

THE DESTRUCTION OF THE ‘HEINER DOCUMENTS’ AND THE ACCOUNTABILITY OF CABINET IN QUEENSLAND

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The ‘Heiner documents’ were made in the course of an inquiry and the Queensland Cabinet later decided that they be destroyed. Their destruction arguably prejudiced and/or frustrated potential litigation. The issue addressed by this article is if a present day Cabinet was to make such a decision what administrative recourse might be available to challenge that decision? The article concludes that such a decision could again be made and that recourse to the various administrative reforms including the Public Records Act 2002 (Qld), the Right to Information Act 2009 (Qld) and the Constitution of Queensland 2001 (Qld) provides no comfort. The episode demonstrates that by giving Cabinet documents a special preserve of confidentiality there is a cost that challenges the foundations of responsible government.

I INTRODUCTION

Mr NJ Heiner, a retired Stipendiary Magistrate, was appointed by the Director-General of the Department of Family Services to investigate and report on certain management matters relating to the John Oxley Youth Centre.¹ Cabinet Decision No. 162 of 1990 decided:

That following advice from the State Archivist and the Crown Solicitor the material gathered by Mr NJ Heiner during his investigation into certain matters at the John Oxley Youth Centre be handed to the State Archivist for destruction under the terms of section 55 of the *Libraries and Archives Act 1988* [(Qld)].²

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¹ For further details about the investigation by Mr NJ Heiner see Queensland, Child Protection Commission of Inquiry, *3(e) Report* (2013) 17-20.

² Queensland, Child Protection Commission of Inquiry, *Cabinet Minute of 5 March 1990 Decision No. 00162* (2012) Exhibit 181, 1

<http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0019/170119/QCPCI_3e_Exhibit_181_Cabinet_decision_162_5_March_1990.pdf>. Notably the *Libraries and Archives Act 1988* (Qld) required the State Archivist to ‘authorize the disposal’ of ‘public records’ (s 55) ‘subject to directions from the Minister’ (s 51(2)(b)) where ‘public record’ is defined to mean ‘the documentary, photographic, electronic, mechanical or other records of a public authority [meaning ‘an office, department, sub-department, board, commission, institution or instrumentality’] and includes: (a) records brought into existence by a public authority as records for future reference; (b) a matter or thing kept by a public authority as a record of its activities or consequent upon a function, power or duty to keep records; (c) public records of one public authority held by another public authority’ (s 5(2)). This raises ‘concerns

The materials gathered by Mr NJ Heiner were a range of documents including tape recordings, transcripts, computer discs, and so on ('Heiner documents').³ Cabinet was informed that some time after the investigation started the Acting Director-General of the Department of Family Services had decided, on advice from the Crown Solicitor,⁴ to terminate the investigation 'as the basis for his appointment did not provide any statutory immunity from legal action for him or for informants to the investigation' as '[d]uring the course of his investigation, Mr Heiner gathered information of a potentially defamatory nature'.⁵ The Cabinet was clearly informed of the purposes of destroying the Heiner documents: '[d]estruction of the material gathered by Mr Heiner in the course of his investigation would reduce risk of legal action and provide protection for all involved in the investigation'.⁶

The then recent *Public Service Management and Employment Act 1988* (Qld) and the *Public Service Management and Employment Regulation 1988* (Qld) had expanded the potential for public servants to be provided with both a copy of a document and a right to respond to any content reasonably considered detrimental to the public servant.⁷ During the course of Mr Heiner's investigations solicitors representing some of those being investigated had made requests relying on these statutory provisions.⁸ The solicitors were seeking access to the documents because '[o]ur clients are most concerned that they have been denied natural justice in defending themselves from allegations from persons unknown to them'.⁹ As a consequence these provisions enabling access to documents 'played a significant role in the events which led to Mr Heiner's decision that he would

about the possibility of political pressure being brought to bear upon the State Archivist in the exercise of this responsibility': Anita Sweet, *Preserving the Public Record: Review of Archives Legislation in Queensland*, Research Bulletin No 2/96 (Queensland Parliamentary Library, 1996) 12.

³ Queensland, Child Protection Commission of Inquiry, above n 1, 2.

⁴ Queensland, Child Protection Commission of Inquiry, *Letter from Crown Solicitor to Acting Director-General* (2012) Exhibit 129, 1-2 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0010/169975/QCPCI_3e_Exhibit_129_Letter_to_R_Matchett_re_appointment_of_Heiner.pdf>.

⁵ Exhibit 181, above n 2, 2.

⁶ Exhibit 181, above n 2, 2.

⁷ See *Public Service Management and Employment Regulation 1988* (Qld) regs 46 and 65.

⁸ See, for example, Queensland, Child Protection Commission of Inquiry, *Facsimile Solicitor to Acting Director General* (2012) Exhibit 141, 1

<http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0017/170009/QCPCI_3e_Exhibit_151_Cabinet_decision_101.pdf>; Queensland, Child Protection Commission of Inquiry, *Facsimile to Acting Director General*, (2012) Exhibit 109A, 1 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0011/169949/QCPCI_3e_Exhibit_109A_Memo_to_DG_from_A_Dutney.pdf>; Queensland, Child Protection Commission of Inquiry, *Facsimile to Acting Director General* (2012) Exhibit 96, 1 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0010/169912/QCPCI_3e_Exhibit_96_Memo_to_DG_requesting_documents.pdf>.

