Chapter One
The Heiner Affair

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In this paper I shall invite you to consider the Heiner affair, which has persisted for the last 15 years in "post-Fitzgerald" Queensland, its era of so-called open and accountable government. This affair is the long-running Hydra of Queensland's public administration. It grew out of a decision by the Goss Government, within weeks of taking control in 1990, which now gives rise to the most serious questions about the constitutional state of affairs in Queensland.

Heiner affair's epicentre

The decision to which I refer was the order by the Queensland Cabinet to deliberately destroy the Heiner Inquiry documents to prevent their known use as evidence in an anticipated judicial proceeding, and to prevent the contents of the gathered public records being used against the careers of the public servants involved. These public records were gathered during the course of a lawful inquiry[1] into the management of the John Oxley Youth Detention Centre conducted by retired Stipendiary Magistrate Noel Heiner, from whom the affair's name is derived.

The Heiner Inquiry was established in the final days of the Cooper National Party Government; within weeks of the Goss Government coming to power, the Inquiry was shut down, and all the gathered material secretly destroyed. At the time the Cabinet ordered the records be destroyed, the Queensland Government was aware that they were likely to be required in evidence in a judicial proceeding.

Let me present some key Heiner facts as they affect the rule of law and Queensland's governance.

Due process commenced

In January and February, 1990 my union member, the manager of the Detention Centre, sought to access the Heiner Inquiry documents, insofar as they were about him, under a public service "access" regulation, namely *Public Service Management and Employment Regulation 65*. He also indicated that he might take defamation action. As his union organizer, I was required to protect his industrial interests.

His solicitors and two trade unions placed the Government on notice of foreshadowed court proceedings. That was done by letter, phone call and meeting. The Queensland Government was told not to destroy the evidence, and that if access was not granted "out of court", then the matter would be settled "in court". Unbeknown to us, the Families Department had meanwhile transferred the documents to the Office of Cabinet in a desire to gain access exemption under "Cabinet confidentiality" or "Crown privilege".

The relevant February/March, 1990 Cabinet submissions, copies of which we now hold, divulge that all Cabinet members in attendance were aware that the documents were likely to be required as evidence in a foreshadowed judicial proceeding. Crown Law advice, which we also now hold, reveals that the Cabinet,

and Crown Law, knew that the records would be discoverable upon the serving of the anticipated writ. By other evidence spoken in the media, we know that at least one Minister, if not all, were aware that those public records contained evidence about the known or suspected abuse of children at the Centre.[2]

As each layer of cover-up has been peeled away, the presence of child abuse at the Centre surfaced after being concealed for years. It was primarily through the investigative skills of Mr Bruce Grundy that the horrible truth became known. The abuse went from physical, psychological abuse to the offence of criminal paedophilia,[3] involving the sexual assault of a 14-year-old female indigenous minor in the lead up to the Heiner Inquiry. Worse, those working within government knew of such things at all relevant times, and did nothing about it, and some are still working in government.

The gravest legal and constitutional ramifications flow from the shredding of the evidence and the assault against the female minor in State care as handled by our law-enforcement authorities. It is clear that those authorities, including the Cabinet and the legislature, could not face the horrendous political, legal, and constitutional prospect that perhaps all members of the Queensland Cabinet of 5 March, 1990 might be in serious breach of the Criminal Code of Queensland.

In a nutshell, instead of upholding the law, all relevant law-enforcement and accountability arms of government collapsed in around the Cabinet's shredding desire by declaring it perfectly legal[4] when the law, properly applied, suggested otherwise.

Foreshadowed judicial proceedings known

It was known and acknowledged by the Government that court proceedings had been foreshadowed by a firm of solicitors (officers of the court) and two trade unions,[5] and that the Heiner Inquiry records were the central item of evidence. We were told by the Queensland Government that Crown Law was considering our access request, and once its advice was received, we would be informed.

Unbeknown to us, the Queensland Government meanwhile had secretly sought urgent approval from the State Archivist on 23 February, 1990 to have the records destroyed pursuant to the *Libraries and Archives Act* 1988, and secured her approval on the same day.

However, in Cabinet's letter to the State Archivist, it failed to inform her of the known evidentiary value of the records for the foreshadowed judicial proceeding. She was told that the records were, in the Cabinet's view, "no longer required or pertinent to the public record". At this very time the Queensland Cabinet, Department of Families and Crown Law knew that (a) the records were critically relevant evidence for the anticipated judicial proceeding; (b) they would be discoverable pursuant to the discovery/disclosure rules of the Supreme Court of Queensland; and (c) any claim of "Crown privilege/Cabinet confidentiality"[6] would fail once the expected writ arrived and discovery procedures commenced, because the records were not created for a Cabinet purpose.[7]

So while we were waiting patiently for the Crown Solicitor's final advice regarding access or non-access, on the assurance that we were dealing with "the Crown" – the so-called "model litigant" – and that the records were safe, on 5 March, 1990 the Queensland Cabinet ordered the destruction of the evidence. The order was secretly carried out on 23 March, 1990. Official notification on the

"access issue" – the issue to be litigated – did not come from the Government until 22 May, 1990, weeks *after* all the sought-after records had been destroyed. We were given no opportunity to seek injunctive relief from the courts.

