, and implementation of, staff disciplinary processes.
> 5. Compliance or otherwise with the Code of Conduct for Officers of the Queensland Public Service.
> 6. Whether the behaviour of management and/or staff has been fair and reasonable.
> 7. The adequacy of induction and basic training of staff, particularly in relation to the personal safety of staff and children.
> 8. The need for additional measures to be undertaken to provide adequate protection for staff and children and to secure the building itself.

A number of observations can be made about this document. First, it presented 'draft' terms of reference. Second, it required Mr Heiner to investigate and report to the Minister and the Director-General. Third, none of the draft terms of reference made any reference to either alleged sexual conduct between children or the alleged sexual abuse of children. They were therefore arguably deficient if the purpose had been to have such allegations investigated by Mr Heiner. The draft terms of reference failed to direct Mr Heiner to investigate and report on such issues.

The purpose of the inquiry, so far as Mr Nix was concerned, was primarily a consideration of the complaints made about Mr Coyne.[80] He regarded the draft terms of reference as responsive to the matters that the Queensland State Service Union wished to have investigated and management issues which had arisen at the centre.[81] The draft terms of reference were consistent with Mr Nix's understanding.

Exhibit 80, dated 2 November 1989, bears a notation in Mr Pettigrew's writing, 'Approved by Minister'. Comparison of this document with the terms of reference that were given to Mr Heiner[82] show that the draft terms submitted for Mrs Nelson's approval were not altered to accommodate in any obvious way the concerns that Mrs Nelson testified she then harboured about allegations of sexual abuse. She said that she approved the terms believing that they were broad enough to cover her concerns. However, Mrs Nelson's understanding could not have been one shared by a reasonable person who read the terms of reference. They contained no hint that sexual misconduct of any description was a subject which required investigation. Each term of reference had to be understood in the context of all the others.

---

[80] Transcript 3(e), 13 February 2013 [p35: line 45].
[81] Transcript 3(e), 13 February 2013 [p37: line 35].
[82] Exhibit 83.

On 8 November 1989 a memorandum was sent on Mr Coyne's behalf to Mr Peers.[83] It advised that Ms Mariana Pearce, a youth worker at the centre, had alleged that Mr Coyne and another had visited her residence in late 1988 and had entered her unit without her permission. It sought an investigation into the allegation and suggested that someone not otherwise associated with the centre carry that out. Although Ms Pearce later retracted her allegation[84] the fact that it was made says much about the state of some personal relationships at the centre in 1989.

On 13 November 1989 Mr Pettigrew wrote to Mr Heiner advising him that he had been appointed to undertake the task of investigating staff complaints.[85] Terms of reference attached to this correspondence were as follows:

> TERMS OF REFERENCE FOR THE INVESTIGATION OF COMPLAINTS BY CERTAIN MEMBERS OF STAFF AT JOHN OXLEY YOUTH CENTRE
>
> _____
>
> To investigate and report to the Honourable the Minister and Director on the following:
>
> 1. 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.
> 2. Compliance or otherwise with established Government policy, departmental policy and departmental procedures on the part of management and/or staff.
> 3. Whether there is a need for additional guidelines or procedures or clarification of roles and responsibilities.
> 4. Adequacy of, and implementation of, staff disciplinary processes.
> 5. Compliance or otherwise with the Code of Conduct for Officers of the Queensland Public Service.
> 6. Whether the behaviour of management and/or staff has been fair and reasonable.
> 7. The adequacy of induction and basic training of staff, particularly in relation to the personal safety of staff and children.
> 8. The need for additional measures to be undertaken to provide adequate protection for staff and children and to secure the building itself.

Mr Heiner was also advised that a report was expected from him within six weeks, that an office would be made available for him at the Childrens Court and that two staff members would be provided to assist him. On 17 November 1989 the Queensland State Service Union was advised that the investigation had commenced.[86] Staff at the centre were told of the investigation on 20 November 1989.[87] On 23 November 1989 the Queensland State Service Union, the Professional Officers Association, the Australian Workers Union and the Queensland Teachers' Union were advised that Mr Heiner had commenced his investigation. Each union was supplied with a copy of the terms of reference.[88]

Mr Heiner's assistants were Ms Jan Cosgrove and Ms Barbara Flynn. Ms Cosgrove testified that she met Mr Heiner at the centre. She could not recall how many times she went there and could not remember ever going to the centre and performing tasks in Mr

[83] Exhibit 82.
[84] Exhibit 104.
[85] Exhibit 83.
[86] Exhibit 84.
[87] Exhibit 85.
[88] Exhibit 86; Exhibit 86A.

Heiner's absence. She took no part in any interviews Mr Heiner conducted beyond setting up the tape recorder for Mr Heiner to record what was said during the interviews. She did not remain in the room when interviews were conducted but assumed that she transcribed some of the tapes used to record the interviews. She could not recall the names of any of the people mentioned in the tapes that she transcribed. Although she had no recollection of doing so she thought that she may have set up a tape recorder for Mr Heiner at a building in the city. Ms Cosgrove recalled that she and Mr Heiner were given a tour of the centre and shown the place where a child had been hand-cuffed. There is evidence[89] which shows that in November 1989 Ms Cosgrove asked the department to provide the names of those members of staff who had resigned from the centre in the three years preceding the investigation. On 22 November 1989 she had requested the departmental 'Personal Files' held on four youth workers, including Mr Lannen.[90] Ms Cosgrove recalled requesting the files held on youth workers and said that she would have done this at Mr Heiner's request.[91]

Ms Flynn testified that when Mr Pettigrew asked her to assist Mr Heiner she was reluctant to do so. He assured her that the investigation concerned 'a storm in a teacup'.[92] Ms Flynn said that as far as she knew all the interviews were conducted in a room at the centre. She and Ms Cosgrove were present for those interviews. Ms Flynn asked questions of the interviewees if she thought that something needed to be clarified. All those who were interviewed attended voluntarily. Mr Heiner told the interviewees that anything that they said would be treated as confidential and not disclosed and she perceived that Mr Heiner was thereby conferring some sort of immunity on the interviewees.[93] Ms Flynn said that she never conducted an interview with a staff member when Mr Heiner was absent.[94]

The question of what Mr Heiner's investigation discovered has become a matter of considerable controversy over the years. Although the terms of reference were designed for the 'investigation of complaints by certain members of staff'[95] and although there was no evidence presented before me that any member of staff had raised matters concerning sexual abuse prior to Mr Heiner's appointment, it has been asserted, by Mr K Lindeberg, that Mr Heiner obtained evidence concerning the sexual abuse of children. In a letter[96] to the Governor dated 13 February 2003 Mr Lindeberg called on the Governor to dismiss the Executive Government unless it agreed to appoint a 'Special Prosecutor' to investigate what he called the 'Heiner Affair'. In that letter Mr Lindeberg asserted that prior to the destruction of the 'Heiner' documents Executive Government had 'in its possession and control (even including known evidence of abuse of children in a State-run institution going to the crime of criminal paedophilia)'.

[89] Exhibit 114.
[90] Exhibit 114.
[91] Transcript 3(e), 4 December 2012 [p16: lines 10-30].
[92] Transcript 3(e), 4 December 2012 [p31: line 10].
[93] Transcript 3(e), 4 December 2012 [p36: lines 15-30].
[94] Transcript 3(e), 4 December 2012 [p44: line 40].
[95] Exhibit 83.
[96] Exhibit 346.

In a previous letter to the Governor dated 13 May 2002 Mr Lindeberg claimed that the destruction of the material was a:

> …cover up in respect of the offence of rape and criminal paedophilia against a 14 year old female Aboriginal inmate while in care and custody of the Crown at the John Oxley Youth Detention Centre …[97]

In October 1999 Mr Lindeberg had asserted that 'knowledge of suspected child abuse' was at the 'centre of the Heiner Inquiry' that 'supporting evidence of child abuse' was 'known to be contained in the Heiner documents' and that such abuse was reasonably suspected of having been inflicted by 'Crown employees'.[98] In September 1994 Mr Lindeberg had asserted that the destruction occurred 'in order to obstruct Mr Coyne's known course of justice of court proceedings'.[99]

The deaths of Mr Heiner, Mr Pettigrew and of Mr O'Shea have meant that the evidence now available about some important aspects of the events is incomplete.

However, as far as can be ascertained, about one hundred people had been employed at the centre between 13 November 1989 and 19 January 1990. The significance of the later date is that it was the day that Mr Heiner decided to not proceed further with his investigation.[100] Seventy-two employees provided statements and/or gave evidence to the Commission confirming that they had never spoken with Mr Heiner or with anyone that they understood was associated with him. No one who had authority to appear challenged this aspect of the evidence provided by these people. Twenty-seven employees gave evidence that they met with and were interviewed by Mr Heiner. One employee claimed that he met with and was interviewed by Ms Flynn and another. A summary of this evidence is provided below.

Mr Warren Christensen worked as a youth worker at the centre from 4 April 1989. He only became aware that an investigation was underway when he arrived for an afternoon shift at the centre. He was told to wait in a room until Mr Heiner was ready to see him. He did not know why he had to see Mr Heiner as he had not made any complaints to anyone about any aspect of the centre. Mr Heiner questioned him about aspects of the centre, in particular about Mr Coyne's management. Mr Heiner did not ask any questions about sexual abuse at the centre and Mr Christensen did not volunteer any information about that topic.[101] Although he knew something about an incident involving the hand-cuffing of a child, he did not discuss it with Mr Heiner.[102] He thought that he could recall that another person was present who may have made notes of the discussions and the interview may have been tape-recorded.

Ms Sabina Konicanin wrote one of the nine statements that the Queensland State Service Union had submitted to Mr Pettigrew.[103] The statement spoke of her having seen other staff members harassed and victimised, in some cases they resigned, in other cases their employment had been terminated. She said the style of management was somewhat unprofessional, insensitive and inconsistent. She claimed that some children had been 'bribed' to induce them to supply information to management about staff. Ms Konicanin said that some time prior to her interview with Mr Heiner she had attended a staff meeting where either Mr Nix or Mr Peers advised the staff that there was to be an

[97] Exhibit 345.
[98] Exhibit 344.
[99] Exhibit 343.
[100] Exhibit 123.
[101] Transcript 3(e), 4 December 2012 [p54: line 45 – p55: line 5].
[102] Exhibit 10.
[103] Exhibit 72J.

inquiry they could participate in and any information provided would be treated confidentially.[104] Ms Konicanin said that Mr Heiner, in the presence of Ms Flynn, interviewed her at the centre[105] and asked questions. She noticed that Ms Flynn had the statement she had previously provided. She was asked to provide some examples of the matters she had complained about in the statement but was not asked any questions about the sexual abuse of children at the centre and did not volunteer any information about that topic.[106] The interview was recorded on a tape-recorder.

Ms June West had worked at the centre as a youth worker from about 1987 and she regarded Mr Coyne as a 'marvellous man'. In 1989 or 1990 she was asked or directed to attend and speak to a man who had come to the centre. Her recollection was that there may have been a woman with him. She thought that the conversation was recorded on a tape-recorder and could not recall what was discussed at the interview. However, she was not aware of any incidents of sexual abuse at the centre at the time of the interview and she said that she did not speak about any allegations of sexual abuse.[107]

Mr Dennis Everett was employed at the centre from February 1989. He heard from other staff members that Mr Heiner was conducting an inquiry and that any information given to him would be kept confidential. Mr Everett decided that he would speak to Mr Heiner because he was not being rostered for shifts despite Mr Coyne having given him a very good reference. He thought that he saw Mr Heiner either somewhere in Brisbane or at the centre.[108] He thought that he only discussed the way he had been treated. He had no recollection of discussing sexual abuse concerns with Mr Heiner.[109]

Mr Brian Cartledge worked at the centre from late 1988 until no later than June 1989. Subsequently someone contacted him and asked him if he would be willing to meet with a retired magistrate. Mr Cartledge went to a building in the city, it may have been located on George Street. There was a woman present at the meeting. The discussion concerned Mr Coyne's management of the centre. There was no discussion about sexual abuse at the centre or anywhere else.[110] He recalled that the woman made notes at the meeting.

Mr Bruce Cassidy worked at the centre from 1987. He was away on sick leave from July 1989 until some time in November 1989. One day in 1990 a senior youth worker asked him to go and meet with a magistrate. He met the magistrate and a woman at the centre. Their discussion concerned something to do with Mr Coyne but he could not recall making any complaints about Mr Coyne. He had no recollection of providing any information, or raising any concerns, about sexual abuse at the centre.[111]

Mr Glenn Healing worked at the centre from 1987. At the time of Mr Heiner's inquiry Mr Healing was employed in the centre's kitchen. He regarded Mr Coyne as a likeable man and had a positive view of the management group. He felt that management was supportive of staff meeting with Mr Heiner. He recalled that he went to a building by the river. He was interviewed over the course of some minutes. A woman was present and she made typed notes as the interview proceeded. He believed that the conversation may also have been recorded. He recalled that up to six people were present. An elderly man, who I took to be Mr Heiner, asked him questions to which he only had to reply 'yes'

[104] Transcript 3(e), 4 December 2012 [p66: line 8].
[105] Exhibit 29.
[106] Transcript 3(e), 4 December 2012 [p65: lines 10-20].
[107] Transcript 3(e), 5 December 2012 [p14: lines 30-50].
[108] Transcript 3(e), 5 December 2012 [p30: line 27].
[109] Transcript 3(e), 5 December 2012 [p29: line 15].
[110] Transcript 3(e), 6 December 2012 [p35: lines 1-10].
[111] Transcript 3(e), 6 December 2012 [p50: line 45].

or 'no'. He did not volunteer any information, he just answered the questions. He could not recall the topics raised in the questions, but said that none of the questions concerned sexual abuse at the centre[112] as he had no information to provide about that issue.

Ms Lorraine McGregor started as a youth worker at the centre in 1987. She was the author of one of the statements[113] provided to Mr Pettigrew by the Queensland State Service Union. In that statement she complained that Mr Coyne only supported the staff who actively supported him, that Mr Coyne harassed some staff, especially some of those who had formerly worked at the Sir Leslie Wilson Youth Centre, that the harassment continued up until people either resigned or sought a transfer elsewhere and that Mr Coyne had deliberately set out to alienate staff. Ms McGregor saw Mr Heiner, and possibly a female assistant, in a room at the centre. She did not know whether he had a copy of her statement. Their conversation and Mr Heiner's questions concerned Mr Coyne and his management style. She had no recollection that any other topic was discussed. She could not now recall whether the topic of sexual abuse was raised.[114]

Mr Trevor Cox began work at the centre prior to Mr Coyne's appointment as manager. He was employed as a youth worker. Mr Cox said prior to Mr Heiner's investigation the centre had become one where factionalism had taken hold. Some supported Mr Coyne, others did not and they 'paid the price'[115] for it. Mr Cox met with Mr Heiner and Ms Flynn in a room at the centre. He could not recall whether the meeting was recorded or not. He spoke with Mr Heiner about the treatment he had received from Mr Coyne and others and recalled speaking about an incident where a child had been handcuffed. He did not think that he spoke with Mr Heiner about sexual abuse because, as he understood it, the purpose of the inquiry was to investigate the way staff had been treated.[116] There had never been a time since 1989 when he thought that he may have discussed sexual abuse with Mr Heiner.[117]

Prior to meeting with Mr Heiner, Mr Frederick Feige, a youth worker at the centre and also the Australian Workers Union representative there, had written to Mr Pettigrew.[118] In that letter he suggested that the inquiry should investigate the safety of both young people and staff, the use of handcuffs, the alarm system at the centre and the appropriate staff numbers. Mr Feige met Mr Heiner at the centre on 30 November 1989 and gave him a written statement.[119] The document set out Mr Feige's concerns about the way Mr Coyne treated staff, the use of handcuffs and 'suppressant drugs', and the existence of a group 'intent on discrediting others for their own ends'. Mr Feige said that Ms Cosgrove and Ms Flynn were present when the meeting took place. Ms Flynn did most of the questioning. Mr Feige said that he confined all his comments to the management of staff. Sexual abuse was not raised at any stage.[120]

Mr Vincent Robertson had worked at the centre for short periods of time. When he was employed elsewhere in the department his manager told him that he was to go to the centre the next day to be interviewed about his dealings with Mr Coyne. When Mr

[112] Transcript 3(e), 7 December 2012 [p12: line 5 – p13: line 35].
[113] Exhibit 72E.
[114] Transcript 3(e), 7 December 2012 [p30: line 35].
[115] Transcript 3(e), 7 December 2012 [p34: line 23].
[116] Transcript 3(e), 7 December 2012 [p35: line 40].
[117] Transcript 3(e), 7 December 2012 [p42: line 20].
[118] Exhibit 71.
[119] Exhibit 90.
[120] Transcript 3(e), 7 December 2012 [p52: line 10].

Robertson went to the centre he met with three people in Mr Coyne's office. He understood that the three people came from 'head office'. He thought, but could not now be certain, that all of them were men. One man in particular asked the questions which concerned Mr Coyne's dealings with the staff. Sexual abuse was not raised.[121] Those present jotted down notes as Mr Robertson spoke. He did not know whether the discussion was recorded by any other means.

Ms Marion Thompson worked at the centre from about May 1988. She met Mr Heiner in a room at the centre and thought that she had been obliged or required to meet with him. Her recollection was that no one else was present when they met but she said that her memory about this aspect was vague. The discussion concerned safety issues and staff issues.

Mr Peter McNeven had worked at the centre for two years when he wrote a statement[122] which was among those sent to Mr Pettigrew. In the statement he complained that Mr Coyne had told him that he should not associate with the other youth workers because those people were 'out to get' Mr Coyne. He said that Mr Coyne said that the former Sir Leslie Wilson Youth Centre staff was not safe despite the fact that those staff had permanent positions. He said that Mr Coyne said that any one who did not do things his way would be out. Mr McNeven met with a man and a woman at the centre. He now considers that he had in fact been participating in the Heiner investigation. Their discussion concerned the general operation of the centre and how the staff felt about how it functioned. There was no mention of sexual abuse during the course of the meeting.[123]

Ms Mariana Pearce had been employed as a youth worker at the centre from the day it had opened. She had written one of the statements[124] supplied to Mr Pettigrew by the Queensland State Service Union. In that statement Ms Pearce made allegations that Mr Coyne had conducted a campaign of harassment against her and that some of his conduct had encouraged some of the children to complain about her. Ms Pearce met with Mr Heiner at the centre. Their conversation was confined to the issues raised in her statement. There was no discussion about sexual abuse.[125]

Ms Cindy Ranger commenced work at the centre sometime in 1989. She met with Mr Heiner and three or four other people in a room at the centre. She was asked questions but did not have any relevant information to provide so the interview finished soon after it had commenced. She had no recollection of being asked any questions about child sexual abuse.[126]

Mr Bradley Parfitt worked at the centre from about December 1988. He was aware that the Heiner investigation occurred but could not recall whether he provided any information to it.[127] He did not believe that he attended the inquiry.[128]

Ms Kym Yuke was the centre nurse from about January 1989 until May 1990. She recalled meeting Mr Heiner on at least one occasion in a room at the centre. A woman was also present and she may have taken notes. Mr Heiner asked questions about management

[121] Transcript 3(e), 7 December 2012 [p79: lines 10-20].
[122] Exhibit 72G.
[123] Transcript 3(e), 11 December 2012 [p10: line 8].
[124] Exhibit 72D.
[125] Transcript 3(e), 11 December 2012 [p110: lines 30-40].
[126] Transcript 3(e), 12 December 2012 [p53: lines 42-47].
[127] Transcript 3(e), 13 December 2012 [p48: line 15].
[128] Exhibit 233.

issues at the centre. She did not provide any information to him about sexual abuse nor did she have a recollection of him asking such questions.[129]

Ms Lorraine Hayward had started working at the centre when it had opened and supported Mr Coyne.[130] She was interviewed by Mr Heiner in a room at the centre and there may have been someone present taking notes. She believed that their conversation was otherwise recorded. Her recollection was that Mr Heiner asked her for her perspective on how the centre was operating. She did not recall him asking her any questions about sexual abuse.[131]

Dr Pamela Douglas visited the centre to provide medical treatment to the children during most of 1989 and into the early part of 1990. She was aware of the fact that Mr Heiner had been conducting an inquiry. She had no memory of meeting with him but could not be absolutely certain that she did not meet with him. However, during her time at the centre she did not gain any knowledge of any allegations of sexual abuse and so had no need to report such allegations to anyone.[132]

Ms Karen Mersiades had been employed as a teacher at the centre from shortly after it opened. She was interviewed by Mr Heiner in the presence of Ms Flynn at the centre. The meeting was tape recorded. When Ms Mersiades went for the interview she did not know what the purpose for it was. She said that Mr Heiner asked her questions but she did not think that any of those questions concerned sexual abuse and she had no memory of raising that topic with him.[133] She recalled that she had been asked about the circumstances surrounding why someone was chained to the pool fence. Ms Mersiades wrote to Mr Pettigrew on 8 December 1989. The letter[134] is significant because it contains an almost contemporaneous account of Ms Mersiades' interview with Mr Heiner and so provides an arguably reliable account of what was actually discussed. In the letter Ms Mersiades said that she and other staff who had contributed to the inquiry were unhappy about the process. She complained about having been repeatedly asked if she had problems with management. She suspected that the inquiry proceeded on the assumption that management had harassed and undermined youth workers. She was asked to provide her opinion of Mr Coyne's attitude and behaviour.

Mr David Farnworth had worked as a teacher at the centre until late 1989. In the period that he was employed there he was not aware of any sexual abuse.[135] He had a recollection of meeting a man and a woman in a room at the centre but could not recall what was discussed. He did recall talking to Ms Mersiades after the meeting and feeling that the process he had participated in was not right. In the letter to Mr Pettigrew,[136] Ms Mersiades wrote that Mr Farnworth claimed that he was challenged about why he had attended the interview in view of the fact he had no specific complaints or information about the complaints. Mr Farnworth told Ms Mersiades that when he asked for information about the complaints Mr Heiner refused to provide it.

Mr David Smith worked as a youth worker at the centre from the time it opened. He wrote one of the statements that the Queensland State Service Union provided to Mr

[129] Transcript 3(e), 13 December 2012 [p53: lines 20-30].
[130] Exhibit 67A.
[131] Transcript 3(e), 13 December 2012 [p58: line 35].
[132] Transcript 3(e), 21 January 2013 [p5: lines 30-40].
[133] Transcript 3(e), 22 January 2013 [p84: lines 20-30].
[134] Exhibit 94.
[135] Transcript 3(e), 22 January 2013 [p15: line 45].
[136] Exhibit 94.

Pettigrew.[137] That statement did not refer to sexual abuse. It concerned Mr Coyne's management of the staff and his relationship with Mr Coyne. Mr Smith met with Mr Heiner in a conference room at the centre. There was also a woman present who made notes as they spoke. Mr Smith testified that he simply did not know whether he discussed sexual abuse with Mr Heiner.[138] He could not rule out the possibility that he did.[139] However, he had no definite recollection of what was discussed.[140]

Mr Jeff Manitzky worked as the psychologist at the centre from 1987. He decided to go and see Mr Heiner because he wanted to speak to him about the need for the training of staff and improving their skills. He spoke to Mr Heiner, Ms Flynn and someone else in a room at the centre. There was no discussion about sexual abuse.[141] He did not raise the incident involving Ms Harding.[142] He recalled that Mr Heiner commented that something Mr Manitzky said might have been defamatory.

A memorandum[143] written by Ms Lynne Draper on 4 January 1990 evidences the understanding that Mr Heiner was investigating complaints by staff 'of the management of the John Oxley Youth Centre'. Ms Woolard advised that she no longer wanted to meet with Mr Heiner because some staff who had met him had told her that the investigators were not interested in receiving information about those who had complained of 'harassment or victimisation'. This document, made during the currency of Mr Heiner's investigation, provides some support for the testimony of the many employees who said that the inquiry was concerned with management issues rather than sexual abuse.

Youth worker Mr Rudolf Peckelharing had spoken with Mr Heiner but he died prior to the Commission's commencment.[144] However, some time between 13 and 15 May 1998 Mr Noel Newnham, a former Commissioner of the Queensland Police Service, asked Mr Peckelharing about what he had told Mr Heiner. Mr Newnham's contemporaneous note of their conversation was that he replied, 'I told Heiner about the handcuffing and my disagreement with it.'[145] In giving evidence before me, Mr Newnham agreed that had Mr Peckelharing said that he had told Mr Heiner about sexual abuse then Mr Newnham would have recorded that in his notes.[146] Mr Newnham testified that in May 1998 he had been acting on 'behalf of finding out the truth'.[147] He had been asked to make inquiries by an organisation called the Enterprise Council. He understood that Mr Lindeberg was also then interested in the outcome of his inquiries. He called on Mr Heiner in the period between 13 and 15 May 1998 and informed him that he wanted to discuss what he had been told.[148] He made notes about what Mr Heiner said as he spoke. Mr Newnham's notes[149] show, and his testimony was, that he showed Mr Heiner a copy of what he understood to be the terms of reference.[150] The notes record that Mr Heiner 'acknowledged' the document. The notes record him to have said 'No mention of abuse of children'. Mr Newnham said that that remark related to what he called the 'obvious

[137] Exhibit 72C.
[138] Transcript 3(e), 23 January 2013 [p42: line 45].
[139] Transcript 3(e), 23 January 2013 [p54: line 15].
[140] Transcript 3(e), 23 January 2013 [p55: line 20].
[141] Transcript 3(e), 29 January 2013 [p61: line 45].
[142] Transcript 3(e), 29 January 2013 [p62: line 5].
[143] Exhibit 102.
[144] Transcript 3(e), 7 December 2012 [p34: line 5].
[145] Exhibit 288 [p2]; Transcript 3(e), 24 January 2013 [p121: lines 41-42].
[146] Transcript 3(e), 24 January 2013 [p122: line 45].
[147] Transcript 3(e), 24 January 2013 [p119: line 38].
[148] Transcript 3(e), 24 January 2013 [p123: line 40].
[149] Exhibit 287.
[150] Exhibit 289 was in the same terms as Exhibit 83.

fact' that the terms of reference did not refer to the abuse of children. The notes go on to record Mr Heiner said that some staff presented with written reports which they read from or used as aids for their memory, that he recalled some one or more persons saying something about handcuffs and suppressant drugs. Mr Newnham said that Mr Heiner told him these things because Mr Newnham had asked him what 'he was told'.[151] Mr Newnham did not consider that he had achieved his objective of finding out what Mr Heiner had discovered because Mr Heiner answered, as he put it, in the most 'general of terms'.[152] However, he was reluctant to push Mr Heiner. This reluctance was particularly odd given that on Mr Newnham's version, Mr Heiner had apparently opened up the subject of abuse by volunteering to Mr Newnham that the terms of reference did not mention the abuse of children.

Mr Daniel Lannen had worked as a youth worker at the centre from February or March 1987. One day he was asked to go to the conference room at the centre where he met Ms Flynn and another woman. There was no man present for the meeting. The discussion related to his concerns about the centre. He said that he thought he told Ms Flynn about the handcuffing of children, the use of drugs and the victimisation of staff. He stated that he did not recall telling her anything about sexual abuse but believed that he would have told her about that.[153] The only incident of this nature that he was then aware of was the incident involving Ms Harding.[154] Mr Lannen had written to Mr Pettigrew on 28 August 1989.[155] He had also written one of the nine statements that the Queensland State Service Union had provided to Mr Pettigrew.[156] Neither document contained any reference to sexual abuse.

Mr Michael Roch worked at the centre until late in 1988. Due to the effects of a stroke suffered in 2007 Mr Roch said that he had difficulties with his memory.[157] He claimed that he had been interviewed by someone on two occasions although he was not sure about that.[158] One interview occurred at the centre when he was still employed there.[159] The second interview took place at a building in the city. He did not recall the name of the man who interviewed him on the first occasion but when he was asked if it had been Mr Heiner he said that it could have been him. He could not remember what he told the man at the first interview but assumed that he spoke with the man about the management style. That assumption was based on his opinion that the style of management was appalling. When asked to explain why he assumed that the meeting was connected with management he said that they might have been having an investigation 'especially after the sad occurrence of Annette Harding'.[160] He said that he would not have raised that issue unless he had been asked about it. When asked how sure he was that he had been asked he said, 'I'm not sure.'[161] Later in his testimony he advanced the 'possibility' that he was the one who raised it.[162] The second interview, which took place in a building near the river, was conducted by a man, possibly Mr

[151] Transcript 3(e), 24 January 2013 [p129: line 10].
[152] Transcript 3(e), 24 January 2013 [p129: lines 10-25].
[153] Transcript 3(e), 5 December 2012 [p40: line 35].
[154] Transcript 3(e), 5 December 2012 [p66: line 25].
[155] Exhibit 62.
[156] Exhibit 72B.
[157] Transcript 3(e), 13 December 2012 [p3: line 10].
[158] Transcript 3(e), 13 December 2012 [p10: line 7].
[159] Transcript 3(e), 13 December 2012 [p12: line 18].
[160] Transcript 3(e), 13 December 2012 [p12: line 30].
[161] Transcript 3(e), 13 December 2012 [p13: line 39].
[162] Transcript 3(e), 13 December 2012 [p23: line 40].

Heiner,[163] and a woman. When asked to recall what was discussed on that occasion he said 'I think it was a combination of Peter Coyne's administration and I think it did touch on Annette Harding'.[164] He thought that the man raised her name. When asked how sure he was about any recollection that Annette Harding was raised he replied 'I'm not.'[165] Mr Roch's evidence indicating that he could not recall what was discussed in the interview at the centre contradicted what he had said in a written statement dated 12 November 2012[166] provided to the police team attached to the Commission. In that statement he asserted that the interview at the centre concerned 'the rape of Annette'. It can also be noted that it was only after he had provided an earlier statement[167] to the police that Mr Roch recalled the interview he claimed had occurred at the centre. In the earlier statement he said he was 80 per cent sure that he raised the incident about Ms Harding during the interview at the building in the city. Mr Roch said that when he was interviewed in the city there was a man and a woman present but for the interview at the centre there was just a man present.[168] His evidence about who was present at the interview at the centre was contradicted by the evidence given by Ms Flynn which is referred to in the summary of her evidence below.

Ms Irene Parfitt was employed at the centre in the period between August 1987 and August 1990. She commenced employment in another department in September 1990. In the statement[169] supplied to the Commission she said that she may have been interviewed in either March or September 1990. Ms Parfitt testified that she thought that she was interviewed after she had finished working at the centre.[170] She thought that she was interviewed at a Childrens Court by an older man who spoke to her on his own. She was 100 per cent sure that she mentioned the Harding incident.[171] However, at another point in her evidence she said that she could have been totally wrong about everything.[172] Although, despite a transcript that confirmed this occurred she had no recollection of being interviewed about the centre by a Mr Hobson from the Forde Inquiry on 3 March 1999, however, she accepted that she had in fact been interviewed by him on that date, that the interview had occurred in a building in Makerston Street and that they had discussed matters concerning sexual incidents at the centre.[173]

Ms Ann Dutney, who was the deputy manager at the time, testified that she was interviewed by Mr Heiner in the presence of Ms Flynn and another woman in late 1989. Mr Heiner undertook most of the questioning. Ms Dutney's impression was that he was only interested in exploring what she called 'negative elements of Peter Coyne'.[174] She had no recollection of him questioning her about sexual abuse and she said that she did not raise that topic with him.[175]

Mr Coyne testified that he was interviewed by Mr Heiner and Ms Flynn over a period of about four hours. The interview occurred at the centre and the discussion ranged over a

[163] Transcript 3(e), 13 December 2012 [p16: line 45].
[164] Transcript 3(e), 13 December 2012 [p9: line 17].
[165] Transcript 3(e), 13 December 2012 [p17: line 5].
[166] Exhibit 237.
[167] Exhibit 236.
[168] Transcript 3(e), 13 December 2012 [p10: line 17].
[169] Exhibit 42.
[170] Transcript 3(e), 12 December 2012 [p30: line 8].
[171] Transcript 3(e), 12 December 2012 [p26: line 30].
[172] Transcript 3(e), 12 December 2012 [p29: line 55].
[173] Transcript 3(e), 21 January 2013 [p27: line 50 – p28: line 40].
[174] Transcript 3(e), 10 December 2012 [p42: line 35].
[175] Transcript 3(e), 10 December 2012 [p38: line 20-30].

number of topics. He was asked about the use of handcuffs on the children. At no stage was he questioned about the Harding incident or about the sexual abuse of children.[176] The only incident which he then knew of which could have been regarded as involving sexual abuse was the Harding incident.[177]

Although Ms Cosgrove prepared transcripts from some of the tape recorded interviews she could not now recall whether allegations of sexual abuse were raised in the tapes she transcribed.[178] Ms Flynn said that nobody ever raised any allegation of sexual abuse with Mr Heiner when she was present.[179] She particularly recalled Mr Heiner's interview with Mr Roch because Mr Roch became very upset as he informed Mr Heiner of the way he had been treated by management at the centre. She said that Mr Roch's interview with Mr Heiner occurred at the centre.[180]

One written statement[181] made by Mr Heiner relatively close to the time of his interviews with staff is available. In a letter dated 19 January 1990 which was addressed to Ms Ruth Matchett, the Acting Director-General of the department, Mr Heiner informed her that he had agreed to undertake an inquiry 'into the style of management at the John Oxley Youth Centre.' He said that he 'perceived my enquiry to encompass the first' term of reference which was '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.[182] In his letter to Ms Matchett,[183] Mr Heiner stated that he 'believed that the other seven matters in that annexure [terms of reference] were concomitant with the first matter'. The written statements containing complaints from staff were in Mr Heiner's possession when he conducted his inquiry. Not one of those statements referred to sexual abuse or to the Harding incident.

It is relevant to consider what Ms Warner, the Minister who brought the matter of the Heiner investigation to the attention of the new Cabinet, knew about the nature of the material she recommended should be destroyed. Ms Warner did not look at the material at any stage.[184] She understood that Mr Heiner had gathered what she called 'testimony'[185] from staff. She understood from speaking with Ms Matchett that it involved 'low level comments' made about staffing matters.[186] It was only at about the time of the Forde Inquiry, in 1999, that she first became aware of media reports asserting a connection between Mr Heiner's investigation and child sexual abuse.[187]

Another member of Cabinet, Mr Pat Comben, said in 1999 that 'In broad terms we [Cabinet] were all made aware that there was material about child abuse'.[188] That was not Ms Warner's understanding[189] and she stated that she contacted Mr Comben about

[176] Transcript 3(e), 11 December 2012 [p53: lines 1-10].
[177] Transcript 3(e), 11 December 2012 [p57: line 40].
[178] Transcript 3(e), 4 December 2012 [p12: line 35].
[179] Transcript 3(e), 4 December 2012 [p36: line 40 – p37: line 5].
[180] Transcript 3(e), 5 December 2012 [p42: line 10 – p43: line 10].
[181] Exhibit 123.
[182] Exhibit 83.
[183] Exhibit 123.
[184] Transcript 3(e), 14 February 2013 [p95: line 45].
[185] Transcript 3(e), 14 February 2013 [p104: line 15].
[186] Transcript 3(e), 14 February 2013 [p109: lines 12-20].
[187] Transcript 3(e), 14 February 2013 [p115: lines 1-10].
[188] Transcript 3(e), 18 February 2013 [p25: line 18], [p75: line 25].
[189] Transcript 3(e), 18 February 2013 [p25: line 32].

what he had said and asked him what he knew that she did not. She said that Mr Comben replied 'Nothing'.[190]

Mr Comben testified that Ms Warner contacted him after he made the statement, which had been broadcast on television, and asked him what it was he had been referring to and what it was that he knew. He said that he told Mr Warner that he knew nothing.[191] Mr Comben testified that he did not know why he asserted that 'we' know something. He said only he knew things and he erred in asserting that Cabinet had knowledge of what he knew.[192] He had never looked in the box which contained the material Mr Heiner had gathered. He had never even seen the box.[193] He said that he had no specific knowledge about any matters involving child abuse.[194] Over some period of time he had received complaints at his electoral office about things that had allegedly occurred at the Sir Leslie Wilson Youth Centre, he had received complaints from homeless youths who had were detained at the John Oxley Youth Centre and had received 'low grade scuttlebutt' from some staff about children being inappropriately treated or inappropriately punished. He said that it was information of this nature which he had in mind when he referred to 'child abuse' in the statement broadcast in 1999.[195]

The only people still alive who claim to have examined the material Mr Heiner had gathered are Ms Lesley McGregor and Ms Kate McGuckin. Ms McGregor was the State Archivist. Ms McGuckin was an officer who was employed at the State Archives. On 23 February 1990 they examined the material Mr Heiner had gathered. It consisted of various cassette tapes, computer discs and a number of typed transcripts. Both said that, insofar as they could determine, the transcripts concerned complaints about the actions of management by the staff at the centre.[196] Ms McGuckin thought that if there had been anything in there about child abuse or similar then it would 'have stood out, I'm sure'.[197]

Change of government

A state election was held on 2 December 1989. The National Party Government lost the election to the Australian Labor Party opposition. Mrs Nelson believed that she resigned as a Minister on Monday, 4 December 1989.[198] On 5 December 1989 Mr Pettigrew wrote to Mr Nix[199] and advised that earlier that day he had raised the question of Mr Heiner providing Mr Coyne with access to the letters of complaint. Mr Heiner declined to make the letters available because some had been written on a confidential basis and Mr Heiner was 'not disposed towards breaking that confidentiality'. Access to copies of the statements containing complaints about Mr Coyne had clearly become a contentious issue at an early stage of Mr Heiner's investigation.[200] Mr Coyne testified that he had asked Ms Flynn for copies of the statements. He said that he had been 'very strong'[201] with Mr Peers, Mr Nix and Ms Flynn about access to the statements. He testified that he

[190] Transcript 3(e), 18 February 2013 [p25: line 40].
[191] Transcript 3(e), 18 February 2013 [p93: lines 25-40].
[192] Transcript 3(e), 18 February 2013 [p75: lines 30-40].
[193] Transcript 3(e), 18 February 2013 [p76: line 20].
[194] Transcript 3(e), 18 February 2013 [p94: line 8].
[195] Transcript 3(e), 18 February 2013 [p75: lines 20-30].
[196] Transcript 3(e), 1 February 2013 [p53: line 40], [p6: lines 30-40].
[197] Transcript 3(e), 11 February 2013 [p7: line 10].
[198] Transcript 3(e), 24 January 2013 [p85: line 5].
[199] Exhibit 91.
[200] Transcript 3(e), 22 January 2013 [p50: line 45]; Transcript 3(e), 13 February 2013 [p41: line 30].
[201] Transcript 3(e), 11 December 2012 [p35: line 35].

wanted copies because he did not think that he could respond meaningfully to the complaints unless he knew the detail of them. He said that the first term of reference required Mr Heiner to determine the validity of the complaints. Although Mr Coyne had been given a document[202] which listed the names of the complainants and a summary of each person's complaint, he did not consider it sufficient for him to be able to respond properly. He understood that the document[203] had been prepared for him with Mr Heiner's knowledge.

On 7 December 1989 Ms Anne Warner was appointed as the Minister for Family Services.[204] The following day on Friday, 8 December 1989 Mr Nix had a meeting with some youth workers employed at the centre. In a memorandum,[205] written some days later, Mr Nix noted that the staff complained of 'inappropriate questions' directed to them by Mr Heiner which, although relevant to the terms of reference, were 'slanted towards whether or not individuals have complaints about the Manager, Peter Coyne'. On 11 December 1989 Ms Ruth Matchett was appointed as the Acting Director-General of the Department.[206] Prior to assuming that role she had been the Executive Director (Community Support) in the department, a position that reported to Mr Nix. As the Acting Director-General Mr Nix was to then report to her. Mr Pettigrew was transferred to another department.

On 14 December 1989 Mr Coyne wrote a memorandum to the 'Director-General'.[207] He made reference to the investigation of complaints by staff at the centre and requested 'a copy of the allegations made against me', and a 'a copy of the transcripts of evidence taken during the investigation to date'. The memorandum was stamped as 'received' in the department on 15 December 1989. Mr Coyne testified that as Mr Heiner was required to determine the validity of the complaints, Mr Coyne needed to know more than allegations that someone had been 'victimised' if he was to provide a meaningful response.[208] Mr Coyne had not, at that stage, sought legal or other advice; the memorandum proceeded where he said from a 'common sense perspective', that responses to allegations could not be properly made in the absence of the details of the allegations.[209] A copy of this memorandum was sent to Mr Peers. Although Mr Peers did not seem to specifically recall seeing it, he knew from speaking with Mr Coyne that he was unhappy about the way that Mr Heiner's investigation had proceeded.[210] Mr Peers said it was fairly early in the process when he told Mr Nix that there was 'trouble' developing.[211] There was no evidence presented about whether Ms Matchett was shown this memorandum on or about 15 December 1989. Her evidence was that she only became concerned about the inquiry around 10 January 1990. On 15 December 1989 Mr Coyne wrote a memorandum to 'R Matchett, Acting Director-General'.[212] It said that on 15 December 1989 Ms Flynn informed Mr Coyne that letters supportive of him had not been 'tabled' at the inquiry. Mr Coyne wrote that consideration should be given to 'tabling' those letters. The memorandum was stamped as received on 18 December 1989.

[202] Exhibit 88.
[203] Exhibit 88.
[204] Exhibit 282.
[205] Exhibit 93.
[206] Transcript 3(e), 13 February 2013 [p74: line 5].
[207] Exhibit 96.
[208] Transcript 3(e), 11 December 2012 [p37: line 45].
[209] Transcript 3(e), 11 December 2012 [p38: line 10].
[210] Transcript 3(e), 22 January 2013 [p50: line 35].
[211] Transcript 3(e), 22 January 2013 [p50: line 45].
[212] Exhibit 97.

