Where Best Practice Recordkeeping Ends, Corruption Begins: The Heiner Affair

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Abstract

The catch-cry of 'where best practice recordkeeping ends, corruption begins' should be emblazoned across the heart and mind of every recordkeeper[1] because their mission lies at the very core of enduring democratic values which, because of the corrupting nature of power, are under constant threat. Access or denial of access to information can be a pivotal factor in the exercise of power by those who wish to remain in power without being held accountable for their actions. The centrality of sound professional recordkeeping in maintaining civil society and public confidence in government is paramount.

The Australian Society of Archivists in its 1997 statement about the Heiner Affair noted that:

> The operation of a free and democratic society depends upon the maintenance of the integrity of the public record. Public records are a key source of information about government actions and decisions. They provide essential evidence of the exercise of public trust by public officials. This in turn helps ensure public accountability and protection of the rights of citizens.[2]

While the principle of sound recordkeeping is generally accepted, but perhaps not fully appreciated, it can be compromised by recordkeeping practitioners or Crown (elected or appointed) decision-makers turning a blind-eye to so-called 'noble cause' conduct or the manipulation of the recordkeeping role to suit another purpose. Consequently, a senior recordkeeper's failure to hold firm and refuse an *ad hoc* disposal request desired by those in power in apparent contravention of due process,[3] can, in certain circumstances, lead to catastrophic consequences far beyond the imagining of most recordkeeping professionals. A nation can be brought to the brink of being ungovernable when the rule of law is enforced by 'the governors' for 'the governors' according to different standards from those that apply to 'the governed'. The Heiner Affair[4] in Australia is a classic demonstration of one such recordkeeping failure.

Initiated by Lindeberg's[5] 1990 whistleblowing action, the Heiner Affair has manifested itself as an epic clash between democratic and undemocratic values with universal application. At its core is the fundamental democratic issue of equality for all before the law.[6] Essentially, it is about whether or not the law should be applied by 'the governors' as equally and predictably to 'the governors' as it is to 'the governed' in similar circumstances.

The Heiner Affair has accumulated many layers over its 20-year life span. Its longevity may tend to make it difficult to understand, whereas the clarity of its fundamental principles should not cause any such difficulty. Running through all layers is the golden thread of the necessity for professional recordkeeping and probity in public office.

This paper primarily addresses the role of public recordkeeping in the Heiner Affair, but other layers have been added so that recordkeepers themselves may reach a better appreciation of just how important this role is in any society governed by the rule of law. Without proper recordkeeping and respect for proper process, the rule of law is subject to failure.

Introduction

Allegations of child abuse at a Queensland state facility and the continued perversions of justice lie at the core of what has become known as the Heiner Affair (named after the retired magistrate, Noel Heiner, who led the Inquiry). Unanswered questions about the short-lived Inquiry into what was going on in a Brisbane youth detention facility (John Oxley Youth Centre) in the late 1980s and early 1990 and subsequent questionable actions by public officials will not go away. Ever since the premature termination of the Heiner Inquiry and the deliberate shredding of the material it gathered (*the records*), the Queensland government has been dogged by allegations of misconduct. After two decades the questions and allegations continue unabated.

On 26 May 1997, Queensland Senator John Woodley, when speaking about the Heiner Affair in the Australian federal Senate, noted that:

> The management of our public records in Australia is a measure of how open and accountable our governments are. It is a measure of our commitment

> to democratic principles and the rule of law and it is a yardstick by which we can be judged internationally.

Senator Woodley went on to say that:

> …it is totally unacceptable for any Australian government to send to the international community a signal that shredding public records to stop their use in court proceedings or to stop lawful access to them is acceptable conduct in our public and legal administration or in any aspect of public life at all. It brings our reputation as a nation governed by the rule of law into unacceptable disrepute.[7]

Such statements emphasise the importance of the role of recordkeeping in our society, particularly in the government sector. It follows that, unless recordkeepers themselves take their professional responsibilities seriously, others will not. When a failure to stand up for recordkeeping principles occurs by one of their own, it may bring adverse consequences on all recordkeepers, their workplace (public/private/corporate), and the whole recordkeeping profession.

Records and 'public' records

The international standard ISO 15489 defines *records* as "information created, received, and maintained as evidence and information by an organization or person, in pursuance of legal obligations or in the transaction of business"; and *records management* as "the field of management responsible for the efficient and systematic control of the creation, receipt, maintenance, use and disposition of records, including processes for capturing and maintaining evidence of and information about business activities and transactions in the form of records".[8] Records may be in any format.

Public records are those records created or received by a public officer (i.e. someone employed in the public sector, be it at the federal, state or local level) in the course of his/her duties. Public recordkeeping has become highly regulated and the Australian national, state and territory governments all have legislation governing the management of public records. This includes directions on the retention and disposal of public records. Most records (public or otherwise) will be destroyed at the end of their useful business life and details of when this is destined to occur should be defined in an 'approved' *Retention and Disposal Authority/Schedule*. Only a very small percentage of the records created, usually 3–10%, will be deemed significant enough, for **operational, evidential, accountability, legal, research or historical reasons,** to be retained for lengthy periods of time, even permanently. Those records identified as having permanent or enduring value are termed *archives*.

Legal disposal guidelines for Queensland

Disposal of public records in Australia is legally sanctioned under specific legislation at state and federal levels depending on the specific public agency. At the time of the Heiner Inquiry state agencies/departments in Queensland were subject to the *Libraries and Archives Act 1988.*[9] The head of the archives authority (in Queensland the State Archivist) is the one with ultimate authority under the legislation for the disposal of records. However, there is usually a delegation of this authority. Normally, each agency would present a *Retention and Disposal Authority/Schedule* to the relevant authority and, once this *Authority/Schedule* is formally 'approved', records can be destroyed according to the terms of the *Authority/Schedule* without further consultation with the state or federal authority.[10] In the development of such a schedule, a broad range of factors such as legislative requirements and evidential and historical values is considered in the decision about how long a specific type of record is kept. Those records considered to have little ongoing value will have very short time frames or sentences applied to them; others may be considered to have long-term or enduring value and become archives. Records that fall outside a particular approved schedule[11] usually have a special *ad hoc* schedule prepared by the controlling agency for approval by the relevant archival authority. This process has been well established in most Australian jurisdictions for decades. For a disposal decision to be made outside the established process is of itself unusual.

Are the Heiner documents public records?

The first question that should be answered when discussing the Heiner Affair is, where does *responsibility* for the management of the records of the Heiner Inquiry reside? If an investigation, inquiry or royal commission

or the like, is set up (and funded) by the Parliament or a government agency, are the records of that inquiry public records? In most cases the answer would be a resounding YES! Sometimes, if the case is unclear or ambiguous, specific arrangements are made to ensure that the records are managed appropriately, as was the case in Western Australia when specific legislation was enacted to preserve the records of the Royal Commission into Commercial Activities of Government and Other Matters (colloquially known as WA Inc) of 1991–1992.[12]

Regardless of the degree of sensitivity or its size, any inquiry should have protocols in place to manage the records created and accumulated in the course of the inquiry. The individual charged with responsibility for the inquiry should ensure that the process is consistent with all requirements under the instrument of establishment and other relevant laws of the particular jurisdiction. Even the smallest formal inquiry usually has a dedicated records officer. Larger inquiries usually have a team of records officers. For example, WA Inc had a records staff of over 40.

Heiner was appointed lawfully to carry out an inquiry into child abuse at the John Oxley Youth Centre (JOYC) by the Queensland Minister for Family Services, the Hon. Beryce Nelson, on 2 November 1989 pursuant to section 12 of the *Public Service Management and Employment Act 1988*. In a signed statement dated 15 May 1998, witnessed by former Queensland Police Commissioner Noel Newnham, and tabled in Queensland State Parliament on 25 August 1998, Nelson confirmed that, after taking Crown Law advice in respect of establishing an inquiry, she anticipated that the following known and/or suspected concerns would be investigated by Heiner:

> …that some boys and girls were being forced into sexual activity against their wishes, for the benefit of others; that illicit drugs and prescribed medications were being brought into the Centre, sometimes by staff and sometimes by detainees who had simply walked out and returned apparently without any permission; that some staff were physically and sexually abusing children in their care.[13]

As a properly constituted public inquiry, the Heiner Inquiry was an ‘agency’ of the government even if not established under the *Commissions of Inquiry Act 1950*.[14] If that is indeed so, the records of the Heiner Affair should have been considered public documents from the very beginning and managed under the protocols relevant to Queensland agencies under the *Libraries and Archives Act 1988*. Had the records of the Inquiry been ‘managed’ appropriately from the beginning, the sorry episode in Queensland history that became known as the Heiner Affair would probably never have eventuated.

Fundamental recordkeeping premise

One stark feature in the Heiner Affair is that the relevant laws that have been breached are not complex in their interpretation. Distinguished counsels such as the Hon. David Malcolm, the Hon. Jack Lee, the Hon. Roddy P. Meagher and Independent Commission Against Corruption (ICAC) Commissioner, the Hon. Barry O’Keefe, have advised consistently that they were unarguable in wording and intent.[15]

For recordkeeping professionals, the starting point is the fundamental recordkeeping premise that public records are only ever destroyed through the mechanism of an approved schedule or authority. Furthermore, when records are known to be required, or likely to be required, in judicial proceedings, it is not a signal to destroy them to prevent access, and yet that is exactly what occurred in the Heiner Affair. It is more likely that any such records foreshadowed for judicial proceedings of any kind would have a ‘hold’ or ‘freeze’[16] applied to them, ensuring their retention for just that purpose. Best practice recordkeeping, as promulgated in the international recordkeeping standard,[17] ensures that governments and corporations are held to account because records are retained as long as they are required for a multiplicity of purposes. As the Heiner Inquiry progressed, it received and generated agency ‘public records’ as was required under the relevant Act.[18] The management and safe-keeping of such records is especially vital when it is known that judicial proceedings have been foreshadowed or are a realistic possibility and the records may be required in a justiciable matter (e.g. as was the case in *Ensbey*), and yet, in the Heiner

Affair it appears that records were destroyed without initially raising any suspicion of official misconduct.

Baptist Pastor Douglas Ensbey,[19] as a private citizen, was charged and successfully prosecuted pursuant to section 129 of the Queensland *Criminal Code* in 2003/2004 for engaging in a similar type of shredding conduct *before* the relevant judicial proceedings had commenced. Ensbey's counsel made an unsuccessful application before the Queensland Director of Public Prosecutions (DPP) on 13 October 2003 to have the charge dropped against their client by citing what had occurred in the Heiner Affair. On 6 November 2003, the new DPP, Leanne Clare, refused the application.[20] She rejected the earlier interpretation of section 129 applied in the Heiner Affair by her predecessor.[21] Citing *Rogerson*,[22] she held that Ensbey's shredding conduct struck at the heart of the administration of justice because of the deliberate attempt to obstruct it. She declared that it was in the public interest to proceed with prosecution and Pastor Ensbey was duly found guilty. His Honour Justice Davies' 2004 ruling[23] in the *Ensbey* case noted that:

> …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.[24]

Any claim, especially by lawyers or record managers, that this principle was unknown before *Ensbey*, is naïve in the extreme. The principle is as long-standing as the right to due process itself. In their letter of 16 August 2007 to Premier Beattie,[25] eminent legal professionals noted that "there is authoritative case law available for citing dating back as far as 1891 in *R v Vreones*".