In this early March, 1990 period, when discussing the matter with the Family Services Minister's Private Secretary, I was inadvertently told of the shredding plans or act-of-shredding. I immediately challenged the proposed action, only to be told the next day that the Minister would no longer deal with me. The Minister insisted on my union's General Secretary and/or his Assistant taking over the case, which happened, and then several weeks later, I was summarily dismissed. My handling of this case was used as one of the excuses to dismiss me.

Before I was finally dismissed, I informed my union's Executive that the shredding of the records represented a potential serious breach of the criminal law which could involve the entire Cabinet. It did not move them, other than to remove me.

The Criminal Justice Commission: administration of justice

In December, 1990 I took my dismissal to the new Criminal Justice Commission (CJC). It indicated that it could look into the matter because it involved a unit of public administration.

This journey went into the very bowels of Queensland's criminal justice system and public administration. Both were found wanting. I was confronted with dissembling, delay, double standards, misleading of Parliament, conflicts of interest, errors and omissions, lost documents, failure to refer, tampered tapes, intimidation, threats, misquoting and misinterpreting the law.

The alleged offence, which I put to the CJC as fitting the destruction-of-evidence conduct by the Queensland Cabinet, was s. 129 of the *Criminal Code Act* 1899 (hereinafter "the Criminal Code").

The Griffith Criminal Code

Over 100 years ago, Sir Samuel Griffith wisely drafted, and the Queensland Parliament accepted into law, his Criminal Code. It still stands. Section 129 – 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".[8]

Section 119 of the Criminal Code, dealing with the definition of "judicial proceeding", reads as follows:

> "In this chapter – 'judicial proceeding' includes any proceeding had or taken in or before any tribunal, or person, in which the evidence may be taken on oath".

The CJC held that because the words "had or taken in or before" were in the present tense, they excluded a judicial proceeding in contemplation or anticipated. It held that s. 129 could only be triggered once a judicial proceeding was on foot, even though it was within the knowledge of the doer that the relevant judicial proceeding was foreknown, contemplated, or anticipated. Even in the wake of *R v. Rogerson*, the CJC considered it was a

perfectly reasonable view for competent lawyers to hold.

I challenged the CJC's view from the outset, suggesting that it was legal nonsense. I also suggested that the alternatives of attempting to obstruct justice, or a conspiracy to pervert the course of justice, may be available on the facts.

Under elementary statutory interpretation rules, the operative word in s. 119 is "includes". In other words, the term "judicial proceeding" was "unfettered" – but more of that later.

In 1993 the Senate established the Senate Select Committee on *Public Interest Whistleblowing*[9] as part of a federal government move to establish national whistleblower protection legislation. I presented a submission, using the Heiner affair as the vehicle to address its terms of reference. In its August, 1994 report, the Committee unanimously recommended that the Goss Government review this case, and eight other "unresolved" Queensland cases.[10] The Goss Government declined to do so.

In reaction to the Goss Government's refusal, in December, 1994 the Senate established the Senate Select Committee on *Unresolved Whistleblower Cases*, in which the Heiner affair was a specific term of reference. This Committee, chaired by (then) ALP Tasmanian Senator Shayne Murphy, took evidence throughout 1995.

In evidence before this Senate Select Committee, the CJC official and lawyer who had had prime carriage of my complaint made this so-called "legal declaration" concerning due process touching on the protection of evidence:

> "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".[11]

The Queensland Government and CJC claimed that the Queensland Government acted on legal advice when ordering the destruction of the evidence, and pointed to advice of 23 January, 1990 which relevantly said:

> "...this advice is predicated on the fact that no legal action has been commenced which requires the production of those files...".[12]

The CJC claimed that so long as the Queensland Government acted on legal advice, it could not be established that it was acting dishonestly; which, in turn, could not enliven the necessary official misconduct provisions of the *Criminal Justice Act* 1989 or, for that matter, the Criminal Code.

The CJC said that its duty was not to adjudicate between competing advices on the same legal point – that is, s. 129 – but rather, so long as advice existed and had been acted upon – in effect any advice, including wrong advice[13] – that was sufficient to give the government clearance to those involved in the shredding.

In dealing with the CJC's understanding of the law, I point to *Ostrowski*,[14] wherein Callinan and Heydon JJ, in finding a guilty verdict against Mr Palmer, a crayfisherman from Western Australia who obtained Crown advice which happened to be erroneous before acting on it, said:

> "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...".

The role of the State Archivist in the administration of justice

The Queensland Government has also claimed that it acted under the authority of the *Libraries and Archives Act* 1988. If this were the end of the matter, it would permit the power under that Act – now the *Public Records Act* 2002 – to intervene unilaterally in the administration of justice and override s. 129 of the Criminal Code or the discovery/disclosure Rules of the Supreme Court.

Of course, the correct position is that no archivist would ever authorize,[15] or may legally authorize, the destruction of public records when knowing that they were likely to be evidence for a judicial proceeding. Yet the CJC claimed that the "legal value" of public records did not fall within the archivist's statutory discretion when appraising them for destruction/retention, as her sole concern was their "historical" value. Out of this affair, I have suggested that State/federal archivists should be made, by law, officers of the Parliament, just as Auditors-General are, to afford them greater independence and protection from Executive power when protecting public records in the public interest.[16]

I reiterate, openness and transparency were not present at this vital period of February-March, 1990. When we were waiting for the "final" advice from Crown Law at that time, the Queensland Government had already received it on 23 January, 1990. We were not officially told of this advice, or what the government intended to do, in a matter which unquestionably concerned judicial proceedings in which the Heiner Inquiry documents were known to be the central item of evidence. Moreover, we were misled into believing that the final advice was *still* coming, when the Government already had it, and had decided to destroy the evidence. Official notice only came after everything had been destroyed.

