

SUBMISSIONS RE GROUND 3(e)

The Commissioner has invited submissions on three questions (T25-86; 19/2/13);

- A. The meaning of 3(e).
- B. Whether there is sufficient evidence of historic child sexual abuse in youth detention centres within the meaning of 3(e) that makes reviewing the adequacy and appropriateness of the cabinet decision to destroy the documents reviewable under the Terms of Reference.
- C. Whether reviewing the adequacy of Cabinet responses – the decision to destroy the documents – can be done fully and carefully within the requirements of an Order in Council without hearing from members of Cabinet.

A. The meaning of 3(e)

Clause 3(e) requires the Commission to take several steps:

- Step 1 Allegations: the key word in 3(e) is "allegations". To enliven the Commission's jurisdiction there needs to be an allegation or allegations of child sexual abuse.
- Step 2 There needs to be a government response to such an allegation (and doubtless, that includes a failure to respond).
- Step 3 The Commission is to review the adequacy and appropriateness of the government response to allegations.

- Step 4 The Commission is to also review allegations of criminal conduct associated with government responses.

Observations

1. "Historic" --

"Having importance in or influence on history" (American Heritage Dictionary, 4 ed).

"Famous or likely to become famous in history; significant" (American Heritage Dictionary, 4 ed)

"Referring to past time" (Collins English Dictionary)

"Well known or important in history; likely to be recorded in history" (Macquarie Dictionary, 3 ed)

In the Terms of Reference we submit the term "historic" adds little, but perhaps it suggests not just one or two events but refers to events that are of great significance or even systemic and likely to be recorded in history; or that they are already well known.

2. "Government" -- has been held by the Commission (after submissions) to refer to the political executive, namely Premier and Cabinet (Ruling 24/7/12). However to perform its task the Commission has had to undertake an examination of the evidence of those employed by the State from the senior to the most junior.

3. The Commission is not concerned as to whether allegations of sexual abuse are true or false. The Commission is concerned with the responses and actions of government in relation to allegations.

B. Whether there is sufficient evidence of historic child sexual abuse in youth detention centres within the meaning of 3(e) that makes reviewing the adequacy and appropriateness of the cabinet decision to destroy the documents reviewable under the Terms of Reference.

We will deal with this first with a top down and then with a bottom up approach. If the Commissioner decided that there was historic child sexual abuse, then the Commissioner must consider whether allegations were made about the abuse that came before Premier/Cabinet. No witness has suggested that Cabinet had, at any time before it, allegations of historic child sexual abuse.¹ Hypothetically, if the box of Heiner documents contained allegations of historic child sexual abuse (which it obviously didn't²), the Premier and Cabinet have no knowledge of that because it was simply not raised with Cabinet or the Premier by any of their employees (or by any member of the public).³ Indeed, it appears that suggestions of historic child sexual

¹ Warner, A T24-54/15; T24-57/7; T24-63/40; T23-114/45 – the first time she heard of a link between the Heiner Inquiry and child sex abuse was in approximately 1999; Comben, P T24-75/20; T24-76/13; T24-78/28

² Matchett, R T23-83/20 – was never told the Heiner material contained information regarding child sexual abuse; McGregor, L T20-64/90 and McGuckin, C T21-7/1 – no documents that they saw mentioned sexual abuse.

³ Crook, S T19-58/30; Mann, B T18-37/5 and Neilsen, S T18-6/25 – they were never aware of allegations of sexual abuse so did not raise the issue with anyone.; Warner, A T24-61/33

abuse did not arise until many years later.⁴ In destroying documents, Cabinet had no knowledge whatsoever that it was, or indeed could conceivably be, destroying documents relating to historic child sexual abuse.⁵ Sexual abuse was not on the Cabinet agenda⁶ or in the Heiner terms of reference⁷.

Putting aside the issue of Cabinet's knowledge of anything, it is submitted that there is no evidence of a cover-up of child sexual abuse by anybody else working for the government.

Annette Harding

Ms Harding had intercourse with boys on an outing to the Lower Portals on 24th May 1988. The suspicion that something happened (possibly that she had had a sexual encounter) was properly reported by staff members Manitzky, Mersiades and Moynihan on the day of the incident.⁸ The following morning, Mr Coyne met with the teachers who were on the excursion.⁹ Later in the day he learned that the incident was of a sexual nature.¹⁰ At some time on 25th May 1988 an experienced paediatrician

⁴ For example, Warner, A T23-114/45 – the first time she heard of a link between the Heiner Inquiry and child sex abuse was in approximately 1999;

⁵ Warner, A T24-61/33; Comben, P T24-75/20; T24-81/15; T24-93/1 – Comben confirms that in his TV interview on the 'Sunday Program', when he says 'we [Cabinet] were aware that there as material about child abuse', this actually refers to his own knowledge, not Cabinet's knowledge

⁶ Warner, A T23-91/18 – Cabinet was concerned with indemnifying Heiner and the destruction of the Heiner documents.

⁷ Exhibit 289 ; See also Peers, I T13-53/10; Flynn, B T4-36/38, T4-46/40;4-50/34; Cox, T T7-35/35; 7-42/30 – Heiner inquiry dealt with management issues, sexual abuse was never raised. Walker, J T15-28/18 – discussed with Pettigrew the need for a review based on complaints from union members.

⁸ Coyne, P T9-91/10.

⁹ Coyne, P T9-85/20

¹⁰ Coyne, P T9/85/29

examined Ms Harding¹¹ and found no evidence of any force being used internally or externally.¹² That is consistent with Ms Harding's report to Mr Coyne that no force was used but that she felt under pressure,¹³ and it is consistent with the statements of the 14 year old boys involved made to Mr Coyne¹⁴. Later that day Ms Harding told Mr Coyne that she wanted the boys to be charged by police.¹⁵ On that day Mr Coyne contacted his superior, Mr Peers.¹⁶ Mr Peers suggested that Ms Harding's family should be contacted before police were called.¹⁷ Mr Coyne contacted the police once the family arrived at JOYC on Friday 27th May 1988.¹⁸ Dr Forbes and Coyne approved Ms Harding being given a contraceptive pill.¹⁹ Superintendent Jeffries deputed police officers to conduct an investigation.²⁰ Detectives Podlich and Tomsett were the officers involved.²¹ Ms Hayward and Mr Pekelharing told the police officers about the nature of the complaint.²² Detective Podlich interviewed Ms Harding on 28 May 1988 regarding the sexual offence allegation. Her diary confirms that Ms Harding did not wish to make a complaint.²³ The diary of Detective Tomsett,

¹¹ Coyne, P T9-93/30

¹² Exhibit 250

¹³ Exhibit 242; Coyne, P T9-22/1

¹⁴ Exhibit 242; Coyne, P T9-20/29

¹⁵ Coyne, P T9-95/1

¹⁶ Coyne, P T9-86/1.

