

2014

# Royal Commission into Institutional Responses to Child Sexual Abuse

**Issues Paper 5 – Civil Litigation**

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## SUBMISSION – CIVIL LITIGATION

1. One of the key elements this Royal Commission permits to be ventilated in public **via Issues Paper 5**<sup>1</sup> is the question of properly serving the end of justice in a so-called civilised society governed by the rule of law when an injustice has been inflicted against a citizen, albeit in this setting against a child when in institutional care of church or state.
2. What colours this important question of properly serving the ends of justice further is that the victims of this unspeakable injustice may not awaken from their deep trauma and pluck up sufficient courage to venture down this path until decades later, which in and of itself may invite fresh terrors when trying to access justice against the power and deep pockets of church and state, and of necessity to be played out in the daunting forum of a court room.
3. In this context, the Royal Commission simply cannot ignore the need to preserve relevant evidence for a possible future time when these types of judicial proceedings may commence, quite often well beyond the short 6-year statute of limitations period.
4. I come to this important question through my experience as the whistleblower at the centre of the so-called notorious “Heiner affair”<sup>2</sup>. *Inter alia*, it is a *cause célèbre* in the archives world. It features in archives text books and is the subject of lectures in universities across Australia and around the world in archives studies. Since 2009, it has entered the Queensland Education curriculum for its senior Years 11 and 12 students to study in their OP discipline for **Business, Communications and New Technologies**.<sup>3</sup>
5. This scandal embodies all the elements of abuse of power and how a system of government, in order to protect mates, avoid embarrassment and accountability at law, has been prepared to use every device at its disposal to corruptly thwart the ends of justice during my 24-year struggle for redress.
6. I am not a victim of child sexual abuse, but rather a victim of abuse of power exercised at its zenith. I have become an advocate in this child abuse cause and of the general democratic principle of equal justice in materially similar circumstances. It is premised on Lord Denning’s words in *Gouriet*, namely: “...Be you ever so high, the law is above you.”<sup>4</sup>

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<sup>1</sup> <http://www.childabuseroyalcommission.gov.au/our-work/issues-papers/issues-papers/>

<sup>2</sup> <http://www.heineraffair.info/>

<sup>3</sup> <http://www.brisbanetimes.com.au/queensland/heiner-being-taught-in-queensland-schools-20090903-fa04.html>; Also see <https://www.cambridge.edu.au/education/titles/Investigating-Business-Communication-and-Technologies:edition-1ed/>

<sup>4</sup> *Gouriet v Union of Post Office Workers and Others* [1977] CA

7. In the eyes of many in the past an Archbishop, Judge, Governor or especially a Cabinet may have been seen and treated as ever so high as to be untouchable. I hold a contrary view.
8. In my persistence for justice, as with those who have come before this Royal Commission as victims of child sexual abuse to tell their stories have been prepared to struggle for justice despite the odds and the passage of time, my journey commenced with my May 1990 dismissal as a public sector trade union organiser. I attempted to preserve 'public records' relating to the dysfunctional management of the **John Oxley Youth Centre ("JOYC")** for their known use as evidence in anticipated judicial proceedings, and, in persisting over the years, I discovered that the hidden contents of those shredded 'public records' concerned the abuse of children at this state institution as provided in evidence by JOYC staff witnesses to the aborted Heiner Inquiry.<sup>5</sup>
9. Accordingly, it is submitted that this documented affair embodies the issues which are highly relevant to the Royal Commission's terms of reference.

### **The Importance of the Preservation of Records**

10. Of central importance to accountability of church and state, especially in the area of the welfare of children in their care and protection, is best practice recordkeeping. Without proper recordkeeping, justice can be too easily denied and corruption can flourish with impunity either at the hands of church or state.
11. The Heiner affair demonstrates the importance of this great principle at play and its extraordinary impact on an **entire** machinery of government when the alleged criminality concerned all members of a Cabinet which had knowingly destroyed public records to prevent their use as a centrally-relevant item of evidence in anticipated and realistically possible future judicial proceedings, and which was done with knowledge that those public records recorded incidents of child abuse.
12. The consequences of my 1990 public interest disclosure ("**PID**") being substantiated by the authorities were always potentially vast. An unprecedented constitutional crisis was on the cards with the political landscape being radically altered if an entire Cabinet was placed on trial in respect of such a serious alleged *prima facie* crime, and likely found guilty<sup>6</sup>.
13. This situation was arguably worsened at every level because it happened in the immediate aftermath of the famous 1987-89 **Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct**<sup>7</sup>. A new government, which was largely elected to office on 2 December 1989 on the coat-tails of the unedifying spectacle of corruption in the