Inviting a world without evidence

The CJC's position on "due process" gave rise to very serious concern. In effect, it invited open slather on the administration of justice by the Executive in terms of destroying evidence, with its full backing as the so-called independent watchdog against government corruption.

It was suggesting that all evidence in the possession or control of a party, including the Queensland Government, could be legally and proactively destroyed up to the moment of the expected writ being filed and/or served. The shredding could be done for the specific purpose of preventing the known evidence being used in those anticipated proceedings. If this were correct at law, it would simply invite a "world without evidence"[17] – and dare I say, one of Australia's greatest jurists, Sir Samuel Griffith, was not that silly when drafting s. 129!

This position has not been recanted by the CJC's successor body, the Crime and Misconduct Commission (CMC), or the Queensland government.

In his oral submission to the Senate Select Committee on *Unresolved Whistleblower Cases* on 23 February, 1995 in Brisbane, my senior counsel, Mr Ian Callinan, QC[18] said this on the point of destroying known evidence which is or may be required in judicial proceedings:

> "The real point about the matter is that it does not matter when, in technical terms, justice begins to run. What is critical is that a party in possession of documents knows that those documents might be required for the purposes of litigation and consciously takes a decision to destroy them. That is unthinkable. If one had commercial litigation between two corporations and it emerged that one of the corporations knowing or

believing that there was even a chance that it might be sued, took a decision to destroy evidence, that would be regarded as conduct of the greatest seriousness – and much more serious, might I suggest, if done by a government".[19]

In August, 1995, after certain inculpatory admissions were made by a CJC official to the Senate[20] concerning the state of knowledge of the members of Queensland Cabinet before the shredding, and the purpose for ordering the destruction of the records, Mr Callinan, QC advised the Senate Select Committee that the CJC's strict, narrow interpretation of judicial proceedings was "too significant to ignore".[21] He went on to advise that s. 129 may have been breached, or s. 132 of the Criminal Code – conspiracy to pervert the course of justice – in the alternative for the sake of completeness. He cited *R v. Rogerson*[22] as the leading authority.

In its October, 1995 report the Senate Select Committee described the shredding as "an exercise in poor judgement",[23] and failed to address Mr Callinan's advice.

The Morris/Howard report

In May, 1996, the Borbidge Queensland Government appointed two independent barristers, Messrs Anthony Morris, QC and Edward Howard to investigate my allegations "on the papers" and to recommend to Government whether or not an open inquiry should be held. Their report was tabled in October, 1996 with considerable fanfare.

Messrs Morris, QC and Howard found that it was open to conclude that numerous criminal offences[24] may have been committed – that is, breaches of ss. 129, 132 and/or 140, 192 and 204, including official misconduct. They recommended the immediate establishment of a public inquiry, stating that it was warranted because the potential offences, carrying penalties ranging from one to seven years imprisonment, were far more serious than those which brought the Fitzgerald Inquiry into being in 1987.

Messrs Morris, QC and Howard suggested that s. 129 had been breached. They cogently argued that it did not require a judicial proceeding to be on foot to trigger it, and that the Form of the Indictment Schedule (No. 83) could not dictate the meaning of the Code.[25] They roundly criticized the conduct of the CJC, suggesting that its investigation was not thorough or independent.

The Borbidge Government, instead of establishing a public inquiry, sent the report to the Office of the Director of Public Prosecutions (DPP) to be advised (a) as to the correct interpretation of s. 129; (b) of whether charges could be brought against those named; and (c) of whether a public inquiry should be held.

After a 6-month delay, the Borbidge Government made an announcement that the DPP had advised (a) that it was not in the public interest to hold an inquiry; (b) that certain officials could be charged, but it was not in the public interest to do so. There was, however, no announcement about the proper interpretation of s. 129.

I now want to introduce the contents of a "highly protected internal CJC memorandum"[26] dated 11 November, 1996, written by then CJC Chief Complaints Officer Mr Michael Barnes, to his superiors (i.e., Messrs Frank Clair and Mark Le Grand) in response to the findings of the Morris/Howard Report. It says this at page 4:

"Nor do the authors refer to section 119 of the Criminal Code which defines 'judicial proceeding' for the purposes of the offences under consideration. That definition is framed entirely in the present tense which, in my view, supports the contention that proceedings must have commenced for an offence under section 129 to be made out.[27]

"While the authors refrain from making any findings of guilt in relation to Cabinet on the basis that they were unaware of the state of knowledge of the ministers concerned, memoranda from Matchett and Warner strongly suggest that the knowledge which Messrs Morris and Howard deem sufficient to inculpate the Departmental officers involved was shared by the politicians who gave the order to shred the Heiner documents".

The smoking gun – the January, 1997 DPP's advice

Now let me return to the DPP's advice to the Borbidge Government on the findings and recommendations of the Morris/Howard report.

