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Document Destruction and Civil Litigation in Victoria

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Report on

**Document Destruction
and Civil Litigation
in Victoria**

Professor Peter A Sallmann
Crown Counsel for Victoria

May 2004

The Author

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**Report on
Document Destruction and
Civil Litigation
in Victoria**

I. TERMS OF REFERENCE

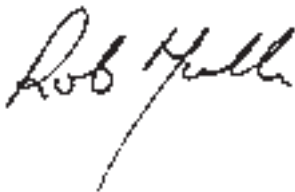
**To:
Professor P A Sallmann
Crown Counsel**

Following the recent case of *Roxanne Cowell (representing the estate of Rolah Ann McCabe, deceased) v British American Tobacco Australia Services Limited*, you are asked to examine the current law, procedures and practices of discovery in the conduct of civil litigation in Victoria, with special emphasis on the approach that should be adopted if documents that could be relevant evidence in a trial are destroyed, whether the destruction occurs before or after the actual legal proceedings commence.

As part of your investigation of these matters, you are requested to give particular attention to the need for fair trials in civil litigation in Victoria, and what the appropriate role for the courts should be in ensuring the fairness of proceedings when relevant documentary evidence has been destroyed.

Having examined these matters you are asked to report your views to the Attorney-General, The Hon Rob Hulls, MP, including on any proposals or suggestions for changing the present position under Victorian law, and on how any such proposals or suggestions would best be implemented.

You are requested to provide your report by the 29th of February 2004



ROB HULLS MP
Attorney-General

6 November 2003

2: EXECUTIVE SUMMARY

This review was commissioned by the Victorian Attorney-General, The Hon Rob Hulls MP, following the recent case of *McCabe* in the Supreme Court of Victoria. Mrs McCabe suffered from lung cancer which she attributed to the smoking over many years of cigarettes produced by British American Tobacco Australia Services Limited (BAT). She sued BAT for personal injuries caused by its alleged negligence, and claimed damages. At the trial, the trial judge struck out BAT's defence, thus awarding the case to Mrs McCabe. He did so on the basis that BAT had failed to comply with a series of discovery orders he had earlier made, requiring the company to produce various documents relevant to Mrs McCabe's case. BAT was unable to produce many of these documents because over a period of years they had been destroyed pursuant to a number of document retention policies devised by the Company.

BAT appealed to the Court of Appeal against the decision of the trial judge to strike out its defence. The Court allowed the appeal and in doing so made new law for Victoria on the key issue of principle which had arisen, of what the position should be when documents relevant to litigation have been destroyed in advance of the formal commencement of legal proceedings. On this question the Court of Appeal said that the document destruction in *McCabe* was not unlawful because it took place before the commencement of litigation. The Court also said that decisions of the type made by the trial judge in *McCabe* to strike out a defence would only be justified in future cases if the pre-commencement destruction amounted to an attempt to pervert the course of justice or, if open, contempt of court.

The broad policy conclusion reached by this review is that the exercise of a trial judge's discretion in civil litigation to rule on the consequences of failure by parties to comply with discovery rules should not be limited to circumstances in which formal legal proceedings have been commenced. It should extend to certain pre-commencement situations. The main reasons for this general conclusion are to ensure fairness in civil litigation; to enable the courts to decide cases on the basis of as much relevant evidence and information as possible; and to preserve and enhance the overall integrity and reputation of the civil justice process and therefore the justice system as a whole. Destruction of relevant documents is a serious matter and can adversely affect individual parties to litigation as well as damage community confidence in the system of justice itself. This can be so whether the destruction occurs after or before the commencement of litigation.

To deal with this important issue, a three-pronged approach is proposed in this report. First, there should be a new statutory provision applicable to civil proceedings in all the Victorian courts, giving judicial officers very similar discretionary powers in dealing with pre-commencement document destruction as those available if destruction occurs after proceedings have been formally commenced. The second proposal is that Victoria should have a new statutory criminal offence dealing with the destruction of documentary material which is relevant to a judicial proceeding. This statute would deal with the worst and most blatant instances of the destruction of material relevant to civil litigation and would cover highly negligent destructions as well as intentional ones. It should cover cases of pre-commencement destruction as well as those post-commencement of proceedings.

The third key proposal is that there should be a new professional conduct regulation, as there now is in New South Wales, to apply where advice is given by lawyers to clients about document retention and destruction and also to situations where lawyers themselves are in possession or control of material which is relevant to actual or reasonably anticipated litigation. This regulation would be aimed at guiding the day-to-day operations of legal practitioners in this area, both solicitors and barristers, as distinct from dealing with a particular case before a court or an actual allegation of destruction so serious that it could give rise to possible criminal liability.

The particular *Recommendations* are set out in the next section of the report. They are expressed in reasonably broad, general terms. This is because the main thrust of this review has been to identify the key public and legal policy issues which arise in this area and to suggest what the appropriate responses might be. The drafting of any specific statutory and regulatory provisions should be left to the relevant experts, depending upon decisions that the Attorney-General and the Government as a whole may make in relation to the *Recommendations*.

3: RECOMMENDATIONS

1. There should be a new statutory provision to apply to document destruction situations in civil litigation in Victoria. It should have the following features:
 - It would apply when the proceedings in question are affected by the unavailability of relevant documents, including when documents have been destroyed or removed in advance of legal proceedings being commenced.
 - It would provide a basis for the exercise of a broad judicial discretion to do justice when relevant documents are unavailable, and it would also indicate the criteria that a court would consider in the exercise of that discretion. The latter would include looking at why the documents are unavailable, the broader circumstances of it, and the impact of the unavailability on the particular litigation in question.
 - If the various pre-conditions were established, the court would have a number of options available to it, including the striking out of a claim or a defence, or part of a claim or defence.
2. While the common law criminal offence of attempting to pervert the course of justice might apply to some instances of document destruction in the context of civil proceedings, it is proposed that there should be a new statutory criminal offence in Victoria modelled on provisions in other Australian jurisdictions, in particular, Section 39 of the *Commonwealth Crimes Act 1914*, which covers the destruction of evidence relevant to a judicial proceeding. Among other things, this new provision should include the following features:
 - A definition of intention that would require proof that the party destroying a relevant document knew that it would be or may be required for litigation, coupled with an intent to prevent it from being available for that purpose. (The *Commonwealth Criminal Code Act 1995* provides an appropriate model in this regard).
 - It would apply in the case of proceedings which *are* to be commenced or *may* be commenced at a later date as well as those which have already commenced. (A model for this could be Section 243 of the *Criminal Law Consolidation Act 1935* of South Australia).
 - A basis for prosecution for a highly negligent destruction of a relevant document. This would involve adopting the principles of corporate criminal responsibility set out in Part 2.5 of the *Commonwealth Criminal Code Act 1995*.
3. That a professional conduct rule be introduced in Victoria, similar to that now operating in New South Wales, to govern the role of legal practitioners, both solicitors and barristers, in advising clients about the retention and destruction of documents which may be required for anticipated litigation, and also their role when in possession or control of such documents themselves. Breach of such a rule would be professional misconduct.
4. That the Rules Committee of the Supreme Court of Victoria should consider examining those aspects of Rule 29 which deal with the obligations of parties to litigation to disclose the destruction of documents which were at some stage in their possession, custody or power. Such an examination might look, in particular, at what inquiries should be made by parties to identify what documents have been destroyed and the circumstances surrounding their destruction.

