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CORRUPTION AND REFORM

THE FITZGERALD VISION

Edited by
Scott Prasser, Rae Wear
and John Nethercote

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Foreword

Sir Max Bingham QC

A series of royal commissions in Australia from the 1960s on, brought a public awareness of the extent and impact of organised crime in this country and led to the establishment of the National Crime Authority (NCA). In an interesting local parallel, the Fitzgerald Inquiry held up a mirror to certain sections of Queensland society. The efforts of Commissioner Fitzgerald and his crew produced an awareness in this community about organised crime and corruption. They also led to consideration of a number of wider issues of great social significance and to the establishment of the Criminal Justice Commission (CJC) and the Electoral and Administrative Reform Commission (EARC).

In many ways, the Fitzgerald Report has proved a watershed. It has also demonstrated that there is, in fact, nothing new under the sun. Mr Fitzgerald's report has served as a reminder that Queensland politics do have, and have had for many years, a certain simplicity; and that the corrupting influence of power, too long enjoyed, knows no boundaries, neither party-political nor geographical. If the Queensland body politic is to remain healthy, it is essential that public awareness continues. It is indeed true that for evil to prevail, it is necessary only that good men do nothing. It is therefore important that the process of debate continues to enliven the public conscience. Public debate requires informed participation. It is for this reason that occasions such as the *Fitzgerald Vision for Reform Conference* (held in Brisbane on 29-30 November 1989) are so important. Queensland has no Upper House. An Upper House in itself is, of course, no guarantee of purity in political matters, and there is plenty of experience around the country to demonstrate that. But an Upper House does at least provide a forum in which public debate can occur and in which varying points of view can be expressed. In the absence of such an institution, it seems to me that the media and the academic world have an enhanced responsibility to provide the possibilities of such debate.

Now that the Fitzgerald adventure is moving into its legislative reform phase, it will be continually important for the agents of reform to be subjected to public scrutiny, comment and accountability. The two reform commissions are not excluded from this category. As they embark upon the discharge of their functions prescribed by the report and the ensuing legislation, it will be essential that they retain public confidence. From the point of view of the CJC, this will be very difficult in some areas because, of necessity, some of its enquiries and investigations will need to be in private. However, every opportunity must be taken to engage and attract public attention to the underlying purposes of the reform process.

There will probably be little difficulty in achieving this, at least in the early stages of the work of the CJC because it seems clear that following from the Report, priority must be given to consideration of such topics as the control of prostitution and SP bookmaking; not to mention the reform of the police force. It can probably be fairly observed that each of these areas of activity has the potential for attracting public attention. But even the less glamorous and controversial realms of activity will require the same level of supervision.

From the CJC's point of view, the initial steps in the reform process will necessarily focus upon police restructuring. This is the area in which the Fitzgerald comments have the greatest impact and the re-establishment of morale and efficiency among the police must be regarded as a matter of great urgency.

Fairly closely linked with this is the revision of the legal provisions which regulate voluntary sexual behaviour and SP bookmaking, because it is clear from the report that those activities generated the greatest opportunities for corruption and abuse in the pre-Fitzgerald days. No less important will be the rearrangement of provisions for the vocational training of police and the broadening of the police educational process. Commissioner Newnham has already indicated a policy that will require commissioned police officers to hold university qualifications by the late 1990s. Consequently, there is here a new challenge for the academic world to collaborate with police educators in seeing that this goal is achieved in a practical and effective way.

Later, attention will need to be turned to the functioning of the criminal justice system and the way in which the courts and the police, and the correctional agencies, interact. This picture must include the work of the public prosecutors' and defenders' offices; and it may well be that in the long term this will be the most important area of the Fitzgerald inheritance. In establishing a body which is

capable of overviewing the whole criminal justice process, Queensland will be seen to be blazing a trail for other states to follow. It is a process which contains many exciting challenges.