¹⁷ Coyne, P T9-89/33

¹⁸ Coyne, P T9-89/39; T9-96/1

¹⁹ Cox, T T7-37/25

²⁰ Exhibit 242; Coyne, P T9-23/18

²¹ Podlich, J T8-2; Tomset, S T17-69

²² Podlich, J T8-12/31; T8-20/10; Tomsett, S T17-70/18

²³ Exhibit 252; Podlich, J T8-4/12

confirmed Ms Harding's wish not to proceed further by making a complaint, and it is signed by Harding, Tomsett, Hayward and Pekelharing.²⁴

Mr Coyne advised that on the Friday Ms Harding was medically examined at the Mater Hospital and that this was arranged with the police investigating the matter,²⁵ and that on the Saturday the police again interviewed Ms Harding who indicated she did not wish to make a formal complaint.²⁶ Ms Harding's mother agreed with her decision.²⁷ Lorraine Hayward, a youth worker, was asked by Annette Harding to be present during her interview with the detectives.²⁸ Ms Hayward was there for the whole of the interview and Mr Pekelharing was there for some of the time. Ms Harding was given an opportunity which she took, to discuss the matter privately in the absence of the police and she was given support and assured that she would be protected at all times if she made a formal complaint.²⁹ At no time did Hayward try to influence her decision not to make a complaint.³⁰ The interview took 1 hour 18 minutes.³¹

Mr Nix was later notified by Mr Coyne of those matters by a memo written by Mr Coyne.³² Mr Nix advised the Director-General of the above matters.³³ Mr Coyne

²⁴ Exhibit 253; Tomsett, S T17-71/40

²⁵ Coyne, P T9-93/30

²⁶ Exhibits 252 and 253; Tomsett, S T17-71/40; Podlich, J T8-4/12;

²⁷ Exhibit 242; Coyne, P T9-25/19

²⁸ Exhibit 244

²⁹ Exhibit 242; Coyne, P T9-23/10

³⁰ Hayward, Lorr T11-66/20

³¹ Exhibit 244

³² Exhibit 242; Coyne, P T9-17/20

told Mr Nix who told the Director-General that two of the reasons that the child did not wish to make a complaint were that the court process would take from 6 to 12 months and that other children at the centre were teasing her and threatening her.³⁴ Mr Coyne spoke to the other children involved in the teasing and threatening and advised them of the outcomes should they continue in that fashion.³⁵ The boys were transferred to Westbrook. Mr Coyne also advised the staff about the need for confidentiality³⁶ in respect of the event and it is submitted that was appropriate.

In answer to the question as to whether or not there had a cover-up, Mr Coyne said:

"It's just not possible that there would be a cover-up that involve – to cover up a matter of this nature would involve all the staff that went on the outing; all the children that were on the outing; anybody like the youth worker Mr Mark Fremantle the children had spoken to, the staff that were briefed in terms of caring for Annett or protecting Annette. Lorraine Hayward was a youth worker that sat in on an interview. There was Mr Trevor Cox. We told the police. We told the nurses. We told the social workers. It's just not possible....The focus was upon Annette and Annette's care and rumours of discussions that could be overheard by other children should really be kept to a minimum that was required to facilitate her care and security. No more than that."³⁷

³³ Exhibit 246; Coyne, P T9-24/1; Nix, G T22-60/10

³⁴ Exhibit 246; Coyne, P T9-25/39

³⁵ Exhibit 246; Coyne, P T9-26/1

³⁶ Coyne, P T9-27/15

³⁷ Coyne, P T9-27/4

This matter progressed from a suspicion by the youth workers, to an investigation by Mr Coyne who involved police and carers for the girl. The police caused a medical examination to take place by a paediatrician at the Mater Hospital. The girl was given support by her carers. Her mother was involved and she declined to make any complaint. Her mother agreed with that decision. Mr Coyne reported it to Mr Nix who reported it to the Director-General³⁸ who reported it to the Minister³⁹. It should be noted that both the girl and the boys involved were 14. There was no cover-up by any person and the matter was handled appropriately.

Mr Peers (Mr Coyne's immediate superior) was kept informed about the incident and assumed the matter had been properly handled.⁴⁰

The proposition that the matter was covered up was denied by those involved in the matter.⁴¹

Shelly Neal

The Shelley Neal matter could not have been mentioned to Mr Heiner as it post-dated his inquiry.

³⁸ Exhibit 246

³⁹ Exhibit 246; Nix, G T22-60/10

⁴⁰ Peers, I T20-6/1

⁴¹ Nix, G T22-60/10 – denies a cover up as police were involved and reports submitted to the DG and Minister; Coyne, P T9-26/30 – denies cover up as police contact, she saw a doctor, Nix informed

On 4 April 1991, three male and one female youth workers escorted four male and two female residents of JOYC on a day excursion to the Wivenhoe Dam. Staff reported no incidents and said they had had an enjoyable day.⁴²

Twelve days later on 16 April 1991, Shelly Neal advised a youth worker, Mr Meulenberg that she had been sexually assaulted by a youth worker while swimming at the dam on 4 April.⁴³ The manager of the centre was advised of the allegation, and advised Ms Neal that as it was a serious allegation the police would have to become involved, even though she did not want that to happen.⁴⁴ The youth worker was advised of the allegation and resigned on the spot.⁴⁵ The Inala Juvenile Aid Bureau was advised of the allegation on 18 April,⁴⁶ and Mrs den Houting, a solicitor from the Inala Community Legal Service, visited the centre to explain to Shelly the legal implications and to represent her interests during a police investigation.⁴⁷ Arrangements were made for police to interview Ms Neal on 18 April 1991, however the interview was then conducted at a later date.⁴⁸ The child's mother was advised of the allegation and visited the centre on 19 April 1991.⁴⁹ She advised that Ms Neal had made similar allegations in the past and presented as not being overly concerned about