Mr Nix's diary entry for 15 December 1989 stated '9am Ruth re JOYC'.[213] Either at that meeting with Ms Matchett, or as a result of that meeting,[214] Mr Nix wrote the memorandum[215] referred to above. The memorandum contained his signature and the date '15/12/89'. He said that he either gave the memorandum to Ms Matchett or she solicited it from him. After setting out some detail of the complaints staff had made to him about Mr Heiner's inquiry on 8 December, Mr Nix went on to say:

> In my view, the situation is polarising the staff at John Oxley and it would appear to me that there will be no winners at the end of the day. The following is brought to your attention.
>
> - You should be aware that a number of managerial staff at John Oxley are ready to throw it in (it was stated to me quite forcefully that if Peter Coyne goes, the majority of the senior staff would go with him).
> - You should be aware that the POA are very much involved with the senior staff. Basically, they are keeping their powder dry at this point in time but are not happy. Do you know if Kevin Lindenberg (sic) has briefed the Honourable the Minister – he advised staff that he would be doing so?
> - It is my opinion that the Magistrate should give you a briefing of where he is at with the inquiry.
>
> Some solutions for consideration:
>
> - time limit the inquiry;
> - call for a report; and
> - state what the outcome of the inquiry will be.
>
> In my view, depending on the flavour of the report, one outcome should be that the complaints will be dealt with by way of the grievance procedure on an individual basis. This is dependent upon what the Magistrate tells you when he briefs you.
>
> It is also my view that it is necessary that the Department be seen to support management and a clear message to given to staff (sic) that any future complaints should be submitted through appropriate channels. I would hope that a system can be devised whereby youth workers can make formal complaints to the Director-General after they have been duly noted by management and myself, rather than going direct to the Director-General. For example, it is not possible for a teacher in a school to write direct to the Director-General of Education, rather any such letters have to receive the endorsement of the principal of the school.

Ms Matchett testified that she had never seen this document before.[216] She agreed that a piece of paper with handwriting[217] contained notes that she had written and said that one note read 'George Nix, 15/12/89'. That note referred to a discussion with Mr Nix on that date.[218] She said that the note stated:

> Written complaints by QSSU. Peter doesn't know what the complaints are. Peter doesn't know what the process is. Peter to POA to magistrate. He will be last one called. Peter wants to know what the complaints are. Conflict between QSSU and POA. Peter is seeking legal advice.[219]

[213] Transcript 3(e), 13 February 2013 [p43: line 18].
[214] Transcript 3(e), 13 February 2013 [p44: line 36].
[215] Exhibit 93.
[216] Transcript 3(e), 13 February 2013 [p75: line 40]; Transcript 3(e), 14 February 2013 [p8: line 25].
[217] Exhibit 323.
[218] Transcript 3(e), 14 February 2013 [p8: line 1].
[219] Transcript 3(e), 14 February 2013 [p8: lines 5-10].

Ms Matchett agreed that she had been made aware on 15 December 1989 that there were difficulties between Mr Coyne and Mr Heiner.[220]

On 18 December 1989 Mr Coyne wrote to Ms Matchett again.[221] He enclosed copies of a summary of a meeting with the Queensland State Service Union,[222] the terms of reference[223] and a list of names and summaries of complaints[224] and asserted that information needed for the purposes of enabling him to fairly defend his reputation had been kept from him. He put 21 questions to the Director-General. Some of these questions included:

> …
>
> 2. Why was an investigation of this nature required in preference to individual staff members submitting grievances as provided for by Regulation 63 of the Public Service Management and Employment Regulations of 1988?
>
> …
>
> 8. What rules and/or guidelines exist for the operation of this investigation? I was concerned about how I could possibly conduct a defence of my reputation without knowing the specific allegations made against me by other persons. Mr A Pettigrew was not prepared to provide me with a copy of the complaints and I received no communication from Mr Heiner or his assistants regarding requests. On 29 November, 1989, I went to see Mr Heiner without an appointment. He would not see me, nor would he make an appointment for me to see him at a later date.
>
> After discussion with Ms J Cosgrove, I was given an unsigned document (attachment number three). No details were given to me regarding the status of this document or any information about it's (sic) use.
>
> …
>
> I then requested clarification on the status of the document and it's (sic) use from Mr Heiner via Ms Flynn. Mr Heiner has made no response. Ms Flynn has since told me that she believed the document was confidential and should not have been given to other people. I offered not to give a copy to other people but she said it was too late.
>
> 9. How will I be permitted to conduct a defence against these allegations?
>
> I have been told that the persons making allegations will be interviewed, any person who requests an interview will be interviewed, and a number of staff will be selected at random and interviewed. However, no person will be interviewed against their will. I will then be the last person interviewed.
>
> I have been told that I will not be able to cross examine any person. Nor will I be permitted to call witnesses. I have also been told I will get a fair hearing on the last day.
>
> …
>
> 16. What legislative base does this inquiry have?
>
> …
>
> 18. Where will the records associated with this investigation be filed?
>
> 19. Will the transcripts of evidence be kept and filed? I would strongly request that the transcripts not be destroyed.

[220] Transcript 3(e), 14 February 2013 [p10: line 26].
[221] Exhibit 98.
[222] Exhibit 66.
[223] Part of Exhibit 83.
[224] Exhibit 88.

Mr Coyne also sent a copy of this memorandum to Mr Peers. Mr Peers recalled that he discussed it with Ms Matchett.[225] He could only say that the discussion occurred early in her term as Director-General and that her view was that all official responses to Mr Coyne's letters ought to be sent through her office. He recalled that she thought that Mr Coyne's letters may have been an attempt to elicit inconsistent replies from the department.[226] However, Ms Matchett had no recollection of seeing this memorandum with questions[227] before Christmas 1989.[228]

On 18 December 1989 Mr Nix prepared a briefing note[229] at Ms Matchett's request. It was designed to acquaint her with issues that were going on in the department. In relation to the inquiry at the centre the note stated, 'This matter has been the subject of a separate memo concerning the concerns I have with the present state of this inquiry'. Mr Nix said that this passage referred to the memorandum he sent to Ms Matchett on 15 December 1989.[230] Ms Matchett said that she had no recollection of having seen Mr Nix's memorandum of 18 December 1989.[231]

On 20 December 1989 Mr Nix went interstate for his holiday. He left some telephone numbers at which he could be reached in case someone needed to call him. While he was away Mr Peers acted in his role as Deputy Director-General. On 2 January 1990 Mr Peers wrote a memorandum to Ms Matchett[232] with copies of a number of documents attached. This included a copy of the report of the meeting that Mr Pettigrew had with Ms Walker on 14 September 1989,[233] copies of letters from staff who had written to support Mr Coyne, a copy of Mr Heiner's letter of appointment of 13 November 1989 and the terms of reference,[234] a copy of Mr Coyne's memorandum to Ms Matchett dated 18 December 1989 which posited the 21 questions[235] and a file compiled by Mr Nix which included the original letters of complaint. Mr Peers went on to say that Mr Coyne and other senior staff had told him that they were unhappy with the process, that some staff had expressed similar views to Mr Nix on 8 December 1989, that Mr Coyne and others had expressed their dissatisfaction to the Professional Officers Association and that Mr Coyne was due to be interviewed on 12 January 1990 after which a report would be prepared. Mr Peers could not recall whether he wrote this memorandum on his own initiative or because Ms Matchett asked for advice about the Heiner investigation.[236] Ms Matchett said that she did not see this memorandum until years later.[237] She did not ask Mr Peers to prepare it and had no idea why he wrote it.[238]

Mr Coyne's interview with Mr Heiner took place on 11 January 1990.[239] Prior to the meeting Mr Coyne rang Ms Matchett's office. He advised her secretary that no reply had been provided in response to his memoranda, that he was due to meet with Mr Heiner

[225] Transcript 3(e), 22 January 2013 [p51: line 20].
[226] Transcript 3(e), 22 January 2013 [p51: line 15-30].
[227] Exhibit 98.
[228] Transcript 3(e), 13 February 2013 [p76: line 35].
[229] Exhibit 99.
[230] Exhibit 93.
[231] Transcript 3(e), 13 February 2013 [p76: line 8].
[232] Exhibit 101.
[233] Exhibit 66.
[234] Exhibit 83.
[235] Exhibit 98.
[236] Transcript 3(e), 22 January 2013 [p54: line 5].
[237] Transcript 3(e), 13 February 2013 [p77: lines 30-40].
[238] Transcript 3(e), 13 February 2013 [p78: lines 1-10].
[239] Transcript 3(e), 11 December 2012 [p49: line 12].

that day and that he wanted a response.[240] Mr Coyne disagreed with the proposition that his telephone call was merely an attempt to maintain pressure on Ms Matchett or to generate a trail of ignored correspondence to be deployed for his purposes at a later time. He maintained that he believed that he would succeed in gaining access to the letters of complaint. Mr Coyne decided to go ahead with the meeting with Mr Heiner because he was concerned that it might have been the only opportunity he would have to put forward his views. What was discussed at the meeting has been referred to earlier. At the end of the meeting Mr Heiner asked a question about a personal relationship Mr Coyne had allegedly had with a colleague. Mr Coyne said that he regarded the question as very offensive.[241]

Ms Matchett testified that her secretary would have told her about Mr Coyne's telephone call. Ms Matchett said that Mr Coyne met with her at 5.30 pm on 11 January 1990. She thought that the meeting had been arranged some days earlier. Notes which she had made in February 1990 recorded that she met Mr Coyne in the presence of Mr T Walsh, her executive assistant. Mr Coyne told her that Mr Heiner put to him that he had been involved in a sexual relationship with a female colleague. She discussed the matter with him and gave him some personal advice.[242] She said that she assured Mr Coyne that the truth or otherwise of such an allegation was of no concern to the department. She further stated that Mr Coyne was very distressed and emotional. She told Mr Coyne that she would look into how the inquiry was established and how it was being conducted.

Subsequently Ms Matchett asked to be provided with the papers relevant to the establishment of the inquiry and to Mr Heiner's appointment. She thought that she was provided with a copy of the minutes of the meeting had with the Queensland State Service Union on 14 September 1989.[243] She was never shown copies of the nine statements of complaint. She recalled seeing a copy of Mr Heiner's letter of appointment and his terms of reference.[244] She also saw a copy of Ms Walker's letter of 10 October 1989.[245]

On 15 January 1990 Mr Coyne wrote to Ms Matchett[246] and referred to his previous request for advice about the legislative basis for the inquiry and stated that he was still waiting for a reply. Ms Matchett did not receive this memorandum until 18 January 1990. On 15 January 1990 Mr Coyne wrote to Mr Gary Clarke, who was identified as the Director, Organisational Services,[247] and said that he had been concerned about Mr Heiner's behaviour towards him. Mr Coyne asked whether Mr Heiner was an officer of the public service or not. Mr Coyne was told that Mr Heiner was not an officer. The significance of Mr Heiner's status was that the availability of a grievance procedure under the Public Service Management and Employment Regulations depended upon whether or not Mr Heiner was a public servant. Mr Coyne testified that he asked about the grievance process because of the last question Mr Heiner had put to him.

[240] Exhibit 106.
[241] Transcript 3(e), 11 December 2012 [p59: line 25].
[242] Transcript 3(e), 13 February 2013 [p8: lines 40-45].
[243] Transcript 3(e), 13 February 2013 [p82: line 45]; Exhibit 66.
[244] Transcript 3(e), 13 February 2013 [p85: line 17]; Exhibit 83.
[245] Transcript 3(e), 13 February 2013 [p87: lines 30-40]; Exhibit 72.
[246] Exhibit 107.
[247] Exhibit 108.

Also on 15 January 1990 Mr Coyne wrote in the following terms to Ms Matchett:

> I am aware I am subject to complaints by known and unknown persons. The Department has received written complaints and copies of these complaints have been given to Mr Heiner. I have previously requested copies of these complaints on 14 December 1989 and 18 December 1989. However, I have not received any correspondence regarding those requests.
>
> In accordance with Regulation 65 of the Public Service Management and Employment Regulations, I request a copy of records held on myself relating to the abovementioned investigation.
>
> Your advice within forty-eight hours would be appreciated as the investigation closes on Wednesday, 17 January 1990.[248]

Ms Matchett said that she may not have seen this memorandum or one[249] sent in similar terms to her by Ms Dutney.[250] However, she would have been told about their requests when she signed the replies[251] to Mr Coyne and Ms Dutney which advised them that their requests could not be complied with because there were no records of those descriptions on their personal files and that she was not aware of any other departmental files relevant to their requests. From the material provided to her Ms Matchett concluded that Mr Heiner had been appointed 'by way of a simple letter' and so she needed to take further steps to ascertain how he had been 'constituted'.[252] She agreed that two obvious sources of information about this were Mr Pettigrew and Mr Nix. She did not contact Mr Pettigrew because he was 'absolutely flat out' establishing a new department and she did not think it 'good form' to ring him and say that she could not ascertain how the appointment had been made.[253] She asked her department whether a Cabinet submission could be located which might cast some light on how Mr Heiner had been appointed. No submission could be found. She then resolved to contact the Cabinet Secretariat to see if that office could assist. Someone there told her that there was no Cabinet submission but that the matter had been raised in the collective minutes of the Cabinet. She decided then to contact Crown Law[254] and agreed that she probably did so on 16 January 1990.

A handwritten file note[255] made by Mr O'Shea, the then Crown Solicitor, was deciphered by Mr Barry Thomas. Mr Thomas was a lawyer employed in the Crown Solicitor's office in the relevant period. Mr Thomas said[256] that Mr O'Shea's note was:

> 16/1/90 I rang Ruth Matchett back; in November 1989 inquiry John Oxley Youth Centre staff's complaints, QSSU –
>
> Complaints; Noel Heiner retired SM; 13/11/89 brought terms of reference appointed by DG at the time by letter; question put to him whether he was having a sexual relationship with …. 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.

In the meantime Ms Dutney had decided that she would see a solicitor about her position. Mr Coyne went with her to the offices of Rose Berry and Jensen at Ipswich

[248] Exhibit 109.
[249] Exhibit 109A.
[250] Transcript 3(e), 13 February 2013 [p93: lines 25-30].
[251] Exhibit 111; Exhibit 112.
[252] Transcript 3(e), 13 February 2013 [p89: lines 1-10].
[253] Transcript 3(e), 13 February 2013 [p90: lines 1-10].
[254] Transcript 3(e), 13 February 2013 [p92: line 5].
[255] Exhibit 110.
[256] Transcript 3(e), 30 January 2013 [p51: lines 15-30].

where they met with Mr Ian Berry, a partner in that firm. After explaining the circumstances to Mr Berry, Mr Coyne said that Mr Berry resolved to write to Ms Matchett. At 5.17 pm on 17 January 1990 Mr Berry's office faxed a letter to Ms Matchett[257] which stated:

> We act for Mr Peter Coyne and Mrs Anne Dutney employees of your department.
>
> The instructions received indicated that since late 1989 under the order of your predecessor, an enquiry was established under the provisions of the Public Service Management and Employment Act 1988. Though our clients do not know the basis of the establishment of the enquiry, they were asked by Mr Heiner's office to give evidence before him. In late 1989 taped evidence was given by Mrs Dutney, and only recently taped evidence was given by Mr Coyne.
>
> At the outset Mr Coyne requested details of the allegations made against him. Mr Heiner's office provided him with a list of grievants and a summary of their complaints.
>
> Mrs Dutney was not supplied with any list, and it was represented to her that no allegation has been made concerning her. It was upon that basis she assisted the enquiry by giving evidence.
>
> It was put to Mr Coyne, by Mr Heiner, when giving evidence just recently that he had a sexual relationship with … Mr Coyne denied the allegation.
>
> …
>
> Our clients are most concerned that they have been denied natural justice in defending themselves from allegations from persons unknown to them.
>
> …
>
> It is therefore open to you, to review the decision of your predecessor by providing further directions to the appointed enquirer Mr N Heiner to:
>
> A. Allow all further witnesses, in allegations concerning either or both our clients, to be examined and cross examined by them or their advocate.
>
> B. That all specific allegations relating to our clients be particularised as to time place and the action or words alleged.
>
> C. Allow for them, or either of them, to have copies of all allegations and evidence taken to date, including copies of the tapes used in recording the evidence.
>
> D. Allow them to recall witnesses for cross examination concerning the specific allegations against our clients.
>
> The principles of natural justice are well founded, and it is our firm opinion that we will be able to persuade a Court to intervene on a Writ of Prohibition to injunct the enquirer from proceeding further with the enquiry until full observance of the applicable principles, a précis of which we have stated herein. However that procedure is costly and unnecessary if you recognise the correctness of the natural justice principles.
>
> … we respectfully request your response by 2.00p.m. 18th January 1990.

Both Mr Coyne and Ms Dutney testified that the objective was not to shut down Mr Heiner's inquiry but to have Mr Heiner afford them a fair hearing.[258] Both wanted an opportunity to answer any complaints staff had made about them and both were willing to provide their answers to Mr Heiner.[259] On 18 January 1990 Ms Matchett wrote to Mr

[257] Exhibit 113.
[258] Transcript 3(e), 10 December 2012 [p43: line 40]; Transcript 3(e), 11 December 2012 [p66: line 45 – p67: line 5].
[259] Transcript 3(e), 10 December 2012 [p43: lines 30-40]; Transcript 3(e), 11 December 2012 [p67: lines 10-20].

O'Shea and sought his advice about how she should respond to Mr Berry's letter.[260] In another letter sent to Mr O'Shea that day[261] Ms Matchett sought his advice about a letter that she proposed to send to Mr Heiner. Mr O'Shea replied to the second letter at 12.45 pm that day.[262] Mr O'Shea was of the view that the power to appoint Mr Heiner to carry out an investigation could be found in a number of provisions of the Public Service Management and Employment Act. Provided that an appropriate written instrument of delegation existed and that his appointment was in writing, Mr Heiner was empowered to conduct the investigation. Mr Heiner's powers to carry out an investigation were in contrast with the powers conferred on a person appointed to inquire pursuant to the *Commissions of Inquiry Act 1950*, Mr O'Shea observed that 'the possibility of defamation proceedings arising out of any information given to him would also have to be borne in mind'. He said that no 'absolute privilege' would apply to things said or provided to Mr Heiner, unlike the position which would have obtained had he been appointed under the Commissions of Inquiry Act. Mr O'Shea endorsed the terms of the letter Ms Matchett proposed to give to Mr Heiner. Ms Matchett wrote to Mr Heiner later that day.[263] She cited uncertainty about the source of his power to request correspondence as giving rise to a need for them to meet to clarify the position. Mr Heiner replied[264] in terms which betrayed a distinct lack of enthusiasm for a meeting.

After reading Mr O'Shea's letter, which mentioned the possibility of defamation action, Ms Matchett said that she became concerned about what would happen if all the allegations supposedly made to Mr Heiner were to become the subject of action by staff. She thought the situation could have become very unpleasant given that the staff had provided information believing that it would be treated confidentially. She said that she also became concerned about Mr Heiner's position.[265]

In the meantime Mr Coyne submitted more correspondence to Ms Matchett[266] again requesting access to records held on him pursuant to regulation 65 of the Public Service Management and Employment Regulations and again requesting advice about the legislative basis for Mr Heiner's inquiry. On 19 January 1990 Ms Matchett forwarded that correspondence to Mr O'Shea so that he might advise her about how she should respond.

On the same day she met with Mr Heiner. By reference to notes made on that date[267] Ms Matchett was able to say that she told him that some staff at the centre and some staff in the department had raised concerns with her about possible legal action and possible denials of natural justice. She asked Mr Heiner how he saw his role. He replied that he did not propose to make recommendations, rather he was to find out the facts. She told him that there had only been an oral submission to Cabinet.[268] She told him she had not found any document to support his view that he had been appointed by Cabinet.[269] Mr Heiner said that he would proceed no further until the situation was clarified.[270] Ms Matchett also said that Mr Heiner was shocked to hear that he had not been appointed

[260] Exhibit 115.
[261] Exhibit 116.
[262] Exhibit 117.
[263] Exhibit 118.
[264] Exhibit 119.
[265] Transcript 3(e), 13 February 2013 [p99: line 40 – p100: line 20].
[266] Exhibit 120; Exhibit 121.
[267] Transcript 3(e), 14 February 2013 [p4: line 40].
[268] Transcript 3(e), 14 February 2013 [p5: lines 1-40].
[269] Transcript 3(e), 14 February 2013 [p21: line 40 – p23: line 12].
[270] Transcript 3(e), 14 February 2013 [p24: line 30].

by Cabinet under the Commissions of Inquiry Act.[271] By 11.30 am that day Mr Heiner wrote to Ms Matchett. That letter[272] stated:

> Following discussions on the morning of 19th January, 1990 between Ms Matchett and myself the question was raised as to the validity of the establishment and appointment and approval for my conducting this enquiry. I believed from the wording of the letter and annexure that I was to investigate matters and report to the Honourable the Minister and Director-General. I inferred from that that approval and authority from the Honourable the Minister to authorise the Director-General to appoint me to conduct this enquiry had had the specific approval of Cabinet for this action to be taken. I proceeded on the basis that Cabinet, through the Minister and thus subsequently through the Director-General to myself, had been authorised and approved. Following discussions this morning I have serious doubts as to the validity of the enquiry which I am conducting. I am not satisfied firstly that Cabinet was aware of the intention for the Director-General or the Minister to authorise the enquiry. It seems to me from the document that I have seen that it may have been the Minister solely who was responsible for the authority and my appointment to conduct the enquiry. I base this on a document I have, undated, which I have seen which purports to be notes that the Minister relied on for her submission to Cabinet – the last part of which reads, 'I have agreed to accept the recommendation of the Director-General on this matter. It does not seem possible to ascertain particulars or information as to whether that recommendation was made or that Cabinet has in fact authorised this enquiry.
>
> …
>
> In view of the confusion which exists and my doubt as to the validity of my actions so far, I am not prepared to continue any further with my inquiry. The action taken by me to this point was taken in good faith and in the belief that the whole structure of my appointment and authority to so act had been legally and properly constituted by Cabinet downwards. I am therefore ceasing from now to continue any further with the matter until I have obtained written information and confirmation that my actions to date including my appointment and authority to act are validated. I have had each of the interviews recorded by tape recorder and these tapes have been transcribed. I will retain possession of each of these records of interview personally and take no further action until I receive further advice from the Director-General along the lines I have suggested.
>
> If after the Director-General has received legal advice and she determines no further action be taken I will produce to her all the documents which I have maintained as a result of my enquiry and she may do with them as she is advised to do. There has been reference to legal proceedings being taken as a result of my enquiries. I believe if there is any legal action taken, the Department of Family Services and Aboriginal and Islander Affairs should take action to indemnify all my actions to date.

Ms Matchett sent Mr Heiner's letter to Mr O'Shea.[273] At 12.27 pm on 19 January 1990 Mr O'Shea faxed a letter to Ms Matchett.[274] In it he said that he was yet to finally determine which provision in the Public Service Management and Employment Act authorised the appointment of Mr Heiner. After noting that Ms Matchett was to meet with the Queensland State Service Union and the Public Officers Association later that day Mr O'Shea went on to say:

> The problems concerning the possibility of defamation proceedings and indeed the general power of Mr Heiner to be conducting this inquiry remain, but these can be addressed further, if and when you are in a position to give me more complete instructions.

[271] Transcript 3(e), 14 February 2013 [p2: line 20].
[272] Exhibit 123.
[273] Exhibit 123.
[274] Exhibit 124.

> I confirm my telephone advice to your Mr Walsh today that for the time being it would be better not to respond to the Solicitors' letter.

Mr O'Shea said that Mr Thomas would now handle the matter.

At 3.00 pm on 19 January 1990 Ms Matchett met with Mr Kevin Lindeberg from the Public Officers Association and Ms Walker and Ms Susan Ball from the Queensland State Service Union. Ms Ball's note[275] of the meeting records that Ms Matchett believed that Mr Heiner's inquiry had not been 'properly constituted under the powers of the Chief Executive nor by any other powers.' Ms Suzanne Crook, the department's industrial officer, said that it was believed that Mr Pettigrew did not have the power to establish the inquiry or appoint Mr Heiner. Ms Crook also said that 'certain management staff at JOYC had threatened legal action against the Department.' I note that the evidence before me demonstrates that the only legal action 'threatened' against the department at that stage had been Mr Berry's letter about the possibility of obtaining a writ of prohibition. Ms Ball's note also recorded that 'Ms Matchett indicated … her view that the Inquiry was not legally constituted and therefore should be abandoned as soon as possible.'

By reference to notes she made on 19 January 1990 Ms Matchett stated that Mr Lindeberg said that he thought action needed to be taken to ensure that the tapes used to record the interviews were secured. Ms Matchett could not recall whether he explained why that needed to occur.[276] On Monday, 22 January 1990 Mr O'Shea spoke to Mr Thomas and asked him to attend a meeting that day. Prior to that Mr Thomas had not been involved with the matter. Mr Thomas met with Ms Matchett and Ms Crook at 11.00 am. By reference to notes which he made as the meeting occurred[277] Mr Thomas testified that either Ms Matchett or Ms Crook told him that 55 people worked at the centre, that Mr Heiner did not intend to make any recommendations, that the outcome would not satisfy any of the unions or the managers and that there had been no Cabinet approval. His note referred to the possibility of a new appointment from either inside or outside the department. Mr Thomas said that he probably raised the possibility of having another person conduct a new inquiry and that the options included a departmental officer or an officer from another department. He had also made a note about replying to Mr Heiner's letter and about obtaining an indemnity for him. His note also included the words 'destroy files'. This was a matter that Ms Matchett raised.[278] She told Mr Thomas that staff had complained about Mr Coyne's overbearing nature, and she did not want the situation to be made worse by the staff possibly being victimised, though he could not recall her actually using the word 'victimised'.[279] Ms Matchett recalled meeting Mr Thomas but could not recall who said that 55 people were employed at the centre. She said she would have told Mr Thomas that Mr Heiner was going to find facts but not make recommendations. Either she or Ms Crook said that what Mr Heiner proposed to do would not satisfy the unions or management. She said that either she or Ms Crook told Mr Thomas that the inquiry did not have Cabinet approval. She could not recall who raised the possibility of appointing a new inquisitor or who raised the possibility of an indemnity for Mr Heiner. The destruction of files was discussed but she did not raise it as an option.[280] She said that she wanted advice about what they could do with the documents.

---

[275] Exhibit 125.
[276] Transcript 3(e), 14 February 2013 [p6: line 40 – p7: line 30].
[277] Exhibit 126.
[278] Transcript 3(e), 30 January 2013 [p59: line 30], [p86: line 28].
[279] Transcript 3(e), 30 January 2013 [p59: line 40].
[280] Transcript 3(e), 14 February 2013 [p31: lines 5-10].

Later on Monday 22 January 1990 Ms Matchett raised the possible application of the *Libraries and Archives Act 1988* with Mr Thomas.[281] On Tuesday 23 January 1990 Mr Thomas sent Ms Matchett his advice,[282] settled after consultation with Mr O'Shea.[283] Mr Thomas expressed the opinion that Mr Heiner had been 'lawfully appointed' to conduct his inquiry pursuant to section 12 of the Public Service Management and Employment Act. He testified that he firmly held that view and never subsequently said anything to Ms Matchett to suggest anything to the contrary. In the advice Mr Thomas wrote that there was no 'legal impediment to the continuation of the inquiry'. However, some other considerations operated, he said, that could lead to a conclusion that no useful purpose would be served by a continuation of the inquiry. He identified those considerations as the unlikelihood that any report by Mr Heiner would satisfy any person affected by it and that the 'whole matter' had 'gone astray from its inception'. Mr Thomas testified that the desirability or otherwise of persevering with an inquiry conducted by Mr Heiner seemed to be a matter Ms Matchett wanted advice about so that was why he referred to what might be regarded as a question of policy.[284] Mr Thomas went on in the letter to advise that it was appropriate for:

> …Cabinet to be approached for an indication that should any proceedings be commenced against Mr Heiner because of his involvement in this inquiry, the government will stand behind him in relation to his legal costs and also in the unlikely event of any order for damages against him. In short, that he will be indemnified from all costs associated with carrying out the task he was given.

Mr Thomas testified that it was 'standard' for all public servants to be indemnified for their work as public servants.[285] Indeed, a policy to that effect had existed, at least since 1975.[286] Mr Thomas wrote that Mr Heiner's informants had no statutory immunity from 'suit or action for defamation' in providing information to Mr Heiner, though they might have 'qualified privilege'. Mr Thomas testified that had the informants been witnesses at a commission of inquiry any evidence given there could not be used against them except for contempt. However, actions could be brought against those who gave information to Mr Heiner, though provisions of the Criminal Code might have operated to provide them with a qualified privilege. Mr Thomas wrote that some of the material Mr Heiner had gathered could have been 'defamatory'. He had assumed that those who had wanted to complain about Mr Coyne might have made statements that were defamatory of him.[287] Mr Thomas was never provided with the material that Mr Heiner had obtained. Mr Thomas went on to observe to Ms Matchett that the material Mr Heiner had gathered was 'now' in her hands. It had been collected from Mr Heiner by Mr Dermin Roughhead, the Executive Officer to the Director-General, acting at Mr Walsh's request. Mr Roughhead had gone to the Childrens Court, where Mr Heiner gave him a cardboard box which had been sealed with tape and which bore Mr Heiner's signature across the seals. Mr Roughhead took the box to Mr Walsh's office.[288] He did not open it. Mr Walsh did not look inside the box.[289] Ms Matchett never looked inside the box.[290] Mr Thomas wrote that if Ms Matchett decided to discontinue the inquiry then 'I would recommend that as

[281] Transcript 3(e), 30 January 2013 [p78: line 40 – p79: line 5].
[282] Exhibit 129.
[283] Transcript 3(e), 30 January 2013 [p79: line 40].
[284] Transcript 3(e), 30 January 2013 [p81: lines 1-10].
[285] Transcript 3(e), 30 January 2013 [p81: lines 20-25].
[286] Exhibit 341.
[287] Transcript 3(e), 30 January 2013 [p72: line 35].
[288] Exhibit 309.
[289] Exhibit 292.
[290] Transcript 3(e), 14 February 2013 [p34: line 20].

it [the material] relates to an inquiry which has no further purpose, the material be destroyed.' Mr Thomas explained to Ms Matchett that two considerations militated in favour of destruction, namely:

> …to remove any doubt in the minds of persons concerned that it remains accessible or could possibly affect future deliberations concerning the management of the …. Centre or the treatment of any staff at the Centre.

It should be noted that Mr Thomas did not say that the material should be destroyed due to a need to deter, defeat or avoid potential actions for defamation. However, the juxtaposition of the recommendation to destroy with the speculation that the material may have included defamatory material goes much of the way towards explaining why those who wrote the submissions provided to Cabinet expressed them as they did. Mr Thomas testified that the reasons he advanced in the letter in favour of destruction were informed by considerations such as that if the material was not destroyed then it might become available to a new inquiry and so taint it from the start, and staff might fear that Mr Coyne could gain access to it to retaliate against them.[291]

After distinguishing between what should be done with material Mr Heiner obtained from the department from what should be done with the material Mr Heiner gathered himself, Mr Thomas wrote that:

> This advice is predicated on the fact that no legal action has been commenced which requires the production of those files and that you decide to discontinue Mr. Heiner's inquiry. I note that in a letter of 17 January 1990 Messrs. Rose, Berry and Jensen, solicitors for Mr Coyne and Mrs Dutney request that they be allowed to have copies of all allegations and evidence taken to date. However, such request is related to the continuation of the inquiry which is now to be halted, therefore, it is my recommendation that the solicitors for Mr. Coyne and Mrs. Dutney be advised that the inquiry has been terminated, no report has been prepared, and that all documentation related to the material collected by Mr Heiner has been destroyed. I have enclosed a draft letter to this effect.

Mr Thomas also enclosed a copy of the Cabinet policy statement concerning indemnities for officers. The description of the document corresponds with Exhibit 341.

A note[292] made by Mr Thomas assisted him to testify that at about 9.30am on 24 January 1990 he spoke with Ms Matchett. The note included the words, 'destruct of documents (sic)'. Cabinet approval backlash union, need consent of Archives at least'. Mr Thomas said that Ms Matchett spoke of destruction, cabinet approval and backlash from a union. He did not know now who raised the need for consent from State Archives.[293] Ms Matchett's evidence, assisted by a copy of notes she had made,[294] was that Mr Thomas raised the notion of destroying the material.[295] Mr Thomas testified that he did not regard it as necessary for Cabinet approval to be obtained to destroy the material. He said that the documents were not created to inform Cabinet of anything and that the documents were not Cabinet documents. He could not think of any reason why he would have suggested that Cabinet be involved.[296]

[291] Transcript 3(e), 30 January 2013 [p74: line 40 – p75: line 40], [p82: lines 25-35].
[292] Exhibit 133 (unpublished).
[293] Transcript 3(e), 30 January 2013 [p86: lines 26-30].
[294] Exhibit 324.
[295] Transcript 3(e), 14 February 2013 [p63: lines 10-30].
[296] Transcript 3(e), 30 January 2013 [p86: line 30 – p87: line 15].

Mr Thomas's evidence, that there was no need to obtain Cabinet approval to destroy the documents, sits comfortably with the absence of any discussion of that course in either the written advice to Ms Matchett, dated 23 January 1990,[297] or in the memorandum Mr Thomas provided to Mr O'Shea on 22 January 1990,[298] which was the foundation for the advice to Ms Matchett. Indeed, in both documents Mr Thomas spoke of advising the solicitors for Mr Coyne and Ms Dutney of the fact that the material had been destroyed. Further, Mr Thomas drafted a letter to the solicitors,[299] which Ms Matchett never sent, stating that 'all material collected by Mr Heiner … has been destroyed in an effort to avoid biasing any future inquiry …' The draft letter is entirely consistent with the view Mr Thomas held that Cabinet approval for destruction was unnecessary.

Ms Matchett knew that Cabinet approval was not a necessary pre-requisite for the destruction of the material.[300] She took the view, however, that it was an issue that Cabinet should be asked to consider because it was a 'controversial thing to do'.[301] I accept Ms Matchett's evidence that she thought it 'prudent'[302] to bring the matter to Cabinet's attention.

Mr Peers identified a memorandum that he had written to Ms Matchett about a conversation he had with Mr Coyne on 24 January 1990.[303] The memorandum noted that Mr Coyne said that he and Ms Dutney had decided to leave Ms Matchett to make her decision about the inquiry, and consequently they would 'drop their Supreme Court action for a writ of prohibition…' At this point I note that no such action had been commenced, it had merely been mooted.[304] The memorandum,[305] also noted that they intended 'to continue their District Court action for access to the documents …' It is important to recall at this point Mr Coyne's evidence, that no such action had then been commenced and no such action was ever commenced.[306] Mr Peers said, and I accept, that he noted what Mr Coyne had said.[307] Mr Peers did not personally deliver the memorandum to Ms Matchett, he said it would have gone through the departmental mail system.[308] Mr Walsh did not recall giving the memorandum to Ms Matchett but said that he would normally have provided a document like this to her.[309] Ms Matchett said that Ms Walsh did not give her a copy of this document, she first saw it months or years later.[310] However, another notation on the unpublished Exhibit 133 was '10.10 24/1 R. Matchett, second-hand advice that Coyne withdrawing letter.' Mr Thomas made this note[311] and said that it meant that Ms Matchett had been told by someone that Mr Coyne was going to withdraw the request for access to the material. Mr Thomas assumed this was a reference to the solicitor's letter.[312] Having regard to this part of Mr Thomas's note

[297] Exhibit 129.
[298] Exhibit 128.
[299] Exhibit 129.
[300] Transcript 3(e), 14 February 2013 [p44: line 15].
[301] Transcript 3(e), 14 February 2013 [p44: line 25].
[302] Transcript 3(e), 14 February 2013 [p44: lines 35-40].
[303] Exhibit 131.
[304] Exhibit 113.
[305] Exhibit 131.
[306] Transcript 3(e), 11 December 2012 [p71: lines 1-12].
[307] Transcript 3(e), 22 January 2013 [p60: line 30].
[308] Transcript 3(e), 22 January 2013 [p61: lines 10-20].
[309] Transcript 3(e), 25 January 2013 [p75: lines 1-30].
[310] Transcript 3(e), 14 February 2013 [p39: lines 1-23].
[311] Transcript 3(e), 30 January 2013 [p87: lines 25-30].
[312] Transcript 3(e), 30 January 2013 [p87: line 30 – p88: line 10].

it seems reasonable to conclude that Ms Matchett was made aware of or became aware of at least one aspect of what Mr Coyne told Mr Peers on 24 January 1990.

On 29 January 1990 Mr Donald Martindale, the General Secretary of the Public Officers Association, wrote to Ms Matchett[313] and asserted that the failure to disclose the specific allegations made against Mr Coyne and Ms Dutney constituted a breach of regulation 63 of the Public Service Management and Employment Regulations.

By 5 February 1990 a Cabinet submission numbered '100' had been completed.[314] The submission had two parts, a 'Cover Sheet' which was three pages long, and a part headed 'Body of Submission' which was four pages long. Ms Crook testified that she prepared the first draft of the Cabinet submission.[315] Her recollection was that she was likely to have prepared it at Ms Matchett's request.[316] Ms Matchett's evidence accorded with Ms Crook's in this regard.[317] Ms Crook was sure that Ms Matchett reviewed the draft and may have made changes to it. Ms Matchett testified that it was highly likely that she did 'put in bits and pieces here and there'.[318]

The 'Body of the Submission' under the heading 'Background' stated:

> On 13th November, 1989, the former Director-General, Department of Family Services, following consultation with the former Minister for Family Services, appointed Mr N. J. Heiner, a retired Stipendiary Magistrate, to investigate and report on certain matters relating to the John Oxley Youth Centre. The investigation was initiated following representations by the Queensland State Service Union relating to concerns raised by some of its members over certain management practices at the Centre.
>
> Subsequent to the commencement of the investigation, a number of doubts emerged as to the legal basis and authority for Mr Heiner's appointment, the establishment of the investigation and hence the conditions under which it was being conducted. Accordingly, the Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs, sought the advice of the Crown Solicitor on the matter.
>
> Advice received from the Crown Solicitor indicated that, although Mr Heiner had been lawfully appointed as an independent contractor to perform his tasks, there were certain practical considerations which made it inadvisable for the investigation to continue. An important consideration was the lack of statutory immunity from 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 gathered by Mr Heiner in the course of his investigation.

Two matters should be noted. First, the assertion that the investigation related to certain 'management practices at the centre'. Second, the assertion that Mr Heiner and those from whom he received information were not immune from possible legal action due to Mr Heiner having received potentially defamatory material. The significance of what Cabinet was told Mr Heiner was appointed to investigate is the complete absence, again, of any suggestion that he had been appointed to investigate issues such as sexual abuse. In relation to defamation proceedings, none had been commenced as at 5 February 1990, and no such proceedings had been foreshadowed as a possibility by a solicitor. Under the heading 'Objective' it was stated:

---

[313] Exhibit 134.
[314] Exhibit 151.
[315] Transcript 3(e), 31 January 2013 [p69: line 22].
[316] Transcript 3(e), 1 February 2013 [p14: line 45].
[317] Transcript 3(e), 14 February 2013 [p47: line 40].
[318] Transcript 3(e), 14 February 2013 [p47: line 40].

> There currently exists a Statement of Policy issued by Cabinet in 1982, and distributed via Public Service Board Circular No. 13/82, in respect of Crown acceptance of legal liability for actions of Crown employees. This Statement provides, inter alia:-
>
> It is recognised that many Crown employees have difficult and delicate duties and functions and that in the diligent carrying out of them they are exposed to claims for damages.
>
> It is not desirable that such employees should be restricted in the carrying out of their duties and functions by any fear that they may have to make payment out of their own pockets in respect of any claims arising out of the due performance of these duties and functions.
>
> The Crown will accept full and sole responsibility for all claims including the cost of defending or settling them, in cases where the Crown employee concerned has diligently and conscientiously endeavoured to carry out his duties.
>
> It is by no means certain that Mr Heiner, in his capacity as independent contractor would be covered by a policy applying to Crown employees. However, as there is no doubt that Mr Heiner acted in good faith in performing his task, it is considered inequitable for him to be exposed to the risk of incurring costs associated with future legal action which may ensue. It is therefore proposed that Mr Heiner be indemnified from any such costs, in keeping with the Statement of Policy applicable to Crown employees, should legal action result from his part in the investigation into the operations at the John Oxley Youth Centre.
>
> Having considered the Crown Solicitor's advice and the limited value of its continuation, it has been decided to terminate the investigation. This will to some extent reduce the risk of legal action for all concerned. However, the fate of the material collected by Mr Heiner in the course of his inquiries has yet to be determined. This material has been handed in sealed boxes to the Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs. It has been stored in a secure place and has not been perused by the Acting Director-General.
>
> The Crown Solicitor has advised that, as the material gathered by Mr Heiner does not constitute a public record, there is no legal impediment to the Acting Director-General destroying it. This advice does not apply to material removed from official files, which should be returned, nor would it apply in the event of legal action requiring production of the material being commenced. To date, no such action has been initiated.
>
> As this material relates to an investigation which has been terminated and therefore has no further purpose, it is recommended that all material, with the exception of official material mentioned above, 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 the John Oxley Youth Centre.

It is obvious that there was not one, but rather, two objectives that were sought to be achieved. The first was to secure an indemnity for Mr Heiner; it was being sought due to a doubt that he was protected by the 1982 policy which covered Crown employees. The second objective was to secure Cabinet approval to enable the Acting Director-General to destroy the material. In pursuit of that objective it seems to have been overlooked that the 1982 policy would have been apt to indemnify staff of the centre should any proceedings have been brought against them. However, the submission was mindful of the impediment that a commenced legal action would have constituted.

Under the heading 'Consultation' it was stated that:

> Discussions have been held with the Queensland State Service Union and the Queensland State Service Union and the Queensland Professional Officers' Association, both of which have members affected by the investigation. Neither Union has raised any specific objections to the proposed course of action.

