

In the Agora

The Rule of Law: Model Archival Legislation in the Wake of the Heiner Affair

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For over thirteen years, **Kevin Lindeberg** has been the key whistleblower in the Heiner Affair, also called Shreddergate, which concerns the inappropriate destruction of public records by the Queensland Government and the role of the archivist more generally. He has been directly involved since its beginning as a union representative dismissed during the case. His extensive analyses has been tabled as privileged documents in the Queensland and national parliaments, and have attracted national and international archival attention. He is a cartoon artist living near Brisbane.

The rule of law depends on sound archival legislation to promote fairness, transparency, and justice in a democracy. In light of the Heiner Affair in Queensland, where a state archivist was misled, state documents were destroyed inappropriately, and citizens thereby were gravely disadvantaged, this article explores the lessons to be learned for future archival legislation. While the history of Heiner or Shreddergate and its consequences for archival daily practice have been explored elsewhere, and are only briefly summarised here, the weak legal underpinnings of the archival profession revealed by Heiner need to be better understood. Archival law should strive to place archivists or recordkeepers on the same status as government auditors and information commissioners, independent of the executive government, and with much more autonomy of action. Seven generic principles for archival legislation are offered in this analysis.

* The inspiration and assistance of Dr. Terry Cook, Visiting Professor, Archival Studies Programme, University of Manitoba, Winnipeg, Canada, in the preparation of this essay are readily acknowledged and much appreciated. It was his initial suggestion on the Australian listserv (21 April 2002) that the author's series of postings on the subject be gathered and edited as a more permanent record in *Archives and Manuscripts*, and his own revision and editing of this draft manuscript have substantially enhanced its final state.

The rule of law is fundamental to free societies. It is the formal glue of the 'social contract' whereby individual citizens voluntarily give up some personal freedoms to the state in exchange for common protections and rights that are guaranteed by law. New South Wales' Appeal Court Justice Dyson Heydon¹ has recently reflected on the universal and all-important significance of this relationship:

...Under the 'rule of law' as the expression is used below, it is not possible, at least without explicit parliamentary legislation to the contrary, for most important material or personal interests of one citizen to be radically damaged against that citizen's wishes by another citizen, a corporation, or an arm of government unless some independent person holds that that is right.

The rule of law prevents citizens being exposed to the uncontrolled decisions of others in conflict with them. Powerful citizens are not permitted to use self-help against other citizens so far as their arbitrary might permits. Officers of the state are not permitted to imprison or otherwise deal forcibly with citizens or their property merely because they think it is their duty to do so. Mobs are not able to loot or lynch their enemies at will. Indeed, St Augustine thought that without the rule of law states themselves were nothing but organised robber bands.

The rule of law operates as a bar to untrammelled discretionary power. It does so by introducing a third factor to temper the exposure of particular citizens to the unrestrained sense of self-interest or partisan duty, applying a set of principles, rules and procedures having objective existence and operating in paramouncy to any other organ of state and to any other source of power, and possessing a measure of independence from the wrath of disgruntled governments or other groups. These independent arbiters are usually judges.

In order to determine what is a fair and legal use of such 'discretionary power', these independent arbiters require evidence of the various interactions of citizens, corporations, and the state with each other, if the rule of law is to mean anything. Very often that evidence takes the form of records, although it may also be oral testimony or of artefacts and forensics. In this critical context of the rule of law, what is the role of archives law, both as a constituent part of the rule of law itself, and as (usually) the legislative gatekeeper for the survival or destruction of this recorded evidence? When is the destruction of such documentary evidence an obstruction of justice and an undermining of the rule of law, and when is it a positive archival contribution and normal administrative practice?

