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Statement to Commission of Inquiry

Context of this evidence

1 Although I have not been asked to provide a statement, I have been summonsed to attend the Inquiry, and having read certain parts of the proceedings of the Commission of Inquiry relating to a cabinet decision of 12 February 1990 and its aftermath, it seems to me that I have information that may be of assistance.

2 On February 12 1990 I was Attorney General, having been appointed to that position in the newly elected government in December 1989, approximately seven weeks before the problem of the Heiner documents emerged. My role in the cabinet decisions relating to those documents was as an ordinary cabinet minister attending cabinet meetings. The Attorney General's role as "first law officer" was mentioned in a previous hearing. That role relates to certain discretions which the Attorney exercises in the legal system which by convention must be exercised without taking instructions from cabinet. It does not relate to cabinet submissions: by convention the Attorney should not take these issues or that role into cabinet, and further by long standing convention the Attorney does not go into cabinet as a legal advisor, but merely as the political official to whom the government's legal advisors report for administrative and budgetary purposes. No elected Attorney General could purport to give disinterested advice to a government of which they were a member, and no Australian cabinet that I know of treats the in cabinet remarks of its Attorney General as professional legal advice. To do so would compromise any government's reputation for acting on objective advice. So when I spoke in cabinet I did not purport to be providing professional legal advice and no one thought I was. Questions number 2 and 3 in the schedule to the summons (what "advice" did you give to cabinet etc) might be taken to imply that it is part of the role of the Attorney General to give legal advice. That was never so. From memory for more than half a century between the Goss government and the TJ Ryan government early in the 20th century no Attorney General, or if I am wrong very few, even had a law degree. I did, but I was not at that time a practitioner but an academic, and this too was well known to ministers. To the best of my knowledge in every Australian jurisdiction the cabinet treats the advice coming out of the Attorney General's *department* as cabinet's legal advice. The departmental lawyers who have no political axe to grind are seen as the experts. The contributions to the cabinet debate made by the Attorney General, however well informed, are seen as those of a colleague who on walking into cabinet becomes a political official and an equal.

3 The Crown Law office was the sole source of cabinet's legal advice in respect of the Heiner documents and the Crown Solicitor's advice was always relied on in cabinet on this and other issues. In nearly twelve years as a cabinet minister I was not aware of any instance where cabinet chose to act contrary to the advice of the Crown Solicitor. At all times the cabinet discussions relating to the Heiner documents were conducted against the background of an awareness that the Crown Solicitor was advising that there was no legal impediment to destroying the documents. Ministers knew that the Crown Solicitor's appointment predated our government, and that he was highly respected as a lawyer both within government and outside. Ministers were confident that his advice was objective and that we would never get an accommodating opinion from him.

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4 The Crown Solicitor was briefed directly by departments when they had carriage of a matter that required advice. My office was not the intermediary or even the post box. He observed solicitor/client confidentiality between himself and his client department, though when a client department waived the privilege in some respect, for example if their minister was taking a submission to cabinet which referred to his advice, he would often give me a briefing or send me his Opinion.

5 Questions were raised earlier at the Commission of Inquiry as to how cabinet was run. In those days cabinet was run according to the standard Westminster conventions familiar from the textbooks of the time. The minister making the submission speaks first: discussion follows if the matter requires it. Sometimes there is consensus, sometimes robust debate. The view of cabinet is then summed up by the head of government (in this case the premier) and recorded by the cabinet secretary. There are no votes, no minority positions and no dissenting judgements. The convention is that if you are not prepared to support the decision outside the cabinet room, including in parliamentary party meetings, you must resign. The cabinet decisions under examination by this Inquiry were taken in this standard way.

6 A corollary of this is that the proceedings of cabinet by convention remain secret. While I would abide by that convention in other circumstances, especially in a case that involved issues of national security, I do not intend to observe that part of the convention in respect of the matters before the Inquiry. There are no issues of security involved and the public interest in disclosure of these matters heavily outweighs the value of the convention in all the circumstances of this case.

The problem with keeping the documents as presented to the first cabinet meeting

7 Although it was 23 years ago, and I do not remember the precise words people used in the meetings, or every contribution made, I do remember a significant part of the content of what was said at the relevant cabinet meetings. I remember the events around this issue better than some other cabinet matters at that time because it was a baptism of fire. It was our first damned if you do damned if you don't cabinet issue. It struck me at the time that if we kept the documents we would incur the very legal problems of which former magistrate Heiner had divested himself by giving them to us, whereas if we destroyed them we would incur serious political problems.