The submission did not inform Cabinet that Mr Berry had written on 17 January 1990 seeking access to the material Mr Heiner had gathered. An explanation for this omission might be that the request for access had been contingent upon the continuation of the inquiry by Mr Heiner. As it had been decided to end Mr Heiner's inquiry the request to provide access to the material so that those affected by it could be accorded natural justice was then to be regarded as serving no practical purpose. That was certainly Mr Thomas' view. It was not an unreasonable view in those circumstances.

Cabinet was not told of Mr Coyne's written requests for access to the material pursuant to regulation 65 of the Public Service Management and Employment Regulation. However, at that stage the view was open that his written requests were tied to the continuation of the inquiry. His statement to Mr Peers on 24 January 1990 informed that he and Ms Dutney intended to continue a non-existent action for access to the documents, notwithstanding their decision to 'drop' their non-existent action for a writ of prohibition should have been sufficient to alert the department to the fact that access to the material was no longer, if it ever had been, confined to access for the purpose of procedural fairness at an on-going inquiry. However, this oversight was later rectified as will be seen in information presented below.

Under the heading 'Recommendations' appeared the following:

> (i) the Queensland Government accepts fully and sole responsibility for all legal claims, including the cost of defending and settling them, against Mr N. J. Heiner, if such claims occur as a result of his investigation of matters relating to the John Oxley Youth Centre; and that
>
> (ii) all material collected by Mr Heiner in the course of his investigation, with the exception of any material forming part of official files, be destroyed.

In that part of the submission headed 'Cover Sheet' there appeared the following:

> Current government policy provides for Crown employees to be indemnified from costs associated with legal claims arising out of the due performance of their duties.

Under the heading 'Objective of Submission' it was stated that:

> 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.

On 6 February 1990 at 1.00 pm Ms Matchett and Ms Crook met with Ms Ball and Mr Brian Mann from the Queensland State Service Union. The minutes of that meeting[319] record that the 'Department outlined … they had abandoned the … Inquiry… and they were yet to be advised as to whether to destroy all of the evidence provided to the Inquiry to protect staff from legal action by the Management staff …' Ms Crook stated that she could have said this.[320] Ms Ball testified Ms Crook would have made this remark.[321] She said that Ms Crook had told her that the department had received threats of legal action for 'possible defamation'.[322] Ms Ball's minute went on to record that Ms Matchett said that she did not want the Queensland State Service Union to inform their members

[319] Exhibit 135.
[320] Transcript 3(e), 31 January 2013 [p68: line 10].
[321] Transcript 3(e), 30 January 2013 [p18: line 25].
[322] Transcript 3(e), 30 January 2013 [p18: line 30].

about the abandonment of the inquiry, instead she said that she intended to visit the centre the following Wednesday to inform the staff herself.

On 7 February 1990 Ms Matchett wrote to Mr Heiner[323] and told him that the Crown Solicitor had confirmed that his appointment accorded with the Public Service Management and Employment Act. Ms Matchett said that she had decided that his inquiry should not continue and that no report from him would be required. She said that the interviews he had conducted would 'remain confidential' and that the indemnity for any legal costs was being pursued. Also on that day the Queensland State Service Union issued a circular to their members who worked at the centre.[324] Members were advised that Ms Matchett intended to visit the centre early the following week to address the staff about security and staffing issues.

On 8 February 1990 Mr Berry wrote another letter to Ms Matchett.[325] It was stamped as received in her office on 9 February 1990. Although that letter was received three days prior to the Cabinet meeting at which the matters relating to Mr Heiner were to be discussed it was not forwarded to the Crown Solicitor's office with any degree of urgency. It was only received in the Crown Solicitor's office on 14 February 1990 with an undated cover letter signed by Ms Crook.[326]

Mr Berry's letter of 8 February 1990 relevantly stated that:

> As you know we act for the above persons who wish to exercise their rights as contained in Regulation 65 of the Regulations to the above Act.
>
> We specifically request copies of the following documents:
>
> (i) Statements of allegations made to the Department by employees appertaining to complaints against our clients and which may be the subject of Mr Heiner's enquiry; and
>
> (b) Transcripts of evidence taken either by Mr Heiner or in respect of the complaints which specifically refer to allegations of complaints against our clients.
>
> We are of the opinion that Regulation 65 includes such documents as they are within your control as such an enquiry was implemented by a direction from your predecessor the then Director General.

A reply within seven days was requested.

It will be recalled that regulation 65 was the provision which conferred on a public servant the right, at a mutually convenient time, to peruse and copy any departmental file or record held on that person. On 8 February 1990 the Director-General of the Department of the Attorney-General wrote to Mr O'Shea.[327] Reference was made to the impending Cabinet meeting at which Mr Heiner's appointment was to be discussed. So that the Attorney-General could be 'fully briefed for this meeting of Cabinet' Mr O'Shea was told to ensure that copies of all advice to Ms Matchett were provided to the Director-General of the Department of the Attorney-General by 3.00 pm that day. Later the same day Mr O'Shea wrote to the Director-General of the Department of the Attorney-General. That letter[328] stated as follows:

[323] Exhibit 136.
[324] Exhibit 137.
[325] Exhibit 141.
[326] Exhibit 153.
[327] Exhibit 142.
[328] Exhibit 143.

> Mr Heiner was not appointed to conduct a commission of inquiry and did not purport to exercise any powers such as compelling attendance before him or requiring people to answer any questions.
>
> It appears he interviewed approximately 35 people and may have tape recorded many of those interviews.
>
> In the circumstances of this inquiry, there is no absolute protection from action for defamation for either the informants or Mr Heiner although a qualified privilege would exist.
>
> On 17 January 1990 just prior to the completion of the investigation, the Solicitors for Mr Coyne and another employee, Mrs Dutney, wrote to Ms. Matchett asking to be informed of the legal basis for the inquiry and additionally to be supplied with material gathered by Mr. Heiner as well as having the right to cross-examine witnesses.
>
> I provided certain interim advice to Ms. Matchett on 18 January 1990 concerning the various provisions of the Public Service Management and Employment Act.
>
> On 19 January 1990 Ms Matchett met with Mr. Heiner who indicated in writing he would not continue further with the inquiry until he received written confirmation that his appointment and authority to act were valid. He supplied all the material he had collected to Ms. Matchett in a sealed envelope.
>
> On Monday, 22 January 1990 a conference took place between Ms. Matchett and Ms Crooke of the Department and Mr. Thomas of my office concerning the issue. On 23 January 1990 a letter of advice, including draft replies to Mr. Heiner and the Solicitors for Mr Coyne and Mrs Dutney, was provided to Ms. Matchett. The advice was to the effect that Mr. Heiner's appointment was a lawful exercise of the Chief Executive's power under Section 12 of the Public Service Management and Employment Act.
>
> Further, as the inquiry did not seem to be satisfying the needs of any of the affected parties, it should be terminated. The material which had been collected from any Departmental files should be returned to those files but the material created by Mr. Heiner should be destroyed.
>
> If it was desired to constitute a further inquiry into the Centre, my office would give specific advice on the method of appointment and terms of reference when a particular person was identified to undertake the investigation.
>
> Since that time further discussions have taken place between my officers and those of the Department.
>
> It appears that the decision whether to destroy any material is to be referred to Cabinet on 12 February 1990; likewise the issue of an indemnity for Mr. Heiner is to be addressed on that day.

On 9 February 1990 Mr O'Shea wrote to the Director-General of the Department of the Attorney-General again[329] and confirmed that the only written advice provided concerning the question of destruction had been that provided on 23 January 1990. Mr O'Shea advised that Mr Thomas had discussed that issue with Ms Matchett or Ms Crook. He expressed the view that the tapes and transcripts that Mr Heiner had generated were not public records within the meaning of the Libraries and Archives Act. The same day Mr Coyne told Mr Peers that if he was disadvantaged by the inquiry process he 'would consider' legal action against the department.[330] He felt that his reputation had already been considerably harmed. At 3.50 pm on this day, Mr Coyne told Mr Walsh[331] that he 'had backed-off taking legal action as he felt there was a need to end all this'. He went on to say that unless Ms Matchett telephoned him by 5.00 pm that day he would start

[329] Exhibit 144.
[330] Exhibit 146.
[331] Exhibit 149.

'legal action, industrial action and that he had other courses of action planned'. Ms Matchett rang Mr Coyne at 4.15 pm and told him that she would decide when she would speak with him.[332]

Cabinet considered the submission[333] brought to it by Ms Warner on 12 February 1990. Ms Warner testified that Cabinet submission 100 was the first submission she had signed. She was happy to recommend to Cabinet that it provide an indemnity to Mr Heiner. As to the material, Ms Matchett had told her that destruction had been the 'main option' advanced by their legal advice.[334] She was reasonably sure Cabinet discussed the issue.[335] In speaking to the submission she had signed, Ms Warner said that she would have related to Cabinet parts of a document tendered as evidence.[336] One of the issues mentioned in this document was that 'certain staff of the centre had indicated to the Acting Director-General their intenion to take civil action agains informants to the inquiry'. The evidence does not establish whether Ms Warner actually related the passage just quoted to the Cabinet.

Mr Dean Wells, the Attorney-General at that time, said that Ms Warner informed Cabinet that the material recommended for destruction comprised allegations in the nature of scuttlebutt and malicious gossip from employees about other employees.[337] Mr Wells understood from this that the material contained allegations of misconduct but not allegations of criminal conduct.[338] He said that the most extensive discussion about the matter occurred on this occasion and that by the end of it Cabinet was resigned to destroying the material unless a better option could be found.[339] Mr Wells said that Cabinet did not want the government to keep the material because the notion that the government would retain unsubstantiated defamatory material on departmental files which might adversely affect employees' careers was 'rather odious'.[340] Cabinet's focus was almost entirely upon whether it was sound policy to keep untested defamatory allegations about its own employees.[341] Although destruction of the material would have advantaged one section of employees over another, Mr Wells testified that Cabinet believed it was simply improper for the government to keep untested allegations of misconduct in government files.[342] Mr Wells said that keeping the material would eventually result in the 'publishing' of it. It would either have been accidentally released or forcibly released after freedom of information laws were passed.[343]

Cabinet deferred further consideration of the matter pending the provision of another submission about it.[344] Cabinet's decision to defer consideration about whether the material should be destroyed is arguably not consistent with a desire to defeat or destroy any person's legal rights or with a desire to hurriedly suppress evidence or

[332] Exhibit 150.
[333] Exhibit 151.
[334] Transcript 3(e), 14 February 2013 [p91: line 28].
[335] Transcript 3(e), 14 February 2013 [p91: line 38].
[336] Exhibit 151A.
[337] Exhibit 351.
[338] Exhibit 351.
[339] Exhibit 351.
[340] Exhibit 351.
[341] Transcript 3(e), 23 April 2013 [p25: lines 1–10].
[342] Transcript 3(e), 23 April 2013 [p29: lines 10–15].
[343] Transcript 3(e), 23 April 2013 [p37: lines 1–10]; Exhibit 351.
[344] Exhibit 151.

information about wrongdoing at the centre. Ms Warner said that she had not looked at the material Mr Heiner had gathered.[345]

A number of events occurred on Tuesday 13 February 1990. Ms Matchett met with Mr Coyne at the centre. It probably took place at around 9.00 am.[346] Mr Coyne recalled that the meeting was brief and said that Ms Matchett told him that the Heiner inquiry had been ended.[347] She gave him a letter[348] that informed Mr Coyne he had been seconded to perform 'special duties' in the department's Brisbane office for a period of six months at his then pay level supplemented by a 'special allowance' of $188.00 per fortnight. Ms Matchett said that she told the staff at the centre about what had become of the Heiner inquiry.[349] That meeting probably occurred at about 10.30 am.[350] The details about what Ms Matchett said to the staff are not now important. However, typed notes[351] prepared for her reveal the department understood the vulnerability of staff to legal action and the measures available to protect them. The notes contain the following:

> My decision to terminate the inquiry was based on the following:
>
> 1) The need to minimise the exposure to legal liability of both the staff and Mr Heiner;
>
> 2) The fact that in accordance with his terms of reference, no specific recommendations were to be included in any report prepared by Mr Heiner;
>
> 3) The terms of reference did not enable broader issues such as staff training and safety to be fully investigated and recommendations made thereon.
>
> Hence, there will be no report. Thus the risk of staff being exposed to legal action is reduced.
>
> I want to remind you all however of the current Government policy regarding the legal liability of Crown employees – which you all are.
>
> In short the Crown will accept full responsibility for all claims arising out of a Crown employee's due performance of his/her duties provided these duties have been carried out conscientiously and diligently.

At some stage on 13 February 1990 Mrs Myolene Carrick, a Deputy Director-General of the Department of Family Services signed Cabinet submission 117.[352] Mrs Carrick had not previously had any involvement with the Heiner investigation and had no responsibility for youth centres. She played no part in the compilation of the submission. She testified that Mr Walsh brought it to her and asked her to sign it. She said that she would have asked why she had to sign it. She could not now recall what she was told but she said she may have been told that Ms Matchett was not available to sign it. That possibility might be accepted. Ms Matchett was out at the centre on the morning of 13 February 1990. Ms Matchett's name had been typed on to the end of the submission so there must, at some point, have been an expectation that she would have signed it. Mrs Carrick never asked Ms Matchett why she had been asked to sign the submission. She said that it was not the 'culture' at the time to question Ms Matchett.[353] The evidence does not clearly establish who prepared submission 117. Mr Walsh could not recall who

[345] Transcript 3(e), 14 February 2013 [p96: line 10].
[346] Exhibit 154.
[347] Transcript 3(e), 11 December 2012 [p79: line 45].
[348] Exhibit 155.
[349] Transcript 3(e), 14 February 2013 [p49: line 15].
[350] Exhibit 156.
[351] Exhibit 156.
[352] Exhibit 168; Transcript 3(e), 11 February 2013 [p77: line 1].
[353] Transcript 3(e), 11 February 2013 [p78: lines 15-23].

it was[354] but believed that Ms Crook may have done so.[355] A file note[356] made by Mr Walsh suggests that Ms Crook may have prepared it. Ms Crook had no recollection of preparing it.[357]

Submission 117 referred to Mr Heiner having gathered information of a potentially defamatory nature in both written and electronic formats. Under the heading 'Issues' was:

> The fate of the material gathered by Mr. Heiner has yet to be determined. This is a matter of some urgency, as there have been a number of demands requiring access to the material, including requests from Solicitors on behalf of certain staff members.

It can be seen that Cabinet was provided with the knowledge that people, including a solicitor, had sought access to the material gathered by Mr Heiner.

Under the heading 'Options' appeared the following:

1. Destruction of material gathered by Mr Heiner in the course of his investigation, on the basis that the investigation has now been terminated and the material has no further purpose.
2. Public release of the material in a summarised form as a Parliamentary Statement.
3. Retention of the material within the Department, thus making it part of Departmental official records.
4. Referral of the material to Cabinet for noting.

On 13 February 1990 the Cabinet secretary, Mr Stuart Tait, wrote to Mr O'Shea.[358] He sought advice from Mr O'Shea about what 'action might be taken should a writ be issued to obtain information that is considered to be part of the official records of Cabinet.' The letter did not inform Mr O'Shea about what 'information' was now 'considered' to be part of the 'official records of Cabinet'. The letter told Mr O'Shea that he could contact Mr Tait's assistant, Mr Kenneth Littleboy, for further information. Later that day, Mr O'Shea rang Mr Littleboy. Mr O'Shea's note of their conversation[359] was as follows:

> They (Cabinet Secretariat) have large sealed box containing all Noel Heiner's tapes etc. Want to know whether they would become Cabinet docs and thus be secret. I explained to him that unless they were made for a submission to Cabinet then they would not be. I told him that I would let him have a considered advice …

Mr Littleboy said that he may have drafted the letter to Mr O'Shea.[360] If he did so he did not deliberately cast it in vague terms.[361] He knew Mr O'Shea would call him and he knew that the letter had been sent to Mr O'Shea.[362] Mr Tait said that the absence of detail in the letter to Mr O'Shea may have been attributable to the consideration that he had quite a bit of discussion with Mr O'Shea about Cabinet's need for more information.

The box of material was in Mr Tait's office when Mr Littleboy first saw it. He did not believe that he looked inside it because, he said, it was 'Cabinet confidential

[354] Transcript 3(e), 29 January 2013 [p24: line 29], [p40: line 8].
[355] Transcript 3(e), 29 January 2013 [p40: line 14].
[356] Exhibit 157.
[357] Transcript 3(e), 1 February 2013 [p23: line 9].
[358] Exhibit 158.
[359] Exhibit 158.
[360] Transcript 3(e), 11 February 2013 [p62: line 20].
[361] Transcript 3(e), 11 February 2013 [p62: line 35].
[362] Transcript 3(e), 11 February 2013 [p62: line 1-12].

information'.[363] Mr Tait said that at some stage the box was delivered to the Cabinet secretariat because 'the Premier wanted me to do further investigations about this matter. He was very unhappy about the recommendation that the material be destroyed – and he wanted more information from the Crown Solicitor about the advice he had given to the Department …' [364] Mr Tait 'never'[365] looked inside the box. His explanation for not doing so was that at that time he believed that Mr Heiner may not have been lawfully appointed, that Mr Heiner did not have an indemnity and that he 'had no interest in looking at the documents'.[366] Mr Tait's explanation is difficult to accept in its entirety. He testified that he read submission 100 when it arrived at the Cabinet secretariat.[367] He testified that he read every submission which came to Cabinet.[368] Submission 100 had arrived at the Cabinet secretariat on 6 February 1990.[369] If Mr Tait had read it he must have forgotten that it stated that 'Mr Heiner had been lawfully appointed'.

On 14 February 1990 Mr Berry called Mr Walsh. According to a memorandum Mr Walsh wrote that day,[370] Mr Berry sought assurances from Ms Matchett that the documents relating to the Heiner inquiry would not be destroyed. No evidence was put before me to explain the source of Mr Berry's apprehension about the fate of the documents. Perhaps his apprehension arose due to the fact that he had not received a reply to his letter of 8 February 1990.[371] Mr Walsh's memorandum went on to state that Mr Berry said that he had counsel's opinion that they could not proceed to court until they could show that Mr Coyne had been adversely affected, but that the decision of 13 February 1990, to transfer Mr Coyne, had at least prejudiced Mr Coyne's career. Mr Walsh wrote that:

> Mr Berry made it quite clear that there is still an intention to proceed to attempt to gain access to the Heiner documents and any departmental documents relating to the allegations against Mr Coyne and that they have every intention to pursue the matter through the courts.

Mr Walsh wrote that he told Mr Berry that a request for an assurance about the documents should be put in writing.

Ms Matchett was informed of what Mr Berry had said on 15 February 1990[372] and testified that she did not provide any assurance to Mr Berry because the issue was not one she could provide any assurance about.[373] As far as she was concerned the matter was in the hands of the Crown Solicitor. When asked why she could not have told Mr Berry that she could not provide the assurance, she replied that she thought that Mr Berry would have appreciated that, because Mr Walsh told him to put his request in writing.[374]

In a letter dated 15 February 1990[375] Mr Berry advised Ms Matchett that during a telephone conversation the day before, Mr Walsh indicated that he would tell her 'of our intention to commence Court proceedings in view of the fact that against the wishes of

[363] Transcript 3(e), 11 February 2013 [p31: line 30].
[364] Transcript 3(e), 18 February 2013 [p105: lines 10-25].
[365] Transcript 3(e), 18 February 2013 [p105: line 32].
[366] Transcript 3(e), 18 February 2013 [p105: line 35 – p106: line 22].
[367] Transcript 3(e), 18 February 2013 [p102: line 45].
[368] Transcript 3(e), 18 February 2013 [p104: line 20].
[369] Exhibit 151B.
[370] Exhibit 159; Transcript 3(e), 29 January 2013 [p17: line 12].
[371] Exhibit 141.
[372] Transcript 3(e), 29 January 2013 [p17: line 28].
[373] Transcript 3(e), 14 February 2013 [p35: line 10].
[374] Transcript 3(e), 14 February 2013 [p17: line 30].
[375] Exhibit 161.

our client' he was seconded from the centre. Ms Matchett acknowledged that she saw this letter.[376] The letter also contained her signature and the date '19/2/90', which was the date it had been stamped and received in her office. Although the letter did not constitute the written request Mr Walsh suggested should be made it was certainly sufficient to advise Ms Matchett that Mr Coyne intended to commence curial proceedings connected to his transfer. Mr Berry's letter of 15 February 1990 also contains a handwritten note made by Mr Walsh. It was directed to Ms Crook and stated, 'For referral to Crown Solicitor as a matter of urgency'. That note was dated '21/2/90'.

On 16 February 1990, prior to receipt of Mr Berry's letter advising of the intention to begin curial proceedings, Ms Matchett met with staff at the centre. According to notes made by Ms Ball, which are not dated,[377] it was stated that 'The Inquiry is abandoned and all documentation is destroyed'. Ms Ball said that this was something that she told the staff based on what she had been told or thought that she had been told.[378] Accordingly, I make no finding one way or the other about whether Ms Matchett said on either 16 February or earlier that 'all documentation is destroyed'. Mr Berry's letter of 8 February 1990 was acknowledged on 16 February 1990[379] when Ms Crook advised Mr Berry that his letter had been referred to departmental lawyers. The letter also stated that 'none of the material sought by you in your letter of 8th February 1990 is contained on a file or record of either of your clients'. A handwritten note on this document[380] stated 'contents of letter cleared by B Thomas'. Mr Thomas testified that he probably was informed about what was intended to be sent to Mr Berry, but Mr Thomas had not been provided with either officer's file.[381]

At 4.31 pm on 16 February 1990 a letter signed by Mr O'Shea was sent to Mr Tait.[382] This letter was Mr O'Shea's reply to Mr Tait's letter of 13 February 1990. Mr O'Shea's understanding of what he was being asked to provide advice about was stated by him to be:

> Your query, as I understand it from my conversation with your Mr. Littleboy, is what options are open to Cabinet so far as retention or disposal of these documents is concerned and could they be obtained by way of subpoena or third party discovery should a writ be issued touching or concerning them.[383]

Mr O'Shea said that the practice had been for the Crown Solicitor to consider whether a claim for 'Crown privilege' could be made in relation to Cabinet documents sought by way of subpoena or by way of third party discovery. After explaining what Crown privilege meant Mr O'Shea said:

> There must however be a pending action, Commission of Inquiry or other civil or criminal proceeding pending before anyone can seek production of documents.
>
> If then, for example, anyone who suspects he or she was defamed in any of the material produced by Mr Heiner, were to commence an action against him in respect thereof, the plaintiff would, no doubt, at a fairly early stage in the action, seek an order for third party

[376] Transcript 3(e), 14 February 2013 [p78: line 33].
[377] Exhibit 162.
[378] Transcript 3(e), 30 January 2013 [p21: lines 25-30].
[379] Exhibit 163.
[380] Exhibit 163.
[381] Transcript 3(e), 30 January 2013 [p92: line 15].
[382] Exhibit 164.
[383] Exhibit 164.

> discovery of the material pursuant to Order 35 Rule 28 of the Rules of the Supreme Court.[384]

Mr O'Shea said that an order for discovery could be resisted on various grounds but unless the documents were Cabinet documents a claim to 'Crown privilege' would have only limited prospects of success. He did not regard the materials Mr Heiner had gathered as likely to have been created to formulate a Cabinet submission or for the purpose of being put before Cabinet; accordingly, the materials could not be fairly described as Cabinet documents. He considered that an argument that discovery of them would hamper the effective functions of governing would have a very limited prospect of success. He was of the view that the material was then in the possession of the Crown and so the material constituted public records for the purposes of the Libraries and Archives Act. Consequently, section 55 of that Act required the material to be disposed of either by forwarding it to the State Archives or 'by obtaining the consent of the State Archivist to the disposal of the documents …' On the same day Mr O'Shea forwarded a copy of that advice to Ms Matchett,[385] to the Director-General of the Department of the Attorney-General[386] and to the Attorney-General[387].

On 19 February 1990, Cabinet considered submission 117. It will be recalled that the submission informed Cabinet that an urgent decision was needed because demands for access to the Heiner material had been made including by solicitors acting on behalf of some staff. It will also be recalled that the submission provided four options, namely, destruction, public release, retention by the department or referral to Cabinet for noting. Another recommendation was also put to Cabinet. It was that 'the recommendation be deferred to allow the secretary to Cabinet to liaise with the State Archivist.'[388] Mr Tait testified that Exhibit 168A looked like a 'billet doux'.[389] He explained that in evidence as:

> A what? --- A billet-doux. In the executive process prior to a cabinet meeting there is a meeting of about five or six people in the premier's office in the hour before the cabinet meets and treasury and premier's department prepare very small briefing notes that summarise their view on every cabinet document, both the financial and the legal and political consequences of each cabinet document, and this then forms the basis of the premier and the treasurer's discussion about how cabinet can thoughtfully review the matter when it sits. This to me appears like a briefing note that would have been attached as a billet-doux to the cabinet submission and could well have been prepared by the secretary of state, but I don't know, I can't recall 23 years later who prepared this note.[390]

Mr Tait recalled attending a meeting at which it was decided to recommend to Cabinet that a decision be deferred to allow him to liaise with the State Archivist.[391] He could not recall who else attended that meeting but generally the Director-General of the Premier's Department, Mr Erik Finger, and the head of the Treasury Department attended those meetings.[392] Ms Warner testified that she may have been consulted about the four options that her department put into submission 117. She had no personal view about which option was to be preferred. She was prepared to consider the option of

[384] Exhibit 164.
[385] Exhibit 165.
[386] Exhibit 166.
[387] Exhibit 167.
[388] Exhibit 168A.
[389] Transcript 3(e), 18 February 2013 [p110: line 12].
[390] Transcript 3(e), 18 February 2013 [p110: lines 15-27].
[391] Transcript 3(e), 18 February 2013 [p110: line 40].
[392] Transcript 3(e), 18 February 2013 [p111: line 1-20].

destruction despite knowing that access to the documents had been sought including by a solicitor. Her recollection was that Cabinet was concerned about the option for destruction but also regarded the other three options as not appropriate.[393] Although the submission and the one later considered on 5 March 1990 spoke of a need for an urgent Cabinet decision, Mr Wells said that Cabinet understood that unless a decision was made quickly Cabinet would end up releasing or publishing defamatory material if access was permitted.[394]

Cabinet's decision on 19 February 1990 was to defer further consideration until after the Secretary to Cabinet had liaised with the State Archivist.[395] On 20 February 1990 Mr Tait wrote to Mr O'Shea.[396] He attached a copy of a letter he intended to send to the State Archivist and sought Mr O'Shea's advice 'in regard to the letter's suitability especially in relation to the State Archivist not being seen to be pressured by the Government.'

On 22 February 1990 Ms Matchett wrote to Mr O'Shea and Mr Thomas.[397] The letter may not have been received until 23 February 1990 so I shall refer to it in more detail shortly. Ms Di Fingleton wrote a memorandum to Mr O'Shea that was dated 22 February 1990.[398] In this correspondence she stated that the Attorney-General wanted Mr O'Shea to advise Ms Warner about how she should reply to correspondence from Mr Coyne's solicitor who had written in relation to the availability of documents. It is not clear whether this was a reference to correspondence the solicitor had sent to the Attorney-General or a reference to correspondence to Ms Matchett which was tendered before me. In any case, Ms Fingleton stated in the memorandum that, 'We have advised Ms Warner that proceedings for defamation would have to be on foot before she would have to comply with any request for documents'. That is a correct statement of the legal position. Ms Fingleton's memorandum was referred by Mr O'Shea to Mr Thomas who testified that he could not recall receiving it[399] and had no recollection of ever discussing the issues raised in it with Ms Fingleton.[400] At 5.17 pm on 22 February 1990 Mr O'Shea replied to Mr Tait's letter of 20 February 1990. In it he said that there was nothing objectionable in the letter Mr Tait wished to send to the Archivist and that he could see no harm in it being sent as it was.[401] Mr Thomas testified that Mr O'Shea did not involve him in drafting the reply to Mr Tait.[402] The first that the State Archivist, Ms McGregor, knew about the matter was when she received a telephone call from Mr Tait.[403] He told her that there had been an inquiry into the management and staffing issues at the John Oxley Youth Centre and that the inquiry had been ended because it had not been established in a way that provided protection for those who had given statements. He told her that the government did not want to keep the material and that she was to determine whether her organisation needed to keep the material under the Libraries and Archives Act.[404] She was told that she needed to make her decision as soon as she possibly could because either the government or the department was worried that legal provisions were

[393] Transcript 3(e), 14 February 2013 [p93: line 10-40].
[394] Exhibit 351.
[395] Exhibit 168.
[396] Exhibit 169.
[397] Exhibit 170.
[398] Exhibit 171.
[399] Transcript 3(e), 31 January 2013 [p6: line 25].
[400] Transcript 3(e), 31 January 2013 [p6: line 27].
[401] Exhibit 172.
[402] Transcript 3(e), 31 January 2013 [p4: line 30].
[403] Transcript 3(e), 1 February 2013 [p50: line 15].
[404] Exhibit 306.

not in place to protect witnesses.[405] The material was subsequently delivered to Ms McGregor.[406]

Ms McGregor received Mr Tait's letter of 23 February 1990[407] on that day.[408] Mr Tait's letter was relevantly as follows:

> Your advice is sought regarding certain public records which I am advised fall within the meaning of the Libraries and Archives Act 1988.
>
> In early November 1989, Mr. N. J. Heiner, a retired Stipendiary Magistrate was engaged by the Department of Family Services to investigate and report on certain matters relating to the John Oxley Youth Centre.
>
> During the course of the investigation, questions were raised concerning the possibility of legal action against Mr Heiner and informants to the investigation because of the potentially defamatory nature of the material gathered. Because of the limited value of its continuation, the Department of Family Services has decided to terminate the investigation.
>
> Subsequently, the material was handed to the Department of Family Services by Mr Heiner and forwarded to the Cabinet Secretariat for safe-keeping pending a submission seeking Cabinet's view on what should be done with the material.
>
> As Mr Heiner has handed the material to the Crown, the Crown Solicitor has advised that the Government would be entitled to claim possession of the documents and other material gathered by Mr Heiner in the course of his Inquiry. The material is therefore considered to be "public records" within the meaning of Section 5(2) of the Libraries and Archives Act 1988.
>
> I am also advised that the material could not be fairly described as "Cabinet documents" unless they were created for the purpose of submission to Cabinet. This appears not to be the case and any claim by the Crown for "Crown Privilege" would, therefore, have little chance of success in order to maintain the confidentiality of the material.
>
> The Government is of the view that the material, which I understand includes tape recordings, computer discs and hand-written notes, is no longer required or pertinent to the public record.
>
> The question of the destruction of the material therefore falls within the responsibility of the State Archives under section 55 of the Libraries and Archives Act 1988 and your urgent advice is sought as to the appropriate action to be taken in this regard.
>
> Any further information concerning the material may be obtained from Ken Littleboy, Acting Principal Cabinet Officer, telephone 224- 4858.

In relation to this letter, two things can be noted. First, it reiterated that Ms McGregor was to provide her answer as a matter of urgency. Second, although it advised her that the government was of the 'view' that the material was 'no longer required or pertinent to the public record' it did not inform Ms McGregor that others, such as a solicitor, were then desirous of having access to the material. This omission was significant. Ms McGregor said that had she been told that the material was then wanted by someone she would not have advised that the documents should be destroyed.[409] She would have sought to discuss the situation, perhaps with lawyers, to see what could be done.[410] It was a very serious failure on the part of Mr Tait not to advise Ms McGregor

[405] Transcript 3(e), 1 February 2013 [p50: line 45 – p51: line 5].
[406] Transcript 3(e), 1 February 2013 [p51: line 23].
[407] Exhibit 173.
[408] Exhibit 174.
[409] Exhibit 306.
[410] Transcript 3(e), 1 February 2013 [p74: lines 20-35].

about the solicitor's interest in the documents. Mr Littleboy testified that the failure to include that detail was due to either his own carelessness[411] or because he may have been asked not to include the detail in the letter.[412] The only person who might have asked him to omit the detail, he said, was Mr Tait.[413] Mr Littleboy admitted that Ms McGregor was not told of all the relevant facts when she should have been and that a reason for not telling her was to make it easier for her to decide to consent to destruction of the material.[414] However, there was not simply an omission of a relevant fact from the letter. Insofar as it informed Ms McGregor that the government view was that the material was no longer pertinent to the public record, it was arguably calculated to engender a belief on Ms McGregor's part that no-one at all had an interest in the material.

Mr Tait denied that he told Mr Littleboy to omit from the letter any reference to the fact that a solicitor was then seeking access to the material.[415] He did not even regard that fact as a matter that he needed to be mindful of because his role, he said, was not 'deliberative' rather, he was 'like a super-duper paper shuffler' just trying to 'make sure that the will of Cabinet was the highest possible standard and met the Premier's requirements for more information.'[416] If that was Mr Tait's objective he failed.

Ms McGregor, after examining the contents of the box and after addressing herself to the criteria she normally used to determine whether material should be retained or not,[417] informed Mr Littleboy over the telephone[418] and Mr Tait by letter[419] that she approved the destruction under section 55 of the Libraries and Archives Act. That provision relevantly provided as follows:

> **Public records protected**
>
> **55.(1)** A person shall not dispose of public records other than by depositing them with the Queensland State Archives –
>
> (a) unless –
>
> (i) the State Archivist has authorised the disposal; or
>
> (ii) notice in writing of his intention to do so has been given by him or on his behalf to the State Archivist and –
>
> (A) a period of at least 2 months has elapsed since the giving of the notice; and
>
> (B) the State Archivist has not exercised his power under subsection (2) to take possession of the public records or direct that they be deposited with the Queensland State Archives;
>
> and
>
> (b) unless, in the case of public records to which subsections (4) and (5) apply, the period prescribed therein has expired.

[411] Transcript 3(e), 11 February 2013 [p73: line 16].
[412] Transcript 3(e), 11 February 2013 [p72: line 26].
[413] Transcript 3(e), 11 February 2013 [p72: line 29].
[414] Transcript 3(e), 11 February 2013 [p73: line 35 – p74: line 5].
[415] Transcript 3(e), 19 February 2013 [p5: line 20].
[416] Transcript 3(e), 19 February 2013 [p3: line 40 – p4: line 5].
[417] Transcript 3(e), 1 February 2013 [p55: lines 1-20].
[418] Exhibit 174.
[419] Exhibit 175.

A person who disposes of public records in contravention of this section commits an offence against this Act and shall be liable to a penalty not exceeding 100 penalty units.

(2) ...

(3) Subject to this Act, it shall be competent to the State Archivist or a person acting on his behalf to authorize the disposal of public records subject to such conditions as he thinks fit.

A person who disposes of public records in contravention of a condition imposed in respect of the disposal by the State Archivist or a person acting on his behalf shall be deemed to have disposed of them in contravention of this section.

It is notable that section 55 of the Act did not prescribe any criteria to guide the exercise of the State Archivist's authorisation. It cannot therefore be concluded that the criteria Ms McGregor applied to determine whether approval for the destruction of the records should be given were wrong. On a copy of the letter Ms McGregor sent to Mr Tait appear the words:

K. L. Please destroy records after to Cabinet on the 26.2.90.

The word 'after' appears above the word 'prior'[420] as the word 'prior' had been crossed out. The notation was signed by Mr Tait.[421]

On 26 February 1990 Mr Littleboy advised Mr Walsh of Ms McGregor's approval.[422] On the same day Mr Tait wrote to Ms Matchett and told her that:

It would now be appropriate for a further submission to be prepared for consideration by Cabinet on 5th March, 1990, recommending that the documents and material be handed to the State Archivist for destruction under the terms of Section 55 of the Libraries and Archives Act 1988.

On the same day Mr Thomas prepared correspondence[423] for Mr O'Shea which was then sent to Ms Matchett. A draft letter was also provided to her. It was addressed to Mr Berry and concerned his letter of 15 February 1990[424] which had been sent to Mr O'Shea and Mr Thomas on 22 February 1990.[425] Mr Thomas suggested that Ms Matchett advise Mr Berry that the matters raised in his letter were still under consideration. By 27 February 1990 Cabinet submission 160 had been prepared. It was signed by Ms Warner, apparently on 27 February 1990.[426] Submission 160 began by informing the Cabinet that Mr Heiner's inquiry had been terminated by Ms Matchett because his appointment did not carry with it immunity from legal action either for him or for informants who provided information. It went on to say that Mr Heiner had gathered information of a potentially defamatory nature. It noted that Cabinet had previously deferred consideration of a recommendation to destroy the material Mr Heiner had gathered so that other options could be explored. Under the heading 'Objective of Submission' appeared the following:

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.

[420] Exhibit 175A.
[421] Transcript 3(e), 19 February 2013 [p21: lines 10-20].
[422] Exhibit 175B.
[423] Exhibit 176.
[424] Exhibit 161.
[425] Exhibit 170.
[426] Exhibit 181.

> However, the Crown Solicitor has advised that as the material is in the Crown's possession, it constitutes a 'public record' for the purposes of the Libraries and Archives Act 1988.
>
> Therefore, the approval of the State Archivist must be obtained before such destruction can occur. The State Archivist has now given approval in writing for the destruction of these records in terms of section 55 of the abovementioned Act.

Under the heading 'Urgency' it was stated that:

> Speedy resolution of the matter will benefit all concerned and avert possible industrial unrest.
>
> Representations have been received from a solicitor representing certain staff members at the John Oxley Youth Centre. These representations have sought production of the material referred to in this Submission. However, to date, no formal legal action seeking production of the material has been instigated.

It was asserted that both the Crown Solicitor and the State Archivist 'supported' the destruction of the material and it was noted that the course of action recommended was expected to be acceptable to the 'majority' of the parties involved. Ms Warner's recommendation was as follows:

> I recommend that the material gathered by Mr N. J. Heiner during his investigation be handed to the State Archivist for destruction under the terms of section 55 of the Libraries and Archives Act 1988.

Ms Crook said that she may have drafted this submission.[427] Mr Walsh testified that either Ms Crook or Ms Matchett prepared it.[428] Ms Matchett said that she may have drafted it alone or in conjunction with Ms Crook and Mr Walsh.[429] Ms Matchett said that she knew that a solicitor had been seeking access to Mr Heiner's material and that was of considerable concern to her and Ms Warner.[430] She said that the option of doing nothing had been put to Cabinet on the previous occasion but was not adopted by Cabinet.

Ms Warner testified that her recommendation for destruction of the material was the only option. The other options to protect the material from disclosure were not going to prove adequate. The possibility that Cabinet could have just deferred any further decision about the documents until a legal proceeding was commenced was not considered to be a reasonable option. She perceived the issue for Cabinet to be how the disputation at the centre could be stopped. Mr Coyne's determination to defend himself against allegations and his need to obtain the material to do so contributed to or caused the unrest at the centre which Cabinet needed to end. The unrest had not stopped even though he had been transferred.[431] People at the centre were concerned that information might be used against them by the government or the department. They were concerned the material could be used against each other. There needed to be an outcome whereby the material could not be available to do harm to anyone so after other options had been explored it was thought that the best option was to destroy the material.[432]

[427] Transcript 3(e), 1 February 2013 [p35: line 35].
[428] Transcript 3(e), 29 January 2013 [p47: line 15].
[429] Transcript 3(e), 14 February 2013 [p58: line 25].
[430] Transcript 3(e), 14 February 2013 [p57].
[431] Transcript 3(e), 14 February 2013 [p95: lines 1-40].
[432] Transcript 3(e), 14 February 2013 [p97: lines 15-35].

A source of Ms Warner's knowledge that people at the centre were concerned that the information might be used against them may well have derived from a briefing paper possibly prepared for her by Ms Matchett.[433]

> Correspondence received from Solicitors representing two staff members at John Oxley Youth Centre seeking production of certain documents including the material gathered by Mr Heiner. Correspondence referred tp Crpwm Solicitor for advice. Interim responses sent. No final comitment given. Will depend on Cabinet's decision in relation to the fate of the material.
>
> Similar request received from Queensland Teachers' Union in relation to one of its members.
>
> In both cases, it would appear thaqt concerns stem from a belief that the material gathered by Mr Heiner is being used as part of decision making processes in the Department. This has not been so.

Ms Warner agreed that Cabinet's view was that it was in the public interest for the material be destroyed so that the centre could operate as cohesively as possible. Staff had participated in the inquiry process in order to assist in finding solutions to problems then only to find that the process they participated in had given rise to further and continuing problems.[434] As far as Ms Warner was aware no one thought of extending the indemnity that was given to Mr Heiner to the staff.[435] Her view was that to keep faith with the staff, who had been asked to provide information to Mr Heiner and had been assured about the confidentiality, it was necessary to protect those people from potential harm when all they had done was what was asked of them.[436] Ms Warner rejected the suggestion that Mr Coyne's interests had been subordinated for the interests of the majority of the staff employed at the centre. She said that Cabinet protected Mr Coyne by preventing any material which may have been damaging to him being made public.[437] Ms Warner said that she never saw the correspondence which was sent to the State Archivist in order to obtain her authorisation for destruction.[438] Mr Comben did not believe that he was shown it.[439] Mr Wells did not believe that he saw it.[440]

Mr Comben testified that he wondered at the time how serious the solicitor's request for access was.[441] He could not recall the matter going to a vote with a consensus in favour of enabling destruction.[442] He understood that destruction would achieve two purposes: primarily, it would prevent re-publication of defamatory materials and second, it would stop potential litigation.[443]

---

[433] Transcript 3(e), 14 February 2013 [p56: line 30].
[434] Transcript 3(e), 14 February 2013 [p118: lines 13-30], [p120: lines 1-10].
[435] Transcript 3(e), 14 February 2013 [p29: lines 30-50]; Transcript 3(e), 18 February 2013 [p58: lines 20-30].
[436] Transcript 3(e), 18 February 2013 [p28: lines 1-10].
[437] Transcript 3(e), 18 February 2013 [p32: line 20 – p33: line 10].
[438] Transcript 3(e), 18 February 2013 [p60: line 10].
[439] Transcript 3(e), 18 February 2013 [p71: line 20].
[440] Transcript 3(e), 23 April 2013 [p46: line 10].
[441] Transcript 3(e), 18 February 2013 [p71: lines 20-50].
[442] Transcript 3(e), 18 February 2013 [p72: line 5].
[443] Transcript 3(e), 18 February 2013 [p84: lines 25-30].