⁹ Queensland, Child Protection Commission of Inquiry, *Facsimile Solicitor to Acting Director General* (2012) Exhibit 113, 4 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0019/170434/QCPCI_Exhibit_113_Fax_sent_to_Matchett.PDF>. For a personal account of this journey see Kevin Lindeberg, 'The Heiner Affair' in Samuel Griffith Society, *Upholding the Australian Constitution, Volume Seventeen* (The Samuel Griffith Society, 2005) 10-27.

not proceed further with the preparation of a report'.¹⁰ The result was that Mr Heiner's investigations was ended,¹¹ Cabinet decided that the Heiner documents should be destroyed,¹² and the documents were destroyed.¹³

The significance of these events for our purposes is that they reveal a decision by Cabinet to destroy documents prejudicing and/or frustrating access to information and potential litigation. The recent Queensland Child Protection Commission of Inquiry¹⁴ extensively canvassed these matters as they related to the Heiner documents and provided a rare insight by actually disclosing relevant Cabinet documents and other key documents, including legal advices.¹⁵ Rather than rehearse the inquiry, and the possible criminality issues, the purpose of this paper is to assess if a present day Cabinet was to make such a decision what administrative (non-criminal) recourse might be available to unveil that decision. The paper is structured as follows: Part 2 outlines the circumstances of the decision to destroy the 'Heiner documents'; Part 3 outlines the conclusions of the Queensland Child Protection Commission of Inquiry; Part 4 reviews the role and place of Cabinet in Queensland including the effect of the *Constitution of Queensland 2001* (Qld); Part 5 reviews the role and place of the *Public Records Act 2002* (Qld) and *Right to Information Act 2009* (Qld); Part 6 reviews the role and place of ministerial responsibility in the Cabinet government; and Part 7 sets out a discussion and the conclusion that if Cabinet was to make a similar decision again then there is essentially no recourse available under the now more comprehensive *Public Records Act 2002* (Qld), *Constitution of Queensland 2001* (Qld) and *Right to Information Act 2009* (Qld). The analysis demonstrates that giving Cabinet documents a special preserve of confidentiality means there is a cost that challenges the foundations of responsible government by delaying and avoiding the proper scrutiny and accountability of ministerial decisions.

II ADVICES ABOUT THE HEINER DOCUMENTS

The sequence of events leading to the destruction of the Heiner documents¹⁶ demonstrates that the decision makers knew the documents might be relevant in legal proceedings consistent with the submission accompanying the Cabinet decision that '[d]uring the course of his investigation, Mr Heiner gathered information of a potentially defamatory nature'.¹⁷ The Queensland Child

¹⁰ Queensland, Child Protection Commission of Inquiry, above n 1, 15.

¹¹ Queensland, Child Protection Commission of Inquiry, *Letter Acting Director-General to Crown Solicitor (including Heiner letter)* (2012) Exhibit 123, 2-3
<http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0005/169970/QCPCI_3e_Exhibit_123_Letter_to_K_OShea_re_meeting_with_Heiner.pdf>.

¹² Exhibit 181, above n 2, 1.

¹³ Queensland, Child Protection Commission of Inquiry, *Senior Archivist File Note* (2012) Exhibit 189, 1
<[http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0019/170128/QCPCI_3e_Exhibit_189_File_note_by_Senior_Archivist_re_destruction_of_rec](http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0019/170128/QCPCI_3e_Exhibit_189_File_note_by_Senior_Archivist_re_destruction_of_records.pdf)
[ords.pdf](http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0019/170128/QCPCI_3e_Exhibit_189_File_note_by_Senior_Archivist_re_destruction_of_rec_ords.pdf)>.

¹⁴ Terms of Reference: Commissions of Inquiry Amendment Order (No.2) 2013 (Qld); Commissions of Inquiry Order (No.1) 2012 (Qld).

¹⁵ See Queensland, Child Protection Commission of Inquiry, above n 1.

¹⁶ A very detailed analysis of the events and circumstances was presented in Queensland, Child Protection Commission of Inquiry, above n 1, 31-64.

¹⁷ Exhibit 181, above n 2, 2.

Protection Commission of Inquiry provides a rare insight into the Cabinet deliberations and the gravity of the mischief in deciding to destroy the Heiner documents. The events unfolded as follows:

- (a) *13 November 1989* – Heiner was appointed by Director-General to investigate and report on certain matters relating to the John Oxley Youth Centre.¹⁸
- (b) *2 December 1989* – The Labor Party Government replaced the National Party Government.
- (c) *Undated (albeit contemporaneous)* – An ‘FOI Release’ document setting out ‘thoughts about a possible process’ (presumably maintained on a file) provided:

She [Deputy Manager at the John Oxley Youth Centre] considers herself a victim of a ‘defamatory process’.

I understand that she has not yet decided what action she will take but intends to consult a solicitor.¹⁹

- (d) *19 January 1990* – Letter from Mr Heiner to the Acting Director-General pending ending the investigation:

If after the Director-General has received legal advice and she determines no further action be taken [investigating the terms of reference] I will produce to her all the documents which I have maintained as a result of my enquiry and she may do with them as she is advised to do. There has been reference to legal proceedings being taken as a result of my enquiries. I believe if there is any legal action taken, the Department of Family Services and Aboriginal and Islander Affairs should take action to indemnify all my actions to date.²⁰

- (e) *23 January 1990* – The Crown Solicitor advice about the investigation be terminated and the documents be destroyed:

... that he will be indemnified from all costs associated with carrying out the tasks which he was given ... it seems that some of the material which has come into [Mr Heiner’s] hands may well be regarded as defamatory. This material is now in your hands and if you decide to discontinue the inquiry I would recommend that as it relates to an inquiry which has no further purpose, the material be destroyed to remove any doubt in the minds of persons concerned that it remains accessible or could possibly affect any future deliberations ... I do not see any difficulty in destruction of the material supplied to Mr Heiner, naturally any material removed from official files should be returned to those files but the tape recordings of interviews had with people or any notes or drafts made by Mr Heiner should I

¹⁸ Queensland, Child Protection Commission of Inquiry, *Letter of Appointment* (2012) Exhibit 83 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0012/169896/QCPCI_3e_Exhibit_83_Letter_to_Noel_Heiner_confirming_his_appointment.pdf>.

¹⁹ Queensland, Child Protection Commission of Inquiry, *FOI Release Document* (2012) Exhibit 131A, 1 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0020/170363/QCPCI_Exhibit_131A_John_Oxley_Youth_Centre_Inquiry_-_FOI_Release.PDF>.