The work of the EARC covers a much wider field of public administration. Naturally, its primary task will be the electoral reform which Fitzgerald saw as being at the centre of the State's political activity. However, the ramifications of EARC interest in the public service and local government areas generally are likely to be far-reaching and important. The coincidence of a change of government after a very long period of conservative dominance means that the stage is set for an exciting era of reform in Queensland. It imposes awesome responsibilities on those involved.

Introduction

The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (commonly known as the Fitzgerald Inquiry) was appointed in May 1987 by the Queensland National Party Government. The Commission had one member, Tony Fitzgerald QC. Its Terms of Reference were limited and the Government clearly thought that the Inquiry would be a short term affair, a view shared by the Opposition and most other observers.

In July 1989, the Fitzgerald Inquiry released its report to a highly expectant public amidst unprecedented media coverage. The Fitzgerald Inquiry had not been a short term affair. Instead it had gained extra powers, staff and resources to become one of the most expensive public inquiries in Australian history. Even before it had completed its inquiries, its impact had been felt throughout the Queensland political system: a police commissioner had been compelled to stand down: a premier had been forced into premature retirement by his party; and two ministers had lost their jobs. More than this, the widely reported public hearings verified what many had long suspected, that much was indeed rotten in the State of Queensland. Ultimately, the corruption which the Fitzgerald Inquiry revealed at the heart of Queensland's political institutions brought about the downfall of the resilient and long-lived National Party Government.

Not only did the Fitzgerald Inquiry identify the sources and causes of corruption in Queensland, but also it sought to provide a vision for reform. The Report stated that "the most pressing task for this Commission was to formulate recommendations to found the process of reform[1] [which would allow] permanent institutions and systems to work properly".[2] The Report stressed that its recommendations made up a "package of reform"[3] which had to be accepted in its entirety if corruption was to be tackled seriously.

What provoked this volume and the conference which preceded it in Brisbane in November 1989, was this "package of reform". The Fitzgerald vision for reform captured the imagination of many Queenslanders. There was, at least in the early stages, almost universal support for the Fitzgerald Report by the Government, the Opposition and the media. National Party Premier Mike Ahern's unprecedented acceptance of the Report "lock, stock and barrel"[4] twelve months

before its release symbolises this. In the flood of early enthusiasm for the Report, and repugnance for the corruption which it had revealed, there was little detailed analysis of its recommendations. The need for such analysis became even more apparent when it was clear that the Fitzgerald Report and its recommendations were the key issues in the 1989 Queensland election and would colour the political life of the State for many years to come.

In order to meet the need for a careful analysis of the Report away from the arena of party politics, the School of Management of the University College of Southern Queensland decided to run its inaugural Public Sector Management Conference on *The Fitzgerald Vision for Reform: Making it Happen.* These papers are the result of that conference. They bring together a wide range of contributors from the media, the police, the legal profession, the public sector and the universities. They cover all aspects of the Inquiry, from the media reports which were the catalyst for its establishment, to the style of the Inquiry itself and the implications of its recommendations for the police, for government, for the bureaucracy, for the media and for electoral reform.

The Fitzgerald vision involves not only the creation of new institutions and processes and the employment of new personnel, but also the development of a new spirit of openness and accountability in bureaucrats and politicians and a new spirit of vigilance on the part of the Queensland public. Is this is too much to ask? The contributors to this volume seek to provide an assessment.

Scott Prasser

Rae Wear

J R Nethercote

Notes

1. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. 14.
2. *Ibid.*, p. 5.
3. *Ibid.*, p. 7.
4. *Australian Financial Review*, 5 July 1988.