The Cabinet decision of 5 March 1990 was recorded in the Cabinet minute as follows:

> CABINET decided:-
>
> That following advice from the State Archivist and the Crown Solicitor the material gathered by Mr. N. J. Heiner during his investigation into certain matters at the John Oxley Youth Centre be handed to the State Archivist for destruction under the terms of section 55 of the Libraries and Archives Act 1988.

On 19 March 1990 Ms Matchett wrote to Mr Berry in the terms of the draft letter[444] which Mr Thomas had provided to her on or about 26 February 1990. After referring to Mr Walsh's recollection of part of the conversation he had with Mr Berry on 14 February Ms Matchett wrote, 'the other matters are subject to ongoing consideration'. [445] Had this letter been sent to Mr Berry on or about 26 February that assertion would have been accurate. By 19 March 1990 that statement was no longer accurate. Cabinet had decided to enable destruction of part of the material that Mr Berry had sought access to pursuant to regulation 65 of the Public Service Management and Employment Regulations. There can be no doubt that Ms Matchett knew that, because on 19 March 1990 she also wrote to Mr O'Shea[446] and told him that Cabinet had decided to give the material Mr Heiner had gathered to the State Archivist for destruction. In that letter to Mr O'Shea, Ms Matchett pointed out that Cabinet's decision did not extend to the statements that the Queensland State Service Union had given to Mr Pettigrew prior to Mr Heiner's appointment. She attached copies of those statements. Her letter was not received in the Crown Solicitor's office until 27 March 1990.

On 22 March 1990 Mr Tait wrote to Ms McGregor. He informed her that Cabinet had decided that the material should be given to her for destruction.[447] He said 'Accordingly, I am forwarding the material to you for necessary action'.

According to a file note made by Ms McGuckin:[448]

> 23 March 1990
>
> H318/41
>
> Ken Littleboy from Cabinet Office collected me from Queensland State Archives on 23 March 1990 at 2.30p.m. We went to the Executive Building and collected the records of the inquiry by Mr N. J. Heiner, that Lee McGregor and myself had inspected on 23 February 1990.
>
> We took the box of records to the Family Services Building where I took possession of the records and myself and Trevor Walsh from the Department destroyed them in a shredding machine.
>
> All the records were destroyed – paper, cassettes and computer disc.

Ms McGregor testified that she made Ms McGuckin available because someone, possibly Mr Littleboy, had called Ms McGregor and asked her to ensure someone be present when the destruction took place.[449] It was an unusual request but Ms McGregor complied with it because she understood that Cabinet wanted the matter to be handled that way.[450] Ms McGuckin's recollection was that she received a call from Mr Littleboy. He told her that the documents could be destroyed to which she replied that State

[444] Exhibit 176.
[445] Exhibit 184.
[446] Exhibit 183.
[447] Exhibit 188.
[448] Exhibit 189.
[449] Transcript 3(e), 1 February 2013 [p58: lines 30-40].
[450] Transcript 3(e), 1 February 2013 [p59: line 35].

Archives did not normally destroy documents. He said that he needed to be sure that the material intended to be destroyed was the same material that she and Ms McGregor had examined. Mr Littleboy came out and picked her up. They went to the Cabinet office where Ms McGuckin saw the box. She could not recall whether it was sealed or not.[451] She accompanied Mr Littleboy, who carried the box, to the Department of Family Services building on George Street. There she and Mr Walsh destroyed what, she said, was the same material that she had previously looked at with Ms McGregor.[452] Mr Littleboy claimed not to know why the documents could not have been destroyed at the Cabinet office.[453] This was the only occasion on which Mr Littleboy supervised the carrying out of a Cabinet decision.[454] He was not present when the documents were destroyed, however. Mr Tait testified that he left it up to Mr Littleboy about where the documents were to be destroyed and did not say that they could not be destroyed at the Cabinet office but that the Cabinet office only had shredders capable of shredding paper. Mr Tait did not know what was in the box. He said that it may have contained tapes or computer hard-drives.[455]

On 11 April 1990 The Sun newspaper reported that all the material gathered by Mr Heiner had been destroyed.[456] Mr Coyne believed that it was from that article that he learned that the material had been destroyed.[457] On 18 April 1990 Mr O'Shea replied to Ms Matchett's letter of 19 March 1990.[458] This reply was prepared by Mr Thomas.[459] The letter set out the history of the department's involvement with the statements and stated that there were two options, destruction or retention. If the documents were retained then regulations 46 and 65 of the Public Service Management and Employment Regulations were possibly applicable. In relation to regulation 65 Mr O'Shea wrote that:

> However, Mr. Coyne, through his solicitor's letter of 8 February has specifically sought to exercise his rights under Regulation 65. While it may be argued that the statements are not part of a Departmental file held on Mr Coyne, it would appear artificial to say they are not part of a Departmental record held on him as all but one of the statements specifically identify Mr. Coyne by name or by position. (The exception is the statement of 3 October 1989 signed 'very concerned'.)
>
> Therefore, if a decision is made not to destroy the statements Mr Coyne would appear to be entitled to read them and to obtain a copy of all but the one statement identified above.

Mr Donald Smith replied on Ms Matchett's behalf to Mr O'Shea's letter on 8 May 1990.[460] The reply drew attention to the fact that the statements had been supplied on the basis that they would not be widely circulated. In those circumstances Ms Matchett's letter stated that her preference was to return the statements to the Queensland State Service Union or to at least invite the union to take them back.

On 22 May 1990 Ms Matchett wrote to Ms Walker of the Queensland State Service Union.[461] She returned the statements that Ms Walker had supplied to Mr Pettigrew. On

[451] Transcript 3(e), 11 February 2013 [p8: line 38].
[452] Transcript 3(e), 11 February 2013 [p11: line 40 – p12: line 20].
[453] Transcript 3(e), 11 February 2013 [p37: line 36].
[454] Transcript 3(e), 11 February 2013 [p39: line 1].
[455] Transcript 3(e), 19 February 2013 [p31: lines 1-30].
[456] Exhibit 342.
[457] Transcript 3(e), 11 December 2012 [p83: line 15].
[458] Exhibit 191.
[459] Transcript 3(e), 31 January 2013 [p7: line 45].
[460] Exhibit 194.
[461] Exhibit 204.

the same day Ms Matchett wrote to Mr Berry[462] and said that the department neither possessed nor controlled the possession of any of the material Mr Berry had sought in his letter of 8 February 1990. She told Mr Berry that the material that Mr Heiner had gathered had been destroyed. Ms Matchett's 22 May assertion that the department did not possess the statements provided by the Queensland State Service Union did not sit with a notation made by Mr Smith on 23 May 1990.[463] The notation referred to copies of the statements and said 'These copies were photocopies. They were destroyed today'.

The review

My task now is to consider whether in light of accepted or agreed facts any criminal conduct was associated with a response of, or action taken by, the executive government in relation to the centre industrial dispute. The relevant executive action or response is Cabinet Decision No. 162 of 5 March 1990. The potential criminal conduct is the shredding of the Heiner documents on 23 March 1990.

Whether the shredding was criminal conduct associated with a relevant executive government response or action depends on whether the personal decision of those ministers who actually agreed with or acquiesced in the recommendation to destroy the documents was, in the case of each of them, a deliberate act with intent to directly or indirectly cause or enable[464] destruction of the documents.

Summary of the factual context

The Crown Solicitor recommended the centre inquiry be shut down and that the Heiner documents be destroyed[465] on the basis of the assumption that once it was over there would no longer be: (a) any point in pursuing any proposed action to gain access or compel their production or, consequently, (b) any need or obligation to retain them because no proceeding would be underway.

The strict legal position from the perspective of proceedings being proposed or possible rather than 'pending' was not specifically considered because section 129 was, despite being there to be seen, ignored, overlooked or (in light of the 2004 Court of Appeal decision in *Ensbey*) misinterpreted.

The Director-General of the Family Services department, Ms Ruth Matchett, terminated the centre investigation on 7 February 1990 and very soon after took possession of the Heiner documents and other material on the advice of the Crown Solicitor. The Minister for Family Services and Aboriginal and Islander Affairs, the Honourable Anne Warner, was the Minister responsible for Submissions to Cabinet numbers 100,[466] 117[467] and 160.[468] Cabinet considered Submission 100 on 12 February 1990 and decided to grant indemnity to Mr Heiner in relation to the conduct of the centre investigation and the adverse financial consequences of any related legal action.[469] The Minister also had advice from the Crown Solicitor interpreted as meaning that there was no legal

[462] Exhibit 205; Exhibit 206.
[463] Exhibit 191.
[464] *Criminal Code Act 1999* (Qld) ss 7(1)(a)(b), (4).
[465] Exhibit 129.
[466] Exhibit 151.
[467] Exhibit 168.
[468] Exhibit 181.
[469] Exhibit 151A.

impediment to the recommended destruction.[470] However, the issue was deferred to allow consideration of alternative options.

On 19 February 1990 the Minister presented Cabinet with four options including partial disclosure and retention but expressed a preference for destruction of the Heiner documents (excluding parts of official files). Urgency and the requests of solicitors and other demands for access to the material were mentioned.

Again, Cabinet decided to postpone making a final decision so the opinion of the State Archivist could be obtained.

On 5 March 1990, acting on the Minister's recommendation and the advice of both the State Archivist and the Crown Solicitor, Cabinet reached Decision No. 162 of 1990 apparently believing that there was no 'legal impediment' to destroying the Heiner documents because no litigation relating to them was then underway . The minutes record no dissent and there is nothing to suggest a disparity in relevant states of knowledge or belief.

The documents were shredded at the Family Services Building in Brisbane by two public servants, Ms McGuckin and Mr Walsh, on 23 March 1990.

The Lindeberg claims

As already mentioned, since about 2000 former union official Mr Kevin Lindeberg has been claiming that some of the shredded Heiner documents tended to prove a tardy or substandard investigative response of the centre management and others to child sexual abuse allegations made by Annette Harding in 1988 and that in agreeing to destroy that evidence Cabinet had conspired to cover up the allegations and inaction by centre staff.

Alternatively, it is contended that, regardless of their content, destroying public records was not only inappropriate conduct in the circumstances but criminal as well.

Curiously, in light of its highly contentious history, no party with authority to appear put either proposition to former ministers Warner, Wells or Comben when they were in the witness box. This failure, in the case of Mr Lindeberg, is at odds with vociferous statements attributed to him in the mass media and a raft of submissions made on his behalf to an array of public and parliamentary inquiries dating back, at least, to 1992. I consider reticence to be reflective of a man willing to wound but not prepared to strike.

The Commission has jurisdiction to review decisions and other actions of the 1990 Goss Cabinet it is reasonably satisfied were in response to child sexual abuse or industry disputes in a youth detention centre. Without such a response there is no power or authority to review.

Child sexual abuse in youth detention centres

Twenty-six people have testified either that they had no recollection that such a matter was discussed or that, in fact, it was not discussed. Mr Peckelharing did not mention such a matter when spoken to by Mr Newnham and Mr Heiner did not mention to Mr Newnham that he discovered anything of this nature. Although so many said that the issue was not discussed, this would not mandate that the evidence, even of only one person, stating that it was discussed should be disregarded if that person's evidence could be considered reliable. Reasonable satisfaction could be reached on the basis that only one person raised sexual abuse because it would only require one person to

[470] Exhibit 151A.

have told Mr Heiner about it for it to have found its way into the material Mr Heiner gathered. However, reasonable satisfaction cannot be reached on indefinite testimony.

Mr Lannen could only testify to a belief that he informed Ms Flynn about it. However, his belief is inconsistent with Ms Flynn's testimony. He also said that he was interviewed in the absence of Mr Heiner. That too conflicts with Ms Flynn's evidence. I prefer the positive recollection of Ms Flynn rather than the belief harboured by Mr Lannen, especially when the matter, which he says then concerned him, did not manifest itself in any of the correspondence written by him in 1989 or 1990.

I cannot act upon the basis that Mr Roch told Mr Heiner about sexual abuse when the witness was not sure that he did and nor was he sure that the person he spoke to on the second occasion was Mr Heiner. He is an unreliable historian. I also cannot be satisfied that he met with Mr Heiner in the city. There is a basis for concluding that Mr Roch is especially suggestible.[471]

The indefinite testimony of Mr Lannen and Mr Roch can be contrasted with Ms Parfitt's confidence that she raised the Harding matter in her interview. But for the consideration that she was interviewed in 1999 about matters at the centre, during the course of which she raised issues about sexual behaviour by the inmates, it would have been open to conclude that she was simply wrong in her recollection about the time at which she spoke to the person who she said questioned her in March or September of 1990. However, her failure to recall the interview with Mr Hobson in 1999 demonstrates that she is not a reliable historian and I cannot be satisfied that she was interviewed by Mr Heiner.

The vague recollections of Ms Parfitt, Mr Roch, Mr Lannen and Mr Smith in my opinion are not solid or safe enough foundations for establishing the jurisdictional fact that the shredding was a response to child sexual abuse allegations at the centre.

Ms Flynn, by contrast, was adamant that no one raised any allegations of child sexual abuse at the centre with Mr Heiner. Twenty-three of the other witnesses called either did not recall or positively denied any reference to Ms Harding.

On 18 January 2013 Mr Comben signed a statement in relation to the Cabinet meeting of 5 March 1990 he stated:

> I leant over to Ann Warner, the then Department of Families Minister and said to her words to the effect 'What's it all about'. She said they are all having a go at each other and accusing each other of abusing kids and all that stuff[472]

Yet sitting in the witness box on 18 February 2013 he was unsure whether Ms Warner had said 'kids'. He said that he may simply have extrapolated from her remark about 'abuse' to assume that it concerned children.[473]

Ms Warner did not personally inspect the documents. There is no direct evidence of their contents.

Given the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, and the gravity of the potential consequences, I am not reasonably satisfied, in the Briginshaw sense, that Mr Heiner received or discovered information about child sexual abuse.

---

[471] Transcript 3(e), 13 December 2012 [p30: line 1 – p34: line 40]; Exhibit 254.
[472] Exhibit 329.
[473] Transcript 3(e), 18 February 2013 [p79: lines 1-30], [p95: line 35 – p96: line 3], [p97: lines 10-15].

In fact, to my mind there is no logical factual basis for reasonably believing or suspecting that destroying the Heiner documents in 1990 was a response of, or action taken by, the executive government in relation to allegations of child sexual abuse in youth detention centres or like facilities within paragraph 3(e).

It should be seen as disingenuous and misleading, if not deliberately deceptive, for anyone to continue to claim otherwise.

Destroying the Heiner documents, on the other hand, was clearly an action taken by the executive government in 1990 in connection with an industrial dispute in a youth detention centre. Accordingly, its 'adequacy or appropriateness', including whether any criminal conduct was associated with it, calls for close scrutiny under 3(e) and requires me to do much more than simply casting a benign eye over the decision-making process of the State's official governing body before giving it the 'all clear' as some may hope or expect.

The degrees and quantum of proof

While no direction is given in the amended Order in Council as to the standard or quality of evidence (or information) on which any findings should be based[474] it would be both pointless and unjust if I did not apply orthodox notions of criminal responsibility, rules of evidence and principles of proof.

In criminal law when the sufficiency of evidence to support a conviction is considered the test of cogency is its capacity to satisfy a jury of guilt beyond reasonable doubt. The sole question as to sufficiency is 'whether on the evidence as it stands [the defendant] *could* (not should or must) be lawfully convicted'.[475] Where there is such evidence a jury may not be directed to acquit on the ground that the evidence is 'exiguous or unsatisfactory'.[476] The minimum degree of proof the criminal law requires to resolve a contested liability issue is 'prima facie'.[477] The evidence in support of an allegation has to be compelling enough to take the case outside the realm of conjecture into the domain of permissible inference and rational conclusion.

There must be positive proof of objective primary facts from which to logically infer other relevant facts to be established. In some cases the inference is irresistible; in others it does not go beyond reasonable satisfaction.

A case is only insufficient in the relevant sense if it is not reasonably capable of satisfying a jury that the disputed fact or allegation is made out. Evidence capable of supporting the guilty verdict, even if tenuous, inherently weak or vague, must be left to the jury to assess[478] despite the risk of an unreasonable or unsupportable verdict being returned.[479]

Prima facie evidence is sometimes strong enough to call for an explanation which, if not satisfactorily given, allows a tentative view to harden into positive proof in both an evidentiary and final sense and is sometimes called 'presumptive evidence'.[480]

---

[474] cf *Victoria v BLF* (1981-1982) 152 CLR 36.
[475] *May v O'Sullivan* (1955) 92 CLR 654, 658.
[476] Cross on Evidence 6th Australian ed (2000) [9100-9110].
[477] Cross on Evidence 6th Australian edition 2000 [1600-1605].
[478] *Doney v R* (1990) 171 CLR 207.
[479] cf *Criminal Code 1899* (Qld) s 668E(1).
[480] *R v Birdett* [1814-23] All E R 80, 93.

This means the supporting evidence is so persuasive that no reasonable person could reject its natural conclusion if it was the only evidence on the point.[481]

The reasonableness of a conviction based on legally sufficient evidence is an entirely different matter considered later in this report.

Circumstantial evidence

Circumstantial proof involves inferential reasoning. The fact-finding task in a circumstantial case is two-fold: first, a decision has to be made about which parts of the available body of circumstantial evidence are safe enough to use in the reasoning process and, second, whether taken in combination they are sufficient to fairly reject a not guilty plea beyond reasonable doubt.[482]

The presumption of innocence can be eroded circumstantially by the united strength of a series of linked facts which considered as a whole removes all reasonable doubt about disputed issues and leads a reasonable person to the ultimate conclusion that criminal guilt is adequately proved.[483]

Doubts about inferences to be drawn may also be more readily discounted in the absence of reasonably contradictory evidence expected being given or called.

In particular, in a criminal trial a hypothesis consistent with innocence may cease to be rational or reasonable in the absence of facts to support it, which if they existed at all must be within the knowledge of the defendant who did not supply them.[484] Importantly, however, a weak prosecution case cannot be strengthened by a defendant's silence unless exercising that hallowed right leaves incriminating evidence unexplained and uncontradicted. On the other hand, sufficient evidence in support of a conviction cannot be reduced to insufficiency by any amount of contrary evidence for the defence no matter how 'overwhelming or preponderant' it may be unless the defendant explains incriminating circumstances so convincingly that no reasonable man or woman could honestly reject it.[485]

Criminal responsibility

Criminal responsibility in Queensland depends on proof of coincident elements: a state of mind as well as conduct.

There is no relevant concept of corporate criminal complicity outside the joint enterprise and common purpose doctrine provisions of sections 7-8 of the Code.

Section 8 applies where an unintended but likely offence is committed instead of the one that was planned. The rule is redundant where, as here, the intended crime is actually committed either by a principal aided by an accessory or innocent agent.

Liability to punishment for an offence in this case is, therefore, governed exclusively by section 7.

Every person who does or omits to do the act constituting the offence and acts or omits for the purpose of enabling (or aiding) another person to commit the offence is deemed

---

[481] *Campbell v Inkley* [1960] SASR 273.
[482] *R v Van Beelen* (1973) 4 SASR 353, 374.
[483] *Chamberlain v R (No. 2)* (1984) 153 CLR 521, 534-9.
[484] *Weissensteiner v R* (1993) 178 CLR 217, 227-229.
[485] Cross on Evidence 6th Australian ed (2000) [912]; *Haw Tua Tau v Public Prosecutor* (1982) AC 136, 151.

to have taken part in, to be guilty of, and may be charged with, actually committing it (section 7(1)(a)(b)). Such a person is said to be both causally and criminally responsible.

Subsection 7(4) of the Code incorporates the common law doctrine of innocent agency.[486] A person using an innocent agent to achieve a criminal objective is liable as a principal; that is, an offender under section 7(1)(a), not a secondary offender.

Innocent agents are not criminally responsible personally because although they directly cause harm they do so without blame or fault. They are unaware of the true facts and believe that what is being done is quite lawful.

Thus, in *White v Ridley*[487] the High Court held a person who airmailed a package of cannabis to himself from Singapore to Australia liable for drug importation on the basis that the carrier was an innocent agent rather than on the ground that he aided or procured the importation.

Principals, by contrast, are held criminally responsible for directly causing or indirectly contributing to the offence with intent.

The lack of criminal responsibility on the part of the innocent agent does not provide the principal with a defence and nor does the lack of guilty intent.[488]

In theory, the Premier and each participating minister could be liable either as a secondary party under section 7(1)(b) (having enabled destruction of the documents if they had the same guilty intent as the public servants who actually shredded them) or, alternatively, under sections 7(1)(a) and (4) based on a shared intention to prosecute an unlawful purpose in conjunction with one another, such as making Cabinet Decision No. 162 of 1990, and then procuring Ms McGuckin and Mr Walsh to actually commit the destructive act as innocent agents.

However, criminal responsibility under subsections 7(1)(a),(b) or (4) of the Code requires that necessary mental elements (wilfulness, intent and knowledge) be inferred beyond reasonable doubt to make harmful conduct so blameworthy that it is punishable by the State.

Cabinet liability

The *Commissions of Inquiry Amendment Order (No. 2) 2013* uses the term the 'executive government' in the way it was understood in 1990.

The executive government on 5 March 1990 comprised the Premier and 18 Cabinet Ministers but did not constitute the State or the Crown in the right of the State of Queensland. It was therefore, neither a body politic nor a 'person for the purposes of criminal law'.[489]

Historically, Cabinet acts as a mechanism for distributing executive power and authority so that control is not concentrated too heavily in central portfolios or principal office-holders. However, the notion that a Premier is the 'first among equals' had long since

---

[486] *R v Maroney* [2000] QCA 310, [25] (McPherson JA); cf *R v Webb* 1995 1 Qd R 680, 685.
[487] (1978) 140 CLR 342, 347-48.
[488] *R v Webb* (1992) Qd R 275.
[489] cf *Constitution of Queensland 2001* (Qld) s 51; *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSW CA60 [31] (Allsop P); Harding, 'Origins of the Concept of the State' (1994) 25(1) *History of Political Thought* 57; cf *Aurukun Shire Council the Chief Executive and others* [2010] QCA 37 [37-38]; *Cain v Doyle* (1946) 72 CLR 409, 417-418; *Crowther v State of Queensland* [2007] 1 Qd R 232, [8]-[20] (Jersey CJ).

faded. Cabinet Ministers are, and in 1990 were, in reality, handpicked assistants of the Premier, or caucus, and answerable to their parliamentary and political leadership.

In 1990 Cabinet's chief function was, as it still is, to decide public policy and governance-related issues. Its determinations were and are authoritative. It also, at least in theory, shared the burden of risk and responsibility for politically sensitive and highly contentious or contestable decisions. What items of business could or should go to the Cabinet is up to the Executive itself to decide, but it stopped settling all matters of State importance at least 200 years ago.[490]

Decisions of Cabinet are customarily reached by consensus or majority rule so as to maintain the principle of collective responsibility for policy decisions,[491] but it is really the Premier who determines and declares the corporate view of the Cabinet.[492]

In Roman law the term 'consensus' referred to informal consent sufficient for a simple contract. In modern usage it can denote binding assent but in a government context may be used in the sense of submission to the will or view of the majority of members. It does not necessarily mean unanimity or that concurring parties were consenting or equally committed to achieving an agreed result for the same reasons.

Although the executive government has wide latitude in choosing what issues it decides and the way it conducts its business, individual members are not beyond the reach of the criminal law and there is no applicable period of limitation despite the lapse of 23 years.

The position of the public servants

Hanger QC for the Crown submitted[493] that the mandate of the Order of Council does not go as far as requiring or even allowing consideration of the conduct of public servants. He argued that the sole question for me to consider and report on is whether any criminal conduct of the executive government was associated with a relevant response or action, and not whether criminal conduct by a public servant was associated with an executive government response or action.

This submission was not contested and because of the authority of its source should be accepted for present purposes.

However, the role of Ms McGuckin and Mr Walsh as potential innocent agents remains to be considered.

Potential criminal conduct

The Queensland criminal law is consolidated and codified in schedule 1 of the *Criminal Code Act 1899* (the Code). Offences against property are dealt with in Chapter 46 of the Code.

Property damage

Wilfully and unlawfully destroying someone else's property (including a document) is punishable in Queensland by imprisonment under section 469. However, subject to the offences against the administration of justice, a person can lawfully destroy his or her

[490] D Chester 'Who governs Britain?' *Parliamentary Affairs* Vol XV, No 4 p.522.
[491] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615; cf *Constitution of Queensland 2001* (Qld) s 42(2).
[492] J Mackintosh, The British Cabinet, 2nd ed (1968:610).
[493] Transcript 3(e), 6 May 2013 [p63].

own property as long as there is no intention to defraud. It is common ground that the Heiner documents belonged to the State and there is no suggestion of dishonesty or deception.

Chapter 16 of the Code deals with offences against the administration of justice.

Interfering with the course of justice

Sections 132 and 140 concern attempts (with or without a conspiracy) to obstruct, pervert or defeat the course of justice.

The 'course of justice' which is arguably a broader concept than a 'judicial proceeding' begins when the formal process invoking the jurisdiction of a court is filed or issued.[494]

Section 132 of the Code then relevantly provided that:

> Any person who conspires with another to obstruct, prevent, pervert, or defeat, the course of justice is guilty of a crime…

The consent of the Attorney-General is required for a valid prosecution.

In *The Queen v Rogerson*[495] Brennan and Toohey JJ said:

> To establish a conspiracy to pervert the course of justice, it is necessary to prove an agreement to do an act which the conspirators either know will have a manifest tendency to pervert the course of justice or which the conspirators intend to have such an effect.

The evidence of both Ms Warner and Mr Comben was that Cabinet rarely voted on matters it had to consider. Decisions were generally arrived at by consensus.[496] Mr Comben confirmed that was the case on 5 March 1990. An obvious issue arises as to whether any compact was reached between Cabinet members and, if so, what did it concern.

One could well imagine that for many members of Cabinet the fate of the Heiner documents may not have been a matter of major interest and endorsing or acquiescing in a course of action may be, but is not necessarily, tantamount to agreement with it.

In any case, as a general rule a substantive offence, if there is one, is preferred to a conspiracy charge on the basis of the theory that actually doing or causing criminal harm is generally worse than merely agreeing to do it.

In the relevant context, to breach section 140 a person must have (a) appreciated the possibility that a person might bring an action for defamation or an administrative law proceeding analogous to judicial review or a mandatory injunction application and (b) enabled or procured destruction of the documents, which would (c) pervert, prevent, obstruct or defeat the course of justice.

Proof is required that the conduct engaged in had the tendency to obstruct, prevent, pervert or defeat the course of justice and upon proof that the conduct was engaged in with such an intent.[497]

Knowledge that a document might be required for a possible future judicial proceeding would be a necessary prerequisite to proving that the purpose of destroying it was to obstruct, prevent, pervert or defeat the course of justice.

---

[494] *R v Rogerson* (1992) 174 CLR 268; cf *Criminal Code 1899* (Qld) s 126 (fabricating evidence).
[495] (1992) 174 CLR 268, 282.
[496] Transcript 3(e), 14 February 2013 [p104: line 40]; Transcript 3(e), 18 Feuary 2013 [p66: line 20].
[497] *Meissner v The Queen* (1995) 184 CLR 132, 140-141.

Suppressing documentary evidence, however, attracts a higher penalty than interfering with the course of justice by any other means does. The operation of section 140 in 1990 was expressly limited to conduct that is not otherwise 'specifically defined' as an offence elsewhere in the Code. Therefore, the same criminal act could not be punished under both sections when the Heiner documents were shredded.

Disposing of a document with evidentiary value in an attempt to prevent it from being used in a court as evidence is more appropriately punishable under section 129 than section 140. For different reasons, therefore, neither section 132 nor section 140 have any ongoing role to play if section 129 was contravened.

Destroying evidence

On 5 March 1990 wilfully destroying a document that is known to, or may, be required in a 'judicial proceeding' so as to prevent it from being used in evidence was a Criminal Code offence under section 129.

A 'judicial proceeding', defined in section 119, included any proceeding had or taken in or before any court, tribunal or person in which sworn evidence may be given.

To be criminally responsible for a section 129 offence the Premier or Cabinet Minister must have (a) known the 'Heiner documents' were or may be needed as evidence in a 'judicial proceeding' (b) wilfully destroyed them and in doing so (c) intended to prevent their use as evidence in that proceeding.

The practical operation of section 129 is best seen through the lens of the leading Queensland decision of *R v Ensbey ex parte Attorney-General.*[498] Mr Ensbey, a Baptist minister, shredded pages of a diary to make incriminating entries indecipherable before returning the diary to a child victim of ongoing sexual abuse by an adult parishioner who had been exposed and disciplined by the Church in 1995. He was not charged by police until 2001. Despite the destruction of the diary evidence he pleaded guilty so the diary notes were never actually needed 'in evidence'.

If defeating justice was the intended purpose in shredding the diary then he failed dismally.

Ensbey had counselled the victim's family against involving police in the matter, ostensibly to protect the victim from embarrassment in court. The victim, S, and her parents initially opted for internal disciplinary action but after later leaving the Church asked Ensbey for the diary back without saying why.

When the mutilated diary was (reluctantly) returned Ensbey enclosed a note explaining that what he had done was intended to 'facilitate the desire to close the issue with the hope that it, in fact, does that'.

The Court of Appeal (Davies, Williams and Jerrard JA) rejected Ensbey's argument that the jury's verdict of guilty was unreasonable because there was a reasonable explanation consistent with innocence; that is, that in shredding the diary he may simply have wished to bring the matter to finality for the sake of all concerned without any thought of court action and she should have been given the appellant the benefit of the doubt on that basis.

His conviction for shredding part of a diary of uncertain probative value was unanimously endorsed by the Court of Appeal as not only reasonable but inevitable despite (a) a five year gap between the act of destruction and commencement of the

[498] [2005] 1 Qd R 159.

'judicial proceeding' and (b) proof of belief and intent based on no more than inference drawn from a request for the return of the diary for an unstated purpose.

Williams JA thought there was ample inculpatory evidence and Jerrard JA regarded the convictions proper.

Davies JA noted at [15] that a section 129 offence could be proven if the offender 'believed' that a document 'might be required in evidence in a possible future proceeding' and wilfully destroyed the document intending to prevent the use of it for that purpose. He regarded 'knowing' as equivalent to 'believing'.

In his Honour's assessment the only logical reason for the victim wanting the diary pages back was to take them to the police[499] and that it was not open to the jury to conclude the pastor shredded the diary for any purpose other than preventing them from being used in possible future court proceedings.

Jerrard JA held[500] that the judicial proceeding referred to in section 129 should be understood 'to include a judicial proceeding which the offender knows, or believes on reasonable grounds, may occur' and added:[501]

> There is no need for the prosecution to establish more than the possibility known to or believed in by the accused on reasonable grounds, that a judicial proceeding would occur, those reasonable grounds being matters shown to exist to the knowledge of the accused.

Thus, Ensbey is authority for the proposition of law (if not logic) that it is reasonably safe and satisfactory enough from a legal viewpoint for a criminal jury to conclude that the *only* reason a victim would want the diary with some legal value back was to give it to police for potential use in contemplated court proceedings and there was no room for believing that the chance of a court case had not been considered even though (a) a formal complaint wasn't made until many years after the diary was destroyed and returned and (b) there was a possibility that S herself have been 'incriminated' or embarrassed by the contents of the destroyed pages of the diary 'if it was sent back in its proper state' and (c) it was highly unlikely that the diary would be needed intact as evidence because of the improbability that the offender would contest the charges in a 'judicial proceeding' because he had made a full confession and already suffered public exposure and admonition.[502]

Notably, Ensbey did not give evidence. He simply relied (unsuccessfully as it turned out) on innocent inferences arising naturally from the proven facts to raise a reasonable doubt. He may have failed at trial and on appeal because there was no evidence from him explaining, contradicting or clarifying what was in his mind when shredding the diary.

Documentary evidence

The term 'document' was not relevantly defined in section 1 of the Criminal Code.

Ordinarily, however, a statement in a document is admissible as evidence in a court if it is relevant to a disputed issue and properly authenticated. The form and contents of

[499] *R v Ensbey; Ex parte Attorney-General* [2005] 1 Qd R 159, [21].
[500] *R v Ensbey; Ex parte Attorney-General* [2005] 1 Qd R 159, [48].
[501] *R v Ensbey; Ex parte Attorney-General* [2005] 1 Qd R 159, [54].
[502] *R v Ensbey; Ex parte Attorney-General* [2005] 1 Qd R 159, [22] (Davies JA).

public or official documents are generally allowed to speak for themselves[503] whether tendered in a real, original or testimonial capacity. The Heiner documents undoubtedly had legal significance or value in either a judicial review type proceeding or a civil defamation action and could, therefore, potentially have been used 'in evidence' for section 129 purposes.

Tendering, producing, inspecting, cross-examining on or referring to a document in a 'judicial proceeding' is using it 'in evidence' in the relevant sense but pre-trial disclosure under a procedural rule may not qualify as such a use.

Wilfulness

In section 129 of the Code the destruction simply has to be wilful; that is, deliberate not inadvertent. Used in connection with a property offence 'wilfully' denotes a voluntary act with intention to cause actual injury.[504]

In *R v Lockwood*[505] the Court of Criminal Appeal held that the word 'wilfully' used in connection with a property offence requires proof of (1) an actual intention to cause the harm that was in fact done or (2) a deliberate or willed act and reckless disregard of the risk of the damage being a likely consequence.

Foreseeable and foreseen litigation

Section 129 requires no more than either a belief that a judicial proceeding might occur in the future, was foreseen as a 'realistic possibility' based on the known facts or, alternatively, an 'actual' belief that the destroyed documents '*might* be required in evidence in a possible future proceeding'.[506]

A slightly wider test based on *R v Rogerson*[507] would be satisfied if at the time the criminal act was committed the offender contemplated the possibility that a judicial proceeding might be commenced at some time in the future.

Litigation can be a realistic future possibility even if the party with a cause of action had not yet decided, or even considered, legally enforcing the claim in a court of competent jurisdiction.[508]

Either way the chance of future judicial proceedings (before a court tribunal or persons in which sworn evidence may be given) has to be something more than speculative, remote or fanciful.

The possible judicial proceeding in which the Heiner documents might have been required as evidence in if they had been retained are suggested to be:

(i) a trial for civil defamation and related discovery procedures or alternatively,

(ii) a formal court application by Mr Coyne and/or Ms Dutney for the delivery up, (or production) and inspection of the documents under the court rules, prerogative write or a regulation 65 enforcement procedure.[509]

---

[503] *Albrighton v Royal Prince Albert Hospital* [1982] NSWLR 542; *McKay v Hutchins* [1990] 1 Qd R 533.
[504] Griffiths Letter with the Draft Code, 29 October 1897 at viii.
[505] R v Lockwood; Ex Parte Attorney-General [1981] Qd R 209.
[506] *R v Ensbey; Ex parte Attorney-General* [2005] 1 Qd R 159, [15-16] (Davies J), [48-54] (Jerrard J).
[507] (1992) 174 CLR 268.
[508] *R v Rogerson* (1992) 174 CLR 268, 277-278 (Mason CJ); Transcript 3(e), 18 February 2013 [p53: line 20] , [p57: line 7], [p63: line 4], [p69: line 30].

No one mentioned industrial court action.

Which particular form of litigation was foreseeable as possibly turning into a 'judicial proceeding' anticipated by Cabinet on 5 March 1990 has been the subject of ongoing debate. It does not need to be definitively resolved now.

The precise character or nature of the proceeding that was threatened or foreshadowed is not the real issue. What matters most is whether a 'court-like' proceeding with the defining characteristics of a 'judicial proceeding' was anticipated by Cabinet as a realistic or reasonable possibility and that the destroyed documents may have been required for future use in that proceeding.[510]

Motive, good or bad, may have circumstantial significance but is legally irrelevant to liability if Cabinet Decision No. 162 of 1990 was intentional (see section 23 of the Code). Acting in good faith does not alter the character of an intentional act but can moderate penalty. In other words, doing the wrong thing for the right reasons does not make criminal conduct a legally innocent mistake.

Actual knowledge and belief

In a submission made on behalf of former Premier Goss and former ministers Braddy, De Lacy and Hamill,[511] Burns SC and Ms Rosengren assert that, Ms Warner aside, it is:

> … quite impossible to discern the states of mind of the individual members of Cabinet and nothing can safely be concluded about the individual beliefs or motivations of those members of Cabinet
>
> … because the facts known to them are simply unattainable on the evidence.

They add:

> …the evidence is overwhelmingly to the effect that the Cabinet was not at all focused on the possibility of a future proceeding and, as such, the belief necessary to be proved under s129 is entirely absent.
>
> There was certainly no sinister intent behind the decision to agree to the responsible Minister's recommendation, let alone a specific intention to prevent the Heiner material being used in evidence. To the contrary, the decision was made with the very best of intentions in response to an industrial issue about which advice had been taken from the Crown Solicitor. The evidence is otherwise such that it was impossible to discern the state's of mind of the individual members of Cabinet. No offence under s129 could possibly be established.

And further Burns SC and Ms Rosengren submitted:

> …several Ministers of Cabinet (may very well have) agreed to the recommendation for no other reason than in (1) it had been sought by the responsible Minister (2) it was supported by the Crown Solicitor and consented to by the State Archivist and (3) nothing appeared on the face of the material placed before Cabinet to ring any alarm bells. If so, that would not be surprising because the taking of such a stance reflects the more limited role of members of Cabinet (other than the responsible Minister) have in relation to such decisions. Such members are perfectly entitled to act on the advice and recommendations of the responsible Minister, and that must be particularly so when it is apparent on the face of the Cabinet material that the issue at hand has been considered by the Crown Solicitor and consented to by the State Archivist.

I don't entirely agree.

---

[509] Exhibit 151; Exhibit 168; Exhibit 181; Exhibit 363; Exhibit 161; Exhibit 159.
[510] *Selim v R* [2006] NSW CCA 378, [33].
[511] Exhibit 369.

A state of mind can be proved in a criminal context by a truthful admission or rational inference from established and logically relevant primary facts or circumstances. There can, obviously, be significant (sometimes insurmountable) evidentiary and reasoning problems in identifying which person or persons in the case of the 'corporate' defendant had a relevant state of knowledge or belief in common. The issue is even more complicated if a number of persons whose mental state is relevant have varying knowledge, mixed motives and different beliefs.[512]

Admittedly, there is no direct evidence of what the 1990 Cabinet ministers had in mind when Cabinet Decision No. 162 of 1990 was made. It would be unsafe or unsound to work on the basis of the assumption that they 'must have known'.

However, what each individual Minister knew, believed or intended to achieve via Cabinet Decision No. 162 of 1990 is a matter of inference capable of being rationally drawn from the available fund of circumstantial facts, regardless of any rival explanation that may also be open on the same body of evidence.

Concurrence (which may be different from not dissenting and acquiescence) in a decision 'en bloc' based on identical information is an evidentiary fact from which a legitimate inference of coincident intention can rationally be drawn and could exclude any other rival explanation, but it does not necessarily follow that they also had shared or overlapping intents.

The voluntary and intentional act of concurrence may, however, make them indespensible links in a causal chain knowingly concerned in contributing in a tangible and substantial way to producing an intended criminal outcome.

Cabinet records and the related oral deliberations comprise the only source of evidence from which crucial mental elements can be reasonably inferred.

Ms Warner was unable to recall in evidence the specifics of any additional oral information she provided to Cabinet in 1990 but thought she would have related parts of exhibits 151A and 181. Exibit 151A mentioned that 'certain staff… had indicated… (an) intention to take civil action *against informants* (emphasis added) to the inquiry'.

Ms Warner expressed the view that there needed to be an outcome where the Heiner documents would not be available 'to do harm to anyone' and therefore the best option was to destroy them. Clearly in the context of the Cabinet discussion 'harm' included being sued for defamation.

Mr Wells had probably read the Crown Solicitor's advice before the first cabinet meeting and remembered that he was 'very very definite'[513] and strongly in favour of the destruction option.[514]

Otherwise, according to Mr Wells, Cabinet relied very heavily on Ms Warner's recommendation and her view was quite strong that the documents be destroyed.

Mr Comben had no definite recollection of the Cabinet deliberations.

Ms Warner did not think that 'the whole question of the legal action being on foot'[515] was ever considered seriously. It certainly was not seriously considered by her.

---

[512] cf *Timms v Darling Downs Co-op Bacon Assoc.* (1989) 2 Qd R 264, 264 (Macrossan J).
[513] Transcript 3(e), 23 April 2013 [p31].
[514] Transcript 3(e), 23 April 2013 [p47].
[515] Transcript 3(e), 18 February 2013 [p57].

Mr Wells recalled that, by the end of its first meeting on 12 February 1990, Cabinet was 'resigned' to destroying the Heiner documents unless a better option could be found.

Mr Wells said that Cabinet did not want the government to keep the material because the notion that it would retain unsubstantiated defamatory statements on departmental files which might adversely affect employees' careers was 'rather odious'.[516] He said Cabinet's focus was 'almost entirely' upon whether it was sound policy to keep untested defamatory allegations about its own employees.[517]

Mr Wells made the valid point that the Labor Party was new to government in 1990 after 32 years in opposition. He denied that Cabinet had any 'vested interest' in avoiding 'a judicial process' and went on:

> … governments are in court every day, and one more would have made little difference … the decision was taken with a motive to minimise misgovernment, not with the intent to avoid the production of the material in a judicial proceeding. It was never about destroying the documents to get in the way of some hypothetical person bringing a defamation action: it was always about ensuring the government did not itself defame or publish the defamation of someone.[518]

When asked whether one of the goals of Cabinet, in having the Heiner documents destroyed, was to reduce the risk of legal action Mr Wells responded:

> It was not something that was foremost in the mind of Cabinet Ministers.[519]

He later added:

> We were being asked to destroy something that we did not know was going to be evidence at all.[520]

Although destruction of the material would have advantaged one section of employees over another, Mr Wells testified that Cabinet believed it was simply improper for government to keep untested allegations of misconduct in government files.[521]

Mr Wells said that keeping the material would eventually result in the 'publishing' of it in terms of criminal defamation because it would either have been accidentally or forcibly released under proposed freedom of information laws.[522]

Excluding the psychological phenomenon of 'inattentional blindness' (where what is in plain human sight is somehow inexplicably missed, misread or misconstrued) and assuming that they had all read and interpreted them according to their natural meaning and tenor, it is reasonable to conclude that the executive government all 'knew' each of the following facts when Cabinet Decision No. 162 of 1990 was made:

Submission 100 (Exhibit 151)

- centre staff had immunity under 1975 government policy
- extending the policy to Heiner would provide indemnity from the costs and damages of future legal action which could result from his investigation.