In terms of providing a measurement for the offence of knowingly destroying evidence, in the *Ensbey* case J.A. Williams stated that:

> 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.[26]

Destruction of evidence

In a democracy, all citizens have a right to their day in court without interference from others, especially from the government or one of its servants. Indeed, it is the duty of the State/Crown to ensure that such a right can be exercised. Any destruction of known or foreseeable evidence relevant to judicial proceedings is clearly inappropriate and inadvisable.

The Queensland *Criminal Code* clearly states that, when an offence is committed, all those party to it in any way are also culpable. Chapter 2, section 7 (Principal offenders) states that:

> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.[27]

Section 129 of the Queensland *Criminal Code*—destruction of evidence, provides that:

> Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.[28]

Other relevant provisions of the Queensland *Criminal Code* relate to conspiracy to defeat justice (s. 132), and attempting to pervert justice (s. 140).

The wording of this legislation is very clear. Do records managers (and other senior bureaucrats who may be part of the decision-making process) overlook such legislation when engaging in appraisal decisions which authorise the destruction of documents?

If equality before the law matters then serious questions arise. How could so many high-ranking public officials and politicians, required by law to act honestly, impartially and in the public interest, have initially got it so terribly wrong? And how was it that they were reluctant to modify their position despite receiving advice and warnings from eminent jurists, and others including the archival community,[29] that something was seriously amiss? What does prosecutorial discretion mean in terms of protecting the public interest when 'the governors' appear to break the law?[30] How could all this happen and continue for so long without giving rise to the conclusion that a systemic cover-up associated with the Heiner Affair has been going on in 'post-Fitzgerald Queensland'?[31]

The Rofe Audit

In an effort to establish a complete, accurate record of the events relating to all aspects of the Heiner Affair, a detailed two-year audit (2005–2007) of the agreed facts of the Heiner Affair was conducted by leading Sydney silk, David Rofe QC, Brisbane solicitors Ryan & Bosscher Lawyers, and the author. Based on departmental and Cabinet evidence, admissions and acts of omission, reports, submissions, and case law etc., it was the first thorough audit of its kind into the Heiner Affair. When attempting to present the audit in federal parliament in 2007, Senator Barnaby Joyce noted that "The audit performed by David Rofe QC makes clear that the cover-up of this matter has been a corrupting influence on the Queensland legal system".[32]

At the core of the Rofe Audit's findings is the premise that the shredding was a *prima facie* illegal act, and that the relevant law, section 129 of the Queensland *Criminal Code*, is so unambiguously clear in its wording and intent, that no competent lawyer should have so misconstrued it as they did in the Heiner Affair without giving rise to serious concern. This position is now supported by a plethora of retired superior court judges, including the former Chief Justice of the High Court of Australia, the Right Honourable Sir Harry Gibbs,[33] QCs, barristers, lawyers and legal academics. While the audit is still confidential, the facts used in its compilation can be discussed openly because they are in the public domain or covered by parliamentary privilege.

The Rofe Audit established compelling evidence of a widespread systemic cover-up. The audit suggested some 68 alleged *prima facie* criminal charges against those involved in the initial shredding decision and others who subsequently handled Lindeberg's 1990 public interest disclosure (PID). The audit now provides a compelling blueprint for a commission of inquiry.

The extent of the Heiner Affair

The origin of the Heiner Affair lies in the unresolved sexual assault of a 14-year-old female indigenous inmate by male inmates of the John Oxley Youth Detention Centre (JOYC) during a supervised bush outing on 24 May 1988. A record on this incident was kept on file by the Queensland Government as per normal administrative practice. Details on the file were not revealed publicly until 17 January 2002 when access to the documents was obtained through a freedom of information (FOI) application lodged by the sexual assault victim. Evidence exists showing that, during the course of an inquiry between November 1989 and January 1990, retired Magistrate Noel Heiner asked witnesses about this incident because certain JOYC staff had made allegations of a cover-up at the time.[34] In doing so, Heiner made those 'public' records relevant and potentially probative to (a) the offence itself, and (b) offences against others in positions of authority with a duty of care when the offence occurred.[35]

In the last five years, the reach of the Heiner Affair has extended to the highest public offices of Australia. All because of an extraordinary concatenation of events involving certain public officials who, at various times, were themselves involved in the Heiner Affair while working in Queensland and who later were either elected or appointed to high public office in Canberra and/or elevated to judicial office in Queensland.

In his evidence to the Tasmanian Parliament's Joint Select Committee on Ethical Conduct (JSCEC) on 24 November 2008, Lindeberg gave an opinion into the possible ramifications that any inquiry into the Rofe Audit might have:

> Such an inquiry, however, would not only rock Queensland to its foundations but the nation itself because it is known that the Prime Minister Rudd and Her Excellency Governor-General, Quentin Bryce, are adversely named in the audit. Amongst other things, six serving Queensland judicial officers are adversely named.[36]

What was known and by whom?

It is alleged that information known now has always been known to those in government but it was either kept hidden, ignored, misrepresented or downplayed by those in power. It was only through the persistence of Lindeberg and others such as the University of Queensland's Associate Professor Bruce Grundy,[37] and the convergence of events over time, that hidden truths have come to light and the full extent and gravity of the cover-up can be realised.

It is beyond doubt that the Queensland Government was always aware of a defamation action threatened by JOYC Manager, Peter Coyne, and others, should adverse outcomes result from the Heiner Inquiry. All parties were aware that Heiner would be, *inter alia*, investigating allegations of child abuse (for example, the alleged handcuffing of children to fences and drainage grates at night) because such a complaint was lodged by a JOYC staff member with the Department on 10 October 1989, and a copy subsequently provided to Heiner to establish its validity. Coyne was given only a summary of the complaints made against him in which child abuse allegations were cited.[38]

There is no dispute that the Minister for Family Services in the Goss Government, the Hon. Anne Warner, also knew about this alleged abuse. In *The Sunday Sun* of 1 October 1989[39] Warner urged the Cooper Government to set up an inquiry, which it duly did, namely the Heiner Inquiry. A realistic possibility existed that the evidence gathered was relevant for future police or other Crown inquiries such as the Criminal Justice Commission (CJC) and/or the 1998/99 Forde Commission of Inquiry into the Abuse of Children in Queensland Institutions[40] and a possible action in breach of fiduciary duty against the State of Queensland by those JOYC children who alleged abuse, as indeed one victim of May 1988 did in 2002.

It is difficult to believe that this state of knowledge did not reach the Goss Cabinet *before* the shredding decision was taken on 5 March 1990. In February 1999, former Environment and Heritage Minister the Hon. Pat Comben, confirmed this on Channel 9's *Sunday* program:

> In broad terms we were all made aware there was material about child abuse. That there was material which was said to be highly defamatory and it was accepted on face value that if this matter was of such concern that if it got to a level of cabinet decision then those allegations must have had considerable merit and substance.[41]

On 26 November 2003, current Federal Shadow Attorney-General Senator the Hon. George Brandis SC, when speaking on Matters of Public Importance regarding the establishment of the Senate Select Committee on the Lindeberg Grievance, noted that:

> …the submission was taken to cabinet at the beginning of 1990, evidently on a false premise, which had the effect of authorising, probably in breach of section 129 of the Queensland Criminal Code, the destruction of documents which proved the existence of a complaint of child abuse. That complaint, years later, was subsequently verified by the victim of that child abuse—and very serious child abuse: gang rape of a 14-year-old girl—and a member of that cabinet, Mr Comben, in years since, has confirmed on the public record that the cabinet knew about it. It does not get much more serious than that.[42]

During a debate on the Heiner Affair in the Queensland Legislative Assembly in May 2006, this admission was supported by former Goss Government Attorney-General, the Hon. Dean Wells, when he confirmed that the Heiner Inquiry allegations concerned 'suspected misconduct'. He said:

> There was a view at the time that the documents that it was required to shred did not represent the only

opportunity the complainants would have to have their allegations aired. High hopes were held that the CJC would deal with the matters that were squarely within its remit, being allegations of misconduct. Similarly, people in government felt confident that complainants like these would be much more willing to go to the police in the new post-Fitzgerald world than in the days of Terry Lewis and 'the joke' [the corrupt network in the Queensland police force].[43]

And, the letter of concern about the Heiner Affair presented to Premier Beattie in August 2007 from a number of eminent judges and lawyers also confirmed that:

> Evidence adduced also reveals that the Queensland Government and Office of Crown Law ***knew***, at the time, that the records would be discoverable under the Rules of the Supreme Court of Queensland once the expected writ/plaint was filed or served. With this knowledge, the Queensland Government ordered the destruction of these public records before the expected writ/plaint was filed or served to prevent their use as evidence.[44]

Foreshadowed judicial proceedings

However, what was known beyond any reasonable doubt were the pending claims for access to the Heiner Inquiry documents and the original complaints documents of Coyne and others.[45] On three separate occasions in February 1990,[46] Coyne's solicitors, Rose Berry Jensen, served notice on the Queensland Government by phone call and correspondence. For example, on 14 February 1990, solicitor Berry phoned Walsh, Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) acting Director-General and Matchett's Executive Officer, placing the Crown on notice. Walsh recorded the conversation in a Departmental memorandum dated the same day to his superior officer Matchett. Matchett later initialed the memo as read. Walsh noted in the memo that:

> Mr Berry is seeking assurances from you that the documents relating to the Heiner Inquiry will not be destroyed… Mr Berry made it quite clear that there is still an intention to proceed to attempt to gain access to the Heiner documents and any departmental documents relating to the allegations against Mr Coyne and that they have every intention to pursue the matter through the courts.[47]

Coyne's union organiser, Lindeberg, also affirmed a similar legal claim on the Heiner Inquiry documents at a meeting with Matchett on behalf of the Queensland Professional Officers' Association (QPOA) and the Queensland Teachers' Union (QTU) on 23 February 1990, and again in writing, for the QPOA on 1 March 1990. The QTU itself followed up with another letter to Matchett on 27 February 1990.[48]

Meanwhile, unbeknown to Lindeberg, Coyne and other interested parties, the Heiner Inquiry documents were transferred secretly from the DFSAIA to the Cabinet in early February 1990.

Having indemnified Heiner and all his witnesses and thereby making itself an interested party in any future proceedings, the Queensland Cabinet on 12 February 1990 decided to seek advice from the Crown Solicitor on the legality of holding the Heiner documents as Cabinet documents to prevent their access should a writ be issued to obtain access to them.[49] In a letter to the Crown Solicitor, Acting Cabinet Secretary, Tait, wrote on 13 February 1990:

> Advice is sought as to what action might be taken should a writ be issued to obtain information that is considered to be part of the official records of Cabinet. The information was gathered during the course of a Departmental investigation and will be submitted to Cabinet and retained within the Cabinet Secretariat.[50]

On 13 February 1990, Matchett convened a special meeting of JOYC staff at the Centre. She informed them of their Crown indemnity and that the Heiner Inquiry had been terminated. In her address to the staff she gave the following assurances:

> ...there will be no report. Thus the risk of staff being exposed to legal action is reduced…I want to remind you all however of the current Government policy regarding the legal liability of Crown employees—which you all are… In short the Crown will accept full responsibility for all claims arising out of a Crown employee's due performance of his/her duties provided these duties have been carried out conscientiously and diligently.[51]

At law, the Heiner Inquiry witnesses who, without malice, told Heiner either the truth or what they genuinely believed to be the truth—given that Heiner was lawfully authorised to receive such information about the functioning of the JOYC—were always covered by the indemnity of the Crown and qualified privilege.[52] Indeed, Crown Law advised Cabinet that any prospective action in defamation was likely to fail.[53] However, those who may have knowingly lied would not enjoy such indemnity at law. The shredding afforded these particular witnesses an unwarranted advantage.