Part 1

Corruption: An Australian Perspective

1

Corruption — The Evolution of an Idea 1788-1988

Gary Sturgess

Corruption is - to borrow a charming Americanism from the 1960s - one of those acts that is characteristically committed between consenting adults in private. It is a secret crime - so much so that we have made secrecy one of the statutory indices of corruption. And it follows that those of us who would seek to compile histories of corruption - authors, journalists, even, may I say, royal commissioners - need to approach the task with a large dose of humility. We find ourselves, if you like, standing in the front garden of a house, trying to guess at the intimate personal relationships of the family inside. Very occasionally, through telephone intercepts or the evidence of a "super-grass", we are privileged to peek through a window and glimpse one or two scenes. Sometimes, a family argument spills out onto the front porch. But, most of the time, even with the powers of a royal commission, we are left standing out on the footpath trying to reconstruct the scenes inside according to our respective theories of corruption and the vignettes we have been lucky enough to glimpse.

Any history of corruption must, therefore, be primarily a history, not of corruption itself, but of scandal, especially political scandal. Walter Lippman observed sixty years ago "It would be impossible for an historian to write a history of political corruption in America. What he could write is the history of the exposure of corruption."[1] And so it is with us. What we are studying, when we look at graft in our society, is not corruption itself, but corruption exposed, corruption scandalised, corruption moralised.

It is, at once, both more and less than corruption itself. It is less in the sense that we are guessing at the whole picture from nothing more than a few small pieces of the jigsaw. It is more, because through exposure and scandalisation, we add to reality by personal hypothesis, misunderstanding and (quite proper) moral outrage.

This process of simplification and exaggeration that takes place during a period of scandal and reform, creates special problems for the historian. For the social reformer, scandal is but one of the tools of trade. The moral entrepreneur uses it to awaken public outrage and to facilitate attitudinal change within society.

But for the historian, it is yet another layer of distortion through which interpretation of the past must be sought. Of these distortions, the one to which we are all most vulnerable, in my experience, is the tendency to retrospectivity; the inclination to read yesterday's corruption in light of today's moral and legal "certainties".

There is nothing especially novel about this. Indeed, judicial reformers are deliberate in the selective use of "precedent" when they seek to justify change to the law. By arguing that the new law or ethic is, in fact, not new at all, but has always been so - only ignored by wicked men - the reformer minimises resistance and manages to present himself or herself at the same time, as a conservative.

But for those of us who wish to understand corruption as it is, or was, such retrospectivity is deceptive and unprofessional. The brute fact is that both the law and society's ethics on corruption are still evolving. The boundary line between public duty and private interest is still being drawn. And the ethos against which we measure our public officials today is very different from that against which (say) Lachlan Macquarie judged himself. It is simply unfair to judge the officers of the New South Wales Rum Corps against the standards now being enforced by Ian Temby QC and Doug Drummond QC.

In this chapter I want to trace this line between public duty and private interest and the way in which it has shifted over the 200 year history of government in New South Wales. It is my firm belief that we cannot know where we are unless we know where we have been.

Origins of the Concept of the Bribe

As John Noonan argues so eloquently in his superb study, *Bribes*,[2] the question which we need to ask about corruption is not why does it exist but, rather, why is it deserving of censure?

In almost every other part of human endeavour, reciprocity is regarded as an unquestioned good. In our personal relationships and in business, exchange is the norm, and gift-giving a virtue. In most societies, it is not only acceptable to bring a gift when approaching a more powerful social figure, but positively offensive not to do so.

So the puzzle is not why *these* attitudes exist, but why, when it came to public officials, did we in the West develop a different ethic which treats gift-giving as corruption.

The answer according to Noonan, can be found among the kings who governed Mesopotamia two or three thousand years before Christ. Somewhere during that period it occurred to Ur-Nammu or one of his contemporaries that if, on Judgment Day, God rewarded men according to the value of their gifts, and not according to the virtue of their acts, then the poor were not going to make it to the "Great Dwelling". And it followed, when these earthly kings set about trying to emulate Divine Justice in their courts, that they made a virtue of treating rich and poor alike. So it is that, in the Old Testament, we find, for example, the prophet Isaiah condemning Israel's leaders for taking bribes when they sit in judgment:

> Your princes are rebels, accomplices of thieves
> All are greedy for gifts and itch for presents.
> They do no justice to the orphan.
> They never hear the cause of the widow. (Isaiah 1:23)

As a result of this very deep biblical foundation, English law has regarded judicial bribery as unacceptable from the very earliest of times. By 1788, when Captain Arthur Phillip sailed into Port Jackson, there was no doubt in anyone's mind that corruption of the judicial process was beyond the law.