[516] Exhibit 351.
[517] Transcript 3(e), 23 April 2013 [p25].
[518] Exhibit 351 [p6].
[519] Transcript 3(e), 23 April 2013 [p25].
[520] Transcript 3(e), 23 April 2013 [p34].
[521] Transcript 3(e), 23 April 2013 [29].
[522] Transcript 3(e), 14 February 2013 [p96].

Indemnifying Heiner in this context arguably implies anticipation of having to defend probable defamation claims arising out of the inquiries he conducted

- except for 'any material forming part of official files' there was no legal impediment to destruction but this advice did not apply in the event of legal action requiring production having commenced and to date no such action has been instituted
- an important consideration in terminating the investigation was the level of statutory immunity or the exposure to the possibility of legal action against Heiner and his informants because of the potentially defamatory effect of the material
- terminating the Inquiry would 'to some extent' reduce the risk of legal action
- Minister Warner recommended destruction, with the exception of official material to 'remove doubts in the mind of all concerned that it remains accessible or could affect future deliberations about management issues at the centre'
- neither the Public Service Union nor the Professional Officers Association raised 'specific' objections to destroying the documents.[523]
- Exhibit 151 explains the rationale for the recommendation to destroy the material as being to:

  > …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.

Submission 117 (Exhibit 168)

- the fate of the 'potentially defamatory' material had yet to be determined
- the matter was of some urgency as there had been a number of demands requiring access to the material including solicitors' requests or belief of certain staff
- there were four available options including destruction, partial public release, retention and referral to Cabinet for noting. There is no recorded decision about the comparative merits of the rival options.[524]

Submission 160 (Exhibit 181)

- the records constituted a 'public record'
- destroying the documents would 'reduce risk of legal action' and provide protection involved in the investigation
- speedy resolution of the matter would 'benefit all concerned' and 'avert possible industrial unrest'
- 'representations' had been received showing a solicitor for 'certain staff members' seeking access to the material
- to date no formal legal action for production of the documents had been instigated
- some staff may be dissatisfied that their 'concerns' had not been 'resolved'.[525]

Destroying the documents was plainly advanced as a risk reduction strategy and preemptive protection measure against legal action (presumably for defamation) for 'all

[523] Exhibit 151.
[524] Exhibit 168.
[525] Exhibit 181.

involved in the investigation' who at that time were also all indemnified by Cabinet. This inherent conflict of interest and duty may or may not have been appreciated.

Postponing a decision on submission 100 and discussing the options given in submission 117 may be reasonably construed as inconsistent with a intent or desire by Cabinet to hastily destroy potential evidence. However, none of the former Cabinet Ministers satisfactorily explained why the retention option was rejected.

Mr Wells was concerned about keeping evidence of misconduct and unsubstantiated defamatory material on its own employees as 'improper' and 'rather odious' and was afraid that accidental disclosure or compelled production either under proposed freedom of information laws or in a court proceeding could make the government liable for criminal defamation, but neither of these reasons are convincing reasons favouring destruction.

I doubt that the contents of the Heiner documents were any more 'odious' than what is routinely held on record in departmental custody and it is hard to see how mere retention could constitute a criminal offence based on the act of publication.

Mr Wells says that Cabinet understood that unless a decision were made quickly the government would end up having to release or publish defamatory material if access was permitted, for example by subpoena or third party discovery in a pending action.

Even if they were genuine concerns, I would be surprised if they were shared by anybody else in the Cabinet room and it does not mean that litigation was not also anticipated and a factor that contributed to the decision to destroy.

In any case, contrary explanations of Cabinet Decision No. 162 of 1990 are immaterial to the issue of legal sufficiency.

In my opinion it is enough to prove that a mental element actually existed at the material time, regardless of its objective reasonableness or the soundness of the logic underlying it.

However, even on Jerrard JA's narrower view in Ensbey at [54] cf Davies JA at [15], the 18 members of Cabinet had reasonable grounds to believe (and therefore know) that a court or tribunal proceeding to gain access to the Heiner documents, either as a matter of natural justice or alternatively pursuant to regulation 65 access rights, was a possibility.

Intention

Intention is the driver of criminal responsibility for a section 129 offence. An intention is a directing state of the mind. With a definite purpose or design ordinarily actions are intended if they are 'meant' or 'had in mind'.[526]

I reject the argument that section 129 requires proof that the Heiner documents were destroyed 'solely' to prevent them from being used in evidence. It is sufficient if that intention actually existed either alone or with others. As long as preventing the documents from being used in evidence in a possible future court case was *an* intention that mental element would be established.

Ms Warner emphasised that stopping the disputation and argument that had led to the poor running of the centre was the main motivation. She regarded destroying the Heiner documents for the sake of the operation of the institution to be in the public interest.

[526] *R v Willmot (No.2)* [1985] 2 Qd R 413, 418 (Connolly J).

She said the overarching priority was to achieve the overall 'greater good' and allowing staff access to the Heiner material would be counterproductive to the attainment of that objective.[527]

The Minister for Families

Minister Warner took the recommendations resulting in the making of Cabinet Decision No. 162 of 1990 Cabinet.

The shredding probably would not have occurred but for Cabinet's decision to adopt Ms Warner's recommendation or the counselling of the Crown Solicitor.

Consequently, Ms Warner's criminal liability is potentially wider than her Cabinet colleagues on the basis that she recruited her Cabinet colleagues and the public servants as innocent agents to fulfil her section 129 intentions and unlawful purpose.

As Burns SC and Ms Rosengren point out:[528]

> … Ministers, including the Premier, are entitled to act on the advice and recommendations of the responsible Minister who, in turn, is informed by the advice and recommendations of the relevant department. It should, therefore, not be assumed that the Minister's (other than the responsible Minister) had given the decision under consideration the level of thought required of the department or of the responsible Minister. To the contrary, each will be heavily influenced by the fact that particular recommendation has been made and will, generally speaking, adopt the recommendation and the strong reasons appear to justify taking another course, and such reasons would of course need to appear on the face of the material before Cabinet.

A similar point was made that (unless something appearing on the face of the material before Cabinet warrants taking a different course) ministers primarily act on the advice and recommendations of the responsible minister and may routinely proceed on the assumption that any recommendation has been properly thought through.

These are all uncontentious propositions.

Byrne QC for Ms Warner submits[529] that no adverse finding or view about her conduct was reasonably open on all the material. He argues that she (and Cabinet) acted on 'a gross over-simplification of the advice of the Crown Solicitor' in good faith and that there was 'no legal impediment' to the destruction of the document, meaning that the element of intention in section 129 is lacking.

Ms Warner had been advised that '… proceedings would have to be on foot before she would have to comply with any solicitor's request for documents memo to Mr Wells 22 February 1990'.

However, no distinction was drawn between complying with the civil rules of discovery and production and the criminal prohibition of destroying potential evidence. It seems that, in any event, the Crown Solicitor's view was that any civil or criminal duties owed to the court depended on a 'judicial proceeding' being initiated.

Although that interpretation was not an unreasonable one in 1990 it was clearly wrong in light of Ensbey's decision in 2004 and may have inadvertently counselled Cabinet as a whole to adopt the Ministers recommendation to destroy.

---

[527] Transcript 3(e), 18 February 2013 [pp63–64].
[528] Exhibit 369.
[529] Exhibit 372.

Thus, the Crown Solicitor's unqualified advice combined with the growing sense of urgency brought on by postponing a decision could have given the clear impression to the Minister that Cabinet had to act quickly to 'beat the lawyers to the punch' and before an option that what was strictly legal no longer was. It is a view she might easily have shared with or was accepted by the balance of the executive government.

The recommendation to destroy the documents itself could, if intended to destroy potential evidence so it could not be used in an anticipated judicial proceeding, constitute an act of procurement of either or both the other members of Cabinet and/or Ms McGuckin and Mr Walsh as 'innocent agents' to commit a section 129 offence and render her liable as a subsection 7(1)(a) or (4) principal offender.

But this is only relevant if consensus is rejected as evidence of common intent or as having a causal connection with the shredding.

As to motives or objectives, Ms Warner recalled:

> …there were a number of objectives that had to be reached, and one of them was to settle matters down at John Oxley. Therefore, we had to find a way of drawing a line under the confusion about the Heiner inquiry when of those ways was to – because people thought that we wanted to use the information against them, that the department wanted to use that information against them, that *that* information could be used against each other. So there needed to be some resolution of those documents not being in a position to do anyone any harm … so for everyone's peace of mind, all parties, it was thought best to destroy the documents.
>
> We were told … from a number of sources that the information was not required, that it was not going to be used in any practical – or for good purpose…[530]

The motive for an intention act is irrelevant to liability for a Code offence (section 23 of the Criminal Code).

Are the circumstances consistent with a section 129 offence having been committed?

Whether there is a legally sufficient case of criminal conduct depends on whether:

- it is reasonably open to infer that in reaching a consensus to destroy the Heiner documents (Decision No. 162 of 1990) the Premier and each concurring Cabinet Minister actually believed that a 'judicial proceeding' of some kind was a realistic prospect. Some will say the risk was so low that the chance of one being anticipated by Cabinet was unreasonable or remote to the point of being non-existent while others will regard the possibility as a totally unacceptable risk to take with the obvious litigation rights of others who were, at least, apparently interested in 'considering their position' in light of the documents, for example Coyne and Dutney
- Cabinet decided to destroy the documents with the intention, possibly among others, of preventing them from being 'accessible' or available for use if required in any such proceeding.

The key legal question is what each Minister believed and intended based on what he or she 'knew' (or was 'knowable') from all the available information.

I do not think that the chance of the documents being required in evidence to prove (or even defend) a defamation proceedings was so slim that it could not rationally or

[530] Transcript 3(e), 14 February 2013 [pp97–98].

reasonably have been in all Ministerial minds when concurring in Cabinet Decision No. 162 of 1990.

It is not inherently improbable that the executive government acted in the common belief that unless destroyed the Heiner documents might be used against, or even by, a centre staff member in a possible judicial proceeding for defamation.

It is unlikely that it did not dawn on the Cabinet members that Cabinet Decision No. 162 had the practical effect of making the indemnification of Heiner redundant became it would have the effect of destroying the subject matter of or the best evidence of any defamatory material.

Put more plainly, granting the indemnity for damages and litigation costs evinces awareness of the relevance and prospect of a judicial proceeding. When an indemnity is given at the same time as the decision to destroy the very documents whose existence necessitates giving potential defendants indemnity against legal costs this is capable of supporting the conclusion that the members of Cabinet 'knew' the documents may be required as evidence in a defamation case.

It does not matter whether or not the anticipated proceeding was even being contemplated by Coyne or Dutney at that point in time as long as one was 'on the cards'.

It may be readily accepted that in recommending and approving the destruction of the documents the executive government acted honestly and in good faith on legal advice that it had no reason to doubt.

However, ignorance of the law is no excuse unless knowledge of it is an element of an offence.[531] Knowing that a destroyed document is or may be required in a judicial proceeding is an element of section 129. Knowledge of the law is not.

Clearly, there were multiple mixed motives for the recommendation to destroy the Heiner documents, for example, to quell industrial unrest, keeping confidences, not retaining 'odious' allegation on departmental files, reassuring concerned centre staff, or avoiding litigation risks.

I am reasonably satisfied that on the whole of the evidence there is a 'legally sufficient' case of criminal conduct (that is, a breach of section 129 of the Code) associated with the making of Cabinet Decision No. 162 of 1990 in response to an industrial dispute at the John Oxley Youth Centre.

The combination of inferred facts supporting that conclusion are:

- granting the indemnity to Heiner in the belief that the documents recorded potentially defamatory statements made by and about management staff and others
- it is reasonable to suppose that because lawyers were seeking access to the potentially defamatory documents a future judicial proceeding was seen as a definite possibility
- the strong recommendation of the responsible minister to destroy the documents rather than retain them
- the low level category of the decision compared with the likely public controversy and political consequences if anyone ever found out, which probably explains why

[531] See *Criminal Code 1899* (Qld) ss 22, 24; *Ostrowski v Palmer* [2004] HCA 30; *R v Cunliffe* [2004] QCA 293.

the advice from Crown Law was so constrained and the view was decided in Cabinet rather than by the Minister or Director-General

- the reasonable assumption that if defamation proceedings were commenced that the Heiner documents might one day be required in evidence if that proceeding was defended by the government, Heiner or any centre defendant on the basis of qualified privilege
- the importance of preserving public records and the absence of any satisfactory explanation for rejecting the retention option
- the Crown Solicitor's advice that there was no 'legal impediment' to the destruction option unless and until legal proceedings were 'on foot'
- as at 5 March 1990 no proceedings in which the documents might have evidentiary value had commenced but a decision was being urged which is logically suggestive of a decision to 'get in first'
- the executive government (both collectively and individually) perceived that it would be 'best for all concerned' and the least worst of a limited number of imperfect options to hand the documents over to the State Archivist to be destroyed before any legal impediment to that course of action arose.

In all the circumstances Cabinet Decision No. 162 of 1990 may have reflected and given practical effect to a consensus of opinion within the executive government that the shredded documents should and would not be available to anyone for use in evidence if required in any future judicial proceeding and that each participating member of Cabinet was both causally and criminally responsible for the shredding of the Heiner documents.

It is strictly immaterial for criminal responsibility that Cabinet acted in good faith for the greater good on the basis of the recommendation of the responsible minister and the best available but misleading legal advice that may have had the practical effect of counselling the commission of a section 129 offence.

Indeed, the case against the cabinet ministers is arguably stronger than that faced by Mr Ensbey. I note the following features:

- Legal action was an acknowledged risk. The advice that there was no 'legal impediment' to destruction because no proceeding was actually underway arguably presupposed the distinct possibility of such an event happening in the foreseeable future.
- Lawyers on both sides were discussing disclosure of the documents.
- Minister Warner is likely to have been told that solicitors were at least seeking access to the documents and looking for reassurance that the documents would be retained to preserve their clients' interest.
- Heiner and centre employees who were either potential defendants or witnesses in a possible defamation case were all indemnified by the same government that ordered the destruction of the very evidence that might have been used against them in the event of that judicial proceedings transpiring.
- Urgency was growing with each postponement of a decision because the benefit afforded by there being no proceeding pending would evaporate if action was filed any time before destruction. Accordingly it could be inferred that the Cabinet decided to take a 'pre-emptive strike' while it was still strictly 'legal' to do so to avoid the loss of the option by more delay.

- The documents had much greater potential legal value than the Ensbey diary did having regard to the full confession and unlikely event of a contested hearing. They were either or both the subject matter and the 'best' evidence of defamatory statements for or against a prospective litigant and would have identified the maker and potential defendants. Destroying them would obviously disadvantage the plaintiff and advantage the potential defendants (including, potentially the Crown itself).
- Ms Warner thought shredding was the best option for all concerned (including for some unexplained reason, Mr Coyne and Ms Dutney) but that seems more of a paternalistic rather than realistic view.
- According to the departmental advice in Exhibit 168, retaining the documents intact was one of four viable options. It was the safest, least detrimental and controversial, unambiguously legal and, despite suggested concerns about the 'odium' of keeping the documents and an asserted fear of possible liability for criminal defamation if Cabinet did not destroy the documents, it was arguably the most, if not the only, appropriate response.

However, as already noted, an equivocal body of circumstantial evidence can be legally and rationally capable of supporting equally reasonable but opposing forensic findings.

In this regard, there are also factors strongly contradictory of any criminal intent including:

- the deferral of the decision for nearly a month. This is hardly suggestive of 'indecent haste' or rushing ahead with the intention to defeat anticipated legal proceedings or interfere with the course of justice by destroying documents with evidentiary value
- acting in good faith based on reasonable Crown Law advice (that was not 'plainly wrong' at the time it was given) with the best of intentions for the greater good and without any personal gain or any real harm to anyone.
- Ms Warner and Mr Wells' testimony that Cabinet was motivated more by a concern to end industrial strife at the centre and bring harmony to the centre rather than interfere with anyone's litigation rights
- as Burns SC and Ms Rosengren rightly point out it is likely that most Cabinet Ministers relied heavily if not solely on Minister Warner's recommendation and gave little detailed thought to the reasons behind it except to trust that she had thought it all through and that it was not unlawful
- moreover, Exhibit 180, which was prepared between the second and third Cabinet meetings records at [8] that the concerns appear to 'stem from a belief that the (defamatory) material gathered by Mr Heiner is being used as part of decision making processes in the department'. If, as she thought she may have done, Minister Warner spoke to these notes and relied on the same rationale in the Cabinet room the inference that the documents were destroyed to prevent their use in a judicial proceeding as evidence is seriously weakened.

Thus, a jury could readily choose to reject a jaundiced interpretation of the circumstances as implausible and find, on balance, that Cabinet had the Heiner documents destroyed to bring the centre debacle to finality 'without the thought of a court case ever crossing anyone's mind'.

Indeed, an acquittal in such circumstances merely means that evidence which is 'legally' capable of supporting a conviction did not in fact do so because, in the end, it was found by the jury as 'factually' insufficient.

Theoretically, however, logic (if not the law) really only 'requires' acquittal when the circumstances are intractably neutral; that is, 'equally' consistent with guilt and innocence, but when, as here, circumstantial evidence is compatible (but not necessarily equally) with both guilt and innocence.[532] Otherwise it is solely a jury issue. It is common for trial judges to instruct a jury that a defendant ought not be convicted as a matter of law unless the circumstances are 'in their view' incongruent with any reasonable hypothesis other than guilt,[533] not reasonably susceptible to any innocent explanation,[534] or unless guilt is the only rational inference the circumstances allow.[535]

Directions like these are intended to reduce the chance of appellable error or a miscarriage of justice arising from faulty fact-finding and defective reasoning in a finely balanced case, but are not mandatory. They are merely intended to define and emphasise the ultimate question for the jury by applying the criminal standard of proof to a body of circumstantial evidence from which both conduct and states of mind are to be inferred.[536]

They do not stem from a separate rule brought into play by circumstantial evidence but derive solely from the general requirement that criminal guilt be proved beyond reasonable doubt and a presumption of innocence be displaced by sufficiently cogent evidence but it can be omitted without appellable error.[537] Interpretation and weight are quintessential jury questions.

The reasonableness issue

Despite the special respect and legitimacy the criminal justice system normally accord to juries, the provisions of section 668E of the Criminal Code guard against the prospect of an innocent person being wrongly convicted on contestable evidence.

Thus, a jury verdict based on legally sufficient but highly debateable inferences may be set aside on appeal as unreasonable or unsupportable having regard to the whole of the evidence relied on in proof.

A jury verdict may also properly be described as 'unreasonable' if, in all the circumstances, it is characterised exclusively or predominantly by a logical inconsistency or manifests perverse reasoning (for example where the verdict represents a finding contrary to an overwhelming preponderance of obviously credible evidence).

The phrase 'cannot be supported having regard to the evidence' describes a verdict that is based on evidence that is plainly defective or is so weak or obviously unreliable that reasonable doubt as to guilt must necessarily exist however the evidence as a whole is viewed.[538]

Setting aside a jury's verdict after the issue of guilt has been left to them on what was held to be legally sufficient albeit tenuous or ambiguous evidence, on any view, is a

[532] *Knight v R* (1992) 175 CLR 495, 502.
[533] *Peacock v R* (1992) 13 CLR 169, 634.
[534] JD Heydon, *Cross on Evidence* (Butterworths, 6th ed, 2000) 253 [9035]
[535] *Plomp v R* (1964) 110 CLR 234, 252.
[536] *Morrison v Jenkins* [1949] 80 CLR 626, 644 (Dixon CJ).
[537] JD Heydon, *Cross on Evidence* (Butterworths, 6th ed, 2000) 268 [9110]
[538] *R v PAH* [2008] QCA 265.

serious step. There is no justification for an appellate court to disturb a verdict of guilty simply because it disagrees with the result.[539] Nor can the court review the decision of a jury on the facts or lay down what weight is to be given to any particular piece of evidence, nor what particular inference the jury should or should not draw from proven facts. The function of the appeal court is to enquire whether there is evidence upon which the jury could, as reasonable persons, find beyond reasonable doubt that the accused was guilty.

It is not the safe and satisfactoriness of a challenged verdict that counts but whether a manifest miscarriage of justice has occurred because, for example, in the opinion of the appeal court the jury did not give the benefit of a reasonable doubt to the defendant.

The ultimate issue for an appellate court is always whether a reasonable jury would have been satisfied beyond reasonable doubt. In most cases, if a doubt is entertained by the appellate court it will be a reasonable one which a convicting jury ought also to have entertained if acting reasonably.[540]

The question to be decided in such a situation is one of fact based on the court's own independent evaluation of the evidence; in doing so it assesses whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of guilt.[541]

If the evidence underpinning a guilty verdict contains discrepancies, inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court (of appeal) to conclude that even allowing for the advantage enjoyed by the jury there is a significant possibility that an innocent person has been convicted, the court is bound to act and set aside that verdict.

In my opinion, even though I think there is sufficiently cogent evidence to be left to a jury to consider whether the executive government committed a section 129 offence, a conviction could quite easily be reversed on appeal as a miscarriage of justice because the competing inferences of fact that could properly be drawn might be regarded as so finely balanced as to be equally consistent with both guilt and innocence, and therefore give rise to a reasonable doubt that defendants were entitled to.

To avoid the likelihood of this ultimate outcome, the evidence would have to be viewed as strong enough to positively exclude the inference that the Heiner documents were not shredded to ensure that they were not available if later required for use as evidence in a judicial proceeding, but for some other reason.

Recommendation

The Director of Public Prosecutions conducts criminal proceedings on behalf of the Crown. He is answerable for the discharge of his functions to the Minister and performs 'such duties of a legal nature' as the Minister may direct.[542]

The question of whether prosecuting a legally sufficient charge against any person for a contravention of section 129 is justified is for him to decide. It is neither my role nor intention to try to influence the statutory discretion of the Director of Public Prosecutions in the event the issue of prosecution is ever referred to him for consideration.

---

[539] *Chamberlain v R (No 2)* (1984) 153 CLR 521.
[540] *M v R* (1994) 181 CLR 487, 494.
[541] cf *Baini v R* (2012) HCA 59.
[542] *Director of Public Prosecutions Act 1984* (Qld) s 10.

Nonetheless, I think some mention of relevant public interest considerations is appropriate and may be worthwhile in the context of a public report about criminal conduct associated with past government action in a context where the Attorney-General has independent authority to present an indictment as the state's first law officer.[543]

Discretionary factors

Naturally, the decision to prosecute does not depend on the strict legal position alone and there is no rule that suspected criminal offences must always or automatically be the subject of a formal charge. Sufficiency of evidence is a necessary but not adequate justification for the public investment in a prosecution.

The prosecutorial discretion must be exercised to serve, not defeat, the overall ends of justice. The dominant consideration is the public interest.

The relevant public interest criteria include discretionary factors such as: the prospects of success, extenuating circumstances, mitigating factors, staleness and the overall cost benefit, moral blameworthiness or fault, public perception of the merits of the prosecution, the level of community interest and its reasonable expectations after the passage of nearly a quarter of a century, as well as the likely length and expense of a trial and whether the defendant has already suffered enough.

The quality and persuasive strength or cogency of the evidence must be evaluated as it is likely to be at a criminal trial. The lines of defence which are plainly open and the overall merits of a prosecution are also relevant. Clearly, initiating or maintaining a prosecution with no reasonable chance of ultimate success would be contrary to the overall public interest.

Community views about the social utility can be expected to differ widely and strongly. Charging former Cabinet Ministers of previous good character who made no personal gain for doing what was honestly seen as the greater good on the faith of mistaken legal advice from the most authoritative available source would create a dubious precedent.

While honesty, good faith, legal error and acting in what was seen as the overall public interest are not strictly relevant to the legal issue of criminal responsibility they are important considerations going to mitigate moral blameworthiness and the imposition or quantum of any punishment.

Like all other good things justice cannot be easily pursued without moderation and not every channel is or ought to be opened. 'It may be loved unwisely pursued too keenly and may cost too much'.[544]

Adequacy and appropriateness

The word 'adequacy' in paragraph 3(e) denotes 'sufficiency' and is quantitative. It asks – was what was done all that reasonably *could* have been done? 'Appropriateness', by contrast, is essentially qualitative and concerned with propriety more than sufficiency. It asks – was what was done what reasonably *should* have been done?

The most pertinent question for me to answer, therefore, is whether the actions of the Premier and Cabinet in reaching Decision No. 162 of 1990 and handing over the Heiner documents for destruction were 'appropriate' rather than 'adequate'.

---

[543] *Attorney-General Act 1999* (Qld) s 7(1).

[544] cf *Pearse v Pearse* [1846] ER 950, 957.

Cabinet's conduct should not be characterised as deficient unless it clearly fell short of what I think a reasonable Minister would have done at the time in the same circumstances.

Applying contemporary standards or current codes of conduct retrospectively or in hindsight would clearly be unfair.[545]

O'Gorman SC for Mr Wells submits that if I reached the conclusion that there are grounds on which I can:

> …plausibly report that government acted 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' or I would fail to give him a 'full and fair' hearing.

I disagree. The standard of appropriateness being applied is no higher than the ordinary meaning of the word implies. Mr Wells appeared at the public hearing and has made a comprehensive submission with notice of the matters in issue before the Inquiry. I am reasonably satisfied that the requirements of fairness in the context of 3(e) have been fully met.

Resolution of this issue requires striking a balance between relevant considerations so as to arrive at a fit and proper outcome within the ordinary meaning of the term.[546]

What was 'appropriate', having regard to the circumstances in which the Premier and Cabinet made Decision No. 162 of 1990, has to be judged in the context of the community expectations of ethical public administration, as well as the acceptable principles for good, open and transparent government in 1990. This test, I think, properly reflects the importance and standing of the executive government in a liberal democracy, as well as the level of public trust and confidence reposed in the integrity, objectivity, impartiality and competence of Ministers of State.

No doubt Cabinet had a duty to act in a way that bears close public scrutiny; that is, in an exemplary and model way. However, due allowance has to be given for the fallibility and frailty of all human institutions and the fact that what is 'right' and what is 'wrong' in discretionary public decision making can be a highly contestable matter.

Burns QC and Ms Rosengren argue:

> …it cannot be said that (Cabinet) acted other than appropriately and in accordance with the standard to be reasonably expected of members of the executive.

It is further submitted that the decision in question:

> …was arrived at cautiously over the course of three Cabinet meetings and on the advice of the relevant department, as well as, the Crown Solicitor and State Archivist. Cabinet was entitled to rely on that advice, as well as, the recommendation of the responsible Minister. In all of the circumstances they acted appropriately and in accordance with the standard to be reasonably expected of members of the executive.

The question posed for me to answer by 3(e) is not whether Cabinet acted strictly in accordance with the law (as they, rightly or wrongly, were told it was or honestly understood it to be) but whether the executive government acted appropriately; that is, concerned with the broader concept of propriety, rather than mere legality. The obligation is not simply to observe the letter of the law but its spirit and purpose as well.

---

[545] Oliphant Inquiry (2009) Appendix 9-1:2, 386.

[546] *Mitchell v R* (1995) 184 CLR 333, 346.

While the executive government was perfectly entitled to choose to consider and decide whether or not to destroy potentially defamatory departmental records, it was hardly a matter of high public policy or priority. It is even more difficult for me to see why Cabinet was even grappling with such a machinery issue.

It is more difficult again to see how it was 'appropriate' for the Cabinet to take action that was intended, was likely, or had the practical effect of denying an aggrieved public servant the right of access to official records he or she had under public service regulations, or depriving that or another person of discoverable or admissible documents in any potential legal proceedings.

Furthermore, the John Oxley Youth Centre employees already had the protection of indemnity against legal costs as a matter of standard government policy. They did not need (and were not entitled to) the additional benefit of arguably the 'best' evidence against them being prematurely and secretly destroyed by their employer and litigation insurer.

In my opinion, the appropriate standard of conduct expected of the Premier and Ministers in a serving Cabinet, in 1990, was not to have public records destroyed in the circumstances, in the way, or for any of the reasons as the Heiner documents supposedly were.

Even if it is properly characterised as the honest but ill-advised act of a newly-elected government, Cabinet Decision 162 of 1990 caused the destruction of public records which from a governance and public administration perspective fell short of the relevant standard of appropriateness; that is, 'fit and proper'.

This is because, in my view, apart from being prima facie unlawful, it had the tendency and practical effect (whether intended or expected) of prejudicing or frustrating employee access rights and litigation interests and bringing executive government in Queensland into disrepute and intractable public controversy for 23 years.

PART B

Matters placed before the Commission

The cases of Ms Neal and Ms Harding

On 12 October 2012 Mr Gordon Harris was given authority under section 21 of the *Commissions of Inquiry Act 1950* to appear as the solicitor representing Ms Shelly Farquhar (formerly Neal) and Ms Annette McIntosh (formerly Harding) and to examine and cross-examine any witness on any matter deemed by me to be relevant to, and fall within, the ambit of the original paragraph 3(e) of the Terms of Reference.[547] For the purpose of this report both women will be referred to as their former names: Ms Shelly Neal and Ms Annette Harding.

Both Ms Neal and Ms Harding are former residents of the centre. The authority of Mr Harris to appear was grounded in serious allegations of sexual abuse at the centre in 1988 and 1991 respectively and systemic failures in the manner in which that was dealt with both within the centre and in wider government. The allegations of sexual abuse concerning Ms Neal and Ms Harding at the centre were the only matters placed before the Commission concerning paragraph 3(e).

The authority of Mr Harris to participate was supported by written under his hand and dated 20 July 2012 (first submission of Mr Harris) and 27 September 2012 (second submission of Mr Harris). Mr Harris made very serious allegations in those submissions of a systemic breakdown flowing from a particular culture in government with respect to its response to sexual abuse in youth detention centres.[548]

Mr Harris' overarching proposition was that findings could be made that:[549]

> [A] culture which shows a disdain for the law and the rejection of its application had existed throughout the former Department of Families and its protégé the Department of Communities (Child Safety Services) and Police officers over decades. There has been a disregard for the truth, and an abuse of authority to protect the culture.

Mr Harris further asserted:[550]

> Along with the culture comes an unwritten code that is an integral element of the protection of the culture. The code exaggerates the need for mutual loyalty and support and under it, it is impermissible to criticize other officers, the Department and is seen as reprehensible if complaints are made by outsiders. Criticism is kept under control by those who have authority. The code requires that laws are not enforced against other officers or not to provide co-operation to assist investigations or deflect such investigations.

Mr Harris advanced the cases of Ms Neal and Ms Harding for probing by the Commission as particularly serious and complex examples of his overarching proposition.[551]

---

[547] Exhibit 3; Transcript 3(e), 1 November 2012 [p2: line 45].
[548] Exhibit 368.
[549] Exhibit 373.
[550] Exhibit 373.
[551] Exhibit 373.

In relation to Ms Harding, Mr Harris particularised the following matters:[552]

- In 1988 and 1989 Ms Harding was an Indigenous girl aged 14 years.
- She was a detainee at the centre and was 'pack raped' twice while in the care of the centre.
- The first rape occurred at Mt Barney and the second rape occurred at Mt French.

Mr Harris particularised the following factual matters concerning Ms Neal:[553]

- On 4 April 1991 Ms Neal was a 15-year-old detainee at the centre and was raped by a departmental employee (unnamed youth worker) during an excursion to Wivenhoe Dam.
- Threats were made against Ms Neal to remain quiet by three female detainees who would give the unnamed youth worker sexual favours in exchange for favouritism.
- Ms Neal made the allegation to a youth worker on 16 April 1991 and the unnamed youth worker ceased his employment the same day.
- Ms Neal was ultimately assaulted after reporting the allegation.
- The police became involved on 18 April 1991.

In relation to both Ms Neal and Ms Harding, Ms Harris made the following assertions:

- The alleged offending are crimes against humanity comparable to war crimes.[554]
- The alleged offending 'remain uninvestigated'[555] or were 'inadequately investigated by the department and police despite a criminal offence being committed'.[556]
- The alleged offending was '… covered up and the facts distorted to protect a system that failed them and has had a serious impact on their lives.'[557]

In relation to Ms Harding, Mr Harris raised further matters:

- It was questioned whether Ms Harding's ethnicity had something to do with the alleged failure to properly investigate.[558]
- Ms Harding had been abused by the state, in that the state sought to pretend it never happened. He further said that, 'no government can allow and condone the rape of a child in one of its detention centres. It is an abuse of her human rights and is equal to the human rights abuses we see in the third world country.'[559]
- Senior executives at the department and the Queensland Cabinet were each a party to the alleged cover up.[560]
- It was questioned whether the centre manager, Mr Peter Coyne, and the department, 'were involved with obstructing or perverting the course or administration of justice.'[561]

[552] Exhibit 368; Exhibit 373.
[553] Exhibit 368; Exhibit 373.
[554] Exhibit 368; Exhibit 373.
[555] Exhibit 368.
[556] Exhibit 373.
[557] Exhibit 368.
[558] Exhibit 368.
[559] Exhibit 368.
[560] Exhibit 368.

- Police investigating Ms Harding's allegations were motivated by political considerations and not the state of the evidence.[562] Mr Harris said, 'It was the duty of the police officer and departmental officers to investigate and protect evidence.'[563]
- It would raise a serious public outcry if the destruction of the Heiner documents contained evidence of the rape of Ms Harding.[564] Mr Harris asserted that it could be argued that, ' the State knew of the abuse allegations at the Centre but did not want it to be exposed for the public to see.'[565] Mr Harris said, ' it would have been detrimental to any government to allow such atrocities to become publically known.'[566]

On 13 December 2012, part way through the hearings concerning paragraph 3(e), I confirmed with those given authority to appear, without objection, that paragraph 3(e) had two limbs. I said:[567]

> One is to look at the adequacy and appropriateness of government responses into historic child sex abuse in youth detention centres and the other… is to review ... any allegations of criminal conduct associated with government responses to historic abuse. So there's the response itself and then there's any allegations of illegality associated with that response.

Mr Harris was invited to indicate how Ms Neal and Ms Harding fell within paragraph 3(e).

He responded stating that the issues were the same for both Ms Neal and Ms Harding: there was a sanitising of the complaint by management, whether deliberate or not, no recognition of what had happened to them and they were put on the scrapheap of life.[568]

Mr Harris further said that Ms Harding and Ms Neal were let down by the government because they were sexually assaulted while they were detainees, management at the centre mishandled the allegation and nobody upheld the rights that they had arising out of being victims of sexual abuse in a government-run detention centre. There were therefore breaches of the duty of care by the department. As a result of what happened to Ms Harding and Ms Neal at the centre, they have suffered life-long detriment.[569]

In relation to Ms Neal, Mr Harris further said that concerns were raised about her on the day of the excursion on 4 April 1991 and despite those concerns:

> Nothing was done on that date, then when an investigation was done, it appears also to be inadequate because what we find is that the perpetrator of the event was effectively dismissed by the Department.[570]

The allegation that concerns were raised on 4 April 1991 was new to his list of complaints. It had its origin in the evidence of a youth worker, Mr Olley Isaac, to the Commission on 6 December 2012. This was unknown to all prior to that time.

---

[561] Exhibit 368.
[562] Exhibit 368; Exhibit 373.
[563] Exhibit 368.
[564] Exhibit 368.
[565] Exhibit 368.
[566] Exhibit 368.
[567] Transcript 3(e), 13 December 2012 [p71: line 20].
[568] Transcript 3(e), 13 December 2012 [p72: line 15].
[569] Transcript 3(e), 13 December 2012 [p73: line 30].
[570] Transcript 3(e), 13 December 2012 [p74: line 5].

Submissions made by Mr Harris at the close of evidence

Mr Harris filed final written submissions on the issues concerning Ms Harding and Ms Neal on 19 March 2013 (written final submissions of Mr Harris).[571]

Mr Harris made the following central submissions in relation to Ms Harding:

- While the police could not investigate the matter because a complaint had not been received from Ms Harding, the police would have been supplied with all of the information that was in the possession of the department and they would have had ample authority to continue to investigate the matter irrespective of there being no complaint.[572]
- The department orchestrated the response to the allegation of Ms Harding such that, 'The entire exercise was an exercise in minimising the facts to a controllable level'[573]
- Drawing both of the above points together, Mr Harris said:[574]

> The claim that the police investigated the matter is untrue. The police had no complaint to investigate, nor did they have any evidence to put them on a path towards doing an investigation. The claim that a police investigation had taken place was to deflect any inquiries into the matter.

Mr Harris went on to submit, in relation to both Ms Harding and Ms Neal, 'Evidence that could have assisted the police was effectively lost due to inept practises within the Department.'[575] Inept practices and orchestrated control are vastly different explanations and are mutually exclusive. Mr Harris submitted that the same theme applied to Ms Neal, that 'the continuing claim that the police investigated the offence is flawed.'[576]

Mr Harris also argued for particular factual findings to be made in relation to various matters concerning Ms Harding and Ms Neal. Those submissions are dealt with in my review of the evidence below and need not be repeated here. Mr Harris filed additional written submissions on 6 May 2013 (further written final submissions of Mr Harris),[577] raising some supplementary points, which are similarly dealt with below.

Submissions of Mr Lindeberg

Mr Lindeberg made submissions that the responses by government agencies to the Harding allegation were 'disgracefully inadequate … [and] ought … to have been far more rigorous and prompt than the evidence indicates was actually the case.'[578] Like Mr Harris, Mr Lindeberg submitted that the department tried to conceal the matter. He submitted that the police almost did no investigating but their involvement enabled the department to claim that it had done all that was necessary.[579] Particular assertions of fact made by Mr Lindeberg in relation to various matters concerning Ms Harding are dealt with in my review of the evidence below.

---

[571] Exhibit 367.
[572] Exhibit 367.
[573] Exhibit 367.
[574] Exhibit 367.
[575] Exhibit 367.
[576] Exhibit 367.
[577] Exhibit 362.
[578] Exhibit 366.
[579] Exhibit 366.

The truth of the allegations

The allegations made by Ms Neal and Ms Harding have never been tested in a court of law. It is not the function of this Inquiry to comment upon the truth of the allegations.

Under paragraph 3(e), the function of this inquiry is to review the adequacy and appropriateness of, and action taken by, government to the allegations made by Ms Neal and Ms Harding, including any allegations of criminal conduct associated with government response to the allegation.

I am concerned with the response to the allegations, not the truthfulness of the allegation.

Ms Harding

On Tuesday 24 May 1988, five staff and seven detainee children, including Ms Harding, went on an excursion by vehicle from the centre to the Lower Portals via Rathdowney, arriving at a car park in that area around 10.00 am.[580]

The excursion was an environmental bush walk, with a stated aim of 'socialisation within a natural environment'[581] and was only open to children who actually participated in the school program at the centre.[582] It was approved at a meeting of the centre's review team following an application made by one of its teachers, Mr Gordon Cooper.[583] Mr Coyne gave the ultimate approval for the excursion to proceed.[584]

Ms Harding, an Indigenous youth, was aged 14 years and 3 months at the time.[585]

The staff who attended the excursion included a psychologist, Mr Jeff Manitzky[586] and four teachers, Mr Gordon Cooper,[587] Mr Bob O'Hanley,[588] Ms Karen Mersiades[589] and Ms Sarah Moynihan.[590]

The memory of the staff members that attended the excursion is now largely poor.[591] However, the staff members wrote reasonably contemporaneous reports about the events of that day. Those reports, along with other documentary exhibits generated at the time, have been helpful in piecing together the sequence of events.