From ancient decrees and charters to modern parliamentary law and criminal codes, humans have sought, at least in the Western world, to liberalise and democratisise their societies under the rule of law. A long, sometimes bitter

process, that never progressed in a straight or assured line, the form, scope, and content of law-making (and related recordkeeping) over thousands of years has generally seen legislation enacted, and professional standards developed, based on lessons from the past and at the same time hopes to afford future generations a greater degree of personal security, more open, just, and accountable government, and, in some cases, more personal liberty. In this process, out of cataclysmic human-made disasters of negligence, happenstance, or the exercise of political and administrative power brought about by genuine misunderstandings or a corrupt abrogation of power from vested interest to the detriment of one or many in the community, significant advances down the rocky road to a civilised society can and have been made, whenever the wrong has been exposed and corrected with the public interest in mind so that history does not repeat itself. Put simply, out of bad may come good if there is a genuine desire on the part of politicians and professionals to make our system of government and the rule of law more equitable. Conversely, a grave betrayal occurs when those with public authority and professional interest fail to enact change or correct a wrong out of selfish or political interest thereby showing contemptuous disregard to their public office and fellow professionals who have gone before and are yet to come, as well as to the community at large. This obstinacy in not recognising a clear wrong may solely turn on the nature of the wrong and who has committed it, which may, in turn, bring fear of reprisal into the equation if dissent against authority abusing its power is shown or fear of professional disharmony by implicitly criticising long-standing colleagues, perhaps also personal friends. While not easy, each generation in the progress of the rule of law must see, in some form or other, whether it has the ethical and moral steel to prevail and advance.

It is within this context readers are invited to consider the recently enacted *Public Records Act 2002* in Queensland against the experiences of the Heiner Affair (Heiner) and the extraordinary challenges that Affair has brought to various arms of government. The new Queensland archives law is the most recent in Australia, and one of the most recent in the English-speaking world. Does the new law meet the lofty tests for the universal rule of law outlined above by Heydon J? Does the new law demonstrate the capacity to learn from past errors and thereby improve the fundamental justice of our social contract? Does the new law clarify the role of the archivist that Heiner so severely cluttered? This article will consider these questions and suggest, based on the lessons from the Affair, corrective features that any new model archival legislation should contain.

Beyond a brief capitulation to allow readers a sense of context, however, there is no attempt here at a detailed analysis of Heiner's history through its various

investigations, commissions, petitions, and parliamentary interventions, as these have been well covered elsewhere and are readily available to any concerned reader.² Neither is there any extended attempt to draw out the implications for better archival professional practice around the appraisal, disposal, and destruction of public records in order to ensure that the worst abuses of Heiner are not repeated, as these too have already been skilfully articulated.³ And as an outsider looking in to the archival world, I will not presume to detail to Australian archivists, as world champions of a continuum of recordkeeping activity, that your mission is not limited to appraising records solely for their historical or heritage value, and their subsequent custody and care for cultural research purposes, important as those traditional tasks doubtless are; records are also kept for reasons of operational continuity, citizen rights, public accountability, and the public good.⁴ Australian archivists, too, have recognized, without needing any external prompting, the importance of the law as the fundamental framework for recordkeeping and the juridical nature of modern organisations and society.⁵

As an outsider, I can say, though, and without presumption, that you, as archivists or recordkeepers, are the keepers of **my** records. Therefore, you are **my** gatekeepers to past, present, and future. Unless archives law is properly structured, it may adversely affect my rights, instead of enhancing them, and thus I must take an interest in archival legislation. I am a user of my – the People's – records. You and I have an important partnership. On the one hand, I (as a taxpayer in the broader Australian community) place you in a position of trust to guard and administer my public records, and, in the process, give you a secure and interesting job on a reasonable salary paid from our taxes. On the other hand, I expect (as do all informed members of the broader community) that you will administer and apply the law honestly, impartially, and in the public interest (if necessary with courage) because in those records are my rights, and those of my fellow-citizens. Those rights involve not just records about security of property, social benefits, and historical continuity, but the fundamental right of citizens in a liberal democracy to hold governments to account. If records are lost or mismanaged, equality before the courts becomes meaningless, freedom of information cannot work, freedom of the press is diminished, and rapes of children in government institutions are covered up, as in the Heiner Affair. This is a prescription for chaos, for ungluing the social contract of civilised society in favour of the crude notion that 'might makes right'.

