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13 February 2003

Your Excellency Major General Peter Arnison AO
Governor of Queensland
Government House
Fernberg Road
PADDINGTON QLD 4064

Your Excellency

RE: THE HEINER AFFAIR AND THE *LINDEBERG PETITION*

Your Office holds comprehensive correspondence on this matter.

You dismissed my concerns in your letter of 7 May 2002 stating that you did not have the power to investigate them and that the so-called Heiner Affair (Heiner) had been *"...assessed and/or investigated by a wide range of agencies including the Premier, the Queensland Police Service, the Queensland Criminal Justice Commission, the Queensland Crime Commission, and a range of Government Departments."*

The incorrectness of the aforesaid was addressed in my last letter of 12 May 2002. It stands.

I must now bring to your attention further evidence which substantiates the gravity of this matter.

Notwithstanding your ability to act in this matter on what you already hold, I respectfully submit that this additional material is too compelling to ignore pursuant to your constitutional obligation of ensuring that peace, order and good government is delivered by the three arms of government (i.e. Executive, Legislature and Judiciary) within the rule of law so that Her Majesty's Queensland citizens may live in freedom and security under the umbrella of equal justice and not be oppressed by any one arm of government by abuse of power.

The Deception Revealed

On 22 and 23 January 2003 in the Brisbane Magistrate's Court, I witnessed the Queensland Director of Public Prosecutions (DPP) bring committal charges against a Queensland citizen, namely a Minister of religion, in the form of breaches of section 129 of the *Criminal Code (Qld)* – destruction of evidence – and/or section 140 of the *Criminal Code (Qld)* – attempting to pervert the course of justice. (See attached *Courier-Mail* article addendum).

Of relevance, the shredding conduct which the Minister of religion was alleged to have committed thereby enlivening section 129 of the *Criminal Code (Qld)*, occurred some 5 years ***before*** a sexual-assault incident was taken to the police by the victim, and one more year ***before*** the perpetrator was brought before the courts and sentenced for his admitted guilt.

In its submission to the court, the DPP held that at the time the pastor guillotined the victim's diary in which he also knew the girl recounted being sexually assaulted by one of his parishioners, it was beyond reasonable doubt that he knew that the document would be required in a judicial proceeding (and any prospective police investigation) and in destroying the document, he breached section 129 of the *Criminal Code (Qld)* as it prevented its use in a judicial proceeding.

<u>In short, the provision did not require – and never has required - a judicial proceeding to be on foot to trigger it.</u>

The critically relevant point flowing from the DPP's action is not whether the Minister of religion is committed to face trial by the Magistrate, and even whether he is ultimately found not guilty in a superior court, but merely that his alleged criminal conduct was put before the court under section 129 of the *Criminal Code (Qld)* in particular, and section 140 of the *Criminal Code (Qld)* as sufficient *prima facie* evidence existed.

Application to Heiner

In Heiner, the triggering elements, as set out in *Carters*, are more compelling and unequivocal in respect of section 129 of the *Criminal Code (Qld)*, and/or sections 132 and/or 140 of the *Criminal Code (Qld)*.

For your benefit, the elements of the offence are as follows at section 129.10 in *Carters, Chapter 16 - Offences Relating to the Administration of Justice - The Criminal Code.*

The Accused:

1. Knowing any book, document or other thing is or may be needed in evidence;
2. Wilfully destroys it or renders it illegible, or indecipherable, or incapable of identification;
3. With intent to prevent it being used in evidence.

Those elements were present in the minds of the (Goss) Queensland Executive, Office of Crown Law, departmental public officials and others at the time the Heiner records were ordered destroyed on 5 March 1990. You hold this evidence.

