

Political Pressure and the Archival Record
KEYNOTE ADDRESS

The role of the archives in protecting the record from political pressure
University of Liverpool, Wednesday, 23 July, 2003
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I propose to spend my time with you this evening by relating two stories in which I have been personally involved and to deliver two lessons based on these experiences. For the purposes of this discussion, I will treat the term “the record” as being synonymous with “the public record in a free democracy”. It is possible to extend the arguments to cover other political systems and non-government enterprises, even to personal recordkeeping, but the complexities and qualifications multiply and our time is limited. Similarly, because both my stories deal with records destruction, that is what I will focus on. The issues are the same, however, for all aspects of the making and keeping of records.

The Nordlinger Affair : The First Story Takes Place in Victoria (Australia) in 1990

Australia is a federation of six States making up a national or “Commonwealth” government. In addition to federal law, each of these States has its own archival legislation making a State Archivist responsible, *inter alia*, for authorising the disposal of all records. Records cannot, at law, be disposed of until this authorisation is given.

In 1990, I had been the State Archivist of Victoria for nearly ten years. The State Archives was called the Public Record Office (PRO) and my title was Keeper of Public Records.

From time to time, it is the common experience of government archives authorities that cases of unauthorised disposal come to notice – often in the pages of newspapers and usually mentioned incidentally in connection with stories which have another focus. It is normal practice for the Archives to write to the offending department or agency, obtain a reply acknowledging that they are aware of their obligations under archives legislation, explaining that the reported occurrence (if true) was regrettable and that steps have been taken to see it doesn’t happen again. The Archives then usually files the reply and nothing further eventuates. This is sometimes waggishly called “enforcing” the Act.

In 1988, the Cain Labor Government was going to the polls. It might, with some understatement, be said to have had an unusually strong desire to control media reporting of its performance. In the lead up to the 1988 election, a story erupted concerning the dismissal of a senior bureaucrat, Nordlinger, who had been an embarrassment to them.

Nordlinger decided he was not going quietly. He argued his dismissal was improper. The press reports referred to an interview between Nordlinger and the Chairman of the Victorian Public Service Board, Maurice Keppel. Reports said that Nordlinger observed Keppel making notes during the interview and he lodged an FOI request to see them. He was informed that they had been destroyed.

As Keeper of Public Records, I wrote to Maurice Keppel asking him what authority he had under the *Public Records Act* for destroying his notes of interview. I received a reply that I regarded as evasive and unsatisfactory – according to the bench-mark we habitually applied in similar cases of reports of unauthorised destruction. The correspondence continued (unsatisfactorily) throughout the election campaign.

It was not publicised, but none of those involved were unaware of the potential for political embarrassment. Nordlinger was out to make trouble. The State Premier was personally involved in his sacking and was on the record as supporting the Chairman. The tenor of Keppel’s replies to me (I believed) was that the disposition of the notes of interview and the public records issues surrounding the record of the meeting were none of my business. I found this unsatisfactory. It was not a reply I would have accepted from any other agency or

any other public servant. The reply I would have accepted (and then filed) would have said that a mistake had been made and it wouldn't happen again.

The problem for the Government was that the *Public Records Act* laid an obligation on all public offices to make and keep a full and accurate record of the business of the office. If a record of the interview existed, Nordlinger would be entitled to it under FOI. The Government had said he couldn't have it because no record existed. It had been publicly reported, however, that notes had been taken. Either the notes (or a record of the meeting based on the notes) had to be made available to Nordlinger or, if neither the notes nor a full and accurate record based on them could be produced, a breach of the *Public Records Act* would appear to have occurred.

After Keppel's second or third reply, I was summoned to the office of the head of department within which the PRO operated. I was asked to take the matter no further. It was potentially damaging to the Government in an election campaign. In no circumstances would Keppel supply the response I was seeking. If it became public, it would do neither me nor the PRO any good. If, on the other hand, I abandoned my pursuit of the matter, I was promised that after the election the a/g head of department would personally urge an augmentation of my powers as Keeper and seek to obtain the support and resources for us to pursue such matters more effectively.

I should say that I placed no reliance whatsoever in these promises, but I thought the implied threats were real¹. I replied that I had no wish to make a public fuss during an election campaign, but that I felt obliged to pursue the same course of action in this case that we would pursue (and had pursued) in all similar cases. I made the point that if we were seen to pursue a different course of action in a case involving the Premier and the Chairman personally it would expose us all to greater criticism than if the PRO was seen to treat everyone in the same manner. I even alluded to Watergate and the analogy that harm comes not from the offence but the attempt to cover it up. To no avail.