²⁰ Exhibit 123, above n 11, 3.

suggest be destroyed ... predicated on the fact that no legal action has been commenced which requires the production of those files and that you decide to discontinue Mr Heiner's inquiry ... it is my recommendation that the solicitors ... be advised that the inquiry has been terminated, no report has been prepared, and that all documentation related to the material collected by Mr Heiner has been destroyed.²¹

(f) *5 February 1990* – The Cabinet submission provided:

Advice received from the Crown Solicitor indicated that, although Mr Heiner had been lawfully appointed as an independent contractor to perform his tasks, there were certain practical considerations which made it inadvisable for the investigation to continue. An important consideration was the lack of statutory immunity from and thus exposure to the possibility of legal action against Mr Heiner and informants to the investigation, because of the potentially defamatory nature of the material gathered by Mr Heiner in the course of his investigation ... The Crown Solicitor has advised that, as the material gathered by Mr Heiner does not constitute a public record, there is no legal impediment to the Acting Director-General destroying it. This advice does not apply to material removed from official files, which should be returned, nor would it apply in the event of legal action requiring production of the material being commenced. To date, no such action has been initiated ... it is recommended that all material, with the exception of official material mentioned above, be destroyed. Such action would remove doubts in the minds of all concerned that it remains accessible or could affect any future deliberations in relation to the management of the John Oxley Youth Centre ... Speedy resolution of this matter will benefit all concerned, and avert possible industrial unrest.²²

(g) *8 February 1990* – Solicitor for the John Oxley Youth Centre Manager (a public servant) sought access to Heiner documents:

We specifically request copies of the following documents:

- (i) Statements of allegations made to the Department by employees appertaining to complaints against our clients and which may be the subject of Mr Heiner's enquiry; and
 - (b) Transcripts of evidence taken either by Mr Heiner or in respect of the complaints which specifically refer to allegations of complaints against our clients.²³
- (h) *12 February 1990* – The Cabinet decided that '[t]he Queensland Government accepts full and sole responsibility for all legal claims ... against Mr NJ Heiner'.²⁴
- (i) *13 February 1990* – The Acting Cabinet Secretary wrote to the Crown Solicitor seeking advice 'as to what action might be taken should a writ be

²¹ Exhibit 129, above n 4, 1-2.

²² Queensland, Child Protection Commission of Inquiry, *Cabinet Minute* (2012) Exhibit 151, 5 and 7 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0017/170009/QCP_CI_3e_Exhibit_151_Cabinet_decision_101.pdf>.

²³ Exhibit 141, above n 8, 1.

²⁴ Exhibit 151, above n 22, 1.

issued to obtain information that is considered to be part of the official record of Cabinet' where the 'information was gathered during the course of a Departmental investigation and will be submitted to Cabinet'.²⁵

- (j) *16 February 1990* – The Crown Solicitor wrote to the Acting Cabinet Secretary advising that the Heiner documents were subject to the *Libraries and Archives Act 1988* (Qld) and that various privileges would be unlikely to prevent their disclosure:

In reaching the foregoing conclusions, I acknowledge the difficulty that this might cause in that there may be potentially defamatory material contained in the documents now held.²⁶

- (k) *19 February 1990* – The Cabinet decided to defer dealing with the Heiner documents to enable liaison with the State Archivist, but noted:

During the course of the investigation Mr Heiner gathered information of a potentially defamatory nature in the form of written material and electronically recorded information ... The fate of the material gathered by Mr Heiner has yet to be determined. This is a matter of some urgency, as there have been a number of demands requiring access to the material, including requests from solicitors acting on behalf of certain staff members.²⁷

- (l) *23 February 1990* – The Acting Cabinet wrote to the Secretary State Archivist advising:

During the course of the investigation, questions were raised concerning the possibility of legal action against Mr Heiner and informants to the investigation because of the potentially defamatory nature of the material gathered ... The Government is of the view that the material, which I understand includes tape recordings, computer discs and hand-written notes, is no longer required or pertinent to the public record.²⁸

- (m) *23 February 1990* – State Archivist wrote to the Acting Cabinet Secretary advising:

These records [Heiner documents] were delivered to my office on 23 February 1990 ... I hereby give approval, under the terms of section 55 of the *Libraries and*

²⁵ Queensland, Child Protection Commission of Inquiry, *Letter Acting Cabinet Secretary to Crown Solicitor* (2012) Exhibit 158, 1 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0014/170015/QCPCI_3e_Exhibit_158_Letter_to_K_OShea_from-S_Tait.pdf>.

²⁶ Queensland, Child Protection Commission of Inquiry, *Letter Crown Solicitor to Acting Cabinet Secretary* (2012) Exhibit 167, 6 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0014/170033/QCPCI_3e_Exhibit_167_Memo_to_AG_with_advice_to_S_Tait.pdf>.

²⁷ Queensland, Child Protection Commission of Inquiry, *Cabinet Minute* (2012) Exhibit 168, 2 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0015/170034/QCPCI_3e_Exhibit_168_Cabinet_decision_118_19_Feb_1990.pdf>.

²⁸ Queensland Child Protection Commission of Inquiry, *Letter Acting Cabinet Secretary to State Archivist H318/38* (2012) Exhibit 175, 1 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0012/170112/QCPCI_3e_Exhibit_175_Letter_to_S_Tait_from_L_McGregor.pdf>.

Archives Act 1988 [(Qld)], for the destruction of these records.²⁹

- (n) 5 March 1990 – Cabinet decided that ‘the material gathered by Mr NJ Heiner during his investigation ... be handed to the State Archivist for destruction’.³⁰ The accompanying memorandum provided:

Destruction of the material gathered by Mr Heiner in the course of his investigation would reduce risk of legal action and provide protection for all involved in the investigation ... Speedy resolution of the matter will benefit all concerned and avert possible industrial unrest ... [albeit] ... Representations have been received from a solicitor representing certain staff members of the John Oxley Youth Centre. These representations have sought production of the [Heiner documents]. However, to date, no formal legal action seeking production of the material has been instigated.³¹

