

THE
HEINER AFFAIR

**THE SERIES POSTED ON AUS-ARCHIVIST LISTSERVER
STEMMING FROM
TAMPERING
TO
THE LINDBERG PETITION
BY
CERTAIN QUEENSLAND PARLIAMENTARY OFFICIALS
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"WHAT PRICE AUTHENTICITY"

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The Heiner Affair - What Price Authenticity - Part I

A NEW BRANCH OF THE HEINER AFFAIR: WHAT PRICE THE INTEGRITY AND AUTHENTICITY OF THE PUBLIC AND PARLIAMENTARY RECORD - PART I

I write as guest contributor, and in the public interest. My layman's archival credentials may be found in the notorious Heiner Affair.

This branch of the Heiner Affair concerns recordkeeping values of "integrity" and "authenticity" stems out of the treatment of the *Lindeberg Petition*.

I beg your indulgence as it may take several posting so that the significance of this matter becomes clearer. This posting attempts to set the scene in good faith.

The treatment of my Petition by the Speaker and Clerk of the Queensland Parliament in Brisbane has now danced onto the world Parliamentary stage (especially within the Commonwealth of Nations) because of certain advice offered by the House of Commons (UK) in June 2000 whose ripple effect appears to wash aside those aforesaid recordkeeping values.

Simply put, this posting rests on this universal archives principle: Proper recordkeeping of both the public and parliamentary record underpins our freedoms and liberties. Without proper recordkeeping, elected or appointed public officials, who have power and authority over our lives, may evade accountability for their individual or governmental actions or inactions. In short, the rule of law may be open to obstruction or ridicule - and of course this lies at the heart of the Heiner Affair as it is currently known.

Much of what I may have to say has been extracted over many months from various Parliaments. At certain stages, I was unaware of who did what, the significance of remedial attempts or so-called solutions, but slowly and surely the elm tree has grown until I decided to present it for wider debate in the archives world - our professional recordkeepers.

Generally speaking, as each Parliament is sovereign, its recordkeeping resides with each Parliament's Clerk, pursuant to law or Standing Rule and Order, however, the long-awaited Public Record Bill 1999 (Qld) - which is to replace the *Libraries and Archives Act 1988 (Qld)* - proposes to extend the State Archivist's responsibility to not only the public record but our Parliamentary record. The Bill obliges all persons to comply with proper recordkeeping guidelines.

In my opinion, archivists will see the relevance of this elm tree as cultivated by certain Parliamentary officials in Queensland and Westminster, and you may feel professionally obliged to cut it down if you consider it carries the equivalent of Dutch-elm's disease and a danger to your profession's world mission.

THE BACKGROUND

The **original** 84-page *Lindeberg Petition* was tabled in the Queensland Parliament on 27 October 1999. It set out the pertinent Heiner Affair facts - as they were known at the time - within the framework of sound universal governance principles. It called on the Queensland Parliament to address the unresolved wrongdoing associated with the Affair. Since tabling some 450 copies of the tabled document have been sent by the Queensland Parliament to all parts of Australia and world upon request. All Australian Parliaments hold a copy, as do the national Parliaments of the United Kingdom, New Zealand, Canada and the Republic of South Africa, and many world universities.

I was contacted by recipients of Petition soon afterwards and asked why I have highlighted certain passages and words over others in the document. I said that I did not. It was presented to Parliament in a pristine state, and it complied with relevant Standing Rules and Orders of the Queensland Parliament dealing with presentation of petitions.

In December 1999, my QC wrote to the Speaker wanting to know who defaced my Petition with a highlighter pen. The Speaker admitted that he did (albeit by error) while going through its contents (together with the Clerk) and highlighting certain passages which gave him grave concern as to their acceptability within Standing Rules and Orders. He offered a solution that I could send in a fresh replacement copy. I personally inspected my *original* petition in Bills and Papers Section of the Queensland Parliament and found it defaced up to page 54 with a bright green highlighter pen.

On advice I declined the Speaker's so-called solution because it may be (i) unlawful; and (ii) place me in contempt of Parliament.

The relevant facts are these:

- (a) the certification of Petitions is the sole responsibility of the Clerk. The petition should never have left the Clerk's control;
- (b) the Speaker has no lawful and Parliamentary procedural right to involve himself or to be invited into the certification process;
- (c) once a document is tabled, it cannot be simply untabled. In effect, it is an irreversible act because it has been tabled to the world;
- (d) a petition either complies with Standing Rules and Orders or it does not. If it does not comply, it is rejected and remains non-compliant until the Clerk deems otherwise. In this case, to my knowledge, the Clerk was happy (my initial Petition was rejected and I redrafted it) that it complied. He has subsequently denied being party to the "highlighting" action [notwithstanding his position conflicts with the position stated by the Speaker];
- (e) once a petition is tabled and accepted by Parliament, it becomes the property of the Parliament. It is outside the Speaker's or Clerk's authority to decide a tabled petition's fate or remedy as that rests with Parliament;
- (f) Parliament, to date, has not been informed of these matters;
- (g) my petition was signed off on 13 September 1999, and I could not backdate any replacement (same) copy without being in *prima facie* breach of the law, and because of the passage of time since its signature, fresh evidence had emerged which Parliament was entitled to know.

I challenged the Speaker and the Clerk over their respective conduct because I held that the highlighting altered my original Petition by giving an emphasis to certain words and passages which I never wanted or intended. I have suggested that a contempt of Parliament may have been committed, in that my *original* petition had been tampered with, and that the matter should be sent to the Members' Ethics and Parliamentary Privileges Committee for independent examination.

I held that once the Speaker (together with the Clerk) realised that he was defacing my *original* Petition at page 54 (at which point he stopped and did not resume), he was obliged to contact me immediately and request a fresh copy. Instead, by deliberate act of omission, they did not remedy their error and knowingly presented my "defaced" original Petition to Parliament without explanation,

carrying the Speaker's error of unauthorised bright green highlighting marks on its pages, as if his highlighting was mine or approved by me.

I have suggested that this act may have misled Parliament.

RELEVANT STANDING RULES AND ORDERS

Under Standing Rule and Order 333 of the Queensland Legislative Assembly, around late May 2000, the Clerk wrote to the Clerk of the House of Commons (UK) seeking guidance on the matter. It states:

"In all cases not specifically provided for...resort shall be had to the Rules, Forms and Usages of the Common House of the Imperial Parliament of Great Britain and Ireland for the time being, which shall be followed and observed so far as the same can apply to the proceedings of the House."

In June 2000, the Clerk of the House of Commons provided his advice. He cited an 1826 Resolution of the House of Commons which stated that a petition must not have (after signature) erasures, alterations or interlineations on it otherwise a contempt may be committed.

The advice (purportedly) went on to claim that the use of a highlighter pen would not fall foul of this rule because it would not "add" or "alter" a word.

In other words, what the Speaker of the Queensland Parliament did in the seclusion of his Office was acceptable conduct. The advice therefore offered relief notwithstanding it has not been presented to Parliament to question and/or accept or to the public to scrutinise.

Of relevance, the Bible of Parliamentary procedure, Erskine May's *Treatise on the Law, Privileges, Proceedings and the Usage of Parliament* (Twenty-first Edition), sets out the principles relevant to documents presented to the House, including petitions. At page 118 it states:

"It is contempt to present or cause to be presented to either House or to a committee forged, falsified or fabricated documents with intent to deceive, whether by forging signatures or subscribing fictitious signatures, tampering with petitions, fabricating documentary evidence, or altering a paper ordered to be laid before the Lords after the order had been received." (Underlining added)

This view concerning the treatment of the Parliamentary record giving rise to *prima facie* contempt of Parliament is well established and reaffirmed in *Parliamentary Privilege in Canada* (1982) at pages 198-199:

"Similarly, should any person present documents to a committee of the House of Commons which have been forged, falsified, or fabricated with intent to deceive such committee or the House, or, to be privy to such forging or fraud, this will constitute a contempt of Parliament because it is an obvious affront to the House of Commons to present it with such documents. The House of Commons is not only entitled to but demands the utmost respect when material is placed before it for its scrutiny, investigation, or study." (Underlining added)."