As a matter of prudence, and to avoid the possibility of unnecessary publicity in the heat of an election campaign, I agreed to hold off replying to Keppel's latest unresponsive letter to me until two days before the election and to keep the papers locked in my desk until then. This was done.

After the election I was again summoned to the office of the a/g head of department, told there would be no reply from Keppel to my latest letter, instructed not to write to him again on that matter, instructed further to write no letters of any kind to any departments except with the approval of the head of my own department, and (for good measure) asked why I hadn't solved the problems of electronic recordkeeping. I was told my failure to do so might now be viewed as a performance issue. (For some years prior to this, I had been drawing attention, in my annual reports to Parliament, that like archives programmes everywhere we were concerned about the problems of electronic recordkeeping.) The impracticality of having all our correspondence with government departments vetted at departmental level quickly became apparent even to those who had issued this instruction. During the next two years, we gradually re-established that PRO could correspond with government agencies on routine matters, but any correspondence on unauthorised disposal still had to be vetted by higher authority.

¹ I had observed the treatment handed out to a former departmental colleague, Victoria's Chief Electoral Officer. He came under pressure when exercising a statutory discretion whether or not to prosecute a Government minister for electoral fraud (the Nunawading Affair). He sought legal advice and was told that the Minister should be prosecuted. The department "suggested" that prudence required he seek a second opinion, then a third, then a fourth, and so on. Each opinion recommended prosecution. Finally, one was received which said there was a possibility that the prosecution would not succeed. On the basis of this, he was advised not to proceed. A broken man, he resigned shortly afterwards.

In Victoria, the Minister is advised by a statutory body called the Public Records Advisory Council, which I attended *ex officio*. During this period, I gradually placed before them each and every instance of unauthorised disposal which came to our notice. On average there are about half a dozen of these every year in every jurisdiction in Australia which get reported in some way in the media. I encouraged discussion about what, if anything, our responsibilities were – theirs, mine, and the Minister's – in dealing with such reports. At first the Advisory Council was uncomfortable, then they became alarmed, and eventually they concluded (as I had hoped) that if everyone went on effectively ignoring the reported breaches of statutory obligations then everyone, the Minister, the Keeper, and they themselves would be open to blame.

When I thought they were in a ripe frame of mind, I prepared a report to the next Advisory Council meeting recommending that they advise the Minister to adopt a more proactive stance towards reported breaches of the Act. At this time, I was required to submit papers to a departmental official who sat as a member of the Council. Although there was no formal instruction to delay despatch to other members until after this official had vetted them, this was in fact what usually happened. As expected, I was summoned, asked to withdraw the report, and (when I refused) instructed not to send out the papers. I replied that it was too late and they had already gone. In fact they were stamped and waiting for me downstairs and I personally mailed them immediately upon my return to the office.

Two months later I was removed as Keeper and transferred sideways to a non-job of "Chief Archivist" especially created for me and never filled again after I left it. Meanwhile, the statutory position of Keeper was occupied by acting arrangements for the next two years before it was finally filled just before the 1992 election². For the succeeding six years I was left with virtually no duties of any kind being paid at my former salary level. That period became a most fruitful time in my career for research and publishing. So far as I am aware, the Victorian Government has not been made uncomfortable since in the matter of unauthorised disposal of public records.

What should the archivist do in the face of political pressure? In this case, by my own admission, I lied and disobeyed a lawful order. Does the archivist have professional obligations which can, in certain circumstances, justify non-compliance with contractual employment obligations? Was I right to insist that we treat all such cases the same way? Was the manner of treatment we had evolved the correct way of handling them? Can a consistent stance of any kind on unauthorised disposal be maintained by archival authorities? In any case, what role (if any) do archives authorities have in support of accountability of governments for recordkeeping?

When an archives authority is established and functions under arrangements which forbid the destruction of records without the necessary permissions, what is the archivist to do when confronted with evidence (or, at least, allegations) that those arrangements are being violated? Especially when no one else is doing anything about it? Even when the archivist's mandate to enforce the arrangements is far from clear and explicit?

We heard, in yesterday's workshop, two possible approaches to the archival task. One, expressed in relation to the utility of the new international Standard on Records Management in bringing government departments into line, was referred to as "thwaking". This approach emphasises regulation, monitoring, compliance, and the threat of penalties. The other approach, which I would call insinuation or service-delivery, suggests that archivists should work through cooperation, by being helpful, forging alliances, conducting campaigns of persuasion and education. This approach prefers to catch flies with honey.