8 Introducing the first cabinet submission (12 February) Anne Warner said words to the effect that she had become aware that the previous government had appointed former magistrate Noel Heiner to investigate industrial issues at the juvenile detention centre, but they appointed him without importing relevant provisions of the Commissions of Inquiry Act so that allegations made before him did not attract the privilege the law gives to judicial proceedings. When he learned that the material he had collected was not protected he was of course no longer prepared to act on these documents or continue in possession of them, as this might make him as a party to the defamations we were told they were thought to contain, or perhaps involve him in other legal problems that she did not specify. (I assumed the former magistrate might have been thinking of offences against the administration of justice.) As a result she said, she was advised that the investigation should not continue, and Mr Heiner was not prepared to continue with his investigation or report or make recommendations on

the basis of a process that could be legally impugned, and we were being given the documents. She said all this in more colloquial language, but the above is what she said.

9 I think at this point someone asked Anne why she was putting this on us rather than just handling the matter in her own department. In any case she addressed the point. She said that if the documents stayed in her department they would become part of or be relevant to the personal files of the employees who were making or who made the accusations, and to keep unsubstantiated scuttlebutt and insults on people's files was intolerably unfair. It would also, she said she was advised, potentially implicate her department as a party to defamation and whatever else the former magistrate was worried about. The alternative decision to destroy the documents was too big a decision for her to take alone she said. She wanted the consent and protection of the cabinet process for that.

What cabinet thought the documents contained

10 Anne Warner went on to say that she understood the nature of the allegations to be scuttlebutt and malicious gossip employees were making about each other, but that she had not looked at the documents. She said that she had received advice to the effect that if she and her departmental officers or cabinet looked at the documents, that would arguably amount to publication, or otherwise cause whoever looked at them potentially to become a party to a legal transgression of some kind. My impression was that this seemed to ministers to be such an obvious counsel of prudence that nobody asked for any more details. It seemed to ministers to be an obvious precaution not to compromise cabinet, which all ministers understood was not an investigative unit, by involving it in the details of other peoples' allegations about other peoples' misconduct.

11 As to what I thought the documents contained, I understood that they contained allegations of misconduct not amounting to a criminal offence made by employees of the juvenile detention centre against each other. It did not occur to me that they contained allegations of a criminal offence because Heiner was a magistrate. He, better than anyone, would have known to refer any allegation of a criminal offence to the police. So also would many others whose hands the cabinet submission passed through. Significantly it was a B security classification submission, not an A secret submission, and the document that came to us had passed through many hands in eighteen departments, including in the police department. If it had occurred to me to wonder if the documents contained complaints of criminal behaviour I would have dismissed the idea, because if they had, the issue would never have got as far as cabinet. I believe this understanding was shared by other ministers at the meeting. You don't have to be a lawyer to understand that much about how the system works.

Why cabinet thought it would be wrong for anyone to keep the documents

12 Just as former magistrate Heiner did not want to retain possession of the documents, and Anne Warner's department did not want to keep the documents on file, cabinet did not want the government of Queensland to be in possession of them either. It was blindingly obvious to all ministers that whatever legal problems the former magistrate thought he had with keeping the documents were being transferred to the government when he gave them to the department. Accepting the documents amounted to acquiring an administratively transmitted disease. Again I wondered if we kept them how far someone would get with some allegation, perhaps initially made under parliamentary privilege, of an offence against the administration of justice. Although in cabinet I was not thinking about exactly which ones, fabricating evidence, section 126 of the Criminal Code, and conspiracy to bring a false accusation, section 131 of the Code might be possible candidates. Because we had Crown law advice that it was lawful to destroy the documents I was not at the time thinking about the allegation that has been made at this Inquiry, that it was criminal to *destroy* them: I was actually wondering whether someone would have alleged that it was criminal if we *kept* them.

13 The issue before cabinet was thus primarily an issue of what to do about a bundle of material that we understood a magistrate regarded as defamatory or otherwise unlawful or inappropriate to be in possession of. The idea of keeping unsubstantiated defamation on some departmental files somewhere, potentially capable of being accessed and referred to in any processes (including promotion, reassignment, job application etc) relating to the employees concerned was rather odious, especially to a newly elected government that had just got rid of the Special Branch and the dossiers that the Special Branch had kept on opponents of the previous government. The cabinet also did not want the government to harbour defamatory material, because that carried with it the constant possibility of accidental or forced publication that would make the government a party to the defamation. The view that the government of Queensland should not defame or otherwise do avoidable or unjustifiable harm to its own citizens was always the main focus of ministers in the cabinet debate.

