THE HEINER AFFAIR

THE LEGALISM SERIES – NUMBER ONE

> ***"…The importance of the rule of law lies partly in the power it denies to people and to governments, and in the discipline to which it subjects all authority. That denial, and that discipline, are conditions of the exercise of power, which in a democracy, comes from the community which all government serves. Judicial prestige and authority are at their greatest when the judiciary is seen by the community, and the other branches of government, to conform to the discipline of the law which it administers. The rule of law is not enforced by an army. It depends upon public confidence in lawfully constituted authority. The judiciary claims the ultimate capacity to decide what the law is. Public confidence demands that the rule of law be respected, above all, by the judiciary."***

Chief Justice Murray Gleeson AC QC "*Courts and the Rule of Law*" – The Rule of Law Series – 7 November 2000

The commitment to "legalism" by any government in all its dealings is axiomatic to the proper functioning of the rule of law. One cannot exist without the other.

This is to say that any democratic government which claims to respect the law should, as a matter of caution and duty, constantly ask itself whether what it intends to do is legal in the full realisation that if it is not, or is later found to be illegal, then legal consequences must flow against the government just as they do against any ordinary citizen who acts similarly. Why should this be so? Because the law is, and must be, no respecter of persons regardless of who commits the breach. This is especially vital when the breach is criminal in nature and even more so when it concerns the actions of government in a democracy.

For any government or law-enforcement authority to believe that the law, especially the criminal law, ought not to apply to them when it has found a citizen guilty of a crime committed in materially similar circumstances, is to reduce the law to an instrument of sectional, arbitrary oppression, by and at the hands of government and law-enforcement authorities.

The starting point to this *Legalism Series* is when the former Independent Member for Gladstone, Mrs Liz Cunningham MP, introduced her private member's Bill, the *Parliamentary (Heiner Affair and Related Matters) Commission of Inquiry Bill 2014* under the power of section 61 of the *Constitution of Queensland 2001* at her (and the Parliament's) last sitting day for Queensland's 54th Parliament on 27 November 2014. At the time Parliament was under the massive numerical control of the LNP Newman Government.

History will show that the moment Mrs Cunningham's Bill was tabled, the entire governance system of Queensland was put on notice. The game was finally up. The Bill's content exposed the system's present deep malaise as a culmination of the last 25 years of government in 'post-Fitzgerald Queensland' when any real or consistent commitment to "legalism" became subservient to the arbitrary nature of decision-making in unicameral Queensland. There is now an inescapable and urgent need for a remedial parliamentary inquiry headed by three interstate senior judges in order to restore reliable and consistent "legality" in government conduct.

Queensland Premier Campbell Newman MP

Queensland Premier Annastacia Palaszczuk MP

Mrs Cunningam's Bill, however, lapsed almost as soon as it was tabled because former Queensland Premier Campbell Newman MP called a snap election in the first week of January 2015. The State election saw his government routed at the ballot box and replaced by a minority ALP government under the leadership of Ms Annastacia Palaszczuk MP.

https://www.legislation.qld.gov.au/Bills/54PDF/2014/ParlHeinerCommInqB14_P.pdf

http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/141127/HeinerExN.pdf

Although the government has changed hands, the opportunity still exists for any MP to reintroduce the Cunningham Bill at any time. Instead, we see that inaction and deathly silence reign as if the very serious governance issues the Bill identified and sought to address either never existed in the first place or now do not matter.

Why then did one of the most respected MPs to have served Queensland's Parliament in the last quarter of a century become so concerned as to introduce this extraordinary Bill (along with its supporting material) on her last sitting day? Concomitantly, why is it that not one MP in this 55th Parliament - with its numbers so finely balanced - has seen fit to do something about these grave governance issues when they are at pains to assure us that if and when any suspicion of corrupt conduct in government arises that it will be dealt with expeditiously. One presumes that this assurance was given because the present government is committed to upholding the principle of government by the rule of law regardless of any party political consideration.