² The position was advertised and an attempt made to fill it while I was overseas on long service leave. I lodged an appeal, not against the selection but against the process. A competent review authority found the departmental process for filling the position so procedurally flawed that the department was ordered to cancel their selection and reinterview. They did, but it made no difference to the final outcome.

These are alternative implementation strategies for achieving the same goal, not alternative goals. They can be picked up and laid aside as convenient. They should be treated as objects of choice as to strategy and purpose. Which to use and when depends upon the role and function the archivist is mandated to do. Sometimes it is necessary to insinuate, and sometimes it is necessary to “thwak”.

The First Lesson Deals With the Role of Protectors of the Public Record

There is surprisingly little role analysis in our literature concerning the archivist and the protection of the public record. Let us consider for a moment what is involved.

1. There must be a public record
2. It has to be useable
3. It has to be protected and preserved from concealment or distortion.

In some Australian jurisdictions, as in Victoria, the archives statute contains an obligation to “make and keep” full and accurate records of public business. On paper, this means that public servants and politicians who cannot produce a full and accurate record of their dealings in public business are guilty of a statutory breach. Leaving aside the efficacy of that way of going about it, it is clear that if recordkeeping is to underpin accountable practices there must be some obligation to keep full and accurate records of public business.

Where such obligations are imposed, especially when their enunciation or enforcement is entrusted to a body such as the archives authority, it is common (at least in Australia) for departments and agencies to regard this as an unwelcome intrusion, red tape, and a bureaucratic obligation extraneous to their core business. The purpose of recordkeeping obligations, within the public sector or any other corporate enterprise, is largely outside the scope of this paper. In passing on, I will allude only to two things which put the matter in another light.

First, a recordkeeping obligation which bears upon a department, agency, or business unit, while it may seem to be extraneous to the business purposes of the department, agency, or business unit, may be an essential requirement for the enterprise of which it is part. Units have no trouble submitting to enterprise-wide requirements for adequate financial and human resource management requirements, but for some reason have difficulty seeing recordkeeping the same way.

Secondly, while external regulation can always be legitimately seen as an imposition and an obstacle, it can also be a benefit. By subscribing to recordkeeping requirements a department, agency, or business unit can give quality assurances which can underpin business confidence. So, in describing the possible role of the regulator below, it is worth emphasising that it is not necessarily a game of cops and robbers.

If recordkeeping obligations are not met – deliberately or through carelessness or lack of support – it loosens the ties of accountability. In the last Australian election, the Government won support by taking a “hard line” on asylum seekers trying to reach Australia by boat. During the campaign, the Government bolstered its demonisation of these boat people by claiming, with the aid of pictures, that asylum seekers were throwing their children into the sea in a vain attempt to prevent the Australian navy from turning them back. It was a lie. It was known to be a lie almost from the moment the claim was made. But the public did not find this out until after the election. A Parliamentary Inquiry was unable to establish conclusively who, if anyone, in the Government knew it was lie and how it was possible for the lie to remain uncorrected for the whole of the campaign. This was partly due to the fact that inadequate records were made and kept.

In both Britain and Australia we have seen how difficult it has been to reconstruct after the event the story of how untruth concerning the existence and threat of chemical, biological,

and nuclear weapons in Iraq came to form the policy basis for war. Again the lack of a comprehensive, accurate, reliable, and useable public record is partly to blame. In both countries, the role of ministerial advisers has come into question. They are unelected, unaccountable, and outside the traditional recordkeeping framework. They wield great vicarious influence in their minister's name and seem to be used to separate ministers from that responsibility which comes from being the recipient of knowledge or unwelcome (but fair and impartial) advice.

It is not enough to oblige our public officials to make and keep full and accurate records – that obligation must be enforced in some way. In Australia, even where the obligation is given a statutory basis, it is not enforced. If it is to be enforced, it becomes necessary to ask the question : how?

My answer this afternoon is entirely technical. I do not propose to dwell, at this point in my paper, on the politics of enforcement, but on the methods. What are the possible roles and functions which enforce good recordkeeping in support of accountability? In a chapter I have written for a forthcoming book, I have identified at least ten. These can fit fairly easily under the two approaches already referred to (insinuation and “thwaking”) with the addition of a third : auditing.

Under the heading of insinuation, we can include the following :

- setting standards; articulating professional wisdom or experience
- advising, recommending, educating
- assisting; participating in a course of action; carrying out a decision
- providing services and the assurance of quality and meeting professional standards
- enabling by providing tools (e.g. metadata frameworks)

Under the heading of “thwaking” we can include :

- issuing instructions or edicts; allowing or forbidding action (e.g. disposal)
- monitoring behaviour and collecting reports on performance
- policing; detecting wrong-doing
- enforcing requirements and intervening to alter behaviour

The audit function must be separated because it is fundamental that audit must not be done by the same person or body responsible for setting standards or enforcing compliance. The recordkeeper's performance in those roles is being audited too.