Because archivists are keepers of those precious rights-through-records, you will inevitably find yourself in the firing line from competing interests. Any model archives law and related application of codes of conduct should protect you from abuse of power, but unprincipled conduct in high places has many faces. That is

why whenever a new piece of archives law is introduced, the very best of conduct and practice should be aimed for, while the very worst of past conduct must be identified, then limited and made punishable as it offends against the noble mission of public recordkeeping.

This is not some abstract notion from political science, or invoking the vague juridical background against which archivists work. In Heiner, an archivist was actually catapulted directly into the administration of justice as a mainstream player in the destruction of government records known or foreseen to be needed as evidence in a judicial proceeding. This has an impact on the rule of law directly, by undermining the fundamental issue of what constitutes a fair trial, and the right of a citizen to enjoy that constitutional right without obstruction or impediment. And through the process followed, Heiner raises the awesome question: what should an archivist do when it is discovered that the state seemingly tried to cover up criminal acts by its agents (in this case, severe child abuse in a State-run institution, going to the extreme offence of criminal paedophilia⁶) by using the archivist's statutory appraisal function as the legitimising shield to destroy known, requested, relevant, recorded evidence. Worse, the state deliberately withheld relevant information from the archivist about the true legal status of the records in question when seeking the archivist's approval to have them destroyed.

In several subsequent forums, those in positions of authority, when challenged over what occurred, have waved the archivist's approval in the faces of their questioners, and placed a large portion of the responsibility for the shredding of this evidence accordingly on the archivist's shoulders. In simple terms, your profession has been made a scapegoat and brought into disrepute. No mention is made of the fact that the archivist was not in full possession of all known facts. When deceit has been perpetrated against an archivist by the executive government and its public officials in order to obtain sanction to destroy public records, it seems to me most unfair that the abused archivist should then be used, at a later time when the truth behind what was being shredded has come out, as the scapegoat by those who committed the deceit, abused the process, and carried the legislative and moral duty to see that the administration of justice is done fairly and that the rights of abused children are protected. This all touches the rule of law very precisely.

Even if one were to stand apart from the increasing crowd which believes that a widespread, serious, and systemic cover-up involving the Executive Government of Queensland and various accountability arms of government exists which is yet to be properly addressed, the very fact that a key accountability player like the Queensland State Archivist remained silent for over a decade in the face of such serious misrepresentations of the archivist's appraisal function, reveals, in and of

itself, an administrative malfunction too serious to ignore, in terms of model archival legislation. Either she did not have the independence to speak without retribution, or was ordered or intimidated not to speak. It is difficult to believe that independent auditors, arms-length public health officers, or parliamentary ombudsmen, if similarly challenged and made scapegoats, would have remained silent. In short, Heiner has become an ethical issue for archivists. This was recognized, of course, in the 1999 position statement issued by the Australian Society of Archivists condemning what occurred. Yet more resolute attention is still required, if for no other reason than the serious misrepresentations condemned in the ASA position statement are still embraced by the Queensland Government, its Crime and Misconduct Commission (incorporating the former Criminal Justice Commission) and the Australian Senate. For this reason alone, the ASA should raise its voice again to fight for the legislative underpinnings that will preclude a repetition of Heiner.

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For readers unfamiliar with the critical facts against which the shredding occurred on 23 March 1990, the following nine points will suffice to put the requirements for different archival legislation in context.⁷ Most of these key facts were extracted from the system, using freedom of information law, interviews with former staff members and victims, or insider information gathered over a decade by myself and others:

1. The Heiner Inquiry was lawfully established and its documents (gathered and/or created) **were always** public records pursuant to section 5 of the *Libraries and Archives Act 1988*. The witnesses were known to be covered by qualified privilege; and the State accepted any liability flowing out of any consequent court proceedings should they be commenced.
2. Mr Coyne (John Oxley Youth Detention Centre manager), who was deeply involved as a focus of Mr Heiner's investigations, had a legal right to access the records pursuant to *Public Service Management and Employment (PSME) Regulation 65*, and sought to enjoy that right. The Queensland Government **was aware** of that right at all material times, and indeed the Crown Law officers recognised that access right and Coyne's request, as is evident in the wording of its own advice to the government.
3. The Crown Law advice of 23 January 1990, which advised the Department of Families that it could shred the records providing no legal proceedings had commenced requiring their production, was

predicated on an incorrect assumption that the Inquiry's records were Mr Heiner's private property. This was corrected in later advice to Cabinet on 16 February 1990. The 23 January 1990 advice was provided when court proceedings **had not been foreshadowed**, and it did not address the legal position of what could be done to the records once it was known that they were required for anticipated court proceedings, simply because it was not a relevant issue at the time.