4: INTRODUCTION

In the Victorian Supreme Court lung cancer case of *McCabe*, in 2002, the trial judge, Justice Eames, in response to submissions from the lawyers for Mrs McCabe, struck out the defence of the tobacco company, British American Tobacco Australia Services Limited (BAT). He did so in the exercise of his discretion because he found that so many relevant documents had been destroyed by BAT that a fair trial for Mrs McCabe was not possible. Damages and costs were later awarded to Mrs McCabe.

BAT appealed to the Victorian Court of Appeal, arguing that the trial judge's discretion had been wrongly exercised. The Court of Appeal unanimously agreed, saying, among other things, that the destruction of relevant documents by BAT had not been unlawful because it occurred at a time when Mrs McCabe's legal proceedings had not yet commenced. The Court also said that a trial judge would only be justified in exercising his or her discretion in the manner of Justice Eames if the destruction in question constituted the common law criminal offence of attempting to pervert the course of justice, or, if open, contempt of court. Mrs McCabe died after the case had been argued in the Court of Appeal but before the judgment was handed down. Representatives of her estate later unsuccessfully sought leave to appeal to the High Court against the decision of the Court of Appeal.

In November 2003, following the decision of the High Court in October, the Attorney-General of Victoria, The Hon Rob Hulls MP, asked me to examine the key issues of legal and public policy which had emerged in the McCabe litigation, and in particular the law and procedure in Victoria relating to the destruction of documents which could be relevant evidence in civil proceedings, whether the destruction occurred before or after the formal commencement of those proceedings.

In a covering letter to the *Terms of Reference*, the Attorney mentioned that, while the actual merits and adjudication of the McCabe case were a matter for the courts, the Government considered that the case raised some important issues relevant to the overall integrity of the legal system and its processes. The letter also indicated that the Attorney would welcome my consulting with relevant stakeholders in the course of preparing my advice.

While I took the view that the timeframe for the completion of this project was not such as to permit the production of the kinds of issues and discussion papers often associated with review projects, I did consult with a variety of individuals and organisations, and invited their participation and views. Among those consulted were the following: The Law Institute, the Bar Council, Community Legal Centres, Victoria Legal Aid, the Deans of Law Schools, the Chief Executive Officers of interstate Law Societies, the Australian Plaintiff Lawyers Association, the Victorian Government Solicitor's Office, the Australian Law Reform Commission, the Solicitor-General of Victoria,¹ and a range of miscellaneous others. As well as these consultation processes, a number of formal submissions were received in the course of the review. These are listed at the end of this report, together with other contributors to the review.

5: BACKGROUND

Mrs Rolah McCabe died in 2002 at the age of 52. She had started smoking as a child and quickly became addicted to cigarettes. In late 2001, Mrs McCabe issued a writ in the Supreme Court of Victoria against BAT for compensatory, general and exemplary damages for personal injuries. By the time the writ was issued Mrs McCabe was already very ill. She argued that BAT had known for many years that cigarettes were addictive and detrimental to health, and that it specifically marketed its products to children. She further claimed that, knowing the health risks, BAT did not take reasonable steps to deal with them, and either ignored or publicly questioned research results indicating the health dangers posed by smoking.

In response, BAT denied that Mrs McCabe's illness was due to cigarette smoking and also that its cigarettes were addictive. They said they did not have any knowledge of the risk of lung cancer or any difficulty associated with giving up smoking, which was not already in the public domain. They also said that smoking was a behaviour of choice.

Thus, the case was destined to be a direct contest of fact between Mrs McCabe and BAT about the nature and extent of BAT's knowledge of the health risks of smoking and the addictive qualities of cigarettes. On that basis, documents were clearly going to be extremely important to the case, especially any scientific documents commissioned by BAT or research documents produced by or for the tobacco industry generally.

So, it was no surprise that the lawyers for Mrs McCabe sought discovery of a variety of documents from BAT. In December 2001, the trial judge, Justice Eames, made orders for discovery of documents against BAT. These were orders for general discovery and particular discovery. (The Rules of Court provide a basis for the parties to civil litigation to obtain a list of the relevant documents held or controlled by the other party). This is a standard, common component of civil litigation in the higher courts. The novel and noteworthy feature of the *McCabe* case, so far as document discovery was concerned, was that, over many years, and pursuant to a series of document retention policies, BAT had destroyed a very large number of the documents to which Mrs McCabe was seeking access for the purposes of her litigation.

At times, when tobacco related cases involving BAT were before the courts, the company imposed internal "hold orders" preventing the destruction of documents. After the *Cremona* litigation involving BAT concluded in 1998, BAT lifted its own hold order and destroyed thousands of documents which had been discovered as relevant in that case. These documents were relevant to Mrs McCabe's case as well; the fact that they were unavailable gave rise to the main issue in the McCabe litigation. This was the question whether, when litigation is anticipated but not yet formally commenced, a potential party to that litigation is required to retain documents which might become discoverable. If the answer is that they should be required to do so then a series of related questions arises about particular aspects of such retention.

When the documents were not produced, Mrs McCabe applied, in January 2002, for an order from the Supreme Court that BAT's defence be struck out. An additional element of the application was the claim that BAT had deliberately destroyed some documents in an effort to thwart litigation.

It was also claimed that BAT had misled the Court as to the true situation of the discoverable documents. In response, lawyers for BAT argued that it was not unlawful to destroy relevant documents, even if it were done to thwart anticipated litigation, provided the litigation in question had not actually commenced.