These are the possible roles of the recordkeeper in protecting the public record. Some of them do not belong together. It follows that two or more entities must be involved. The auditor and the standard-setter, for example, must always be different entities. It would be possible, but very difficult, for one entity to maintain roles in offering advice and assistance while simultaneously monitoring and reporting.

Clarity around the role is one thing. Mandating it and avoiding the temptation, when the going gets tough, of slipping out of an assigned role and adopting another or of simply failing to meet one's responsibilities is another. Let us assume for a moment, what is manifestly not the case – that the role of the recordkeeper in protecting the public record is clear and unambiguously assigned. My second story raises another question : can the recordkeeper be trusted to carry out such a mandate?

The Heiner Affair : The Second Story Begins In Queensland (Australia) In 1989

For many years the State of Queensland was politically corrupt. Following embarrassing

disclosures and a Royal Commission conducted by Tony Fitzgerald, QC, the incumbent Government was staggering towards its first electoral defeat in decades. In 1989, during the lead up to the election, an opposition candidate leaked accusations of mismanagement and abuse in a State institution for the incarceration of teenagers. Years later, another Royal Commission exposed endemic corruption and abuse (physical, sexual, and psychological) in such institutions throughout Queensland, but this was not publicly known at the time.

The beleaguered Government set up an inquiry under a retired magistrate, Noel Heiner. We now know that Heiner was beginning to uncover accusations concerning the kind of abuse that was later exposed as endemic throughout the State's institutions. We now know of at least one incident of pack rape that was not properly reported or dealt with. Even now, new abuses of children in care within the Queensland system – the abuse of foster children, for example – are coming to light. Despite the Royal commission, there has still not been closure or justice. The reason for this, it is suggested, is a climate of neglect and cover-up, involving successive governments, the abiding bureaucracy, and the unions.

In December 1989, a new Government was elected. The Opposition came to power and the candidate who raised the allegations during the campaign was now minister in charge of the institution Heiner was investigating. Something happened and the new Government stopped Heiner's investigation and ordered his records destroyed. The decision to destroy the records went all the way to Cabinet.

By this time, the head of the institution Heiner had been investigating had taken legal advice. His lawyers were alleging lack of proper process and threatening legal action. Its Crown Solicitor advised the Government that there was no legal obstacle to destruction of the documents up to the moment proceedings were filed in court. Those of you followed the Enron Case last year, culminating in a conviction against the firm of Arthur Andersen, will recall that they acted on exactly similar advice with regard to records of their dealings with Enron – and were punished for it.

The Crown Solicitor's advice to the Queensland Government stated, however, that there was another obstacle to destruction. Heiner's records were public records and the consent of the State Archivist was necessary.

The circumstances of the destruction were subsequently investigated several times : by two Senate Committees and by a team of two lawyers empowered by a subsequent Queensland Government to look into it. Although we still do not have all the facts, there is a wealth of documentary and testamentary material about it.

We know that the Queensland Cabinet was aware an intending litigant wanted the records. We know that the Archivist was requested to approve the destruction and that she inspected the records and agreed to their destruction on the same day. We know that for months afterward, the Queensland authorities refused to reveal that the records had been destroyed and stonewalled the lawyers who were seeking to access them in preparation for their case.

Almost everything else about the Heiner Case is subject to dispute and ill-tempered disagreement. I have written about it in several places³ and I recommend you follow up those writings if you want to explore the matter further. You should be aware, if you do, that my view of the Case is not universally accepted amongst my professional colleagues. The fact that my views, which are the only ones you are going to hear this afternoon, are disputed within the profession is particularly relevant to the thesis that I am now going to place before you.

Before doing so, I have to give you my version of what happened next. Bear in mind that others will have a different story to tell and, accordingly, will draw different lessons from it. In

³ My analysis of the Affair can be found on the Caldeson Consultancy site - <http://www.caldeson.com>

the intervening period, the Heiner Case has entered the textbooks, not just for the recordkeeping aspects (they are, in fact, almost marginal to everyone but us) but in books and articles about the law, whistleblowing, and the politics of accountability. It is still current. As recently as May this year, the Queensland Government and Opposition were exchanging accusations and explanations about it across the floor of State Parliament.