That advice currently remains hidden from public scrutiny. I, however, have the advantage of having read it. On 23 September, 2003 I was given access to this 6 January, 1997, 23-page advice by the Leader of the Queensland Opposition, in whose possession it rests. I can say with certainty that it erroneously interprets s. 129. It claims that a judicial proceeding must be on foot before it can be triggered.[28] It is therefore open to conclude that this erroneous interpretation had the effect of preventing serious criminal charges being laid against those involved in the shredding of the Heiner Inquiry documents.

I now turn to two further events which ran almost parallel in time.

Federal government intervention

The first event was the reference given to the federal government's House of Representatives Standing Committee on Legal and Constitutional Affairs by the Justice Minister, Senator the Hon Chris Ellison in May, 2002. It was commissioned to hold a national inquiry into *Crime in the community: victims, offenders and fear of crime*. This Committee was chaired by the Hon Bronwyn Bishop, MP, and Mr Grundy and I placed the Heiner affair before it during 2003 and 2004.

In August, 2004 the Committee handed down its report into the Heiner affair, but not before all ALP members of the Committee resigned *en masse*. In an unprecedented landmark report in the history of Australian political life, a federal parliamentary Committee recommended criminal charges be laid against the entire Cabinet of a State jurisdiction. This is what was recommended:

Recommendation 1: "That the Queensland Government publicly release the 1997 advice on the Morris/Howard Report provided by the Director of Public Prosecutions to the then Borbidge Government".

Recommendation 2: "Given that:

- it is beyond doubt that the Cabinet was fully aware that the documents were likely to be required in judicial proceedings and thereby knowingly removed the rights of at least one prospective litigant;
- previous interpretations of the applicability of section 129 as not applying to the shredding have been proven erroneous in the light of the conviction of Pastor Douglas Ensbey [as to which see later]; and

- acting on legal advice such as that provided by the then Queensland Crown Solicitor does not negate responsibility for taking the action in question,

the Committee has no choice but to recommend that members of the Queensland Cabinet at the time that the decision was made to shred the documents gathered by the Heiner Inquiry be charged for an offence pursuant to section 129 of the Queensland *Criminal Code Act* 1899. Charges pursuant to sections 132 and 140 of the Queensland *Criminal Code Act* 1899 may also arise".

Recommendation 3: "That a special prosecutor be appointed to investigate all aspects of the Heiner Affair, as well as allegations of abuse at John Oxley Youth Centre that may not have been aired as part of the Heiner inquiry and may not have been considered by the Forde or other inquiries.

"That this special prosecutor be empowered to call all relevant persons with information as to the content of the Heiner inquiry documents, including but not necessarily limited to:

- Public servants at the time, including staff of the then Department of Family Services, the Criminal Justice Commission, Queensland police, and the John Oxley Youth Centre
- Relevant union officials.

"That the special prosecutor be furnished with all available documentation, including all Cabinet documents, advices tendered to Government, records from the John Oxley Youth Centre and records held by the Department of Family Services, the Criminal Justice Commission and the Queensland Police".

Double standards on public display

The second event was the charging of a Queensland citizen, a Pastor Douglas Ensbey, by the police and DPP with the offence of destroying evidence required for a judicial proceeding. The guillotined diary of the girl involved in the case contained evidence about her being abused by a parishioner. The pastor was committed and ordered to stand trial on 13 March, 2003 pursuant to s. 129, or in the alternate, s. 140 (attempting to obstruct justice) of the Criminal Code. The relevance of this to the Heiner affair was that the destruction-of-evidence conduct occurred some five to six years *before* the relevant judicial proceeding commenced. Yet, according to the same law-enforcement authorities, such action could not apply in Heiner because the anticipated proceedings had not commenced.

I witnessed this shredding trial throughout, accompanied for much of the time by Mr Grundy. Within five minutes of the District Court trial commencing, the court ruled that s. 129 *did not require* a judicial proceeding to be on foot to trigger the provision. We saw the criminal law being applied by the State by self-serving double standards. On 11 March, 2004, Pastor Ensbey was found guilty of breaching s. 129. And then, on 25 March, 2004, Queensland's Chief Law Officer, the Attorney-General and Minister for Justice, appealed the leniency of sentence to the Queensland Court of Appeal because of the seriousness of the crime, in doing so using my interpretation of s. 129. On 17 September, 2004 the Court of Appeal upheld that interpretation of s. 129, and the conviction, but rejected any increase in sentence.

Unarguable criminal provision

The central structure for confirming the conviction in *Ensbey*[29] by their Honours Davies, Williams and Jerrard JJA in respect of s. 129 was put in these terms:

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

Their Honours confirmed the legal correctness of Judge Samios' direction to the District Court jury, which was as follows:

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

It is highly relevant to note Jerrard JA's reasoning in *Ensbey* on the definition of "judicial proceeding". He demonstrated its unfettered meaning by its plain reading and application to the offence of perjury (i.e., s. 123). In short, it could not be plainly "unfettered" in perjury, but "fettered" when dealing with the destruction of evidence. Consistency and predictability must apply under statutory interpretative principles.

I may add that in April/May, 2003, well before *Ensbey* was settled, retired former Appeal and Supreme Court of Queensland Justice the Hon James Thomas advised *The Independent Monthly* on s. 129. He advised that while many laws were indeed arguable, s. 129 was not. It plainly included a proceeding not yet on foot but one within contemplation of the doer. He suggested that those involved in any breach may still be open to charges.