4. The Queensland Government was put on notice as early as 8 February, and unquestionably on 14 and 15 February 1990 that the records should not be destroyed and would be required in evidence in a judicial proceedings, if access was not granted out-of-court pursuant to *PSME Regulation* 65. This knowledge was known to the Queensland Cabinet at all material times.
5. Both the Queensland Cabinet and Crown Solicitor **knew** that once Mr Coyne's anticipated writ was filed/served, the records in the government's possession and under its control would be formally discoverable pursuant to the rules of court of the Supreme Court of Queensland, and thereafter any claim of Crown Privilege would fail. They knew because these matters were contained in Crown Law advice of 16 February 1990 to Cabinet.
6. The Crown Solicitor, as an officer of the courts, was obliged to comply with the rules of the Supreme Court of Queensland as a first duty.
7. The Queensland Government informed the would-be litigants (ie, Mr Coyne and two relevant trade unions⁸) on 16 February and 19 March 1990 that its position was '**interim**' and that the Crown Solicitor was still considering the question of access, and once that advice was received, those parties would be informed. They were not informed, in fact, until 22 May 1990, long after the Heiner records had been clandestinely destroyed. In the meantime, the Queensland Cabinet and Crown Law had together agreed on the contents of a letter dated 23 February 1990 to the Queensland State Archivist seeking her urgent approval to shred the records, but they withheld from her the known information that the records were required for anticipated court proceedings; then, having received approval on the same day by those deceptive means, Cabinet ordered their destruction on 5 March 1990 (all while knowing that solicitors were actively seeking access to them) with the shredding occurring on 23 March 1990.

8. On 16 May 1990 the State Archivist was *made aware* by Mr Coyne that the records she had approved for destruction on 23 February 1990 were, in fact, required for foreshadowed court proceedings. On advice sought from the Families Department, the State Archivist declined to respond to Mr Coyne's request for information concerning the fate of the records, and, on instructions from that Department, advised him to contact either the Department itself or Office of Crown Law for information.
9. In her 30 May 1990 internal report on the matter, the State Archivist acknowledged reading the Heiner records before authorising their disposal on the basis that they had no permanent value, but noted that some of the contents were of a defamatory nature concerning the management of the Centre.

Relevant debate has occurred over the past decade of whether there is a critical legal difference between records that have formally been requested as part of a judicial hearing on foot, and those where it is known or anticipated that they are going to be required for a foreshadowed judicial proceeding or a proceeding at a future time anticipated by the person or body in possession and control of the records because of their litigious compensatory or possible or real criminal content. This is not just the difference between legal *versus* moral rights, or the law *versus* justice, as some suggest, for a large weight of legal opinion rests with seeing the deliberate destruction of records known to be anticipated in legal proceedings as an act of obstruction of justice. After *Enron* and *McCabe*, this should come as no surprise.⁹ But what does gravely concern is the incredible application of double standards of the Queensland Government's law-enforcement arm, the Director of Public Prosecutions (DPP), recently charging a church minister in Brisbane Magistrate's court in March 2003 and subsequently ordering him to stand trial in the District Court for (a) destroying evidence required in a judicial proceeding (*Criminal Code (Qld)* section 129), or (b) attempting to pervert the course of justice (*Criminal Code (Qld)* section 140), for destroying a juvenile parishioner's diary in which it was known that the girl had recounted being sexually abused by another parishioner. The critical significance of this case is that this shredding occurred some six years *before* the (sexual abuse) matter came before the courts. In *Heiner*, where the Executive Government (i.e. Cabinet) engaged in materially similar shredding conduct of records also dealing with child abuse, the DPP, police, and the CJC claimed that section 129 could only be triggered when and if a judicial proceeding was formally on foot.¹⁰