One of those affected by the Heiner Case was Kevin Lindeberg, a union official acting on behalf of the head of the institution under investigation. Kevin was sacked by his own union for persisting in support of his union member when everyone else wanted the matter to be suppressed. His dissatisfaction with the treatment of the case by Queensland's Criminal Justice Commission (QCJC) led to its being investigated in the Australian Senate – twice. It was Kevin Lindeberg who first drew my attention to the Case in the early 1990's.

My story of what followed is this : Having read the record, I decided that the professional obligations to defend the public record from political pressure had not been met by the archivist. She had been asked to approve the destruction, had inspected the records, and given her consent all on the same day. She had participated in the Government's refusal to acknowledge the fact of the destruction to the prospective litigant and his lawyers for months after that. In particular, I was drawn to comments by an official of the QCJC before one of the Senate Inquiries to the effect that it was not the role of the State Archivist to consider whether records were wanted in prospective legal proceedings. She had no role to consider the interests of potential litigants in her appraisal; she was concerned solely with whether or not the records had enduring "historical" value.

I drew the attention of the ASA Council to this statement and the surrounding facts and said they must act to refute these words. At the time, it didn't occur to me that they would not act. I assumed that the story was so complex that they had not yet appreciated its significance. I was in my fallow period so I decided to help them by providing a precis. They did nothing. Why they did nothing and the circumstances surrounding their inaction are still a matter of rancorous dispute between me and many of my colleagues in Australia. The matter was fought out bitterly for the next decade on the aus-archivists list-serv⁴ and elsewhere. The archive of that list-serv debate is still available in cyberspace for those with the endurance to follow it and a strong digestion.

After some years, ASA issued a statement refuting the words of the CJC about the role of the Archivist and blaming the Queensland Government for not fully informing her of the facts. To this day, we still don't know what the Archivist knew. She has never said and no one has ever investigated it. Whatever the case, some of us felt that this statement by the ASA was inadequate. It blamed an unsatisfactory appraisal outcome on everyone except the person who conducted it. It failed to explain how archivists could escape the blame when appraisals go wrong. It seemed to me, and some others, self-serving and counter-productive. If we were unable to face up to the implications of a failure to protect the public record when we were involved how could we credibly comment of such failures by others? The problem was compounded when the Council of Federal and State Archivists (COFSTA) issued a public motion of congratulation and support for their Queensland colleague because it was concluded, following one of the investigations, that there was no basis for proceeding against her for a breach under the *Libraries and Archives Act* of Queensland.

I for one felt that the appraisal, regardless of who knew what and having regard to the Archivist's professional obligations, not just her legal ones, was bad and that professionally we had an obligation to say so. My consistent criticism of the appraisal, ever since I had first drawn it to ASA's attention, was what I call its "ad hoc" nature. There were no rules in place against which either the procedure or the outcome could be benchmarked. There was

⁴ <http://www.asap.unimelb.edu.au/asa/aus-archivists/maillist.htm>

nothing in place which said how records of terminated inquiries should be dealt with. Because there was no prior statement of what the outcome should be for records of the kind, the archivist's judgement in the particular case could not be tested against what could reasonably be argued was a predictable outcome. It could not be defended on the basis that it was similar to all such outcomes for similar material.

Finally, in 1999 that is what the ASA Council did say in a second statement, following protracted and furious debates on the Australian list-serv. They said the Heiner appraisal violated the standards of good appraisal and that it was wrong to go about appraisals in an ad hoc way. They began to articulate some professional standards by which the next dodgy appraisal decision by an archivist could be judged.

We know, from what happened next, that they consulted the Council of Federal and State Archivists before issuing their condemnation. Some changes were made. We do not know what. These changes were not enough to satisfy the government archivists. They issued their own statement repudiating key parts of the ASA Statement, in particular trying to disavow the condemnation of ad hoc appraisal.

In short, the government archivists of Australia –

- banded together to support and defend their colleague (as I suppose they would want and expect to be supported in similar circumstances)
- congratulated her when she escaped censure
- opposed the profession's condemnation of her appraisal
- repudiated the statement of principle by which her ad hoc approach to appraisal was condemned by the profession.

In due course, the Heiner Affair reached the agenda of an ICA Committee dealing, inter alia, with recordkeeping practice. When this happened, the ICA Secretariat intervened to have it removed from the agenda and instructed that it was a matter for Australia and should not be considered by ICA.

The Second Lesson : How Protectors of the Public Record Should Behave

In exercising any or all of the roles and functions identified, the archivist's own performance becomes an issue. If you are going to be an agent of accountability, it behoves you occasionally to act like one. Are they capable of it?