In short, it is my contention that the erroneous interpretation of s. 129 used to thwart my pursuit of justice, was one which should never have been involved.

Put simply, this rule by Executive decree is totally unacceptable if the rule of law matters in Queensland.

Some germane considerations

Former United States Supreme Court Justice Felix Frankfurter is credited with having said:

> "...if one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process".

Welding together all the elements which make up a liberal democratic society governed by the rule of law, by which respect for and the upholding of legal process and legal constitutional rights *should guarantee* the democratic timeless value of equality before the law, are the words of Mason C J, Deane and Dawson J J in *Ridgeway*, which reinforce Justice Frankfurter's words:

> "The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of 'high public policy' relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty".

Courts need evidence to do justice in adjudicating disputes.[30] This is commonly known and accepted. Proper public record keeping also plays an essential role in the administration of justice.

Concerning the protection of evidence, its admissibility and discovery/disclosure, it is ultimately for the courts, in a democracy, to decide what is and what is not admissible in evidence in a judicial proceeding.[31] It does not fall on the parties to decide unilaterally for themselves to advantage themselves.

More especially, it does not fall on the executive arm of government to decide for itself what is or is not required, and be permitted to embark on a reckless or deliberate unilateral destruction-of-evidence exercise when party to litigation. To do so would be to seriously and unacceptably breach the doctrine of the separation of powers. It would see the Executive capable of thrusting a dagger into the heart of the independence of the judiciary for self-serving purposes, by denying the judicial arm of government its constitutional right to fact-find, truth-seek, decision-make and to do justice according to law without fear or favour, based on all available evidence relevant to a pending or anticipated judicial proceeding.

Another foundation stone on which this paper is based are the words of Gibbs C J in *FAI Ltd v. Winneke*,[32] namely:

> "I can see no reason in principle why the rules of natural justice should not apply to an exercise of power by the Governor in Council, who is of course not above the law…".

I am also fortified by Deane J in *A v. Hayden*,[33] wherein he said:

> "…neither the Crown nor the Executive has any common law right or power to dispense with the observance of the law or to authorise illegality".

Chief Justice Gleeson, in his speech to the Family Court Conference in Sydney in 2001, said:

> "The importance of the administration of criminal justice, not only to public safety and security, but also to the decency of a society, and its respect for human dignity and rights, is too obvious to require elaboration".[34]

While I agree with Chief Justice Gleeson, from my experience in the Heiner affair with Queensland's criminal justice system and its public administration, I suggest that its importance needs a dose of elaboration from north of the Tweed, where our unicameral system of government reigns supreme.

Power corrupts, absolute power corrupts absolutely. I believe that there must be limits placed on power and its exercise through checks and balances.

The great contract of trust

Our system of government works on the great contract of trust between the Crown – on behalf of the people – and/or the Crown's representative, its Ministers of State and the people's elected representatives that in all things, at

all times, for all parties, the law and Constitution shall be respected and upheld. Before power can be exercised over the people, the governed and the law demand that the governors and/or administrators seal this great contract by a sworn Oath of Office.[35]

Under this great contract, all are publicly committed to the rule of law because the law binds us all, accepting that we are all equal before the law.

However, when and if the Crown's Ministers place themselves beyond the law and constitutional custom, the ultimate guardian is the Crown itself. In Australia's constitutional monarchy system, the role of the Governor-General or State Governor must be, in the last resort, to invoke the Crown's discretionary reserve powers in order to ensure compliance with the general law and the effective working of parliamentary democracy.

In my opinion, we may have such an extraordinary circumstance now in the shape of the Heiner affair.

It is well settled that neither Sovereign, Head of State, President nor executive government should be above the law in societies which claim to be governed by the rule of law, any more than you or I are above the law.[36] This democratic principle engenders public confidence and trust in government. At another level in our system, our Constitution provides the power and authority to an independent judiciary to act as a bulwark against abuse by the executive government, and requires the judiciary to do justice without fear or favour according to law. When necessary, if the Executive and legislature exceed their constitutional limits, as in *Communist Party Dissolution Act* 1951,[37] our High Court may strike down laws or actions by the Executive and the legislature which are found to be unconstitutional or illegal, even in the face of the popularity of those laws or those actions.

I am also reminded of the warning issued by Thomas Jefferson:

> "The two enemies of the people are criminals and government, so let us tie the second down with the chains of the Constitution so the second will not become the legalized version of the first".

Non-negotiable values

Even after 14 years struggling for justice in respect of the Heiner affair, I hold firm to the notion of equality before the law for all, especially expecting government to act lawfully in all things and at all times. It is a non-negotiable value of this nation. It sustains our freedom.

Notwithstanding Voltaire's warning that it is dangerous to be right when the government is wrong, if freedom matters, oppression and abuse of power simply must be resisted because one person's stand can make a difference. There is a need to ensure that this generation leaves the next with the undamaged legacy of a decent free society, and to see that what applies to the lowest in society applies to the highest at law, especially the criminal law.

I put the test in these terms to the House of Representatives Standing Committee on Legal and Constitutional Affairs during its investigation of the Heiner affair as part of its national inquiry into crime in the community. In my opening statement on 16 March, 2004 in Brisbane, I said :

> "...the resignation or jailing of a Minister, and perhaps even, the jailing of an entire Cabinet and senior public officials involved in a serious cover-up, although painful to see, will better secure our democratic future and stability in the long run than turning a blind eye to high level corruption in

the short run because it sends the message to all that no one is above the law".