- (o) 23 March 1990 – The Heiner documents were shredded (destroyed).³²

III QUEENSLAND CHILD PROTECTION COMMISSION OF INQUIRY

There has been ongoing disquiet about the Cabinet’s decision to destroy the Heiner documents.³³ As a result of this ongoing disquiet the Queensland Child Protection Commission of Inquiry was instigated from 1 July 2012 to review, in part, ‘the adequacy or appropriateness of (including whether any criminal conduct was associated with) any response of, or action taken by, the executive government’ about allegations or child abuse and industrial disputes at youth detention centres.³⁴ The inquiry found that there was ‘no factual basis logically supporting a reasonable suspicion or rational belief’ that Cabinet acted to cover up child sexual abuse allegations,³⁵ and that there was sufficient evidence for a jury to find that deciding to destroy the Heiner documents was ‘meant to ensure that they could not be used in evidence if required in an anticipated judicial proceeding’.³⁶

The inquiry then recommended that the issue about the destruction of documents be referred to the Director of Public Prosecutions to determine whether a prosecution should be launched.³⁷ The inquiry did, however, note that were a prosecution to be successful an appeal would likely overturn the decision because ‘the benefit of a reasonable doubt fairly open on the whole of the evidence should have been given to the Premier and Cabinet ... the balance of policy and public

²⁹ Exhibit 175, above n 28, 1-2.

³⁰ Exhibit 181, above n 2, 1.

³¹ Exhibit 181, above n 2, 2-3.

³² Exhibit 189, above n 13, 1.

³³ See, for example, Kevin Lindeberg, ‘Where Best Practice Recordkeeping Ends, Corruption Begins: The Heiner Affair’ [2009] *iRMA Information and Records Management Annual* 61 and the references therein.

³⁴ Queensland, Child Protection Commission of Inquiry, above n 1, 1.

³⁵ Queensland, Child Protection Commission of Inquiry, above n 1, 7.

³⁶ Queensland, Child Protection Commission of Inquiry, above n 1, 7.

³⁷ Queensland, Child Protection Commission of Inquiry, above n 1, 8.

interest considerations, including the lapse of time, does not favour a criminal justice response'.³⁸

In assessing the 'adequacy or appropriateness' of Cabinet's decision to destroy documents, the inquiry found that 'from a governance and public administration perspective' this 'fell short of the relevant standards of appropriateness; that is "fit and proper"'.³⁹ This finding was because the action had prejudiced or frustrated statutory rights to access information and 'potential litigation interests', and started an 'intractable' 23-year controversy.⁴⁰ Importantly for our purposes, however, is not to rehearse the Queensland Child Protection Commission of Inquiry, but instead to consider whether current Cabinet practices and the recent legislative intervention in Queensland through the *Constitution of Queensland 2001* (Qld), *Public Records Act 2002* (Qld) and the *Right to Information Act 2009* (Qld) mean that this cannot happen again? This is considered next.

IV CABINET

In Queensland the *Constitution of Queensland 2001* (Qld) recognised a formal institution of 'Cabinet'⁴¹ providing that there is 'a Cabinet consisting of the Premier and a number of other Ministers' and that '[t]he Cabinet is collectively responsible to the Parliament'.⁴² The Governor appoints the 'Ministers'.⁴³ While the terms 'Premier' and 'Minister' are not defined the term 'Minister' means a person appointed by the Governor that makes an 'oath or affirmation of allegiance and of office'.⁴⁴ In practice, the Governor proclaims the leader of the party or parties with the majority in Parliament as the 'Premier', and by the same proclamation sets out the 'Ministers' according to their seniority and portfolio titles.⁴⁵ Importantly, the statutory recognition of Cabinet in the *Constitution of Queensland 2001* (Qld) 'is not intended in any way to alter the recognised constitutional position of the Cabinet' so that '[t]he constitutional relationship between the Cabinet and the Parliament recognised and practised' was intended 'to continue in the same manner unaffected by the enactment of this clause'.⁴⁶ By convention the Cabinet consists of those Ministers appointed by the Governor with the Premier as chairperson:⁴⁷

The *Constitution of Queensland 2001* [(Qld)] states there must be a Cabinet

³⁸ Queensland, Child Protection Commission of Inquiry, above n 1, 7.

³⁹ Queensland, Child Protection Commission of Inquiry, above n 1, 8.

⁴⁰ Queensland, Child Protection Commission of Inquiry, above n 1, 8.

⁴¹ See Queensland, *Parliamentary Debates*, Legislative Assembly, 9 November 2001, 3716 (Peter Beattie, Premier and Minister for Trade).

⁴² *Constitution of Queensland 2001* (Qld) s 42.

⁴³ *Constitution of Queensland 2001* (Qld) s 43(2).

⁴⁴ *Constitution of Queensland 2001* (Qld) ss 43(2) and (5) and sch 1.

⁴⁵ See Department of Premier and Cabinet, *The Constitution of Queensland 2001 Annotated Section by Section for Easier Understanding* (Department of Premier and Cabinet, 2002) 45 and 100. See also Administrative Arrangements Order (No. 4) 2012 (Qld) setting out the Premier's and Ministers' responsibilities.

⁴⁶ Explanatory Note, *Constitution of Queensland 2001* (Qld) 22.

⁴⁷ Department of Premier and Cabinet, *The Queensland Cabinet Handbook* (Department of Premier and Cabinet, 2002) 4. See also Department of Premier and Cabinet, *The Constitution of Queensland 2001 Annotated Section by Section for Easier Understanding* (Department of Premier and Cabinet, 2002) 45.

consisting of the Premier and a number of Ministers. Cabinet is the principal decision-making body of the government and currently comprises all Ministers. Cabinet's decisions are given formal effect through Acts of the Parliament, actions of the Executive Council or the executive powers held by Ministers for the administration of their portfolios.⁴⁸

The Queensland Cabinet Handbook provides:

The collective responsibility of Ministers for government decisions requires collective adherence to all government decisions made in Cabinet. Cabinet decisions reflect collective deliberation and are binding on Cabinet Ministers as government policy ...