Because Mrs McCabe was by then terminally ill, Justice Eames raised with her lawyers whether the trial should proceed anyway but they argued that her prospects of a fair trial had been irretrievably damaged by the unavailability of the discoverable material which had been destroyed. They asked the Judge to consider the question of striking out BAT's defence. In March 2002, Justice Eames exercised his discretion to strike out the defence and ordered judgment for Mrs McCabe. He did so essentially on the basis of the non-compliance by BAT with the discovery orders he had earlier made and also that the process had been deliberately subverted to deny Mrs McCabe a fair trial. In the words of the Judge:

“Central to the conduct of a fair trial in civil litigation is the process of discovery of documents. ... The party which controls access to the documents must ensure that its opponent is not denied the opportunity to inspect and use relevant documents. ... In my opinion, the process of discovery in this case was subverted by the defendant and its solicitor ... with the deliberate intention of denying a fair trial to the plaintiff, and the strategy to achieve that outcome was successful. It is not a strategy which the Court should countenance, and it is not an outcome which, in the circumstances of this case, can now be cured so as to permit the trial to proceed on the question of liability”²

A jury was empanelled to assess damages. In April 2002, BAT was ordered to pay \$700,000 plus interest and costs.

BAT appealed to the Court of Appeal against the decision by Justice Eames to strike out their defence and thus award the case to Mrs McCabe. In a unanimous judgment the Court allowed the BAT appeal, ordered a new trial and also that the estate of Mrs McCabe repay the damages that had earlier been awarded to her. In its decision, the Court of Appeal overturned a number of the factual findings and conclusions of the trial judge. It also suggested that some of the deficiencies in the discovery process could have been approached by further orders for discovery rather than what it saw as the somewhat drastic action of removing BAT's right to a trial. It also disagreed with the view of the trial judge that there had been a sinister element to the BAT document retention policy, namely, that an innocent intention was to be used as a basis for what was in fact a strategy to deny Mrs McCabe a fair trial. BAT had argued that it had destroyed documents on legal advice and that its purpose in doing so was innocent and appropriate.

Leaving aside various questions of fact and related matters, the key issue of principle which arose in the McCabe litigation was the destruction of documents in advance of the issuing of legal proceedings. What is and what should be the law on this question? In *McCabe*, both the trial judge and the Court of Appeal noted that this was a novel point of law and that there were no Australian or English authorities directly on it.³ On this issue the Court of Appeal produced two key propositions. The first was that the document destruction in *McCabe* was not unlawful because it took place before litigation was commenced. The second was that judicial action, such as that taken by Justice Eames in striking out the BAT defence on the basis of failure to produce discoverable documents, would only be justified when the pre-commencement destruction amounted to an attempt to pervert the course of justice or, if open, contempt of court.

In the words of the Court of Appeal:

*“Accordingly, there being no authority directly in point, we consider that this court should state plainly that where one party alleges against the other the destruction of documents before the commencement of the proceeding to the prejudice of the party complaining, the criterion for the court’s intervention (otherwise than by the drawing of adverse inferences, and particularly if the sanction sought is the striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot”.*⁴

As mentioned in the *Introduction*, Mrs McCabe’s daughter, Roxanne Cowell, representing her mother’s estate, applied in January 2003 for special leave to appeal to the High Court against the Victorian Court of Appeal decision. The application was heard in October 2003, together with applications for leave to intervene by the Attorneys-General for Victoria and New South Wales on the ground that the Victorian Court of Appeal decision raised basic and important questions about the administration of justice.

The High Court refused all the applications. The main point in the High Court special leave application was whether the Court of Appeal in Victoria had imposed too great a restriction on the statutory or inherent power of a judge in the exercise of the discretion under the Rules of the Supreme Court relating to non-compliance with discovery orders. Counsel for the estate of Mrs McCabe argued that the crux of the decision made by Justice Eames was that BAT’s “self-created incapacity to comply with the order for discovery was akin to an abuse of process that precluded a fair trial”, and that the approach of the Court of Appeal was too narrow and wrong in looking at the behaviour of BAT without sufficient regard to its impact on the prospects of Mrs McCabe getting a fair trial. The Court of Appeal, it was argued, had concentrated too much on the lawfulness or otherwise of BAT’s document destruction.

The High Court said that it was not persuaded that the prospects of demonstrating that Mrs McCabe could not have had a fair trial were sufficient to grant special leave. It expressed some doubt about the actual extent of the prejudice Mrs McCabe suffered as a result of the destruction of the documents. The Court also referred to the fact that at a trial strong adverse inferences could have been drawn if it were shown that BAT had deliberately destroyed relevant material in order to prevent Mrs McCabe from having access to it.

The Court further noted that in order to entertain the appeal it would need to have addressed a number of complex issues of fact on which the trial court and the Court of Appeal had different views; it said it was not really in a position to deal with those matters of fact. Finally, with that background, the High Court observed that it did not need to express any view on the correctness or otherwise of the key statements of principle made by the Court of Appeal as to the circumstances of destruction of relevant material prior to the instigation of legal proceedings. This was because these principles were not in operation at the time of the interlocutory hearings in preparation for trial. They only emerged later, as a result of the decision of the Court of Appeal.

6: POLICY CONSIDERATIONS

The review commissioned by the Attorney-General following the decision of the High Court to refuse leave to appeal in the *McCabe* case is not just about that particular case; it has far broader implications. It is essentially about the key legal and public policy issue of how the law, the civil justice system and, in particular, the courts, should deal with a situation where material (documents, broadly defined)⁵ relevant to civil proceedings has been destroyed or is otherwise “unavailable” for some reason, whether destroyed, removed or rendered illegible.

In *McCabe*, the Victorian Court of Appeal reviewed the position and made a ruling on the powers of the Supreme Court to deal with the destruction of documents prior to the actual commencement of proceedings. As indicated already, recognising that, surprisingly perhaps, there was no authority specifically on the point, the Appeal Court said that a Court will not intervene, (other than by the drawing of adverse inferences), unless it can be shown that the destruction in question constituted an attempt to pervert the course of justice or, if open, criminal contempt.

It is important for the proper and fair resolution of civil justice proceedings that material relevant to those proceedings be available to the court. This is a very basic feature of our civil justice system. Serious issues arise if such material is not available, especially if it has been destroyed by a party to the proceedings. Even more so if the destruction is deliberate, with the idea of making things difficult, if not impossible, for the other party to the case. It is interesting that until recently there has been no detailed public discussion of this issue in Australia. There certainly is now, and the Court of Appeal decision in *McCabe* has given that discussion a very real edge and focus.

Broadly speaking, it seems wrong and rather odd that an organisation or individual, anticipating the prospect of litigation, can dispose of material that would be relevant to that litigation and, in effect, “get away with it” within the court system simply because the destruction took place before the proceedings had been formally instituted. Working within the relevant law and, in particular, the Rules of Court of the Supreme Court, this seems to be what the Court of Appeal decision in *McCabe* amounts to. According to the Court, it can only be otherwise if the aggrieved party can establish, albeit on the balance of probabilities, that the party which has caused the material to be unavailable is guilty of the relevant common law criminal offence or, if open, contempt of court. It strikes me that this is a narrow, somewhat artificial, technical and unfair test to be imported into the civil justice arena from the criminal law.