This interpretation of section 129 has since been publicly repudiated by retired eminent jurist Queensland Supreme and Appeal Court Justice the Hon James Thomas QC AM who went so far as to say that because of its word-construction of *'...is or may be required as evidence in a judicial proceeding'*, it was never open to be interpreted as having to have a proceeding on foot to trigger it.¹¹ This view of section 129, which section 132 of the *Criminal Code (WA)* mirrors, has been supported in a 5 June 2003 letter to the author by Western Australia's DPP Mr Robert Cock QC in which he said that the section left *'...little room for ambiguity or confusion as to what behaviour the section is directed at preventing'*.

All these points should be seen contextually. The Hon Murray Gleeson CJ of Australia's High Court in his 7 November 2001 speech to the University of Melbourne in his 'rule of law series' declared that the rule of law encompasses *et al* that the criminal law should be applied uniformly in materially similar circumstances and that the courts may not grant the executive dispensation from the criminal law. By any reasonable standard, Heiner stands in stark contrast to these profoundly important democratic principles.

The lessons learned from Heiner are that administrative policy, professional standards, and even the best of intentions are not sufficient for the archivist to uphold the rule of law, in the face of a powerful executive intent on thwarting it. The Heiner experience demands a legislative guarantee of greater independence for any public archivist (federal, state, municipal, regional) as the 'third force' inside the system duty bound to impartially protect public records to ensure their preservation in the public interest and, where and when necessary, for anticipated court proceedings even to the embarrassment of a government and its public service. Whether sought actively by the archival profession or not, the time has arrived for archivists throughout the world to claim their due place in the administration of justice and all that implies, so that a Heiner-type incident may be avoided in the future. Legislative guarantees must be put in place to afford all public archivists sufficient authority, independence, and protection in the carrying out their function, so that the rule of law becomes more secure.

In the wake of Heiner, all future archives and recordkeeping legislation should have as a benchmark seven cardinal provisions – in addition to their traditional professional, records management, and cultural clauses. The provisions are:

1. that the State/Federal Archivist be an Officer of the Parliament enjoying the full protection of the Parliament in the performance of his/her duties in the same way as do the Ombudsman, Information Commissioner, Clerk of the Parliament, and Auditor-General; with any dismissal requiring a majority vote of the Parliament upon the

giving of reasons, with the Archivist being afforded a right of reply before the vote is taken.

2. that an Office of (State/Federal) Archives be established as an independent authority reporting directly to Parliament annually, capable of suing or being sued, and able to employ or contract its own general counsel for independent advice, and subservient to no department or agency of the Executive or Administration Branch of Government.
3. that the definition of 'public record' make clear that ownership of such records is vested in The People, and that they are not owned by the Executive Government of the day, but rather held in perpetual trusteeship under the independent custodianship of the Federal/State Archivist via the Office of Federal/State Archives.
4. that the term 'legal proceedings' be defined to include 'anticipated or pending court proceedings'.
5. that the destruction of any public record shall only occur after receiving the formal authorization of the Federal/State Archivist, who shall grant that authorization only after following a published set of established regulations, appraisal criteria, and procedural guidelines. Records destruction authority (including records schedules) shall carry the force of law.
6. that it be a criminal offence to knowingly mislead the State/Federal Archivist and his/her agents in the performance of his/her statutory functions.
7. that archives legislation in respect of public access be consistent not only with the principles of the *Freedom of Information* legislation, but also with the administration of justice and thereby cognizant of and cross-referenced to the relevant provisions of the *Criminal Code* for the jurisdiction involved, the *Evidence Act*, and any special public sector watchdog legislation such as Queensland's *Crime and Misconduct Act 2001*.

It is hoped, in light of the above discussion, that reasons for these seven provisions are self-evident, but some brief discussion follows animating the principles behind some of these provisions.