Cabinet processes are established by the Premier to ensure all Ministers are bound by the same rules and by high standards of probity; and

Cabinet collectively, and Ministers individually, are responsible and accountable to the Crown, the Parliament, and ultimately the electorate.⁴⁹

The obligation of Cabinet members is also clearly articulated in *The Queensland Cabinet Handbook*:

Cabinet is responsible for the performance of the government. Each Minister acts jointly with and on behalf of Cabinet colleagues in their capacity as Ministers. Not only does this ensure collective responsibility, but it also enhances collective adherence to all decisions made in Cabinet. Cabinet decisions reflect collective conclusions and are binding on all Ministers as government policy. If a Minister is unable to publicly support a Cabinet decision, the proper course is to resign from Cabinet. All Ministers are required to give their support in public debate to collective decisions of the Cabinet and the government.⁵⁰

Cabinet evolved out of the eminent personages involved in governmental activity to be a grouping of parliamentarians advising the Crown and administering the departments of State under the gaze of Parliament.⁵¹ In practice the Cabinet is now the link between the apparently separate Legislature and Executive because its members are both servants of the Crown and appointed to their positions as a consequence of enjoying a majority support in the Parliament.⁵² By convention the deliberations of Cabinet remain confidential because of a public interest in Cabinet members exchanging different views while maintaining the principle of collective responsibility.⁵³ These deliberations (and associated materials) may,

⁴⁸ Department of Premier and Cabinet, above n 47, 4.

⁴⁹ Department of Premier and Cabinet, above n 47, 3.

⁵⁰ Department of Premier and Cabinet, above n 47, 4.

⁵¹ See John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth of Australia* (The Australian Book Company, 1901) 329-330.

⁵² See Quick and Robert, above n 51, 382-383.

⁵³ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Sankey v Whitlam* (1978) 142 CLR 1, 39-40 (Gibbs ACJ), 56-57 (Stephen J), 97-98 (Mason J). For an historical reflection see *Commonwealth v Northern Land Council* (1991) 30 FCR 1, 16-21 (Black CJ, Gummow and French JJ).

however, in exceptional circumstances be subject to judicial review⁵⁴ and disclosure.⁵⁵ Thus the High Court in 1993 stated:

In the case of documents recording the actual deliberations of Cabinet, only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure, they being documents with a pre-eminent claim to confidentiality ... Indeed, for our part we doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings.⁵⁶

This analysis suggests that Cabinet is a meeting of Ministers where the deliberations (and associated materials) remain confidential. In exceptional circumstances this confidentiality may be relaxed, albeit the threshold for asserting the exceptional circumstances almost certainly requires going to the High Court. Criminal proceedings will be an exceptional circumstance, albeit reliant on the Director of Public Prosecutions (an arm of the Executive) actually bringing such an action.⁵⁷

V PUBLIC RECORDS ACT 2002 (QLD) AND RIGHT TO INFORMATION ACT 2009 (QLD)

The purpose of the *Public Records Act 2002* (Qld) was to 'ensure' that 'the public records of Queensland are made, managed, kept and, if appropriate, preserved in a useable form for the benefit of present and future generations'.⁵⁸ Access to these records is then restricted through the *Right to Information Act 2009* (Qld).⁵⁹ A 'public record' is a 'record'⁶⁰ made before or after the commencement of the *Public Records Act 2002* (Qld) that is made for, or kept by, a 'public authority',⁶¹ a Minister or an Assistant Minister.⁶² This will include a 'record created or received by a Minister in the course of carrying out the Minister's portfolio responsibilities'.⁶³ Some public records are subject to a 'restricted access

⁵⁴ See *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ), 631 (Toohey J); *South Australia v O'Shea* (1987) 163 CLR 378, 387-388 (Mason CJ), 412 (Brennan J), 419-420 (Deane J).

⁵⁵ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 614-619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ), 629-631 (Toohey J); *Sankey v Whitlam* (1978) 142 CLR 1, 40-48 (Gibbs ACJ), 52-71 (Stephen J), 93-102 (Mason J), 107-110 (Aickin J).

⁵⁶ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

⁵⁷ Noting that the *Director of Public Prosecutions Act 1984* (Qld) provides for the appointment of the Director by the Governor on advice of the Premier and Ministers (s 5), the appointment of others assisting the Director under the *Public Service Act 2008* (Qld) (s 23), and subject to the broad power that 'The Director ... shall perform such duties of a legal nature as the Minister may direct' (s 10(1)(f)).

⁵⁸ *Public Records Act 2002* (Qld) s 3(a).

⁵⁹ *Public Records Act 2002* (Qld) s 3(b).

⁶⁰ Essentially being anything on which there is writing, marks, figures, symbols or perforations having a meaning and including anything from which sounds, images or writings can be reproduced: *Public Records Act 2002* (Qld) s 4 and sch 2 ('record').

⁶¹ That includes 'the Governor in his or her official capacity', 'the Executive Council', 'a Minister' and 'an Assistant Minister': *Public Records Act 2002* (Qld) sch 2 ('public authority').

⁶² *Public Records Act 2002* (Qld) s 6(1).

⁶³ *Public Records Act 2002* (Qld) sch 2 ('Ministerial record').

period'.⁶⁴ The effect of these provisions is that documents prepared for Cabinet and Cabinet's deliberations are subject to the *Public Records Act 2002* (Qld) and are likely to be subject to a restricted access period of 20 years 'after the day of the last action on the record'.⁶⁵ This restricted access to Cabinet records is confirmed in the *Right to Information Act 2009* (Qld) albeit the exempt status only applies for 10 years from 'the date the information was most recently considered by Cabinet'.⁶⁶ A central element in determining access under the *Right to Information Act 2009* (Qld) is that access should be provided unless disclosure would 'on balance, be contrary to the public interest'.⁶⁷ Cabinet records are expressly considered to be 'exempt information'⁶⁸ and exempt because they are 'the types of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest'.⁶⁹ In this respect Cabinet records and documents are provided a special preserve of confidentiality.

