Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

Consultation Paper -

Records and recordkeeping practices

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1. FOREWARD

i. [redacted]

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2. THE FOUNDATION STONE FOR JUSTICE AND ACCOUNTABILITY

i. Records are our traceable footprints on the landscape of life. They stand in stark defiance of those imprinted into the sand for that passing second and to then be lost forever by the unstoppable force of perpetual incoming waves passing over them as if they never existed or counted for anything.

ii. In some instances, records are created beyond anyone's control. But, more often than not in this context, they are normally created by those who have a duty of care over children in their care and protection as an obligation (i.e. on the carers), by either a legal or other administrative function or means, to record events (of which they are aware) which take place at a particular time in the course of that child's period of stay in a particular situation. In effect, these records are equivalent of a police officer's running log book of events during time on duty, and are therefore always of potential evidentiary value. These books are routinely preserved due to their potential evidentiary value by the Police Department for an indetermined period.

iii. I submit, as a matter of common sense, decency and human right by legal and moral obligation, that such created records must, by all reasonable means, be fully protected and preserved for their *'realistic possibility'*[4] of future usage as evidence for police, courts, tribunals, the victim and their lawyers when they concern abuse of any child in care by another, be the abuse either sexual, physical, psychological, or emotional in kind.

iv. The simple truth is that recordkeeping, particularly at its best practice level, is the very life blood of civilisation. It underpins the operation of law, public and private sector accountability, rights and obligations. Most importantly, it sustains these associated various vital tributaries in any polity of truth, justice and accountability which, working in combination, make life overall and society itself safer and just, more certain and harmonious, more meaningful and worthwhile.

v. Truthful recordkeeping underpins the intrinsic value of each individual child no matter the circumstances of their beginning in life or social status. This is because it provides a traceable identity of standing for them when inside the system and how they were treated while in the care and protection of the system at a time and place in their lives when most lacking in individual power and influence. It is beyond doubt that at such a time, their welfare is at the mercy of and wholly reliant on protection which the law should and/or ought to afford them. These laws rely on their ethical administration by a child's immediate carers. In turn, they should and/or ought to be oversighted by ethically-motivated supervisors, and which in turn, in a public sector environment, should extend to the responsible Minister of the Crown, and, ultimately, to Parliament itself acting on behalf of the whole electorate where and when reports are tabled under privilege and legislation then either introduced or amended towards the aim of the betterment of child welfare. In these circumstances, the presence or absence of trustworthiness in recordkeeping either holds everything together or destroys everything respectively.

vi. The base line is that less fortunate children, if not all children, should have a binding legal entitlement to be always treated with reasonable compassion and decency instead of being open to abuse by whatever motivating factor might trigger the abuser to think that he/she can abuse a child with impunity. Therefore, to safeguard against such breaches of trust going unrecorded, best practice recordkeeping should be seen as a moral duty on civilised society to create, enforce and preserve, especially on government as *'the model custodian*', for the benefit of our fellow human beings in this context where children have been placed in care and protection either by administrative or court orders.

vii. Many of us enjoy watching the *SBS* series ***Who Do You Think You Are?***[5] As we watch enthralled and captivated the person (more often than not a celebrity of some national notoriety) go from place to place locally or across the world retracing and unearthing the dormant roots of their ancestry, the importance of records **always** quickly surfaces

[4] See ***R v Ensbey; ex parte A-G (Qld)*** [2004] QCA 335 on 17 September 2004; ***R v Rogerson and Ors*** *(1992)* 66 ALJR 500; and ***R v Selvage and Anor*** [1982] 1 All ER 96

[5] http://www.sbs.com.au/programs/who-do-you-think-you-are

as we see them visit their chief staging post, a State Archives buildings. It becomes the linchpin of discovery for their otherwise unknown family knowns (in the records) to become suddenly known. Sitting alongside the guiding hand of an archivist, together they inspect either benign or ghastly revelatory official and unofficial records created by various government authorities and other bodies (e.g. birth, marriage and death certificates, departmental reports, court transcripts and judgements, shipping logs, newspaper cuttings *et al*) going back, on occasions, many decades or hundreds of years.

viii. By plain good sense and civilised order, these records have been methodically appraised and secured away by archivists over the years by application of their long-standing universal archival appraisal values[6] to the record/s under sentence of retention/disposal. Those values are expansive. They include legal, evidentiary, fiscal, administrative or historical value. **This process is expected to be done impartially for posterity's sake in the public interest** rather than by sectional interests (i.e. the Government's) or indifferently force future inquirers to stumble through a disordered mountain of records searching for something of relevance like an ever-elusive winning lottery ticket.

ix. These recovered records, as probative or directional evidence, can often reveal past footprints of unacceptable abusive conduct and injustice again which some probably thought would never see the cold light of day when penned by them or ever have their contents forensically examined to ensure that justice might be finally served. This is because at the time of writing them, the power imbalance was in their favour and thus imbued a sense of entitlement and impunity to arbitrary abuse of their power over the less fortunate who happened to find themselves in care and at the mercy of others.