Eminent senior counsel (such as Messrs Robert F Greenwood QC, Anthony Morris QC, and (now) High Court Justice the Hon Ian Callinan QC AO) have *always* concurred with this view of section 129's applicability in Heiner, and now, in the public glare of Her Majesty's Magistrate's court, the Queensland DPP is applying section 129 in a matter plainly relevant to its provisions but less emphatic against available evidence and far less serious than in Heiner where the alleged wrongdoers are the members of Queensland's Executive Government, two of whom still serve in your Government, namely the Hon Terry Mackenroth MLA as Deputy Premier, Treasurer and Minister for Sport, and the Hon Dean Wells MLA as Minister for the Environment. There is no statute of limitations applicable in this matter.

I respectfully remind you that when the law-enforcement agencies of the Queensland Government came to Heiner, they claimed that section 129 of the *Criminal Code (Qld)* could only be triggered when a judicial proceeding was on foot – and dismissed my claim that the law had been breached, and ridiculed me for suggesting such a thing. The *Lindeberg Petition* and other documents in your possession show who the public officials are who twisted the law in its application in Heiner.

A wide-spread cover-up

You hold evidence of a wide-spread cover-up revealing systemic corruption of the highest order engulfing and involving the Executive and Legislative arms of the Queensland Government for unlawful purposes involving, *inter alia*, the destruction of evidence known (a) to be required in a judicial proceeding, and (b) to contain evidence about the abuse of children held in the care and custody of the State.

If your chief adviser, Queensland Premier the Hon Peter Beattie MLA, is the source of your advice which caused you to believe that this matter has been properly investigated (as suggested above), then you have been deliberately deceived for an unlawful purpose.

If, however, you have taken your own counsel - and, by your own discretion, not approached the Chief Justice of the Supreme Court of Queensland for independent advice which is constitutionally open to you - then I respectfully suggest that your conclusion is profoundly wrong, or, that you have been badly advised by your own staff into suggesting this remains outside your constitutional jurisdiction; consequently, I respectfully request that you reconsider your position.

Equal justice is indivisible if the rule of law is truly respected under our constitution. Equal justice can only function when Oaths of Office taken by elected and/or appointed public officials, such as yourself, the Queensland Premier or police constables, are honoured when confronted with allegations of wrongdoing.

This is such a time.

You now have indisputable evidence that your Executive Government is applying the law by double standards for a corrupt purpose.

Simply put, if it is good enough for a Minister of religion to stand charged before Her Majesty's courts, then I submit, by the application of equal justice, that it is good enough for Ministers of the Crown to be brought before Her Majesty's courts for the same conduct so that justice may be done and the law is not brought into disrepute.

You now have indisputable evidence that your Executive Government is prepared to apply the penal code to one of Queensland's citizens but will not apply the same law to itself for the same conduct.

Furthermore, in unicameral Queensland, your Executive Government, with the acceptance of the Legislature - using Heiner as the benchmark – is declaring to the Judiciary that whenever it has public records in its possession and control (even including known evidence of abuse of children in a State-run institution going to the crime of criminal paedophilia) which the Executive knows is required in anticipated/foreshadowed judicial proceedings, it will deliberately destroy them up to the moment of a writ being filed/served to prevent their use by the Judiciary - pursuant to its constitutional obligations - to deliver justice to and for the

people according to law; and, at the same time, deliberately breach the doctrine of the separation of powers by wilfully offending the Judiciary's rules of court in respect of discovery/disclosure.

In all of the aforesaid, you now see your Executive Government acting tyrannically and unconstitutionally by placing itself above and outside the law, and placing itself in *prima facie* criminal contempt of the Judiciary.

As for the (unicameral) Queensland Legislature, it remains either helpless to do anything in the face of Beattie Government's overwhelming majority on the floor of Parliament which is capable of being abused in this matter, or even, through inaction, supportive of or indifferent to this constitutional crisis where executive decree has undoubtedly replaced the rule of law and destroyed any notion of responsible government.

Gaudron J in *Nicholas v The Queen* [1998] HCA 9 (2 February 1998) at 111 spelt out the seriousness of this core governance principle which plainly now embraces Heiner. She said:

"If the doctrine of the separation of powers is to be effective, the exercise of judicial power needs to be more than separate from the exercise of legislative and executive power. To be fully effective, it must also be free of legislative or executive interference in its exercise. As a result, legislation that is properly characterised as an interference with or infringement of judicial power, as well as legislation that purports to usurp judicial power, contravenes the Constitution's mandate of a separation from legislative and executive powers."