There was some controversy over how the staff reports were constructed, which had the potential to reduce the cogency of the information contained within them. Mr Feige, a youth worker, was told by another staff member that Mr Coyne might have been orchestrating the report writing by the staff in relation to the excursion.[592] However, the evidence of the report writers demonstrates that this gossip has no foundation in fact. For instance:

- Ms Mersiades' incident report was compiled at the request of Mr Coyne[593] either on the evening of the day of the excursion or following a debriefing on 25 May 1988 by staff with Mr Coyne.[594] Whenever her report was written, she said that Mr Coyne had asked them each to write their own view of what had taken place on the day of the excursion.[595]
- Mr Manitzky believed that he wrote his undated report on the day of the excursion or very soon after, but most likely in the evening when they returned from the

[580] Exhibit 241; Transcript 3(e), 22 January 2013 [p95: line 15]; Exhibit 11; Transcript 3(e), 5 December 2012 [p5: line 1].
[581] Exhibit 215; Transcript 3(e), 5 December 2012 [p6: line 25].
[582] Exhibit 215; Transcript 3(e), 5 December 2012 [p6: line 34].
[583] Exhibit 215; Exhibit 242.
[584] Transcript 3(e), 11 December 2012 [p15: line 20].
[585] Transcript 3(e), 22 January 2013 [p103: line 26]; Transcript 3(e), 13 December 2012 [p66: line 5].
[586] Exhibit 294; Transcript 3(e), 29 January 2013 [p60: line 24].
[587] Exhibit 11; Transcript 3(e), 5 December 2012 [p3: line 12].
[588] Exhibit 40; Transcript 3(e), 6 December 2012 [p21: line 15].
[589] Exhibit 272; Transcript 3(e), 22 January 2013 [p81: line 30].
[590] Exhibit 261; Transcript 3(e), 21 January 2013 [p19: line 30].
[591] Exhibit 261; Transcript 3(e), 29 January 2013 [p66: line 32].
[592] Transcript 3(e), 22 January 2013 [p99: line 28].
[593] Transcript 3(e), 22 January 2013 [p87: line 5].
[594] Exhibit 272.
[595] Transcript 3(e), 22 January 2013 [p87: line 20].

excursion.[596] He could not recall precisely how he came to make that report, but believed he may have volunteered it, as opposed to being asked by Mr Coyne to supply it.[597] He said that the facts set out in it are accurate.[598]

- Ms Moynihan wrote a report at the request of Mr Coyne.[599] She completed her report on her own, as opposed to in conjunction with others.[600]
- Mr O'Hanley along with the other staff were told by Mr Coyne to write a report about what happened on the excursion during a staff meeting on 25 May 1988, the morning after the excursion. Mr O'Hanley wrote a report that morning, which was signed by him and dated 25 May 1988. Mr O'Hanley rejected the proposition that Mr Coyne had given instruction on what to put in the reports. Mr O'Hanley noted, 'He simply said recall what happened on the day'. [601]
- On the evening after the excursion, Mr Coyne asked Mr Cooper to supply him with a report, which he gave directly to Mr Coyne.[602]

Details of the excursion

After arriving at the car park, the group set off on a two-hour walk to the Lower Portals[603] but was unintentionally split into two groups along the way, with one group arriving at the destination some time after the other.[604] A consequence was that their lunch at the Lower Portals was staggered.[605] Some of the children from the first group to arrive were playing in some rock pools and exploring the area with Mr O'Hanley before the other children and staff arrived.[606] Mr Cooper waited with the backpacks at the lunch site for the rest of the group to arrive.[607] All members of the excursion had arrived at the lunch site by about midday.[608]

At some stage, about five to ten minutes after Ms Mersiades and the rest of the second group arrived at the Lower Portals, Mr Manitzky alerted the other staff that he could not see some of the detainees.[609] He initially searched for the detainees alone but was then joined by Mr Cooper in the search.[610]

When Mr Manitzky reached the top of a small hill, he saw all the detainees standing in a group, with Ms Harding and one of the boys embracing while standing up. Ms Harding ran over to Mr Manitzky while the rest of the group pointed out another hill that they claimed to have scaled. Mr Cooper arrived shortly after Mr Manitzky and saw the detainees walking towards them. Ms Harding did not appear to Mr Manitzky to be

[596] Exhibit 241; Transcript 3(e), 29 January 2013 [p64: line 10].
[597] Exhibit 294.
[598] Exhibit 294.
[599] Exhibit 256; Exhibit 261; Transcript 3(e), 21 January 2013 [p20: line 20].
[600] Transcript 3(e), 21 January 2013 [p20: line 35].
[601] Exhibit 40; Transcript 3(e), 5 December 2012 [p23: line 15]; Exhibit 361.
[602] Transcript 3(e), 5 December 2012 [p10: line 35], [p11: line 8]; Exhibit 11.
[603] Exhibit 256.
[604] Exhibit 361; Exhibit 360.
[605] Exhibit 272; Transcript 3(e), 22 January 2013 [p94: line 20].
[606] Exhibit 241; Exhibit 256; Exhibit 240; Exhibit 272; Exhibit 361.
[607] Exhibit 360.
[608] Exhibit 361.
[609] Exhibit 240; Exhibit 360; Exhibit 361.
[610] Exhibit 241; Exhibit 256; Exhibit 240; Exhibit 11.

unsettled. He admonished the detainees for disappearing and took them back down to the main party.[611] The detainees were absent for approximately 15 minutes.[612]

Mr Harris put to Mr Manitzky in cross-examination that he saw one of the boys masturbating when he first located the detainees and told him to 'cut that out'. Mr Manitzky rejected that proposition and said that he had no knowledge of such an event.[613]

Ms Harding did not appear to Ms Mersiades to be stressed when the detainees returned to the lunch site with Mr Manitzky and Mr Cooper. She also had no inkling that an incident had occurred during their 15-minute absence.[614] After a further unknown period at the lunch site, the staff and detainees began the return journey to the vehicles at about 1.10 pm.[615] Again, the group got split up from time to time,[616] with the constituents changing as the walk progressed.[617] Mr Manitzky heard four of the boys speaking about sexual activity with Ms Harding, which he said was not unusual and was similar to their regular conversation. However, given the short disappearance of the detainees, Mr Manitzky questioned the boys about what had taken place whilst they were missing. The boys would not answer his questions.[618] Ms Harding arrived back at the vehicles with Ms Mersiades and Ms Moynihan.[619] Mr O'Hanley did not notice any signs of distress with Ms Harding during the walk back to the vehicles.[620] They arrived back at the vehicles at about 2.30 pm.[621]

By the time the whole group had arrived back at the car park, Mr Manitzky had raised his concerns with the some of the other staff about something, perhaps of a sexual nature, having taken place involving Ms Harding whilst the detainees were missing.[622] Ms Mersiades told Mr Manitzky that he must report his suspicions to the manager on their return.[623] Mr Cooper knew nothing of the allegation prior to being informed of it by Mr Coyne later that day or the following day.[624]

While the group was at the car park, four of the boys went to the toilet. Mr O'Hanley went to check on the boys after a few minutes to find that they had absconded.[625] The staff yelled out some instructions to the boys but they did not return.[626] Ms Moynihan and Ms Mersiades remained at the car park while Mr Manitzky searched for the boys back along the track to the Lower Portals.[627] Mr O'Hanley and Mr Cooper drove with the three remaining detainees, including Ms Harding, to a local farm to use a telephone and report

[611] Exhibit 241; Exhibit 11; Exhibit 360.
[612] Exhibit 241; Exhibit 240.
[613] Transcript 3(e), 29 January 2013 [p67: line 22].
[614] Exhibit 240.
[615] Exhibit 11; Exhibit 361.
[616] Exhibit 256.
[617] Exhibit 240.
[618] Exhibit 241.
[619] Exhibit 240.
[620] Transcript 3(e), 6 December 2012 [p25: line 22].
[621] Exhibit 361.
[622] Exhibit 261; Transcript 3(e), 21 January 2013 [p20: line 10]; Exhibit 272; Transcript 3(e), 22 January 2013 [p96: line 32]; Exhibit 256; Transcript 3(e), 21 January 2013 [p22: line 20].
[623] Exhibit 240.
[624] Exhibit 11; Transcript 3(e), 5 December 2012 [p11: line 18].
[625] Exhibit 241; Exhibit 361.
[626] Exhibit 241; Exhibit 240.
[627] Exhibit 256.

the absconsion to police.[628] Mr O'Hanley also contacted the centre at 3.15 pm and informed Ms Foote,[629] who was the deputy manager at all times relevant to the issues concerning Ms Harding.[630] Mr Coyne was then contacted and briefed on the situation but could not remember who contacted him.[631] Mr O'Hanley, Mr Cooper and the three detainees with them returned to the car park briefly before returning to the centre.[632]

A policeman attended the car park and took some details from Ms Moynihan and Ms Mersiades.[633] At about 4.30 pm, that police officer returned to the car park with the four boys.[634] Mr Manitzky, Ms Moynihan, Ms Mersiades and the four boys drove back to the centre.[635] Officers from the Beenleigh police station contacted the centre at about 4.45 pm to advise that the four boys had been located and detained.[636]

Centre response to the incident

Mr Coyne could not recall if there was a written policy or procedure for such an event at the time, but at 4.50 pm he reported the matter to his superior, Mr Ian Peers,[637] who was the Executive Director, Youth Support.[638] Shortly after, at about 5.10 pm, Mr O'Hanley and Mr Cooper arrived at the centre with Ms Harding and the two other detainees.[639] They were returned to the living area of the centre.[640] Mr Coyne and Ms Dutney spoke with Mr O'Hanley and Mr Cooper briefly about the absconsion. They were relieved that the boys had been located because they were concerned for their safety.[641] They each then left the centre, having finished their work for the day.[642]

Mr Manitzky, Ms Moynihan and Ms Mersiades arrived back at the centre with the four boys at about 6.45 pm. As the boys were very aggressive and non-compliant they were placed in the secure admissions area of the centre.[643] Mr Manitzky immediately contacted Mr Coyne at his home at 6.45 pm who gave some brief instructions and immediately travelled back to the centre, arriving at 7.15 pm.[644] When Mr Coyne arrived he observed the boys in the admissions area yelling, swearing, banging doors and walls, and attempting to provoke youth workers Mr Cox and Mr Kaltner into a physical confrontation.[645] Mr Cox was the admitting officer when the boys returned to the centre.[646] Mr Coyne did not enter that area, believing that his presence would only inflame the situation and that in time the boys would tire and voluntarily go to their rooms.[647]

---

[628] Exhibit 241; Exhibit 240; Exhibit 11; Exhibit 360; Exhibit 40; Exhibit 361.
[629] Exhibit 242; Exhibit 361.
[630] Exhibit 275; Transcript 3(e), 23 January 2013 [p6: line 15].
[631] Transcript 3(e), 11 December 2012 [p15: line 30].
[632] Exhibit 241; Exhibit 240; Exhibit 361; Exhibit 360.
[633] Exhibit 256; Exhibit 240.
[634] Exhibit 256; Exhibit 240.
[635] Exhibit 241; Exhibit 256; Exhibit 240.
[636] Exhibit 242.
[637] Exhibit 242; Transcript 3(e), 11 December 2012 [p15: line 36].
[638] Exhibit 270; Transcript 3(e), 22 January 2013 [p19: line 35].
[639] Exhibit 360.
[640] Exhibit 11; Exhibit 242.
[641] Exhibit 242.
[642] Exhibit 242.
[643] Exhibit 241; Exhibit 240.
[644] Exhibit 241; Exhibit 240; Exhibit 242.
[645] Exhibit 242.
[646] Exhibit 14.
[647] Exhibit 242.

Mr Coyne then had a meeting with Ms Moynihan, Ms Mersiades and Mr Manitzky in a conference room next to the admissions area.[648] The meeting lasted about one hour[649] and Mr Manitzky outlined the relevant events and his suspicion that sexual activity may have taken place between the detainees.[650] Mr Manitzky told Mr Coyne that he suspected something but that he did not have any direct evidence.[651] Mr Coyne decided that the suspicion would be investigated as early as possible the following day, 25 May 1988.[652] Mr Coyne ordered all of the staff that attended the excursion to be present, with the intention that the excursion would be reviewed in full.[653]

After Mr Coyne met with the staff from the excursion, the behaviour of boys in the admissions area deteriorated further, such that Mr Coyne had concerns for the safety of the staff. He entered the admissions area and spoke with the boys, delivering an ultimatum, which resulted in the boys going to their rooms one by one. This process lasted about 45 minutes.[654]

Mr Coyne then went to speak with Ms Harding, but found that she was asleep in her bedroom.[655] He said that he did not attempt to wake her up because it was about 10.00 pm and he did not have enough information to justify waking her to ask questions.[656] As a result of the suspicions raised by Mr Manitzky, Mr Coyne ensured that one of the youth workers was asked to keep an eye on Ms Harding overnight.[657] Mr Coyne then left the centre at about 10.00 pm.[658]

At 9.00 am on Wednesday 25 May 1988, as planned Mr Coyne and Ms Foote held a meeting with all of the staff who had attended the excursion. The meeting lasted about one and a half hours.[659] The focus of the meeting was to find out what everybody knew about the events of the excursion and to work out what needed to be done.[660] There was a concern that Ms Harding had been sexually assaulted, but no direct evidence was available.[661] The discussion in the meeting did not rise above suspicion.[662] During the meeting, Mr O'Hanley and Mr Cooper learned for the first time about the allegations of Ms Harding.[663] Mr Coyne noted in his later report to the deputy director-general of the department, Mr George Nix:[664]

> The purpose of the meeting was to analyse the program, debrief staff, gather information for future planning and to develop a strategy for investigating the concern about Annette Harding being sexually assaulted.[665]

---

[648] Exhibit 241; Exhibit 240; Exhibit 242.
[649] Exhibit 240; Exhibit 242.
[650] Exhibit 241; Transcript 3(e), 22 January 2013 [p97: line 5]; Exhibit 242.
[651] Transcript 3(e), 11 December 2012 [p83: line 45].
[652] Exhibit 241; Exhibit 242.
[653] Exhibit 240.
[654] Exhibit 242.
[655] Exhibit 242.
[656] Transcript 3(e), 11 December 2012 [p84: line 14].
[657] Transcript 3(e), 11 December 2012 [p84: line 30].
[658] Exhibit 242.
[659] Exhibit 242.
[660] Transcript 3(e), 11 December 2012 [p85: line 20].
[661] Exhibit 242.
[662] Transcript 3(e), 11 December 2012 [p85: line 26].
[663] Transcript 3(e), 6 December 2012 [p23: line 30], [p26: line 20]; Exhibit 11.
[664] Exhibit 322.
[665] Exhibit 242.

Ms Foote produced a memorandum dated 24 May 1988 from a meeting attended by Mr Coyne, Ms Foote and all of the staff that attended the excursion.[666] The memorandum must be incorrectly dated as it can only refer to the 9.00 am meeting of 25 May 1988. On the available evidence, there was no point in time when all of the staff from the excursion were assembled together at the centre for a meeting on the evening of 24 May 1988. Ms Foote could not recall the circumstances in which she produced the memorandum.[667] The memorandum set out guidelines for future excursions from the centre. There is no reference to the Harding matter.[668]

Mr Mark Freemantle, a youth worker, had some involvement with the Harding matter and wrote a report, dated 31 May 1998, at the request of Mr Coyne.[669] Mr Freemantle was not called at the hearings. He told Commission investigators that he had no knowledge of the Harding matter beyond what was contained in his report of 31 May 1988.[670]

This report indicates that on the morning of 25 May 1988 Mr Freemantle spoke with a male detainee who appeared to be upset. As they spoke the boy started to cry, became further distressed and returned to his room.[671] Mr Freemantle sought the guidance and support of his superior, Ms Wendy Kropp (now Modini), a social worker,[672] about how to handle the boy. Ms Kropp told Mr Freemantle that she would contact Mr Coyne and then revert to him.[673] Mr Freemantle continued to speak with the boy, who eventually disclosed consensual physical interaction between Ms Harding and himself as well as three other boys during the excursion on 24 May 1988. He also indicated that one of the boys had sexual intercourse with Ms Harding while the other boys watched and masturbated.

Mr Freemantle spoke with the boy again later in the day and was told that both he and two other boys each individually had sexual intercourse with Ms Harding while other boys watched and masturbated.[674] The boy told Mr Freemantle that the excursion staff was at the bottom of a hill talking when this took place.[675] He said that at one stage Mr Manitzky came up the hill and saw one of the boys masturbating and told him to cut it out.[676] The boy also said that Ms Harding went crying to the staff after these events and he overheard the staff saying how distressed they were for Ms Harding and her situation.[677] The boy told Mr Freemantle that the boys had discussed the situation amongst themselves and assumed that the teachers had sided with Ms Harding because of what they had heard. He said that the boys did not think that they had done anything wrong and decided to abscond because they did not want to get into any trouble.[678]

Mr Freemantle endeavoured to pass this information on to management as soon as possible.[679] He met with Mr Coyne and Ms Foote at 10.30 am that day, 25 May 1988,[680]

---

666 Exhibit 243A; Transcript 3(e), 23 January 2013 [p10: line 20].
667 Exhibit 243A; Exhibit 275.
668 Exhibit 243A.
669 Exhibit 248.
670 Exhibit 352.
671 Exhibit 248.
672 Exhibit 301.
673 Exhibit 248.
674 Exhibit 248.
675 Exhibit 248.
676 Exhibit 248.
677 Exhibit 248.
678 Exhibit 248.
679 Exhibit 248.
680 Exhibit 242.

which must have been immediately after the staff meeting. He reported all of the information that the boy had supplied.[681] This was the first direct evidence that Mr Coyne had of an alleged sexual assault.[682] Mr Freemantle also raised his concerns for the safety of Ms Harding and Mr Coyne directed him to return to the Blaxland Living Area to ensure Ms Harding's safety.[683] Mr Coyne asked Mr Freemantle not to discuss the matter with other staff until he had the opportunity to speak with all persons involved and gather more information.[684] Mr Coyne spoke with the male detainees involved and Ms Foote spoke with Ms Harding. Mr Coyne did not question the staff at any stage about what he had been told by Mr Freemantle.[685] He noted that the information that the boy gave Mr Freemantle was different to the information contained in the reports from the staff that went on the excursion.[686]

Ms Kropp now has no recollection of any of the conversations referred to by Mr Freemantle, nor did she have any recollection of the Harding incident.[687] She said that if the assertions in Mr Freemantle's report are correct, she followed the correct procedures at the time in that she contacted the centre manager at the earliest opportunity and provided briefing and assistance in responding to the incident.[688]

Ms Harding was moved sometime later on 25 May 1988 from the Blaxland wing to the Wentworth wing of the centre, in response to the information received by Mr Coyne.[689] Mr Harris suggested to Mr Coyne in cross-examination that it would have been better for Ms Harding to be removed from the centre at that time to ensure her safety. Mr Coyne said that it would not have been easy to move her and the staffing ratio in Wentworth wing was such that her safety could be ensured.[690] Mr Peers said that if movement of Ms Harding was desirable, all that could be done at that time was to move her to another part of the centre because, 'I don't think there was a centre that would have been suitable.'[691] Mr Lindeberg submitted that Ms Harding remained in the same environment without any steps being taken to protect her or remove her to another environment.[692] This submission is inconsistent with the evidence referred to above.

Ms Foote interviewed Ms Harding in her office following the staff meeting on 25 May 1988 and the report of Mr Freemantle.[693] She now has no recollection of her involvement with the matter, but she still recalls Ms Harding.[694] Ms Foote wrote a report dated 27 May 1988 concerning her involvement with the matter.[695] She said that she would have prepared the report because it was a very significant event which needed to be documented and given to the manager as part of normal practice.[696] Ms Foote assured Ms Harding that she was not in any trouble and told her that if anything had taken place

[681] Exhibit 248.
[682] Transcript 3(e), 11 December 2012 [p85: line 35].
[683] Exhibit 242.
[684] Exhibit 248.
[685] Transcript 3(e), 11 December 2012 [p88: line 36].
[686] Transcript 3(e), 11 December 2012 [p89: line 18].
[687] Exhibit 301; Transcript 3(e), 31 January 2013 [p51: line 36].
[688] Exhibit 301.
[689] Exhibit 242; Transcript 3(e), 11 December 2012 [p22: line 28].
[690] Transcript 3(e), 11 December 2012 [p87: line 10].
[691] Transcript 3(e), 22 January 2013 [p23: line 30].
[692] Exhibit 366.
[693] Transcript 3(e), 23 January 2013 [p12: line 5].
[694] Exhibit 275; Transcript 3(e), 23 January 2013 [p8: line 30], [p17: line 12].
[695] Exhibit 243; Transcript 3(e), 23 January 2013 [p9: line 10].
[696] Exhibit 275.

the boys would be spoken to.[697] Ms Harding denied that any sexual contact took place during the excursion.[698]

At 11.00 am on 25 May 1988 Mr Coyne placed the four boys who had absconded into their rooms and then spoke with each of the boys, and a further boy, individually and on a number of occasions.[699] The details that emerged from those conversations were broadly that during the excursion, two boys individually had consensual sexual intercourse with Ms Harding whilst other boys watched and masturbated. One of those boys had some lesser physical contact with Ms Harding in the form of kissing.[700] Mr Harris raised questions concerning the admissibility of those disclosures in criminal proceedings, his thesis being that Mr Coyne, in seeking the truth, was contaminating evidence that may otherwise be available to investigating police.[701]

Shortly after lunchtime on 25 May 1988, Mr Coyne spoke with Ms Harding in an interview room at the centre. Mr Coyne explained to her that he had spoken with the five boys and when questioned further, Ms Harding told Mr Coyne that she had sexual intercourse with two boys and provided their names.[702]

On the issue of consent, Mr Coyne noted in his report:

> I asked about her willingness to participate and she indicated that no physical force was used. However she indicated she felt under a lot of pressure from the boys. She was unable to explain what this pressure was but I assumed it to be both peer pressure and psychological pressure. I then asked if she wanted the boys to be charged by the Police and she tentatively said yes. [703]

Mr Coyne explained to Ms Harding that he would call her parents and advise them of the events. Ms Harding did not want Mr Coyne to contact her parents as she was fearful of their response.[704]

At 1.50 pm on 25 May 1988, Mr Coyne contacted his line manager Mr Peers to advise him of the information that he had received and to seek his advice.[705] The official departmental line of reporting from the centre at the time was from Mr Coyne to Mr Peers to Mr George Nix, Deputy Director-General, to Mr Alan Pettigrew, Director-General (now deceased),[706] and finally to the Minister, the Honourable Craig Sherrin.[707] Mr Coyne said that he usually reported to Mr Peers. However, he largely reported to Mr Nix on this matter because once briefed, Mr Nix wanted information about what was occurring and was concerned.[708] Mr Peers now has very little independent recollection of the events concerning Ms Harding and he relied heavily upon contemporaneous documents to

[697] Exhibit 243.
[698] Exhibit 243; Transcript 3(e), 23 January 2013 [p12: line 8].
[699] Exhibit 242.
[700] Exhibit 242; Transcript 3(e), 11 December 2012 [p20].
[701] Exhibit 367
[702] Exhibit 242; Transcript 3(e), 11 December 2012 [p21: line 45].
[703] Exhibit 242; Transcript 3(e), 11 December 2012 [p22: line 1].
[704] Exhibit 242.
[705] Exhibit 242.
[706] Transcript 3(e), 13 February 2013 [p29: line 28].
[707] Transcript 3(e), 11 December 2012 [p25: line 5]; Exhibit 270 [p2: para 6]; Transcript 3(e), 22 January 2013 [p20: line 12]; Exhibit 322; Transcript 3(e), 13 February 2013 [p17: line 1].
[708] Transcript 3(e), 11 December 2012 [p25: line 10].

inform his evidence of his involvement in the matter.[709] He said that he expected that he would be contacted over such allegations as those made by Ms Harding.[710]

Mr Peers believes that he would have briefed Mr Nix, having received the information from Mr Coyne.[711] Mr Nix held the position of Deputy Director-General in charge of youth detention centres for about one month at the time.[712] He had a supervisory role and general responsibility for youth detention centres, including the John Oxley Youth Centre, and also a general responsibility for other youth justice matters.[713]

On 25 May 1988 Mr Coyne convened a further meeting with Ms Foote and the staff who had attended the excursion. Mr Coyne advised the staff that he believed that Ms Harding had been sexually assaulted and requested them to provide him with a report about the previous day.[714] At about 3.30 pm that day, Mr Coyne met again with the boys from the excursion and spoke about the 'inappropriateness' of their actions on the previous day.[715] Having reviewed the reports prepared by staff that attended the excursion, Mr Coyne then spoke with each of the five boys individually in order to collect more specific information. Each of the boys declined to be further interviewed.[716]

Ms Harding's family is contacted

At 4.30 pm on Thursday 26 May 1988 Mr Coyne contacted Mr G Butler, the Family Services Officer with relevant responsibility at Beenleigh, about the Harding incident and his intention to contact the parents of Ms Harding.[717] Mr Coyne unsuccessfully attempted to contact Mr and Mrs Harding by telephone on 26 May 1988 at 4.40 pm and 4.50 pm from the centre.[718] At approximately 7.00 pm, Mr Cox received a telephone call from Mr Harding, who was returning the call of Mr Coyne. He called Mr Coyne at home and passed on the number of Mrs Harding.[719] Mr Coyne called Mr and Mrs Harding and informed them about the incident involving their daughter. Arrangements were made for Mr and Mrs Harding to attend the centre at 11.00 am the following day to discuss the matter more fully. Mr Coyne also encouraged Mrs Harding to call the centre to speak with her daughter. [720]

At approximately 8.00 pm Mr Cox received another telephone call from Mrs Harding, who had spoken with Mr Coyne, and he arranged for Ms Harding to speak with Mrs Harding on the telephone in his office. Ms Harding spoke with both her mother and father and she was visibly upset during those conversations.[721] Mr Coyne later that evening received a call from Mr Cox to inform him that Mrs Harding had spoken with Ms Harding over the telephone.[722]

---

[709] Exhibit 270.
[710] Exhibit 270.
[711] Exhibit 270.
[712] Transcript 3(e), 13 February 2013 [p58: line 1].
[713] Exhibit 270.
[714] Exhibit 242.
[715] Exhibit 242.
[716] Exhibit 242.
[717] Exhibit 242.
[718] Exhibit 242.
[719] Exhibit 249; Exhibit 242.
[720] Exhibit 242.
[721] Exhibit 249.
[722] Exhibit 242.

As a result of the content of the interviews conducted by Mr Coyne with the male detainees, Ms Foote again spoke with Ms Harding on Friday 27 May 1988.[723] Ms Foote informed Ms Harding that the male detainees had said that two of the boys had intercourse with her while the other three watched.[724] Ms Harding then told Ms Foote that she had intercourse with two boys on the excursion.[725] Ms Foote informed Ms Harding that she and Mr Coyne would be speaking with her mother regarding the events.[726] Ms Harding said that she had spoken to her mother on the evening of Thursday 26 May 1988 and had told her what had happened. Ms Foote noted,[727] 'Annette indicated that her mother did not say much in reply'. Ms Foote could not recall if she discussed the topic of a complaint to police with Ms Harding as she had little memory of the event.[728]

At approximately 12.30 pm on Friday 27 May 1988 Mrs Harding attended the centre and spoke at length about the incident involving her daughter with Ms Foote and Mr Coyne.[729] Mrs Harding then spoke privately with Ms Harding for about 30 minutes.[730] Mr Coyne and Ms Foote then rejoined Ms Harding and Mrs Harding who both indicated that they wanted a complaint to be made to police. Ms Harding stated that one particular boy was not involved in any way.

Police are contacted

On Friday 27 May 1988, immediately after Mrs Harding and Ms Harding indicated that they wanted to make a complaint to police, Mr Coyne contacted Detective Inspector David Jefferies of the Brisbane Juvenile Aid Bureau, who said that he would organise an investigation of the complaint.[731]

Between 1988 and 1991 Detective Inspector David Jefferies was tasked with the oversight, control and administration of the Juvenile Aid Bureau,[732] he is now retired.[733] I will refer to him as Inspector Jefferies. He was often the contact point for external agencies, including the department, seeking information and assistance from the Queensland Police Service and coordinated the response of Juvenile Aid Bureau officers to incidents and events as they arose.[734]

In 1988 Inspector Jefferies was aware that Mr Coyne was the manager of the centre and he would speak with Mr Coyne when the attendance of Juvenile Aid Bureau personnel was required in relation to child related offences.[735] Inspector Jefferies has no specific recollection of the events concerning Ms Harding, but from his understanding of the history of the matter says that it is likely that he was contacted to arrange the attendance of police.[736] Mr Coyne thought it more appropriate, given the nature of the matter, to refer it to the central Brisbane branch of the Juvenile Aid Bureau because he

[723] Exhibit 243.
[724] Exhibit 243.
[725] Exhibit 243; Transcript 3(e), 23 January 2013 [p12: line 38].
[726] Transcript 3(e), 23 January 2013 [p9: line 38].
[727] Exhibit 243.
[728] Transcript 3(e), 23 January 2013 [p13: line 40].
[729] Exhibit 242.
[730] Exhibit 242.
[731] Exhibit 242; Transcript 3(e), 11 December 2012 [p34: line 5], [p96: line 20].
[732] Exhibit 273; Transcript 3(e), 22 January 2013 [p112: line 40].
[733] Transcript 3(e), 22 January 2013 [p112: line 10].
[734] Exhibit 273.
[735] Exhibit 273.
[736] Exhibit 273.

found, from his earlier career in child abuse work, that particular branch was very experienced in child sexual assault matters. Additionally, he did not believe that the Inala branch of the Juvenile Aid Bureau operated outside of weekday nine-to-five hours.[737]

Management response to the incident

On Friday 27 May 1988 Mr Coyne spoke with Mr Nix about the matter and signed and sent a report to him that same day.[738] The report summarised his knowledge of the Harding matter up to that time.[739] It was directed to Mr Nix, as opposed to his line manager Mr Peers. Mr Peers thought that it was possible that he advised Mr Coyne to directly advise his superior, Mr Nix, of the matters contained in the report.[740] Mr Peers said that he did see the report to Mr Nix at some stage.[741] He based that assertion on a notation, 'EDYS 21/6/88', written on the report which meant 'Executive Director Youth Services', which was Mr Peers' position at the time.[742] After he received the report of Mr Coyne, Mr Nix sent it the same day to the Director General, Mr Alan Pettigrew.[743] Mr Nix stated:[744]

> After receiving it I passed it on to the Director General. I believe he had a discussion with the Minister at the time and then sought some Crown Law advice from memory. I remember receiving the memo back from the DG which had noted on it, 'George, noted by Minister and discussed. Please keep me advised of further developments'.

In sending it through to the Director-General, Mr Nix wrote on Mr Coyne's report:[745]

> Director-General. Submitted for your information. I will keep you informed of the outcome of the police investigation [signed by Mr Nix and dated] 27/5/88.

That direction to Mr Nix from Mr Pettigrew is noted on the cover of Mr Coyne's report and Mr Nix recognised the writing to be that of Mr Pettigrew.[746] The reference to the briefing of the Minister was similarly noted on the report by Mr Pettigrew.[747] Mr Nix recalled having discussions at the time about the matter being reported to the police and whether anything further was going to happen.[748]

Medical examination of Ms Harding

On 27 May 1988 Mrs June West, a youth worker at the centre, accompanied Ms Harding to the Mater Children's Hospital for a medical examination by paediatrician Dr Maree Crawford.[749] Mrs West had worked in the capacity of nurse-youth worker at Wilson Youth Detention Centre from 1977 prior to commencing at the centre in 1987 as a youth worker.[750] Mrs West now has no memory of her involvement with Ms Harding in May 1988.[751] However, she wrote an unaddressed hand written report dated 30 May 1988.

---

[737] Transcript 3(e), 11 December 2012 [p23: line 20].
[738] Exhibit 242; Transcript 3(e), 11 December 2012 [p16: line 6].
[739] Exhibit 242.
[740] Exhibit 270.
[741] Transcript 3(e), 22 January 2013 [p25: line 10].
[742] Transcript 3(e), 22 January 2013 [p24: line 20], [p25: line 10].
[743] Exhibit 322.
[744] Exhibit 322.
[745] Exhibit 242; Transcript 3(e), 13 February 2013 [p59: line 15].
[746] Exhibit 242; Transcript 3(e), 13 February 2013 [p59: line 24].
[747] Transcript 3(e), 22 January 2013 [p24: line 12].
[748] Exhibit 322.
[749] Exhibit 216.
[750] Exhibit 54.
[751] Exhibit 54; Transcript 3(e), 5 December 2012 [p16: line 6].

She said that she would have written that report at the request of a superior.[752] Dr Crawford was at that time, and still is, highly regarded by those involved in law enforcement to be very committed to child protection.[753] Dr Crawford wrote a report of her examination of Ms Harding which is dated 9 June 1988 and addressed to Dr Harold Forbes at the centre. The clinical notes of Dr Crawford are attached to the report.[754]

Dr Forbes appears to have been a medical doctor who had some association with the centre as at May 1988.[755] His duties with respect to the centre can perhaps be gleaned from the evidence given by Dr Pamela Douglas. Dr Douglas described her employment with the department from 1989 to include a weekly session at the centre for non-urgent medical appointment for detainees which were booked through Ms Yuke, a nurse at the centre.[756] Dr Douglas appears to have taken over from Dr Forbes in 1989 in this regard.[757]

Dr Crawford notes in her report that she examined Ms Harding ' on 27th May 1988 on the request of the JAB'[758] That request must have followed on from Mr Coyne discussing the matter with Inspector Jefferies and his seeking police assistance. In a telephone conversation between Mr Coyne and Mr Nix on Monday 30 May 1988, Mr Coyne advised that Ms Harding was medically examined at the Mater Hospital on Friday 27 May 1988 and that the examination was arranged by police investigating the matter.[759] The only other medical matter that emerged in the evidence was that My Coyne had told Mr Cooper that, at some stage, Ms Harding was to undergo a pregnancy test.[760]

Hr Harris submits that the centre management engaged Dr Crawford, as opposed to the Juvenile Aid Bureau, and pointed to a number of details to support this conclusion.[761] In contrast, Mr Lindeberg submitted that Dr Crawford was retained through the efforts of Inspector Jefferies.[762] Mr Harris submitted first, there was no record of any police officer speaking with Dr Crawford. Secondly, he submitted that police are required to obtain the consent of a complainant before that person is medically examined. The lack of consent being obtained indicated that someone other than the police engaged Dr Crawford. Mr Harris submitted positively that consent was not obtained from Ms Harding, '[O]n the material before the Commission…' This is an overstatement of the evidence called on the issue. There is no evidence of how Dr Crawford came to examine Ms Harding, save for what is written in her report. There is no evidence one way or the other on whether or not consent was obtained for that examination. A lack of evidence on these points does not enable an inference to be drawn that consent had not been obtained from Ms Harding.

From these two points Mr Harris submits:[763]

> Although there is no evidence before the Commission, other than Ms West's evidence, it is respectfully submitted that when Dr Crawford was spoken to, she would have been told that the JAB are being involved in the matter by Management of JOYC.

---

[752] Transcript 3(e), 5 December 2012 [p16: line 1].
[753] Transcript 3(e), 22 January 2013 [p19: line 30].
[754] Exhibit 250.
[755] Exhibit 250.
[756] Exhibit 257.
[757] Exhibit 239.
[758] Exhibit 250.
[759] Exhibit 246; Transcript 3(e), 11 December 2012 [p24: line 10], [p27: line 40]
[760] Exhibit 11.
[761] Exhibit 367.
[762] Exhibit 366.
[763] Exhibit 367.

That submission, which is premised upon speculation, cannot be accepted. The contemporaneous record made by Dr Crawford states that she examined Ms Harding at the request of the Juvenile Aid Bureau.[764] I prefer that evidence over unpersuasive inferential reasoning.

Dr Crawford noted no evidence of trauma and also that Ms Harding was menstruating at the time of her examination. She was not aware of the results of forensic swabs taken from Ms Harding at the time she wrote her report.[765] Sexual contact had taken place on 24 May 1988, three days earlier. Dr Crawford noted in her report,[766] 'Superficially, Annette appeared unperturbed by events. She has not had adequate contraceptive advice to date'.

The clinical notes of Dr Crawford contains what appears to be a history from Ms Harding, which includes the following:[767]

> 4 boys took [Annette] into bushes, took off pants, laid on top of her penetrated vagina with penis.
>
> …
>
> Says didn't want to have intercourse. Not physically held. Did struggle.

Mr Hanger QC, for the State of Queensland, questioned Inspector Jefferies about his expectation concerning the involvement of Dr Crawford with Ms Harding. Inspector Jefferies, having expressed his high regard for Dr Crawford, said:

> … having a paediatrician do an assessment of the child protection needs was certainly an advantage and Dr Crawford would have certainly been looking at the overall child protection issues as well as the medical examination that may give us corroborative evidence.

The time that the examination of Ms Harding took place on 27 May 1988 is unknown.

Mr Harris also submitted that neither the police nor the minister received the report of Dr Crawford.[768] This also is overstating the true state of the evidence. There is now simply no evidence available concerning who received the report of Dr Crawford.

At 7.15 pm on Friday 27 May 1988, Dr Forbes called the centre and spoke with Mr Cox. Having ascertained that Mr Cox was aware of the situation regarding Ms Harding, he advised him of a number of contraceptive medications that Ms Harding could take, which may be at the centre.[769] Mr Cox wrote a letter to Mr Coyne dated 2 June 1988 concerning his involvement with Ms Harding.[770] The detail in that letter has assisted Mr Cox with piecing together the sequence of events.[771] At 8.10 pm Dr Forbes called again to check what medications Mr Cox had located and was advised that he had found a packet of 'Sequela ED', a 'morning after' contraceptive medication.[772] At 8.15 pm Mr Cox telephoned Mr Coyne and advised him of Dr Forbes's calls.[773] At 8.37 pm Mr Coyne

[764] Exhibit 250
[765] Exhibit 250.
[766] Exhibit 250.
[767] Exhibit 250.
[768] Exhibit 362.
[769] Exhibit 249.
[770] Exhibit 249: Transcript 3(e), 7 December 2012 [p37: line 16].
[771] Exhibit 249: Transcript 3(e), 7 December 2012 [p37: line 25].
[772] Exhibit 249: Transcript 3(e), 7 December 2012 [p37: line 25].
[773] Exhibit 249.

telephoned Mr Cox in order to obtain the telephone number of Dr Forbes.[774] At 8.45 pm Mr Coyne telephoned Mr Cox again and gave approval for Ms Harding to be given the contraceptive medication according to the prescription of Dr Forbes.[775] Mr Cox said that he himself may have given the medication to Ms Harding, but he cannot recall.[776] Mr Coyne had no recollection of those telephone conversations with Mr Cox and Dr Forbes.[777] He thought that there was some involvement with a doctor who regularly visited the centre. He thought that the doctor asked him to ensure that Ms Harding received certain medication, but he cannot recall what the medication was for.[778]

Police attendance at the centre

The police did not attend the centre until Saturday 28 May 1988. Neither Mr Coyne[779] nor Mrs Harding[780] was present at the time of the police attendance. Mr Coyne had a distinct memory of personally meeting with the police about the Harding matter at some stage, but he could not now recall any detail of that meeting or its timing with respect to other events relevant to Ms Harding.[781]

That morning, Mr Rudolph Pekelharing, Principal Youth Worker, advised Ms Harding that police officers would be attending the centre to speak with her and that she could choose a staff member to sit in and support her in her interview. Ms Harding chose Ms Lorraine Hayward, a youth worker.[782] Mr Pekelharing is now deceased.[783] However, he wrote a report of his involvement with the matter, which from its terms must have been written on the day the police attended.[784] Ms Hayward also wrote a report that day, which was addressed to Mr Coyne, and sets out her involvement with Ms Harding and police. Ms Hayward does not know why she wrote the report [785] and has no recollection now of what was said during the interview with police.[786] Ms Hayward did not know why she was present at the interview, but thought it may have been because she was the most senior youth worker on staff that particular day.[787] She did not think that she had a close relationship with Ms Harding and said that she treated her like all of the other young people in the centre.[788] Ms Hayward said that it was unusual for a youth worker to be asked to be present in relation to such an intimate matter being discussed and said that a caseworker would normally be asked for, unless there was a particular rapport with a youth worker, which she was not aware of with Ms Harding.[789] She noted that the interview took place on a Saturday and said that no caseworkers would have been at the centre at that time.[790]

---

[774] Exhibit 249.
[775] Exhibit 249.
[776] Transcript 3(e), 7 December 2012 [p38: line 40]; Exhibit 14.
[777] Transcript 3(e), 11 December 2012 [p88: line 1].
[778] Transcript 3(e), 11 December 2012 [p93: line 45].
[779] Transcript 3(e), 11 December 2012 p27: line 42], [p96: line 28].
[780] Transcript 3(e), 13 December 2012 [p65: line 16].
[781] Transcript 3(e), 11 December 2012 [p97: line 30].
[782] Exhibit 245.
[783] Exhibit 14, Exhibit 352.
[784] Exhibit 245.
[785] Exhibit 244; Exhibit 226.
[786] Exhibit 226; Transcript 3(e), 13 December 2012 [p60: line 8].
[787] Exhibit 226.
[788] Transcript 3(e) 13 December 2012 [p65: line 30].
[789] Transcript 3(e) 13 December 2012 [p67: line 4].
[790] Transcript 3(e) 13 December 2012 [p67: line 40].

The police arrived at the centre at approximately 9.30 am and left at 10.48 am.[791] The police officers were Detective Sergeant Janelle Podlich and Plain Clothes Constable Sue Tomsett, from the Juvenile Aid Bureau. An entry in the diary of Detective Sergeant Podlich tends to indicate that she had been tasked with the matter by Inspector Jefferies on 27 May 1988.[792] Detective Sergeant Podlich was in charge of the Ashgrove Juvenile Aid Bureau at the time[793] and had been in that field of policing for approximately nine years.[794] She resigned in December 1990.[795] Detective Sergeant Podlich now has very little independent memory of her attendance at the centre that day, although she had access to notes written by her at the time of her attendance.[796]

Plain Clothes Constable Tomsett is presently a sergeant of police performing the duties of the Domestic and Family Violence Coordinator for the Pine Rivers Police District.[797] Plain Clothes Constable Tomsett also has a vague memory of the matter and is similarly very much guided now by the notes that she had written at the time.[798] Both police officers were in plain clothes for their attendance at the centre, as was the usual course in the Juvenile Aid Bureau at that time.[799]

Both police officers were stationed at Ashgrove at the time and the centre was not within the usual geographical area serviced by that station.[800] Inspector Jefferies said that he would have detailed Podlich and Tomsett to investigate after looking to see who was available to handle the matter.[801] Plain Clothes Constable Tomsett thought that they may have been tasked to the matter because it was a female complainant and female officers would often be sought in those circumstances.[802] Detective Sergeant Podlich had never seen a Criminal Offence Report for the matter, which in some cases could trigger an investigation, and thought that she may have received a phone call or a call over the police radio to attend the centre.[803] She said that they had been detailed 'to speak with a female inmate who had made allegations of sexual abuse by two male inmates at the centre.'[804] She had no prior knowledge of the matter.

The police officers initially spoke with Ms Hayward and Mr Pekelharing prior to seeing Ms Harding.[805] Detective Sergeant Podlich could not remember the detail of that conversation and deferred to her written note of it, which recorded:[806]

> Annette Harding had said to them that she had been raped by 2 males while they were on a bush walk at Mt Barney on Tuesday 24 May 1988 and that she wished to make a complaint. She had been examined by a doctor on the Friday 27 May 1988.