Apart from the fact that it involves introducing elements of the criminal law into civil litigation, itself an unusual arrangement, the narrowness of the test means that only the most extreme, deliberate and blatant instances of document destruction would be covered. It also means that, rather than emphasising the need for fairness in civil proceedings, there is instead an undue emphasis on the lawfulness or otherwise of the behaviour of the party which has destroyed or removed relevant documents. Naturally, the circumstances and context of the destruction are relevant but one would have thought that much more important was the impact of the destruction on the disadvantaged party and also the ability of the court to adjudicate upon the proper merits of the dispute before it.

In these respects I agree with the observations of the authors of a very recent article about the *McCabe* case in the *Melbourne University Law Review*.⁶ Cameron and Liberman have, correctly I believe, suggested that the key question for a court faced with a document destruction issue in civil litigation is what *consequences* should follow from the destruction, so far as the parties are concerned, where the destruction has occurred before the instigation of proceedings but at a time when litigation could reasonably be anticipated? And, more specifically, can a destruction in these circumstances justify the court making an order striking out the offending party's case or parts of it?

The authors argued that in these circumstances the fairness of the civil trial should be the primary consideration:

“The criterion of fairness is equally relevant to the destruction of evidence both before and after the commencement of proceedings. That is because the role of a court is to do justice between the parties in the case it is adjudicating, and that role may be prejudiced equally by the destruction of evidence before commencement as after. This is not to say that the deliberate destruction of evidence either in anticipation of or during proceedings is not a serious matter worthy of punishment. Indeed, it is. It represents a fundamental attack on the role and rationale of courts. However, its punishment ought to occur through the criminal offences of attempting to pervert the course of justice and contempt of court, rather than in the civil proceeding (or proceedings) it has prejudiced.”⁷

While there is clearly a range of value judgements involved in the kinds of key decisions made by the trial judge and the Court of Appeal in the *McCabe* litigation, it seems to me that the core values and emphases articulated by Cameron and Liberman in their law review article are correct. Fairness is perhaps the most fundamental of these but also important is the general integrity and reputation of the judicial and legal systems. In this regard it seems to me unsatisfactory if the legal position is that a trial judge in the position of Justice Eames in the *McCabe* case is not able to exercise his or her discretionary powers to strike out a case simply because the destruction of documents took place before litigation had formally commenced, especially when litigation is reasonably anticipated.

In this regard, Gorelick, Marzen and Solomon, authors of the leading U.S. text, *Destruction of Evidence*, have commented on the broader public policy considerations:

“The arguments for controlling destruction of evidence are most keen when legal proceedings are ongoing, imminent, or reasonably foreseeable. Three policies might justify strictly regulating the circumstances under which individuals and businesses may destroy evidence. First, rules ensuring that relevant evidence survives until trial promote truth seeking. Second, for the adversary system to perform its function of ensuring equal access to justice, relevant evidence must survive to the time of settlement or trial. Third, the integrity of the judicial system is bolstered by restricting the destruction of evidence; the fundamental principle that litigants may not by their own acts deprive the court of its ability to adjudicate a controversy is contravened when one party destroys evidence central to a lawsuit.”⁸

These authors refer to “truth seeking” and suggest that, in order to be credible and to have the confidence of the community, the judicial system needs to achieve accurate results. This is a strong reason, they say, for restricting the destruction of evidence and dealing with it appropriately when it arises:

“The evidence destroyer stands the assumption of the adversary system on its head: The parties, instead of feeding the factfinder all relevant evidence, become engines of destruction, purging the record of the relevant material that is favourable to the other side.”

This overlaps with the important issue of the integrity of the system. This integrity is surely prejudiced if parties to civil litigation, even in circumstances where proceedings have not actually commenced but are reasonably anticipated, can, in effect, get away with the destruction or removal of material which would have been relevant and discoverable in the case. Is not the integrity of the system seriously at risk if this is permitted to occur?

Questions of evidence destruction have been dealt with quite extensively in the United States over a number of years. Writing in 1984 in the *Hastings Law Journal*, Van Patten and Willard observed in relation to the integrity of the system in dealing with issues like evidence destruction:

“It is a well established principle that courts will not permit themselves to become agents for the commission of a recognised wrong. If a defendant may use the judicial process to delay, diminish, or even defeat a valid claim then the court has in effect become a partner in the abuse. The essential policy question is whether there is any adversarial conduct which will not be tolerated by the courts. The court should not, by default, acquiesce in conduct which is designed to perpetrate fraud or injustice. If such conduct goes unchecked, public confidence in the law and the legal profession will be undermined.”¹⁰

These remarks are rather apt in the context of document destruction, especially for any case in which there has been deliberate destruction for the purpose of stymying an opponent in an actual or potential piece of civil litigation.

Consultations conducted for the review have revealed some serious concerns in some quarters that, as a result of the decision in the Court of Appeal, there may be a risk that some businesses and individuals could believe that it is permissible to destroy documents in anticipation of litigation. Even if this is not a significant problem at present, and *McCabe* was a very isolated and unusual case, it seems to me that there is some justification for this concern. This is highlighted in a submission received from the law firm which acted for Mrs McCabe. The submission emphasises both the issue of fairness as between the parties to civil proceedings, and also the integrity and repute of the civil justice system in general:

“Properly viewed the issue is not about the rights and duties of parties to retain or destroy documents, but the powers of the courts to protect the administration of justice and prevent its processes from being abused when confronted with the consequences of pre-litigation document destruction. If properly framed in this way the laws can protect the integrity of the civil justice system without imposing onerous new obligations on persons and corporations who handle documents. Every person

would remain free to deal with their documents as they choose, subject to the criminal law. However where a Court is confronted with the destruction of evidence prior to the commencement of litigation it should have available to it appropriate powers to deal with the consequences of that destruction, so as to protect the integrity of its processes. As such when a person destroys documents they will run a risk that a Court in a future proceeding will act in order to address the prejudice caused by that destruction.”¹¹

Against the backdrop of this discussion of the key policy issues which arise in the document destruction debate, it is now useful to consider what the position should be and how it might be achieved.

7: WHAT SHOULD BE DONE?