⁴² Exhibit 315

⁴³ Exhibit 315; McIntyre, I T21-112/30; Muelenberg, A T15-17/25

⁴⁴ Exhibit 315; McIntyre, I T21-112/30

⁴⁵ Exhibits 314 and 315; McIntyre, I T21-113/8; Armstrong, W T20-9/20

⁴⁶ McIntyre, I T21-123/10

⁴⁷ Exhibit 333; McIntyre, I T21-117/40; den Houting, H T25-58/10 has no independent recollection of the event

⁴⁸ McIntyre, I T21-117/20; T21-118/1

⁴⁹ Exhibit 315

the matter.⁵⁰ Due to threats of physical assault to Ms Neal by some residents being made and her planned imminent release from custody, it was thought prudent to release her into her mother's care that day, which subsequently occurred.⁵¹

On 8 July 1991, Mr Otter wrote⁵² that he was satisfied that the information provided to the manager of the youth centre was promptly provided to the police for their consideration and that the girl was provided with prompt and adequate opportunity to act on any concerns and provided with access to a legal representative. That memo was received in the Director-General's Office on 25 July 1991. Four days later, the Director-General, Ruth Matchett, referred it to the CJC,⁵³ and the Chairman of the CJC advised Ms Matchett on 29 October 1991⁵⁴ that advice had been received from the Queensland Police that Shelly Neal did not wish to discuss her allegations with police and that no further action was proposed. As the youth worker mentioned had resigned, the Commission planned to take no further action.⁵⁵ Both Mr McIntyre and Mr Otter acted appropriately in this matter.

Since there is no suggestion that the sexual contact (whatever it may have been) was other than consensual and had occurred twelve days before the first complaint was

⁵⁰ Exhibit 315

⁵¹ McIntyre, I T21-124/34

⁵² Exhibit 316

⁵³ Exhibit 317

⁵⁴ Exhibit 318

⁵⁵ Exhibit 318

made about it to anyone, a medical examination would not have served any useful purpose.⁵⁶ In any event, the child did not want to pursue the matter at any time.⁵⁷

It is submitted that this matter was handled appropriately by all concerned.

Neither of the above matters were handled inappropriately. They were not brought to the attention of the Premier or Cabinet.

Whether Heiner was made Aware of Allegations of Sexual Abuse at JOYC

A number of witnesses (including those integral to the Inquiry) suggest that the Heiner Inquiry dealt only with managerial issues and staff complaints, and never was Mr Heiner made aware of child sexual abuse at JOYC. Those who held the belief that the Heiner Inquiry dealt only with managerial/staff matters included Peers,⁵⁸ Flynn,⁵⁹ Cox,⁶⁰ and Walker.⁶¹ In addition, Manitzky (a staff member present at the excursion on the Harding incident) did not even inform Heiner of the matter.⁶² Christensen did a similar thing – he was aware of a rumour concerning sexual assault of Annette Harding and says there was dissatisfaction amongst staff that it wasn't handled appropriately. He says in evidence that Heiner did not ask, nor did Christensen raise,

⁵⁶ Exhibit 320 - Statement of Otter, K at para. 12

⁵⁷ Exhibit 315; Otter, K T21-132/30; Elliott T25-69

⁵⁸ Peers, I T13-53/10

⁵⁹ Flynn, B T4-36/38, T4-46/40;4-50/34.

⁶⁰ Cox, T T7-35/35; 7-42/30

⁶¹ Walker, J T15-28/18.

⁶² Manitzky, J T17-61/35

any questions concerning sexual abuse at JOYC. He did not witness any sexual abuse at JOYC.⁶³

Other witnesses that gave evidence to Heiner and said there was no mention of sexual abuse to Heiner include Kleidon⁶⁴, Healing⁶⁵, Feige⁶⁶, Robertson⁶⁷ and McNeven⁶⁸.

Conversely, several staff members have vague recollections of informing Heiner about the Harding incident. These include Parfitt (formally Colmer),⁶⁹ Roch,⁷⁰ and David Smith.⁷¹ We would suggest that these witnesses are not credible. Parfitt's 'evidence' provided to Heiner was based on hearsay statements overheard at JOYC. For example, she was under the impression the police were not involved as she didn't hear about it.⁷² Under further questioning, Roch and Smith conceded that they could not be sure that they informed Heiner of the Harding matter.⁷³ Roch was also under the impression that the matter was covered up as staff were not kept in the loop regarding the investigation.⁷⁴

⁶³ Christensen, T4-55, 47, 58

⁶⁴ Kleidon, T5-33

⁶⁵ Healing, 7-12

⁶⁶ Feige, T7-52

⁶⁷ Robertson, T7-79

⁶⁸ McNeven, T9-10

⁶⁹ Parfitt, I T10-19/35; suggest she is informed about inquiry

⁷⁰ Roch, M T11-9/15 – had a stroke; has had many problems since 2005

⁷¹ Smith, D T14-55/23 – complete hearsay

⁷² Parfitt, I T10-22/37

⁷³ Roch, M T11-13/35; 11-19/29; Smith, D T14-55/23

⁷⁴ Roch, M T11-15/28

The Heiner Inquiry

Mr Coyne was appointed as a CEO of John Oxley in March 1988.⁷⁵ His management style upset a number of workers. He seemed to be wanting to implement a change in approach to the inmates which found favour with some and did not find favour with others. There seems to have been some tension between the workers who came across from Sir Leslie Wilson Youth Detention Centre and those who were already at John Oxley.⁷⁶ Further it should be noted that there were two rival trade unions on site.

Mr Coyne's management style is not germane to this Inquiry, but it resulted in the establishment by the Director-General, Mr Pettigrew, of an inquiry by retired Magistrate Noel Heiner.⁷⁷ On 13 November 1989, the then Director-General, Mr Pettigrew, wrote to Mr Heiner confirming his appointment and attaching his terms of reference. The terms of reference were⁷⁸:

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.