Having given those assurances to JOYC staff, Matchett then seconded Coyne to commence special duties at the DFSAIA Head Office in Brisbane Central. Coyne believed his career had been adversely affected and linked it with the Heiner Inquiry. He immediately instructed his solicitor to serve notice on the DFSAIA of his intention to request access to the Heiner documents (and other relevant complaints documents) under the *Public Service Management and Employment Act 1988*, Regulation 65, in court, as a follow-up to his earlier solicitor's letter of 8 February 1990.[54] Clearly, the continued existence of the Heiner Inquiry documents was pivotal to the exercise of Coyne's democratic rights.

Mistake of law

On 23 January 1990, Crown Law advised Matchett that the Heiner Inquiry had been lawfully established under section 12 of the *Public Service Management and Employment Act 1988 (PSME)*. However, erroneously believing that the Heiner Inquiry documents were Heiner's private property when, by law, they were always public records, Crown Law advised that they could be destroyed provided that no court proceedings requiring their production had commenced.[55] Even after the facts changed radically on 8, 14 and 15 February 1990 (applications for the documents), this advice seeped into the Cabinet, despite being superseded by advice to Cabinet from Crown Law on 16 February 1990, which stated that it came to a "better view" than its previous view as set out on 23 January, that the Heiner Inquiry documents were indeed always "public records" and not Heiner's private property and therefore were protected at law.[56]

This later advice was also wrong-at-law in that it was indifferent to Coyne's legal rights and improperly deferential to Cabinet's desire at the expense of due process. The Crown had a duty to act always as a 'model litigant', that is, with complete propriety, fairness and in accordance with the highest professional standards.[57] It recognised that once the (expected) writ was served and third party discovery/disclosure processes activated against the Queensland Government, any claim of 'Cabinet confidential' would have "…very limited chance of success"[58] to prevent access because the Heiner Inquiry documents did not properly fall under any exempt access category.

On the weight of available evidence, the Queensland Government reasonably *knew* that any judicial review would grant access to the particular documents. Thus, by destroying the Heiner Inquiry documents, it knowingly and deliberately interfered with the judicial process because a court cannot grant access to documents which no longer exist.

Delaying tactics

Having placed the Queensland Government on notice of foreshadowed judicial proceedings, Coyne's solicitors received letters[59] informing them that Crown Law's advice was still being considered and that the Government's position was 'interim'. It is possible to view these letters as deliberate delaying tactics until the shredding order of 5 March 1990 was carried out, on 23 March 1990. The Morris and Howard Report of 1996 into the allegations of Lindeberg, Harris and Reynolds,[60] states:

> It is impossible to accept that Ms Matchett honestly believed that the matters previously raised by Mr Berry were going to be "addressed" upon the receipt of "final legal advice." In all of the circumstances, it is perfectly apparent that she did not have the slightest intention of addressing Mr Berry's legitimate demands (on behalf of Mr Coyne) that he be permitted to exercise his legal rights under Regulation 65; on the contrary, it was clearly Ms Matchett's intention to avoid addressing these matters raised by Mr Berry, by procuring the destruction of the Heiner documents.[61]

Further incriminating evidence

The advice to Matchett from Crown Law on 18 April and 18 May 1990 tells a chilling story. The first advised that the documents relating to the original complaints were in the ownership of the Crown and that under *PSME Regulation 65* Coyne was entitled to access the records "if a decision is made not to destroy them".[62] Relevantly, Coyne and others were known to be seeking that lawful access from at least 8 February 1990, and, if necessary, would press for access through a court order. Matchett still wanted to return the original complaints to the union official who handed them to the former Director-General of the Department of Family Services, Alan Pettigrew, at the beginning of the Heiner Inquiry in October 1989, and sought assistance from Crown Law on 8 May 1990[63] in this regard. On 18 May 1990,[64] Crown Law supplied draft letters to Matchett "in accordance with your instructions". The accompanying letter noted that the drafts would be of use only if the material had been destroyed or returned to the union officer as they specifically noted that the agency did not hold any of the records being sought. Clearly, Coyne's known legal right of access was not a consideration.[65]

It is open to suggestion that this conduct was in *prima facie* breach of the *Criminal Code*,[66] the *Criminal Justice Act 1989*[67] and potentially the *Discovery/Disclosure Rules of the Supreme Court*[68] because sufficient evidence exists to demonstrate that documents which were (a) immediately accessible under Coyne's application of 8 February 1990 pursuant to *PSME Regulation 65*, and (b) required in foreshadowed judicial proceedings if access were not granted out of court, were knowingly and deliberately disposed of.

Morris and Howard reported that on 23 May 1990, the DFSAIA realised that it still held photocopies of the original complaints and that they were immediately and secretly destroyed without prior approval from the State Archivist. Senior DFSAIA bureaucrat, Donald A.C. Smith, noted his (destruction) action on page 2 of the advice to Matchett from the Crown Solicitor of 18 April 1990, with an arrow to the passage which said that the photocopies supplied to Crown Law for "perusal and consideration" were being returned to the DFSAIA's safekeeping.[69]

On 16 February 1990, aware of the legal demands for access to the Heiner Inquiry documents and original complaints, Ken O'Shea, then Crown Solicitor, advised the Goss Cabinet that the Heiner Inquiry documents could not be reasonably described as material gathered in order to formulate a Cabinet submission and therefore any claim of "Crown Privilege" to resist access under the discovery and disclosure Rules of the Supreme Court would fail once court proceedings commenced. He went on to say, in a "better view" to the previously stated (mistake of law) view in the advice of 23 January 1990, that the Inquiry documents would have to be described as "public records" in terms of Section 5(2) of the *Libraries and Archives Act 1988*[70] because they were now in the possession of the Crown, and because:

> The overwhelming difficulty in relation to this matter (i.e. deciding whether the material could be defined as "public records" or Mr Heiner's private property) is that the precise terms of engagement of Mr Heiner remain vague but at the very least, he must have been acting as a consultant or agent of the Crown and in those circumstances, it would appear that the documents prepared during the course of his consultancy or period of agency were prepared for and are held on behalf of the Crown.[71]

Enter the State Archivist[72]

On 23 February 1990, the Goss Cabinet's acting secretary, Tait, faxed a letter to McGregor, the State Archivist, and had the Heiner Inquiry material delivered to State Archives. The letter advised McGregor that the material was of a defamatory character, and further (while failing to discuss specifically Coyne's known foreshadowed legal action) that:

> ...the material could not be fairly described as "Cabinet documents" unless they were created for the purposes of submission to Cabinet. This appears not to be the case and any claim by the Crown for "Crown Privilege" would therefore, have little chance of success in order to maintain the confidentiality of the material.
>
> The Government is of the view that the material, which I understand includes tape recordings,

> computer discs and hand-written notes, is no longer required or pertinent to the public record.
>
> The question of the destruction of the material therefore falls within the responsibility of the State Archivist under Section 55 of the *Libraries and Archives Act 1988* and your urgent advice is sought as to the appropriate action to be taken in this regard.[73]

On the same day that the letter was received, McGregor and her colleague, Kate McGuckin, decided that the material could be destroyed because it had no permanent value. Despite a recognition that the Heiner Inquiry documents were not Cabinet documents, the immediately obvious issue of whether Cabinet had any legal authority over them appears not to have been considered by McGregor and McGuckin, despite it being strongly open to speculation that the Heiner Inquiry documents were being secretly 'warehoused' in Cabinet in order to circumvent access. McGregor faxed her decision to Tait on 23 February 1990:

> Thank you for your letter of 23 February 1990 regarding the disposal of certain records of an enquiry by Mr N J Heiner in November 1989 into certain matters relating to the John Oxley Library [sic] Youth Centre. These records were delivered to my office on 23 February 1990. They were examined by myself and Ms Kate McGuckin, Senior Archivist, User Services. The records consisted mainly of tapes and transcripts of interviews and some associated notes and correspondence. I am satisfied that they are not required for permanent retention. I hereby give approval, under the terms of Section 55 of the *Libraries and Archives Act 1988*, for the destruction of these records.[74]

Despite all this activity concerning anticipated judicial proceedings dependent on the continuing existence of the Heiner Inquiry documents[75] and, with complete indifference to the Crown's overriding duty to the courts and the due administration of justice, Crown Law advised Matchett on 26 February 1990 (in response to her letter of 22 February 1990) that "…the matter cannot advance further from the Department's point of view until Cabinet makes a decision".[76]

According to the findings of the *Morris and Howard Report*, there was no doubt that DFSAIA officers were indeed aware of a realistic possibility that the records in question would be required for judicial proceedings, with perhaps four separate kinds of judicial proceedings open to Coyne alone. They were: (a) a prerogative Writ of Prohibition to restrain the continuation of the Heiner Inquiry; (b) proceedings to enforce his rights under *PSME Regulation 65*; (c) proceedings in defamation; and (d) proceedings for some form of relief in respect of his involuntary secondment away from the JOYC.[77]

At the time in question (1989-1990), destruction of public records in Queensland came under section 55 of the *Libraries and Archives Act 1988.*[78] By this time most other jurisdictions in Australia had formal schedules in place for the disposal of records. Queensland did not have such a schedule until 1997.[79] Previously, public authorities in Queensland were required to apply directly to the State Archivist or to the Library Board on an *ad hoc* basis for approval to dispose of public records.

On 5 March 1990 Cabinet decided to shred the documents of the Heiner Inquiry for a number of reasons, the key one being "to reduce the risk of legal action against all the parties involved".[80] At the time, the Queensland Government itself was one such party to the foreshadowed judicial proceedings.

The relevant Cabinet submissions of 19 February and 5 March 1990—now publicly available[81]—confirm that members of Cabinet and certain senior bureaucrats involved in the decision-making process *knew* of the legal demands on the records. The relevant inculpatory passage in the Cabinet submission of 5 March 1990 states:

> URGENCY. Speedy resolution of the matter will benefit all concerned and avert possible industrial action. Representations have been received from a solicitor representing certain staff members at the John Oxley Youth Detention Centre. These representations have sought production of the material referred to in this Submission. However, to date, no formal legal action seeking production of the material has been instigated.[82]

On 22 March 1990, Tait wrote to McGregor again in the following terms:

> I refer to previous correspondence concerning the disposal of certain records of an enquiry conducted by Mr N J Heiner in November 1989 into matters relating to the John Oxley Library (sic) Youth Centre (sic)…On 5 March 1990, Cabinet decided that the material be handed to the State Archivist for destruction under the terms of section 55 of the Libraries and Archives Act 1988. Accordingly, I am forwarding the material to you for necessary action.[83]

The shredding occurred in secret on 23 March 1990. Parties seeking access had been assured on 19 March 1990, well *after* the Cabinet decision of 5 March to shred the documents that Crown Law advice was still ongoing and the Crown's position was "interim". The shredding was recorded in two documents obtained from the Department of Administrative Services (DAS) by Lindeberg under his Freedom of Information application of 18 January 1993. A State Archives memorandum written by senior archivist McGuckin, dated 23 March 1990, stated that:

> Ken Littleboy from Cabinet Office collected me from Queensland State Archives on 23 March 1990 at 2.30pm. We went to the Executive Building and collected the records of the Inquiry by Mr N J Heiner, that Lee McGregor and myself had inspected on 23 February 1990. We took the box of records to the Family Services Building where I took possession of the records and myself and Trevor Walsh from the department destroyed them in a shredding machine. All the records were destroyed—paper, cassettes and computer disc.[84]

It is interesting to note that, despite having obtained approval from State Archives to destroy the Heiner Inquiry documents, the Queensland Cabinet Office wanted someone else to do the shredding, namely State Archives. Just as noteworthy is the fact that senior DFSAIA bureaucrat, Walsh, participated with McGuckin in the shredding despite being informed earlier by (Coyne's) lawyers that they would be required as evidence.[85]

In 1991, a submission of the Criminal Justice Commission (CJC) to the Electoral and Administrative Review Commission (EARC)[86] Issues Paper, *Archives Legislation*, the CJC expressed the view that all public servants should understand the importance of complying with legislation pertinent to the management of the public record.