If and when the law is breached by government, it has the capacity to wreak untold havoc on the peace, order and good government of any nation or State.

Invoking the State Governor's discretionary reserve powers

On 13 October, 2003 and again on 20 September, 2004 I placed these matters before Her Excellency the State Governor, because I believed that her government was placing itself beyond the reach of the criminal law by abuse of power. I held that such a circumstance may give rise to the need for her to invoke her discretionary reserve powers wherein, if satisfied that the allegation be well made, and it is not being properly addressed because of abuse of power, Her Excellency could "encourage" her government to appoint a Special Prosecutor to finally resolve the matter, or take other necessary measures within her legal discretion,[38] in order to restore public confidence in government.

In his 1999 Sir Robert Menzies Oration entitled *Governors, Democracy and the Rule of Law*,[39] former Tasmanian Chief Justice and Tasmanian Governor the Hon Sir Guy Green said this:

> "The principle of responsible government is not the sole or even the main principle upon which our system is founded. An even more important principle is the rule of law".

He went on:

> "It is certainly the case that if one has regard to the principles of responsible government alone it can be persuasively argued that a Governor must always follow the advice of the Ministry. But the application of the principles of the rule of law leads to a different conclusion. The rule of law also imposes an obligation upon a Governor to see that the processes of the Executive Council and the action being taken are lawful and to refuse to act when they are not. That duty is not confined to refusing to be a party to an action which is unlawful in the sense of being contrary to say the criminal law but includes acts which are beyond power or acts which are within power but are being exercised irregularly as was the case for example in *FAI v. Winneke*".

In my view, pursuant to the sworn duty of her Ministers of the Crown to uphold Queensland law, which includes the *Crime and Misconduct Act* 2002, in which exists a body of conduct described as "suspected official misconduct", Her Excellency need only satisfy herself that suspected official misconduct exists which is not being addressed equally and properly by her government, thereby placing itself beyond the reach of the law by self-serving abuse of office, and that may trigger her discretionary reserve powers.

After receiving my first letter of 13 October, 2003, Her Excellency requested a report from the Premier on the Heiner affair on 21 October, 2003. As of 29 March, 2005, almost 18 months later, Her Excellency was still waiting for the report, which had been purportedly delayed by the Queensland Government wanting to wait until the *Ensbey* case was settled.[40] That case was settled on 17 September, 2004 by the Queensland Court of Appeal. No appeal was taken on its verdict. I simply ask, why the delay still?

I also put these legal/constitutional issues to the Queensland Premier by letters dated 15 October and 22 November, 2004. I requested that a Special

Prosecutor be appointed because the CMC and police were tainted and not free of real or apprehended bias.[41] Premier Beattie refused. He claimed that my allegations had been "exhaustively investigated" – a claim which is simply untrue, and arguably self-serving.

On 23 March, 2005, in a further letter to Her Excellency, I put the significance of the Heiner affair in these terms:

> "The criminal law only carries a moral and constitutional basis of authority and respect in a democracy if it is applied equally by government against all citizens who transgress it. That is government by the rule of law. If, however, the law becomes an instrument of sectional application by government for government, such conduct is unfair and oppressive and sets government in conflict with democracy itself and the rule of law. That is tyranny".

In my last letter of 3 April, 2005 to Her Excellency I suggested that her government's only weapon of defence now was delay in providing the requested report.

On 6 April, 2005 I gained access to a submission faxed to the Queensland Director of Public Prosecutions on 13 September, 2003 from Pastor Ensbey's legal team. They cited the former DPP's interpretation of s. 129 as applied in the Heiner affair as reason not to proceed with the charge under s. 129 against their client in the District Court. The submission was handed to me by Mr Ensbey. He had been sacked as a pastor of the Baptist Church in the wake of his conviction and was earning a living as a truck driver. He also made available the response, dated 6 November, 2003, from the current DPP, Ms Leanne Clare, in which she rejected the earlier interpretation and advised that the prosecution against Pastor Ensbey was in the public interest and would proceed.[42]

Consequently it may be said with certainty that when the State of Queensland prosecuted one of its citizens, namely Pastor Douglas Ensbey, the State knew that its Ministers of the Crown and senior bureaucrats escaped the same fate for the same destruction-of-evidence conduct by the same criminal provision (i.e., s. 129) being interpreted differently.

No statute of limitations applies in regard to these alleged offences under the Criminal Code, and they may therefore still be addressed.

Issues of concern

In regard to the administration of the criminal law in Queensland, its governance and the conduct of certain legal practitioners, it is now reasonably open to conclude that:

1. Certain Queensland public officials (i.e., Ministers of the Crown, MLAs and public servants) collectively have themselves misinterpreted and/or know that the criminal law (i.e., s. 129 of the Criminal Code) has been erroneously interpreted in the Heiner affair, which has had the effect of preventing serious criminal and/or disciplinary charges being brought against certain of them for their destruction-of-evidence conduct. Yet, in the case of a private citizen (i.e., Pastor Ensbey), some of those same public officials have knowingly applied and/or now know that the same provision was applied correctly to the full extent of the law for the citizen's similar destruction-of-evidence conduct and seen him found guilty.
2. Certain Queensland public officials (i.e., Ministers of the Crown, MLAs and public servants) in respect of Point 1 have abused and continue to

knowingly abuse their power and place themselves beyond the reach of the law by not applying the criminal law equally and consistently in a materially similar circumstance.