Is this assurance an empty promise? We shall see.

This Bill's very existence with its head of power (namely section 61 of the *Constitution of Queensland 2001,* which explicitly concerns the presence of allegations of misbehaviour against sitting judges and their potential removal from the Bench on (found) judicial misbehaviour by a vote of the Parliament), means these matters should surely take on greater relevance now after the community recently witnessed the disgraceful, unedifying conduct of certain members of the Queensland judiciary.

We, the people, seek justice from our courts in accordance with our democratic rights and also our overarching right to have full confidence in the integrity of our judges when dispensing such justice. These same judges apparently expect us to view with either complete silence, deferential acquiescence, or cynical indifference their disgraceful display when they boycotted *en masse* the traditional public welcoming ceremony of the lawfully appointed Chief Justice Tim Carmody QC at his first appearance in the main Banco Court.

(Former) Queensland Chief Justice Tim Carmody QC

We, the people, were expected to believe, as if by some mystical co-incidence, that they had all found reasonable grounds to absent themselves from the Banco Court ceremony. Any possibility of prior collective agreement between them would have to be unthinkable.

Thus, by their unprecedented boycott, the new Chief Justice would be presented to the world looking like the proverbial lone judicial shag sitting on a rock in Queensland's highest

court, left stranded by his fellow judges to welcome himself, sending him to Coventry par extraordinaire.

By the subsequent release of internal emails and admissions, we were apparently also expected not to concern ourselves that certain of these judges saw the necessity to secretly tape a conversation with the Chief Justice in his chambers, *inter alia* capturing several expletive outbursts, and also not to be concerned by the refusal of the President of the Court of Appeal to sit on cases with him.

Then, at the same time, we were expected to remain equally unaffected at the sneers and jeers by others of senior standing in the legal fraternity regarding his appointment, alleged incapacity to perform his role, and alleged political bias (to the right) as if to suggest that all judges appointed by Labor governments since 1990 were utterly beyond reproach in all similar respects. (See Example re: Serving Appeal Court Justice John Muir deriding Carmody's capacity **http://www.abc.net.au/news/2014-07-29/court-of-appeal-judge-john-muir-email-against-tim-carmody/5633446**

So what does all this say about the present state of our justice system? To any reasonable person, it must surely cause alarm and disquiet.

It is certainly most concerning for any aggrieved persons seeking justice in Queensland to know it is to be dispensed by these same legal practitioners, all of whom must swear an oath or affirmation to protect and uphold the administration of justice and to refrain from bringing the courts into disrepute, because the public has a right to have confidence in the legal practitioners' character and competence.

During this turbulent period, a prominent journalist joined the howling anti-Carmody chorus. An attempt was made to diminish Carmody's reputation further (if not his legal competence) by specifically highlighting and ridiculing his finding (as Presiding Commissioner) of *prima facie* criminality in the 5 March 1990 Goss Cabinet's decision to destroy the Heiner Inquiry papers to prevent their known use as evidence in anticipated judicial proceedings.

In doing so, the journalist reached the height of absurdity by suggesting that it (i.e. the shredding) must be of no significance because of the (alleged) small amount of evidence destroyed, saying "…*The documents — barely enough to stuff an in-tray".*

This statement was made despite the fact that, under the *Criminal Code,* the offence of destroying evidence (as in "something" like any book, document or thing) now attracts a potential prison sentence of 7 years due to the seriousness of the crime against the administration of justice. The particular law was codified by Parliament in 1899 after being carefully drafted by one of the finest legal minds in the history of Australian jurisprudence, Sir Samuel Griffith.