Given the special treatment of Cabinet documents in the *Right to Information Act 2009* (Qld) and the track record of courts accepting the special place of privileging Cabinet records,⁷⁰ there would seemingly need to be compelling arguments for Cabinet records to be made accessible under the *Right to Information Act 2009* (Qld). Interestingly, the release of the Cabinet records relevant to the Heiner documents was within the terms of accessing documents under the *Commissions of Inquiry Act 1950* (Qld)⁷¹ and their release was not challenged by the Executive government (and could have been).⁷² The Queensland Child Protection Commission of Inquiry 'was no doubt intended to authoritatively resolve, once and for all, distracting and divisive debate about the adequacy, propriety and lawfulness' of the decision to destroy the Heiner documents.⁷³ Despite the treatment of Cabinet documents in the course of the inquiry there is a special preserve of confidentiality for Cabinet documents maintained by both the *Public Records Act 2002* (Qld) and *Right to Information Act 2009* (Qld) that denies access (at least until well after the event). Other non-Cabinet documents are generally accessible under the *Right to Information Act 2009* (Qld) unless disclosure would 'on balance, be contrary to the public interest'.⁷⁴ These include disclosing the deliberative process, disclosing personal information, and so on.⁷⁵ Perhaps interestingly, one of the factors favouring non-disclosure is:

⁶⁴ *Public Records Act 2002* (Qld) ss 16(1) and 62A.

⁶⁵ *Public Records Act 2002* (Qld) s 16(1A) being a Cabinet to which the *Right to Information Act 2009* (Qld) sch 3 (item 2) applies.

⁶⁶ *Right to Information Act 2009* (Qld) s 48(2) and sch 3 (items 2 and 5).

⁶⁷ *Right to Information Act 2009* (Qld) ss 48(1) and (2).

⁶⁸ *Right to Information Act 2009* (Qld) s 48(2) and sch 3 (item 2).

⁶⁹ *Right to Information Act 2009* (Qld) s 48(2).

⁷⁰ See, for example, *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615-618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

⁷¹ See *Commissions of Inquiry Act 1950* (Qld) s 5(1); *Commissions of Inquiry Order* (No 1) 2012 (Qld) order 7.

⁷² Noting the potential of Ministers to decide to allow access: see, for example, *Right to Information Act 2009* (Qld) s 47(3).

⁷³ Queensland, Child Protection Commission of Inquiry, above n 1, 2.

⁷⁴ *Right to Information Act 2009* (Qld) ss 49(1) and (2).

⁷⁵ See *Right to Information Act 2009* (Qld) s 49(2) and sch 4.

Disclosure of the information could reasonably be expected to prejudice the collective responsibility of Cabinet or the individual responsibility of members to Parliament.⁷⁶

At the time the Heiner documents were destroyed the Crown Solicitor advised that their destruction was justified because they were ‘public records’ within the reach of the *Libraries and Archives Act 1988* (Qld).⁷⁷ There seems little doubt the Heiner documents would now be considered ‘public records’ within the reach of the *Public Records Act 2002* (Qld).⁷⁸ Such records can only be disposed of (including ‘destroyed’)⁷⁹ with ‘an authority given by the archivist’ or ‘other legal authority, justification or excuse’.⁸⁰ In deciding to dispose of such records the archivist must have regard to ‘the benefit of present and future generations’.⁸¹

The Queensland Government Chief Information Officer now provides guidance about the retention and disposal of public records with the mandatory principles that ‘[p]ublic authorities must ensure public records are retained for as long as they are required’ and ‘[t]he disposal of public records must be authorised by the State Archivist’.⁸² The State Archivist usually gives an authorisation through the *Retention and Disposal Schedule*⁸³ that may, on occasions, be suspended.⁸⁴ Notably records of inquiries that ‘may have legal significance’ are required to retain records for seven years from ‘after last action’.⁸⁵ And for inquiries conducted under the *Commissions of Inquiry Act 1950* (Qld), like the inquiry in which the Heiner documents were made and collected,⁸⁶ the *Commissions of Inquiry Retention and Disposal Schedule* provides that records in the form of submissions and formal statements, transcripts, and un-transcribed recordings must all be permanently retained.⁸⁷ Similarly, Cabinet records (final Cabinet submission, briefing papers and attachments, agenda and business lists, collective

⁷⁶ *Right to Information Act 2009* (Qld) sch 4 (Part 3, item 1).

⁷⁷ Exhibit 167, above n 26, 6.

⁷⁸ *Public Records Act 2002* (Qld) s 6(1).

⁷⁹ *Public Records Act 2002* (Qld) s 4 and sch 2 (‘disposal’).

⁸⁰ *Public Records Act 2002* (Qld) s 13.

⁸¹ *Public Records Act 2002* (Qld) ss 3(a) and 26(2). Notably, ‘The archivist and the staff of the archives are not subject to the control or direction of a Minister or a department in relation to making decisions about the disposal of public records’ (s 27(1)).

⁸² Queensland Government Chief Information Officer, *Retention and Disposal of Public Records, Information Standard 31* (Department of Science, Information Technology, Innovation and the Arts, 2013) 3 and 4.

⁸³ See Queensland State Archives, *General Retention and Disposal Schedule for Administrative Records*, QDAN 249 v.6 (Department of Public Works, 2011). Notably there are specific policies for the disposal of migrated digital source records and digitized paper records: Queensland State Archives, *General Retention and Disposal Schedule for Digital Source Records*, QDAN 678 v.1 (Department of Public Works, 2012); Queensland State Archives, *General Retention and Disposal Schedule for Original paper records that have been digitised*, QDAN 656 v.1 (Department of Public Works, 2010).

⁸⁴ See Queensland State Archives, *Disposal Freeze Policy: A Policy for Queensland Public Authorities* (Department of Public Works, 2010).

⁸⁵ Queensland State Archives, QDAN 249 v.6, above n 83, 72.

⁸⁶ See *Commissions of Inquiry Act 1950* (Qld) s 5(1); *Commissions of Inquiry Order (No 1) 2012* (Qld) order 7.

⁸⁷ Queensland State Archives, *Commissions of Inquiry Retention and Disposal Schedule*, QDAN 676 v.2 (Department of Public Works, 2013) 6-8.

minutes and attachments and Cabinet decisions) are all permanently retained.⁸⁸ This means that if any these documents were now to be destroyed there would need to be an express authorisation from the State Archivist,⁸⁹ just like there was for the Heiner documents. And there is no absolute restriction on a modern day archivist giving authority to destroy Heiner-like documents.