3. The Executive and legislative arms of government in the State of Queensland have confirmed, by the Cabinet's own destruction-of-evidence action in the Heiner affair and its preparedness to continue to defend such obstructionist conduct, that both will interfere with the judicial arm of government to prevent evidence in the Executive's possession and/or control being used in known or reasonably anticipated proceedings by deliberately destroying it. This is despite knowing that in those records is suspected and/or known evidence concerning the abuse of children in State care, and that such conduct scandalizes the disclosure/discovery Rules of the Supreme Court, and breaches the doctrine of the separation of powers so fundamental to any civil society governed by the rule of law.

A Crown Prosecutor's duty

The law says that a Crown Prosecutor's duty is to act "fairly and impartially, and to assist the court to arrive at the truth", and in respect of any decision to prosecute or not to prosecute, it must be based upon the evidence, the law and prosecuting guidelines, and must never be influenced by:

"(a) race, religion, sex, national origin or political views;
(b) personal feelings of the prosecutor concerning the offender or the victim;
(c) possible political advantage or disadvantage to the government or any political group or party; or
(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution".[43]

I submit that prosecuting duty in Queensland is in doubt in respect of the Heiner affair.

Conclusion

The rule of law requires respect for due process over expediency, political or otherwise.

Those with a sworn duty to uphold the law and our Constitution ought not allow this matter to remain unresolved. To do so imperils our democratic heritage.

The law must not be brought into derision by government, or anyone, particularly the criminal law and our Constitution. This matter must be properly addressed to restore public confidence and trust in Queensland's impartial administration of justice and public administration.

Endnotes:

1. Section 13 of the *Public Service Management and Employment Act* 1988. See Crown Law advice dated 19 January, 1990 to Ms Ruth Matchett, Acting Director-General, Department of Family Services and Aboriginal and Islander Affairs – Volume 1, Queensland Government – *Submissions, Supplementary Submissions and Other Written Material Authorised to be Published* – 1995 Senate Select Committee on *Unresolved Whistleblower Cases*.

2. See pp. 66-67, *The Heiner Affair – The Destruction of Evidence*, August, 2004 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Goss Cabinet awareness of child abuse at JOYC* [John Oxley Youth Centre].

3. *Crime Commission Act* 1997**:** Section 6 (1) states:

> "'Criminal paedophilia' means activities involving (a) offences of a sexual nature committed in relation to children; or (b) offences relating to obscene material depicting children".

4. See pp. 45-46, points 2.179–2.180, *The Heiner Affair – The Destruction of Evidence, op. cit.*.

5. Queensland Professional Officers' Association and Queensland Teachers' Union.

6. See *Sankey v. Whitlam* (1978) 142 CLR 1, at 38-45, 68-69.

7. This opens up interesting *McCabe*-related questions of deliberate "warehousing" of discoverable records "off shore", that is, transferring the records from the Families Department into the hoped-for security of the Cabinet room to avoid discovery/disclosure. Also, certain of those parties knew that the records contained probative contemporaneous evidence concerning the known or suspected abuse of children in care, which on any reasonable view ought to have been referred to the police or Criminal Justice Commission as a matter of legal obligation to be independently investigated.

8. Criminal Code, Part 3, *Offences Against the Administration of Law and Justice and Against Public Authority*, Chapter 16, *Offences Relating to the Administration of Justice.*

9. Established on 2 September, 1993 and chaired by Tasmanian Senator Jocelyn Newman.

10. See Point 1.13, *In The Public Interest*, Report of the Senate Select Committee on *Public Interest Whistleblowing*, August, 1994.

11. CJC Chief Complaints Officer Mr Michael Barnes, Senate *Hansard*, 23 February, 1995, pp. 104-105.

12. See Volume 1, Queensland Government – *Submissions, Supplementary Submissions and Other Written Material Authorised to be Published*, 1995 – Senate Select Committee on *Unresolved Whistleblower Cases.*.

13. In *R v. Cunliffe* [2004] QCA 293, McMurdo P, McPherson JA, Mackenzie J state this:

> "Misinterpretation of the law equates to ignorance of the law and is not an excuse: See *Ostrowski v. Palmer* and see also *Olsen & Anor v. The Grain Sorghum Marketing Board*; *ex parte Olsen & Anor*".

14. *Ostrowski v. Palmer*[2004] HCA 30.

15. http://www.mybestdocs.com/hurley-c-lucas-reprise-0408.htm; also see http://www.mybestdocs.com/hurley-c-rk-des-law-0309.htm.

16. See United States archives academic book *Archives and the Public Good: Accountability and Records in Modern Society*, Quorum Books, Westport, Connecticut & London, July, 2002, edited by Professor Richard Cox of the University of Pittsburgh and Assistant Professor David Wallace of the

University of Michigan archives schools. It cites 14 of the 20th Century's greatest shredding/recordkeeping scandals and places the Heiner Affair alongside the Iran/ContraGate affair *et al.* Heiner's chapter is by renowned Australian archivist Mr Chris Hurley.
See also July/September, 2003 edition of *Image and Data Manager* magazine cover story, *When Proof Goes Missing*, and September/October, 2004 edition (p. 36), *Heiner Revisited – the battle goes on*.
See also May, 2003 edition of Australian Society of Archivists' academic journal *Archives & Manuscripts, The Rule of` Law: Model Archival Legislation in the Wake of the Heiner Affair*, by Kevin Lindeberg in conjunction with Dr Terry Cook of the University of Manitoba, Canada.