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<sup>5</sup> [http://www.heineraffair.info/site\\_pages/QCPCI\\_News\\_Pages/witness\\_confirms\\_pack\\_rape\\_at\\_JOYDC.html](http://www.heineraffair.info/site_pages/QCPCI_News_Pages/witness_confirms_pack_rape_at_JOYDC.html)

<sup>6</sup> *R v Ensbe; ex parte A-G (Qld)* [2004] QCA 335

<sup>7</sup> <http://www.cmc.qld.gov.au/about-the-cmc/the-fitzgerald-inquiry>

government it replaced, would have been seen to be its mirror image. All claims that respecting due process was the new watchword; cutting corners was the new anathema would be exposed as meaningless rhetoric. Its claims of a new governance dawn arriving on 2 December 1989 in Queensland would be shown to be nothing more than false.

14. Evidence is now on the public record which strongly suggests that a “whole of government” systemic cover-up was engaged in<sup>8</sup>. It also includes the unlawful payment of public monies<sup>9</sup> to relevant parties to prevent this serious alleged wrongdoing from becoming public or the alleged wrongdoers being brought to justice.

15. At immediate issue in respect of my 1990 PID to the **Criminal Justice Commission (“CJC”)** was that those who had authorised the destruction of the Heiner Inquiry documents and tapes were in *prima facie* breach of section 129 of the *Criminal Code 1899* (Qld) – **destroying evidence**. It relevantly said:

*“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 is liable to imprisonment with hard labour for 3 years.”*

16. The CJC found no wrongdoing by advising that the aforesaid law permitted all known evidence to be deliberately destroyed providing the anticipated judicial proceeding had not commenced. That is, because the expected writ was not lodged or served at the time of destruction, shredding could occur despite written and verbal instructions from lawyers and trade unions not to destroy the evidence. I immediately contested this interpretation<sup>10</sup>. I suggested that it was so untenable as to be corrupt. I persisted for 24 years. Evidence now on the public record shows that the accountability arms of government fell into line with this ‘corrupt’ interpretation as and when I approached them all<sup>11</sup>.

17. This aforesaid Griffith *Criminal Code* provision – central in Chapter 16 re Offences against the Administration of Justice - has universal application in all jurisdictions across the Commonwealth of Australia notwithstanding its wording may vary slightly, but not its intent.

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<sup>8</sup> See the 10-volume **Rofe QC Audit of the Heiner affair** – Attachment Two to Public Exhibit 5 of the **Carmody Queensland Commission of Inquiry into Child Protection**, Term of Reference 3( e), Recusal Hearing 24 July 2012

<sup>9</sup> <http://www.brisbanetimes.com.au/queensland/state-pays-120000-hush-money-to-alleged-rape-victim-20100708-10263.html>

<sup>10</sup> At various times from 1995 onwards, eminent Queen’s counsel, like Messrs Ian Callinan, Bob Greenwood and Anthony Morris, as well as senior retired judges, like The Honourable Sir Harry Gibbs, Jack Lee, Roddy Meagher, Barry O’Keefe, David Malcolm and James Thomas affirmed my interpretation and in 2004, the Queensland Court of Appeal in *R v Ensby* confirmed its accuracy in emphatic terms dating back from 1899 when the *Criminal Code* was enacted. (See **Points 18 and 19**)

<sup>11</sup> See Footnote 8

18. His Honour Davies JA in *Ensbey* at 16 when confirming Pastor Ensbey's guilty verdict, recited the initial ruling by His Honour Judge Samios in the Queensland District Court when giving a ruling to the jury on section 129's proper interpretation. It provides the breadth of section 129 of the *Criminal Code's* "unfettered" reach in respect of judicial proceedings:

*"...Now, here, members of the jury, the words, 'might be required', those words mean a realistic possibility. Also, members of the jury, I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence. There does not have to be something going on in this courtroom for someone to be guilty of this offence. If there is a realistic possibility evidence might be required in a judicial proceeding, if the other elements are made out to your satisfaction, then a person can be guilty of that offence."*

19. His Honour Jerrard JA, in *Ensbey* at 46 – 48 by looking more deeply into other offences in Chapter 16 of the *Criminal Code* sealed its interpretation:

*"...The definition of "judicial proceeding" provided in s 119 of the Code is an inclusive definition, and includes any proceedings "had or taken in or before any court, tribunal or person, in which evidence may be taken on oath". That inclusive definition suggests a proceeding on foot or completed, but the term is used in chapter 16 of the Code in differing ways. In s 123, dealing with the offence of perjury, it is provided:*

*"Any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime, which is called 'perjury'".*

*The term "judicial proceeding" as used therein includes a proceeding which is in contemplation only. By way of contrast in s 119B, dealing with retaliation against a judicial officer, juror, witness or member of the family of one of those, the term is used to describe a proceeding in which something has already been lawfully done by a juror or witness, and accordingly a proceeding which has occurred or is still taking place.*

*Since the term is used in different ways in chapter 16, and since s 129 should not be unduly restricted in its ambit, the judicial proceeding referred to in s 129 in which*

an offender knows that the relevant book, document, or other thing is or might be required in evidence, should be understood to include a judicial proceeding which the offender knows, or believes on reasonable grounds, may occur. An alleged offender might know, for example, that a complaint and a summons had issued or that the person suspected had been arrested, and thus that criminal proceedings were already on foot; or that a complaint had been made to the police, or that the intending complainant said he or she would report a matter to the police, in which case criminal proceedings would be foreshadowed." (My underlining)

20. The recent **Carmody Commission of Inquiry into Child Protection** ("**Carmody Inquiry**") investigated the shredding element of the Heiner affair under its term of reference 3(e)<sup>12</sup>, leaving the subsequent cover-up untouched. Commissioner Carmody found that section 129 was in *prima facie* breach, and, at this moment, a brief of evidence is before the Queensland Director of Public Prosecution to decide whether or not it is in the public interest to place the surviving members of the 5 March 1990 Goss Cabinet on trial.
21. However, for the strict purposes of **Issues Paper 5**, I shall not traverse all of this scandal's many documented limbs and the extraordinary reach of its systemic cover-up. Nevertheless, it is relevant for the Royal Commission to note that the *prima facie* crime Commissioner Carmody found in his 1 July 2013 Report is the very same *prima facie* crime I took to the CJC in 1990 in respect of the shredding. I was turned away and then publicly ridiculed (as well as threatened) over the years by the CJC when claiming that its 26 January 1993 clearance of my 1990 PID was based on an untenable interpretation which would have reduced civil society to "a world without evidence" and rendered the administration of justice to a state of chaos and injustice. The CJC, and its successor, the **Crime and Misconduct Commission** ("**CMC**")<sup>13</sup> became intractable blockages to achieving justice, and remain so.
22. Furthermore, and without gainsay, if I hadn't persisted in this long quest for justice<sup>14</sup>, the child abuse which was known to be occurring at the JOYC by 'the system insiders' would never have become known to the broader public. It would have remained concealed behind its high walls and by government's self-interest *modus operandi* of deceit, secrecy, intimidation and abuse of power in order to protect itself from the true ends of justice.

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<sup>12</sup> <http://www.childprotectioninquiry.qld.gov.au/term-of-reference-3e>

<sup>13</sup> <http://www.cmc.qld.gov.au/>

<sup>14</sup> This journey has been diligently reported on and greatly aided in its investigative processes by UQ Associate Professor Bruce Grundy of the School of Journalism and via his editorship of *The Weekend Independent*, *The Independent Monthly* and creation of "**The Justice Project**".