To my way of thinking, the idea that material relevant to a piece of civil litigation can be destroyed on the basis that, although litigation may reasonably be anticipated, the actual proceedings have not yet been initiated, and the destroyer not be at risk of having its case struck out unless the disadvantaged party can prove a criminal offence, is unsatisfactory from a number of vantage points canvassed in the previous section of this report. It may be most unfair to the aggrieved party; it deprives the court in question of access to evidence which could be important to the proper resolution of the dispute; and for those reasons, and perhaps others as well, it threatens the integrity of the civil justice system and thus public confidence in our legal institutions and processes generally.

As a matter of public and legal policy it seems to me not a question whether the trial judge or the Court of Appeal in the *McCabe* case was right or wrong but rather what is the best approach to adopt. My view is that the current position is unsatisfactory and needs to be changed. It seems to me inappropriate, in order to justify the exercise of a judicial discretion striking out a case because key documents have been destroyed, to expect proof of a criminal offence, even on the balance of probabilities. And nor, it seems to me, is it good enough for the court to entrust the matter to the drawing of adverse inferences against the party responsible for the material not being available.

The issues are complex and need to be approached at a number of different levels. First, I believe that there should be a new statutory provision applicable to civil proceedings in all the Victorian courts, giving judicial officers very similar discretionary powers in dealing with pre-commencement document destruction as those available if destruction were to occur after proceedings have been formally commenced. In a case like *McCabe* such a statute would provide a clear and legitimate basis, all other things being equal, for a discretionary decision of the kind made by the trial judge, Justice Eames.

The second proposal is that Victoria should have a discrete statutory criminal offence dealing with the destruction of documentary material which is relevant to a judicial proceeding. This statute would be designed to deal with the worst and most blatant instances of the destruction of material relevant to civil litigation. It would cover intentional destructions but also highly negligent ones. It should cover cases of pre-commencement destruction as well as those post-commencement of proceedings.

The third thing is that there should be a new professional conduct regulation, as there now is in New South Wales, to apply where advice is given by lawyers to clients about document destruction and also to situations where lawyers themselves are in possession or control of material which is relevant to actual or reasonably anticipated litigation. This would be aimed at guiding the day-to-day operations of legal practitioners in this area, as distinct from a particular case before a court or an actual allegation of destruction so serious that it could give rise to possible criminal liability.

I am proposing, in other words, a three-pronged approach to the issue of document destruction in civil proceedings in Victoria – a general statutory provision to govern what a judge or magistrate can do if an allegation of document destruction in a case before him or her is substantiated; a new

criminal law provision to cover the worst cases of this behaviour; and a conduct rule to regulate the provision of advice by lawyers on document retention and destruction policies and practices. Each of these suggestions is now discussed in turn.

Before doing that, however, I should indicate that I have seen it as my role in this review to canvass these proposals in broad, general terms; I have not thought it appropriate or practicable to be too detailed or precise about possible particular statutory or regulatory drafting. I have addressed the public policy issues in the document destruction context, leaving the appropriate authorities to make decisions about the proposals I have made, and the legal policy and drafting experts to their task of reducing the ideas to precise statutory and regulatory formulations, should instructions be given to them to that effect.

Civil Procedure Legislation

As already foreshadowed, in order to overcome the problems in the civil litigation system exposed by the McCabe case there should be a new, special piece of legislation. It should apply to civil litigation conducted in the Supreme Court, the County Court and the Magistrates' Court. It could take the form of an amendment to the respective statutes which govern the operations of these three courts. It would apply when the proceedings in question are affected by the unavailability of relevant documents, including when documents have been destroyed or removed in advance of legal proceedings being issued. The reasons for such a new statutory provision were highlighted earlier, namely, the importance of ensuring fairness in civil litigation in Victoria; to prevent courts from having to decide cases in the absence of important, relevant information; and to uphold and enhance the strength and integrity of the civil justice system as a whole.

The legislation should provide a basis for the appropriate exercise of a broad judicial discretion to do justice when relevant documents are unavailable and it should also indicate, again in broad terms, the criteria that a court would consider in the exercise of that discretion. As such, there would be a substantial emphasis on the impact of the unavailability of documents on the particular proceeding (fairness to the parties) as distinct from the lawfulness or otherwise of the conduct which resulted in the documents being unavailable.

In many respects, such a statutory provision would set out the sorts of powers that are currently available as part of the inherent jurisdiction of a superior court and in Rules of Court for dealing with breaches of discovery obligations, would add some elements to them, and would extend them to pre-commencement of proceedings situations. It could include the drawing of adverse inferences; presuming facts in dispute are true; reversal of onuses of proof on particular matters; and striking out all or parts of a defence or statement of claim.

The provision would also need to spell out, at least in general terms, the circumstances that would be considered by a court in exercising its discretion. These could include why the documents were destroyed or were otherwise unavailable; what the broader context was, especially whether litigation was contemplated at the time or should reasonably have been anticipated; and also the impact or consequences of the unavailability not just on the disadvantaged party and the fairness of the proceedings but, as well, on the administration of justice generally.

Two submissions received for this review very usefully included draft proposals along the lines of what I am proposing. There are differences between them but generally they have a common purpose and thrust. The first of these is as follows:-

“(1) In any civil proceeding, where it appears to the court that a relevant document or relevant documents are unavailable, the court may take such action or actions or make such order or orders as it thinks fit in order to prevent or ameliorate injustice that may otherwise be caused by the unavailability of the document or documents.

(2) Without limiting subsection (1), the Court may:

- (a) draw an adverse inference or adverse inferences against a party;*
- (b) presume a fact which is in dispute between the parties to be true;*
- (c) reverse an onus of proof in relation to an allegation or allegations;*
- (d) prevent the leading of certain evidence;*
- (e) strike out a part or parts of a statement of claim or a defence;*
- (f) strike out a statement of claim or a defence.*

(3) In exercising its powers under sub-section (1), the Court shall take into account;

- (a) the reason or reasons for the unavailability of the document or documents;*
- (b) the context in which conduct that caused or contributed to the unavailability of the document or documents occurred; and*
- (c) the impact of the unavailability of the document or documents on the proceeding.”¹²*

The second suggestion is more specific in some respects but, more importantly, is explicitly limited to document destruction *prior* to the formal commencement of a proceeding:

“Power to strike out pleading for document destruction prior to the commencement of proceeding:

X1) If in any civil proceeding, the Court finds that a party has prior to the commencement of the proceeding:

- deliberately destroyed documents that were relevant to an issue or issues in the proceeding*
- at a time when the party anticipated, or ought to have anticipated, that there was a reasonable possibility that proceedings would be commenced in the future which would raise that issue or those issues*

the Court may strike out that party’s statement of claim, or defence as the case may be, or any part thereof, if it is in the interests of justice to do so.

