FURTHER SUBMISSIONS TO THE SELECT COMMITTEE ON UNRESOLVED WHISTLEBLOWER CASES

THE SHREDDING
SPECIAL SUBMISSION

*** The Shredding of the Heiner Inquiry Documents and matters arising therefrom**

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FROM I D F CALLINAN QC AND R D PETERSON

INSTRUCTED BY THOMSON REDMOND BOYD

A new and significant piece of evidence has now emerged. Mr Barnes, Chief Officer, Complaints Section of the Criminal Justice Commission has told the Committee that the Cabinet and various government officials handling these documents were aware of their need for future litigation proceedings of whatever type. In particular, Barnes in evidence before the Senate Select Committee on 29 May 1995 said at page 655

"It is clear that Cabinet made a decision to destroy the documents knowing full well that Coyne wished access to them. It may be that Cabinet made that decision to destroy the documents on the basis that, in its view, the public interest in protecting the people who gave evidence before Heiner outweighed Coyne's private interest in having access to them."

Further, at page 663 Barnes says:

"Mr Coyne says at page 10 of his submission that the destruction of the documents all but extinguished the possibility of defamation proceedings brought by him against those who gave evidence against him - presumably, before Mr Heiner. Certainly, the destruction of those documents made such proceedings more difficult to prove. Indeed that was why the Crown Solicitor advised that it be done. But, equally importantly, it protected Coyne from further damage to his reputation that the continued existence of the documents posed."

At page 682 the interchange between Senator Abetz and Mr Barnes is more relevant:

"Senator ABETZ - Did that not alert you or the CJC that there was something of importance to Mr Coyne there? Documents had been shredded, but the official advice to him that they had been shredded and the final advice received was two months after the event?

Mr Barnes - I do not see that the delay is either here or there. There is no doubt that the documents were destroyed at a time when the cabinet well knew that Coyne wanted access to them. There is no doubt about that at all.

Senator ABETZ - Are you saying that there is no doubt about that in your mind?

Mr Barnes - No, the

Senator ABETZ - Is there no doubt in your mind that cabinet knew that Coyne wanted the documents?

Mr Barnes - I am confident that is the case."

Again at page 685 Barnes says

"Which is clearly a case that cabinet, Matchett and the department knew that there was a possibility that Coyne would seek to sue people."

At page 695 Barnes has this to say:

"Mr Barnes - No, I do not believe so. I do not believe that the Crown Solicitor had the secondment threat at the time he gave that advice. That letter is to the acting d-g, family services: the Crown Solicitor is briefed by the cabinet office; Coyne's solicitor has threatened Matchett with action about the secondment; and he has previously threatened action in relation to defamation and prerogative writs for natural justice.

Senator ABETZ - But that would no longer apply after the commission was wound out, would it?

Mr Barnes - One would think not.

Senator ABETZ - And, therefore, he then talked about regulation 65, did he not?

Mr Barnes - Defamation and secondment.

Senator ABETZ - Defamation and -"

At page 696 the following occurs:

Senator ABETZ - I am trying to get a handle on this. What seems to have occurred is that, with the potential threat of a defamation suit, cabinet decided to shred the documents because they were of no historical value, knowing full well that it may be the material evidence on which a potential litigant would rely to pursue or prosecute his case.

Mr Barnes - I think that probably is a fair summary. As a result of the actions, the correspondence and the communications, I think they believed that coyne was considering suing the people who gave evidence before Heiner for defamation. As you say, the Crown Solicitor's advice seems quite clear that that was a potential and, consistent with that advice, cabinet decided that they would prevent that from happening."

It is evident that the Criminal Justice Commission failed to appreciate the considerable implications of cabinet's decision to shred documents when litigation is being foreshadowed by a party who is the subject of the relevant documents. In our initial submissions on 23 February 1995 before the Senate Select Committee we submitted that this conduct in shredding documents should be regarded with the greatest seriousness and much more so if done by a Government. That submission was made bearing in mind numerous pronouncements about the obligations of governments with respect to litigation. Mr T Sherman, now head of the National Crime Authority in a paper presented some time ago referred to the comments of Vaisey J. in Sebel Product Ltd v Commissioner of Customs and Excise (1949) Ch 409 at 413:

"At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendents being an emanation of the Crown, which is the source and fountain of justice, are in my opinion, bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control..."

Mr Sherman also made the point that the Government must act with complete propriety.

Barnes has conceded that the shredding of the documents was undertaken to avoid defamation proceedings or at least to make their prosecution practically impossible. It follows from this that a number of compelling questions need to be considered.

First, why investigate matters if the facts were already known to the Criminal Justice Commission at all material times?

Secondly, was the further Crown Solicitor's advices after the letters of Coyne's solicitors dated 8 and 15 February 1990 properly accounted for in this case? Did this advice indicate that the documents should not be shredded?

Thirdly, why rely on the State Archivist to justify a course of action with serious legal, as opposed to, historical implications in circumstances moreover in which the archivist did not and could not know the legal implications?

It is evident from all of the above that the Criminal Justice Commission has not given serious attention to the implications of destroying documents knowingly in order to avoid or render more difficult litigation. They have ignored these serious matters. Arguably relevant provisions are as follows.

Section 129 of the Criminal Code (Qld) -

"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 indentification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years."

Section 119 of the Criminal Code (Qld) -

In this Chapter the term "judicial proceeding" includes any proceeding had or taken in or before any court, tribunal, or person, in which evidence may be taken on oath."

Again the Criminal Justice Commission's narrow/strict interpretation of "judicial proceeding" is too significant to ignore. There are now clear compelling reasons for these matters to be investigated comprehensively. Mr Barnes made findings of fact which were not based on all the relevant documentation. For example, the latest opinion of the Crown Solicitor, after Coyne's solicitors letters of 8 and 15 February 1990 needs to be accessed.

For completeness we refer also to the High Court decision in R v Rogerson and Ors (1992) 66 ALJR 500 Mason CJ at p.502 (the highest recent authority)

"...it is enough that an act has a tendency to deflect or frustrate a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be implemented..."

See also Brennan and Toohey JJ at p.503

"A conspiracy to pervert the course of justice may be entered into though no proceedings before a Court or before any other competent judicial authority are pending."

The form of indictment in the Criminal Practice rules is, it is submitted, no more than that, a form of indictment not determinative of the elements of the offence, but a form to be adapted to the particular circumstances of the charge.

It is inappropriate for us to make and therefore we do not make any submissions as to the criminality or otherwise of the conduct of anyone associated wth these matters.

7 August 1995.