English Law and Practice, 1788

Regrettably, the same cannot be said of the law as it affected other public officials - politicians, military officers, civil servants and the like.

Indeed, but for the development of a few rules on the sale of offices (the by-product of the debate within the Church over the practice of simony) and an early and disastrously unsuccessful attempt at preventing election bribery, English law had developed little on the subject of corruption before the late eighteenth century.

In fact, it is fair to say, that as Arthur Phillip set sail from Portsmouth in 1787, British attitudes to corruption were in a state of flux. In the late eighteenth century, electorates, as we know them now, did not exist in Britain. Members were elected by boroughs or counties with a restrictive property-based franchise and, in the case of the rotten boroughs, constituencies consisting of as few as a dozen hand-chosen councillors.

Even in the open boroughs, electoral bribery was commonplace, and treating - plying would-be voters with food and drink prior to voting - was a national outrage. By way of example: "At Shaftesbury in 1774, amidst a great deal of drunkenness, one of the aldermen disguised as Mr Punch passed sums of twenty

guineas through a hole in the door, for which each elector had to sign a bill to an imaginary character called Mr Glenbucket."[3]

Such were the simple artifices by which corrupt politicians by-passed the laws on bribery in the late eighteenth century. In the 1750s, Hogarth had produced his famous series of prints, *The Election,* lampooning these practices. He created a metaphor that was to be overworked throughout the nineteenth century by fiction writers such as Charles Dickens, Benjamin Disraeli, and H.G. Wells.[4]

England waited until 1832 for the first of its electoral Reform Acts, and 1867 before the *Great Reform Act* was passed by Disraeli's Government. Secret ballots did not arrive until 1872.

Throughout the late 1770s, Lord North and George III apparently developed a sophisticated system for buying the votes of members of Parliament through direct payments of money. By about 1780, such blatant bribery appears to have stopped, partly because the King's war against the party system had failed and partly because of the unofficial commencement of parliamentary reporting.[5]

Another corrupt practice which thrived well into the nineteenth century was the awarding of military supply contracts to members of Parliament. The armed forces were a hothouse of corruption at this time, although the loss of the American War of Independence had shaken the military establishment and led to some reform, especially in the Navy, aimed at rooting out corruption and patronage.

In 1780, too, Edmund Burke had made his now-famous attack on defunct offices of the Crown, which had been used by George III to buy the loyalty of selected members in the Parliament. Reform of these extravagant and now entirely-useless offices had been blocked, in Burke's marvellous metaphor, because "the turnspit of the King's kitchen was a member of Parliament." In 1782, Lord Rockingham abolished many of these offices by Act of Parliament, and Burke, newly-appointed Paymaster under Rockingham, abolished more by himself.

And yet - and this is important to understanding the uncertain state of ethics on corruption at this time - Burke used his new position to appoint one of his backers as his Deputy Paymaster, his son as another, and his younger brother as Secretary to the Treasury.[6] The distinction in Burke's mind, and in the mind of most of his contemporaries, seems to have been the payment of money. Reciprocal or partial behaviour was tolerable. Cash payments were not.

As the First Fleet lay off Portsmouth in the early months of 1787, British newspapers were filled with reports of the impeachment proceedings against Warren Hastings, the greatest corruption trial of the century - brought by none other than Edmund Burke. In spite of clear evidence of having received payments while acting as the Governor of Bengal, in 1795 Warren Hastings would be formally judged by the House of Lords to be not guilty.[7]

Despite this setback, reform of the civil service had already begun in the early 1780s. In 1782, in something of an over-reaction, civil servants had been entirely disenfranchised, on the assumption that, in voting, they faced an impossible conflict of interest.