⁷⁵ Exhibit 58

⁷⁶ Peers, I T20-3/42

⁷⁷ Nix, G T22-26/30; 22-35/35; Peers, I T13-31/40; 13-32/5; 13-34/1

⁷⁸ Exhibit 83

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 Coyne was concerned about letters of complaint written by staff about him being given to Mr Heiner, in the circumstances where Mr Heiner was not prepared to provide them to Mr Coyne.⁷⁹ Mr Pettigrew raised that matter with Mr Nix.⁸⁰

Mr Coyne was understandably concerned about what was being said about him and made this clear in many ways.⁸¹

On 18 December 1989 Mr Coyne wrote to Ms Matchett complaining about the fact that he felt he was not being treated fairly by Mr Heiner and asked for her reply to 21 questions that he posed.⁸² On 18 December, Mr Nix (Deputy Director-General Community and Youth Support) provided a note⁸³ to the Acting Director-General

⁷⁹ Exhibits 96 and 98; Coyne, P T9-35/20

⁸⁰ Exhibit 91

⁸¹ Exhibits 95, 96 and 97

⁸² Exhibit 98

⁸³ Exhibit 99

which she may or may not have seen.⁸⁴ This note advised her that the Magisterial Inquiry has been the subject of separate memos concerning the concerns he has with the present state of the Inquiry. On 2 January 1990, Mr Peers prepared a memo to Ms Matchett⁸⁵ pointing out that since Mr Heiner's Inquiry had begun, Mr Coyne and other senior staff had expressed to Mr Peers on a number of occasions that they were unhappy about the process. Several staff had met with Mr Nix on 8 December and expressed those views.⁸⁶ Attached to that memorandum⁸⁷ is a document that appears to be minutes of a meeting of 14 September 1989 with Messrs Pettigrew, Nix and Thatcher and members of the Queensland State Service Union detailing alleged intimidation by Mr Coyne of staff at JOYC. Throughout January Mr Coyne continued to raise concerns about the Heiner Inquiry.⁸⁸

On 15 January 1990⁸⁹ in one of his many letters Mr Coyne asks again about the legislative basis of the Inquiry. That letter was received on 16 January, on the same day that, according to Mr O'Shea's diary note, he advised Ms Matchett to write to Mr Heiner seeking the legislative basis for the Inquiry. Ms Matchett advised Mr O'Shea that the POA was "up in arms".⁹⁰

⁸⁴ Matchett, R T22-75/40; 22-76/40

⁸⁵ Exhibit 101

⁸⁶ Exhibit 93

⁸⁷ Exhibit 101

⁸⁸ Exhibits 107, 108 and 109

⁸⁹ Exhibit 107

⁹⁰ Exhibit 110

On 18 January 1990, Ms Matchett wrote to Mr O'Shea enclosing a copy of letter from Rose, Berry Jensen, solicitors for Mr Coyne and asked Mr O'Shea to represent the Department on the matter.⁹¹ She sought urgent advice as to what response to make to the letter from the solicitors. That letter expressed concern about denial of natural justice to Mr Coyne and Mrs Dutney and asked her to direct Mr Heiner to, in effect, accord to their clients natural justice.

By letter dated 18 January 1990 (settled by Mr O'Shea), Ms Matchett enquired of Mr Heiner as to the source of his authority.⁹²

On 18 January 1990, Mr O'Shea advised Ms Matchett that provided that there is an appropriate instrument of delegation in writing to Mr Heiner and his appointment is in writing signed by the Chief Executive, he may carry out the investigation but that he has very limited powers and that the possibility of defamation proceedings arising out of any information given to him would also have to be borne in mind.⁹³ Mr O'Shea says he doesn't have the relevant documents to enable him to advise fully on the validity of the appointment.

⁹¹ Exhibit 115

⁹² Exhibit 118

⁹³ Exhibit 117

On 18 January 1990 Mr Coyne writes another letter seeking to know the legislative basis for the Inquiry,⁹⁴ and that letter is forwarded to Mr O'Shea under the hand of Ms Matchett, although she says she does not recall the document.⁹⁵

On 19 January 1990, Ms Matchett wrote to Mr O'Shea saying that she has received a letter from Mr Heiner advising he is not prepared to continue any further with the inquiry and that he is ceasing from any further action until he has obtained written confirmation of the legality of his actions to date, including his appointment.⁹⁶ Mr Heiner's letter says that he has had each of the interviews recorded by tape recorder and the tapes transcribed. He says that he will retain possession of them personally and take no further action until he receives further advice. He says that if, after the Director-General has received advice and determines that no further action be taken, he will produce to her all the documents which he has maintained as a result of the inquiry. He seeks to have his actions taken thus far indemnified.

On 19 January 1990, Mr O'Shea advises that the Chief Executive can only delegate his powers to a person who is an officer of the Public Service and that Mr Heiner does not qualify as being an officer of the Public Service and that therefore any power he has to conduct his inquiry must be found in the general of delegation under

⁹⁴ Exhibit 121

⁹⁵ Exhibit 122

⁹⁶ Exhibit 123

s.13 coupled with the power to appoint under s.34 of the *Act*. Mr O'Shea says he hasn't reached a conclusion on that. The risk of defamation proceedings remain.⁹⁷

At 3 pm on the same day, Ms Matchett held a meeting with the POA and QSSU and advised them that pending further legal advice, it was her intention to abandon the inquiry.⁹⁸

In a memorandum dated 23 January 1990, Mr Thomas observed in discussion with Ms Matchett that the inquiry Mr Heiner was conducting had not addressed the needs or desires of any of the parties who appeared to be affected by it. It records that Ms Matchett said that her preferred option was that the inquiry conducted by Mr Heiner not be continued and that another totally independent inquiry be instigated.⁹⁹

Mr Thomas concludes that the appointment of Mr Heiner was probably a lawful exercise of the power of the Chief Executive under s.12 of the *Public Service Management and Employment Act*. However, given the lack of satisfaction, he says the appropriate course is to indicate to Mr Heiner that the Chief Executive doesn't want him to carry out his investigations any longer and that his services are terminated. Mr Thomas records that some of the material received would be of a defamatory nature. He advises that the material should be sorted into those documents which were originally in the possession of the department and those which have been

⁹⁷ Exhibit 124

⁹⁸ Exhibit 125

⁹⁹ Exhibit 128

created as a process of the inquiry. If the inquiry is terminated, the new documents become unnecessary and may well contain defamatory material. He advises: "*As no legal action has been commenced concerning those documents, I believe the safest course would be the immediate destruction of those documents to ensure confidentiality and to overcome any claim of bias if such documents somehow became available to any new investigation.*"¹⁰⁰