14 I had an additional concern at the back of my mind which I did not articulate in cabinet. It was a remote possibility which I intended to mention if necessary, but it was hypothetical given the way the discussion went. The statutory provision relating to criminal defamation was rarely used (though there was in fact one case that crossed my desk in the early nineties). In any case I was aware of it because I was planning a review of defamation law and the existence of this offence was one of the issues for consideration. My thought was that if anyone wanted to run a test case on the scope of the criminal defamation provision, for mischievous or other reasons, a test case against a government would be a good candidate because the higher standard the courts tend to require of governments would make the culpability greater. I knew that if such a case was brought there would be statutory defences available, but being concerned to ensure that public confidence in the administration of justice was maintained, to avoid creating the circumstances in which a prima facie case could be made out was obviously desirable. I believed that such a possibility, though unlikely, was a real one. Without pitching it too high, this added, in my mind, to the gravity of the problems associated with harbouring material a magistrate had divested himself of

because it was defamatory. I was aware that at the time the defamation act was published as one document with the criminal code.

The discussion in cabinet

15 Former minister Patrick Comben has told the Inquiry that Wayne Goss and I both expressed particular interest in the issue at the cabinet meeting. Before that happened somebody else, I don't remember who, told Anne that destroying the documents would not solve the problems in her department. In effect they said this was destroying a record of evidence, a record of evidence it might or might not be illegal to keep, but the evidence itself, as distinct from the record of it would not be destroyed and could easily be repeated by the people who made the allegations in the first place. So her problem would still exist. My memory of this minister's remark is a little hazy, and I may be reporting it as being more precise than it was, but I believe what he said left cabinet with the understanding that he saw a difference between destroying evidence and destroying a record of evidence. It was also said in a challenging way that required an answer from Anne which she gave I think after the Premier spoke. I think it was at this point that the Premier said that these people could in a few weeks repeat their concerns to the Criminal Justice Commission, and we were setting that up with the powers of a standing Royal Commission and with a misconduct division the function of which would be to deal with precisely these kinds of issues. Anne Warner acknowledged that the ongoing problems in her department were something she had to take responsibility for and deal with, but the stuff up by the previous government was something that needed a whole of government response.

16 I think I spoke only once at that cabinet meeting, near to the end. I said words to the effect that it was a bitter irony that, after years of mocking the previous government for shredding documents, and while I was preparing freedom of information legislation to make governments more accountable, we were being asked to remedy the effects of an incompetently planned inquiry of the previous national party government by doing some more shredding for them. I said that while to keep the documents on file would amount to a breach of natural justice and conceivably a breach of statute law, for example by publishing a defamation, we should be very sure there was no better way of handling the matter before we destroyed the documents, because it would send exactly the wrong message about the sort of government we were.

17 By the end of the cabinet discussion on Anne Warner's submission, I had the clear sense that cabinet was reluctantly resigned to destroying the documents subject only to no better alternative being found. Indeed the decision cabinet made that day to call for an options paper, effectively made the destruction option the default position in the event that the other options were not feasible. I was later to learn from this that these processes have their own dynamic. Time available to cabinet ministers is scarce, and where an issue is so intractable that it comes up at successive meetings, ministers do not start all over again: the first discussion is the decisive one unless something completely new comes up. Thus there was less discussion at the second and third cabinet meetings that considered the matter. I do not recall speaking on the second and third cabinet submissions, though I may have. Ministers judged, and so did I, that

the options contained in the second cabinet submission (19 Feb) all involved more problems than the option originally proposed by Anne Warner, and so cabinet opted for what eventually appeared to ministers to be the least worst option. The third submission went through with very little discussion.

The "destruction of evidence" allegation

18 As indicated in paragraph 11, ministers did not believe that the documents contained evidence of any criminal offence. Mr Heiner was a magistrate, and if anyone had made such allegations he would have sent them to the police. However from reading the transcripts on the public website I am aware that the Inquiry wishes to examine the allegation that has been made over the ensuing decades that in choosing to destroy the documents cabinet committed an offence under section 129 of the Criminal Code. That of course is the offence of destroying something known or believed to be needed for an actual or potential judicial process with intent to prevent it being used in that process. I believe I can provide some relevant information on this. The relevant elements of the offence alleged are intent and belief.