I understand that Professor Wendy Duff of the University of Toronto is currently working on UNESCO recordkeeping standards. On her webpage she addresses the value of "authenticity" thus:

"4.5.1 Authenticity

An authentic record is one that is proven both to be what it purports to be and to have been created or sent by the person who purports to have created or sent it.

To demonstrate the authenticity of records, organizations should implement and document policies and procedures which control the creation, transmission and maintenance of records to ensure that records creators are authorized and identified and that records are protected against unauthorized addition, deletion and alteration.

To be authoritative, a record should be created at the time of the transaction or incident to which it relates, or soon afterwards, by individuals who have direct knowledge of the facts or by instruments routinely used within the business to conduct the transaction."

CONCLUSION TO PART I

I have challenged the advice from the House of Commons which has offered relief to the Speaker in respect of his highlighting my original Petition before tabling. As far as I was concerned it was always a matter that he gave an unwanted emphasis and meaning to certain words and passages in my original Petition. He inflicted his interpretation on my document before tabling. He edited it.

Notwithstanding there may be a question as to whether or not the Clerk of the House of Common wrote with "full authority" of the House, and that it was merely "advice", it nevertheless introduces the notion that modern writing devices [i.e. highlighter pens, Microsoft Word capabilities on text (e.g. italic, colour, making bold, fonts)] may be used in an unfettered editing manner so long as the (foreign) user does not "add" or "alter" a word.

I have suggested that it can mean that any report, submission or petition (in *original* form be that hard copy/or electronic text-format) coming before Parliament, after being signed off by the author/creator (e.g. Auditor-General, Ombudsman, petitioner) may be secretly obtained and visibly highlighted by the above devices, and then carrying such editing, sent to the Government Printer for printing and then tabled (showing such highlighting, italic etc) in Parliament without explanation as if it belongs to the author/creator in its presented form because any such foreign invasion does not "add" or "alter" a word.

In my view important archival principles are at stake. I accept that in some cases, highlighting and interlineations become part and parcel of any public document's journey through the machinery of government, while, on the other hand, there are other times when a document's pristine state must be respected and protected. Proper recordkeeping must surely cater for both contingencies.

The House of Common's June 2000 advice may respect a profound change in proper recordkeeping in our democratic processes. If it can seep into public sector recordkeeping, notwithstanding there may be archivists somewhere in the world already whose statutory reach goes to the Parliamentary record (as is intended under the proposed Public Records Bill 1999 in Queensland), then archivists may be confronted by this challenge sooner or later - hence this posting as a real-life learning example.

In simple terms, instead of the Speaker (and potentially the Clerk) facing a possible contempt charge/referral to be resolved by a Parliamentary Privileges Committee impartially, out of which a beneficial look into the use of modern writing devices might occur instead of imposing 1826 writing implements on the 21st century technology, this House of Commons advice, which has been represented as their cure/relief, may, in fact, have created something far worse than the initial disease.

I think the values of "integrity" and "authenticity" in respect of our public and Parliamentary record demand protection, and when placed under threat, must be challenged.

I rest after my opening statement in Part 1.....

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The Heiner Affair - What Price Authenticity - Part II

AUTHENTICITY - A NEW BRANCH OF THE HEINER AFFAIR.

Part II - The case resumes....

Having received the advice from the Clerk of the House of Commons, it was duly presented to me in a letter, dated 6 June 2000, by the Clerk of the Queensland Parliament as offering relief. The advice was presented without qualification. The Clerk of the Queensland Parliament went on to say:

"...According to the Concise Oxford Dictionary, "interlineations" means inserting words between lines of (documents etc) and "erasures" means to rub out, obliterate.

No words were inserted into your petition nor were any words rubbed out or obliterated.

The markings caused by the highlighter as acknowledged by the Speaker as a mistake on his part, do not affect the validity of the petition."

Previously on 23 May 2000, after I set out a series of legal and Parliamentary procedural problems flowing from his treatment of my petition which he failed to answer, the Queensland Speaker informed me that he did *"...not intend to waste the time and resources of Parliament further by continuing a correspondence other than allowing you to take up the offer."* He informed me that all further correspondence should be addressed to the Clerk.

Having been informed of what the Clerk of the House of Commons - the Mother of Parliaments - advised, on 28 June 2000 I decided to write to him in order to re-check his (purported) advice. In part, I posed the following questions and/or propositions (QUOTE):

POINT 1:

"...Your advice seems to be suggesting this: The Speaker, and presumably any other Parliamentary official so authorised by the Speaker, or even the Clerk of the Assembly who is obliged under section 24(1)(c) of the *Parliamentary Services Act 1988* to maintain and uphold *"...an accurate and efficient reporting of proceedings of the Legislative Assembly and of meetings of committees thereof as required"*, may (without notification to or hindrance from anyone, and by personal whim, discretion and interpretation) highlight any passage over others in an original petition, without offending its authenticity and integrity.

With respect, I cannot accept that what the Speaker did to my original document after it was placed into the Assembly's care and before it was presented and tabled in the House is acceptable."

POINT 2:

"...My complaint was not that the highlighting changed the "words."

It was my concern that it changed the "*intent and meaning*" of my original document by placing an undue emphasis on certain passages that I did not intend. It was done *after* it was placed into the care of Parliamentary officials without my knowledge. I expected it to be tabled in the same pristine state that it was in when I signed it, whereupon after it would become inviolate unless Parliament decided otherwise. Anyone looking at the original document held in the Assembly's archives now could reasonably believe the highlighting was done by me or acceptable to me as each page carries my signature."

POINT 3:

"...In my opinion, the House of Commons advice appears to be potentially quite disturbing if it is based on full knowledge of the facts of the case and the petition's content (i.e. the highlighted passages and their context). It seems to invite or allow the important relationship between a citizen bringing a serious grievance to the attention of his or her elected representatives in Parliament to be misrepresented and interfered with in an unfettered manner by a Parliamentary official, whose duty is commonly accepted by citizens as one of impartially safeguarding and strengthening that democratic relationship."

On 4 July 2000 the Clerk of the House of Commons responded. This is what he said:

"Dear Mr Lindeberg

Thank you for your letter of 28 June.

I am not sure that I can help you very much further, since the practice of the United Kingdom Parliament is distinctive in the area you mention, and it may not always be possible directly to apply elsewhere lessons learned at Westminster.

For example, all petitions received by the House of Commons must be presented by a Member of the House. Once presented, it is wholly for the House to determine how a petition is dealt with. The petition belongs to the House. Even more important, Parliament here has exclusive jurisdiction over its internal procedures: it is simply not subject to scrutiny by the courts in that respect.

It follows that I have nothing to add to the advice given to the Journal office in my department to the Clerk of the Queensland legislative Assembly, to whom I am sending a copy of this letter."

I decided to seek advice from a wider field of experts because the world of linguistics had been invoked, and because I believed the incident would be of interest to other Clerks-at-the-Table. Pre-eminent amongst all Australian Clerks of Parliament, I approached was Mr Harry Evans of the Senate. Meanwhile copies of the *Lindeberg Petition* (displaying the Speaker's [unauthorised] highlighting) were sent to all Parliaments throughout the Commonwealth of Australia, and national Parliaments of New Zealand, Canada, the Republic of South Africa and the United Kingdom together with a covering letter asking questions concerning the treatment of petitions in their respective Parliaments.

The following puts this matter into an historical, democratic context concerning the fundamental right of a citizen to petition his or her Parliament with a grievance without experiencing interference - a role in which, if the Public Records Bill 1999 becomes law in Queensland, a State Archivist could find him or herself becoming a critical gatekeeper in this important process dating back to at least the reign of King Edward I, over 800 years ago.

The relevant duty which encompasses the archivist's values of "authenticity" and "integrity" is found in Clause 7(1)(b) of the Public Records Bill which says that a "public authority" - under definitions includes the Queensland Legislative Assembly - must:

"...take all reasonable steps to comply with any relevant policy and standard set, or guidelines issued, by the archivist about the making and keeping of public records."