VI MINISTERIAL RESPONSIBILITY

The Queensland Child Protection Commission of Inquiry expressly sought responses from the Cabinet Ministers involved in the decision to destroy the Heiner documents.⁹⁰ The formal submissions from the Ministers' legal representatives, perhaps unsurprisingly, concluded that no adverse finding against each Minister or Cabinet was likely.⁹¹ In responding to the assertion of a 'realistic possibility' that the Cabinet's decision was 'inappropriate', the responsible Minister at the time submitted that '[t]he clear and un-contradicted position is that [the Minister] (and Cabinet) acted, in good faith, upon what was perceived to be the advice of the Crown Solicitor that "there (was) no legal impediment to (the destruction of the documents)"'.⁹² The other Ministers all made similar arguments in their formal submissions.⁹³ The transcripts of hearings point to the same authority.⁹⁴ In short, the assertion was that Cabinet relied on advice from the Crown Solicitor and the State Archivist that the destruction of the documents was lawful and as a consequence their decision to destroy the documents was reasonable and appropriate. Queensland Child Protection Commission of Inquiry concluded otherwise finding:

Even if it is properly characterised as the honest but ill-advised act of a newly-elected government Cabinet Decision No. 162 of 1990 caused the destruction of

⁸⁸ Queensland State Archives, *Department of the Premier and Cabinet Retention and Disposal Schedule, QDAN 681 v.1* (Department of Public Works, 2012) 15.

⁸⁹ *Public Records Act 2002* (Qld) s 13.

⁹⁰ Queensland, Child Protection Commission of Inquiry, above n 1, 4-5.

⁹¹ See Michael Byrne on behalf of A Warner, Submission to the Queensland Child Protection Commission of Inquiry, *Inquiry into Child Protection*, 17 May 2013, Exhibit 372 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0016/201427/QCPCI_Exhibit_372_-_Michael_J_Byrne_submission_TOR_3_e_on_behalf_of_Anne_Warner.pdf>; Sciaccas Lawyres on behalf of T Mackenroth, Submission No 371 to the Queensland Child Protection Commission of Inquiry, *Inquiry into Child Protection*, 24 May 2013, Exhibit 371 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0011/201422/QCPCI_Exhibit_371_-_Sciaccas_Lawyers_Consultants_-_submission_TOR_3_e_on_behalf_of_Terence_Mackenroth.pdf>; Dan O'Gorman on behalf of D Wells, Submission to the Queensland Child Protection Commission of Inquiry, *Inquiry into Child Protection*, 18 June 2013, Exhibit 370 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0010/201421/QCPCI_Exhibit_370_-_Dan_O_Gorman_submission_on_behalf_of_Dean_Wells.pdf>; Gilshenan Luton on behalf of W Goss, P Braddy, K De Lacy and D Hamill, Submission to the Queensland Child Protection Commission of Inquiry, *Inquiry into Child Protection*, 27 May 2013, Exhibit 369 <http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0009/201420/QCPCI_Exhibit_369_-_Gilshenan_Luton_submission_TOR_3_e_on_behalf_of_W_Goss_P_Braddy_K_De_Lacy_D_Hamill.pdf>.

⁹² Exhibit 372, above n 91, 2.

⁹³ Exhibit 371, above n 91, 3-4; Exhibit 370, above n 91, 16; Exhibit 369, above n 91, 38.

⁹⁴ See Queensland, Child Protection Commission of Inquiry, above n 1, 59-61.

public records which from a governance and public administration perspective fell short of the relevant standard of appropriateness; that is, 'fit and proper'. This is because apart from being prima facie unlawful it had the tendency and, whether intended or not, the practical effect of:

- prejudicing or frustrating right to information rights and potential litigation interests, and
- bringing executive government in Queensland into disrepute sparking an intractable public controversy for over 23 years.⁹⁵

The role of ministerial responsibility is central to the place of representative government that founds the Westminster tradition of government in Queensland. According to this model responsible government explains the nature of the relationship between the Executive and the Parliament branches of government.⁹⁶ The Ministers are in Parliament and responsible to Parliament and the Ministers are the head of the Executive with authority over the departments (including the public servants). In this model accountability flows from the department officials (including the public servants) to Ministers to Cabinet to Parliament (and eventually to voters). A critical element of this model is that Ministers are responsible for their decisions both in their role as Ministers and as members of the collectively responsible Cabinet. While the *Constitution of Queensland 2001* (Qld) did not alter the role and place of Cabinet,⁹⁷ the intention of the *Public Records Act 2002* (Qld) and *Right to Information Act 2009* (Qld) was to maintain records⁹⁸ and make them available.⁹⁹ The benefits of open, transparent and accountable government that follows from accessing governmental documents is that Ministers, as representatives of the Executive in Parliament, can be held to account by the Parliament and the broader community through the Parliament – the foundation of responsible government.

VII DISCUSSION AND CONCLUSION

The terms of reference for the Queensland Child Protection Commission of Inquiry were 'reviewing the adequacy or appropriateness of (including whether any criminal conduct was associated with) any response of, or action taken by, the executive government'.¹⁰⁰ In addressing this term of reference the inquiry canvassed the decision to destroy the Heiner documents in some detail, and for our purposes, this was a rare opportunity to view the Cabinet decision making process with contemporary decisions, documents and testimony. The inquiry report found that there was sufficient evidence to conclude that the Heiner documents were destroyed so that they would not be available in an anticipated

⁹⁵ Queensland, Child Protection Commission of Inquiry, above n 1, 8.

⁹⁶ For a recent exegesis see Charles Lawson, 'The Legal Structures of Responsible Government and Ministerial Responsibility' (2011) 35 *Melbourne University Law Review* 1005, 1008-1011.

⁹⁷ See Explanatory Note, *Constitution of Queensland 2001* (Qld) 22.

⁹⁸ See *Public Records Act 2002* (Qld) s 3(a).

⁹⁹ See *Right to Information Act 2009* (Qld) ss 48(1) and (2).

¹⁰⁰ *Commissions of Inquiry Amendment Order (No.2) 2013* (Qld) order 3. See also Queensland, Child Protection Commission of Inquiry, above n 1, 1.

legal proceeding.¹⁰¹ Responsibility for the Cabinet decision has taken some 23 years to be settled and the prospect of holding the Ministers to account through parliamentary mechanisms, elections, and even criminal sanctions has passed, with the inquiry suggesting ‘the balance of policy and public interest considerations, including the lapse of time, does not favour a criminal justice response’. In effect, administrative responsibility for the Cabinet decision to destroy the Heiner documents has passed.