Not until the mid-nineteenth century were sinecures and pensions finally purged. And only in 1854, was the Northcote-Trevelyan report published, thereby laying the foundations of a modern, merit-based public service.

Paradoxically - partly as a result of the impeachment proceedings against Warren Hastings - the origins of these reforms lay in the British Civil Service in India - from where, indeed, the term "civil service" derives.

New South Wales, 1788 - 1856

Arthur Phillip thus set sail for Botany Bay with an uncertain heritage as concerned the law on corruption. Robert Hughes, indeed, records that the contractor who victualed the First Fleet, Duncan Campbell, had corruptly shortchanged the convicts on their food supply, giving them half a pound of rice, instead of a pound of flour[8] - an inauspicious beginning, evidence that New South Wales' corruption problems did not start with the Rum Corps.

It can, however, be said with safety, that syndicated or organised corruption did begin with the senior officers of the New South Wales Corps, as it was formally known.

Until 1823, when Sir Thomas Brisbane appointed a Legislative Council, New South Wales was governed by the military. So it is not surprising to find that the same principles of accounting, the same standards of propriety adopted by the British army elsewhere in the Empire, prevailed in New South Wales in the early years of the nineteenth century. The officers of the New South Wales Corps monopolised trade in the infant colony because they alone had access to large sums of sterling, which were acceptable to visiting captains as foreign exchange.[9]

In addition, John Macarthur and his fellow-officers also attracted the condemnation of the small farmers because of their control of the Commissariat - the store through which the convicts and many of the settlers were fed and clothed, and through which the produce of the infant settlement was traded. Many allegations of profiteering were probably unfounded. There is no doubt, nevertheless, that Macarthur and his fellow-officers built their pastoral empires on the foreign exchange monopoly which they held during these early years. That monopoly was founded, not just on their personal incomes, but on the company funds which Macarthur, as Paymaster of the NSW Corps, controlled. To put it bluntly, Macarthur built his fortune, at least in those early years, by risking army funds and taking the profits for himself.

This same abuse of office characterised the early years of the Commissariat. A succession of early commissaries were dismissed or charged with fraud and like offences relating to use of government funds for their personal enrichment. The New South Wales commissaries were not so much grafters who had knowingly set about to break the law, as poorly qualified Treasury men who had not caught up with a shift in that boundary line between public duty and private interest.[10]

As late as 1869, a volume on the military forces of the Crown could still report that "it has been the usage, as far back as our inquiry has gone, for the Officers in these departments to be themselves the Proprietors of, or to have shares or interests in, a great number of the vessels and small craft and in almost all the waggons and horses, employed in these services".[11]

As in the United Kingdom, government in New South Wales in the first half of the nineteenth century was marked by patronage and favouritism. Among the many criticisms of Lachlan Macquarie's administration made by Commissioner Bigge, was the Governor's patronage of a small number of public works contractors. In particular, Macquarie was criticised for granting tickets of leave to convicts in breach of his own published guidelines, in order to supplement the work gangs of this select group of contractors. Bigge was careful to clear Macquarie of any suggestion of corrupt conduct, but he did comment on the way in which the Governor's infringement of his own rules had fostered an environment in which corruption could flourish.[12]

Macquarie's most notorious act of patronage was granting a monopoly on the importation of rum to a group - consortium would be the modern word - of private entrepreneurs, in return for an agreement to construct a hospital in what is now Macquarie Street. It was, to borrow the vernacular, a licence to print money. The consortium unfortunately had not tied up the terms of the monopoly, and they were forced by Francis Greenway to rebuild part of the hospital at their own expense. In spite of widespread rumours about the fortune they had made, the consortium, it appears from the available evidence, lost money on the deal. Macquarie, nonetheless, had to bear Lord Bathurst's criticism and the suspicion of some of Sydney's leading citizens. Some regard it as significant that the Parliament of New South Wales is today still housed in the northern wing of Lachlan Macquarie's rum hospital.[13]