X2) Without limiting the generality of sX1, and subject to sX3, in deciding whether it is in the interests of justice to strike out a party’s statement of claim, or defence, as the case may be, or any part thereof, the Court must take into account the following factors:

- a) Whether the destruction of documents has prejudiced the other party,*

- or parties, to the proceeding;
- b) Whether there are other remedies available which can overcome the prejudice that has been caused by the destruction of documents;
 - c) Whether there is a real risk that a fair trial of the proceeding is no longer possible;
 - d) The reason or reasons why the documents were destroyed, and
 - e) The need to protect the integrity of the Court's processes and the public's confidence in the administration of justice.
- X3) Where a Court finds that a purpose of the destruction of documents was to prejudice the claims, or defences as the case may be, of persons who may become involved in proceedings against the party who destroyed the documents, a Court may strike out that party's statement of claim, or defence as the case may be, whether or not there are other remedies available which may overcome the prejudice that has been caused by the destruction of documents.
- X4) The Court's powers under Section X1 and X3 can be exercised at any stage of the proceeding.
- X5) The Court can exercise its powers under Section X1 and X3 upon its own motion, or upon application of any party to the proceeding.
- X6) In any motion or application brought pursuant to sX1 the standard of proof to be applied is the balance of probabilities.
- X7) In order to avoid doubt the Court can exercise its powers under Section X1 and X3 whether or not the destruction of documents amounts to a criminal offence.
- X8) Nothing in this part shall be taken as limiting the Court's powers under the Supreme Court (General Civil Procedure) Rules 1966 or the Court's inherent jurisdiction, or any other power in respect of the destruction of documents prior to the commencement of litigation.
- X9) For the purposes of this part, a reference to documents shall be taken to include a reference to a single document, or any other physical object or thing which can be tendered in evidence.
- X10) For the purposes of this part, where a party has caused documents to be unavailable in the proceeding, then the law will apply as if the party has destroyed the documents."¹³

It should be noted in relation to the first of these two draft proposals, in comparison with the second, that the reasonable anticipation of litigation is not specifically mentioned. This was a deliberate omission on the part of the author. In his view, this aspect could obviously be relevant and important but it should not be a prerequisite to possible court intervention. It would be embraced as part of the circumstances or overall context of the document destruction or removal. I am inclined to agree with this suggestion. The second proposal concentrates specifically on pre-commencement

destruction but provides that if it can be established that a destruction took place with the clear purpose of prejudicing a claim or defence, a court may strike out a claim or defence whether or not there are other remedies available which might overcome the prejudice. Also, it is specifically directed at “striking out” powers, whereas the Liberman proposal deals with the range of discretionary powers that might be available to deal with any document destruction case.

A submission from the Australian Plaintiff Lawyers Association (APLA) supports the second and narrower proposal and, in particular, proposes that, where there is an intentional destruction of potentially relevant documents, there should be a presumption that the relevant claim or defence would be struck out, the onus resting on the party responsible for the destruction to demonstrate that there has been no prejudice to the other party.

In addition, both of these submissions propose reform of Rule 29 of the Supreme Court Rules dealing with a party’s obligations to disclose the destruction of documents which were at some stage in its possession, custody or power. Rule 29.04 already requires a party to identify the documents which are or have been in the possession of the party making the affidavit of discovery but, according to these submissions, there was considerable (and ultimately unresolved) debate in the *McCabe* case as to the precise nature and extent of the obligations under this Rule and, in particular, what inquiries should be made to identify what documents have been destroyed and the circumstances surrounding their destruction. This strikes me as an appropriate and sensible suggestion as an important contribution to the enhancement of the fairness and truth seeking role of the civil justice process.

While a proposal directed specifically at pre-commencement situations and at “striking-out” powers would be worthwhile, I believe that a more general provision along the lines suggested by Jonathan Liberman, directed to document destruction occurring either after or before the commencement of proceedings, and not limited to “striking out”, is probably a preferable approach. It provides a broader and more appropriate framework within which the judicial discretion could be exercised. The provision would, as indicated earlier, include powers already available to courts as part of their armoury of discovery sanctions. The power to reverse the onus would be novel. It strikes me as not inappropriate in a situation where one party has destroyed relevant material, seriously prejudicing the interests of the other party, that a court be in a position to require the “guilty” party to disprove an element of the case which the other party would normally be required to establish.

A general provision of this compendious nature would enable a court to look at the broad circumstances and context of what has happened in the case and to exercise its discretion appropriately to ensure that the proceedings are fairly conducted and that the integrity of the system as a whole is protected. It would be an additional piece of law and would be designed not to limit the existing inherent and statutory powers of courts.

Criminal Responsibility

As mentioned earlier, it is my view that the worst and most clear-cut instances of destruction of documents relevant to civil litigation should expose the responsible party to the risk of a criminal prosecution. At present in Victoria, the common law offence of attempt to pervert the course of justice is theoretically available to deal with some cases of document destruction. In the case of *Rogerson*,¹⁴ Chief Justice Mason said that this offence consists of “the doing of some act which has a tendency and is intended to pervert the administration of public justice”. It would seem that this offence could apply to some document destruction cases, including pre-commencement ones,

provided the “tendency” and “intent” elements of the offence could be proved beyond reasonable doubt.

While this common law offence is available in Victoria I think a different approach is to be preferred. My view is that Victoria should have a new criminal law provision, modelled on Section 39 of the Commonwealth *Crimes Act* 1914, to cover some instances of the destruction of documents relevant to legal proceedings. (Most other jurisdictions around Australia have rather similar pieces of legislation). I believe that specific document destruction legislation is called for in order clearly to specify the circumstances in which destruction will constitute a criminal offence and thus to indicate firmly to parties in civil litigation and their legal advisers what they may and may not do in this context. While the offence of attempting to pervert the course of justice would remain, a new statutory offence strikes me as a clearer, and certainly more emphatic, way of prescribing criminal responsibility for document destruction in relation to civil litigation than leaving the matter to a very broad, general common law offence.

The current Commonwealth provision is as follows:-

“39 Destroying evidence

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, intentionally destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, shall be guilty of an offence.

Penalty: Imprisonment for 5 years.”

For the purposes of this provision a “judicial proceeding” means a proceeding in or before a federal court, court exercising federal jurisdiction or court of a Territory, and includes a proceeding before a body or person acting under the law of the Commonwealth, or of a Territory, in which evidence may be taken on oath.