Subsequent awareness

In the past there has been an inference that the State Archivist was deliberately kept in the dark during the appraisal process leading to the shredding approval granted by her on 23 February 1990. To date, her true state of knowledge has never been verified under oath —indeed throughout the CJC's so-called 'nth degree' investigation of Lindeberg's PID, neither McGregor nor McGuckin was ever questioned. The Rofe Audit of the Heiner Affair evidence indicates that McGregor was not as ill-informed as was previously thought. For most recordkeeping professionals, especially any at this senior level, the unusual request for a specific destruction outside established protocols, although within the rights of the State Archivist, should have started alarms bells clanging.

The Australian Society of Archivists updated their statement about the Heiner Affair in 1999 and noted that:

> While hindsight will always reveal examples of incorrect appraisal decisions, archivists should endeavour to minimise the risks involved by instituting and observing appraisal policies and procedures that are consistent with international professional best practice.
>
> In relation to the Heiner case, it is the view of the ASA that, while the Archivist acted in good faith, nevertheless the appraisal of the documents did not conform to these standards of best practice and, hence, was not conducive to a more satisfactory outcome. Firstly, the ad hoc nature of the disposal ruling highlights the fact that it was made in the absence of a relevant pre-existing records disposal authority. Such ad hoc appraisal decisions were and still are not uncommon in State government archives. It is, however, the view of the ASA that nowadays, in accord with the 1996 Australian Records Management Standard (AS 4390, Part 5—Appraisal and Disposal), as far as possible all appraisal rulings should be made with reference to records disposal

> authorities. Secondly, and more importantly, the speed with which the Heiner appraisal was conducted suggests that there was a departure from the usual orderly processes of appraisal that should occur in government archives.[87]

The ASA also noted:

> 1. that government archivists are key agents of public accountability and that, as such, they must have an adequate charter including statutory independence from political or any other improper interference in the discharge of their duties and responsibilities. Successive Queensland Governments have failed to enact the new archives legislation proposed by the Electoral and Administrative Reform Commission (EARC) following upon Fitzgerald's findings. The ASA reiterates its earlier demand that the Queensland Government enact legislation which guarantees the role and future independence of the State Archivist in order to help ensure the integrity of the public record in that State.
>
> 2. That government archivists must at all times endeavour to observe professional appraisal and disposal practices and procedures governed by an orderly regime of records disposal authorities and that, in particular, archivists should strongly resist any pressure to make hasty and/or ad hoc appraisal decisions.[88]

The shredding came to public notice on 11 April 1990 when published on page 1 of *The Sun*,[89] headed "Labor Blocks Secret Probe".[90] Warner claimed that there was no point in retaining the material.

On 17 May 1990, Coyne wrote the following letter on DFSAIA letterhead to McGregor which must have alerted her to the true status of the documents she had approved for destruction on 23 February 1990. Coyne said:

> …Mr Heiner conducted an investigation of complaints by certain members of staff at John Oxley Youth Centre in late 1989 and early 1990. Documents associated with this investigation are held by the Department of Family Services and Aboriginal and Islander Affairs… My solicitor and I have made legitimate requests for a copy of these documents. The Director-General is still seeking legal advice and has been fully aware of the possibility of legal action…According to *The Sun* newspaper of 11th April 1990, all documents and material tendered at the Inquiry were destroyed. The destruction of documents has never been confirmed in writing by the Department…I feel certain the Director-General would not request the destruction of documents before legal advice was received and when legal action was known to be forthcoming if documents were not provided to me…Given that the State Archivist has the power to dispose of public records, I request that these documents not be disposed of before my request for a copy is decided. It is my intention to have my request determined in a court if necessary…If you are unable to comply with this request please contact me.[91]

Instead of acting independently as guardian of the public interest, it appears that McGregor contacted Walsh at the DFSAIA and took his advice. In an internal State Archives memorandum dated 30 May 1990, McGregor wrote:

> On 17 May 1990 I was contacted by phone by Mr Peter Coyne, who had been manager of the John Oxley Youth Centre at the time of the enquiry, asking for confirmation that the records had been destroyed. Acting on the advice from Mr Trevor Walsh, a senior Officer of the Department of Family Services and Aboriginal and Islander Affairs I declined to make any comment to Mr Coyne beyond suggesting that his lawyer should deal directly with the Department or with the Crown Solicitor's Office.[92]

If Coyne's letter to McGregor of May 1990 concerning the legal value of the Heiner Inquiry documents was as much a revelation to her as has been suggested, then McGregor, as the Crown decision-maker, should have quickly realised that she had been earlier misled and acted accordingly to right the matter, albeit the destroyed documents could never be replaced. Her action or lack of action however, appears to be open to serious question.

Lindeberg's Freedom of Information (FOI) application

On 18 January 1993, Lindeberg made an application to State Archives under FOI legislation for the documents relating to the decision to destroy the Heiner Inquiry documents in February/March 1990. On 24 March 1993,[93] he was informed by FOI Co-ordinator, Leanne Hardwicke of the Department of Administrative Services (DAS)[94] that five documents[95] were still extant. One

of these documents was the Crown Solicitor's advice dated 16 February 1990 to Cabinet Secretary, Tait, now in possession of State Archives. The Rofe Audit's investigation into this FOI application indicates the potential depths of the knowledge shared by McGregor, the Goss Cabinet, its secretariat and others.

The sole purpose test

Access to the advice from the Crown Solicitor's to the Cabinet Secretary on 16 February 1990, held by State Archives, was denied to Lindeberg as 'exempt matter' under section 43(1) of the *Freedom of Information Act 1992* which states that "Matter is exempt matter if it would be privileged from production in a legal proceedings on the ground of legal professional privilege".[96]

Lindeberg appealed this decision internally on 6 April 1993, and later externally to the Information Commissioner, Fred Albietz. In his internal review, DAS Deputy Director-General, Services, Ross Pitt, upheld the exemption and, *inter alia*, added: "These communications (i.e. between the Cabinet Secretary and the Crown Solicitor) were undertaken for the sole purpose of seeking that legal advice".[97]

At that time, exemption under "legal professional privilege" could be claimed, at law, only when the advice was obtained for the 'sole purpose test' relating to anticipated/pending litigation.[98] And yet, in the Heiner Affair, these parties who sought and provided the advice participated in shredding the very evidence that brought such advice into existence, and did so for the express purpose of preventing its use in those anticipated proceedings for which it claimed the (exempt) privilege in response to Lindeberg's application to State Archives of 18 January 1993, under FOI.

When finally obtained, the Crown Solicitor's advice to Cabinet on 16 February 1990 noted, *inter alia*:

> …by way of subpoena in connexion [sic] with criminal or civil proceedings or a Commission of Inquiry or by way of third party discovery in a civil action… and if …anyone who suspects he or she was defamed in any of the material produced by Mr Heiner were to commence an action against him in respect thereof, the plaintiff would, no doubt, at a fairly early stage in the action, seek an order for third party discovery of the material pursuant to Order 35 Rule 28 of the Rules of the Supreme Court.[99]

To suggest that any competent Federal or State Archives holding such material at a moment of normal procedural or *ad hoc* appraisal and disposal would not have asked fundamental recordkeeping questions such as is anyone seeking these documents in a potential court action? or why the rush? is beyond belief. Knowing that State Archives held a copy of the Crown Solicitor's advice to Cabinet of 16 February 1990, a disturbing picture emerges. Knowing the contents of the advice, together with Coyne's direct approach to State Archives in May 1990 and its subsequent immediate compliant 'no-comment' response after consultation with DFSAIA officer Walsh, then the existence of a possible *prima facie* conspiracy to defeat justice involving a number of departments becomes nigh on impossible to ignore, just in this 'recordkeeping' facet of the Heiner Affair alone.[100]

This inaction and silence persisted for a decade unchecked by Queensland State Archives and others in authority while the recordkeeping profession and others continued to debate the issue. In their letter to Premier Beattie in 2007, the legal practitioners believed that "if the Heiner affair remains in its current unresolved state, it would give reasonable cause for ordinary citizens, especially Queenslanders, to believe that there is one law for them, and another for Executive Government and civil servants".[101]

Fait accompli reported

Meanwhile, a letter from Matchett dated 22 May 1990[102] informed Coyne's solicitors, Rose Berry and Jensen (and the QPOA and QTU by separate letters), that "all material gathered by Mr Heiner in the course of his investigation has been destroyed". The letter did not mention the Queensland Cabinet's involvement or the advice from Crown Law to Matchett on 18 April 1990 of the legality of the access claim by Coyne *et al.* pursuant to *PSME Regulation 65*.

On receipt of this letter, Berry phoned Walsh on 24 May 1900. Walsh noted the conversation in a

DFSAIA memorandum to Matchett. He recorded that Berry said:

> The Department is in a lot of trouble… He advised that he wishes to be advised in writing whether the decision to destroy the documents was made by Cabinet. I advised that he would need to place any request for information in writing… Mr Berry advised that he has every intention of pursuing this matter further and that he may contact Mr D. Hammill, M.L.A., concerning the destruction of these documents.[103]

The Criminal Justice Commission's conduct and findings

On 20 January 1993, the CJC's report[104] into Lindeberg's 1990 PID found no official misconduct. It came under the authority of the CJC's Chief Complaints Officer, Michael Barnes, and CJC Chairman, Robin O'Regan QC. It appeared that the CJC's contracted barrister, Noel Nunan, *inter alia*, misinterpreted section 129 of the *Criminal Code*, misquoted and misinterpreted *PSME Regulation 65*, and misrepresented the role of the State Archivist.

In his opening statement to the Joint Select Committee on Ethical Conduct (JSCEC) on 24 November 2008, Lindeberg presented his perspective of the CJC investigation:

> ….in its so-called nth degree investigation, the CJC never interviewed any minister or chief of staff. It never interviewed the State Archivist, the departmental CEO, relevant public officials, Crown Law, Mr Heiner or his witnesses, and the list goes on. Only my union member and I were interviewed. It was conducted by a contracted barrister, Mr Noel Nunan. Unbeknown to me at the time he was an ALP member, activist, a former work colleague of Premier Wayne Goss before Mr Goss entered politics. Mr Nunan was a member of the Queensland Association of Labor Lawyers as was the CJC official, Mr Michael Barnes, who recommended him for the review purposes. They were mates investigating a mate…In the Heiner affair the prospect of charging an entire cabinet was plainly too horrendous to contemplate by crown decision makers involved. The law was abused and twisted to justify its clearance which then saw an entire system collapsing around a demonstrably flawed clearance just because an integrity tribunal declared what was always wrong to be right. It gave the naked emperor imaginary clothes of legality.[105]

Nunan advised that, because misleading an archivist was not an offence under the *Libraries and Archives Act 1988*, no offence could be made out even if she had been misled, despite sections 31 and 32 of the *Criminal Justice Act 1989* making it an offence to mislead any public official in the performance of his or her duties causing that official not to act honestly, impartially or in the public interest. Nunan also advised that McGregor had an "…almost unfettered" discretion under the *Libraries and Archives Act 1988* to order the destruction of any public record.