ENGLISH BACKGROUND

Since the reign of King Edward I (1272-1307) the process of asking the Monarch for action or special favours or perhaps to decide or redress grievances is known as 'Petitioning the Crown'. This was often done in person at the Royal Palace. However, today the Crown is not directly involved in this process.

Nonetheless, petitions (as opposed to picketing) remain one means of publicly asking - in large numbers - the Parliament and/or government to take notice of an issue or take some form of action.

The British Parliament first laid down rules for petitions in 1669, declaring that it was an:

"...Inherent right of every commoner to prepare and present petitions to the House in case of grievance: and of the House to receive them"

After 1842 more formal procedures were necessary to cope with the increasing usage of petitions. These guidelines required that the petition be made in the form of a "prayer", and be "respectful and temperate" and not impute the conduct of Parliament.

My next installment (Part III) shall reveal some interesting authoritative international views on the matter; and further down the track, doubt is cast over the real status and worth of House of Commons June 2000 advice by another authoritative source at Westminster.

The manner in which the advice was sought and status given to it becomes an interesting feature touching on good governance.

It will become clear why a particular interpretation of the words "authentic" and "interlineation" means so much to certain Parliamentary officials (and others); and how a simple but critically important duty of maintaining proper archival principles could become an extraordinary test of wills (and the law) between our supreme Institution, the Parliament, and the relevant Archivist once the Public Records Bill 1999 becomes law (albeit in its current form) if the treatment and related ruling on my Petition provides a template to be followed on how all *original* documents can be handled by Parliament.

The modus operandi mirrors the Heiner Affair concerning the initial advice offered by the Office of Crown Law and later supported by the CJC and the DPP concerning an interpretation of section 129 of the *Criminal Code (Qld)* - destruction of evidence. The law states:

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

The argument turned on what a "judicial proceeding" meant.

On 23 January 1990, the Office of Crown Law offered advice to the CEO of the Department of Family Services and Aboriginal and Islander Affairs that the Heiner Inquiry documents could be destroyed providing no proceedings were on foot. It was presented as a bold statement but left many other fundamental questions relevant to "the course of justice" unaddressed.

The advice was offered at a time when it was (wrongly) thought that the Heiner Inquiry documents were Mr Heiner's private property, and when Mr Coyne's solicitor had not yet served notice on the Crown. The ballgame changed radically within a matter of days which made the 23 January 1990 (alleged) "excuse/coverage" advice completely redundant; but as the Affair blossomed, the mere existence of this advice (to the Department *not Cabinet*) became a cork lifebouy even though the legal ballgame - the course of justice - had changed and even when subsequent Crown Law advice was offered *to Cabinet* which stated that once the writ was issued, disclosure/access would have to be granted (in the discovery process) to the Heiner Inquiry documents (see Crown Law advice dated 16 February 1990), and that the Heiner Inquiry documents were in fact "public records" and subject to the provisions of the *Libraries and Archives Act 1988*.

The Cabinet submissions of February and March 1990 unequivocally show that *all Members of Cabinet knew* that the Heiner Inquiry documents were being sought by solicitors but that the writ had not yet been served. This key piece of information was withheld from the Archivist by Cabinet when it sought her approval by letter to destroy the records. The modus operandi of the Cabinet appears to be one of "...let's get in quick and destroy the evidence before the writ is served."

Or to put it in simple gangster terms, "...Quick boys, we know the police are coming so let's get in quick and destroy the evidence before they turn up with a search warrant."

In the meantime Mr Coyne and his solicitors (including the unions) were being assured in writing and orally in February and March 1990 that the evidence was safe and that once the final Crown Law advice was received concerning access, they would be informed.

They were left holding those Crown/State assurances - from the so-called Model Litigant and Fountain of Justice - while the records were secretly going through the shredding machine. Years later, the authorities would wave the State Archivist's approval of 23 February 1990 to shred and the (redundant) Departmental Crown Law advice of 23 January 1990 as their shield from serious criminal charges.

The position taken by the Office of Crown Law, CJC and (apparently DPP) was that legal proceedings only "legally" commence upon the serving of a writ. It is the view of many people well versed in law (and common sense) that this proposition creates considerable mischief to the impartial administration of justice. In the view of many QC's and law lecturers (supported by case law), it is profoundly wrong at law.

His Honour Justice Ian Callinan QC of the High Court of Australia, when representing me (as a QC at the Bar) before the Senate Select Committee into Unresolved Whistleblower Cases in 1995, suggested that the notion of any party, aware of and/or joined in pending court proceedings, could deliberately destroy evidence known to be required for those court proceedings was "*unthinkable*" - and far more serious if done by any government.

The dangerous nonsense flowing out of the position adopted by the respective Queensland authorities in the Heiner Affair is that records *known to be required* for court proceedings (that is, a defendant and/or plaintiff has be informed via a solicitor's phone call and official letter that certain records in the party's possession *should not be destroyed* as they *will be required* for foreshadowed/pending court proceedings) may be lawfully shredded (even with this state of knowledge) up to the very moment a writ is placed in the party's hand. *This view invites everything to be shredded. It invites totally anarchy for any society governed by the rule of law.*

I shall not develop all the legal arguments which go to show the absurdity of the Queensland authorities' Heiner position as that can wait for another day - save to say that they are substantial, long standing and well founded in law. In simple terms, the law concerning "legal/court proceedings" is activated by the state of knowledge of the person concerned. In the Heiner Affair, *they all knew* that the records in question were being sought by solicitors and were required as evidence in foreshadowed court proceedings. If the offence of destruction of evidence is not triggered, then such conduct opens up the elements of a conspiracy to obstruct justice and/or attempting to obstruct justice.

Where this matter becomes relevant for archivists is that the CJC claimed publicly before the Australian Senate in 1995 that even if the archivist knew the (Heiner) records were being sought for a "legal" purpose (i.e. a legal claim of access), it was none of the archivist's business because his/her sole discretion in determining the fate of public records, according to law, rested on their "historical" value.

I remind readers that this claim put forward by the CJC still stands. It has not been rejected by the Queensland Government or the Australian Senate, both entities of substance in our community.

But a further twist in this Heiner Affair argument exists which I suggest should concern all archivists who care about their mission. By extending the legal argument used by the CJC, it means that an archivist can be informed that:

1. records under sentence are the subject of a legal access demand;
2. Cabinet wants to destroy them for the purpose of preventing their use in court proceedings of which it has knowledge but has not yet been served with a writ,

and with that state of knowledge, an archivist may lawfully authorise their destruction pursuant to archives law providing the records have no "historical" value.

In other words, by applying the Heiner-solution adopted by the Queensland Government and CJC which prevented the triggering of section 129 of the *Criminal Code (Qld)* and other sections (132 and 140 dealing with a conspiracy to obstruct justice and attempting to obstruct justice) against many in high places, an archivist may endanger the impartial administration of justice in my opinion instead of underpinning it by ensuring that any record required by law is not destroyed until it is no longer required.

It may open any archivist with such a specific state of knowledge who became party to the destruction of such records to possible criminal prosecution. Amongst other things, it is one reason why this Affair is a benchmark-of-sorts, but one which all archivists might be wise not to rely on; while disturbingly, in Queensland at least, a government and its premier law-enforcement agency are only too happy to embrace.

To end Part II, the Heiner Affair spins on many points. One concerns the role of the Office of Crown Law and "acting on legal advice". It suggests that it doesn't matter if the advice is profoundly mischievous or wrong at law, as all that matters is that advice exists and can be waved in the air.

In respect of impairing the authenticity of my Petition, the same argument is being adopted by those under challenge in our Parliamentary scene. In effect, it doesn't matter whether the House of Commons advice may be profoundly misconceived and not adopted by the House of Commons itself, just as long as it exists and can be waved in the air.