As for Macquarie's patronage, all that we can say is that the man was a product of his environment. After a life in the British army, Lachlan Macquarie cannot have regarded patronage as anything but the norm. After stagnating because of his refusal to buy commissions in the 77th Regiment, he had purchased the post of the Regiment's Deputy Paymaster-General in Bombay in 1797. If he did not use this position to recoup his investment - as most army paymasters were forced to do - then Macquarie certainly used it to befriend powerful allies who

were able to accelerate his later promotion. We also know that Macquarie was active in lobbying for the appointment of his relatives to ranks within the regiment - brothers, nephews, cousins, servants - some of whom were only five years old.

Macquarie's patronage should not detract from our perception of the man's basic integrity. He was, above all, a man of his time.[14] Patronage of private entrepreneurs, both by the Colonial Office and by officials in Sydney, continued throughout the nineteenth century, and it is often difficult for us to distinguish legitimate government support from corrupt or improper favourites. Even a rogue such as Ben Boyd could begin his Australian adventure by approaching the Colonial Office and obtaining special privileges in relation to land grants and government tenders.

It was difficult enough for the citizens of Sydney in the 1840s to tell where Boyd's public and private interests stopped and started.[15] Looking back 150 years later, I fear we cannot hope to successfully make such a distinction now.

Government by Factions

Responsible government in 1856 brought a new set of challenges, among them the difficulties of conducting honest elections.

New South Wales was in some ways a leader in electoral law reform, with the secret ballot in 1858, two years after Victoria, but fourteen years earlier than the United Kingdom. But in other ways, the law and practice governing elections in New South Wales remained positively eighteenth century until early in the twentieth century: Voting extended over several weeks; rolls were poorly maintained; poll supervision and scrutineering were rare; and, until the 1890s, treating was not illegal. Not surprisingly, in this penumbra between public duty and private interest, electoral malpractice thrived. Between 1858 and 1900, some seventy petitions alleging electoral impropriety were investigated by the NSW Parliamentary Committee of Elections and Qualifications.[16] This, for example, is an extract from a letter from James McClean, one of Henry Parkes' electoral agents, concerning the 1891 election for the seat of The Hume:

> ... as Mr Burley's hotel is almost opposite the Court House where the polling took place we had an excellent opportunity of seeing how faithfully he, Burley, and many other hirelings acted during the day in fulfilment of the bribery arrangement. From 8 to 4 there was one incessant stream of half-muddled creatures led like sheep to the slaughter between two or more agents over to the booth, and on entering which, a printed paper was placed in their hand ...

> Burley's hotel was placarded off as Lyne and Hayes committee rooms and drink was freely administered minus payment by the drinkers. Cabs were also flying about having 'Vote for Lyne and Hayes' placards affixed on the sides, and as they arrived agents jostled them through the hotel to get primed with drink and then led over to the booth.[17]

The bribery arrangement referred to by McClean was an agreement by Hayes to deliver a government roadworks contract to Burley if he worked to get him and Lyne elected.

The infant years of New South Wales democracy did not, as our "founding fathers" had hoped, produce a party system such as had developed in Britain. For almost forty years, until the advent of the Labor party in 1891, the State was governed by loose alliances of independent members, clustered about powerful figures such as Sir Henry Parkes and Sir John Robertson.

Not surprisingly, this period of factional government was highly unstable, and the temptation to use patronage or even bribery to hold onto office must have been great. Allegations of bribery are notoriously difficult to prove, but if smoke is evidence of fire, then bribes were paid for members' votes during this period of rapidly shifting alliances.