In respect of section 129, Lindeberg always held firmly to the view that if, as the CJC claimed, all known evidence could be lawfully destroyed to prevent its use in anticipated judicial proceedings up to the moment of those proceedings commencing (i.e. the lodging and serving of a writ), it would lead to 'a world without evidence' and would undermine the administration of justice. It was absurd for anyone to suggest that section 129's purpose in the *Criminal Code*, as drafted by Sir Samuel Griffith[106] and enacted by the Queensland Parliament in 1899, was to permit assaults on the administration of justice by wilfully destroying known or suspected evidence rather than protect it. The 2004 *Ensbey* ruling therefore confirmed Lindeberg's position rather than clarified section 129 as some[107] claimed, because it was always unambiguously clear, as was again confirmed in the judges' letter of August 2007, *The Heiner Affair: A Matter of Concern.*

Forced to seek justice outside Queensland

Lindeberg then searched for recordkeeping experts outside Queensland—Chris Hurley, Rick Barry, Terry Cook, Adrian Cunningham and Randal Jimerson, all acknowledged leaders in international recordkeeping.

For example, Chris Hurley, a former State Archivist of Victoria, wrote in *An Appreciation of the Heiner Affair in 1995, that:*

> The professional associations - the Australian Society of Archivists (ASA) and the Records Management

> Association of Australia (RMAA) have long argued the propriety of submitting records disposal practices to professional review in the interests of public accountability (not just preservation of an historical record). Nowhere has the opposing case (that governments are free to destroy records at their own discretion subject only to a consideration of historical value and that State archives authorities have no role to play in support of accountability) been so strongly and persistently placed on the public record. It cannot be allowed to stand. The ASA and RMAA should take up the challenge and do whatever is necessary to place on the public record their opposition to the stance taken by the Queensland authorities in the Heiner case.[108]

The Australian Society of Archivists issued a statement about the Heiner Affair in June 1997 and subsequently updated it in March 1999.[109]

In evidence given before the Senate Select Committee on Unresolved Whistleblower Cases (SSCUWC) on 23 February 1995, Barnes declared that McGregor was strictly fettered in the exercise of her appraisal discretion (i.e. to retain or dispose). According to him, McGregor's discretion only went to the question of a document's 'historical' value, and, even if there were legal demands on the record, that was not part of her remit as State Archivist. This view, however, ran counter to the CJC's 1991 submission to the Electoral and Administrative Review Commission (EARC) in which the CJC claimed her discretion covered a 'wide audit'. In short, the CJC recognised that the State Archivist worked within a framework of values covering accountability, administrative, data, historical and legal values.

This misrepresentation of the State Archivist's role turned the professional recordkeeping community on its head. It was an outrageous claim which is yet to be recanted by the CJC/CMC.[110] In finding no official misconduct, the CJC found that, as prior approval was sought from and given by the State Archivist, it was sufficient. It saw no value in ascertaining the morality or integrity of the process or its outcome. This appeared to be the view it took in respect of all the dealings with Crown Law, the Cabinet and DFSAIA.

Barnes gave his view of due process in evidence before the SSCUWC on 23 February 1995:

> Senator Chamarette: I am then saying that to me, from a lay point of view, to actually destroy the documents to prevent litigation being on foot seems very similar. Are you now saying that to actually use as a rationale for the destruction to prevent litigation on foot is somehow different from litigation already being on foot?
>
> Mr Barnes: Yes. With respect, I say it is a lot different. What you do with your own property before litigation is commenced, I suggest, is quite different from what you do with it after it is commenced.[111]

On the other hand, Lindeberg's senior counsel, Ian Callinan QC, advised the SSCUWC on the same day that:

> 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 it might be sued, took a decision to destroy evidence, that would be regarded as conduct of the greatest seriousness —much more serious, might I suggest, if done by a government.[112]

Callinan, in his special submission to the SSCUWC on 7 August 1995, in light of SSCUWC admissions made by Barnes concerning the Queensland Cabinet's state of knowledge at the time it ordered the destruction of the Heiner Inquiry evidence, advised that sections 129 and/or 132 were in *prima facie* breach. He also advised that the CJC's definition of "judicial proceedings" was "…too significant to ignore".[113] The system, however, continued to ignore his expert warning.

Judges speak out

In August 2007, a number of superior court judges issued a public statement, *The Heiner Affair: A Matter of Concern*,[114] calling on Queensland Premier Beattie to appoint an independent Special Prosecutor to investigate the Heiner Affair. He rejected their call. *Inter alia*, the judges stated that:

> …This serious inconsistency in the administration of Queensland's Criminal Code touching on

> the fundamental principle of respect for the administration of justice by proper preservation of evidence concerns us because this principle is found in all jurisdictions within the Commonwealth as it sustains the rule of law generally…The affair exposes an unacceptable application of the criminal law by prima facie double standards by Queensland law-enforcement authorities in initiating a successful proceedings against an Australian citizen, namely Mr Douglas Ensbey, but not against members of the Executive Government and certain civil servants for similar destruction-of-evidence conduct. Compelling evidence suggests that the erroneous interpretation of section 129 of the *Criminal Code (Qld)* used by those authorities to justify the shredding of the Heiner Inquiry documents may have knowingly advantaged Executive Government and certain civil servants.[115]

Premier Beattie resigned some two weeks later. The judges' letter was subsequently served on new Queensland Premier, the Hon. Anna Bligh, by Lindeberg's legal team in mid-September 2007. She refused to act claiming, *inter alia*, that the Heiner Affair had been thoroughly investigated by the CJC.

On 14 February 2008, documents (i.e. the 9-Volume Rofe Audit, the Judges' Statement, *The Heiner Affair: A Matter of Concern*, and a 55-page legal summary) were served by Lindeberg's solicitors on the 'bipartisan-by-law' Queensland Parliamentary Crime and Misconduct Committee (PCMC) requesting a review by an acting Parliamentary Commissioner into the CJC/CMC's handling of Lindeberg's PID (in particular the CJC's findings of 20 January 1993) pursuant to section 295 of the *Crime and Misconduct Act 2001*. The complaint was accepted.

In his 2008 submission to the Tasmanian Joint Select Committee on Ethical Conduct, Lindeberg described the issues confronting the PCMC in its duty to reach a bipartisan decision:

> In the opinion of senior counsel, the issues are very simple if the rule of law is to prevail. On the evidence supplied, there only needs to be found the low threshold of a suspicion of official misconduct to lead to the establishment of a full and an open inquiry to get to the truth. Such an inquiry, however, would not only rock Queensland to its foundations but the nation itself because it is known that the Prime Minister Rudd and Her Excellency Governor-General, Quentin Bryce, are adversely named in the audit. Amongst other things, six serving Queensland judicial officers are adversely named.[116]

An extraordinary twist

Meanwhile, in April 2008, Prime Minister Kevin Rudd announced that Queensland Governor Quentin Bryce was to become Australia's next Governor-General. The announcement created quite a stir as many were aware of the ongoing PCMC investigation into the Heiner Affair and the alleged findings in the Rofe Audit against Rudd, Bryce and others. Sydney journalist Akerman argued that "Ms Bryce should stand aside in Queensland until a proper investigation clears [sic] removes forever this taint from the Queensland government and the office of Governor in that State".[117] Despite appeals directly to the Queen,[118] the then Governor-General Major-General Michael Jeffrey, and Prime Minister Rudd, the appointment was confirmed before any proper investigation into these matters of alleged wrongdoing was concluded.

Notwithstanding that Governor-General Jeffrey acted properly in seeking an investigation and advice on the Heiner Affair by letter to Rudd on 10 June 2008 (which it appears Rudd ignored), there is, however, no evidence of any follow up by him (Jeffrey), or anyone else in public office, to assuage legitimate concerns before the swearing-in of Bryce on 5 September 2008. Under such circumstances, the office of Governor-General is unacceptably exposed to risk because of the unresolved investigation.

The Queen instructed that Lindeberg's correspondence be sent to Premier Bligh in November 2008. It appears that little consideration was given to the matter, nor was the PCMC informed of the relevance of the Queen's correspondence to its ongoing investigation into the Heiner Affair. However, on 2 July 2009, in answer to a Question on Notice on 2 June 2009,[119] Bligh noted that only a compliments slip from Buckingham Palace accompanied said correspondence and as no covering letter came with the correspondence, no action was deemed warranted by the Queensland Government. It was simply ignored.

Earlier, on 25 June 2008, (now) Opposition Leader, the Hon. Tony Abbott, delivered an adjournment speech in the Federal Parliament on the Heiner Affair. He noted Lindeberg's struggle for justice, and, *inter alia,* said:

> It is a fundamental principle of British justice that, be you ever so high, the law is above you. …If they have done the same thing, cabinet ministers, premiers, senior public servants and judges should not escape the same punishment that befalls a misguided Baptist pastor. It is pretty clear that serious mistreatment, including sexual abuse, has over the years taken place in Queensland government institutions. The South Australian government has had the courage to face up to this in appointing the Mullighan inquiry, and I call on the Queensland government to also appoint a royal commission, which should, amongst other things, draw on the work of David Rofe QC to ensure that these mistakes are never made again. …Just because this matter happened some time ago does not mean that it should no longer be investigated. …Injustice is injustice, crime is crime, wrongdoing is wrongdoing and this particular matter cries out for rectification.[120]

Invalid findings

On 24 November 2008, the majority ALP/PCMC members provided evidence to the JESCEC on the issue of bipartisanship inside the PCMC. The ALP/PCMC chairman, Paul Hoolihan, assured the JESCEC that the PCMC could not "make majority decisions"[121] when considering complaints against the CMC.

However, just six weeks later those same ALP/PCMC members used their majority to prevent the Heiner Affair being investigated by an independent parliamentary commission as desired by the non-government PCMC members. The 6-page in-house ALP/PCMC decision failed to address the allegations in the Rofe audit. *Inter alia*, it claimed that "the provision of incorrect legal advice does not of itself amount to misconduct. Something more is needed—in the way of bad faith or improper motivation or gross negligence. On all the material before the Committee, it cannot be concluded that the advice offered was so negligent or tainted by improper motive or considerations".[122]

In effect, the ALP/PCMC members argued that any so-called competent lawyer may advise a client to get rid of documents to prevent their known use as evidence before the expected judicial proceedings commenced without giving rise to dishonesty or negligence.

Once again, ignorance or deliberate misinterpretation of the law prevailed in favour of the government and senior bureaucrats, unlike Pastor Ensbey.[123] It was yet another example of 'the governors' applying the law, in the Heiner Affair, to their own advantage, in glaring contravention of their bipartisanship obligation.

According to Lindeberg's senior counsel, Rofe QC, the 'majority' PCMC decision equates to gridlock, a legal nullity. It cannot be presented as *functus officio.*

A constitutional crisis-in-waiting

In short, the Heiner Affair remains a constitutional **crisis-in-waiting** of unprecedented proportions for Australia, and Queensland in particular. It may yet feature in, or trigger further national debate on our system of governance. It generates governance questions that are too compelling to ignore, particularly for 'the governed' in a society like Australia which claims to be governed by the rule of law under the 'impartial' Crown. Some change may become unavoidable.

For instance, is it constitutionally sound to permit the present process of nominating our Head of State (i.e. the Governor-General)[124] to be left solely within the discretion of the Prime Minister? Ought that process be broadened and made public and transparent? Is it acceptable for any such nominee to be approved, in a 'rubber stamp' manner, by the Sovereign, who, by living in London, necessitates a representative in Australia who is authorised by law to exercise powers under the Australian Crown, the *Constitution* and other relevant laws? This issue is especially important when it is known that the Prime Minister's nominee, at the relevant time of appointment, was the subject of an ongoing criminal justice investigation by a committee of the Parliament. For the sake of preserving public confidence in the integrity of the Office of Governor-General of the Commonwealth of Australia, is it not reasonable that any such nominee should decline to be sworn in until any ongoing investigation has properly concluded its lawful deliberations?