[791] Exhibit 244; Exhibit 245.
[792] Exhibit 252.
[793] Exhibit 234.
[794] Transcript 3(e) 10 December 2012 [p23: line 40].
[795] Transcript 3(e) 10 December 2012 [p2: line 28].
[796] Transcript 3(e) 10 December 2012 [p5: line 01].
[797] Exhibit 295; Transcript 3(e), 29 January 2013 [p69: line 05].
[798] Transcript 3(e) 29 January 2013 [p70: line 15, p70: line 38].
[799] Exhibit 234.
[800] Transcript 3(e), 29 January 2013 [p69: line 40].
[801] Transcript 3(e), 22 January 2013 [p123: line 01].
[802] Transcript 3(e), 29 January 2013 [p70: line 05].
[803] Transcript 3(e), 10 December 2012 [p9: line 10], [p11: line 35].
[804] Exhibit 234.
[805] Transcript 3(e), 10 December 2012 [p11: line 12], [p18: line 24].
[806] Transcript 3(e), 10 December 2012 [p10: line 10]; Exhibit 234.

Plain Clothes Constable Tomsett said that note reflected the extent of what they knew about the complaint when they arrived at the centre.[807] They were not told anything about the outcome of the medical examination[808] and they did not know prior to attending the centre that Ms Harding had been seen by Dr Crawford on 27 May 1988.[809] There is no evidence available now about whether and how the report of Dr Crawford featured in the police response to the matter. The police officers then met with Ms Harding and Ms Hayward in the staff room.[810] Detective Sergeant Podlich thought that Mr Pekelharing was also present during the interview with Ms Harding.[811] Ms Hayward thought that Mr Pekelharing was present for part of the time only.[812] Mr Pekelharing recorded in his report in direct terms that he remained in his office at that time.[813] Ms Harding was advised by the police of her legal rights and the options that were open to her.[814] Ms Hayward did not record, nor could she recall, better particulars of those matters.[815] Plain Clothes Constable Tomsett thought that she referred to Ms Harding not needing to make a complaint if she did not want to.[816] Plain Clothes Constable Tomsett could not recall what was said to Ms Harding during the interview, but said it was her standard practice at the time to attempt to engage with a complainant by saying things such as:[817]

> Such and such has told us that you've said this about what's happened. We're here for you to talk about it. Do you want to make a complaint or do you want to tell us about it… You're not in any trouble. We just need the information from you to continue with the investigation or complaint…

Plain Clothes Constable Tomsett agreed with a proposition put by Mr Harris during cross-examination that Ms Harding was being interviewed as a complainant, not as a suspect, and that all that could be done by police was to attempt to take a complaint. They were not bound by restrictive rules applicable when questioning a suspect.818 Having advised Ms Harding of her options, the police officers suggested that she may like to discuss her options privately with Ms Hayward.[819] The police officers left the room and spoke with Mr Pekelharing, telling him that Ms Harding and Ms Hayward were discussing the matter.[820] Mr Pekelharing went to the staff room and asked Ms Harding if she would like him to be present, she indicated that she did.[821] Ms Harding raised two concerns that she had with making a formal complaint to police. First, the length of time for the matter to proceed if a complaint was made. Secondly, that there had been threats made against her from other detainees about the complaint.[822] Ms Hayward and Mr Pekelharing reassured Ms Harding that she would be protected at all times.[823] Ms

---

[807] Transcript 3(e), 29 January 2013 [p70: line 20], [p76: line 30].
[808] Transcript 3(e), 29 January 2013 [p70: line 30].
[809] Transcript 3(e), 10 December 2012 [p7: line 10].
[810] Exhibit 226; Exhibit 244; Transcript 3(e) 13 December 2012 [p55: line 12].
[811] Exhibit 234.
[812] Exhibit 244.
[813] Exhibit 245.
[814] Exhibit 244.
[815] Transcript 3(e), 1 November 2012 [p63: line 30].
[816] Transcript 3(e), 29 January 2013 [p75: line 35].
[817] Transcript 3(e), 29 January 2013 [p72: line 30].
[818] Transcript 3(e), 29 January 2013 [p75: line 38].
[819] Exhibit 244.
[820] Exhibit 245.
[821] Exhibit 245.
[822] Exhibit 244; Exhibit 245.
[823] Exhibit 244.

Hayward noted, 'All aspects were made as clear as possible to Annette by the Police, Mr Pekelharing and myself.'[824]

After about three to five minutes, with the consent of Ms Harding, Mr Pekelharing invited the police officers to rejoin them.[825] Ms Harding then indicated to police that she did not want to make a formal complaint about the matter. Ms Hayward noted in her report, 'Annette chose not to make an official complaint.'[826] Plain Clothes Constable Tomsett then wrote a formal note in her police notebook, which was read aloud by Ms Harding, signed by her and witnessed by both police officers, Ms Hayward and Mr Pekelharing. It reads:[827]

> On Saturday 28th May, 1988 I, [Annette Harding,] spoke with Det. Podlich and Det. S Tomsett from Ashgrove Juvenile Air Bureau in the presence of Lorraine Hayward and Rudolf Peckelharing at John Oxley Youth Centre in relation to a sexual type incident which occurred on Tuesday the 24 May 1988 at Mt Barney. I do not wish to make an official complaint to the Police and I am happy with Police enquiries made in relation to this matter. [Signed Annette Harding]

Plain Clothes Constable Tomsett said that was a standard sort of notation that would be made in circumstances where police were asked to attend to make inquiries in relation to information received and were met with a complainant who did not want to proceed further with a matter.[828] The words 'sexual type incident' was her own turn of phrase and not that of Ms Harding.[829] Plain Clothes Constable Tomsett said that Ms Harding did not speak to them at all about the allegations that had previously been made and she was not able to ascertain what the extent of the alleged offence or assault was.[830] Inspector Jefferies said it was standard practice to have a child sign such a withdrawal of complaint if the child had capacity to understand what in fact she was signing.[831] Inspector Jefferies said that this formalised the recording of the wishes of the child and verified that the police had attended as instructed, investigated the matter to whatever extent they thought appropriate and that was the outcome as they saw it.[832] The police officers left the centre after Ms Harding signed the withdrawal of complaint.[833] Plain Clothes Constable Tomsett wrote the following in her police notebook about her attendance at the centre that day:[834]

> Rostered 8am-4pm (Podlich)
>
> Correspondence
>
> To John Oxley Youth Centre re allegations of rape by Annette Harding, 14 years by 2 male persons of the Centre. Alleged to have occurred on 25/5/88 at Gold Coast Hinterland during bushwalk. She decided not to make an official complaint. Examined by doctor on Friday afternoon. Withdrawn complaint in notebook. N.F.A.D. [No further action desired by Annette Harding]

---

[824] Exhibit 244.
[825] Exhibit 245.
[826] Exhibit 244; Transcript 3(e), 13 December 2012 [p61: line 8].
[827] Exhibit 253; Transcript 3(e), 29 January 2013 [p71: line 15]; Transcript 3(e), 10 December 2012 [p5: line 10], [p6: line 15]; Exhibit 245.
[828] Transcript 3(e), 29 January 2013 [p72: line 01].
[829] Transcript 3(e), 29 January 2013 [p71: line 26].
[830] Transcript 3(e), 29 January 2013 [p71: line 35].
[831] Transcript 3(e), 22 January 2013 [p118: line 42].
[832] Transcript 3(e), 22 January 2013 [p119: line 10].
[833] Transcript 3(e), 10 December 2012 [p7: line 18].
[834] Exhibit 253A; Transcript 3(e), 29 January 2013 [p74: line 30].

An entry in the notebook of Detective Sergeant Podlich dated 28 May 1988 reports[835] that she and Detective Tomsett:

> … went to John Oxley Centre Wacol where we spoke to Annette Harding re allegations of sexual I/C with a number of boys also from John Oxley Centre. Harding did not wish to make a comp. Withdrawal of Comp. completed in Det Tomsett's notebook.

In her recent statement to the Commission, Detective Sergeant Podlich noted her recollection of the interview with Ms Harding as follows:[836]

> Plain Clothes Constable Tomsett and I spoke to Annette and asked her if she wanted to talk to us about what she had told Lorraine Hayward and Adolf Pekelharing. I can't recall the exact conversation with Annette. Annette appeared to not want to talk to us at all about it. I felt she did not want to talk to us as we were Police Officers. Plain Clothes Constable Tomsett and I were both wearing plain clothes, as we did in the JAB. Plain Clothes Constable Tomsett made a notation along the lines of her not wanting to make a complaint to Police about the allegations. This was noted in the official Police Notebook of Plain Clothes Constable Tomsett. Plain Clothes Constable Tomsett read Annette the contents of the entry in her notebook and then she signed it in the presence of myself, Plain Clothes Constable Tomsett, Lorraine Hayward and Adolf Pekelharing. (Stating that she did not want to make an official complaint to Police about the sexual assault).

Plain Clothes Constable Tomsett had essentially the same recollection of their interaction with Ms Harding as that of Detective Sergeant Podlich.[837] Detective Sergeant Podlich said that an 'Occurrence Sheet', recording in brief what she had done throughout the shift, would have been filled out, which would have been forwarded on to the inspector at head office.[838]

At the end of the interview with police, Mr Pekelharing and Ms Hayward arranged for Mrs Harding to be contacted and Detective Sergeant Podlich informed her of her daughter's decision.[839] Ms Harding then spoke with her mother. Mr Pekelharing and Ms Hayward made arrangements to collect Mrs Harding from her residence at Eagleby to visit Ms Harding in the afternoon.[840]

Mr Pekelharing then contacted and discussed the events of that day with Mr Coyne.[841] Mr Coyne said that he became aware that Ms Harding had decided not to make a complaint to police some time over that weekend or on Monday 30 May 1988.[842] Mr Pekelharing then went to each wing of the centre and informed all detainees and staff of the consequences of any verbal abuse of Ms Harding.[843] He informed the oncoming senior officer at the centre, Mr Cox, of the arrangements.[844]

Mr Peers recalled attending the centre after the police had been contacted, on a date that he could not recall, but very soon after the incident.[845] He met with Mr Coyne and the deputy manager, who he thinks was Ms Foote, to discuss the Harding matter and the actions that needed to be taken in response to the information he received.[846] Ms Peers

[835] Exhibit 252; Transcript 3(e), 10 December 2012 [p3: line 30].
[836] Exhibit 234.
[837] Exhibit 295.
[838] Transcript 3(e), 10 December 2012 [p7: line 30].
[839] Exhibit 245.
[840] Exhibit 245.
[841] Exhibit 245.
[842] Transcript 3(e), 11 December 2012 [p96: line 45].
[843] Exhibit 245.
[844] Exhibit 245.
[845] Transcript 3(e), 22 January 2013 [p25: line 28].
[846] Exhibit 270; Transcript 3(e), 22 January 2013 [p21: line 24].

noted,[847] 'It was also a meeting to ensure that all the proper processes that had to be done were in fact done.' As a result of the meeting, Mr Peers was satisfied about those matters.[848] He said that the staff at the centre never expressed any dissatisfaction to him with the thoroughness of the management response to the Harding matter.[849] Mr Peers said that he imagined that he would have immediately briefed Mr Nix after attending the centre that day.[850]

Mr Nix was not aware that the police did not attend the centre in relation to the allegations of Ms Harding until 28 May 1988, four days after the excursion.[851] Mr Nix recalled being briefed about the attendance of police at the centre and Ms Harding not wishing to make a complaint, 'and at the time it had been consensual.'[852]

The involvement of the Director-General and the Minister

Mr Coyne contacted Mr Nix on Monday, 30 May 1988 to inform him that Ms Harding had changed her position.[853] Mr Nix made a memorandum of that telephone conversation, which he sent the same day as an 'Inter-office memo' to Mr Pettigrew.[854] Mr Nix does not recall writing the document. He nonetheless believed that his memorandum briefing Mr Pettigrew contained all of the information that he knew about the events.[855]

The following matters raised by Mr Coyne were dealt with in the memorandum:[856]

- On Monday, 30 May 1988 Mr Coyne telephoned Mr Nix to advise him that Ms Harding was medically examined at the Mater Hospital on Friday, 27 May 1988 and that the examination was arranged by police investigating the matter.
- On Saturday, 28 May 1988 police interviewed Ms Harding who indicated that she did not wish to make a 'formal complaint'.
- On 28 May 1988 Mrs Harding was contacted and brought to the centre and spent a couple of hours with Ms Harding. It records,

  > Initially, Mrs Harding was upset that her daughter had made this decision, but after spending a couple of hours with her daughter, she was interviewed by the training officer and advised that she was happy for her daughter not to make a complaint.

- Ms Harding did not want to make a formal complaint because the court process would take from six to twelve months and the other children at the centre were teasing and threatening her.
- The other children at the centre had been spoken to by Mr Coyne and subsequently everything had settled down at the centre.
- One particular staff member 'that they have had a lot of trouble with' was alleging a cover-up of the matter and Mr Coyne was to speak with that individual and other staff that day, 30 May 1988, where they will be advised of the investigation and the passing on of information.

---

[847] Exhibit 270; Transcript 3(e), 22 January 2013 [p21: line 40].
[848] Transcript 3(e), 1 February 2013 [p6: line 5].
[849] Transcript 3(e), 1 February 2013 [p6: line 10].
[850] Transcript 3(e), 22 January 2013 [p25: line 20].
[851] Transcript 3(e), 13 February 2013 [p67: line 18].
[852] Exhibit 322.
[853] Transcript 3(e), 11 December 2012 [p97: line 1].
[854] Exhibit 246; Exhibit 322.
[855] Exhibit 322.
[856] Exhibit 246; Transcript 3(e), 11 December 2012 [p24: line 10], [p27: line 40].

- The paediatrician had advised that there was little chance of Ms Harding falling pregnant. This had been conveyed to Mr Coyne by the doctor.[857]

Mr Nix said that there was 'a flood of memos at the time from Coyne trying to explain the thing away.' Mr Nix could not recall the detail of those memoranda.[858] Mr Nix said that the focus at the senior departmental level was the fact that the excursion resulted in failure because the detainees had not been under staff supervision at all times.[859] Mr Nix understood, as a matter of common sense, that if a child was taken out of detention at all the child should be under constant supervision, though there was no written policy at that time.[860] He said, in the sense of the detainees getting out of the sight of the staff on the excursion, 'The way the staff had handled it had been abominable.' [861] The briefing memorandum of Mr Nix notes that it was seen by the Minister and carries the initials of Mr Pettigrew in that regard.[862] Further, Mr Pettigrew signed a letter dated 30 May 1988 addressed to the Honourable the Minister, stamped as received in the office of the minister at 9.30 am on 1 June 1988. The letter is short and relevantly states:[863]

> I received word late on Friday afternoon that there was a problem during a recent picnic outing by a mixed group of children from the John Oxley Youth Centre. Apparently four boys interfered with one of the girls.
>
> I suppose there is some possibility of this leaking to the media and a full report has been requested by Monday.
>
> The girls parents have been contacted and they are not placing any blame on the staff.

That letter also carries a handwritten note under Mr Pettigrew's hand, which states, 'Full report given to Minister [initialled by Pettigrew] 31/5/88'.[864] There is also a note on that document from Mr Nix, being, 'Noted [initialled by Nix] 31/5/8'.[865]

Criticisms of the police investigation

The thoroughness of the police investigation was called into question on a number of bases by a number of people who gave evidence to the Commission. Those criticisms are best examined after police protocols and procedures of the time are outlined in the context of the Harding matter and the thought processes of the police officers involved are understood.

Mr Harris placed excerpts of the *Queensland Policeman's Manual* (1975) before the Commission during his cross-examination of former police officer, Detective Sergeant Malcolm Elliott in relation to the Ms Neal case, which is dealt with below.[866] On 5 March 2013 Mr Harris further supplied the Commission, as he had helpfully undertaken to,[867] with materials that confirmed that the version of the *Queensland Policeman's Manual* tendered into evidence was current at the time of both the Harding and Neal incidents in all material respects.[868] This document was a manual for police officers, which amongst

[857] Transcript 3(e), 11 December 2012 [p103: line 10].
[858] Exhibit 322.
[859] Exhibit 322; Transcript 3(e), 13 February 2013 [p36: line 40].
[860] Transcript 3(e), 13 February 2013 [p66: line 28].
[861] Exhibit 322; Transcript 3(e), 13 February 2013 [p61: line 40].
[862] Exhibit 246; Transcript 3(e), 13 February 2013 [p59: line 36]; Transcript 3(e), 11 December 2012 [p24: line 5].
[863] Exhibit 247.
[864] Transcript 3(e), 13 February 2013 [p59: line 45].
[865] Transcript 3(e), 13 February 2013 [p59: line 50].
[866] Exhibit 359.
[867] Transcript 3(e), 19 February 2013 [p68: line 20].
[868] Exhibit 359.

other things highlighted the role of police officers with respect to investigation.[869] Paragraphs 4.365 and 4.367 of the manual[870] required a member of the Juvenile Aid Bureau or a senior detective to be assigned to investigate the type of information supplied by Mr Coyne. That is, allegations of the rape of a child or of unlawful carnal knowledge. Both Detective Sergeant Podlich and Plain Clothes Constable Tomsett were suitably qualified for the assignment. In accordance with paragraph *4.344 - Rape* of the manual,[871] police required a 'complaint' in order to commence an investigation into such a matter. Similarly, if the information supplied to police was considered to amount to the offence of unlawful carnal knowledge of Ms Harding, an investigation for that offence, in accordance with paragraph *4.331 – Carnal Knowledge (Unlawful) of Girl Under 16 Years*,[872] would only have been conducted if there was a 'complaint'. Under paragraph 4.331(h), an alleged offender should only be interrogated after various other actions are taken by the investigating officer, including the taking of both a 'complaint'[873] and a statement from the girl.[874]

A question that arises is the meaning of 'complaint' in terms of the above provisions of the *Queensland Policeman's Manual*. That word is significant because it is a pre-condition to the work of police officers in many respects. No content is given to the word 'complaint' in the above provisions. In order to get a greater understanding of the word 'complaint', I undertook two exercises. First, in addition to the excerpts supplied by Mr Harris, I have examined a copy of the full two volumes of the *Queensland Policeman's Manual* with its various amendments, as it existed at the times relevant to Ms Harding and Ms Neal. While 'complaint' is a word that is often used in the manual, I have not located any provision that directly assists with determining what a complaint is or whether one had been received.

I note that the *Queensland Policeman's Manual* was first produced in 1969. It was superseded by the electronic Operational Procedures Manual, which was issued by Mr J.P. O'Sullivan, Commissioner of Police, on 1 January 1995 pursuant to s.4.9 of the *Police Service Administration Act 1990*. The Operational Procedures Manual does contain guidance to police officers with respect to dealing with child complainants. However, any analysis of the Operational Procedures Manual provisions will only serve to distort the process of considering the police conduct in the Harding matter some years earlier and under a different regime. The Operational Procedures Manual emerged following the release of the Commissioner's Circular 38/94 on 20 July 1994 which stated, 'After a complete review of the *Queensland Policeman's Manual* and the incorporation of policy and instructions into the relevant manuals/handbooks/documents.'

Secondly, I searched the Commissioner's Circulars, which are in the nature of directives by the Commissioner to police officers with respect to a particular subject matter, issued from time to time. My research indicates that there are no Commissioner's Circulars that assist with defining 'complaint' as that word is used in the *Queensland Policeman's Manual*.

In short, having conducted the above investigations, I have been unable to find any operative definition of the word 'complaint'. Complaint is broadly, and unhelpfully in the present circumstances, defined in the *Australian Concise Oxford Dictionary* to mean,

[869] Transcript 3(e), 19 February 2013 [p66: line 14].
[870] Exhibit 359.
[871] Exhibit 359.
[872] Exhibit 359.
[873] Exhibit 359.
[874] Exhibit 359.

'utterance of grievance; expression of grief; formal accusation; subject or ground of complaint; bodily ailment.'

In the course of conducting this research, I have located a number of provisions in the manual that may more generally assist with understanding proper police response to circumstances where information has been received.

> GENERAL REQUIREMENTS IN RELATION TO PARTICULAR CRIMES
>
> 4.319 – INTRODUCTORY: Criminal investigation requires personal attributes such as initiative, perseverance, and dedication to the efficient performance of the onerous and highly responsible duties involved.
>
> For the guidance of members of the Force a number of serious crimes, not infrequently encountered in police work, have been so treated in the following pages as to give a general indication of the relevant statutory law, the jurisdiction of the courts in each case to deal with the charges, the forms of charges used, essential elements to be proved in order to secure the conviction of offenders, power of police to apprehend offenders, and suggested procedures which may be adopted to obtain necessary evidence to sustain the charges preferred.
>
> ...
>
> The suggested investigations procedures are largely basic, and alert investigating officers will modify, adapt, and add to them according as the varying circumstances of individual cases dictate. Moreover, they must be read in conjunction with detailed instructions set out elsewhere in the Manual in relation to particular phases of police duty, and members of the Force must clearly understand that the action suggested in each case is to be regarded as including additionally all necessary action based on those detailed instructions, concerning (for example only) the preparation of criminal offence reports, interrogation of suspected persons, utilisation of available technical facilities, preparation of briefs, the taking of statements and the making of records of interview, etc.
>
> ...
>
> 4.1 POLICE TO PREVENT AND DETECT CRIME:
>
> (a) Police responsibility concerning offences – Members of the Police Force must clearly understand and constantly bear in mind that they are strictly responsible for the prevention and detection of offences of every description. They should therefore cultivate their powers of observation and be always on the alert, so that they will be in a position, should the occasion arise, to furnish complete and accurate descriptions of persons or things observed.
>
> 4.53 – INTERROGATION – OBJECT OF: The object of interrogation is to discover the truth in relation to the subject matter of an investigation, and having this in mind members of the Police Force should not rely on obtaining personal explanations of any matter under inquiry, but should always endeavour to obtain other evidence which may assist in sustaining a charge of an offence.
>
> 4.54A – POLICE QUESTIONING PERSONS UNDER DISABILITY: ...
>
> (b) Questioning of children – All children under the age of 17 years are to be regarded as being persons under disability because of their immaturity. If a necessity arises to question a child for an offence, that child must be questioned, in the presence of a parent, guardian, or an adult person nominated either by the child concerned, or by such parent or guardian. If no person is nominated, an independent adult person, preferably of the same sex as the child, in whose presence the child does not feel overborne or oppressed in any way, should be present.

> (c) Questioning of Aborigines and Torres Strait Islanders – Whilst many Aborigines and Torres Strait Islanders would fall into the category of persons under disability, pigmentation of the skin or genealogical background should not be used as a basis for this assessment. Whilst all of the factors outlined above should be considered, particular attention should be given to the suspect person's educational standards, knowledge of the English language, or any gross cultural differences.
>
> Aborigines and Torres Strait Islanders who come within the category of persons under disability will be questioned in the presence of an independent adult person concerned with the welfare of those races, in whom the person being questioned has confidence and by whom he feels supported, and who can act as an interpreter during the period of interrogation, if necessary. The Aborigine or Torres Strait Islander should not be overborne or oppressed in any way by the person present.
>
> 4.56 JUDGES' RULES:
>
> ...
>
> (1) Preliminary inquiries – When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
>
> 7.29 – PRIMARY FUNCTIONS OF THE POLICE FORCE: Among the primary functions of the Force are the preservation of life, the protection of property, the prevention and detection of offences and the bringing to justice of offenders. To these ends all efforts of members of the Force, wherever stationed, must be directed.

It can be noted that while the *Queensland Policeman's Manual* does provide some guidance in dealing specifically with investigating child related offences, it is tailored towards interacting with alleged child offenders and does not provide guidance on how to interact with or manage a potential child complainant.

As noted above, between 1988 and 1991 Inspector Jefferies was an inspector of police involved in the oversight, control and administration of the Juvenile Aid Bureau.[875] He was well placed to assist the Commission with matters of police practice at the time of the Harding and Neal cases. Dealing more broadly with child protection beyond the *Queensland Policeman's Manual* at the relevant times, Inspector Jefferies noted:[876]

> The gathering of evidence and the protective needs of the child victim were considered of the utmost importance to any investigational response, however effecting this was dependent on the level of cooperation and assistance provided by the victim and or family to assist the investigation.

Inspector Jefferies referred to paragraph 9.499 of the *Queensland Policeman's Manual*, which has its genesis in a Commissioner's Circular[877] referable to the formal introduction of a system of multidisciplinary teams to deal with 'Suspected Child Abuse and Neglect' (SCAN) cases in Queensland in 1980. Paragraph 4.999 notes that the SCAN system was introduced, 'for the purpose of reporting and dealing with suspected child abuse and neglect cases' and that a SCAN team consists of a medical practitioner, a childcare officer and a Juvenile Aid Bureau police officer.

[875] Exhibit 273; Transcript 3(e), 22 January 2013 [p112: line 40].
[876] Exhibit 273.
[877] Exhibit 273 (Annexure: Commissioner's Circular number 102/83 from the Queensland Police Department, T.M. Lewis, Commissioner of Police, 14 September 1983).

Paragraph 9.499 provides guidance to police officers with respect to SCAN matters, including the following relevant matters:

> (e) Unilateral decision making – No member of a S.C.A.N. team, including a member of the Police Force acting in that capacity, is to act unilaterally except in emergent circumstances. Should problems arise which cannot be resolved by the team, the member of the Police Force concerned will immediately advise his District Officer or Commissioned Officer in Charge and the other core team members will advise their respective superiors.
>
> (f) Protection of children – The predominant factor in all cases of child abuse is the protection of children. Investigation by S.C.A.N. teams should be the protection of children. Investigation by S.C.A.N. teams should be victim oriented rather than offender oriented. The first consideration should be the assurance of the child's safety.

Inspector Jefferies noted that guidelines were later established by the Director of Public Prosecutions regarding the continued prosecution of sexual offence matters where victims' rights were considered and respected wherever possible.[878] Those formal guidelines were not in existence at the time of the Harding or Neal matters. Inspector Jefferies said that if a child indicated to police at the time of interview that she did not want to make a complaint, the SCAN procedures would have applied. A multi-disciplinary SCAN team would have, 'looked at the report of that child and then looking at what is the best way to ensure that child's protection and that the child is given assistance'. He said that prosecution was just one aspect of the SCAN response and the paramount concern was the protection of the child.[879]

The options that were open to police to obtain evidence in May 1988, if a child said that she did not want to make a complaint, would depend upon the circumstances and the support being offered by the parents or those in loco parentis. Inspector Jefferies said that in the case of Ms Harding, the departmental officers were the parental authorities and they consented to the child being medically examined, which was one way of obtaining evidence, which may corroborate an event.[880] When asked by counsel assisting whether it was an option in May 1988 to simply issue a summons to a child to attend court to give evidence about a matter, in circumstances such as those that presented with Ms Harding, Inspector Jefferies said:[881]

> I suppose it would always be an option, but if I was honest, I'd have to say that our experience had been that your case was only ever as good as your complainant and I know from personal experience that if in fact you tried to take a case to court and you had an unwilling complainant or an unwilling complainant and uncooperative parents, you really would find it almost impossible to successfully bring the case, but there two different issues here. One would be the protection of the child and the other would be the prosecution of the offender.

Inspector Jefferies disagreed that the prosecution aspect would have been the prime purpose of the Juvenile Aid Bureau[882] and said that the protection of the child was the paramount concern in the Juvenile Aid Bureau.[883] His experience was that, with the sorts of circumstances that presented to investigating police as did in the Harding matter, it would usually be considered, weighing up all of the evidence that was available, that

[878] Exhibit 273.
[879] Transcript 3(e), 22 January 2013 [p113: line 30].
[880] Transcript 3(e), 22 January 2013 [p114: line 5].
[881] Transcript 3(e), 22 January 2013 [p116: line 4].
[882] Transcript 3(e), 22 January 2013 [p116: line 15].
[883] Transcript 3(e), 22 January 2013 [p117: line 5].

the case would be unlikely to be successful.[884] In terms of dealing with the protective options open to a SCAN team in the sorts of circumstances concerning Ms Harding, Inspector Jefferies said:[885]

> Well, we'd obviously discussed with the department what the child protection needs for that child were. If we were satisfied that action had been taken to protect the child from whatever risks were there, we in fact would leave that, particularly in view of the fact that it was the department that was charged with the care and protection of that child.

Detective Sergeant Podlich agreed with Mr Harris during cross-examination that the police were not armed with a complaint when they attended the centre.[886] Inspector Jefferies had been provided with some information from Mr Coyne in relation to Ms Harding, which did not amount to a complaint. Detective Sergeant Podlich accepted that she had a duty to investigate the information that had been received by police.[887] Part of that investigative process required Ms Harding to be interviewed and her complaint taken, if one was made.[888] It was in this context that the police officers attended the centre to investigate an offence.[889] Detective Sergeant Podlich said that the investigation did not proceed further because Ms Harding did not wish to make a complaint, she said:[890]

> We went out and we spoke to Annette and that was – that was the job detailed to us. We went out and spoke to her and then there was no further action to be taken because there was no complaint.

When pressed on a number of occasions by Mr Harris during cross-examination about the investigations that could have been undertaken by police, Detective Sergeant Podlich maintained that, 'there was no complaint to investigate' and 'if a complaint is made, we would investigate it'[891] The obligations that Detective Sergeant Podlich believed she had at the time were further clarified by an exchange with Mr Bosscher, representing Mr K Lindeberg, during cross-examination:

> You keep going back to the issue of 'if there's a complaint made'. If police receive information that an underage child has been potentially sexually active with an adult, do you require a formal complaint before you can proceed? – Yes, we did.

When asked by Mr Bosscher why the police did not follow up on the information from Ms Hayward or Mr Pekelharing, Detective Sergeant Podlich explained that they did at the time and further, 'if Annette didn't want to make any complaint to us, then we didn't follow through on any complaint.'[892] Detective Sergeant Podlich said,[893] 'There was no complaint. … Annette did not make any complaint to us, so to us we had nothing to work on'. Detective Sergeant Podlich was drawing the distinction between information received and a formal complaint.

The evidence of the understanding of Detective Sergeant Podlich and Plain Clothes Constable Tomsett is clear. They attended, as they were bound to, to interview Ms Harding in relation to information that had been received by police. Ms Harding would

---

[884] Transcript 3(e), 22 January 2013 [p116: line 40].
[885] Transcript 3(e), 22 January 2013 [p118: line 28].
[886] Transcript 3(e), 10 December 2012 [p11: line 22].
[887] Transcript 3(e), 10 December 2012 [p11: line 01].
[888] Transcript 3(e), 10 December 2012 [p10: line 20], [p20: line 08].
[889] Transcript 3(e), 10 December 2012 [p10: line 18].
[890] Transcript 3(e), 10 December 2012 [p11: line 03].
[891] Transcript 3(e), 10 December 2012 [p13: line 18].
[892] Transcript 3(e), 10 December 2012 [p21: line 08].
[893] Transcript 3(e), 10 December 2012 [p20: line 15].

not speak to police about the matter and made no official complaint. They considered that, to use Inspector Jefferies' words,[894] they had investigated the matter to the extent that they thought appropriate in the circumstances. There was nothing to investigate and the matter was at an end, subject to procedural formalities such as Ms Harding signing a note in the diary of Plain Clothes Constable Tomsett.

Mr Lindeberg submitted that a complaint had been made in relation to Ms Harding on 27 May 1988 and an investigation commenced at that time. From that platform, he proceeded to criticise the police investigation in the matter.[895] This submission fails to grasp the distinction between the narrow duty to investigate information received and the wider powers of investigation under the *Queensland Policeman's Manual* once a 'complaint' had been received. Mr Lindeberg drew support from the crime of murder where there is no complainant to make a complaint.[896] Such submissions are patently unhelpful. It was not suggested to Detective Sergeant Podlich or Detective Tomsett by any party that they did not investigate in compliance with the *Queensland Policeman's Manual*.

Initial interpretation of the evidence suggests that Detective Sergeant Podlich and Plain Clothes Constable Tomsett took a very 'black and white' view of their duty to investigate. However, it must be kept in mind that the information made available to them was very limited. There was additional information available at that early stage that was not provided to the investigating police officers. For example, on the evidence available, Mr Coyne did not inform the police about the admissions that both he and Mr Freemantle had received from the male detainees as to their involvement in, or observations of, sexual conduct taking place with Ms Harding during the excursion.[897] Similarly, the reports prepared by Mr Manitzky of 24 May 1988,[898] Ms Mersiades of 24 May 1988,[899] Mr Cooper of 25 May 1988,[900] and Mr O'Hanley of 25 May 1988[901] were not supplied by Mr Coyne to police. Inspector Jefferies agreed with Mr Harris that an offence of unlawful carnal knowledge did not require a complaint, so long as it can be proved that the act had occurred. However, Inspector Jefferies said:[902]

> … as I expressed earlier, the difficulty of being able to successfully bring a case to conclusion is very severely hampered if in fact you haven't got the cooperation of the complainant or the parental figures.

Under cross-examination by Mr Lindeberg, Inspector Jefferies agreed that the fact that an admission of intercourse had been made to a credible person who would be able to give evidence, namely Mr Coyne, would be a relevant factor to take into account in terms of the police investigation.[903] The investigating police did not have that information. Detective Sergeant Podlich agreed with Mr Bosscher that if there was a complaint from Ms Harding, both Ms Hayward and Mr Pekelharing might have potentially been sources

[894] Transcript 3(e), 22 January 2013 [p119: line 10].
[895] Exhibit 366.
[896] Exhibit 366.
[897] Exhibit 248.
[898] Exhibit 241.
[899] Exhibit 240.
[900] Exhibit 360.
[901] Exhibit 361.
[902] Transcript 3(e), 22 January 2013 [p124: line 40].
[903] Transcript 3(e), 22 January 2013 [p127: line 40].

of fresh complaint evidence.[904] As to why the staff was not interviewed by police, Plain Clothes Constable Tomsett said:[905]

> As Annette Harding hadn't made a complaint, we didn't have any further information to go on and there was no official complaint to sort of investigate.

When asked by Mr Harris whether she took statements from Ms Hayward and Mr Pekelharing, Detective Sergeant Podlich said:[906]

> No, because we went out to take a statement from Annette. She was the complainant so it was her complaint and because she did not make a complaint to us, then no further action was taken.

Inspector Jefferies agreed with counsel assisting that prior to changes in the criminal law in 1989, there usually had to be direct evidence from the complainant child about what had taken place or an eyewitness who could give evidence of the event.[907] In response to criticism by Mr Harris about police not speaking with the alleged offenders, Inspector Jefferies said:[908]

> I would have thought that the police officers going out there and attempting to get complaint from the child would be what I would see as part of endeavouring to do an investigation. To follow it up then and go and talk to alleged offenders when you haven't got a complaint and you've already got the people as their parental figures aware of the thing and taking what I would see as probably appropriate action, is probably something that the police officers considered in terms of the way in which they handled it.

Polarised views were held about the management style of Mr Coyne by the staff at the centre. However, the common theme that can be taken from all of those witnesses is that he managed the centre with a very tight rein. If he was absent from the centre and a serious matter needed to be attended to, he would be contacted and would attend without delay. For example, he returned to the centre on the evening of the excursion in order to deal with the emerging problems with the male detainees. In dealing with problems he would, to use his metaphor, speak to the butcher rather than the butcher's block. For example, in reporting the Harding matter to the police, he sought out the inspector in charge of the Juvenile Aid Bureau. The absence of Mr Coyne from the centre when police attended on Saturday 28 May 1988 is most puzzling. No explanation has been sought, none has been offered and speculation is ultimately of no assistance. What is significant is the consequence, which appears to be that the police officers were not supplied with all of the information that was available at that time. That lack of information may have affected the extent of the inquiries that the investigating police thought appropriate in the circumstances in order to discharge their duty to investigate. The same police officers armed with all of the available information at that time may have continued to make inquiries, despite the lack of an official complaint coming from Ms Harding.

Mr Newnham, the Queensland Commissioner of Police between 1989 and 1992,[909] was most correct when he drew the distinction between investigation and prosecution of crime.[910] The investigation was deficient, not because of any defect in the way in which the police officers handled the matter in 1988, but because of a breakdown in

[904] Transcript 3(e), 10 December 2012 [p19: line 20].
[905] Transcript 3(e), 29 January 2013 [p72: line 45].
[906] Transcript 3(e), 10 December 2012 [p12: line 34].
[907] Transcript 3(e), 22 January 2013 [p118: line 20].
[908] Transcript 3(e), 22 January 2013 [p125: line 06].
[909] Transcript 3(e), 24 January 2013 [p118: line 14].
[910] Transcript 3(e), 25 January 2013 [p32: line 30].

communication such that the police officers were not supplied with all of the relevant information available. Whether a prosecution would have commenced if a proper investigation was conducted in 1988 is rather too speculative a question to now contemplate.

A strong theme developed in the evidence that the decision to proceed further with a police investigation should not have been left to Ms Harding. For example, Mr Coyne said that he wanted Ms Harding to make a complaint if she had been sexually assaulted. He was disappointed with the process because he did not think that a 14-year-old girl should be able to make a decision as to whether a complaint was made to police or not, in the sense that it determined the future course of police involvement with the matter.[911]

Similarly, Mr Newnham had concerns about the police involvement in the matter and he thought, in short, that the police officers were too easily deflected from their investigative duties because of the wishes of Ms Harding. He considered they should have continued to investigate the matter despite her wishes.[912] In the course of his work for the Enterprise Council he became aware of the Harding matter and had been supplied certain departmental information obtained under a freedom of information request.[913] Mr Newnham was critical of the police for taking what he described as no more than the most superficial of details from Ms Harding.[914] Mr Harris asked Mr Newnham what he would have done in the circumstances that presented, namely, police attending the centre to interview Ms Harding with her saying she did not want to make a complaint. Mr Newnham said:[915]

> She is a minor.
>
> … She'd already been examined, apparently without being required to give her consent. I would have persisted in trying to obtain a statement from her.
>
> … I would not have simply put in my report 'based upon her statement'; I would have continued to investigate it.

The comment about a lack of consent to medical examination does not have any evidential foundation. It is simply unknown whether or not consent was obtained. It became clear, through the cross-examination of Mr Selfridge for the State of Queensland, that Mr Newnham did not know the extent of the information that the police officers possessed at the time that they dealt with the Harding matter. The criticisms made of investigating police by Mr Newnham clearly drew on information not known to the police at the time of the investigation.[916] In addition, the views of Mr Newnham were informed by his general knowledge and experience of what he thought police should have done and not by reference to the *Queensland Policeman's Manual*.[917]

As the above matters demonstrate, the extent to which police investigated such matters was not solely driven by the existence of a complaint or the wishes of the alleged victim. When properly understood, the wishes of Ms Harding were just one feature of the case that fed into the decision of the police officers concerning the extent of their investigations of the matter. Mr Hanger QC suggested to Inspector Jefferies that it was

[911] Transcript 3(e), 11 December 2012 [p98: line 55].
[912] Transcript 3(e), 25 January 2013 [p27: line 40], [p28: line 28], [p31: line 10].
[913] Transcript 3(e), 25 January 2013 [p11: line 2], [p19: line 05]; Exhibit 286.
[914] Transcript 3(e), 25 January 2013 [p3: line 25].
[915] Transcript 3(e), 25 January 2013 [p6: line 04].
[916] Transcript 3(e), 25 January 2013 [p22: line 30], [p27: line 28].
[917] Transcript 3(e), 25 January 2013 [p3: line 20], [p23: line 08]; Exhibit 358.

perfectly proper for the police not to proceed further with the Harding matter when Ms Harding herself said she did not want to proceed and her mother, after speaking with her daughter, supported the decision. Inspector Jefferies said:[918]

> Obviously the police proceeded in terms of getting the medical examination done, but having weighed up the child's stated wish and the mother's and obviously having discussed it with the paediatrician and the child-care people, I see that it's an appropriate decision.

Having reviewed the matter, Inspector Jefferies said that he would not criticise the police decision.[919]

In terms of the skills that Juvenile Aid Bureau personnel had at that time with respect to dealing with children, Inspector Jefferies said:[920]

> I am aware that at this time not all JAB staff had been trained in specialist child protection investigations, and gathering evidence from potential child victims.

Detective Sergeant Podlich, as a member of the Juvenile Aid Bureau, had not received any training in the way to communicate with people from various cultural backgrounds, particularly Aboriginal or Torres Straight Islander people.[921] She also said that police had very basic training at that time as to how to coax information from complainants.[922] Mr Bosscher suggested that a complaint was less likely in circumstances where Ms Harding was being interviewed at the centre, in the presence of staff and without the support of her mother. Detective Sergeant Podlich thought it was sufficient to interview Ms Harding in those circumstances because she was a detainee and the staff at the centre, in her mind, represented an independent person being present in the interview.[923] Similarly, Plain Clothes Constable Tomsett rejected the proposition of Mr Harris that the police should have spoken to Ms Harding on her own and free of any association with the centre, on the limited basis that there always had to be another person present during an interview with a child, whether the child was a complainant or an alleged offender.[924] These views accord with the approach that police would take to questioning a child for an offence under paragraph 4.54A of the *Queensland Policeman's Manual*. However, Ms Harding was not being questioned as an offender. Further, as was pointed out by Mr Harris, if she was being questioned as an offender, being Aboriginal, an 'adult person concerned with the welfare of [her] race' should have been present.[925]

Detective Sergeant Podlich said that she would have asked Ms Harding if she was comfortable with the centre staff being present during the interview. However, I note that question was never asked of Ms Harding without those persons being in the room.[926] Inspector Jefferies said that the police procedures at that time were not to have an independent person present for the complainant, but that their preference was to have somebody present that the child felt comfortable with and supported by.[927] It appears

[918] Transcript 3(e), 22 January 2013 [p121: line 30].
[919] Transcript 3(e), 22 January 2013 [p121: line 35].
[920] Exhibit 273.
[921] Transcript 3(e), 10 December 2012 [p19: line 01].
[922] Transcript 3(e), 10 December 2012 [p23: line 45].
[923] Transcript 3(e), 10 December 2012 [p21: line 40].
[924] Transcript 3(e), 10 December 2012 [p10: line 34].
[925] Exhibit 362; Exhibit 359 (Queensland Policeman's Manual [para 4.54A(c)]).
[926] Transcript 3(e), 10 December 2012 [p22: line 10].
[927] Transcript 3(e), 22 January 2013 [p124: line 30].

that procedure was followed by investigating police. Mr Hanger QC questioned Inspector Jefferies about whether it was proper behaviour for Ms Harding to have a member of staff that she chose present. Inspector Jefferies said:[928]

> I think it would be appropriate if in fact the child has asked for someone that she feels is supportive and that she's comfortable with in discussing something like this. From a police perspective it certainly would be beneficial. The child feels supported and relaxed in order to be able to tell what occurred.