Chief Justice of Queensland and 1st Chief Justice of the High Court of Australia Sir Samuel Griffith GCMG QC

Reasonable persons, not to mention the courts, know that quantity must be an utterly irrelevant consideration at law just so long as 'the item' was known to be "evidence" at the time of its destruction, and irrespective of whether its content was about a will, child abuse, real or imputed defamatory comments or whatever, justice can stand or fall on the continuing existence of one strand of hair with its vital DNA capable of proving guilt or innocence.

The law was always unambiguous in purpose and clarity. It was always to protect the continuing existence of "the item" until no longer required as evidence, and the relevant judicial proceedings only had to be a "realistic possibility" of commencing in the future, let alone in the Heiner affair where the Queensland Government (inclusive of the Cabinet) had been placed on notice by lawyers and unions and told not to shred the evidence.

On 23 February 1995, when appearing as counsel before the Senate Select Committee on Unresolved Whistleblower Cases, Mr Callinan QC had the following to say in the context of the Heiner affair (*Hansard* p3): Quote:

> ***"…The real point about the matter is that it does not matter when, in technical terms, justice begins to run. What is critical is that a party in possession of documents knows that those documents might be required for the purposes of litigation and consciously takes a decision to destroy them. That is unthinkable. If one had commercial litigation between two corporations and it emerged that one of the corporations knowing or believing that there was even a chance that it might be sued, took a decision to destroy evidence, that would be regarded as conduct of the greatest seriousness - and much more serious, might I suggest, if done by a government."***

The question any reasonable person might therefore ask is, how could such an incomprehensible view of the destruction of evidence ever be promoted credibly in the main stream media (MSM) as serious impartial journalism, let alone the ridiculing of Carmody because he found a *prima facie* crime had been committed by the 5 March 1990 ALP Cabinet, and to then use this particular recognition of "legalism" by him as an example of lack of capacity to serve as Chief Justice?

Adding salt to the wound, espoused corruption buster and former judge, Tony Fitzgerald QC, saw fit to bring the Heiner affair into the equation in his July 2014 public statement when criticising Carmody's appointment and capacity and how it would likely undermine the independence of the Judiciary: (Quote)

> ***"…A year earlier, he was an unexceptional barrister who provided the government with a report recommending that the entire Goss Cabinet be considered for prosecution for actions taken with the advice of the Crown Solicitor more than 20 years earlier."***

http://www.brisbanetimes.com.au/queensland/tony-fitzgerald-slams-newmans-politically-motivated-apology-20140725-zwtxn.html

The Hon Tony Fitzgerald QC

The Hon Dyson Heydon AC QC

It seems that, in Fitzgerald QC's view, fundamental legal principles such as ignorance of the law being no excuse, including acting on erroneous legal advice (i.e. "mistake of law" even from the Crown Solicitor)

which breaches the *Criminal Code*, should not be upheld when actions of the Executive are involved. Nonsensically, Carmody was subjected to derogatory comments because he found otherwise.

The 'legalism' reality is that Carmody was doing no more and no less than asserting his independence from the Executive by finding against the Executive. Which the evidence clearly required.

Readers may wish to compare the view taken by Fitzgerald QC in cases involving the Executive, with the view taken by the courts when dealing with ordinary citizens. This fundamental legal principle of ignorance of the law being no excuse was rigidly upheld in the case of Pastor Doug Ensbey. Pastor Ensbey was found guilty under section 129 of the *Criminal Code* by the District Court and Queensland Court of Appeal in shredding-of-evidence circumstances factually similar to those of the Heiner Affair. Additionally, acting on erroneous 'Crown' advice did not prevent Mr Jeffrey Palmer, a crayfisherman from Western Australia, from being found guilty by the High Court of Australia.