Mr Thomas records that the solicitors for Mr Coyne and Mrs Dutney have written to the Chief Executive requesting an opportunity to examine and cross examine evidence presented before the inquiry so far as it concerns allegations against their clients and to allow for either of them to have copies of all allegations and evidence taken to date including copies of tapes used in recording the evidence. Mr Thomas says that as these matters relate to the inquiry which he suggests should be terminated, he does not believe there will be any impropriety in destroying the material gathered by the inquiry without affording those people an opportunity to view the material. He says the solicitors should be advised that the inquiry has been terminated and the material collected at the inquiry has been destroyed.¹⁰¹

Mr Thomas discussed his memorandum with Mr O'Shea who drew his attention to the *Libraries and Archives Act*. Mr Thomas examined that legislation and was of the opinion it contained no prohibition on the destruction of any of the tapes,

¹⁰⁰ Exhibit 128 at page 4

¹⁰¹ Exhibit 128 at page 4

transcripts or documents created by Mr Heiner. Mr O'Shea says that he agrees generally with the advice.¹⁰²

A letter is then sent that is drafted by Mr Thomas to the Acting Director-General, Ms Matchett, and in the course of that letter says:¹⁰³

"Mr Heiner's informants had no statutory immunity from suit or action for defamation in carrying out these duties although they would appear to have qualified privilege. Therefore it seems that some of the material which has come into his hands may well be regarded as defamatory. This material is now in your hands and if you decide to discontinue the inquiry I would recommend that as it relates to an inquiry which has no further purpose, *the material be destroyed* to remove any doubt in the minds of persons concerned that it remains accessible or could possibly affect any future deliberations concerning the management of the John Oxley Youth Centre or the treatment of any staff at that centre.

I do not see any difficulty in destruction of the material supplied to Mr Heiner, naturally any material removed from official files should be returned to those files but the tape recordings of interviews had with people or any notes or drafts made by Mr Heiner should I suggest be destroyed.

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 Jenson, 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

¹⁰² Exhibit 128

¹⁰³ Exhibit 129

prepared, and that all documentation related to the material collected by Mr Heiner has been destroyed."

On 24 January 1990, Ian Peers advised the Director-General that he had been speaking to Peter Coyne who, among other things, advised that he intended to continue his District Court action for access to the documents but drop their Supreme Court action for a writ of prohibition until the rules of natural justice were complied with.¹⁰⁴

On 24 January 1990, Mr Coyne asks for notification of the outcome of any investigation relating to himself¹⁰⁵

On 7 February 1990, Ms Matchett wrote to Mr Heiner requesting that he not continue with his inquiry.¹⁰⁶

Mr Coyne continued to agitate matters by phoning Trevor Walsh on 7 February,¹⁰⁷ and his solicitors continued to seek access to documents.¹⁰⁸

In answer to an inquiry by the Director-General, Mr Brian Stewart of the Department of the Attorney-General on 9 February 1990, Mr O'Shea tells Mr Stewart:¹⁰⁹

¹⁰⁴ Exhibit 131

¹⁰⁵ Exhibit 132

¹⁰⁶ Exhibit 136

¹⁰⁷ Exhibits 138 and 140

¹⁰⁸ Exhibit 141

¹⁰⁹ Exhibit 144

"I am of the opinion that the tapes and transcripts and other records created by Mr Heiner are not public records within the meaning of the *Libraries and Archives Act* 1988. This is because Mr Heiner was never an officer of the department and was retained only to supply a report to the Director-General and Minister.

Therefore the documents were not brought into existence by a public authority but rather by someone in the position of a consultant. Also they were not to be records for future reference of the department.

If the matter had progressed to the stage of a report being submitted by Mr Heiner, that report may well be a public record of the department. However his working papers gathered to allow him to compile that report are not in my opinion public records. Discussions have been had as to whether any of the written complaints from staff which the union supplied to the department were addressed to the Director-General. Investigations were to be made by the department and Ms Crook was advised that if that were the situation, it may be necessary for the procedure under s.55 of the Act to be followed to authorise the destruction of those particular complaints. No advice has been received from the department concerning this item."

On 8 February, Mr Peers phoned Mr Coyne about a particular matter. Mr Coyne said that if he was disadvantaged by the inquiry process he would consider legal action against the department¹¹⁰. He felt that already he had been considerably harmed.¹¹¹

On 9 February 1990, Mr Coyne phoned Trevor Walsh and advised that he would commence legal action, industrial action and that he had other courses of action

¹¹⁰ We note as the Inquiry process was halted, this threat of legal action was effectively extinguished.

¹¹¹ Exhibit 146

planned if he did not receive a phone call¹¹² and a proposal for a reconciliation meeting by 5 pm.¹¹³

On 12 February 1990, Cabinet had to consider the issue of provision and indemnity to Mr Heiner in respect of the cost of any legal action which might ensue from his involvement.¹¹⁴ The submission put before Cabinet by Anne Warner explained the nature of the problem and advised that destruction of the material gathered by Mr Heiner 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."¹¹⁵ The recommendation to Cabinet was that "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".¹¹⁶ Warner submitted that the justification for the destruction was based on several issues, the need to protect complainants from defamation proceedings, the need to protect careers and reputations (of Peter Coyne, and other staff members), to ensure that JOYC was running efficiently, and prevent victimisation that may occur,¹¹⁷ presumably if the source of the complaints were made public. Cabinet decided to grant the indemnity but required a further memorandum concerning what approach should be taken to the papers of Mr

¹¹² No such action ensued.