There is a distinction between having an independent person present during an interview and having a person present who is able to support the child. As Mr Harris raised during the cross-examination of Ms Hayward, Ms Harding was sitting in a room in a prison with four government employees and in those circumstances she withdrew her complaint.[929] Those matters were echoed in the submission of Mr Lindeberg.[930] Criticism was made of Mrs Harding not being invited to be present for the interview of her daughter by police on 27 May 1988. Inspector Jefferies said:[931]

> I wouldn't have thought that if in fact the child had been in care for some period of time that you would normally have had the parents, particularly until in fact you got all of the circumstances, whatever, and obviously at that time, just having received the complaint, they'd be looking towards action to get the matter investigated and the person who was, for want of a better term, fulfilling that parental role at the time would have been the one that contacted the police and one of the child-care officers would've been, I imagine, present at the time that the child was interviewed.

Detective Sergeant Podlich did not know where Mrs Harding was at the time she interviewed Ms Harding.[932] There is no indication that she was aware that Mrs Harding had spoken with her daughter about the matter by telephone on Thursday, 26 May 1988. There was also no indication that she had attended the centre and spoke with her daughter in person on Friday, 27 May 1988 and had informed Mr Coyne that she supported her daughter in making a complaint. Again, this represents a substantial breakdown in communication between the management of the centre and the police. Had the police officers known these details, the apparent change of position by Ms Harding would have seemed so much more significant. Inspector Jefferies thought that Mrs Harding being brought to the centre to see her daughter after the police interview was appropriate conduct by the centre management.[933]

The community is much better informed now about the sensitivities of young people and those from various ethnic backgrounds, even compared with community understanding as recent as 1988. Similarly, police officers working within the Child Protection and Investigation Unit are now much better trained in how to deal with such issues than they were in 1988. Those matters must be kept in mind when police conduct from 25 years ago is reviewed at present.

There was a defect with the way in which the allegations made by Ms Harding were handled, but that defect is confined to the flow of information between the management of the centre and police. The police officers investigating the Harding matter were applying standard police practices of the time when they interviewed Ms Harding, tailored to the factual circumstances that had been disclosed to them. One can only

[928] Transcript 3(e), 22 January 2013 [p121: line 20].
[929] Transcript 3(e), 13 December 2012 [p66: line 18].
[930] Exhibit 366.
[931] Transcript 3(e), 22 January 2013 [p121: line 02].
[932] Transcript 3(e), 10 December 2012 [p21: line 10].
[933] Transcript 3(e), 22 January 2013 [p120: line 05].

speculate as to what impact the additional information may have had upon the course of the police investigation.

Mr Harris submits that this defect was deliberate and designed to contain the incident within the department, at the expense of the rights of Ms Harding as a complainant. Mr Harris submits:[934]

> JOYC was caught in a web of internal disputes and power struggles because of the disputed Management procedures and media leaks.
>
> It is respectfully submitted that the sexual assault on Annette had the ability to fuel the dispute between various fractions at JOYC. The fear of such an incident was foremost in the mind to the Director General and the Minister [foot note 69: Exhibit 247 – Alan Pettigrew]. The entire exercise was an exercise in minimising the facts to a controllable level, as the Director General said in his correspondence to the Minister. He said 'Apparently four boys interfered with one of the girls'.[935]

Mr Harris reads much into the correspondence of Mr Pettigrew that is simply not supported by its plain and ordinary meaning and otherwise in the context in which it was sent, which is detailed above. I do not find any support for the speculative submission that the police investigation into the Harding matter was manipulated by the department as part of a wider plan of containment.

Assessment of the way the matter was handled by the centre and the department

Assertion of a cover-up

The 30 May 1988 memorandum of the conversation between Mr Nix and Mr Coyne includes an assertion by Mr Coyne that at that stage a staff member was alleging the Harding incident was being covered up.[936] Mr Coyne could not recall reporting any allegation of a cover-up of the Harding incident at the time he spoke with Mr Nix.[937] In any event, Mr Coyne thought the proposition impossible and inconceivable given his seeking the involvement of so many people, including the police, the parents of Ms Harding and medical professionals.[938] Mr Coyne said:[939]

> I mean, the focus very much was on about was Annette sexually assaulted and what should we do about that and to engage the different parties in terms of supporting her and investigating the matter and involving the family. There was less focus on, you know, whether staff had done the right thing or the wrong thing.

The recollection of Mr Coyne was that staff were directed to focus their attention upon the care of Ms Harding and that discussions or rumours amongst staff were to be kept at a minimum in order that other detainees were not picking up information in that manner.[940] In terms of the proper processes to deal with such a situation, Mr Peers said that the matter had to be reported to police, which it was, and then the considerations focused on the girl and her family and what kind of assistance she needed from staff within the centre.[941] Mr Peers had no real recollection of the outcome of the police

[934] Exhibit 367.
[935] Exhibit 247
[936] Exhibit 246.
[937] Transcript 3(e), 11 December 2012 [p26: line 30], [p102: line 45].
[938] Transcript 3(e), 11 December 2012 [p26: lines 22-27], [p102: line 01].
[939] Transcript 3(e), 11 December 2012 [p89: line 24].
[940] Transcript 3(e), 11 December 2012 [p27: line 30].
[941] Transcript 3(e), 22 January 2013 [p22: line 02].

investigation, save for the fact that no charges were laid.[942] Nonetheless, he agreed with the proposition that the response of Mr Coyne in this case was consistent with what his own response would have been.[943] Mr Peers said,[944] 'I cannot agree with this allegation and state that there was no cover-up. I can say that everything we could think to do was done.' Mr Nix said:[945]

> I don't think it was covered up at all because the police investigated it and the girl didn't want to proceed with anything else. Full reports came in. They were sent up to the DG and onto the minister. Everything was noted during the course of everything. I just don't know who would be involved in the cover up, for want of a better term.

A media release was issued by the Minister, the Honourable Craig Sherrin, on 17 March 1989.[946] Mr Nix said that it was not part of the responsibility of Mr Pettigrew to draft media releases. It was noted that the document contained a notation, 'Further information Frank Jackson'.[947] Mr Jackson was the press secretary to the Minister.[948] Mr Nix gave the opinion, which seems to be sound, that the article was referring to the Harding incident.[949] However, it is noted that the media release may contain some inaccuracies, as was brought to my attention by Mr Newnham.[950] What can be taken from the media release is that the Harding incident was made public to the community generally on 17 March 1989, which does not accord with allegations of a cover-up of that incident.

Mr Harris submitted that the media release was demonstrative of sanitised facts concerning Ms Harding being given to the Minister.[951] Mr Lindeberg submitted that the press release 'apparently added another layer of misdirection, if not deliberate deception'.[952] An example offered by Mr Harris is the lack of any mention of a police investigation in the press release. The press release must be viewed for what it was. It was not, nor could it be given the nature of such documents, a detailed summary of all aspects of the handling of the matter. A proper consideration of the document does not reveal cogent evidence that could fill the wide evidential gaps in the theories promoted by Mr Harris and Mr Lindeberg.

The involvement of the police at the earliest opportunity

Mr Coyne was cross-examined by Mr Harris about why the police were not called upon his first receiving the information from Mr Freemantle.[953] Mr Coyne said that he thought that he needed to get more information about what had transpired. He went and spoke with the male detainees who were implicated, Ms Foote spoke with Ms Harding and he then, later that day, sought the assistance of his superior, Mr Peers.[954] He agreed that it was important to get the police involved as soon as possible. However, he said that he

[942] Transcript 3(e), 22 January 2013 [p25: line 30].
[943] Transcript 3(e), 22 January 2013 [p71: line 05].
[944] Exhibit 270.
[945] Transcript 3(e), 13 February 2013 [p60: line 12].
[946] Exhibit 251.
[947] Transcript 3(e), 13 February 2013 [p60: line 30].
[948] Transcript 3(e), 13 February 2013 [p60: line 35].
[949] Transcript 3(e), 13 February 2013 [p61: line 20].
[950] Exhibit 358.
[951] Exhibit 362.
[952] Exhibit 366.
[953] Transcript 3(e), 11 December 2012 [p85: line 40].
[954] Transcript 3(e), 11 December 2012 [p86: line 01] .

had received advice that it was important to get Ms Harding's parents involved, which he followed.[955] Mr Coyne said:[956]

> There would have been a discussion about that on the Wednesday with Ian Peers in the afternoon. Ian wanted the family contacted first. I think most of us were biting at the bit to – you know, wanted to see the police involved as soon as possible, but we endeavoured to contact the family et cetera.

Mr Coyne noted that as soon as the family came in, the police were immediately contacted.[957] Mr Peers said:[958]

> Back in 1988 there was no standardised process or procedures for managers to follow so it was up to the manager to investigate and manage incidents as they arose. I think there was a significant issue in that there was not a set manual for the manager and staff to follow back then. I would have expected that the manager back then would have consulted with the members of his or her professional team.

Mr Peers said that the manager had responsibility for making all operational decisions at the centre, though the manager may have discussed some decisions with him.[959] Given the respective authorities and the chain of reporting, Mr Peers agreed that Mr Coyne did not need his permission to contact the police, but Mr Coyne did need to inform him that action had been taken.[960] Mr Peers said that if Mr Coyne had not already taken the action to call the police when he became involved, he would have proposed that happen immediately.[961] This is inconsistent with the evidence of Mr Coyne, who said that his instructions from Mr Peers were to speak with the parents of Ms Harding before contacting the police.

No disciplinary measures taken against the excursion staff

Mr Peers did not cause any action to be taken against any staff in relation to the excursion, though he recalls speaking with the centre management about the excursion.[962] Mr Nix did not know if any of the staff were disciplined in any way.[963] He never received any memorandum from Mr Coyne to that effect, which would have been the protocol on such discipline.[964] Mr Nix did not direct any disciplinary measures to be taken against any of the staff and said that was not really part of his role.[965]

Mr Coyne did not make any referral to the department in terms of action against the staff failure and responsibility for the events of 24 May 1988 because he had the ultimate authority to say whether or not the excursion proceeded. As a result of these feelings, and his lead role in handling the allegation, he said that he did not think that it was appropriate that he initiated disciplinary action against his staff. He said that any disciplinary action against the staff at the centre should have been handled by somebody external to the centre.[966] It appears that this issue was never discussed

[955] Transcript 3(e), 11 December 2012 [p87: line 06].
[956] Transcript 3(e), 11 December 2012 [p89: line 35].
[957] Transcript 3(e), 11 December 2012 [p89: line 40].
[958] Exhibit 270.
[959] Transcript 3(e), 22 January 2013 [p70: line 10].
[960] Transcript 3(e), 22 January 2013 [p71: line 10].
[961] Transcript 3(e), 22 January 2013 [p71: line 01].
[962] Transcript 3(e), 22 January 2013 [p25: line 45].
[963] Transcript 3(e), 13 February 2013 [p70: line 40].
[964] Transcript 3(e), 13 February 2013 [p71: line 04].
[965] Transcript 3(e), 13 February 2013 [p71: line 20].
[966] Transcript 3(e), 11 December 2012 [p100: line 20].

between Mr Coyne and Mr Peers or Mr Nix. I note that some of the boys were moved from the centre to a higher security facility, the Westbrook Youth Detention Centre.[967]

The submissions of Mr Harris revisited

Exhaustive evidence was placed before me concerning the Harding incident. I cannot find any support in that evidence for the overarching proposition advanced by Mr Harris that a culture of disdain for the law and the rejection of its application existed in the department and Queensland Police over decades. No evidence emerged in relation to the Harding incident that authority was abused, or that some sort of unwritten code of mutual support existed amongst the various stakeholders in youth detention, in order to protect such a culture at the expense of truth, as was alleged.

All relevant evidence available was called in relation to Ms Harding

Those with authority to appear were invited to advise the Commission if they considered that any further witnesses needed to be called in relation to any aspect of paragraph 3(e).[968] Mr Harris did not request that any further witnesses be called in relation to Ms Harding and he confirmed on 19 February 2013 that the Commission had called all of the evidence that he submitted should be called in relation to Ms Harding.[969] I note that Mr Harris did not advance any evidence concerning the allegation of a second incident involving Ms Harding at Mt French, as was submitted in his initial written submissions.[970] No evidence of that event was disclosed in the materials made available to the Commission.

[967] Transcript 3(e), 11 December 2012 [p100: line 24].
[968] Transcript 3(e), 1 February 2013 [p85: line 05].
[969] Transcript 3(e), 19 February 2013 [p71: line 15].
[970] Exhibit 368; Exhibit 373.

Ms Neal

Details of the excursion

On 4 April 1991 six detainees including Ms Shelly Neal and four staff from the centre went on an excursion to Wivenhoe Dam.[971] The staff members were Ms Linda De Cocq Van Del Wijnen, a practical youth worker, Mr Muelenberg, a training officer, a further youth worker who I will continue to refer to as 'the unnamed youth worker', Mr Gordon Cooper, a teacher, and Mr Terry Owens , a youth worker (now deceased).[972] Ms De Cocq Van Del Wijnen sat on the bank and watched the other staff and the detainees swimming. She did not notice anything unusual or of concern,[973] nor did she see any change in the behaviour of Ms Neal that day.[974] In contrast, Mr Muelenberg thought that Ms Neal seemed 'out of sorts and not her typical self' after going swimming.[975] The unnamed youth worker denied any impropriety in relation to Ms Neal.[976] Mr Cooper did not recall there being any issues of concern during the excursion.[977]

The allegation

Ms Neal later made a serious allegation to Mr Muelenberg of child sexual abuse being perpetrated upon her by the unnamed youth worker while she was swimming in the dam. Mr Muelenberg was inconsistent as to the timing of the disclosure relative to the excursion. In his 2012 statement, Mr Muelenberg said Ms Neal made the allegation to him one to two days after the excursion.[978] In his evidence on 24 January 2013, he said that he reported it to the centre manager, Mr Ian McIntyre, about four days later.[979] In his evidence, Mr Muelenberg said he immediately reported what Ms Neal had told him to Mr McIntyre.[980] Mr McIntyre was the manager of the centre at all times relevant to Ms Neal. On 14 May 1991, some weeks after the relevant events, Mr McIntyre authored a report to his line manager Mr Kenneth Otter, Regional Manager.[981] In that report he records that Mr Muelenberg reported the matter to him on 16 April 1991,[982] some 12 days after the excursion. The inconsistency in the evidence may be explained by present memory difficulties that Mr Muelenberg has, which are associated with medication that he takes.[983] The 14 May 1991 report of Mr McIntyre is the most contemporaneous and otherwise cogent evidence available. Ms De Cocq Van Del Wijnen thought that the unnamed youth worker had resigned the evening of the excursion.[984] This evidence is inconsistent both with the evidence of Mr Muelenberg, Mr McIntyre's report of 14 May

[971] Exhibit 264; Transcript 3(e), 21 January 2013 [p46: line 30]; Exhibit 305; Transcript 3(e), 24 January 2013 [p16: line 10].
[972] Exhibit 264; Transcript 3(e), 21 January 2013 [p46: line 30]; Transcript 3(e), 24 January 2013 [p16: line 10]; Exhibit 11; Exhibit 352.
[973] Exhibit 264.
[974] Exhibit 264.
[975] Exhibit 283.
[976] Transcript 3(e), 1 February 2013 [p10: line 40].
[977] Exhibit 11.
[978] Exhibit 283.
[979] Transcript 3(e), 24 January 2013 [p17: line 25].
[980] Transcript 3(e), 24 January 2013 [p17: line 20]; Exhibit 283.
[981] Exhibit 315.
[982] Exhibit 315; Transcript 3(e), 11 February 2013 [p115: line 42].
[983] Transcript 3(e), 24 January 2013 [p19: line 40].
[984] Exhibit 264; Transcript 3(e), 21 January 2013 [p47: line 22].

1991 and a handwritten letter of resignation of the unnamed youth worker dated 16 April 1991.[985]

Mr Olley Isaac, a youth worker, had concerns about the welfare of Ms Neal from his observations and interaction with her when she returned to the centre following the excursion.[986] His concerns arose from seeing Ms Neal having sunburn on her back, save for what appeared to be handprints as if someone had been facing her and holding her back.[987] Ms Neal also did not seem her usual self at that time.[988] Mr Isaac questioned Ms Neal about the hand prints and she indicated that she was floating on a tube with the unnamed youth worker who was holding her with his hands on her back.[989] Mr Isaac said that he made a report about his suspicion.[990] He did not know if he made a written or verbal report and he could not remember whom he made his report to.[991] Mr Isaac believed that 'it wasn't long after' his report of his suspicion that the youth worker's employment was terminated.[992] It was never suggested to Mr McIntyre by any party that he received any such report.

Mr Isaac held very strong views that management did not inform the police, the youth worker 'got away with it', management did not protect Ms Neal and all-in-all 'absolutely nothing happened'.[993] Mr Isaac said, 'I thought I did my bit as I passed on the information or concerns I had but no one took it any further.'[994] Mr Isaac said he was angry about the incident and it still distresses him.[995] Mr Isaac was clearly unaware of the action that was taken at the centre by Mr McIntyre once Mr Muelenberg reported the matter to him, which is detailed below. Mr Isaac did not receive any feedback from management about his report.[996] The swift action taken by Mr McIntyre, once he received the initial report from Mr Muelenberg, suggests that Mr McIntyre was never aware of the suspicions of Mr Isaac or any report made thereof. The absence of any mention of Mr Isaac in the thorough report of Mr McIntyre supports this inference. It is difficult to point to any reporting failure at the centre given the vagaries of how and to whom Mr Isaac made report of what were only his suspicions.

The response by the centre manager

Once Mr Muelenberg reported the matter to Mr McIntyre, Mr Muelenberg had no further involvement in the matter and Mr McIntyre took over the response to the allegation.[997] Ms De Cocq Van Del Wijnen recalls going to speak to one of the senior staff, or 'possibly the manager', and being told not to discuss the matter further for fear of 'defamation or something'.[998] Her appreciation was that the allegation of Ms Neal was handled by management.[999]

---

[985] Exhibit 314.
[986] Transcript 3(e), 6 December 2012 [p13: line 28].
[987] Exhibit 24.
[988] Transcript 3(e), 6 December 2012 [p14: line 01].
[989] Exhibit 24.
[990] Exhibit 24.
[991] Exhibit 24;Transcript 3(e), 6 December 2012 [p15: line 35], [p16: line 10]
[992] Transcript 3(e), 6 December 2012 [p15: line 40].
[993] Exhibit 24.
[994] Exhibit 24.
[995] Exhibit 24; Transcript 3(e), 6 December 2012 [p15: line 45].
[996] Exhibit 24; Transcript 3(e), 6 December 2012 [p18: line 05].
[997] Transcript 3(e), 24 January 2013 [p17: line 40]; Transcript 3(e), 11 February 2013 [p119: line 40].
[998] Exhibit 264.
[999] Transcript 3(e), 21 January 2013 [p46: line 08]

After Mr McIntyre received the report from Mr Muelenberg on 16 April 1991, he put in train a number of matters, which he described as being more designed around common sense, as opposed to departmentally prescribed practices and procedures that may have been in place at the time.[1000] Mr McIntyre frankly admitted that he was not aware of any departmental guidelines that dealt with matters such as the allegation of Ms Neal and said that he just used his initiative.[1001] Mr Otter said that there would have been guidelines at the time,[1002] but that the processes were very much evolving during the 1990s where more structured manuals were developed with the advent of the juvenile justice legislation.[1003]

Mr McIntyre understood that he alone was to deal with day-to-day ordinary management matters at the centre, but that serious matters were to be referred to his line manager.[1004] Mr McIntyre considered the allegation of Ms Neal to be in the very serious category.[1005] On 16 April 1991, after receiving the report from Mr Muelenberg, Mr McIntyre almost immediately spoke with his line manager Mr Otter and received advice to contact police.[1006] He was also told that the Criminal Justice Commission would need to be involved.[1007]

On 16 April 1991, Mr McIntyre next spoke to Ms Neal who confirmed the allegation, but said that she did not want the police involved because she did not want to get the youth worker into trouble.[1008] Mr McIntyre advised Ms Neal that the police would be contacted in any event.[1009]

On the same day, Mr McIntyre next spoke with the unnamed youth worker in his office.[1010] Mr McIntyre outlined the allegation to the unnamed youth worker who got upset, resigned and left the centre.[1011] In his evidence, the unnamed youth worker said that he could not believe the allegation made against him. He said that the centre was 'toxic' at that time in the sense of division between management and staff[1012] and morale was very poor.[1013] He had done his best to stay out of the politics but when it turned on him, he decided that he had enough and resigned.[1014] Mr McIntyre unsuccessfully attempted to dissuade the youth worker from doing this.[1015] A handwritten letter of resignation from the youth worker dated 16 April 1991 was tendered into evidence.[1016] Mr McIntyre had never seen that document[1017] and said he only saw the youth worker once concerning the allegation. Looking at the letter of resignation, he believed that the date he accepted the youth workers resignation was 16 April 1991,

[1000] Transcript 3(e), 11 February 2013 [p124: line 8]; Exhibit 303; Exhibit 304.
[1001] Transcript 3(e), 11 February 2013 [p124: line 10].
[1002] Exhibit 303; Exhibit 304.
[1003] Transcript 3(e), 11 February 2013 [p133: line 10].
[1004] Transcript 3(e), 11 February 2013 [p124: line 16].
[1005] Transcript 3(e), 11 February 2013 [p124: line 20].
[1006] Transcript 3(e), 11 February 2013 [p111: line 30], [p116: line 12], [p128: line 16].
[1007] Exhibit 319; Transcript 3(e), 11 February 2013 [p115: line 10].
[1008] Exhibit 319; Transcript 3(e), 11 February 2013 [p113: line 35].
[1009] Exhibit 319.
[1010] Exhibit 319; Transcript 3(e), 11 February 2013 [p113: line 43].
[1011] Exhibit 319, Transcript 3(e), 11 February 2013 [p114: line 01].
[1012] Exhibit 305; Transcript 3(e), 1 February 2013 [p8: line 40].
[1013] Transcript 3(e), 1 February 2013 [p11: line 10].
[1014] Exhibit 305.
[1015] Exhibit 319; Transcript 3(e), 11 February 2013 [p114: line 10]; Exhibit 305.
[1016] Exhibit 314.
[1017] Transcript 3(e), 11 February 2013 [p115: line 18].

which was the day he left the centre.[1018] In his statement, the unnamed youth worker said that he resigned over the next couple of days.[1019] This cannot be the case because all of the evidence indicates that Mr McIntyre received the report from Mr Muelenberg on 16 April 1991 and the unnamed youth worker resigned that day. Mr McIntyre believed that all of the events so far happened on 16 April 1991.[1020]

Police involvement

Mr McIntyre reported the matter to the Inala police[1021] but was unsure of the exact date and believed it to be the following day.[1022] His 14 May 1991 report indicates that he contacted the police on 18 April 1991.[1023] Mr McIntyre was cross-examined by Mr Harris about why it took until that date for the police to be contacted, given that Ms Neal had been subject to threats from other detainees over the reporting, as was noted in his 14 May 1991 report. Mr McIntyre said he did not think that Ms Neal was at risk, but he freely and fairly accepted that it would have been prudent to have the police involved immediately.[1024] It appears that the police did not attend immediately in any event. Mr McIntyre referred to his 14 May 1991 report and noted that while 'arrangements were made' for the police to attend on 18 April 1991, they did not attend prior to the release of Ms Neal on 19 April 1991.[1025] After her release, he spoke with the police and told them that Ms Neal had been released to the home of her mother and they should contact the area office of the department and liaise with them in order to speak with her.[1026]

Detective Sergeant Malcolm Elliott of the Inala Juvenile Aid Bureau, who is now retired, was called as a witness at the request of Mr Harris. I will refer to him as Detective Sergeant Elliott. Detective Sergeant Elliott now has only a vague memory of his involvement in this matter.[1027] He has some memory of attending the centre to speak with Ms Neal to find that she had already been discharged.[1028] He said that he would have made further inquiries with the department to locate Ms Neal to deal with the matter, however, he recalls that no complaint was ever made by Ms Neal.[1029] Mr Harris placed excerpts of the *Queensland Policeman's Manual* before Detective Sergeant Elliott during his cross-examination. He was well aware of the document and accepted that it was a manual for police officers, including highlighting the role of a police officer with respect to investigation.[1030] In the words of Detective Sergeant Elliott, 'I can never forget it.'[1031]

As a result of the subject matter contained in the information supplied to police by McIntyre, paragraphs 4.365 and 4.367 of the *Queensland Policeman's Manual* required a member of the Juvenile Aid Bureau or a senior detective to be assigned to the matter. The tasking of Detective Sergeant Elliott to the matter complied with those provisions.

[1018] Transcript 3(e), 11 February 2013 [p115: line 25, p116: line 28].
[1019] Exhibit 305.
[1020] Transcript 3(e), 11 February 2013 [p115: line 42].
[1021] Exhibit 319.
[1022] Transcript 3(e), 11 February 2013 [p116: line 34].
[1023] Exhibit 315.
[1024] Transcript 3(e), 11 February 2013 [p123: line 22].
[1025] Transcript 3(e), 11 February 2013 [p117: line 30].
[1026] Transcript 3(e), 11 February 2013 [p117: line 4], [p118: line 02].
[1027] Exhibit 334.
[1028] Exhibit 334.
[1029] Exhibit 334.
[1030] Transcript 3(e), 19 February 2013 [p66: line 14].
[1031] Transcript 3(e), 19 February 2013 [p66: line 10].

He was a police officer from 1979 through to 2006[1032] and was both a member of the Juvenile Aid Bureau and a senior detective at the time. He had commenced work in the Juvenile Aid Bureau in 1982.[1033]

Detective Sergeant Elliott made clear that he had intended to attend the centre to speak with Ms Neal with a view to taking a complaint from her.[1034] After he knew that she was no longer at the centre, arrangements were made for him to speak with Ms Neal at the Caboolture office of the department. When he arrived at the Caboolture office, he was 'told by a youth worker that she had not fronted up and that she didn't want to speak to police'.[1035] Detective Sergeant Elliott said that he never spoke personally to Ms Neal and a complaint was never made.[1036] The lack of a complaint by Ms Neal was a significant matter in terms of commencing an investigation. In accordance with the relevant provisions of the *Queensland Policeman's Manual*, which are the same as those that I dealt with above in relation to Ms Harding, Detective Sergeant Elliott needed a complaint in order to commence an investigation. He never received a complaint.

Detective Sergeant Elliott agreed with Mr Harris that if an official complaint had been made to him by Ms Neal, he would have investigated that complaint in accordance with the general instructions contained in the *Queensland Policeman's Manual*.[1037] It was not suggested to Detective Sergeant Elliott during his evidence that he did anything other than faithfully and properly follow the *Queensland Policeman's Manual*. The parallels between the Harding and Neal matters concerning the lack of an official complaint are obvious. It is noteworthy that very senior ranking and experienced police officers were appointed to both matters and that each of the officers held the same views on the obstacle that a lack of official complaint represented in the investigative process. Their evidence is also consistent with Inspector Jefferies, who I accept as being the superior authorities on these matters.

Referral to the Community of Inala Legal Service

At some stage, the Community of Inala Legal Service was advised about the matter and assistance was sought in terms of a solicitor attending the centre to act in the interests of Ms Neal.[1038] Ms Heather Den Houting, a solicitor from that organisation attended the centre in that regard. Ms Den Houting was called as a witness at the request of Mr Harris. Ms Den Houting could only say that she attended the centre to speak with a female child.[1039] From a review of all the records associated with the allegation, it must have been Ms Neal.

Ms Den Houting now has no memory of the content of the meeting,[1040] but does recall that the purpose of her attendance was to provide support, advice and education,[1041] and that she may have explained the process, legalities and rights of a victim in making a complaint to police.[1042] She believes that she spoke with Ms Neal one-on-one[1043] and

[1032] Transcript 3(e), 19 February 2013 [p65: line 45].
[1033] Transcript 3(e), 19 February 2013 [p66: line 01].
[1034] Transcript 3(e), 19 February 2013 [p69: line 18].
[1035] Transcript 3(e), 19 February 2013 [p69: line 26].
[1036] Transcript 3(e), 19 February 2013 [p69: line 32].
[1037] Transcript 3(e), 19 February 2013 [p67: line 01].
[1038] Exhibit 319.
[1039] Exhibit 333; Transcript 3(e), 11 February 2013 [p117: line 46]
[1040] Exhibit 333.
[1041] Exhibit 333.
[1042] Exhibit 333.
[1043] Exhibit 333.

would have made notes of the meeting but does not believe that any notes would now be in existence, given the expiration of time.[1044] Ms Den Houting believed that if the allegation was of a sexual nature, she would have encouraged Ms Neal to make a complaint to police and she would have supplied her with information in order for her to make an informed choice and to make available any necessary support.[1045] If Ms Neal did not want to make a complaint, she would have respected her decision and would have ensured that appropriate supports were available to Ms Neal.[1046] Ms Den Houting believed that she would have left her details with Ms Neal, but she did not hear further from her.[1047]

It is not known who made contact with that organisation. Mr McIntyre himself did not seek their assistance and he thought that was an initiative of the Juvenile Aid Bureau.[1048] Detective Sergeant Elliott could not recall contacting the Community of Inala Legal Service for Ms Neal.[1049] Nonetheless, the significant fact is that an independent solicitor was retained and did attend the centre and meet with Ms Neal in order to assist her prior to her involvement with police and release from the centre. That referral can only have come from someone engaged in the public service.

Contact with Ms Neal's mother

Mr McIntyre also spoke with Mrs Cecily Neal, the mother of Ms Neal, about the allegations. Mrs Neal attended the centre on 19 April 1991. Following consultation with Mrs Neal about the allegation and threats Ms Neal had received from other detainees as a result of her reporting the matter, Mr McIntyre exercised his power to authorise the early release of Ms Neal into her mother's care.[1050] Ms Neal was a couple of weeks away from being discharged from the centre at that time.[1051] Under the legislative regime at that time, Mr McIntyre had authority to reduce a period of detention in this manner.[1052] Mr McIntrye said that Mrs Neal came to the centre immediately after his telephone conversation with her.[1053] He was unsure of the day that he called Mrs Neal. Looking at his report of 14 May 1991, he said that it could have been on 18 or 19 April 1991.[1054]

Cessation of Mr McIntyre's involvement

The involvement of Mr McIntyre with the Neal matter ceased upon her discharge from the centre on 19 April 1991.[1055] The matter then became the responsibility of the area office because Ms Neal was still under the care of the department, even though she had been discharged.[1056] Mr McIntyre subsequently gave Mr Otter his 14 May 1991 report.[1057] He expected that Mr Otter, and those up the line of management from him, would deal with

[1044] Exhibit 333.
[1045] Exhibit 333.
[1046] Exhibit 333.
[1047] Exhibit 333.
[1048] Transcript 3(e), 11 February 2013 [p117: line 18], [p117: line 46].
[1049] Exhibit 334.
[1050] Exhibit 319; Transcript 3(e), 11 February 2013 [p124: line 26].
[1051] Transcript 3(e), 11 February 2013 [p119: line 20].
[1052] Transcript 3(e), 11 February 2013 [p119: line 24].
[1053] Transcript 3(e), 11 February 2013 [p118: line 20].
[1054] Transcript 3(e), 11 February 2013 [p119: line 14].
[1055] Transcript 3(e), 11 February 2013 [p120: line 4].
[1056] Transcript 3(e), 11 February 2013 [p120: line 6].
[1057] Transcript 3(e), 11 February 2013 [p120: line 8].

matters such as the referral of the allegation to the Criminal Justice Commission.[1058] Mr McIntyre considered that the investigation of the complaint was a police matter.[1059]

Written reports

In his evidence, Mr Muelenberg said that he believed that he filled in a written report at the request of Mr McIntyre.[1060] However, in his statement he said that he only made a verbal report to Mr McIntyre.[1061] No written report has been located. Mr McIntyre said that Mr Muelenberg did not present anything in writing to him in relation to Ms Neal.[1062] Ms De Cocq Van Del Wijnen could not recall whether or not she made any written report in relation to the excursion.[1063] Mr Cooper did not make any report in relation to Ms Harding because he did not know about the allegation until many years later.[1064] Mr McIntyre did not request a written report from the unnamed youth worker, nor was one supplied.[1065]

Mr McIntyre was cross-examined by Mr Harris about whether or not he took statements from each of the staff members present on the excursion. Mr McIntyre said that after he received the information from Mr Muelenberg, his immediate concern was the safety of Ms Neal and he thought that interviewing staff over the matter was outside his managerial function and was a matter more appropriately to be dealt with by the police.[1066] He had an expectation that the police would investigate the matter.[1067]

Mr Otter said that general practice was that if a matter was referred to the police, then the department would leave it to the police to investigate. Here, a potentially indictable offence was referred to the police and it would not have been the general practice of the department to conduct their own internal investigations into such matters.[1068]

Mr McIntyre was cross-examined by Mr Harris about why he did not take a full report from Ms Neal. Mc McIntyre said that he thought that was the responsibility of the Juvenile Aid Bureau. His experience was that they had been advised that social workers conducting such inquiries can serve to contaminate the investigation by the Juvenile Aid Bureau. It had been suggested to him that they should not get too involved in investigating such matters.[1069]

The handling of the allegation beyond the centre

It is clear that Mr McIntyre took advice and direction from Mr Otter immediately upon receiving the report from Mr Muelenberg. Mr Otter requested a report in writing from Mr McIntyre and a comprehensive report on the matter was sent on 14 May 1991.[1070] Mr McIntyre said that the 14 May 1991 report to Mr Otter contained all of his knowledge

[1058] Transcript 3(e), 11 February 2013 [p120: line 10].
[1059] Transcript 3(e), 11 February 2013 [p120: line 16].
[1060] Transcript 3(e), 24 January 2013 [p18: line 10].
[1061] Exhibit 283.
[1062] Transcript 3(e), 11 February 2013 [p119: line 32], [p122: line 18].
[1063] Exhibit 264.
[1064] Exhibit 11.
[1065] Transcript 3(e), 1 February 2013 [p9: line 30].
[1066] Transcript 3(e), 11 February 2013 [p125: line 10].
[1067] Transcript 3(e), 11 February 2013 [p125: line 28].
[1068] Transcript 3(e), 11 February 2013 [p131: line 1].
[1069] Transcript 3(e), 11 February 2013 [p123: line 2].
[1070] Exhibit 315.

concerning Ms Neal's allegation.[1071] The purpose of the 14 May 1991 report was to give Mr Otter something formal in writing.[1072]

As a result of the seriousness of the allegation, on 8 July 1991 Mr Otter sent his own report on the matter, annexing Mr McIntyre's 14 May 1991 report, to his line manager, Ms Leigh Carpenter, the Divisional Head - Protective Services and Juvenile Justice.[1073] In his report, Mr Otter noted his satisfaction with the way the matter was handled by Mr McIntyre, that it was now a police matter and that procedures and safeguards in the area had been re-examined and appropriate changes implemented. While the report was signed by one of the subordinates of Mr Otter, Ms Julie Kinross, Mr Otter confirmed that he authored the report and was unable to sign it himself as a result of being out of the office in the regions at the time.[1074]

A stamp on the report indicates that the divisional head referred the report to the Office of the Director-General, where it was received on 25 July 1991.[1075] On 29 July, 1991 the Director-General of the department, Ms Ruth Matchett, signed a Notice of Complaint under the *Criminal Justice Act 1989* in relation to the allegation of Ms Neal, which referred the matter to the Criminal Justice Commission.[1076] Mr Otter noted that the allegation potentially constituted both an indictable offence and official misconduct, thus it was reported to both the police and the Criminal Justice Commission.[1077]

Ms Warner was the Minister holding the Family Services and Aboriginal and Islander Affairs portfolio for two terms of government between 1989 and 1995.[1078] Mr Harris placed the 14 May 1991 report of Mr McIntyre before Ms Warner, who said that she had never seen the document.[1079] It is not known whether Ms Warner was briefed on the allegation concerning Ms Neal; she was not questioned on that point. It seems to make little difference given the thorough consideration that the matter received by the department, including the Director-General personally. Ms Matchett was not questioned at all concerning her knowledge or involvement in the management of the allegation concerning Ms Neal.

On 29 October 1991 Sir Max Bingham QC, Chairman of the Criminal Justice Commission, wrote to Ms Matchett in relation to her referral,[1080] noting that the Queensland Police Service had advised the Criminal Justice Commission that Ms Neal did not wish to discuss her allegations with police and that no further action was proposed by the police. Further, that as a result of the youth worker resigning from the department, the Criminal Justice Commission would not take any further action in relation to the complaint.

Assessment of the response to the allegation

While the response of Mr McIntyre to the allegation by Ms Neal was instinctive as opposed to being by reference to any guidelines that may have been in place at the centre at the time, his response was balanced, timely and thorough. Mr McIntyre swiftly

[1071] Transcript 3(e), 11 February 2013 [p112: line 24].
[1072] Transcript 3(e), 11 February 2013 [p11: line 30].
[1073] Transcript 3(e), 11 February 2013 [p127: line 45]; Exhibit 316.
[1074] Transcript 3(e), 11 February 2013 [p129: line 5]; Exhibit 316.
[1075] Transcript 3(e), 11 February 2013 [p130: line 8]; Exhibit 316.
[1076] Exhibit 317.
[1077] Transcript 3(e), 11 February 2013 [p130: line 20].
[1078] Exhibit 325.
[1079] Transcript 3(e), 18 February 2013 [p45: line 15].
[1080] Exhibit 318.

involved his regional manager, he confirmed the allegation with Ms Neal, he extended procedural fairness to the unnamed youth worker, he referred the matter to the police, an independent solicitor was retained for Ms Neal, he involved Mrs Neal and made a significant and sound decision concerning her continued detention. He documented all of these matters in his report of 14 May 1991. The investigation of the allegation was properly a matter for the police and his evidence of trying to avoid contaminating such an investigation by taking statements is logical and demonstrates insight.

I note that the response of Mr McIntyre was in any event in substantial compliance with guidelines that were in place in the department in 1986.[1081] Once Mr Otter was aware of the matter, the documents show that the process followed a regular course from the regional manager to the divisional head, from the divisional head to the Director-General and from the Director-General to the Criminal Justice Commission. The handling of the referral of the matter by Mr McIntyre by the department was transparent and appropriate at all stages.

A complaint from Ms Neal was essential to Detective Sergeant Elliott commencing any investigation into the matter. From the available evidence, no complaint was ever made to police by Ms Neal. No criticism can be made of the handling of the matter by Detective Sergeant Elliott. As a police officer, he simply did not have the requisite complaint to continue an investigation in accordance with the *Queensland Policeman's Manual*. In order for the Criminal Justice Commission to investigate official misconduct at that time, the unnamed youth worker had to still be in the employ of the department. He had resigned on 16 April 1991. The Chairman of the Criminal Justice Commission, Sir Max Bingham QC, clearly set out in his correspondence of 29 October 1991[1082] that the unnamed youth worker had resigned, which as a matter of law brought the involvement of the Criminal Justice Commission in the matter to an end.

Points raised by Ms Neal via Mr Harris relevant to paragraph 3(e)

Having outlined the evidence called in relation to the allegation of Ms Neal, consideration can be given to the propositions advanced by Mr Harris in his various submissions. Mr Harris asserted that the alleged offending was inadequately investigated by the department and the police. Mr McIntyre reported the disclosure by Ms Neal to the police and it was not, according to Mr Otter, the policy of the department to conduct an investigation when such an allegation had been brought to the attention of the police. It was simply a police matter. It is clear that the matter never became the subject of a police investigation because Ms Neal chose not to make a complaint to police, despite the attempt by Detective Sergeant Elliott to take a complaint from her in compliance with the *Queensland Policeman's Manual*. There is no support for the proposition advanced by Mr Harris that the disclosure by Ms Neal was inadequately investigated by either the department or the police.

Mr Harris asserted that the unnamed youth worker was dismissed by the department and inferentially that this was part of the cover-up and otherwise evidence of the alleged culture enveloping child protection. However, the undisputed evidence is that the unnamed youth worker resigned from his position and supplied an explanation for his decision.

The Minister responsible for the department and Cabinet had no involvement with the matter and there is no suggestion in the evidence that either should have had any

[1081] Exhibit 303; Exhibit 304.
[1082] Exhibit 318.

involvement. It is noted that the Director-General herself had some personal and significant involvement with the matter.

There is no evidence whatsoever that the disclosure of Ms Neal to Mr Muelenberg was covered up, distorted or sanitised either by the centre staff, the department, the police or any other person or body in order to protect a system that had failed Ms Neal.

The evidence I heard concerning the handling of the allegation by Ms Neal does not support any of the assertions made by Mr Harris in any of his submissions.

All relevant evidence available was called in relation to Ms Neal

It is noted that those with authority to appear were invited to advise the Commission if they considered that any further witnesses needed to be called in relation to any aspect of paragraph 3(e).[1083]

Mr Harris requested that Detective Sergeant Elliott and Ms Den Houting be called in relation to Ms Neal. Those witnesses were called and gave evidence. Mr Harris confirmed on 19 February 2013 that the Commission had called all of the evidence that he submitted should be called in relation to Ms Neal.[1084]

[1083] Transcript 3(e), 1 February 2013 [p85: line 5].
[1084] Transcript 3(e), 19 February 2013 [p71: line 15].