The law is quite clear in respect of parties following legal advice. Acting on legal advice which turns out to be unlawful does not prevent charges being brought because bad advice cannot be placed above the rule of law but may go towards mitigation in sentencing if found guilty by a court of law.

Sadly, I am reminded of British Prime Minister Neville Chamberlain's famous proclamation after stepping out of his aircraft and proudly waving his piece of paper bearing Adolf Hitler's signature. "*Peace in our time!*" he declared to the masses. *Months later World War II broke out.*

All these matters go towards demonstrating why an archivists' mission in any proper functioning democracy is a foundation stone to freedom, liberty and accountability; a mission which should never be compromised or misrepresented with impunity.

Part III to follow soon...

Kevin Lindeberg
2 October 2001

The Heiner Affair - What Price Authenticity - Part III

AUTHENTICITY - A NEW BRANCH OF THE HEINER AFFAIR.

Part III - The case resumes....

Let me start by presenting certain principles which I suggest should be embraced and cherished by those of us who believe in a liberal democratic society. In my view these principles are formed and sustained by DNA qualities of:

- Parliamentary propriety;
- Honesty, integrity and impartiality in public office;
- the integrity of the public and Parliamentary record

1. FREEDOM OF INFORMATION

In *Australian Capital Television Pty Ltd and Ors & State of New South Wales v the Commonwealth of Australian and Ors (1992) 177 CLR at 38 [No.2]* Mason CJ, in the context of the freedom of communication, said that the supply of government information to the people was an indispensable part of representative democracy. He observed: "*...Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives. By these means the elected representatives are equipped to discharge their role so that they may take account of and respond to the will of the people. Communication in the exercise of this freedom is by*

no means a one-way traffic, for the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgements on relevant matters. Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative".

2. THE IMPORTANCE OF KNOWLEDGE

4th President of the United States of America James Madison stated this concerning the importance of knowledge to governments:

"...A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy - or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power which knowledge gives."

3. THE SUPREMACY OF PARLIAMENT

Article 9 of 1689 Bill of Rights (UK) states:

"...the freedom of speech and debates or proceedings in Parlyament ought not to be questioned in any court or place out of Parlyament."

There is a well known saying" Garbage in, Garbage out."

Starting from the premise that within any society governed by the rule of law where no one is supposed to be above the law and whose framework recognises the supremacy of Parliament as the law-making body of freely elected representatives of the people by the people, it is clear that law-makers should be entitled to feel sure that all material which comes before them possesses integrity and authenticity otherwise laws, which might framed from records lacking in those qualities and/or values, may prove to be deleterious to our freedoms and rights.

In the same way that courts have their records protected on pain of imprisonment for those who dare to impair or destroy such records known to be required for court so that the administration of justice is fair and honest, should we treat records created for of supreme institution in a much lesser manner?

Parliaments have their Standing Rules and Orders. They define tampering with their records as a contempt, but are they always genuine about upholding of such rules? Or, does it simply turn on whether or not the alleged wrongdoer has the numbers on the floor of Parliament at any particular point in time?

For instance, if a junior administrative Parliamentary officer conducted him or herself in the same manner as the Queensland Speaker has (given that the Speaker generally enjoys the support of any House), would such a lowly Parliamentary officer get away with it? Or perhaps, would he or she be grandly admonished to demonstrate to the public at large that the values of "integrity" and "authenticity" of the Parliamentary records are inviolable and that anyone who infringes such values - and then attempts to cover it up - has no place in the precincts of Parliament?

I submit that it is essential for due process to be upheld always and understood by those who work within the system or by those who seek to use it from time to time. *Respect for due process underpins freedom and accountability.* Education may be needed to drive home this point, providing of course

that my belief has substance and that I am not just being pedantic about semantics. I suggest that this new branch of the Heiner Affair should be seen, at the very least, as an educative process so that certain standards concerning the archival values of "integrity" and "authenticity" are either implemented, known about or clarified where required.

The cavalier treatment of my Petition in the first instance (inflicted on the *original* document in the seclusion of the Speaker's Office by the Speaker himself and not corrected but deliberately covered up), and then, after being sprung, attempting to have that treatment and conduct justified by a world authority like the House of Commons (UK) - the Mother of Parliaments - has not only internationalised the incident but it has brought these various "anti-bodies within the body-politic" into play to where they are now in deadly conflict.

It is a struggle which I believe is vital to the profession of archives, and one in which proper standards must win out if the freedom of an individual to petition his or her Parliament without interference is to remain; and must be won if our law-makers can be sure that records presented to Parliament are what their creators wanted them to be.

I point readers to these archival standards:

The Australian Standard defines records as 'recorded information in any form, including data in computer systems, created or received and maintained by an organisation or person in the transaction of business or the conduct of affairs and kept as evidence of such activity'.

[4] Records are traditionally regarded as documents in paper files or bound volumes. In fact, records can exist in any physical format such as photographic prints, videocassettes, microfilm and a multitude of electronic formats. Records possess certain characteristics that distinguish them from other kinds of recorded information. Records are 'fixed', that is, they are the product of particular actions that occur at particular times. To retain their value as authentic and reliable evidence of particular actions, they must not be altered or tampered with. Records derive much of their meaning, and therefore their usefulness and value as evidence, from the context in which they are created, maintained and used. Because records are both the by-product and means of doing business activity, they reflect the purpose of that activity. Individual records also derive meaning from their relationship to other records. This interrelatedness reflects the fact that records are the by-product of work processes that take the form of sequences of actions. Records also have status as official evidence of the decisions and actions of government and, as such, embody the authority of organisations and their officers. Finally, because an individual record documents a single action and groups of records document sequences of interrelated actions, they are necessarily unique. In order to serve as reliable evidence of activity, records must possess certain attributes. The Australian Standard defines the characteristics of 'full and accurate' records. Such records must be:

compliant – complying with the recordkeeping requirements arising from the regulatory and accountability environment in which the organisation operates;

adequate – for the purposes for which they are kept;

complete – containing not only the content, but also the structural and contextual information necessary to document a transaction;

meaningful – containing information and/or linkages that ensure the business context in which the record was created and used is apparent;

comprehensive – documenting the complete range of the organisation's business for which evidence is required;

accurate – reflecting accurately the transactions that they document;

authentic – enabling proof that they are what they purport to be and that their purported creators did indeed create them; and

inviolable – securely maintained to prevent unauthorised access, alteration or removal. [5]

Records are an organisational asset, just as human resources, financial resources, property, equipment and stock are organisational assets. Accordingly, organisations should manage their records to a high standard of practice and adequately resource their recordkeeping responsibilities.

(Underlining added)

THE FIGHTBACK

CLERKS-AT-THE-TABLE

On 23 June 2000 I wrote to the Clerk of the Australian Senate Mr Harry Evans setting out the facts as I understood them to be. It is fair to state that Mr Evans is one of Australia's foremost experts on Parliamentary procedure, and has a long-standing reputation of providing independent advice to all. Amongst others things, I summarised my concerns thus:

"...In my opinion, the House of Commons advice appears to be potentially quite disturbing if it is based on full knowledge of the circumstances of the case and the petition's content (i.e. the highlighted passages and their context). It seems to invite or allow the important relationship between a citizen bringing a serious grievance to the attention of his or her elected representatives in Parliament to be misrepresented and interfered with in an unfettered manner by a Parliamentary official, whose duty is commonly accepted by citizens as one of impartially safeguarding and strengthening that democratic relationship.

The treatment of my petition and my subsequent objections have not been reported to Parliament yet. I face the prospect that the Legislative Assembly may adopt the Speaker's conduct on party political lines if forced to a vote thereby creating an unhealthy precedent instead of fairly and openly addressing all the issues impartially applying due process to ensure and restore the integrity of Queensland's Parliamentary record and procedures."

Mr Evans said this about the treatment of petitions: *"...The standing orders of the Senate allow only three marks to be made on petitions before their presentation: a statement of the number of signatures, the signature of the senator presenting the petition, and the certificate of the Clerk that the petition is in accordance with the standing orders. The making of any other marks on petitions before their presentation would be contrary to the standing orders."*

He answered my four "whether or not" questions thus:

Q1. The Senate's Standing Rules and Orders concerning the treatment of petitions reflect the 1826 Resolution of the House of Commons as cited to Mr Doyle?