We have dealt with the regulation or monitoring of the behaviour of others by the recordkeeper in the roles and functions articulated above. In those roles, the archivist operates in the left hand column of an accountability model (**Figure One**).

Let us now move the recordkeeper over to the right hand column. The question is : who or what regulates the recordkeeper in the discharge of the obligation to protect the archival record? It is a question as old as Plato : who guards the guardian?

The question has two aspects. Firstly, is it possible for relatively low-level bureaucrats to uphold a role as agents of accountability within a bureaucratic structure which makes them subservient to bureaucratic and political direction? It is after all, the politically motivated actions of politicians and other bureaucrats which the archivist would have to control in some way.

Let us not look for isolated acts of courage to do the right thing. Let us look for a systemic solution, a set of functional requirements with which recordkeepers themselves must and do comply. Let us try to specify the standards which they must meet, bench-marks we can use

to evaluate their performance, the hallmarks of a good appraisal (or any other aspect of our work) so that we too can be made accountable.

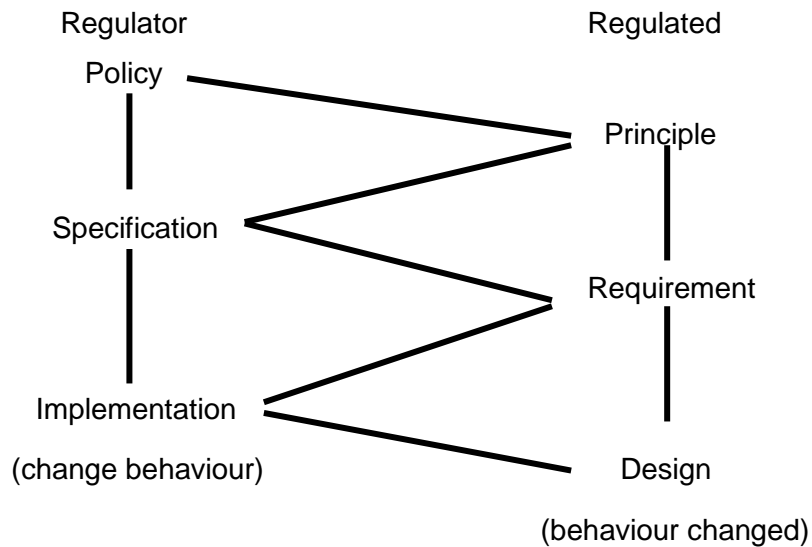


Figure One

Part of the answer, it has been suggested, lies in a second aspect of the matter : according the government archivist some degree of independence or autonomy; providing for the archivist to answer to a loyalty or responsibility outside the chain of bureaucratic command or the requirements of an employment contract. This might be to a professional standard, to an external review process, to the legislature, or some other constituent mechanism which frees the archivist (to some degree or other) from the ordinary chain of command when exercising the role of agent of accountability.

Such arrangements can not be the whole answer. Even when there is a formal “independence”, government watch-dogs are susceptible to subtle pressures to compromise their integrity. Their organisational budgets and personal career prospects lie in the hands those whose political interests such a role calls upon them to defy. The literature on what is sometimes called the “regulatory capture” of watch-dogs within governments is a growing one. Such capture can be venal or can be simply the demoralisation of good men and women through exhaustion. Many and varied are the ways politicians and the bureaucracy can find to wear the watch-dog down. Sometimes, especially when under pressure to perform, the watch-dog, knowing the lengths the system will go to in fighting a particular issue, will simply decide that life is too short and that more good can be done taking on issues with a chance of success.

What I want to deal with, however, is a more basic question. Let us suppose that the archivist has a clearly mandated and clearly articulated role and the capacity to exercise it. My question is : how can we trust them to do it and, if they do it, how would we know? My question is about bench-marking the performance of the archivist as an agent of accountability.

The significance of the debate about Heiner which I have recounted to you is not who was right and who was wrong – although that is an important question in its own right. The significance of it is that the debate went on for years, is still going on, without any way of telling who was right against criteria which had been clearly articulated and consistently applied. All of the opinions expressed (including mine) amounted to little more, ethically, than a personal preference for chocolate ice-cream.

I'm not saying there should have been bed-rock certainties, immutable laws which covered all possibilities. Bench-marking is not like that. Setting out the bench-marks initiates debate over their application in particular cases and, when necessary, they can be modified in the light of experience and with the benefit of hind-sight. What the debate over Heiner demonstrated, for me at any rate, was not the inadequacy of our bench-marks but the fact that we didn't have any.