**Point 4: What changes should be made to address the elements of civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts**

1. In respect of Point 4, I respectfully submit that the Royal Commission should not allow itself to be restricted in its final recommendations regarding ways and means by which just the victims of “child sexual abuse” by church or state might redress their wrongs in civil litigation but rather, on ethical, moral and legal grounds, broaden it to the victims of “child abuse” so as to encompass its broad understanding to **all forms of abuse** while in institutional care and protection.
2. If our nation truly values its greatest asset – its children – then it would expect the Royal Commission to be bold and innovative in its recommendations to bring about a new form of thinking for our nation (if not for other nations also through our enlightened leadership) to open up new channels to justice for abused children and to reap all its manifest benefits.
3. It is a self-evident truth that those who are the victims of abuse at the hands of church or state are more often than not daunted at the awesome prospect of entering into litigation because of the massive imbalance in financial resources and legal expertise. They are caught in a cruel dilemma which can be soul destroying. The compelling, rightful, understandable and innate desire for justice conflicts with the real danger of being further crushed emotionally, psychologically or financially, let alone trying to balance a multitude of other considerations such as holding a family together and keeping a roof over their head.
4. The legal fraternity has attempted to address this imbalance with a “no win: no fee” undertaking for such would-be clients. It is suggested however that this so-called solution (apart from *pro bono* offers) represents a second-class and still-vulnerable route to justice when it ought to be otherwise.
5. It is submitted that if our nation truly values its children and genuinely desires to give back what was plainly lost and unconscionably required of our children to endure (often in silence for fear of additional punishment) in all their childhood innocence when they were entitled to the full protection of the law and the guardian, then this challenge of ‘proper redress’ takes on a raw moral tone.
6. This suggests that a ‘break-through’ bold remedy is required. It should deliver justice for the abused and the abusers, as well as sending a clear warning to church and state, would-be associated abusers and to those in positions of authority that victims will have access to adequate

resources to allow them to embark on legal action without the fear of financial penury or losing everything to either commence a legal action or to reimburse such a powerful deep-pocketed defendant if unsuccessful in such a legal action.

7. The Royal Commission has repeatedly shown that the church and state have played fast and loose with the truth, and shown little sympathy or empathy towards the abused. They have both gambled and relied on the knowledge and experience of the current 'imbalance to financial resources' so that the dice of accountability and justice is loaded in their favour, not that of the abused.
8. Accordingly, if 'balance to financial resources' and 'levelling the administration of justice in redressing child abuse' becomes public policy and opens up a new way to accessing justice for abuse victims, then hopefully those who would abuse children and whom church and state might have then sought to attack by a "see you in court" bluff and bluster, may think anew and finally bring an end to or limit this dreadful scourge of institutional child abuse. However, because the reality of evil intent being a feature of the human condition in some and thus the probability of eradicating child abuse completely being a pipe dream, the new reality that the abused will be able to access sufficient funds to commence and, if necessary, see a legal action through to court should discipline church and state into an constant attitude of fair dealing. Expeditious and just outcomes in respect of dealing with those whom they have harmed should occur instead of continuing unabated with dissemblance, delay and the propensity to engage in cover-ups.

#### **RECOMMENDATION 1.**

**It is recommended that a National Child Abuse Future Litigation Fund Authority be established by the Federal Parliament.**

9. In 2006, the Federal Parliament established **The Future Fund**<sup>15</sup> pursuant to the *Future Fund Act 2006*. As at 31 December 2013, its assets are declared to be \$96.56b. Its purpose is described in these terms:

*"The Future Fund was established by the [Future Fund Act 2006](#). The object of the fund is to strengthen the Australian Government's long term financial position by making provision for unfunded Commonwealth superannuation liabilities. These liabilities will become payable at a time when an ageing population is likely to place significant pressure on the Australian Government's finances. The Future Fund has received contributions from a combination of budget surpluses, proceeds from the sale of the government's holding of Telstra and the transfer of remaining Telstra*

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<sup>15</sup> <http://www.futurefund.gov.au/>



*shares. The Future Fund Board of Guardians is responsible for deciding how to invest the assets of the Fund.*

*Legislation stipulates that money may not be withdrawn from the Future Fund until 2020 except for the purpose of meeting operating costs or unless the Future Fund's balance exceeds the target asset level as defined by the Future Fund Act."*