A1. The Senate standing orders provide that petitions are not to have any "interlineation or erasure". The Senate standing orders were originally derived from those of the South Australian Legislative Council, which were influenced by British procedures, but I think that this rule, rather than originating in the House of Commons resolution, simply reflects

the requirement that signed documents contain no matter which may have been added since signature and no sign that any matter may have been removed since signature.

Q2 The Senate interprets the meaning of "interlineation" so narrowly as to allow unrestricted highlighting by use of highlighter pens on various passages in *original* petitions by the Senate President, its Clerk or any other Senate official without the knowledge and permission of either the petitioner/s or the Senate?

A2. As indicated above, I think that any marks other than those authorised by the standing orders would not be permitted, regardless of whether they fall within the meaning of "interlineation"

Q3. The Senate would view highlighting certain passages over others in any original petition as *prima facie* altering its intent and meaning despite not having the effect of altering any word?

A3. It follows that highlighting of a petition after its signature would be contrary to the standing orders.

Q4. The Senate and/or the House of Representatives take advice on Parliamentary procedural matters from the Lords or House of Commons respectively or collectively?

A4. The House of Representatives has a standing order requiring it to advert to the practices of the House of Commons in cases not provided for by the standing orders, but the Senate has no such rule. I doubt that the House of Representatives standing order would necessarily attract the interpretation to which you have referred. In any event, I doubt that the interpretation apparently offered from the House of Commons is correct even for that House. Erskine May's Parliamentary Practice, 22nd edition, records at p.111 that tampering with petitions has been held to be a contempt of the House, and precedents are cited which I have not had time to check. I would have thought that highlighting passages in a petition after its signature and before its presentation would fall under the heading of tampering with a petition.

(Underlining added by Lindeberg)

NOTE WELL: Mr Evans advised that the resolution of the specific matter rested solely within the province of the Queensland Parliament to decide and anything he had to say should be seen within the context of the Australian Senate.

The same set of questions was put to other Clerks of Australian (Federal/State/Territory) Parliaments (Lower and Upper Houses) with most refusing to answer. This is not to suggest that they were not within their rights given the sovereignty of each Parliament in accordance with Article 9 of the 1689 Bill of Rights.

However, of relevance, the Clerk of the Western Australia Legislative Council advised on the matter of "interlineation" He said:

"..The precise question you pose has never been an issue. A petition, at the time of presentation, will have 3 endorsements, viz, (1) a signed statement of the promoter of the petition identifying the promoter, a statement of the number of signatories; (2) the signature of the member presenting the petition; (3) a declaration signed by the Clerk that the petition complies in all substantive respects with the rules governing petitions. If I refuse the certificate, the reasons are appended, on a separate sheet, and the petition is returned to the member. Under no circumstances would I, or officers of the House, write any comments on the petition or, to use your words "deface" it in any way. The President is not consulted by me as to whether or not I will give my certificate."

CERTIFICATION OF PETITIONS

The question of how and why the Queensland Speaker was ever invited or involved himself without invitation in the certification process for the *Lindeberg Petition* remains an unanswered question. It is nevertheless quite clear that it was none of his business and the answer may be found in the extraordinary content of the Petition itself detailing the facts of the Heiner Affair as they were known up to 13 September 1999 when I signed off every page as being true and accurate. Readers might wish to obtain a hard copy of the Petition, however, in another posting, a sample of the "highlighted" sections of the Petition shall be included.

Nevertheless this is what Mr Evans advised on the certification process:

"...In relation to petitions, the standing orders of the Senate provide that a petition cannot be presented unless the Clerk certifies that it is in accordance with the standing orders. The task of examining and certifying petitions, and withholding certification in appropriate cases, is imposed upon the Clerk. It would not be permissible for the Clerk to consult anyone else about the performance of the function, including the Presiding Officer. The standing orders of the Senate also provide that the President may allow the presentation of a petition which has not been certified by the Clerk if the President is satisfied that there are exceptional circumstances warranting the presentation of the petition. No exceptional circumstances have yet been found in any case."

(Underlining by Lindeberg)

In simple terms, by requiring the certification process to fall under the Clerk's total control, it de-politicises the process. The Clerk is obliged, by law and tradition, to be impartial in advice provided to all about Parliament and its process. Speakers of Parliaments within the Commonwealth of Australia do not resign from their respective political parties as occurs in the United Kingdom (and their seats are not contested in UK general elections). Many attend Party meetings after their elevation to the post of Speaker. Under our Parliamentary system, it is therefore exceedingly difficult for any Speaker, either by perception or real-politics, to come to any highly contentious political issue (such as the Heiner Affair is) in an unbiased manner.

In this case, if the Clerk had any doubts about the acceptability of the *Lindeberg Petition*, he was lawfully entitled to reject it - and to keep on rejecting it until, in his view, the 100th draft, if necessary, complied with Standing Rules and Orders. For the record, I submitted two drafts of my 84-page Petition to the Clerk.

THE WORLD OF LINGUISTICS

Given that those in authority sought to apply a particular interpretation to the word "interlineation" and place an acceptance on the use of highlighter pens on *original* documents, I approached one of the world leading linguists, Professor David Crystal of Wales University at Bangor.

Readers might wish to consider his standing in the world of linguistics.

Professor David Crystal edited the book "*The Cambridge Encyclopedia of The English Language*". On its cover leaf it states:

"David Crystal works from his house in Holyhead Wales as a writer, editor, lecturer and broadcaster. Formerly professor of linguists at the University of Reading, he now has an honorary affiliation to the linguistics department of the University of Wales, Bangor. He divides his time between work on

language and work on general reference publishing. He has written over 40 books on language, including "Linguistics", "Clinical Linguists", and "The Cambridge Encyclopedia of Language", and is editor of the journals "Linguistics Abstracts" and "Child Language Teaching and Therapy". He is also editor of the general reference book "The Cambridge Encyclopedia", and its related publications."

This is what Professor Crystal said on 2 July 2000:

"Thank you for your message of a little while ago - and my apologies for the delay in replying, but I have been away.

As a linguist, I can make only one point about this interesting question, and would have to leave it to others to assess its significance in the political context you describe. There can surely be no doubt that to highlight parts of a passage is, by definition, to add emphasis to those parts - whatever the intent behind the highlighting. People highlight for all kinds of reasons, of course - as an aide-memoire, as a way of saving time on subsequent readings, as a means of drawing other people's attention to a point, and so on. But to a reader who comes fresh to the document, the highlighting inevitably alters the way the semantic structure of the document is perceived. To highlight X in the sequence WXYZ is to give semantic prominence to X, which otherwise would be equivalent in semantic weight to the other elements. In this way, it is similar to certain functions of bold face, italics, spacing, and layout, in writing, and of pitch prominence, loudness, and some tones of voice in speech. It is not the meaning of individual words which is affected, but the discourse structure of the text as a whole. There is an old phrase - *'it ain't what you say but the way that you say it'* - which in the present context would have its parallel as *'it ain't what you write but the way that you write (i.e. present) it'*. In the technical terms of pragmatics (a branch of my subject which specializes in such matters), what has happened is that the highlighting has altered what is called the *'perlocutionary effect'* - i.e. the effect of the language on the reader.

As for the references to erasures, deletions, or interlineations, I think you are quite right to refer to the nature of the writing technology which was available at the time. It is surely the spirit and not the letter of the law which is critical here. The original resolution banned these alterations for a very obvious reason - but highlighting is an alteration which has a very close parallel to underlining. Indeed, if people do not have a highlighter available, they will underline, to impose their presence on a text. I personally see no difference, linguistically, between the two.

Incidentally, there are still other technologies which could be used in the same way, now that the Internet makes documents available. Material on screen can be not only highlighted but animated, interrupted (flashing on and off), changed in colour, and much more. It is quite plain that new technology is forcing us all to reinterpret past procedures, and it seems only sensible for organizations to take these new developments into account, for they are not going to go away.