No one was able to say the Heiner appraisal was wrong because it didn't conform to the agreed standard for a good appraisal in this or that respect. If that had been possible, those who disagreed could have argued that my interpretation of the agreed standard was incorrect or that my understanding of the facts was flawed, or that my application of the standard to the known facts was faulty. Finally, recourse could have been had to an argument that the Case illustrated that the standard itself was inadequate and should be varied in the light of our experience of this Case.

None of this was possible. Instead, participants in the debate were, in effect, saying what they thought good appraisal was in order to apply that opinion to a defence or attack of what happened.

But even that dignifies the debate. Just two months ago, I was making these points to an ASA meeting in Sydney. One of the State Archivists present responded by saying (yet again) that the central issue in Heiner was not about any rule concerning what constitutes a good appraisal or establishes when it is bad. He said the issues in Heiner were whether the Queensland Cabinet knew the records were wanted in legal proceedings⁵ and whether or not the Archivist was told.

In other words, an evaluation of the Heiner appraisal does not depend upon our being able to test it empirically against the measures of what a good appraisal should be, it depends upon an evaluation of the state of mind of the participants. This begs the question. I won't say the state of mind of the participants is irrelevant, but neither is it central. If there were bench-marking about what constitutes a good appraisal, it would matter less what the participants were thinking. We can instead measure their actions, their behaviour, against the criteria which set out what should be done, how it should be done, and what the outcome should be.

With this argument, I felt, my opponent was making my case for me. By saying the state of mind of the participants was the key issue, he was highlighting the absence of standards against which actions, methods, and outcomes could be empirically measured. In the common law system, *mens rea* is an essential ingredient of crime, but so is certainty. You can't be convicted of an offence that hasn't been defined (unless, of course, you're being confined at Guantanamo Bay). He was saying (whether or not he realised it) that because we had no other way of establishing what was, and what was not, acceptable behaviour we were driven to inquire only into what the participants were thinking at the time. You bench-mark by asking what people did, not what they thought.

But bench-marking is not just about running a ruler over peoples' actions. It is not simply about measuring the methodology, procedures, and techniques which were used. In some ultimate and fundamental way, it must also be about principle.

The ASA's 1999 statement condemning ad hoc appraisal, calling itself a policy on appraisal, has stayed on the public record for three years. Earlier this year, the current ASA Council issued for comment a document calling itself a draft Appraisal Policy. That document, and my subsequent response to it, can be found on the archive of the aus-archivists list.

⁵ It is an established fact that they did know, but that is another debate.

I am highly critical of this draft Appraisal Policy. My reason tracks directly back to the Heiner Case. In all the years in which this Case was being hotly debated, the fundamental problem, I now see, was that we were arguing about what was, and what was not, the standard for an adequate appraisal. The problem was that there was no satisfactory and credible standard or bench-mark against which the actions of the Queensland State Archivist could be judged. And the same can be said, I believe, for any and all aspects of the potential role recordkeepers might have in protecting the public record.

Emails flew thick and fast, public pronouncements were made, personal endorsements were given, positions were taken, attacked and repudiated by people (myself included) who were not actually able to demonstrate, by reference to some standards or bench-marks, which view of the matter was correct. The point here is not that such bench-marks could have resolved the debate - there remains plenty of room for disagreement between those who are examining the same set of facts against undisputed bench-marks. The elimination of dispute is not the point. What has been lacking is not just agreement, but a credible basis upon which disagreements could be debated. What was lacking was a point of reference from which expectations of the behaviour of archivists could be derived and against which their actual performance could be measured.

We know that other agents of accountability have such bench-marks and that they do not eliminate disagreement and dispute. Court judgements are appealed and over-ruled. Audits are shown to have overlooked shonky practices and to have been adapted to obscure flaws in financial management. Ombudsmen and corruption watch-dogs fail to get it right. To a greater or lesser extent, however, the systems within which such agents of accountability operate are self-correcting because these failures can be examined in the light of prevailing bench-marks and the system within which they operate is, to a greater or lesser extent, self-correcting.

Post Enron, the rules about how accountants operate and their relationship with their clients have been adjusted. In a recent tobacco case in Australia, the rules about the way lawyers relate to their clients were changed after another instance of records destruction on legal advice in advance of formal proceedings. It is not that bench-marks prevent untoward behaviour, but rather that they provide a basis for measurement and corrective action.

Above all, such bench-marks provide a statement by which outcomes, not just procedural rules, can be judged. What matters, ultimately, in the Heiner appraisal, is not simply whether or not the Queensland Archivist followed the provisions of the State's *Libraries and Archives Act*. What matters, ultimately, is : did she get it right? Professionally, did she do a good job?