x. Consequently, if this Royal Commission can better secure and demonstrate just how vital this foundation stone of best practice recordkeeping is to our society where the rule of law must be so respected that we, as a democratic and caring society, must take all reasonable steps - where it is both manageable and feasible - to have a reliable, traceable resource base of 'recorded incidents of child abuse' where and whenever it may occur throughout Australia, then a giant step forward in the interests of accountability and justice for abused children will have been taken.

xi. I submit that it is by the existence and impartial preservation and access of such records (as prescribed by archives law and similar and punishable under same in their breach[7]) that not only will a forceful warning be delivered to would-be abusers to not abuse but a clear and comforting beacon of hope for justice for all aggrieved children will come into the justice mix so that, at some future time if and when they finally find the courage and support to act against their abusers, including the State/Crown/Church as responsible entities, these records may still exist in the system to support their claims.

[6] http://www2.archivists.org/glossary/terms/a/archival-value

[7] E.g. *Public Records Act 2002* (Qld), *Right to Information Act 2009* (Qld), Discovery/Disclosures Rules of the Supreme Court, and section 129 of the *Criminal Code 1899* (Qld) - **destroying evidence**.

Accordingly, I respectfully submit that the Royal Commission should recommend that in all legislation within the Commonwealth of Australia which authorises the placement of children into care and protection that an **(ISO) independently auditable best practice recordkeeping regime**[8] shall be mandatory and retained in perpetuity by either the care authority itself or transferred to an appropriate Federal/State Archives entity within the Commonwealth of Australia for safekeeping and subsequent access by a relevant party upon request.

Introducing the Doctrine of Spoliation of Evidence

xii. This law commonly exists in many jurisdictions across the United States of America and, perhaps more relevantly for Australia, Canada also for its general application in all civil proceedings.

xiii. Its purpose permits an argument to be put in court going to an *adverse inference against a fair trial*[9] by the conduct of the authorised carer-cum-subsequent-spoliator responsible for the recordkeeping of the abused child being capable of being drawn in circumstances where a relevant document to a "*realistically possible*" future proceedings regarding a breach of fiduciary duty is found not to exist when it otherwise, on the balance of probabilities, reasonably ought to and/or did exist but had been intentionally destroyed (due to its unfavourable character) in the context of a mandated regime of best practice recordkeeping being in place.

xiv. At the same time, as a right in expectation, these records mandated to be created and kept for the long term shall provide any future law-enforcement authority with a ready pool of contemporaneous material to use in the facilitation of justice being done on more safe, reliable and supporting grounds on "what the authentic document says at the time"[10]. This pool of contemporaneous records would mitigate against the authorities not just having to rely on what might or might not be recalled by either the abused, abuser or other associated parties in the respective chains of responsibility after the passage of many years. Too often with the passage of time, the delivery of justice can be thwarted by the ready defence of a defendant repeatedly saying "*...I can't remember!*" or being found to be compromised due to creeping aged dementia afflicting a relevant party. Furthermore, providing they haven't been tampered with[11], records created at the time say what they say no matter the passage of time. Indeed, they often exist under the contemporaneous seal of the defendant's signature when neither memory failure nor

[8] Also see my published earlier 14 March 2014 **Recommendation No 2** (9) in Consultation Paper Issues Paper 5 "**Redress and Civil Litigation**" regarding the establishment of the **Australian Recordkeeping Conversion Authority** whose purposes would be to convert all current paper files held by child care protection authorities to electronic form (PDF) for more ready access and better security for perpetuity's sake.

[9] *omnia praesumuntur contra spoliatorem* (i.e. all things are presumed against the wrongdoer)

[10] In some instances, by the convergence of other related evidence, it may well also be probative as 'inculpatory conduct' capable of being made out against the record creator (as the authority figure) by what was **inexcusably omitted** from the official record at the particular time regarding the incident and the circumstances surrounding it. This is because the law recognises not just acts, but deliberate acts of omission in the formulation of charges which either knowingly advantaged another or him/herself (i.e. the creator of the record). Also see Offences under Chapter 13 of the *Criminal Code 1899* (Qld) which deals with **Corruption and abuse of office**.

[11] See section 126 of the *Criminal Code 1899* (Qld) - **Fabricating evidence**

senility were afflictions, just as this Royal Commission has discovered for itself in some of its case studies.

xv. Such a situation of having access to contemporary records reminds us all of Persian poet and philosopher Omar Khayyám's famous words of warning:

> *"The Moving Finger writes; and, having writ,*
> *Moves on: nor all thy Piety nor Wit*
> *Shall lure it back to cancel half a Line,*
> *Nor all thy Tears wash out a Word of it."*

xvi. It seems to me therefore that while other consultation papers issued by the Royal Commission so far have all been important in their different ways, this subject matter represents the very foundation stone on which everything else relies in some way or another.

xvii. Accordingly, if this consultation paper can bear such positive fruits in the area of mandatory recordkeeping, then this Royal Commission's creation on 11 January 2013[12] by the Gillard Government and whatever its eventual cost to the public purse may turn out to be shall be of enduring value to our nation as a whole, but most especially for our vulnerable children.