My apologies for the brevity of this reply. You have caught me in between trips abroad, and time is very short. I hope the comments are of some help, nonetheless.

David Crystal"

In my view Professor Crystal touched on matters which the archives profession are presently wrestling with. They are real issues, and yet, what is so disturbing is that our supreme institution - Parliament - seems to be applying 19th century writing techniques and devices to our 21st century of cyberspace.

I pose this question to you all as professional recordkeepers: Should Article 9 of 1689 *Bill of Rights (UK)* prevent you having a say?

CONCLUSION:

I shall conclude Part III at this point and allow time for it to be considered.

In Part IV I shall return to the "real" status of the House of Commons June 2000 advice and consider the various archival and Parliamentary challenges flowing out of these matters.

At the end of the day, it appears that much turns on the performance and propriety of our elected representatives given that each Parliament effectively controls its own destiny as founded in Article 9 of *1689 Bill of Rights (UK)*.

A simple question arises: Do they even care so long as they have the numbers?

However, it appears that legal consequences flowing out of this matter may reach into the workings of the Queensland Parliament flowing out of the provisions of the *Criminal Justice Act 1989* and the *Parliamentary Services Act 1988* if the treatment of the *Lindeberg Petition* does provide a template in respect of Parliament's future handling of all records coming before it, and if the Public Records Bill becomes law with its current clauses unchanged.

Then, dear Archivists, I suggest that a significant clash is inevitable between the State Archivist and the Queensland Legislative Assembly.

I rest my case again...

Kevin Lindeberg
6 October 2001

2002

The Heiner Affair - What Price Authenticity - Part IV - A Final Comment

· *To:* · aus-archivists@asap.unimelb.edu.au
· *Subject:* The Heiner Affair - What Price Authenticity - Part IV - A Final Comment
· *From:* Kevin Lindeberg <kevlindy@tpg.com.au>
· *Date:* Thu, 10 Oct 2002 23:24:40 +1000
· *Delivered-to:* aus-archivists-archive@austehc.unimelb.edu.au
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The Heiner Affair - What Price Authenticity - Part IV - A Final Comment

Dear Archivists and Readers

This public interest posting is done for the sake of completeness. It shall be in four parts because of size as it appears that this e-cite cannot handling substantial postings.

It completes a series commenced last year concerning the tampering to my 84-page **original** Petition on the Heiner Affair (as it was known at the time) which was tabled in the Queensland Parliament on 27 October 1999. My last posting to aus-archivists listing was on 6 October 2001, and, therein, I undertook to make one more final posting. Unfortunately other events of a more urgent nature overtook me and delayed the promised final comment.

The stage on which this incident was played out has changed since my last posting. At the time, it was proposed in the Public Records Bill 1999 that the parliamentary record would come within the State Archivist's jurisdiction which opened up consideration on what had occurred to my Petition. Extending the State Archivist's jurisdiction into Parliament's recordkeeping processes was a unique and bold proposition, especially given the well-settled doctrine of the supremacy of Parliament dating back to Article 9 of 1689 *Bill of Rights (UK)*. When the Bill was reintroduced in early 2002, those clauses had been dropped by the Beattie Government. As to whether better, and, perhaps, wiser counsel caused a rethink is unknown.

In one sense, the dropping of those unique provisions made this series redundant, but in another sense, out of the circumstances surrounding the tampering, the fundamental issue of maintaining the integrity of the public/parliamentary record remains, after all it is a core archival value. Without authenticity being guaranteed and documents being what they purport to be, integrity becomes meaningless and great harm may be caused.

We need look no further than last year's unprecedented attack on His Honour Justice Michael Kirby of the High Court of Australia by NSW Liberal Senator Bill Heffernan in the Australian Senate under privilege. The allegations were based on entries in a Comcar document from which grave accusations of sexual impropriety were drawn against His Honour going to his unfitness to sit, and which could have led to possible criminal offences because of the improper use of his Commonwealth car. **The document turned out to be unauthentic.** Until that was firmly established, incredible damage to Justice Kirby's reputation was done which an unqualified apology later given by Senator Heffernan in the Senate tried to redress. Although Justice Kirby accepted the unqualified apology, the clock could never properly be turned back.

This series remains very relevant because the attitude of certain high ranking public officials, reaching from Brisbane to London caught up in this tampering incident, demonstrates what they believe can be done to **original** documents (handwritten and/or electronic) with impunity; and because the archives world is still wrestling with the problem of how to maintain the authenticity of the electronic record. Therefore, it is hoped that this belated final comment will be useful for those who may have followed my three earlier postings and waited for a completed record.

For the record, while this posting may complete my series, it does not finalise the case itself.

Under the circumstances, because of the passage of time, it is fitting that I should put down 13 points for newcomers so that they may more quickly understand what occurred and why I have challenged the conduct of certain high ranking parliamentary officials in their handling of the *Lindeberg Petition* which was a landmark step on the Heiner Affair's continuing journey.

It has been followed since with the *Lindeberg Declaration*, the *McCabe* ruling and new discoveries by journalist Bruce Grundy revealing that the Queensland Government covered up criminal paedophilia when the shredding occurred in March 1990, and latterly, the publication in the United States of the major academic book "*Archives and the Public Good - Accountability and Records in Modern Society*" which features the Heiner Affair along with 13 other notorious world shredding/recordkeeping incidents.

To be continued with the aforementioned 13 points.....

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10 October 2002
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The Heiner Affair - What Price Authenticity - Part V - A Final Comment

- To: · aus-archivists@asap.unimelb.edu.au
- Subject: The Heiner Affair - What Price Authenticity - Part V - A Final Comment
- From: Kevin Lindeberg <kevlindy@tpg.com.au>
- Date: Tue, 15 Oct 2002 14:50:45 +1000
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The Heiner Affair - What Price Authenticity - Part V - A Final Comment

Dear Archivists/Readers

As a refresher, I set out 13 points.

THE TAMPERING AND ITS CONSEQUENCES FROM BRISBANE TO LONDON AND GLOBALLY

1. 13 September 1999 the *Lindeberg Petition* was signed off by me. It was presented to Parliament through an MP who handed the 84-page document to the Clerk of Parliament for certification in accordance with the Rules of the Queensland Legislative Assembly. It was handed over in a pristine state;
2. Sometime between 13 September and 27 October 1999, the **original** Petition found itself in the possession and control of the Speaker of the Queensland Parliament. He proceeded to edit it with a bright green highlighter pen up to page 54 where he stopped, apparently because an unknown Parliamentary official interrupted and told him that he was editing my **original** document. The Clerk although being aware of the Speaker's "editing" action, and having by some yet-to-be explained reason allowed the original document to leave his possession and control, claimed that he was not party to the Speaker's conduct, despite the control of petitions up to their tabling being his sole responsibility;
3. Standing Rules and Orders of the Queensland Parliament state that any interference with a Parliamentary officials functions causing him or her not to act impartially and with integrity may be a contempt of Parliament;
4. With a state of knowledge that the authenticity of my Petition had been impaired by the Speaker's visible editing - i.e. highlighting certain passages over others - both the Clerk and the Speaker, by deliberate act of omission, went on and presented my "edited" original Petition to Parliament on 27 October 1999 without explanation or qualification; and, together, knowingly allowed Parliament to believe that the editing/highlighting was done by me and/or approved of by me. It is therefore open to conclude that this deliberate act of omission, entered into by the Speaker and Clerk at a time when a remedy was available by requesting a freshly signed pristine Petition from me, had the potential to mislead Parliament upon its tabling and may therefore be a contempt of Parliament;

5. When later challenged by my QC over the unauthorised tampering on the Petition, the Speaker revealed that he did it. He confirmed that he had highlighted certain passages which gave him grave concern as to their acceptability under Standing Rules and Orders. He offered us the option of sending in clean copy to replace the defaced original;
6. Acting on advice, I declined his offer because (a) the Petition's ownership and control was in the Parliament as a whole and it was beyond the Speaker's authority to remedy the matter himself, especially given his conflict of interest in the matter; (b) any solution had to come from the floor of Parliament after tabling; and (c) it would be unlawful and a potential contempt of Parliament to backdate any document to be presented to Parliament, especially given that my state of knowledge in respect of the Heiner Affair had increased since signing off the **original** Petition on 13 September 1999;
7. I requested that the matter be referred to the Members' Ethics and Parliamentary Privileges Committee for examination because of possible contempt of Parliament having been committed;
8. Around May/June 2000, the Clerk wrote to the House of Commons in London seeking advice as to whether or not the use of a highlighter pen fell foul of the Standing Order that no addition or subtraction should occur to a petition after being signed off by the petitioner/s. Although the provision to seek such advice exists with the Standing Rules and Orders of the Queensland Parliament (No. 333), it was sought without any prior approval from the floor of Parliament given that the Petition was within that forum's ownership and control, and the conflict of interest both the Clerk and the Speaker had in the matter of concern which could lead to a possible charge of contempt of Parliament;

Points 9 to 13 to follow....