In ***Ostrowski v Palmer*** [2004] HCA 30; 218 CLR 493; 206 ALR 422; 78 ALJR 957 (16 June 2004), the McHugh J of the High Court said the following at 59:

> ***"…in any situation where a person's mistaken belief as to the legality of an activity is based on mistaken advice, that person would not have a defence under s 24. To find otherwise would expand the scope of the defence in s 24 to an unacceptable extent. It would also undermine the principle that ignorance of the law is no excuse, a principle expressly provided for in s 22 of the Criminal Code."***

And Callinan and Heydon JJ said at 85:

> ***"…A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it, however relevant such matters might be to penalty when a discretion, unlike here, in relation to it may be exercised."***

http://www.austlii.edu.au/au/cases/cth/HCA/2004/30.html

The extraordinary putdown of Carmody by the MSM and Fitzgerald, flew in the face of some of Australia's most eminent jurists (e.g. High Court Chief Justice Sir Harry Gibbs, Justice Ian Callinan, WA Chief Justice David Malcolm, NSW Supreme and Appeal Court Justices Jack Lee, Barry O'Keefe and Roddy Meagher) who had long held a similar opinion of serious *prima facie* illegality in the Heiner affair. Several of the above had called for a full and proper inquiry to resolve this scandal on several occasions despite the claims by the CJC/CMC that Lindeberg's allegations had been investigated to "…*the nth degree*."

Why would these senior highly-respected jurists speak out? Did they also lack a legal capacity to serve at the highest levels of the Judiciary because of their insistence on "legalism" by government in all its dealings?

Perhaps they spoke out publicly concerning the Heiner shredding because they knew what the law unambiguously said and that the law applied equally to all, **including to the Executive.**

Perhaps they spoke out because the Heiner affair scandal's key elements strike at the very heart of open, democratic government by the rule of law, such as the right to a fair trial, equality before the law, separation of powers, probity in government etc., and that no responsible jurist could remain silent in the

face of such an assault on these democratic principles by government as the so-called "model litigant" as occurred in the Heiner affair.

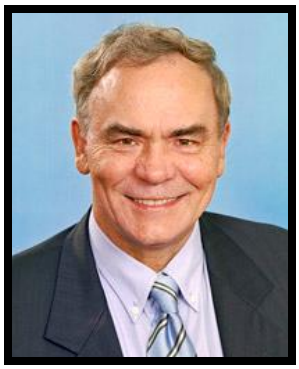
Perhaps they recognised that a dangerous precedent had been set by an untenable interpretation of section 129 of the *Criminal Code* and if the shredding of evidence was allowed to stand as a lawful act, as the CJC and others had claimed *inter alia*, then the entire foundation of our justice system would be fatally undermined.

Perhaps they also recognised that unless justice was done by upholding the law equally and impartially in the Heiner affair, then those democratic/rule-of-law values underpinning our justice system could be in jeopardy at any time, at the hands of any Executive, when either the moment, desire, numbers or issue suited any political purpose and because such alleged *prima facie* offending conduct by any Cabinet against the administration of justice would place this central organ of power above law enforcement and thereby undermine all notions of equality before the law. In short, inaction legitimised anarchy.

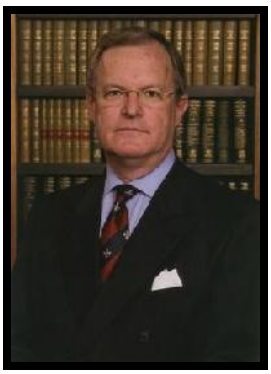
High Court Chief Justice Sir Harry Gibbs **Justice Ian Callinan AC** **WA Chief Justice David Malcolm AC**

In the recent Queensland Supreme Court case ***Wells v Carmody and Anor*** [2014] QSC 59, former Goss Government Attorney-General, the Hon Dean Wells, challenged (Commissioner) Carmody's handling and findings of the Heiner affair (albeit within its strictly limited terms of reference which is covered on earlier postings on this internet site). In dismissing his application, His Honour Justice Glenn Martin AM said the following at 76(b):

> ***"…Mr Lindeberg had been making allegations about the conduct of the Cabinet with respect to the Heiner documents since December 1990. He has made allegations about the legality of that conduct at various times since 1990. He has alleged that the conduct amounted to, amongst other things, an obstruction of justice, interference with the right to a fair trial, abuse of office, and misleading Parliament."***



The Hon Dean Wells



Justice Glenn Martin AM

A pattern of behaviour has emerged showing an infinite capacity of some, through position and opportunity, to super-impose politics and their own self-interest by denigrating and dismissing those who find "illegality" in the unresolved Heiner affair. This abuse has a long history and commenced from inside the Criminal Justice Commission as early as 1991. It seems to know no bounds.