Does not such a process also undermine public confidence in the integrity of the Office of Governor-General of the Commonwealth of Australia and cast doubt over Australians' democratic rights enshrined in the *Constitution* being impartially guarded by the Office Holder as they otherwise ought to be under the impartial Crown which claims to act always above politics in the interests of 'the governed' and not 'the governors'?

Recommendations

In conclusion I would like to make the following recommendations, that

> the Commonwealth and all State Archivists be made officers of the Parliament and report directly to Parliament annually to ensure their independence from the executive, in the same manner as Commonwealth and State Auditors-General and Ombudsmen;
>
> an Office of Commonwealth/State Archives be able to obtain independent legal advice and, when necessary, seek judicial review, judicial declaration or injunction to ensure that the public interest is protected in the performance of its statutory function; and
>
> a professional association[125] similar to the Bar Association or Law Society be established by statute for recordkeepers, due to their complementary role in the preservation of evidence required in the administration of justice, with authority to (a) set professional standards; (b) discipline, by appropriate means, a recordkeeper (records manager or archivist) in breach of professional standards; or (c) defend a record manager under improper professional attack, be it from government, integrity tribunal or another.

Conclusion

The unresolved state of the Heiner Affair presents a major professional and ethical litmus test for the profession of recordkeeping. Unless recordkeepers themselves are independent and strong professionally, what hope is there for the maintenance of inviolate public records which are the lynchpin of our democracy? Those politicians and public officials involved in the Heiner scandal have been more than willing to make the State Archivist the scapegoat in this affair in order to conceal widespread corruption of the political and legal process. This paper rejects a position which focuses solely on the actions of the State Archivist in order to deflect and conceal self-serving and morally bankrupt conduct.

The records of 'the governors,' be they the Queen, Governor-General, Prime Minister, Premier, Minister of the Crown, senior bureaucrat, or even a retired Magistrate such as Noel Heiner lawfully looking into the administration of an allegedly dysfunctional State-run youth detention centre, belong to all of us, and, if necessary, invoked in our courts. Public records must always be treated within a framework of utmost respect for due process and the law and not be subject to executive desire or decree. The Heiner Affair, with its deceit and dissembling by officers of the Crown, patently does not give rise to the so-called 'noble cause' motive which has been advanced by those with most to conceal.

The Heiner Affair also demonstrates just how vital to our democracy is the inviolability of our public record system. An assault on proper public recordkeeping is an assault on democracy itself, and ought not be tolerated no matter who demands such a violation. The violation of the bipartisanship obligation inside the PCMC by its majority ALP government members who used their numbers to prevent an independent examination of the Rofe Audit and then declare their own decision *functus officio* when it is a 'gridlock nullity' has been yet another assault in a long list of abuses of power.

Without reliable records, there can be no accountability; without accountability, 'the governors' can act in self-serving ways towards 'the governed'. The systematic cover-up of that illegal shredding act has continued for twenty years. The truth cries out now more loudly than ever, not just in the interests of those injured by the initial shredding, including the then 14-year-old female indigenous victim of pack rape, but because the nature of the subsequent series of concealments has reached out to embrace and tarnish our entire nation's system of administrative accountability, formal justice and public confidence in government.

Lord Acton, in a letter to Bishop Mandell Creighton in 1887, famously said: "Power tends to corrupt, and absolute power corrupts absolutely".[126] This still rings true over 100 years later.

End notes

1 The term *recordkeeper* is a collective term for those working in the records discipline or profession. It encompasses both records managers and archivists. Theoretically, if not in practice, with the rise of continuum theory in the latter part of the twentieth century, the recordkeeping profession today is a unified profession of all those practitioners involved in the management of the record, regardless of time or space. This has largely come about as the records continuum model unites societal memory and evidentiary focused recordkeeping practice.

2 Australian Society of Archivists Inc. (1997). *Position statement on the Heiner Affair* (p. 1). Canberra: ASA.

3 The head of the archives authority (in Queensland, the State Archivist) is the one with designated authority under specific legislation for the disposal of records. However, there is usually a delegation of this authority. Normally each agency would present a *Retention and Disposal Authority/Schedule* to the relevant authority and once this *Authority/Schedule* is formally approved records can be destroyed according to the terms of the *Authority/Schedule* without further consultation with the state or federal authority or the state archivist. Most Australian jurisdictions have formal protocols (due process) in place to ensure that all records disposal is legal.

4 Allegations of child abuse at a Queensland state facility and the continued perversions of justice lie at the core of what has become known as the Heiner Affair (named after the retired magistrate who led the Inquiry). Unanswered questions continue about the short-lived Inquiry into what was going on in a Brisbane youth detention facility (John Oxley Youth Centre) in the late 1980s and early 1990 and subsequent questionable actions by public officials. There are many sites commenting on the Heiner Affair. Retrieved December 7, 2009, from http://www.thepunch.com.au/tags/heiner-affair/

5 Kevin Lindeberg was a senior organiser with the Queensland public service trade union, the Queensland Professional Officers' Association (QPOA). Its members are professional and technical Queensland public servants and TAFE teachers. He challenged the Queensland Government's shredding of the Heiner Inquiry documents and was dismissed in May 1990, one reason being his handling of 'the Coyne case'. This whistleblowing episode has been categorised as one of Australia's five most important by Whistleblowers Australia. The Heiner Affair is now the subject of lectures in universities throughout Australia and globally, and was recommended by Queensland Education in 2009 as an OP/HSC topic to be studied by Years 11 and 12 students in all Queensland secondary schools. In May 2004 it also featured in the ABC's *Australian Story* "Three Little Words" (a.k.a. They've been shredded).

6 In his study of the constitution, Professor A.V. Dicey noted that "…every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen". See Dicey, A.V. (1959). *Introduction to the study of the law of the constitution* (p. 193). (10th ed.). London: MacMillan & Sons.

7 Parliament of Australia, Senate. Parliamentary Debates. (1997, May 26). *Hansard: Queensland document archiving.* Senator John WOODLEY (Queensland)(10.16 p.m.). Retrieved December 7, 2009, from http://www.gwb.com.au/gwb/news/goss/gov.html

8 International Organization for Standardization. (2001). *Information and Documentation–Records Management–Part 1: General (ISO 15489–1)* (p. 3). Geneva: ISO.

9 *Libraries and Archives Act 1988 (Queensland).* Part 5. Public Records. Retrieved December 7, 2009, from http://www.legislation.qld.gov.au/LEGISLTN/SUPERSED/L/LibrarisArchA88_01B_.pdf Superseded by *The Public Records Act 2002 (Queensland).*

10 See endnote 82 for information about the disposal authority status in Queensland during the period concerning the subject of this article.

11 Sometimes when agencies move to new premises 'old' records are discovered that are not covered by the existing schedule. In order to dispose of these records legally, an *ad hoc* schedule is prepared for approval by the relevant authority and any records disposal is done by the agency itself according to the schedule and established protocols.

12 The Royal Commission into Commercial Activities of Government and Other Matters (colloquially known as WA Inc) was held between 11 February 1991 and 14 October 1992. When the Commission concluded proceedings, the records, consisting of millions of documents, were sealed and forwarded to the Director of Public Prosecutions (DPP) pursuant to s. 5 of the *Royal Commission (Custody of Records) Act 1992 (WA).*

13 Legislative Assembly of Queensland, Parliamentary Debates. (1998, June 27). *Hansard* (p. 1872). Retrieved December 7, 2009, from http://www.parliament.qld.gov.au/view/historical/hansard.asp

14 *Commissions of Inquiry Act 1950 (Queensland).* Retrieved December 19, 2009, from http://www.qphci.qld.gov.au/legislation/CommissionsAct.pdf

15 Tasmanian Parliament, Select Joint Committee on Ethical Conduct, Submission 24A. (2008, August 18). See Point 2.22 re former Queensland Appeal Court Justice the Hon. James Thomas A.M.; and Attachment A: August 2007 *The Heiner Affair: A Matter of Concern* (see endnote 24).

16 See the National Archives of Australia site: *Preventing the destruction of significant records.* Retrieved December 7, 2009, from http://www.naa.gov.au/records-management/keep-destroy-transfer/freezes/index.aspx

17 International Organization for Standardization. (2001). *op cit.*

18 *Libraries and Archives Act 1988 (Queensland). op cit.*

19 Sometime in 1996, Pastor Ensbey guillotined into strips a female minor's diary in which she had recounted details of an improper relationship with an adult parishioner. Later, in 2001 as a young adult, the victim took her complaint to the police; the adult admitted his guilt and was dealt with judicially. The police subsequently charged Pastor Ensbey in 2003 with an attempt to obstruct justice (i.e. the 2001 judicial proceeding concerning the adult parishioner). The police alleged that he ought to have known, as a realistic possibility at the time he rendered the relevant diary pages "…illegible or undecipherable" to prevent their use as evidence, that such a judicial proceeding was a future possibility. Unlike the events in the Heiner Affair, he had not been served with notice of foreshadowed judicial proceedings by solicitors and others but was still expected to know that it was a realistic possibility that they might be required in the future.

20 Leanne Clare was later appointed Judge of the District Court of Queensland (2 April, 2008).

21 Royce Miller QC, the DPP, erroneously interpreted section 129 on two occasions relating to the Heiner Affair. On both occasions he advised that the relevant judicial proceedings had to be on foot before section 129 could be triggered. The first occasion was on 28 November 1995 in response to a request on 9 November 1995 from Shadow Queensland Attorney-General, the Hon. Denver Beanland, that charges should be brought against those involved in the shredding in the wake of the special submission by Ian Callinan QC, on 7 August 1995, to the Senate Select Committee on Unresolved Whistleblower Cases in which he (Callinan) suggested that section 129 and/or section 132 of the Criminal Code were in *prima facie* breach. The second occasion was on 7 January 1997 when offering advice to the Borbidge Government on the findings of the *Morris and Howard Report* (who had correctly interpreted section 129).

22 *R v. Rogerson and Ors* (1992). 66 ALJR 500, Mason CJ said at p. 502: "...it is enough that an act has a tendency to deflect or frustrate a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be implemented...".

23 *R v. Ensbey*; ex parte A-G (Qld) (2004). QCA 335. Retrieved December 7, 2009, from http://archive.sclqld.org.au/qjudgment/2004/QCA04-335.pdf

24 *R v. Ensbey*; ex parte A-G (Qld) (2004). *op cit. s.* 16.

25 Judges' statement. (2007). *The Heiner Affair: A matter of concern* (p. 2). Letter of 16 August 2007 to the Premier of Queensland, the Hon. Peter Beattie MLA, from The Hon. Jack Lee AO QC, Retired Chief Judge at Common Law Supreme Court of New South Wales; Dr Frank McGrath, Retired Chief Judge Compensation Court of New South Wales; Alastair MacAdam, Senior Lecturer, Law Faculty, QUT Brisbane, and Barrister-at-law; The Hon. R.P. Meagher QC, Retired Justice of the Supreme and Appeal Court of New South Wales; The Hon. Barry O'Keefe AM QC, Retired Justice of the Supreme Court of NSW, former ICAC Commissioner; Mr Alex Shand QC; The Hon. David K. Malcolm AC CitWA, former Chief Justice of Western Australia.

26 *R v. Ensbey*; ex parte A-G (Qld) (2004). *op cit.* p. 36.