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15 October 2002
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The Heiner Affair - What Price Authenticity - Part VI - A Final Comment

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- *Subject:* The Heiner Affair - What Price Authenticity - Part VI - A Final Comment
- *From:* Kevin Lindeberg <kevlindy@tpg.com.au>
- *Date:* Tue, 15 Oct 2002 14:51:26 +1000
- *Delivered-to:* aus-archivists-archive@austehc.unimelb.edu.au
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The Heiner Affair - What Price Authenticity - Part VI - A Final Comment

Dear Archivists/Readers

Points 9 to 13 continue:

9. In June 2000 the Clerk of the House of Commons advised that although an 1826 Resolution of the House of Commons stated that a petition must not have (after signature) erasures, alterations or interlineations on it otherwise a contempt may be committed, but that the use of a highlighter pen would not fall foul of this rule because it would not "add" or "alter" a word;

10. I sought national and international advice on the issue. Australian authority on parliamentary procedures, Clerk of the Senate Mr Harry Evans advised that if such conduct were to occur in the Senate it would be a *prima facie* contempt of its Rules and Orders;

11. One of the world's leading linguists, Professor David Crystal, of the University of Wales at Bangor, advised that the use of a highlighter pen would alter a document as "...a reader who comes fresh to the document, the highlighting inevitably alters the way the semantic structure of the document is perceived". He went on to suggest that in the electronic era fresh challenges had to be faced preserving the authenticity of original document because "... Material on screen can be not only highlighted but animated, interrupted (flashing on and off), changed in colour, and much more. It is quite plain that new technology is forcing us all to reinterpret past procedures, and it seems only sensible for organizations to take these new developments into account, for they are not going to go away."

12. Having been effectively told by the Clerk that the conduct was acceptable by "the Mother of Parliaments", the so-called tampering charge was closed as far as he was concerned. The advice however was not put before the Queensland Parliament;

13. To my mind, the advice greatly exacerbated the situation. In effect, it gave licence to the Speaker, Clerk and presumably anyone, to secretly and/or unknowingly obtain any original document after the author had signed it off (including electronic versions) and then to highlight (presumably by any means available) various passages over others without the author's permission, and then have the document printed with those "additional editing" marks visible, and not have to explain such conduct to anyone (including the author, recipient or Parliament) because the action did not "add" or "alter" a word.

The next posting will reveal the true status of the House of Commons advice...

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The Heiner Affair - What Price Authenticity - Part VII - A Final Comment

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• Subject: The Heiner Affair - What Price Authenticity - Part VII - A Final Comment
• From: Kevin Lindeberg <kevlindy@tpg.com.au>
• Date: Wed, 16 Oct 2002 14:23:04 +1000
• Delivered-to: aus-archivists-archive@austehc.unimelb.edu.au
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The Heiner Affair - What Price Authenticity - Part VII - A Final Comment

Dear Archivists/Readers

The Correspondence and Real Status of the House of Common's Advice

Given that the Clerk of the House of Commons was prepared to provide such advice to Queensland's Speaker and Clerk, I took the view that what's good for the goose is good for the gander.

In other words, if Queensland's Speaker and Clerk could treat petitions in such a manner on the say so of the Clerk of the House of Commons, then presumably the Speaker of the House of Commons and its Clerk (Sir William R McKay CB) could engage in the same conduct, after all the Commons was looked on throughout the world by nations which had embraced the Westminster style of government as the standard keeper and maker. Surely it would be a bit rich if the House of Commons were to be offering second-grade advice to the outreaches of the Commonwealth but which it would never embrace at home.

On 20 August 2001 I wrote to The Right Hon Michael Martin MP, Speaker of the House of Commons. In my 3-page letter, various points were made against the facts of the situation. Of relevance to this posting, here are four extracts.

In the first instance I laid out Erskine May's *Treaties on the Law, Privileges, Proceedings and the Useage of Parliament* (21st edition) authoritative view concerning the handling of petitions at page 118: *"It is contempt to present or cause to be presented to either House or to a committee forged, falsified or fabricated documents with intent to deceive, whether by forging signatures or subscribing fictitious signatures, tampering with petitions, fabricating documentary evidence, or altering a paper ordered to be laid before the Lords after the order had been received."*

I then made these points: *"...In my opinion, such actions must surely undermine the authenticity and integrity of the Parliamentary record and endanger the democratic process. Highlighter pens are visible editing devices. I believe it should be a completely unacceptable to all Speakers and Clerks-at-the-Table, and their use utterly rejected on original documents coming before Parliament. They give an emphasis to certain words and passages over others."*

and

"...With respect, with your being the current Speaker of the House of Commons and cognizant of all its traditions and history, I seek confirmation concerning your acceptance of Mr McKay's interpretation of the aforesaid 1826 Resolution of the House of Commons which (apparently) permits your unfettered editing use of highlighter pens on original petitions (and presumably all original documents, reports, and submissions coming before the House before tabling without the knowledge or approval of their authors) providing you do not "add" or "alter" a word."

and, concluded with this: *"...If, however, Mr McKay's advice, as I understand it, is unacceptable to you and the House of Commons, then it is my respectful request that it should be conveyed to the Queensland Parliament by your good Office as a matter of urgency, because this particular matter is holding some public attention in Queensland. It would be most unfortunate to see the good name of the Office of Speaker of the House of Commons, and of the House of Commons itself, brought into disrepute and used for inappropriate purposes."*

The correspondence ends in the next posting....

Kevin Lindeberg
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16 OCTOBER 2002

PS: I apologise for the number of email postings to end this series but it appears the webpage cannot take more than 5 pages at a time, and that was not the case when this series began.

The Heiner Affair - What Price Authenticity - Part VIII - A Final Comment

- To: • aus-archivists@asap.unimelb.edu.au
- Subject: The Heiner Affair - What Price Authenticity - Part VIII - A Final Comment
- From: Kevin Lindeberg <kevlindy@tpg.com.au>
- Date: Wed, 16 Oct 2002 14:23:38 +1000
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The Heiner Affair - What Price Authenticity - Part VIII - A Final Comment

Dear Archivists/Readers

The correspondence ended thus:-

On 11 September 2001, Sir Nicholas Bevan CB, the Speaker's Secretary, responded and of relevance stated: *"The Speaker has asked me to emphasize that, while officials at Westminster can and frequently do give their best advice to colleagues in other Parliaments on their reaction to potential problems arising in House of Commons rules, they necessarily cannot speak with authority. Decisions, especially in areas like contempt, rest with the House concerned or (where the meaning of contempt has been coded in law) with the courts.*

The advice that was given to the Clerk of the House of Commons to the Clerk of the Queensland Legislative Assembly was given on that basis. It is not for Mr Speaker either to confirm or to reject the Clerk's advice and he has no intention of taking a view on the matter."