10. In referring to the Future Fund, it is not to suggest that its assets are capable of sustaining a suitable remit to assist in establishing a **National Child Abuse Future Litigation Fund ("NCAFLF")** instead of requiring an additional burden on taxpayers, even at the risk of exacerbating our current Budget deficit. I acknowledge that disbursement from the Future Fund is strictly prescribed at law.
11. It is submitted that forasmuch as our Federal Parliament saw fit and prudent to establish the Future Fund to ensure that the so-called 'liabilities' associated with our nation's ageing population could be met **in the future**, it would seem discriminatory in the extreme if the needs of our children (now as adults) who were abused while in care **through no fault of their own** could not be met via a similar fund to secure their futures and that of others who may yet, unhappily, suffer similar abuse in the future.
12. Actuarial advice would be needed to estimate what amount of public money would be required to commence and sustain such a Fund. It may also require appropriate contributions from State and Territory Governments as initial seeding. Appropriate legislation would be needed to ensure its wise stewardship with suitably qualified personnel and what thresholds an application would be required to enliven financial backing.
13. Given its client group and their importance to our nation and international standing, the responsible Federal Minister might be either the Prime Minister or Attorney-General while operationally the statutorily independent **National Child Abuse Future Litigation Fund Authority ("NCAFLFA")** would be held accountable to a standing all-party joint Parliamentary Committee which would be obliged under its relevant Act to be bipartisan in decision outcomes.
14. This recommendation goes further than the (Queensland) **Forde Foundation Trust Fund**<sup>16</sup> in its purpose. This represents a bolder, long overdue change in national thinking regarding the critically important issue of redress to our courts in the immediate to long-term for those Australians who have suffered institutional child abuse. It is suggested that after decades of being silenced, ignored and blighted by their personal experiences of abuse, this fund will go a long way to restoring their faith in society and in themselves by being able to exercise their democratic and human rights to be heard in court.

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<sup>16</sup> <http://fordefoundation.org.au/>

15. It is suggested that a victim of church or state child abuse may apply to the independent NCAFLFA with the details of the abuse and relevant associated information. On an assessment, the Board, or delegated authority, would underwrite the legal costs to permit the victim to engage counsel on a normal professional basis to commence legal action against the relevant church or state entity to force and hopefully achieve a just outcome, either in or out of court.
16. It would be prescribed that in the event of “winning” compensation (and/or its sought-after equivalent), the payment of the plaintiff’s costs by the defendant (as normally occurs) would go directly to the NCAFLF as a reimbursement. In this way, the Fund’s asset base – which may even become an adjunct limb for investment by **The Future Fund**’s Investment Managers due to its ‘futuraity’ element - would be replenished from within and not by a recurrent expenditure item in each Federal Budget.

**RECOMMENDATION 2.**

**It is recommended that the Australian Recordkeeping Conversion Authority be established by the Federal Parliament.**

17. As society moves into the digital/electronic 21<sup>st</sup> century era of recordkeeping, the requirements of space and preservation of paper may lessen considerably over time. To ensure long-term accountability, it becomes imperative for conversion of paper records to a modern digital/electronic format is undertaken in a methodical way so that the histories of children in the care and protection of church and state are not lost. Associated legal questions of authenticity may become the major future challenges when being converted. These compelling demands appear to be best met by recommending the establishment of the **Australian Recordkeeping Conversion Authority (“ARCA”)**.
18. Professional bodies like the **Australian Society of Archivists**<sup>17</sup> and the **Records and Information Management Professional of Australasia**<sup>18</sup> would doubtless provide appropriate expertise and guidance as would national and state government archives authorities in establishing the ARCA to ensure its success.
19. Within this context where the redressing of past offences is often delayed, a statutory period of 100 years retention of all records concerning the ‘whole of management’ of institutions associated with the care and protection of children ought to be mandatory, as well as the

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<sup>17</sup> <https://www.archivists.org.au/>

<sup>18</sup> <http://www.rimpa.com.au/>

conversion of all paper records and archives of such institutions to modern digital/electronic formats.

20. It would be essential that adequate federal/state funding be allocated to assist in this important nationwide up-dating/conversion (with appropriate guarantees of privacy and security) of the records of all children who have been, are and may come under church/state institutional care and protection so that breaches of their human and legal rights (in the shape of abuse in the past, present or future) are able to be better redressed via best practice 21<sup>st</sup> century recordkeeping instead of having justice denied by missing or shredded evidence.

A handwritten signature in black ink, appearing to read "Lindenberg". The signature is fluid and cursive, with a long horizontal stroke at the end.

14 March 2014