My condemnation of the ASA's draft Appraisal Policy was that it did not help to answer that question. The document was almost entirely procedural. It said how you go about appraising records. What it needed to say, in my view, is what kind of outcome an appraisal had to achieve in order for it to be a good appraisal. It had to condemn ad hoc appraisal. It had to provide certainty, consistency and reliability by specifying that in similar circumstances, the same kind of records would be appraised in the same way and with the same result. It had to provide a basis for examining and testing the actions of the recordkeeper and for demonstrating that they were wrong if they did not adhere to the principles outlined in the policy. It had to be possible to use it to say if their appraisal decision was not what a reasonable person could expect it to be in the light of the Policy Statement.

We know how to do this. What we try to teach others about the articulation and implementation of standards is the same for us (or it ought to be). My complaint about the Heiner appraisal – that it was ad hoc – would have been met, in part, if the Queensland Archivist had pre-determined rules about how to treat categories of material so that some degree of consistency and predictability was being achieved. But that would be doing no

more than replacing ad hoc appraisal with disposal schedules. Ultimately, disposal schedules are no more satisfactory because they are still validated by the archives institution itself. They are not referenced to any externally promulgated standard of performance and outcome. That, however, is what accountability means.

To be an effective tool of accountability, an appraisal policy must not stop at saying that appraisal outcomes should be consistent and predictable. That would be satisfied by schedules. It must say what is needed to test whether the archivist's decision in particular cases (however that decision is expressed) is good or bad. That is what archivists, like anyone faced by new accountability requirements, find so threatening in this. It would remove the autonomy they now enjoy to keep or dispose of records entirely within their own discretion⁶.

There lies the paradox. If archivists are even to be considered for the kind of autonomy which is the hallmark of any profession, the individual judgement of practitioners must be circumscribed by standards which remove the freedom to make professional judgements unfettered by any requirement to meet stated outcomes and achieve prescribed benchmarks. In order to be trusted with autonomy, archival judgement must first be professionally constrained.

This will be neither a simple nor an easy thing. But the model of how to do it lies before us in the lessons we teach to others about the implementation of recordkeeping standards. First, the principles (the functional requirements) must be articulated. These fundamental purposes are abiding. Underneath the principles must be developed appropriate statements of requirements and practice :

<u>Theoretical Model</u>	<u>Actual Application</u>
Implementing Functional Requirements	Napoleon's Plans for 1812
◆ Principle : What do you want to do?	◆ Conquer Russia
◆ Requirement : How you must do it.	◆ Capture Smolensk
◆ Implementation : Have you done it?	◆ Get out of bed

Implementation can take a variety of forms, so long as they meet the same functional requirement :

My purpose is to reach the Indies :

- ◆ I propose to sail to the Cape of Good Hope, then turn east (Vasco da Gama)
- ◆ I propose to sail west (Christopher Columbus)
- ◆ We don't propose to sail anywhere (Wright Bros)

⁶ It is no answer to submit appraisals for external comment. Firstly, because mechanisms to elicit effective external scrutiny do not exist and will not until we create parallel contextual frameworks within which others can apply appraisal criteria appropriate to them rather than the organisational concerns within which traditional appraisals are carried out (but that is another debate). Secondly, because no external commentator has a mandate to validate appraisal outcomes. Thirdly, because such methodologies simply spread the arbitrariness in the absence of articulated standards and benchmarks by which appraisals must be judged. Peer review, however, provided it was done externally, could be acceptable if it were properly managed.

As I indicated in the beginning, there remains a question whether, even if we were given such a mandate, clearly and unequivocally, we would be able, allowed, or willing, given the political circumstances in which we find ourselves, to carry it out. My point here is much more modest. Without the necessary Policy statements which can be used to bench-mark our actions in protection of the public record, not just appraisal, but any of the recordkeeping requirements necessary for the creation and preservation of a full, accurate, and useable record, how would we (or anyone else) know?

I very much fear that there is an element within the recordkeeping profession which wants to prevent the emergence of such standards. Fearing, not without justice, they would not be able (or permitted) to sustain them, they prefer not to have bench-marks in place against which their failures can be measured. Be that as it may, while we lack the bench-marks against which particular appraisals, and the work of particular appraisers, can be judged by others against something like objective standards which give predictability to the task, any claim we might make to act as protectors of the public record must remain hollow.

I am optimistic that it can be done, less so that the will exists to do it. So, my response to the challenge posed by the theme of this conference is this : If we want to protect the archival record from political pressure, the first step is to wake up and get out of bed.