Independence of the Archivist

Given the sad realities of modern life, the independence of the Archivist under law is critically important. It is an incontrovertible fact that governments of all persuasion,

from time to time, from ancient to modern, have and will act unlawfully, and, every now and then, in such a serious fashion as to jeopardize, at least in a democracy, their hold on power. At that point, when political survival is on the line, the 'fix-it brigade' or 'cover-up merchants' get to work, and usually the first casualty is the disappearance of incriminating records, from Nixon to Iran-Contra to Apartheid to Enron to Heiner.¹²

Unless someone in public office, such as an independent Federal/State Archivist, can stand firm, and break the chain of corrupt administration, the cancer will spread throughout the entire system of government until the rule of law is undermined, if not even brought into gridlock. In my opinion, the best way to ensure the survival of the Federal/State Archivist in such a massive political storm is for the position to have the protection of Parliament. If an Ombudsman, Information Commissioner, Auditor General, and Clerk of the Parliament can be afforded such protection because of the conflict-based and accountability nature of their jobs, let alone affording such positions appropriate status (which is an important issue in this type of debate), then why should our public recordkeepers not enjoy similar independence, protection, and status?

Misleading the Archivist

Archival legislation should not be silent on the serious matter of knowingly misleading an Archivist in order to destroy public records. Archival law should be explicit, unequivocal, and on this point complement what is stated in the *Criminal Code (Qld)*, for example, in respect of (a) knowingly destroying evidence; (b) conspiring to obstruct justice; (c) attempting to obstruct justice; and (d) engaging in abuse of office. Misleading an Archivist, whether by consciously misstating facts about the records and their use, or by denying requested access to, or time for review of, records, should be treated as a criminal offence. This should pertain because the Archivist, in my view, plays a critical role in the administration of justice, insofar as the protection of public records is essential to protecting and enshrining individual and corporate rights which may need to be adjudicated in a court of law.¹³

Readers might like to know what the *Criminal Code (Qld)* says in respect of these relevant matters:

(a) Section 129 – Destruction of evidence: 'Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, 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 3 years;'

(b) Section 132 – Conspiring to defeat justice: ‘Any person who conspires with another to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime, and liable to imprisonment for 7 years’.

(c) Section 140 – Attempting to pervert justice: ‘Any person who attempts, in any way not specifically defined in this code, to obstruct, prevent, pervert, or defeat, the course of justice is guilty of a misdemeanour, and is liable to imprisonment for 2 years’.³

Legal Infrastructure, ‘Legal Proceedings’ and the Archives Office

One of the most disturbing features in Heiner was the role of the Office of Crown Law. It has served several masters at the same time which, in my view, is not ethically and legally proper. Conflict of interest must inevitably arise between the Office of Crown Law and State Archives, if the latter is a department or agency of the Executive Branch and compelled to use the Office Crown Law for its legal counsel. Concerns of Cabinet, Ministers, and large or senior departments will outweigh the concerns of the archives as a mere sub-office of an administrative or line department. That can only be avoided by creating a truly independent entity of the Office of State Archives, capable of being sued or suing others, including the parent State of Queensland (or Australia) if necessary, and capable of engaging or employing its own counsel. There is no cogent legal argument which can properly sustain any solicitor serving two parties in a matter in which those parties may have a difference of opinion on the matter in question. Heiner centred on the original question of ‘access vs non-access’. In such an action, where the plaintiff (Mr Coyne) explicitly put the Crown ‘on notice’ that the issue would be resolved in court unless access out-of-court were given, it is not for the State Archivist to decide the issue of access or non-access to the records in question. However, in this matter, the Office of Crown Law did nothing to respect Mr Coyne’s known law-based claim, nor, for that matter, its obligation to obey to the rules of the Supreme Court of Queensland (i.e. its fact-finding process under disclosure and/or discovery) as officers of the court.