Another confirmation of the law

I respectfully draw your attention to the outcome of the Standing Committee of Attorneys-General's (SCAG) meeting in Cairns on 1 August 2002 as reported in *The Australian Financial Review* on 2 August 2002.

In a declaratory law announcement, SCAG agreed to crack down on solicitors who advised or assisted their clients to destroy documents known to be required for ***anticipated*** court proceedings, and who assisted or advised their clients to relocate documents in order to avoid the disclosure/discovery obligations pursuant to the rules of court of the Supreme Court.

This agreement came in the wake of the landmark *McCabe* case and the USA Enron/Arthur Andersen shredding scandal. Although such conduct is already impermissible and capable of

disbarring a lawyer from the rolls (at the very least), it appears that SCAG wanted to reinforce the unacceptability of this impermissible conduct in unambiguous terms to the community at large and the legal fraternity.

Or, in other terms, SCAG was attempting to restore public confidence in our justice system and to allay public concern that the right to a fair trial being jeopardised in the present climate of *McCabe* and Enron was being addressed by all the first law officers within the Commonwealth of Australia.

I respectfully remind you that in Heiner this relevant law (section 129 of the *Criminal Code (Qld)*) has been deliberately flouted and its interpretation twisted for the purpose of self-interest in order to avoid the consequences of what the law really says.

Plainly the SCAG 'declaratory law' agreement also confirms everything I have stood for in Heiner but which the Queensland Government, Criminal Justice Commission and others have ridiculed for years in their systemic cover-up to escape equal application of the law.

The Victorian Appeal Court on destroying known evidence

In referring to *McCabe* earlier, you should note that on 6 December 2002, in *British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002) at 173, the court relevantly and unanimously found:

> "... it seems to us that there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court, meaning criminal contempt (inasmuch as civil contempt comprises wilful disobedience of a court order and will ordinarily be irrelevant prior to the commencement of proceedings). Such a test seems to sit well with what has been said in the United States as well as what has been said in England. Whether contempt, even criminal contempt, is possible before any proceeding has been instituted need not be examined on this

occasion. (For instance, in *James v. Robinson,* which did not involve disobedience of a court order, it was said that that there can be no contempt of court before there is any litigation actually on foot, but, as the majority in the High Court pointed out, that case concerned only the narrower type of contempt, namely interference with the fair trial of a particular cause. Certainly, there can be an attempt to pervert the course of justice before a proceeding is on foot, as *R. v. Rogerson* demonstrates, and that, we think, provides a satisfactory criterion in the present instance."

Rogerson has *always* been specifically cited in Heiner as being relevant by my earlier senior counsel Messrs Ian Callinan QC and Robert F Greenwood QC.

Mason CJ's said in *R v Rogerson* (1992) 174 CLR 268 F.C. 92/021 (1992) 60 A Crim R 429 that:

"... It is well established at common law and under cognate statutory provisions that the offence of attempting or conspiring to pervert the course of justice at a time when no curial proceedings are on foot can be committed (12) *Reg. v. Murphy* (1985) 158 CLR, at p 609; *Vreones; Sharpe; Kane; Reg. v. Spezzano* (1977) 76 DLR (3d) 160; *Reg. v. Thomas. That is because action taken before curial or tribunal proceedings commence may have a tendency and be intended to frustrate or deflect the course of curial or tribunal proceedings which are imminent, probable or even possible. In other words, it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceeding before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency* (13) *Reg. v. Spezzano* (1977) 76 DLR (3d), at p 163."

The Heiner Affair – Ranked as One of Last Century's worst shredding cover-ups

A new exhibit, showing how seriously another profession views this matter, is a 340-page major academic book entitled *"Archives and the Public Good – Accountability and Records in Modern Society"* published by Quorum Books Westport Connecticut (USA) and London in July 2002.[1] It was jointly edited by Professor Richard Cox, School of Information Management and Archives, University of Pittsburgh, and Assistant Professor David A Wallace, Assistant Professor, School of Information, University of Michigan.