Having received Sir Nicholas' confirmation that the June 2000 advice did not enjoy the authority of the House of Commons, on 9 October 2001 I resolved to write again to Sir William McKay CB, the Clerk of the House of Commons. Of relevance, the letter asked: *"... Your advice was put forward by the Clerk of the Queensland Legislative Assembly as offering unqualified relief when in fact it was far from that. In reality, it is open to being incorrect and potentially not even acceptable to the House of Commons (if ever it were put); while at the same time, this is not to suggest or to be interpreted by anyone that you offered the advice in anything other than good faith. However, the plain fact is that your advice does not enjoy the backing or full authority of the House of Commons and cannot be considered or presented as a definitive view on the matter.*

With respect, in light of what your Speaker's Secretary has stated, would you be good enough to confirm that your advice is just that and not an authoritative position please?"

On 16 October 2001, Sir William responded stating that he had read Sir Nicholas' letter and had nothing further to add. My correspondence with the House of Commons ceased at that point.

To be continued and finalised in the next posting/s...

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16 October 2002

The Heiner Affair - What Price Authenticity - Part IX - A Final Comment

- To: • aus-archivists@asap.unimelb.edu.au
- Subject: The Heiner Affair - What Price Authenticity - Part IX - A Final Comment
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- Date: Wed, 16 Oct 2002 14:32:09 +1000
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The Heiner Affair - What Price Authenticity - Part IX - A Final Comment

Dear Archivists/Readers

SUMMARY

The spore of this branch of the Heiner Affair occurred in the cultivation jar of abuse of power unrestrained by concerns about probity and decency but where numbers on the floor of Parliament count for everything. It has been fertilized by an indifferent Opposition which appears, to date, quite incapable of understanding how important it is in any vibrant democracy to maintain the integrity of the Parliamentary record to ensure good law-making, proper recordkeeping and accountability processes, not to mention the duty of all Parliamentary officials to protect the right of the citizenry to petition Parliament without interference.

In my opinion, it is unacceptable for any Speaker of Parliament to be engaged in the certification of petitions to be presented to Parliament because it leaves open a tendency to politicize this process which may, in terms of a petition's content, be highly politically contentious in the first place. **This unfettered editing intervention now stands as a real danger in Queensland.**

In my opinion, it is unacceptable for any Clerk of Parliament to abrogate his/her responsibility in respect of certifying petitions to another (including the Speaker) when he/she has been given that duty by the Parliament, and been afforded lawful protection from intimidation by others (including the Speaker) by being declared an officer of the Parliament. **It is now open to conclude such a situation exists in Queensland.**

In my opinion, it is unacceptable for any Parliamentary official to seek advice from the House of Commons on a matter concerning the (local) Parliament as a whole without first informing the Parliament and seeking its views when the seekers of advice have a vested interest in its content going to a possible charge of contempt of Parliament. **This conduct now exists in Queensland.**

In my opinion, it is unacceptable for any Parliamentary official to present such relieving advice to the world as something it may not be, and which can only be tested by being endorsed by the Parliament as a whole to which they will not and have not put the advice. **This conduct now exists in Queensland.**

In my opinion, it is unacceptable for any Parliamentary official not to put advice to a Parliament for acceptance or rejection going to its Standing Rules and Orders which they publicly present as being acceptable to that Parliament and its Standing Rules and Orders. **This conduct now exists in Queensland.**

Given the interconnectedness between the integrity of the public and Parliamentary record in any properly functioning democracy which, in turn, underpins the rule of law and the right to a fair trial, it is unacceptable that contradictory standards of maintaining the authenticity of such records should operate at the same time within any one constitutional State.

Notwithstanding the advice from the Clerk of the House of Commons in this matter, which, until properly tested on the floor of Parliament, has no standing save that it exists, I believe that the Queensland Parliament has made itself into a rogue State by this conduct which would not be tolerated in other Parliament within the Commonwealth of Australia and elsewhere. Foremost expert in Parliamentary procedures, Mr Harry Evans, Clerk of the Australian Senate, has opined that if such conduct were to have occurred in the Senate then it would be open to suggest that a contempt may have been committed.

Put bluntly I believe that the conduct outlined in this series has placed in jeopardy the right of Queensland citizens to petition their Parliament without interference.

In short, the so-called "acceptability" of this tampering rests on the premises of *not* whether the [House of Commons] advice is acceptable [to the Queensland Parliament] or even lawful, but just by its *mere (untested) existence*. The fact that the advice may be misconceived, illbegotten, illogical, nay, even dangerous to the process of maintaining the integrity of the Parliamentary record, is of no moment because as long as it exists, it provides relief from possible contempt of Parliament - end of story.

The "authenticity" series ends in the following Part X.

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16 October 2002

The Heiner Affair - What Price Authenticity - Part X - A Final Comment

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The Heiner Affair - What Price Authenticity - Part X - A Final Comment

Dear Archivists/Readers

The summary ends thus:

Readers will readily recognize that similarities between this situation and the shredding of the Heiner Inquiry documents by the Queensland Cabinet.

In both cases, their so-called relief from wrongdoing cast the Heiner Affair down the rocky road of

unacceptable consequences of a most serious and dangerous kind. In respect of the shredding, the application of the relief means that documents known to be required for anticipated court proceedings, may be lawfully shredded up to the moment of being served with a writ, and the destruction of the (public) records may be done for the express purpose of preventing them being used as evidence and/or accessible pursuant to the rules of court in those proceedings when they commence.

And remember always dear archivists and readers, your profession has been dragged into this unhappy mire by the CJC and other authorities without any bleat of public protest from Queensland State Archives.

In simple terms - if this is the law! - the so-called relief utterly undermines the administration of justice and the right to a fair trial, moreover such conduct may purportedly be carried out by the Crown - the model litigant and font of Justice. Aspects of this argument have been put to the Appeal Court in Victoria's Supreme Court in *McCabe vs British American Tobacco Australia*, whose decision should come down before Christmas, or early in the 2003. It is my understanding that whatever way the Appeal Court rules, the matter will go to the High Court of Australia for final adjudication in 2003.

In regard to the relief provided over the tampering to my Petition, it follows that modern writing techniques and devices (i.e. Microsoft Word, italic, highlighter pens etc) may be used, in an unfettered editing secret manner by another after the author has signed off his/her document or any report, and providing this editing does not "add" or "alter" a word, it is perfectly acceptable, and may be published in that tampered state.

One of the world's leading linguists Professor David Crystal of the University of Wales at Bangor opined, in this case, that such editing did change the authenticity of the original document. He went on to suggest that modern technology presented us all with an inescapable challenge of maintaining the authenticity of documents into the 21st century. Although not an archivist, he plainly understood your plight in the technologically-advanced era of the 21st century.

This then remains the challenge: Professional standards over abuse of power. To resist and dissent, or, to acquiesce and remain silent.

This public interest series has been written for those in the firing lining of protecting public records, and for those who care about our democratic processes. It is a real war zone. I hope it offers some lessons. This branch of the Heiner Affair will only find its remedy by Parliamentary processes, and to date, it has been seen as a waste of time [by the Queensland Speaker], and as a tiny glowing ember, if that, by the Opposition.

But, if we were to rely on the professional and ethical standards set by those caught up in this Affair as to what is important and what isn't, then this matter would have been buried long ago on 23 March, 22 and 23 May 1990 when certain records were disposed of. In pure terms, abuse of power attempted to bury the public record, but like the best laid plans of mice and men, it went off the rails when I was sacked.

The key to the Speaker's conduct is found in the contents of the 84-page *Lindeberg Petition* itself. When one reads the document, and sees what he highlighted with his bright green highlighter pen, some of the mystery is washed away. Therefore, dear archivists and readers, to better understand this posting, you should obtain a copy for yourselves from Bills and Papers at the Queensland Parliament. So far, it has been the most requested tabled petition (a copy thereof) in Queensland's political history.

For the record, the Queensland Parliament has just introduced, as a 12-month trial, e-petitions.

And so, I conclude this public interest series with this question and my answer: What price authenticity? The right to petition a Parliament without interference. Freedom.

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Thursday 16 October 2002
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