This Commonwealth provision should be adapted to suit Victorian purposes, particularly to make it clear that instances of “pre-commencement” destruction would be covered. This is because it is not absolutely clear whether the Commonwealth law relates only to a “judicial proceeding” that is already on foot. It certainly could be read that way and it seems to me that a Victorian statutory provision should put the matter beyond doubt. This could be achieved by adding to the provision words such as “whether proceedings are in progress or are to be or may be commenced at a later date”, or other suitable words to that effect.¹⁵ While it would apply to proceedings that have not yet commenced, conviction under such a provision would still require proof beyond reasonable doubt of knowledge that the document was required or may be required; an intention nonetheless to destroy it; and an intention of preventing it from being used in evidence.

Another thing I would recommend for a Victorian criminal law provision on this topic is adoption of the Commonwealth *Criminal Code Act* 1995 approach to the definition of intention, and, in particular, Section 5.2(3) of the Schedule i.e. “A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.” This would be designed to cover situations where a person or corporate entity deliberately and knowingly destroys

a document relevant to litigation, and does so aware of the likely impact on the litigation, but might otherwise be able to claim that the destruction occurred as part, say, of a document retention or cost saving initiative. Thus, the fundamental elements of such a new provision for Victoria would be knowledge on the part of the party destroying the document that it is or may be required for litigation, coupled with an intent to prevent it from being available.

Victoria should also borrow from the Commonwealth law its new principles of criminal responsibility of corporations. The reason for this is that many of the parties to civil litigation are corporate entities and, traditionally, the application of the principles of criminal responsibility to corporations can be difficult. Generally, this is because, as Clough and Mulhern have put it:

“The criminal law has traditionally focussed on notions of actus reus and mens rea: guilty acts and guilty minds. As an artificial entity, a corporation cannot have a guilty mind.”¹⁶

In other words, it will often be very difficult to apply the criminal law to corporations and organisations in the same way it can be applied to individuals. If it is not possible to find a particular individual at fault it will often be difficult to convict a corporation under the principles of direct, personal liability. These principles are generally aimed very much at individual rather than organisational responsibility.¹⁷

Any new criminal law provision for Victoria should provide for the prosecution and conviction of corporations on the basis of direct liability but should also recognise the difficulties posed in proceeding against corporations in that way. It should specifically provide for an offence of document destruction by criminal negligence. This would recognise the important responsibility of the modern corporation to maintain a top class document management and retention programme in order to fulfil not only its various legal obligations but also to perform at its optimal level as a business. This is not a peripheral issue but central to the healthy life of a corporation. This is part of the broad context in which one needs to examine corporate criminal responsibility in the particular context of the destruction of documents relevant to civil litigation.

The level of negligence required of a corporate entity would need to be very high and would only operate in cases of serious failure of corporate responsibility. Again, the Commonwealth *Criminal Code* of 1995 provides a living example, “such a great falling short of the standard of care that a reasonable person would exercise in the circumstances.”¹⁸ This definition is based closely on the decision of the Victorian Supreme Court in *Nydam v R*.¹⁹ The preference would be for a provision which would only allow a corporation to be convicted if it could be demonstrated according to the usual criminal law standard of proof that there had been a reasonable anticipation of litigation at the time of the destruction or removal of the relevant documents. Also, in accordance with general principles, the test would be an objective one not a subjective one. Clearly, in the application of that test, a court would take account of a wide variety of circumstances relating to the situation of the corporation, how it conducted its affairs, and what happened in the particular case in point.

Professional Conduct of Lawyers

It is proposed in this report that there be a new piece of legislation in Victoria to govern a situation in civil litigation where it appears to the court that relevant documents are unavailable. This legislation would include situations where documents are destroyed before commencement of legal

proceedings. In exercising the relevant discretion the judicial officer in the case may well consider whether, at the time of the destruction of the documents, there was a reasonable anticipation of litigation. It would not be necessary to establish this aspect but it would obviously be a relevant factor to consider.

It is also proposed that there be a new piece of criminal law to deal with the most blatant and serious instances of destroying documents relevant to litigation. This could be modelled on Section 39 of the Commonwealth *Crimes Act 1914*. Also, recognising the traditional difficulties of dealing with corporate criminal responsibility, there would be a specific offence of criminal negligence to apply to document destruction where there was a reasonable anticipation of litigation.

The civil litigation provision would, by definition, only apply in a litigation context and when a case came to a court for interlocutory or trial purposes. One suspects that it would not be used very often but it would be important to have it available for appropriate cases and also to act as a deterrent and general educative mechanism in relation to document destruction, especially in the corporate community. Likewise, one would not expect criminal prosecutions for document destruction to be common, although it is important to have an appropriate provision available.

Something that could, however, be expected to have a day-to-day practical impact would be a conduct rule on document destruction, directed specifically at the operations of the legal profession. It would be aimed at what lawyers advise their clients about retaining documents and also at the lawyers themselves when they are in possession or control of documents which are relevant to anticipated litigation. Such a rule now applies to the legal profession in New South Wales. It was introduced following the *McCabe* case in Victoria, as part of its Legal Profession Regulations:

“LEGAL PROFESSION REGULATION 2002 – SECT 142A”

Advice on and handling of documents

142A Advice on and handling of documents

- (1) A legal practitioner must not give advice to a client to the effect that a document should be destroyed, or should be moved from the place at which it is kept or from the person who has possession or control of it, if the legal practitioner is aware that:
 - (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and*
 - (b) following the advice will result in the document being unavailable or unusable for the purposes of those proceedings.**
- (2) A legal practitioner must not destroy a document or move it from the place at which it is kept or from the person who has possession or control of it, or aid or abet a person in the destruction of a document or in moving it from the place at which it is kept or from the person who has possession or control of it, if the legal practitioner is aware that:
 - (a) it is likely that legal proceedings will be commenced in relation to which the document may be required, and*
 - (b) the destruction or moving of the document will result in the document being unavailable or unusable for the purposes of those proceedings.**

- (3) *Subclauses (1) and (2) apply even if there has been no indication that a specific person intends to commence proceedings in relation to which the document concerned may be required.*
- (4) *A contravention of this clause is declared to be professional misconduct.*
- (5) *Despite the other provisions of this clause, it is not professional misconduct for a legal practitioner merely to move a document in the possession or control of the legal practitioner to a person who is lawfully entitled to possession or control of the document if the person requests the practitioner to do so.*
- (6) *In this clause:*
 - “destroy” a document includes make the document illegible.*
 - “legal practitioner” includes an interstate legal practitioner.*

Consistent with the discussion and proposals elsewhere in this report about new civil litigation and criminal law provisions, it would seem sensible to replace the New South Wales concept of the “likelihood” of legal proceedings being commenced with that of “reasonable anticipation” of litigation. Breach of a rule of this kind would be professional misconduct. It would apply to legal practitioners generally in Victoria, thus covering both barristers and solicitors.