Compelling supporting evidence or the law itself are not allowed to get in the way of peddling myths, misinformation, half-truths and legal absurdities as a way of dismissing demonstrable *prima facie* illegality in high office, even when the *prima facie* illegality is expressed by jurists of the highest standing in the land, and comprehensively underpinned in cases like ***R v Ensbey, R v Rogerson, R v Selvage and Anors, R v Vreones*** and others.

All that being said, however, the purportedly honourable solution to this crisis in Queensland's judiciary by Chief Justice Carmody voluntarily resigning from his position but not from staying on as a Justice of the Supreme Court was nothing but a band aid solution for a gaping wound, plainly with a desire that all would be forgotten, and perhaps forgiven.

By staying on as a Justice of the Supreme Court instead of either going back to the Bar or to a lower court as presumably many hoped might occur, either by inadvertence or design on his part, Carmody exposed the mischief going on in unambiguous terms because a glaring illogicality now stands nakedly on view every day in court.

Taken against the undeniable background of public bullying in this judicial workplace, undermining of the integrity and independence of the Judiciary by those within and formerly of it when they publicly declared Carmody's incapacity to function at such a high judicial level rendering him unsuitable to serve, and then to embrace him by their **subsequent silent acceptance** as an 'equal' Supreme Court Justice alongside them, the solution condemns them all.

Why?

> ***Judicial independence is a sacrosanct principle. It is fundamental to the rule of law.***
>
> ***The well-established norm is that the Chief Justice of the Supreme Court is "the first among equals". If it were otherwise, particularly in terms of capacity, then the independence of each other Justice on the Supreme Court Bench would be compromised by rendering their presence and judgements of less or questionable value in court.***
>
> ***In short, everyone would want their cases only heard by the Chief Justice to receive the best justice possible to which we are all entitled.***
>
> ***Therefore, by their dissenting words and deeds that Carmody was not up to the mark to serve as Chief Justice of the Supreme Court while all acknowledge the norm of equality amongst those sitting on the Supreme Court Bench, incapacity must not only logically still apply to him but must now satisfy their own standards by his acceptance in their ranks.***
>
> ***They cannot have it both ways and expect to remain either credible or enjoy full public confidence.***

The removal of a judge from office is, however, next to impossible. That's as it should be. However, if and when, a judge, including on the Supreme Court Bench, may be engaging in suspected misbehaviour, then a Chief Justice does play a predominant role over of his/her colleagues according to law as head of jurisdiction, (i.e. section 61 of the *Constitution of Queensland 2001* and section 58 of the *Crime and Corruption Act 2001,* or *Criminal Code*) but no one was ever accusing him (Carmody) of any such thing in this appointment process.

Great damage has been done by all. An indelible stain has been left on our judiciary. The inescapable reality is that its integrity was subjected to inside and outside ridicule and resulted in public doubt over the judiciary's probity.

It ought not to be forgotten by anyone that, when it was "game on," certain key players cited the Heiner affair as one of the legitimising factors for the removal of Chief Justice Carmody. If any might think that all the foregoing represents unqualified support for (now) Justice Carmody then they should think again. It does not. But he is not alone.