17. See *Melbourne University Law Review*, Volume 27, *Destruction of Documents Before Proceedings Commence: What is a Court to do?*, by University of Melbourne Law Faculty Associate Professor Camille Cameron and solicitor Mr Jonathan Liberman. This paper was written in the wake of *British American Tobacco Australia Services Ltd v. Cowell (as Representing the Estate of Rolah Ann McCabe, Deceased)* [2002] VSCA 197.
18. Now Justice of the High Court of Australia.
19. Senate *Hansard*, 23 February, 1995, p. 3 – Senate Select Committee on *Unresolved Whistleblower Cases*.
20. See Senate *Hansard*, 29 May, 1995 – Senate Select Committee on *Unresolved Whistleblower Cases*, pp. 663,665, 682, 685 and 696. For example, Mr Barnes for the CJC at p. 685 said:
> "I do not see that the delay is either here or there. There is no doubt that the documents were destroyed at a time when the Cabinet well knew that Coyne wanted access to them. There is no doubt about that at all".
21. See Point 2.100, *The Heiner Affair – The Destruction of Evidence, op. cit.*.
22. *R v. Rogerson and Ors* (1992) 66 ALJR 500. Mason C J at p.502 says:
> "...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. See Point 5.39, p. 60, *The Public Interest Revisited*, October, 1995 Report of Senate Select Committee on *Unresolved Whistleblower Cases*.
24. Morris/Howard Report to Hon The Premier of Queensland and Queensland Cabinet, *An Investigation into the Allegations by Mr Kevin Lindeberg and Allegations by Mr Gordon Harris and Mr John Reynolds*, pp. 203-5.
25. Also see *R v. His Honour Judge Morley and Mellifont* [1990] 1 Qd R 54 at 56.
26. This document was lawfully accessed by the author at the Connolly/Ryan *Inquiry into the Effectiveness of the CJC* in July, 1997, when the Heiner affair came under review. At the Inquiry, the author was provided with access to his CJC file.
27. See Point 2.99, *The Heiner Affair – The Destruction of Evidence, op. cit.*, on the statutory interpretation of the word "includes" (as mentioned in s. 119) by QUT senior law lecturer Mr Alastair MacAdam.
28. See Point 2.171, *The Heiner Affair – The Destruction of Evidence, op. cit.*, and Recommendation 1, Point 2.174.

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

30. *Huddart, Parker & Co Pty Ltd v. Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

31. *Davies v. Eli Lilly & Co* [1987] 1 All ER 801. Lord Donaldson MR gave what has become one of the most oft-quoted descriptions of the modern common law process of civil discovery. He said:

> "The right [to discovery] is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object".

32. *FAI Ltd v. Winneke* (1982) 151 CLR 342 at 4.

33. *A v. Hayden* (1984) CLR 532.

34. http://www.australianpolitics.com/news/2001/01-07-27.shtml

35. Sections 31 (1) (b) and 43 (6) of the *Constitution of Queensland* 2001 regarding Her Excellency and Ministers of the Crown respectively.

36. Mason C J in *Walker v. New South Wales* (1994) 182 CLR 45, at 49-50:

> "It is a basic principle that all people should stand equal before the law ... the general rule is that an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters ... And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose".

37. *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1.

38. Section 33 of the *Constitution of Queensland* 2001 – General Power of Governor.

39. http://www.unimelb.edu.au/speeches/sirguygreen 99oct29.html.

40. See Answer by Queensland Premier, the Hon Peter Beattie, MLA to Question on Notice (No. 47), 29 March, 2005 from Mrs Liz Cunningham, MLA, Queensland Legislative Assembly.

41. *Livesey v. New South Wales Bar Association* [1983] 151 CLR 288 at 294; *Metropolitan Properties Co (FGC) Ltd v. Lannon* (1969) 1 QB 577 at 599; *Stollery v. The Greyhound Racing Control Board* (1972) 128 CLR 509, where Menzies J stated:

> "Authority (i.e., *Dickason v. Edwards* (1910) 10 CLR 243; *Allinson v. General Council of Medical Education* [1894] 1 QB 750; and *R v. London County Council ex parte Akkersdyk* [1892] 1 QB 190) further establishes that a person who has an interest adverse to, or in such proceedings, has been opposed to, the person on trial, is within the category of persons who in fairness ought not to be present at the deliberations of the tribunal".

See also: *Carruthers v. Connolly, Ryan & A-G* [1997] QSC 132; *R v. Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, Gibbs, Stephen, Mason, Aickin and Wilson J J at 55 is relevant:

"If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted".

42. See April, 2005 edition of *The Independent Monthly*.

43. 14 November, 2003, Guidelines of the Office of the Director of Public Prosecutions under s. 11(1)(a)(i) of the *Director of Public Prosecutions Act* 1984. Also see: http://www.justice. qld.gov.au/odpp/home.htm.