Whether the proposal should be taken further and specifically incorporated by way of, say, an amendment to the *Legal Practice Act*, and provision made for the application of criminal law penalties is an interesting question. Under certain circumstances, a lawyer who destroys a document relevant to litigation may be guilty of an offence under the criminal law provision proposed in this report. But that provision would not cover advising a client on the proposed destruction of material relevant to a legal proceeding. One could argue in that some instances the behaviour of a legal practitioner in advising a client about document destruction could be sufficiently blatant and reprehensible to justify criminal liability. However, my sense is that, for the time being at least, the civil and criminal law initiatives suggested in this report would be a reasonably powerful combination in relation to document destruction. On that basis, it should be sufficient that the role of lawyers in advising clients on the matter is governed by a professional conduct rule, as distinct from yet another criminal law provision. It may be a matter of testing the proposed regime, seeing what happens in practical terms, and then assessing whether any further legislative steps are required.

A related question is whether such a new conduct rule should be incorporated into the relevant provisions of the *Legal Practice Act* or simply become part of the detailed, respective sets of conduct rules of the Law Institute and the Bar. Given the significance of the issue, it may be preferable to give it greater prominence by putting it into the relevant statute but this is not a matter about which I have strong or clear views at this stage. It could be something considered at a later stage by those charged with the responsibility of looking overall at the possible implementation of the proposals in this report.

8: CONCLUSION

The recent *McCabe* case in the Supreme Court of Victoria raised a key issue of principle and practice for the civil justice system and indeed for the administration of justice generally in Victoria. The Trial and Appeal Courts wrestled with the difficult and complex issue of the destruction of documents relevant to legal proceedings, in circumstances where the destruction occurred before the proceedings were formally commenced. While it arose in the particular circumstances of the *McCabe* case, the issue is relevant to all civil litigation in the State, and has attracted national and international interest because of its significance to the operation of all common law type civil justice systems. How such an issue is resolved not only has important practical consequences for parties to civil litigation but also could affect the general role and integrity of the civil justice system. This, in turn, can impact upon how the system is regarded by the community.

There is no evidence available to demonstrate, or to shed any real light on, the nature and extent of the destruction of material relevant to judicial proceedings. The fact of the matter, however, is that the issue squarely arose in the *McCabe* case. This report contains a discussion of the circumstances in which it arose; the general issue of document destruction in relation to litigation; the policy considerations which, arguably, are relevant to it; and some proposals for changing the current legal and procedural position in Victoria.

The particular proposals, expressed in fairly general terms, are set out separately at the front of the report. Their underlying philosophical and policy premise is that destruction of such material raises important issues of civil and criminal justice – issues of fairness and integrity in the civil justice realm, and matters of limiting and punishing certain kinds of behaviour in the criminal justice area.

Document destruction of the kind discussed in this report can take many forms and have a great variety of impacts and consequences but at the core of concern are situations where material is destroyed in the knowledge that litigation is about to occur or at a time when it is reasonably anticipated. It seems to me that legislative and other action is required to make it clear that such behaviour is inappropriate and to provide the legal and procedural machinery to deal with its consequences.

9: ENDNOTES

- 1 It was the Solicitor-General for Victoria, Ms Pamela Tate, SC, who appeared on behalf of the Victorian Attorney-General in seeking leave to intervene in the application for special leave to appeal to the High Court in *McCabe*. Also, a paper prepared by Ms Tate on the *McCabe* case has been most helpful to me in providing background for this review (See “The Issues Raised by the McCabe case”, speech delivered at the Victorian Government Solicitor’s Office 2003 Seminar Series, Melbourne, 30 October 2003).
- 2 [2002] VSC 73, 78 (22 March 2002).
- 3 This is interesting because although there has been a good deal of discussion in the U.S. about document destruction issues, the matter has received virtually no attention at all in the U.K. or Australia. As an illustration of this, last year (2003) a 1,000 page book was published in the U.K. on civil procedure, with no mention of document destruction as an issue. (See Zuckerman, A. *Civil Procedure*, Lexis Nexis, Butterworths, U.K. 2003). Also, there is no mention of document or evidence destruction in the Index to Cairns, B., *Australian Civil Procedure*, Lawbook Co. Fifth Edition, Australia, 2002.
- 4 [2002] VSCA 197 at 106 (6 December 2002).
- 5 “Document” should be defined broadly for the purposes of this discussion and should obviously include all modern forms of electronic capture of documentary material. And, as a submission from the Victorian Bar has suggested, perhaps the scope of any “court power” or professional conduct reforms should extend to property items (chattels), as well as documents. The Commonwealth criminal law provision discussed in the next section of the report has that coverage already.
- 6 Cameron, C. and Liberman, J. “Destruction of Documents Before Proceedings Commence: What is a Court To Do?”, www.austlii.edu.au/au/journals/MULR/2003/12.html.
- 7 Cameron and Liberman (See *Endnote* 6 above) at P.20.
- 8 Gorelick, J.S., Marzen, S. and Solum, L., *Destruction of Evidence*, John Wiley & Sons, U.S., 1989, at P14.
- 9 Gorelick, Marzen and Solum, (*Endnote* 8 above) at P.15.
- 10 Van Patten, J.K. and Willard, R.E. “The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation”, 35 *Hastings Law Journal*, (1984), 891 at 917.
- 11 Submission from Slater & Gordon, Lawyers.
- 12 Submission from Jonathan Liberman, Director, Law and Regulation, VicHealth Centre for Tobacco Control, The Cancer Council Victoria. The submission is endorsed by the Consumer Law Centre Victoria, the National Heart Foundation (Victoria Division) and VicHealth (The Victorian Health Promotion Foundation). The criminal law proposals put forward in this report are also broadly consistent with those contained in the Liberman submission.
- 13 See *Endnote* 11 above.

14 (1992) 174 CLR 268.

15 This is very similar to the approach taken in Section 243 of the *Criminal Law Consolidation Act 1935* of South Australia, which deals with the fabrication, altering or concealing of evidence which is or may be required in a judicial proceeding. The Section specifically includes “proceedings that are to be or may be instituted at a later time”.

16 Clough, J. and Mulhern, C., *The Prosecution of Corporations*, Oxford University Press, Melbourne 2002, p.71.

17 See, however, *Meridien Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918, 923 where Lord Hoffman indicated that it may be sufficient to find criminal liability if the conduct in question can be attributed to the board of directors.

18 Section 5.5, Commonwealth *Criminal Code Act 1995*.

19 [1977] VR 430.

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