The book is now being used as a teaching tool in universities throughout the world.

It features 14 essays by some of the world's foremost archivists on the world's worst shredding/archives scandals of 20th century. It features this matter in that company and is Australasia's sole example. According to this independent analysis, the Heiner Affair has placed Queensland into the category of a rogue world State in respect of proper public recordkeeping and accountability. For example, it is ranked alongside the Iran-Contra Affair and the shredding of South Africa's apartheid records in the final days of that notorious regime.

The book derides the role of the CJC (and the Queensland Government) in handling the Heiner Affair and misrepresenting the archivist's proper role, and the notion that acting on legal advice may provide an unchallengeable shield for a client who deliberately destroys documents required for anticipated court proceedings.

Mr Chris Hurley[2], the author of the chapter on Heiner, makes this assessment of the proposition put to the Australian Senate in 1995 by then CJC Chief Complaints Officer Mr Michael Barnes,[3] in which he declared that an archivist's sole discretion when appraising public records for retention and/or disposal was limited to considering their "historical" value. At page 314, Mr Hurley says:

"...The Queensland Electoral and Administrative Review Commission found that its investigation of alleged irregularities in electoral redistribution was thwarted by the lack of an adequate public record. It concluded that the state's archives system had to be upgraded and strengthened. Can anyone suppose, as CJC would apparently have us believe, that EARC's concern was for the lack of an adequate historical *record? The Western Australian Royal Commission into W.A. Inc., scandals concluded that its investigations were hampered by gaps in the official record. It recommended that the Western Australian archives system should be upgraded and strengthened. It is nonsense to suggest, as the CJC must contend, that the Royal Commission was worried solely about the impact on scholars."*

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[1] See Amazon url: http://www.amazon.com/exec/obidos/ASIN/1567204694/qid%3D1028653373/sr%3D11-1/ref%3Dsr%5F11%5F1/102-6116804-6768961

[2] Former General Manager of New Zealand Archives Business and former State Archivist of Victoria, Australia. Former Australian representative on UNESCO's International Council on Archives stationed in Paris. Keynote speaker in 1991 for EARC's seminar on "Archives Legislation" as part of the Fitzgerald reform process.

[3] Now Head of Queensland University of Technology's School of Criminal Justice Studies.

In respect of the shredding itself and the view taken by the CJC, Mr Hurley makes this comment at page 305:

"...The CJC's contention that there is no evidence of criminal intent is dubious to say the least. The record shows that it was Cabinet's intention to prevent Coyne from getting the documents and using them in a legal action he was contemplating. Having formed this intention, which may or may not have been criminal, the government sought legal advice on how to carry it through. CJC seems to have reached a conclusion that whatever criminality may have been involved in forming an intention to destroy records in these circumstances, it is removed once a lawyer says you can do it!"

***Archives and Manuscripts* publication**

I also invite your attention to another article *"Recordkeeping, Document Destruction, and the Law (Heiner, Enron and McCabe)"* by Mr Hurley in *Archives and Manuscripts* - the journal of the Australian Society of Archivists[4] Volume 30 Number 2 November 2002 pp6-25. It reinforces material before you.

Prospective Retrospective legislation

On advice, I respectfully forewarn you that a remedy to the parlous political, legal, and constitutional predicament your Executive Government now find itself in, may see an attempt by the Queensland Government, with its overwhelming majority in the Queensland Legislative Assembly, to introduce retrospective legislation declaring lawful all matters and actions associated with Heiner.

Should such a policy be adopted by the Executive and passed in the Legislature then you are earnestly requested not to sign it into law as it would be the grossest breach of the law itself and such an unconscionable abuse of power perpetrated against the people and our constitution as to crack the very foundations of our constitutional monarchy system of government, namely equality before the law.