Readers need look no further than to the material on this internet site, as well as the contents of Mrs Cunningham's Bill and Explanatory notes (and supporting material like the public Rofe QC Audit of the Heiner affair). A very different and disturbing picture emerges about him and also others in high places, including on the Bench. **http://www.gwb.com.au/gwb/news/goss/rofeaudit.pdf**

This is very serious unfinished business primarily because the necessary impartial commitment to "legalism" by 'whole of government' in all its dealings went missing in action after that woefully reckless, arbitrary 5 March 1900 shredding-of-evidence decision by an entire Queensland Cabinet (aided and abetted by senior bureaucrats), such decision subsequently becoming too difficult for the law-enforcement/accountability authorities to address because of its unprecedented political/legal/constitutional ramifications. This alleged cover-up remains unaddressed.

The Crown Solicitor on 26 February 1990 foolishly and inexcusably told the relevant acting Departmental Director-General how the legal issue (involving foreshadowed judicial proceedings) concerning access to the Heiner Inquiry documents would be handled. In effect, the cart (i.e. the Cabinet) was put before the horse (i.e. the law) when Crown Law said this: (Quote)

> ***"…It would appear that the matter cannot advance from the Department's point of view until Cabinet makes a decision."***

When later asked why Cabinet destroyed the Heiner Inquiry documents, the relevant Families Minister, the Hon Anne Warner, who was in Cabinet on 5 March 1990 forthrightly told State Parliament (and the world) on 6 September 1994 *Hansard* p9188: (Quote)

> ***"…obviously no court proceedings could logically take place as a result of documents which no longer existed and had no existence in terms of any decisions that were made by the Government or any individuals connected with the Government. There was no possible legal action that would require the production of those documents, except for legal action that would be taken between the individuals about what they had said about each other, which was defamatory and libellous. That is why the documents were destroyed.***
>
> ***I would also like to use this opportunity to correct a statement made in the Courier- Mail on Saturday by Ed Southorn that we destroyed the documents because we were fearful of defamation action against the Government. At no stage were we concerned about defamation action against the Government, because the Government had never said anything to defame anybody. All of the documents related to individuals before the inquiry, and we were concerned that they would sue each other and would be at risk of suit from each other. That was the reason."*** (Bold and underlining added)

Being cognizant of the above admission, let alone knowing that the relevant content of the 5 March 1990 Cabinet submission had specifically forewarned all Cabinet Ministers of anticipated legal action requiring the continuing existence of the documents, the Queensland Court of Appeal in ***R v Ensbey*** addressed the

triggering elements of section 129 of the *Criminal Code* – **destroying evidence.** Justice the Hon John Jerrard QC said at 54 in the process of finding Pastor Ensbey guilty:

> ***"…The judgment in The Queen v Vreones is a leading case, cited in the joint judgment of the High Court in The Queen v Murphy for the proposition that at common law an attempt to obstruct the course of justice was a punishable misdemeanour. It is accordingly appropriate to follow it. Applying the logic of the decision to a charge of destroying evidence, as opposed to a charge of fabricating it, there is no need for the prosecution to establish more than the possibility, known to or believed in by the accused on reasonable grounds, that a judicial proceeding would occur, those reasonable grounds being matters shown to exist to the knowledge of the accused. On that construction the appellant was properly convicted."***

Appeal Court Justice the Hon Geoffrey Davies AO saying at 16:

> ***"…Mr Hanson QC therefore accepted as correct the following direction of the learned trial judge: "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."***

Hon Anne Warner

Hon Geoff Davies AO QC

Hon John Jerrard QC

What should have plainly preceded everything from the very beginning of this long saga was for all concerned to allow "legalism" to take its due course (i.e. the right to a fair trial, respecting the separation of powers and discovery/disclosure of evidence etc.) and not be interfered with just because of the hubristic desires of the 'political' Cabinet.

The initial and continuing twisting and contorting of binding rules, principles, ethics and precedent underpinning government by the rule of law, and the subsequent cover-up persisting for over two decades, has set in motion an unavoidable major constitutional crisis at some future time.

Many say that time is with us now.

14 September 2015