27 *Criminal Code Act 1899 (Queensland)*. Chapter 2 Parties to offences. 7 Principal offenders. (1) When an offence is committed. Retrieved December 7, 2009, from http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf

28 Similar provisions are found in sister *Criminal Codes* or *Crimes Acts* in all jurisdictions in the Commonwealth of Australia and New Zealand, and therefore, while not specifically addressing each jurisdiction, what flows from this Queensland experience has general application. See ACT: Crimes Act 1900; Commonwealth: *Crimes Act 1914* section 39; NSW: *Crimes Act 1900* section 317; NT: *Criminal Code Act* section 102; SA: *Criminal Law Consolidation Act 1935* section 243; VIC: *Crimes Act 1958*; TAS: *Criminal Code 1924* section 99; and WA: *Criminal Code 1913* section 132.

[29] Australian Society of Archivists Inc. (1999). *Position statement on the Heiner Affair.* Canberra: ASA. Retrieved December 9, 2009, from http://www.archivists.org.au/position-statement-heiner-affair ; see also Chris Hurley's *Records and the public interest: Shredding of the 'Heiner' documents: An appreciation,* dated 15 March 1995; and Hurley, C. (2002). Records and the public interest: The 'Heiner Affair' in Queensland, Australia (pp. 294–317). In R.J. Cox., & D.A. Wallace. (2002). *Archives and the public good: Accountability and records in modern society.* Westport, Connecticut: Quorum Books.

[30] *A v. Hayden* (1984). HCA 67; (1984) 156 CLR 532. Brennan, J. said at 18: p. 7. "…no agency of the Executive Government is beyond the rule of law". Retrieved December 7, 2009, from http://www.austlii.edu.au/au/cases/cth/HCA/1984/67.html

[31] The Fitzgerald Inquiry was a judicial inquiry into Queensland Police corruption presided over by Tony Fitzgerald QC. See Fitzgerald, G.E. (1989). *Commission of inquiry into possible illegal activities and associated police misconduct* (Fitzgerald report). Brisbane: Government Printer. Retrieved December 7, 2009, from http://www.cmc.qld.gov.au/data/portal/00000005/content/81350001131406907822.pdf

[32] The Audit is now commonly known as the 9-Volume, 3000-page Rofe QC Audit of the Heiner Affair (the Audit). On 19 September 2007, Senator Barnaby Joyce attempted to table the Rofe audit document in federal Parliament. Leave was not granted. The document is said to contain 68 *prima facie* criminal charges that should be addressed. See *Hansard* for 19 September 2007, page 100–101. Retrieved December 7, 2009, from http://www.gwb.com.au/gwb/news/goss/senatehansard19sept.pdf

[33] The Right Honourable Sir Harry Gibbs, GCMG, AC, KBE wrote to the author in April 2005 upon examination of the author's paper on "The Heiner Affair" presented to The Samuel Griffith Society's 17th Annual Conference held at Coolangatta, Queensland, 8–10 April 2005. Sir Harry wrote: "I have read your paper with great interest. There can now be no doubt that the advice given to the Queensland Government and the view accepted by the Criminal Justice Commission, that s. 129 of the Queensland Criminal Code, read in the light of the definition of 'Judicial Proceedings" in s. 119 of the Code, applies only when the Judicial Proceeding has actually commenced, was erroneous. That was authoritatively recognized in 2004 by the decision of the Queensland Court of Appeal in *R v. Ensbey*. It follows that if the evidence establishes beyond doubt that the Queensland Cabinet on the 5th March, 1990 knew that legal proceedings were likely, and that the material which it ordered to be shredded might be required in evidence in those proceedings, there is at least a *prima facie* case that those members of the Cabinet who ordered the shredding were in breach of the law". Retrieved December 7, 2009, from http://www.samuelgriffith.org.au/papers/html/volume17/v17foreword.html

[34] Wacol Centre 'paradise' for young 'crims'. (1989, March 17). *The Courier-Mail*, p. 3. Report of the JOYC riot, and records an anonymous youth worker claiming that a 15-year old female inmate had been raped on an outing and that the incident had been 'covered up'; also Repression 'not way' to youth reform. (1989, March 18). *The Courier-Mail*, p. 5. Recorded that the then Minister of the Family Services (in the Cooper National Party Government) the Hon. Craig Sherrin, stated that the rape victim was 17 years of age and she had been encouraged to bring charges but had declined to do so. The departmental file on the assault reveals that she was 14 years and 4 months old, and wanted charges brought but was intimidated into not proceeding. Also See Question on Notice No 1471 18 to Premier Peter Beattie and his answer on 18 November 2004.

[35] See *The Courier-Mail* of 8 November 2001, p. 2; ABC Radio 612 4QR interview between presenter Stephen Austin and JOYC witness (Michael) on 7 November 2001; *The Courier-Mail* 17 and 18 March 1989; Volume 2, House of Representatives Standing Committee on Legal and Constitutional Affairs, August 2004, pp. 74–75 (including footnote 85) – Motives for the Shredding and *The 7.30 Report* 24 May 2006.

[36] Lindeberg, K. (2008). Submission to The Joint Select Committee on Ethical Conduct. (http://www.parliament.tas.gov.au/ctee/old_ctees/Submissions/24A%20Lindeberg.pdf) and interview transcripts (p. 57) with The Joint Select Committee on Ethical Conduct, which met in the Premier's Hall, Parliamentary Annex, Parliament House, Brisbane, 24 November 2008. Retrieved December 2, 2009, from http://www.parliament.tas.gov.au/ctee/old_ctees/Transcripts/24%20November%2008%20-%20Brisbane.pdf

[37] Grundy lectured on journalism in the University of Queensland's School of Journalism and Communications and was the editor of its student newspapers *The Weekend Independent* and *The Independent Monthly*. He reported on Lindeberg's struggle for justice over the years and himself investigated and also directed his students in investigations relating to the Heiner Affair. His newspaper coined the affair's colloquial name: *Shreddergate*.

[38] Morris, A.J.H., & Howard, E.J.C. (1996). *Report to the Premier of Queensland and the Queensland Cabinet of an investigation into allegations by Mr Kevin Lindeberg and Mr Gordon Harris and Mr John Reynolds.* Brisbane: Morris & Howard Solicitors. The *Morris and Howard Report* was tabled in the Queensland Legislative Assembly on 10 October 1996. Messrs Morris QC and Howard were commissioned in May 1996 by the Borbidge Government. It found *prima facie* breaches of sections 129, 132 and 92 of the *Criminal Code* (pp. 203–204). The Report recommended the establishment of a commission of inquiry in the public interest. See also Attachment B [FEM-1, Doc.19], October 1996, letter dated 17 January 1990 from Coyne's solicitors, Rose Berry Jensen, to R. Matchett.

[39] Teens handcuffed: MP. (1989, October 1). *The Sunday Sun*, p.18. Warner stated that "…it was time to review security at the centre and ensure proper procedures were carried out when controlling unruly behaviour…".

[40] Forde, L. (1999). *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions.* Brisbane: Queensland Government. Retrieved December 19, 2009, from http://www.communityservices.qld.gov.au/community/redress-scheme/documents/forde_comminquiry.pdf

The 2003/04 House of Representatives Standing Committee on Legal and Constitutional Affairs, chaired by the Hon. Bronwyn Bishop, investigated the Heiner Affair and found (p. 90, Point 3.149) "…without reservation, that the evidence suggests certainly misconduct, possibly extending to criminal conduct, by officers within the Department of Families, the CJC, and possibly the Queensland police, in not investigating—and hence covering up—abuse at the Centre. It is clear these agencies knew about the abuse and did nothing. It is also clear that the Forde inquiry did not adequately address these issues".

[41] Ransley. P. (1999, March 28). *Queensland's secret shame.* Full transcript. Retrieved December 2, 2009, from http://www.gwb.com.au/gwb/news/goss/sunday.htm

[42] Parliament of Australia, Senate, Parliamentary Debates. (2003, November 26). *Hansard* (p. 18093). Retrieved December 9, 2009, from http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2003-11-26/0096/hansard_frag.pdf;fileType%3Dapplication%2Fpdf

[43] Legislative Assembly of Queensland, Parliamentary Debates. (2006, May 24). *Hansard* (p. 1939). Retrieved December 7, 2009, from http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_05_24_WEEKLY.pdf

[44] Judges' statement. (2007). *op cit.*

[45] Queensland government officers have a right to access documents about themselves under s. 65 of the *Public Service Management and Employment Regulation* (PSME), which states that at "a time and place convenient to the department, an officer shall be permitted to peruse any departmental file or record held on the officer".

[46] Letters of 8, 14 and 15 February 1990. See Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 15, pp. 52–53, Points 24 and 25, pp. 56–57.

[47] Memorandum of 14 February 1990 from Acting Executive Officer, Department of Family Services and Aboriginal and Islander Affairs (T. Walsh) to Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs (unnamed). See Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 24. pp. 56–57.

[48] Letter of 27 February 1990 from QTU to R. Matchett. See Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 44. p. 63.

[49] Letters of 8, 14 and 15 February 1990. See Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 27. p. 58.

[50] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 26. p. 58.

[51] Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995). *The public interest revisited.* Canberra: Australian Parliament. See Volume 1, Document 17, Queensland Government – Submissions, Supplementary Submissions and Other Written Material authorised to be published. Retrieved December 9, 2009, from http://www.aph.gov.au/senate/Committee/history/uwb_ctte/pir/index.htm

[52] Queensland Public Service Board. (1982). *Circular No 13/82. Legal liability of Crown employees.* Cabinet Decision No. 37501 of 20 April 1982, outlined the Crown's acceptance of responsibility for claims against employees who have diligently and conscientiously endeavoured to carry out their duties. The latest version of the policy *LGS-PR-003: Crown acceptance of legal liability for actions of Crown employees* is currently under review.

[53] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Points 5.2, 8.4. pp. 47–50.

[54] Letter of 8 February 2009 from Rose Berry Jensen Solicitors to Acting Director-General, Department of Family Services, and Aboriginal and Islander Affairs (Ms R. Matchett).

[55] Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995). *op cit.* See Volume 1, Queensland Government - Submissions, Supplementary Submissions and Other Written Material authorised to be published.

[56] Crown Solicitor's advice of 16 February 1990 to Cabinet Secretary (Tait). pp. 2–3.

[57] Although not formalised by the Commonwealth Government until 2006 with the Commonwealth Model Litigant Policy, the 'fair go' principle is a basic underlying principle of practice.

[58] Crown Solicitor's advice of 16 February 1990 to Cabinet Secretary (Tait). pp. 2–3.

[59] Acknowledgement letters of 16 February and 19 March 1990 from DFSAIA to Rose Berry Jensen Solicitors and Coyne.

[60] Messrs Morris QC and Howard were commissioned in May 1996 by the Borbidge Queensland Government to investigate the allegations made by Messrs Lindeberg, Harris and Reynolds. *The Morris and Howard Report*, tabled in the Queensland Legislative Assembly on 10 October 1996, recommended the immediate establishment of a public inquiry because the possible *prima facie* offences discovered were at least equivalent to those which triggered the famous Fitzgerald Inquiry into police corruption in Queensland. Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 37. p. 218.

[61] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* p. 122.

[62] Letter of 18 April 1990 from Crown Law (signed K. M. O'Shea) to Acting Director-General, Department of Family Services, and Aboriginal and Islander Affairs (R. Matchett). p. 2.

[63] Letter of 8 May 1990 from Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs (signed R. Matchett) to Crown Solicitor (K. O'Shea).

[64] Submission dated 26 April 1997 by barrister Rowland Peterson on behalf of Kevin Lindeberg to the Connolly/Ryan Judicial Review into the Effectiveness of the CJC. Points 6.4.1 – 6.4.3, pp. 56–57.