The bottom line in Heiner (as it impinged on Mr Coyne’s legal rights) was that it was up to the courts to decide the access issue. The role of the State Archivist was and is to protect those and any records – through generic clauses in archives law and related regulations and guidelines – when they had a known legal value or clearly anticipated claim on them, and not to comply with a view which favoured one side over the other. To favour one side to the detriment of another in such circumstances is to interfere with the course of justice, and, as we now know, the act destroyed evidence of severe abuse of children in a State-run institution at the same

time as denying Mr Coyne his right to a fair trial. Plainly the Archivist must be the gatekeeper for the rule of law, not its marauder.

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There are those in positions of power and authority who have laughed at or dismissed your profession, as it has been played out in Heiner. They have sought to relegate your talents solely to historical and heritage issues or limit your genius to the lower procedural divisions of the administration of justice.

By contrast, I assert that your profession is worthy of premier division status. And I believe that, like it or not, you have been promoted to the premier division because of *McCabe* and Enron and Heiner. The rule of law requires no less.

To return to Justice Heydon, access to reliable records to support the rule of law serves as 'a bar to untrammelled discretionary power' and thus acts as a safeguard 'to the unrestrained sense of self-interest or partisan duty, [by] applying a set of principles, rules and procedures having objective existence and operating in paramouncy to any other organ of state'.¹⁴ This perspective places archivists and recordkeepers, as independent gatekeepers to those records by authorizing their retention or destruction, in a critically important position in society. While the results of appraisal will always be a 'fine art' riven by subjectivity, the process of appraisal, and any consequent records destruction, must take place under the clear rule of law, with full and unquestioned transparency of action and self-conscious documentation created by the archivist for his or her own accountability to society.¹⁵

I believe that archives legislation that meets the model provisions outlined in this essay will help archivists achieve that end, with honour and credibility, and professional integrity, and if nothing else comes out of injustices embodied in Heiner, my long struggle for justice will not have been in vain.

ENDNOTES

* The inspiration and assistance of Dr. Terry Cook, Visiting Professor, Archival Studies Programme, University of Manitoba, Winnipeg, Canada, in the preparation of this essay are readily acknowledged and much appreciated. It was his initial suggestion on the Australian listserv (21 April 2002) that the author's series of postings on the subject be gathered and edited as a more permanent record in *Archives and Manuscripts*, and his own revision and editing of this draft manuscript have substantially enhanced its final state.

1 See 'Judicial Activism and the Death of the Rule of Law', *Quadrant* (January-February 2003), pp. 9-10. Justice Heydon was appointed to the High Court of Australia in December 2002, and sworn into office in February 2003.

2 The best short summary of these events is Chris Hurley, 'Records and the Public Interest: The 'Heiner Affair' in Queensland, Australia', in Richard J. Cox and David A. Wallace, *Archives and the Public Good: Accountability and Records in Modern Society* (Westport CN and London, 2002), pp. 293–317. For longer accounts, see the author's *The Lindeberg Petition*, which was tabled in the Queensland Parliament on 27 October 1999. Its 84 pages sets out in factual detail the extent of the alleged cover-up as it was known at the time. This petition was personally examined by the Queensland Premier, the Hon. Peter Beattie MLA, in late 1999 who then assured the Parliament that all the issues (ie, alleged criminality or suspected official misconduct by Ministers of the Crown, Criminal Justice Commission officials and departmental public servants) had been 'the subject of exhaustive investigations' and that he did not intend to take any further action. An expanded and updated statement is the author's *The Lindeberg Declaration*, a 113-page analysis of the Public Records Bill set against the shredding of the Heiner Inquiry documents, and tabled in the Queensland Parliament by the Hon Lawrence Springborg MLA, (then) Shadow Attorney-General, on 17 April 2002 during the legislation's second reading debate. A more recent update (Submission 142) has been accepted and declared a public document by the Australian Federal Parliament's Standing Committee on Legal and Constitutional Affairs, and may be viewed at www.aph.gov.au/house/committee/laca/crimeinthecommunity/subs/sub142.pdf.

3 See Chris Hurley, 'Recordkeeping, Document Destruction, and the Law (Heiner, Enron and McCabe)', *Archives and Manuscripts*, 30 (November 2002), pp. 6–25.