¹¹³ Exhibit 149

¹¹⁴ Exhibit 151A; Warner, A T23-91/18 – Cabinet was concerned with indemnifying Heiner

¹¹⁵ Exhibit 151 pages (2)

¹¹⁶ Exhibit 151 pages (3); Warner, A T24-53/20

¹¹⁷ Warner, A T24-54/15; T24-57/7; T24-63/40; Comben, P T24-69/30

Heiner.¹¹⁸ It is submitted that this was a justifiably cautious and appropriate approach to the matter, a view shared by members of Cabinet.¹¹⁹

In the body of the same submission, the following extract appears:

"7. 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."¹²⁰

On 13 February 1990, Mr Coyne was seconded elsewhere.¹²¹

On or about 14 February 1990, Ms Matchett writes to Mr O'Shea asking for advice as to what action she should take in relation to a letter that she has received on 8 February 1990 on behalf of Mr Coyne and Mrs Dutney seeking to exercise their

¹¹⁸ Exhibit 151, page i; Comben, P T24-67/25

¹¹⁹ Comben, P T24-67/45

¹²⁰ Exhibit 151, page (6)

¹²¹ Exhibit 155

rights contained in Regulation 65 and asking for copies of the statements by the employees made to Mr Heiner and the transcripts of evidence.¹²²

On 13 February 1990, Mr Tait, Assistant Secretary to Cabinet, sought advice from Mr O'Shea as to whether the documents can be made Cabinet documents and thereby attract Cabinet confidentiality.¹²³ He was advised that this was not an option.¹²⁴

Mr Walsh wrote a memo dated 14 February saying that he had received a call from Ian Berry representing Mr Coyne and that Mr Berry sought assurances that the documents relating to the Heiner Inquiry would not be destroyed.¹²⁵

On 15 February, Mr Berry wrote to the Acting Director-General referring to the conversation with Mr Walsh referred to above, and referring again to an intention to commence court proceedings in view of the fact that Mr Coyne had been seconded to another section.¹²⁶ Mr Berry asserts that Mr Coyne's secondment has disadvantaged his client, and it has only come after a discussion with Mr Heiner. That request requests a response to RBJ's letter of 8 February requesting copies of the statements and the transcripts.¹²⁷ A notation on Ex.161 refers it to the Crown Solicitor.

¹²² Exhibit 153

¹²³ Exhibit 158; Tate, S T24-106/25

¹²⁴ Exhibit 164

¹²⁵ Exhibit 159

¹²⁶ Exhibit 161

¹²⁷ Exhibit 153

On 16 February 1990, Mr O'Shea advises that the documents could not possibly be regarded as being Cabinet documents and that he is revising his opinion to the effect that the documents did not fall within the ambit of public records within the meaning of the *Libraries and Archives Act*.¹²⁸ In other words, the documents probably do fall within the definition of the *Libraries and Archives Act*. Mr O'Shea advises that s. 55 of the Act would apply to the documents and that the consent of the State archivist would need to be obtained prior to disposal of the documents.

Mr O'Shea sent that advice not only to Mr Tait but to Ms Matchett on 16 February 1990.¹²⁹

He also sent that advice to Brian Stewart as Director-General of the Attorney-General's department.¹³⁰

Cabinet met again on 19 February 1990.¹³¹

A memorandum to Cabinet signed by Myolene Carrick says:¹³²

"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."

¹²⁸ Exhibit 164

¹²⁹ Exhibits 164 and 165

¹³⁰ Exhibit 166

¹³¹ Exhibit 168

¹³² Exhibit 168

Four options were put up:

- destruction of the material;
- public release of the material;
- retention of the material;
- referral of the material to Cabinet for noting.

Cabinet decided that the memorandum be deferred to allow the Secretary to Cabinet to liaise with the State archivist.

On 20 February, the Secretary to Cabinet asked Mr O'Shea to settle his draft letter to the State archivist.¹³³

The draft letter may have been drafted by Mr Littleboy.¹³⁴ Despite Crown Law advice, the letter fails to advise that solicitors wanted the documents not to be destroyed.¹³⁵ Mr Littleboy says that he wasn't aware of that fact.¹³⁶ Mr Tait did not think it was a relevant fact that the State archivist needed to know, as that wasn't his role, and it is not his recollection that he would have deliberately omitted the information.¹³⁷ Further, he assumed that Ms McGregor would seek appropriate advice

¹³³ Exhibit 169

¹³⁴ Littleboy, K T21-71/13

¹³⁵ Tait, S T25-6/20 and 40

¹³⁶ Littleboy, K T21-72/24

¹³⁷ Tait, S T25-3/45; T25-5/5; T25-7/12; T25-12/20

and would have been made aware of the issue.¹³⁸ One may observe that Messrs O'Shea and Thomas were aware that the solicitors wanted the documents and in settling the letter they did not advert to this fact (doubtless because they regarded it as irrelevant).¹³⁹ Apart from the letter of 23 February 1990 which was sent to Ms McGregor in accordance with the draft settled by Mr O'Shea,¹⁴⁰ there was a phone call from Mr Littleboy to Ms McGregor which basically said the same thing as in the letter.¹⁴¹ The archivist did not know that solicitors wanted access to the documents.¹⁴²

It should be said that there is a reasonable argument for saying that the documents have nothing to do with the archivist. A careful analysis of the definition of public authority and public records in the *Libraries and Archives Act* as it then was, would enable one to mount an argument that the Heiner documents were not public records. If they were public records, then it follows that documents created by solicitors in the course of preparation of an advice for the Crown are public records. A document does not become a public record because it is given into the (temporary) possession of the Crown.

On 23 February, the State archivist advises that the material is not required to be retained.¹⁴³

¹³⁸ Tait, S T25-5/27

¹³⁹ Exhibit 172

¹⁴⁰ Exhibit 173

¹⁴¹ Exhibit 174

¹⁴² McGregor, L T20-77/35

¹⁴³ Exhibit 175

Again, Mr O'Shea in a letter dated 26 February 1990 bearing Mr Thomas' reference, is fully aware of what is happening. He knows that the documents are to be destroyed and he knows that the solicitors want them.¹⁴⁴

C. Whether reviewing the adequacy of Cabinet responses – the decision to destroy the documents – can be done fully and carefully within the requirements of an Order in Council without hearing from members of Cabinet.

If the Commission proposed to recommend that any criminal charges could possibly be brought against members of the Cabinet, or if the Commission were to make any finding that would affect the reputation of any Cabinet Minister, the Commissioner must comply with procedural fairness. Procedural fairness requires that when a person is the subject of adverse allegations which may be reported by a Royal Commission, they are entitled to be heard:

"The Commissioner must listen fairly to any relevant evidence, conflicting with the finding and any rational argument against the finding that a person represented at the Inquiry whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made."¹⁴⁵

This principle applies if there might be a finding that "might reflect

¹⁴⁴ Exhibit 176

¹⁴⁵ *Mahon v Air New Zealand Limited* (1984) App Cas 808 at 820.

unfavourably on a persons conduct”¹⁴⁶

The Commissioner has made a thorough investigation not only of the so-called allegations of sexual abuse; but also the Heiner shredding because rumour, innuendo and gossip led to an association between sexual abuse and the Heiner shredding.