Why cabinet had no intent relating to a possible judicial process

19 The information that a solicitor was expressing interest in the documents is not mentioned in the first written cabinet submission. It is harder to be sure that something was not said in a meeting 23 years ago than to be sure that something was said. Noting that, I do not recall any verbal mention of the solicitor in the first cabinet meeting either and further I believe that there was none. The debate in cabinet was all about what a new government, inheriting a blunder from its predecessor, could do by way of harm minimisation. The proposition that we would be doing a grave injustice if we kept unsubstantiated allegations of misconduct against our own employees anywhere on the files of the government was actually the issue before us. As I mentioned in paragraph 15 the political reality is that the destruction option was effectively established as the default position by the end of the first cabinet submission. The juggernaut of government was already programmed and moving in the direction of the destruction option before cabinet was ever informed that any solicitor was looking for the documents. In other words knowledge of the interest of the solicitor in the documents came too late to have been an ingredient in the direction cabinet took on the issue.

20 Thus there was no intent relating to a possible judicial process. Further being a new government, indeed we had been out of office for thirty two years, the cabinet had no vested interest in avoiding such a judicial process. Governments are in court every day, and one more would have made little difference, especially since the problems that would have been highlighted in the litigation would be seen to be the fault of the previous government. The decision was taken with a motive to minimise misgovernment, not with 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 that the government did not itself defame or publish the defamation of someone. The issue was always about whether from the point of view of sound public administration we would be doing the wrong thing by *keeping* the documents: that there was no legal

impediment to getting rid of them was always assumed because we had Crown Law advice that said so.

21 Likewise the reference in the later cabinet submissions to the urgency of the matter and the fact that a solicitor was looking for the documents were not taken by cabinet, as I understood it at the time, and certainly were not taken by me, to be a trigger to destroy the documents before court proceedings were started. Rather I believed it was understood by cabinet, and it was certainly assumed by me, that the urgency derived from the fact that the government was about to be compromised in respect of its responsibility not to publish defamation. In other words the days of keeping the Heiner documents in a manner that avoided publication of defamation were numbered, so we had better hurry up and make a decision as to whether we were going to publish the defamation or destroy the documents. At the time the fact that a solicitor was looking for the documents was not, as I understood it, seen by ministers, and was certainly not seen by me, as causing the decision to destroy. Because something happens after something else does not mean that the first thing causes the second thing, any more than the crowing of a rooster causes the sun to rise.

22 Even when ministers became aware, at the second cabinet meeting, that a solicitor was looking for the documents, they did not believe that he was looking for them either with intent to start a judicial proceeding, or with intent to start a judicial proceeding that would have required the documents as evidence. Indeed the first written cabinet submission (12 February) advised ministers that no legal action requiring the production of the documents had been initiated. The subsequent mentions of the solicitor (in the submissions of 19 February and 5 March) did not say or imply that the solicitor wanted the documents in contemplation of litigation that required them, or that the legal situation as advised on 12 February had changed. Indeed the natural and reasonable conclusion for ministers to draw from the three cabinet submissions taken together was that in spite of a solicitor coming into the picture by at least 19 February, on 5 March it remained the case that no legal action requiring the documents had been initiated. I do not know if the Inquiry has any evidence to suggest that the solicitor wanted the documents for litigation that required the documents, but the evidence in the written submissions before the cabinet at the time, if it suggested anything, suggested the opposite. It is also the case that ministers knew the solicitor could have wanted the documents for any one of a thousand reasons- for example to assist his client by extracting an apology from the detractor. What cabinet could and as a matter of fact did conclude from the information that a solicitor was looking for the documents was that the government was now being asked to release defamatory material, and thus was about to become a party to a legal wrong or an administrative injustice.

Why cabinet believed the documents were not needed in any judicial process

23 As to the suggestion that cabinet *believed* the documents would be needed or required in a possible judicial proceeding, in fact cabinet *believed* the direct opposite. Cabinet presumed that if the Crown Solicitor advised that the documents could be destroyed then they were not needed. He had said they could lawfully be destroyed, so cabinet believed, and believed without any doubt, that they were not "needed" in any legal sense, by any requirement of law, for any purpose, judicial or otherwise.

24 For completeness I refer to the fact that some lawyers have argued that the advice of the Crown Solicitor was wrong and that therefore, in spite of the fact that cabinet always acted on Crown Law advice, cabinet breached the law because ignorance of the law is no excuse. With respect this proposition misses the point that cabinet's reliance on Crown Law advice negatives the mental element of the offence alleged against cabinet. Cabinet "believed" that the documents were *not* needed because the Crown Solicitor said that destruction of the documents could be lawfully done. Ministers "believed" that implicitly.

Dean Wells

22-4-2013

A Powell