The Hon Peter Beattie MLA
Queensland Premier
Executive Building
80 George Street
BRISBANE QLD 4000

Dear Premier

THE HEINER AFFAIR - A MATTER OF CONCERN

We, the undersigned legal practitioners formerly on the Bench, currently at the Bar or in legal practice, seek to re-affirm our sworn duty to uphold the rule of law throughout the Commonwealth of Australia and to indicate our deep concern about its undermining as the unresolved Heiner affair reveals.

We believe that it is the democratic right of every Australian to expect that the criminal law shall be applied consistently, predictably and equally by law-enforcement authorities throughout the Commonwealth of Australia in materially similar circumstances. We believe that any action by Executive Government which may have breached the law ought not be immune from criminal prosecution where and when the evidence satisfies the relevant provision.

To do otherwise, we suggest would undermine the rule of law and confidence in government. It would tend to place Executive Government above the law.

At issue is the order by the Queensland Cabinet of 5 March 1990 to destroy the Heiner Inquiry documents to prevent their use as evidence in an anticipated judicial proceeding, made worse because the Queensland Government knew the evidence concerned abuse of children in a State youth detention centre, including the alleged unresolved pack rape of an indigenous female child by other male inmates.

The affair exposes an unacceptable application of the criminal law by *prima facie* double standards by Queensland law-enforcement authorities in initiating a successful proceedings against an Australian citizen, namely Mr. Douglas Ensbey, but not against members of the

Executive Government and certain civil servants for similar destruction-of-evidence conduct. Compelling evidence suggests that the erroneous interpretation of section 129 of the *Criminal Code* (Qld) used by those authorities to justify the shredding of the Heiner Inquiry documents may have knowingly advantaged Executive Government and certain civil servants.

This serious inconsistency in the administration of Queensland's *Criminal Code* touching on the fundamental principle of respect for the administration of justice by proper preservation of evidence concerns us because this principle is found in all jurisdictions within in the Commonwealth as it sustains the rule of law generally.

The Queensland Court of Appeal's binding September 2004 interpretation of section 129 in *R v Ensbey; ex parte A-G (Qld)* [2004] QCA 335 exposed the erroneous interpretation that the (anticipated/imminent) judicial proceeding had to be on foot before section 129 could be triggered.

We are acquainted with the affair* and specifically note, and concur with, (the late) the Right Honourable Sir Harry Gibbs GCMG, AC, KBE, as President of *The Samuel Griffith Society*, who advised that the reported facts represent, at least, a *prima facie* offence under section 129 of the *Criminal Code* (Qld) concerning destruction of evidence.

In respect of the erroneous interpretation of section 129 adopted by Queensland authorities, we also concur with the earlier 2003 opinion of former Queensland Supreme and Appeal Court Justice, the Hon James Thomas AM, that while many laws are indeed arguable, section 129 was never open to that interpretation.

Section 129 of the *Criminal Code* (Qld) – destruction of evidence – provides that:

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

It concerns us that such an erroneous view of section 129 was persisted with for well over a decade despite the complainant, supported by eminent lawyers, pointing out the gravity of their

error consistently since 1990 when knowing its wording and intent were so unambiguous, with authoritative case law available for citing dating back as far as 1891 in *R v Vreones.*

Evidence adduced also reveals that the Queensland Government and Office of Crown Law ***knew***, at the time, that the records would be discoverable under the Rules of the Supreme Court of Queensland once the expected writ/plaint was filed or served. With this knowledge, the Queensland Government ordered the destruction of these public records before the expected writ/plaint was filed or served to prevent their use as evidence.

Such scandalizing of these disclosure/discovery Rules by the Executive also concerns us. So fundamentally important is respect for these Rules that the Judiciary's independent constitutional functionality depends on it.

Under the circumstances, we suggest that any claim of "staleness" or "lack of public interest" which may be mounted now by Queensland authorities not to revisit this matter ought to fail. Neither the facts, the law nor the public interest offer support in that regard. However, should such a claim be mounted, we suggest that it would tend to be self-serving and undermine public confidence in the administration of justice and in government itself knowing that the 2004 *Ensbey* conviction, taken by the same Queensland Crown, did not occur until some 9 years ***after*** the relevant destruction-of-evidence incident.

This affair encompasses all the essential democratic ideals. The right to a fair trial without interference by government and the right to impartial law-enforcement, to say nothing of respecting the rule of law itself, rest at its core. Respecting the doctrine of the separation of powers and our constitutional monarchy system of democratic government are involved.

We believe that the issues at stake are too compelling to ignore.

We suggest that if the Heiner affair remains in its current unresolved state, it would give reasonable cause for ordinary citizens, especially Queenslanders, to believe that there is one law for them, and another for Executive Government and civil servants.

We find such a prospect unacceptable.

We urge the Queensland Government to appoint an independent Special Prosecutor as recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its August 2004 Report (Volume Two - Recommendation 3) following its investigation into the affair as part of its national inquiry into "*Crime in the community: victims, offenders and fear of crime*".

Such an independent transparent process we believe will restore public confidence in the administration of justice throughout the Commonwealth of Australia, more especially in Queensland.

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The Hon Jack Lee AO QC – Retired Chief Judge at Common Law Supreme Court of New South Wales

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Dr Frank McGrath – Retired Chief Judge Compensation Court of New South Wales

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Alastair MacAdam, Senior Lecturer, Law Faculty, QUT Brisbane, and Barrister-at-law

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The Hon R P Meagher QC - Retired Justice of the Supreme and Appeal Court of New South Wales

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The Hon Barry O'Keefe AM QC, Retired Justice of the Supreme Court of NSW, former ICAC Commissioner

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Mr Alex Shand QC

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The Hon David K Malcolm AC CitWA, former Chief Justice of Western Australia

CC: Her Excellency the Honourable Quentin Bryce AC, Governor of Queensland
The Hon Lawrence Springborg MLA, Leader of the Queensland Opposition
The Hon Paul de Jersey AC, Chief Justice of the Supreme Court of Queensland
The President, Queensland Bar Association
The President, Queensland Law Society

* (For details see Mr. Kevin Lindeberg's article recently published in Volume 17 of *The Samuel Griffith Society's* book "*Upholding the Australian Constitution.*" http://www.samuelgriffith.org.au/papers/html/volume17/v17contents.htm)