[65] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* See especially 'The smoking gun', Points 68–73, pp. 74–76; also *The Weekend Independent* – Special Edition, 1997, March 12, pp. 1–5.

[66] *Criminal Code Act 1899 (Queensland).* See sections 92, 129, 132 and 140.

[67] *Criminal Justice Act 1989 (Queensland).* See sections 31 and 32 – Official misconduct.

[68] Judges' statement. (2007). *op cit.* p. 3.

[69] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* pp. 74–76.

[70] *Libraries and Archives Act 1988 (Queensland). op cit.*

[71] Crown Solicitor's advice dated 16 February 1990 to Cabinet Secretary (Tait). pp. 2–3.

[72] Editor's note: For other comments on this aspect of the Heiner Affair see www.gwb.com.au/gwb/news/goss/hurley.doc especially sections 4.12-4.15; and http://www.aph.gov.au/Senate/Committee/lindeberg_ctte/report/chapter3.pdf

[73] Letter from Tait to McGregor dated 23 February 1990, tabled by Ms Warner during an answer to a question, 2 September 1994, Legislative Assembly of Queensland. Retrieved December 7, 2009, from http://www.parliament.qld.gov.au/view/legislativeAssembly/tableOffice/documents/TabledPapers/1994/4794T5006.pdf Also available Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 33. p. 59.

[74] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 35. p. 60.

[75] These can be adduced from the contents of thirteen documents held by the Queensland Government. Morris, A.J.H., & Howard, E.J.C. (1996). *op cit*. Point 19. p. 95.

[76] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit*. Point 40. p. 61.

[77] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit*. Point 19. p. 95.

[78] *Libraries and Archives Act 1988 (Queensland). op cit.*

[79] Queensland State Archives. (1997). *General disposal and retention schedule for administrative records.* Brisbane: QSA. This schedule was prepared under section 55 of the *Libraries and Archives Act 1988* and was endorsed by the Library Board of Queensland on 17 June 1997. QSA advises that this was the first such schedule in place in Queensland (14 January 2010).

[80] Tabled in Legislative Assembly of Queensland by Premier Peter Beattie on 30 July 1998, Registration Number 19, Cabinet Submission 5 March 1990, No 00160. p. 1.

[81] Tabled in the Legislative Assembly of Queensland by Premier Peter Beattie, when the Heiner Affair was the major (unresolved) issue of concern during a confidence debate on 30 July 1998 for the newly-elected 'minority' Beattie Government in its need to win the casting vote of the Independent Member for Nicklin, Peter Wellington, to enable it to govern.

[82] Legislative Assembly of Queensland, Cabinet Decision No. 00162. Cabinet-in-confidence Submission dated 5 March 1990 tabled in Queensland Parliament by Premier Peter Beattie on 30 July 1998, Tabled Register No 19, p. 2.

[83] Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995). *op. cit*. See Volume 1, Queensland Government – Submissions, Supplementary Submissions and Other Written Material authorised to be published.

[84] State Archives memorandum of 23 March 1990 written by senior archivist McGuckin.

[85] Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 24. pp. 56–57.

[86] EARC was the sister-commission to the Criminal justice Commission (CJC). Its establishment was recommended in the *Fitzgerald Report* of 1989, see pp. 370–371.

[87] Australian Society of Archivists Inc. (1999). *Position statement on the Heiner Affair* (p. 2). Canberra: ASA. Retrieved December 9, 2009, from http://www.archivists.org.au/position-statement-heiner-affair

[88] Australian Society of Archivists Inc. (1999). *op cit.* p. 3.

[89] Published in Queensland.

[90] Labor blocks secret probe. (1990, April 11). *The Sun*, p. 1.

[91] Letter of 17 May 1990 from Coyne under DFSAIA letterhead to McGregor (State Archivist). See Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 59. p. 69.

[92] State Archives memorandum dated 30 May 1990, McGregor. Exhibit 17, p. 2. Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995). *op. cit.* See Lindeberg's List of Exhibits.

[93] Letter dated 24 March 1993 from DAS FOI Co-ordinator (Leanne Hardwicke) to Lindeberg.

[94] After the 1992 Queensland election, the Goss Government placed State Archives under the Department of Administrative Services (DAS) whereas previously it came under the Department of Premier and the Arts.

[95] Documents under FOI: 1. Letter from the Crown Solicitor to the Secretary of Cabinet dated 16 February 1990 – refused access; 2. Letter from the Secretary of Cabinet to the State Archivist dated 23 February 1990 – partial access; 3. Internal memorandum dated 23 February 1990 – partial access; 4. Letter from the Secretary of Cabinet to the State Archivist dated 22 March 1990 – partial access; and 5. Internal memorandum dated 30 May 1990 – partial access.

[96] *Freedom of Information Act 1995 (Queensland).* s 43(1). p 39. Retrieved December 9, 2009, from http://www.legislation.qld.gov.au/LEGISLTN/ACTS/1992/92AC042.pdf

[97] Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995). *op cit.* p. 2.

[98] *Grant v. Downs* (1976) HCA 63.

[99] Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995). *op cit.* Lindeberg Exhibit No. 6. pp. 2–3.

[100] See *Attorney-General v. Times Newspaper Ltd*. (1973) 2 All ER 54 concerning unhindered access to court, Lord Diplock stated: "...The due administration of justice requires first that all citizens have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities…" See Points 2.40 – 2.45 Lindeberg's public submission 24A 18 August 2008 Joint Select Committee on Ethical Conduct (JSCEC).

[101] Judges' statement. (2007). *op cit.* p. 3.

[102] Letter of 22 May 1990 from Acting Director-General, Department of Family Services (signed R.L. Matchett) to Rose Berry and Jensen Solicitors.

[103] See Morris, A.J.H., & Howard, E.J.C. (1996). *op cit.* Point 66. p. 73. Walsh recorded the phone conversation in a DFSAIA memorandum to R. Matchett.

[104] Criminal Justice Commission. (1993). *op cit.* Lindeberg Exhibit 36. pp. 1–3.

[105] Parliament of Tasmania, Joint Select Committee on Ethical Conduct. (2008, November 24). *Hansard* (p. 57).

[106] Sir Samuel Griffith was Queensland Premier and Attorney-General, Chief Justice of Queensland, co-drafter of the Australian *Constitution*, and first Chief Justice of the High Court of Australia (1903-19).

[107] See letter dated 3 August 2004 from Queensland Ombudsman and Information Commissioner (D. Bevan) to the Secretary of the Select Committee on the Lindeberg Grievance (A. Sands). See p. 3. Retrieved December 7, 2009, from http://www.aph.gov.au/Senate/committee/lindeberg_ctte/adversecomment/bevan030804.pdf

[108] Hurley, C. (1995). *Records and the public interest: Shredding of the* "*Heiner*" *documents* (p. 28). Retrieved December 7, 2009, from http://www.gwb.com.au/gwb/news/goss/hurley.doc

[109] Both these statements are available on the Australian Society of Archivists Inc. webpage. Retrieved December 9, 2009, from http://www.archivists.org.au/position-statement-heiner-affair

[110] The CJC was replaced on 1 January 2002 by the Crime and Misconduct Commission (CMC).

111 Parliament of Australia, Senate, Parliamentary Debates. (1995, February 23). *Hansard* (pp. 104-105).

112 Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995, February, 23), *Hansard* (p. 39).

113 Ian Callinan QC. See Parliament of Australia, Senate Select Committee on Unresolved Whistleblower Cases. (1995). *op. cit*. Chapter 5, Shredding of the Heiner documents, Exhibit received on 10 August 1995, p. 3.

114 Judges' statement. (2007). *op cit.*

115 Judges' statement. (2007). *op cit.* p. 2.

116 Parliament of Tasmania, Joint Select Committee on Ethical Conduct. (2008, November 24). *Hansard* (p. 57).

117 Akerman, P. (2008, April 26). Taint sticks to Bryce. *The Sunday Telegraph.* Retrieved December 9, 2009, from http://blogs.news.com.au/dailytelegraph/piersakerman/index.php/dailytelegraph/comments/taint_sticks_to_bryce/; also Akerman, P. (2008, August 10). Heiner Affair shadows Bryce. *The Sunday Telegraph.* Retrieved December 9, 2009, from http://blogs.news.com.au/dailytelegraph/piersakerman/index.php/dailytelegraph/comments/heiner_affair

118 Lindeberg took legal advice on this turn of events. Wanting to avoid any repeat of the divisive 'Hollingworth crisis' and to protect the integrity of the Office of Governor-General, in particular because of any potential exercise of the reserve powers, he wrote to the Queen on 30 May 2008 pointing out the serious questions concerning Bryce's conduct in handling Lindeberg's PID (between 2003 and 2005 when Queensland Governor). Her actions were under review by a 'criminal justice' parliamentary committee which had the power to subpoena documents, recommend an inquiry or present charges to the DPP. A copy was also sent to then Governor-General Major-General Michael Jeffrey. On 10 June 2008, Governor-General Jeffrey wrote to Rudd requesting an investigation into the Heiner Affair. This request was ignored by Rudd.

119 Legislative Assembly of Queensland, Parliamentary Debates. (2008, September 9). *Hansard*. *op cit.*

120 Parliament of Australia, House of Representatives, Parliamentary Debates. (2008, June 25), *Hansard*, p. 95.

121 Parliament of Tasmania, Joint Select Joint Committee on Ethical Conduct. (2008, November 24). *Hansard*, p. 26.

122 Parliament of Queensland, Parliamentary Crime and Misconduct Commission (PCMC). (2009, January 7). *Majority decision*, p. 5.

123 See Callinan and Heydon in *Ostrowski v. Palmer* (2004). HCA 30 (16 June 2004) who ruled "…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…"

124 *R v. Governor of South Australia* (1907) HCA 31; (1907) 4 CLR 1497 (8 August 1907) Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ said: "….So, in certifying to the Governor General the names of the senators elected, chosen, or appointed the Governor must be regarded as acting in the capacity of the Constitutional Head of the State, being in that capacity the proper channel of communication with the officiating Constitutional Head of the Commonwealth, the Governor General." Also see *Gould v. Brown* [1998] HCA 6; 193 CLR 346; 151 ALR 395; *Re Wood* [1988] HCA 22; (1988) 167 CLR 145; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* [1987] HCA 28; (1987) 163 CLR 117; *R v. Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170.

125 The Records Management Association of Australasia and the Australian Society of Archivists Inc. are the two main professional bodies for recordkeeping professionals. Neither, however, is strong enough in its current guise to carry out this role successfully. A single strong professional body mandated by government is required.

126 Quotation attributed to John Emerich Edward Dalberg Acton, first Baron Acton (1834–1902). The historian and moralist, otherwise known simply as Lord Acton, expressed this opinion in a letter to Bishop Mandell Creighton in 1887.

KEVIN LINDEBERG – Political cartoonist/caricaturist

Kevin Lindeberg was educated at Maryborough Boys High School in Queensland, and holds an Associate Diploma in Industrial Relations from Brisbane College of Advanced Education (1988). Kevin is a former Queensland public sector trade union organiser who now works as a freelance political cartoonist/caricaturist/illustrator while he continues his quest for justice in the Heiner Affair.

He previously pursued a career as a musical comedy/opera baritone singer in Brisbane, Sydney and London. In Sydney he played the leading roles in *Oklahoma* and *The Sentimental Bloke*, and, inter alia, performed with the London Philharmonia Chorus under Maestro Riccardo Muti in London's Southbank. He takes a great interest in criminal, administrative and constitutional law, recordkeeping and current affairs, and was, for a time in the early 70s, a public forum speaker on the Sydney Domain.

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