If there are to be potentially adverse findings against Cabinet, then the Ministers involved may be entitled to recall several key witnesses. However the right to be heard does not guarantee an oral hearing. It is a matter for the commissioner to determine how to satisfy the procedural fairness rules.¹⁴⁷

Key Issues

While several procedural matters could possibly have been handled better, the crux of the matter is that the documents were shredded on the decision of Cabinet after receiving advice from Crown Law that they could be shredded and after receiving advice from the State archivist that they could be shredded. The matter had been brought to Cabinet on three occasions and the deliberations were careful. The shredding was done with the best of intentions for the purpose of avoiding exacerbating matters at JOYC in terms of disunity, factionalism and by possible

¹⁴⁶ *Annetts v McCann* (1990) 170 CLR 596 at 609

¹⁴⁷ *Bond v Australian Broadcasting Tribunal* (1988) 19 FCR 494

defamation proceedings. Of note is that defamation proceedings were not being contemplated by Mr Coyne (T9-29). The above facts are not in issue.

Evidentially, the Commission has before it an official decision of Cabinet¹⁴⁸ as well as several Cabinet Submissions that informed the mind of Cabinet. Further, the Commission has heard evidence from the responsible Cabinet Minister, Ms Warner, as well as from several witnesses involved in the drafting/compilation of the Cabinet Submissions¹⁴⁹, as well as the persons implementing Cabinet's decision¹⁵⁰.

Counsel Assisting the Inquiry have made exhaustive efforts to call all relevant witnesses, and have formally called upon other parties to produce any evidence they seek to adduce, or extra witnesses they suggest to call.

Consequences

If, however, the Commission does intend to call Cabinet members, reference needs to be made to the *Criminal Code*.

Section 129 of the *Criminal Code* (at the time) provided as follows:

¹⁴⁸ EXHIBIT???

¹⁴⁹ CROOK/WALSH

¹⁵⁰ TAIT/LITTLEBOY/McGUCKIN/McGREGOR

"Any person who, knowing that any book document or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour and, and is liable to imprisonment for three years."

The term "judicial proceeding" is defined in s.119 as:

"includes any proceeding had or taken in or before any court tribunal or person in which evidence may be taken on oath."

While there is no doubt the documents were authorised to be destroyed by Cabinet because of fear of the initiation of defamation proceedings, the evidence is that there had been no threat of defamation proceedings and no defamation proceedings were on foot. Indeed, no proceedings were on foot. There was a persistent request to have access to the documents so that Mr Coyne could know what had been said about him and there were persistent requests in effect to accord procedural fairness (as part of the Heiner Inquiry) to Mr Coyne. The only judicial proceedings that appear to be threatened relate to a Writ of Prohibition to injunct Mr Heiner from proceeding¹⁵¹.

There is a reference in Ex.131 to a phone call recorded by Mr Peers in which Mr Peers records a discussion with Mr Peter Coyne saying that they intended to continue their District Court action for access to the documents but would drop the

¹⁵¹

Ex.113.

Supreme Court action for a Writ of Prohibition until the rules of natural justice had been complied with.

Putting aside questions of admissibility for the moment, that is not a threat of proceedings under s.129 that requires the documents as evidence. It is a threat to initiate proceedings for access to the documents. If the word "may" in s.129 is not constrained, the result is that almost any document in any office would fall within the ambit of s.129 because any document may at some time in its life be required for the purpose of litigation.

We should also refer to Exhibits 146 and 161 in which Mr Coyne suggests that if disadvantaged by his transfer to another area he will commence proceedings. If he began proceedings the documents would arguably not be discoverable because Ms Matchett who transferred him: (a) did not see them and (b) transferred him for other reasons.¹⁵²

This submission is consistent with the previous advice of Mr Royce Miller, Director of Prosecutions. It is not inconsistent with the advice of Mr O'Shea and Mr Thomas who should be presumed to know the provisions of the *Criminal Code*.

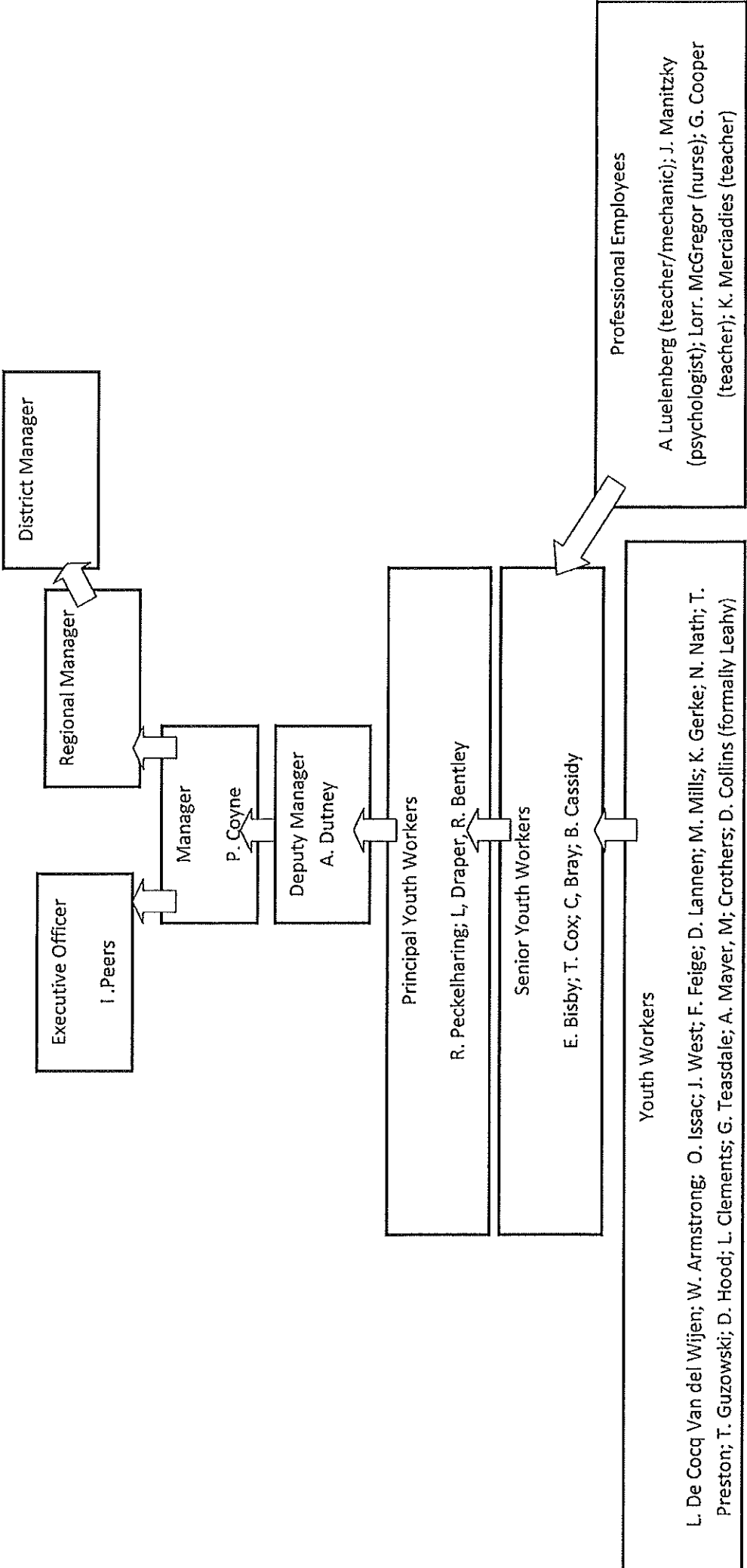
We also draw attention to the fact that there is no complainant in respect of the destruction of the documents