Restricted Avenues for Advice

I must revisit an inescapable threshold issue which confronts you in this matter should you desire to obtain advice about the substance of what is before you and what your constitutional

options are. On advice, I respectfully suggest that it would be neither proper nor constitutionally open to obtain advice on this matter from either your usual chief adviser Queensland Premier the Hon Peter Beattie MLA or Queensland's first law officer, Attorney-General and Minister for Justice the Hon Rod Welford MLA because of the character and grave implications on the Executive which Heiner represents. Hence, I remind you that any such advice from either Minister of your Executive (in this matter) would be tainted through the existence of prejudgement and conflict of interest.

Nor, given the previous role of the Office of the Director of Public Prosecutions in this matter, can that prosecuting organ return here without the existence of prejudgement and conflict of interest. (see *R v Watson; ex parte Armstrong* (1976) 136 CLR 248; *Livesey v NSW Bar Association* (1982-1983) 151 CLR 288; *Re JRL; ex parte CJL* (1986) 161 CLR 342; *Webb v The Queen* (1993-1994) 181 CLR 41; and *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 Gaudron and McHugh JJ at 100:

"...When suspected pre-judgment of an issue is relied upon to ground the disqualification of a decision-maker, what must be firmly established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her".

Abuse of Power

The abuse of power by the Executive and Legislature in respect of Heiner thereby ensuring that it has never been properly investigated and the *prima facie* wrongdoing brought before the court for adjudication gives rise to fundamental questions concerning the constitutional and statutory duty of the main players to carry out their respective duties according to law in the face of the Executive and Legislature failing to do theirs. As Her Majesty's representative, Governor of Queenland, you carry a heavy constitutional duty, made even more burdensome when your overriding duty to ensure peace, order and good government, now gravely disturbed in Heiner, puts you on an inevitable collision course with the Executive and Legislature. In short, there is a constitutional duty to be done - and it cannot be avoided.

The majority judgment in *Clunies-Ross v The Commonwealth*, (1984) 155 CLR 193 at 204 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ points to what your duty may be in Heiner:

[4] Contact address: Australian Society of Archivists Incorporated, PO Box 83, O'Connor ACT 2602.

"...It would be an abdication of the duty of this Court under the Constitution if we were to determine the important and general question of law ... according to whether we personally agreed or disagreed with the political and social objectives which the Minister sought to achieve. ... As a matter of constitutional duty, that question must be considered objectively and answered in the Court as a question of law and not as a matter to be determined by reference to the political or social merits of a particular case".

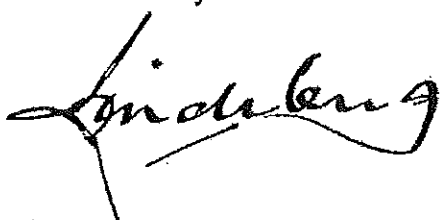
Owing to the non-justiciability in Heiner, in that the Executive arm of the Queensland Government would be effectively incriminating itself by bringing the matter before the courts and is therefore refusing to apply the law equally, it is beyond question that the peace, order and good government of Queensland has indeed been gravely disturbed and the people must now look to you for constitutional relief and restoration of confidence in the rule of law and Her Majesty's government.

An Obligation to Intervene

Consequently, under these grave circumstances, you may feel obliged, pursuant to your powers under the constitution, to warn and advise your Executive and Legislature to take appropriate steps to resolve this matter by appointment of a Special Prosecutor - upon the repealed Special Prosecutor Act's urgent reintroduction onto the statute books - with sufficiently wide Terms of Reference, resources and power, to gather evidence and hold public hearings, make recommendations and, where sufficient evidence exists, to prosecute any wrongdoer in our courts so that peace, order and good government may be restored to the Queensland people.

Should the Executive, in particular, fail to heed your advice and warning, you may feel obliged to execute the ultimate sanction of your constitutional reserve powers, namely dismissal of the current Executive and replaced by the Leader of the Opposition on the strict condition that your advice in respect of Heiner be heeded and a fresh election held.

Yours sincerely



KEVIN LINDEBERG