For our purposes this raises the critical question of whether a present day Cabinet might make such a decision and what administrative recourse might be available to challenge that decision? This is an important question because the decision to destroy the Heiner documents has echoes back to the 1989 Fitzgerald inquiry addressing ‘secrecy’ and the spectre of unaccountable government:

The ultimate check to public administration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is properly informed. A Government can use its control of Parliament and the public administration to manipulate, exploit, and misinform the community, or to hide matters from it. Structures and systems designed for the purpose of keeping the public informed must therefore be allowed to operate as intended.¹⁰²

The analysis in this paper of the current arrangements demonstrates that Cabinet is now an institution recognised in the *Constitution of Queensland 2001* (Qld) and that ‘[t]he Cabinet is collectively responsible to the Parliament’.¹⁰³ The recent *Public Records Act 2002* (Qld) and *Right to Information Act 2009* (Qld) both entrench the confidentiality of Cabinet¹⁰⁴ and carries on the complete exclusion of Cabinet documents (including under the previous *Freedom of Information Act 1992* (Qld)) from public disclosure until well after the events involving the documents.¹⁰⁵ The justification is that it is ‘information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest’.¹⁰⁶ The *Public Records Act 2002* (Qld) also does not prevent documents being destroyed.¹⁰⁷ Thus, despite the plethora of new legislation and the appearance that documents and information are more available, it is certainly not clear whether this is in fact the case and whether it would make any difference to a Cabinet decision about destroying documents, like the Heiner documents.¹⁰⁸ Beyond the blanket exclusion of Cabinet documents the *Right to Information Act 2009* (Qld) also provides a plethora of potential hurdles with its multitude of exemptions and public interest factors that could frustrate accessing *any*

¹⁰¹ *Commissions of Inquiry Amendment Order (No.2) 2013* (Qld) order 3. See also Queensland, Child Protection Commission of Inquiry, above n 1, 7.

¹⁰² Tony Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council* (Premier’s Department, 1989) 126.

¹⁰³ *Constitution of Queensland 2001* (Qld) s 42.

¹⁰⁴ *Right to Information Act 2009* (Qld) s 48(2) and sch 3 (item 2); *Public Records Act 2002* (Qld) s 16(1A).

¹⁰⁵ See also Independent Review Panel, *The Right to Information: Reviewing the Freedom of Information Act* (Department of Justice and Attorney-General, 2008) 117-119 and 121.

¹⁰⁶ *Right to Information Act 2009* (Qld) s 48(2).

¹⁰⁷ An express authorisation from the State Archivist is required: *Public Records Act 2002* (Qld) s 13.

¹⁰⁸ Noting that attempts to access the Heiner documents under the then *Freedom of Information Act 1992* (Qld) failed: see Lindeberg, above n 33, 73-74.

information.¹⁰⁹ In short, the *Right to Information Act 2009* (Qld) is expressly formulated with the objective of excluding access to Cabinet documents. This essentially means that the legislated reforms in the *Public Records Act 2002* (Qld), the *Constitution of Queensland 2001* (Qld) and the *Right to Information Act 2009* (Qld) have entrenched a special preserve of confidentiality for Cabinet documents.

The Queensland Child Protection Commission of Inquiry did consider the potential of criminal liability¹¹⁰ and recommended that the issue of criminal conduct be referred to the Director of Public Prosecutions.¹¹¹ Theoretically illegality would destroy any claims to confidentiality¹¹² and make any documents (and records) available.¹¹³ As a matter of practice, however, the illegality is likely to only be apparent from accessing the documents and without accessing the documents the illegality might be very difficult to identify and then establish. The special preserve of confidentiality for Cabinet documents raises the same problems for administrative recourse – allegations are possible but they cannot be tested without timely access to the relevant documents. This was the essence of the 1989 Fitzgerald inquiry's concern that 'there are structures and systems designed to ensure that [the ultimate check to public administration, the voter] is properly informed'.¹¹⁴

Perhaps the Heiner documents episode is just a difficult example of the trust placed in Cabinet and the potential for Cabinet to act beyond the scrutiny of Parliament and the public. While this particular episode has been subjected to a long and involved investigation, there does remain the prospect of other similar incidents that have escaped scrutiny and without the contemporaneous access to documents and records they may remain hidden. For our purposes, however, the decision to destroy the Heiner documents demonstrates that Cabinet can be a law unto itself and that this has not been ameliorated by the reformed administrative arrangements to preserve and disclose those documents and records. While the Queensland Child Protection Commission of Inquiry did eventually provide an avenue of review this was much, much too late to address the immediate concerns of the Heiner documents and the ministerial decision makers at the time. Most importantly, however, this analysis demonstrates that the legislative reforms and current arrangements do not resolve the potential for Cabinet to make bad decisions and escape timely scrutiny.¹¹⁵ Echoing the Fitzgerald inquiry's concerns the Heiner documents demonstrate that by giving Cabinet documents a special preserve of confidentiality there is a cost that challenges the foundations of responsible government.

¹⁰⁹ See *Right to Information Act 2009* (Qld) ss 48 and 49 and schs 3 and 4.

¹¹⁰ See Queensland, Child Protection Commission of Inquiry, above n 1, 81-87.

¹¹¹ Queensland, Child Protection Commission of Inquiry, above n 1, 7-8.

¹¹² See Independent Review Panel, above n 105, 122.

¹¹³ See *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617-618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

¹¹⁴ Fitzgerald, above n 102, 126.

¹¹⁵ Perhaps intriguingly the *Public Records Act 2002* (Qld) s 16(1A) restricted access period of 20 years 'after the day of the last action on the record' and the *Right to Information Act 2009* (Qld) s 48(2) and sch 3 (item 5) period of 10 years from 'the date the information was most recently considered by Cabinet' allow an intransigent Cabinet to potentially delay access well beyond the 20 and 10 years respectively.