4 In this regard, see the formative thinking in Sue McKemmish and Frank Upward, eds., *Archival Documents: Providing Accountability Through Recordkeeping* (Melbourne, 1993). Many of the essays in the Cox and Wallace book already cited, *Archives and the Public Good: Accountability and Records in Modern Society*, outline cases similar to Heiner where the public good and democratic accountability was undermined by rogue regimes, power-hungry politicians, or careless public servants. The Cox-Wallace books makes for sobering reading both for what happens when good recordkeeping is not present and for finding Australia (via the Heiner Affair – see note 2 above) part of these unsavoury international case studies – although deservedly so. That the 'traditional' historical-heritage mission of the archivist is fully compatible – within Australian continuum thinking (assuming good will and tolerance on both sides) – with the newer accountability-through-recordkeeping framework has been argued by Terry Cook: see his 'Beyond the Screen: The Records Continuum and Archival Cultural Heritage', in Lucy Burrows, ed., *Beyond the Screen: Capturing Corporate and Social Memory* (Melbourne, 2000), pp. 8–21 (originally an ASA conference keynote address).

5 See Livia Iacovino, *Things in Action: Teaching Law to Recordkeeping Professionals* (Melbourne, 1998).

6 On this development, see various articles on Mr Bruce Grundy's University of Queensland webpage regarding fresh revelations concerning the cover-up of the pack rape of a 14-year-old Aboriginal inmate of the John Oxley Youth Centre during a May 1988 supervised bush outing, which came before Mr Heiner in evidence during his brief inquiry (at www.sjc.uq.edu.au/about_journalism/staff/grundy.htm). I wish to pay public tribute Bruce

Grundy, Journalist-in-Residence at the School of Journalism and Communications, University of Queensland, for his dogged pursuit of the truth in Heiner, which is in the finest traditions of investigative journalism. He coined the term, 'Shreddergate', that has often been applied to the affair.

7 As suggested in note 2 above, there is readily available public information outlining these points in more detail, with extensive legal citations, as well as their subsequent analysis and investigation (and sometimes dismissal by government officials) since 1990.

8 Queensland Professional Officers' Association and Queensland Teachers' Union

9 The various legal opinions, and the comparisons to Enron and McCabe, where records destruction to prevent anticipated investigations were judged as criminal acts, are well set forth in Hurley, 'Recordkeeping, Document Destruction, and the Law (Heiner, Enron and McCabe)', already cited. See also the Morris QC/Howard Report into allegations by Kevin Lindeberg, tabled in the Queensland Parliament on 11 October 1996.

10 See *The Courier-Mail* (Brisbane) on Friday 24 January 2003 and 14 March 2003; and www.uq.edu.au/~uqggrund/charges.htm and www.uq.edu.au/~uqggrund/equalitybeforethelaw.htm.

11 See *The Courier-Mail* (Brisbane) on Friday 24 January 2003 and 14 March 2003; and www.uq.edu.au/~uqggrund/charges.htm and www.uq.edu.au/~uqggrund/equalitybeforethelaw.htm.

12 For an extensive analysis of some of these and similar cases, see again Cox and Wallace, *Archives and the Public Good: Accountability and Records in Modern Society*. For discussion of archives as 'arsenals of democracy', see McKemmish and Upward, *Archival Documents: Providing Accountability Through Recordkeeping*, passim.

13 (d) Section 92(1) – Abuse of Office: 'Any person, who, being employed in the public service, does or directs to be done, in abuse of the authority of the person's office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour, and is liable to imprisonment for 2 years'.

14 See note 1 above.

15 On this see Ian E. Wilson, 'The Fine Art of Destruction Revisited', *Archivaria* 49 (Spring 2000), pp. 124–39; Terry Cook, 'Fashionable Nonsense or Professional Rebirth: Postmodernism and the Practice of Archives', *Archivaria* 51 (Spring 2001), pp. 14–35, especially pp. 30–32 and related references; and Verne Harris, *Exploring Archives: An Introduction to Archival Ideas and Practice in South Africa* (Pretoria, 2000), especially chapters 4 and 7.