If the Commissioner did intend to call cabinet ministers we should point out that the ministers might claim public interest immunity.

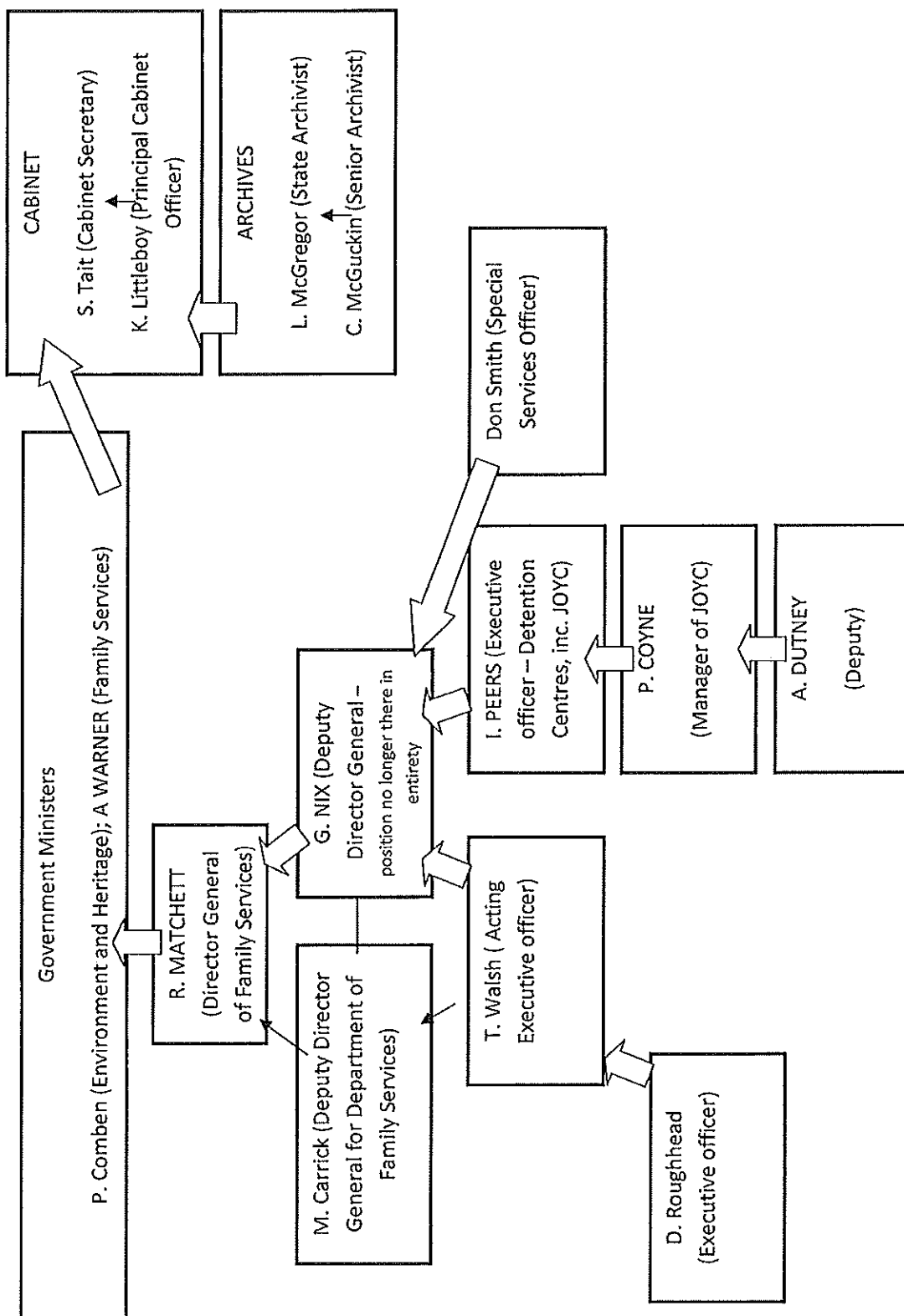
A handwritten signature in black ink, appearing to read 'GR Cooper', followed by the date '1/3/13' written in a similar cursive style.

GR Cooper
Crown Solicitor

Map Outlining Associations between Key JOYC Personnel



Map Outlining Associations between Key Government Personnel – POST December 5, 1989



Map Outlining Associations between Key Government Personnel – PRE December 5, 1989