I submit that it may be appropriate for the Royal Commission to recommend that the **tort of spoliation of evidence** be referred by the Commonwealth Attorney-General to the **Australian Law Reform Commission**[13] to consider and report on its efficacy for introduction into the statute books across all Australian jurisdictions, especially as it might apply in the area of the creation and handling of records associated a child's period in care and protection.

3. WHAT THE LAW CURRENTLY REQUIRES

i. Firstly, it is strongly open to argue that there was never a time in any justice system, particularly one such as ours founded on English Common Law, when any book, document or thing known and/or foreseeable as known to be required as evidence in anticipated future judicial proceedings could be deliberately destroyed by anyone to prevent its use as evidence. Indeed, with such a state of knowledge, no competent lawyer could dare suggest such a course of action might be lawfully undertaken by the client/owner/possessor of the book, document or thing without breaching their professional code of conduct to protect and uphold the impartial administration of justice for all.

ii. Secondly, Discovery and Disclosures Rules of the Supreme Court are also applicable in this context. These Rules place a high ethical/professional duty of lawyers (and thus their clients also) to preserve all known and foreseeable evidence to ensure a fair trial, whether such evidence be advantageous or otherwise to cause of action by either side involved in the litigation.

[12] http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference

[13] http://www.alrc.gov.au/

iii. Thirdly, in respect of the conduct by Crown/State in litigation, the duty to act as *'the model litigant*' also remains paramount which, I might remind the Royal Commission, makes the devious conduct of the Queensland Government (including the conduct of the Office of Crown Law) in the Heiner affair so reprehensible and unthinkable.

iv. To put it more specifically, if a party (including the State/Crown) in possession of any item (including public records kept under archives statutes) which has been properly identified to that party as being required as evidence in a future judicial proceeding, the law **has never permitted** that identified item to then be deliberately and swiftly destroyed to prevent its use as evidence just so long as that future judicial proceeding hadn't commenced at the time of the destruction (i.e. the lodging and serving of a writ).

v. Discovery and Disclosure Rules of the Supreme Court, best practice recordkeeping and plain logic starkly show that if shredding was permitted to take place in such circumstances, **it would quickly lead to a world without evidence**. As a bare minimum, such conduct must tend to, if not wholly, obstruct justice because unless legal practitioners, courts and tribunals (and police *et al*) have access to all available relevant evidence (notwithstanding other factors of legal professional privilege *et al*), our justice system and all notions of accountability must, as a bare minimum, be threatened, if not fail completely in being able to render safe, just decision outcomes.

vi. I am also suggesting that those who possess the record and know about the character of its contents should themselves (being reasonable people) reasonably know at the time of appraisal for retention/destruction about the "*realistically possible*" relevance of such a record to the person in question to future litigation even if the person him/herself (i.e. the prospective plaintiff) was unaware of its existence at the time of its appraisal. In these circumstances, the archives profession **would not** normally approve any destruction order, but, it did occur in the Heiner affair which, as history now shows, turned the shredding into a *cause célèbre* for the profession locally and internationally.

The test of whether or not the record may be required in the future therefore becomes one of the critical benchmarks for this consultation paper to establish. It is submitted that the Royal Commission should recommend that the "***realistic possibility test of usage***" becomes the universal requirement when handling records concerning children in all various forms of care and protection by an authority to ensure that any delay in seeking of justice (as is common in this context when abuse concerns a young child) is not further delayed. On reasonable grounds, this test is therefore needed to safeguard the administration of justice. Any such frustration if and when documents are destroyed under the (likely-proffered) exculpatory reason-cum-guise can be countered so that the offender cannot later say that such a consideration never crossed his/her mind at the time of the appraisal process which saw records destroyed whose content were of known or foreseeable evidentiary value.

vii. The leading legal authority which provides a binding, best practice recordkeeping practice regarding the length of time a record should be kept and never destroyed to prevent usage in future judicial proceedings is found in *R v Ensbey*[14]. Relevantly, Davis JA said at 15-16: (Quote)

[14] See ***R v Ensbey; ex parte A-G (Qld)*** [2004] QCA 335

> *"...It was not necessary that the appellant knew that the diary notes would be used in a legal proceeding or that a legal proceeding be in existence or even a likely occurrence at the time the offence was committed. It was sufficient that the appellant believed that the diary notes might be required in evidence in a possible future proceeding against B, that he wilfully rendered them illegible or indecipherable and that his intent was to prevent them being used for that purpose." ..... "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**."* (Bold and underlining added)

viii. Relevantly also, Williams JA in *Ensbey* at 39 had this to say about the seriousness of the offence of destroying evidence: (Quote)

> *"...The destruction of evidence is, in my view, a serious offence which calls for a deterrent sentence and that would usually necessitate the offender serving an actual period in custody."*

4. [redacted]

i. [redacted]

ii. [redacted]

iii. [redacted]

[15] http://www.sclqld.org.au/caselaw/QCAT/2016/075 - See ***LSC v Bosscher*** [2016] QCAT 75 of 27 May 2016

iv. [redacted]

v. [redacted]

vi. [redacted]

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viii. [redacted]

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Yours sincerely

KEVIN LINDEBERG