It is some measure of the times, that in the 1885-86 session of the NSW Parliament, the Speaker, Edmund Barton, found it necessary to rule the following terms as unparliamentary: "cooking a return", "gaol birds", "bribery and forgery", "bribery and corruption", "this corrupt government", among others of a similar kind.[18]

More significantly, in 1881, a royal commission investigated claims that members had been paid for their votes on the appropriation of money to the Millburn Creek Copper-mining Company, which was part-owned by the Minister for Mines, Ezekiel Baker. The Commissioner accepted evidence that at least one member, a former minister, Thomas Garrett, had been party to an agreement to sell his vote in return for shares. As a result, Baker was expelled from the Parliament and his faction leader, Jack Robertson, who was effectively the Deputy Premier, resigned out of personal loyalty to the two men. Robertson's resignation saved Garrett from expulsion, Robertson returned to the ministry and Baker successfully applied to the next Parliament for his expulsion to be rescinded.[19]

In 1889, yet another inquiry was held into allegations of bribery to buy members' votes on a tramway tender.[20] In retrospect, it is difficult to reconstruct just how serious this bribery problem was. But from the very highest public officials in the State, contemporaries of this period accepted the inevitability of nepotism and patronage. In 1868, for example, the Chief Justice, Sir Alfred Stephen, wrote to Henry Parkes:

> Parliamentary (or as it is fancifully called responsible) government is necessarily to some extent - it at all events always has been - a government by corruption ... Pass a stringent *Public House Act* - or try to do so - such as shall really restrain public drunkenness, and you will not be Colonial Secretary six months. Appoint the sons and nephews of a sufficient number of members of Parliament to be clerks of Petty Sessions or Waiters in the Customs or something on the Roads or in a lighthouse, and you will command votes for the session, probably for two.[21]

Prior to 1856, entrants to the New South Wales Public Service had been required to pass an examination in the basic skills, but this had been abandoned on the arrival of responsible government. It was not resumed until 1871, although this could only check the very worst abuses of the system.

Until 1889, when they were paid for their services, the financial pressures on some members of Parliament were considerable. Henry Parkes was bankrupted early in his career, and spent his entire political life on the edge of insolvency.

The immense burden on a young MP who became a Minister of the Crown is well illustrated by Bernhard Wise, elected for the seat of South Sydney in 1887 and appointed two months later by Henry Parkes as Attorney-General. Recently returned with a law degree from Oxford, Wise was one of New South Wales' most promising political leaders. He was not a wealthy man and, in the absence of a political party to share the costs of election, the new member for South Sydney started political life in debt.

Upon appointment as Attorney-General in May, Wise was obliged to resign from Parliament and contest the seat again. At that time, the 1707 *Act of Settlement* still prevailed in New South Wales, requiring a member of Parliament who accepted an office for profit under the Crown to resign from Parliament and stand again. Wise's debt was immediately doubled and, with a full-time job in the Executive Government, he was deprived of whatever opportunity he would have had at the Bar to slowly pay off his financial obligations.

Wise undertook paid legal work for the Crown whilst Attorney-General. This, too, was attacked by the Opposition and nine months after his appointment, he was forced through financial pressures, to resign from the Ministry. At a time when most MPs were still "gentlemen", Bernhard Wise's financial misfortune was a matter of political gossip. And during his second Attorney-Generalship in 1902, it was rumoured, entirely without foundation as best we know, that the controversial early release from prison of a Jewish moneylender was related to Wise's financial indebtedness to someone of the same name.[22] (I should add that, in the payment

of members, Australia once again led the United Kingdom, where MPs were not paid until 1911.)

Away from this frontier between public and private interest, in the heartland of the law on public duty, errant officials continued to be pursued for abuse of office. They included a senior officer in 1856, who misappropriated moneys from Treasury's iron box, a group of Customs officers in 1858, who conspired with smugglers to defraud the revenue, a corrupt licensing magistrate and a crooked Lands Department accountant.[23]

By the 1890s, corruption was the bread and butter of New South Wales politics. In 1896, in his *Life of Sir Henry Parkes*, Charles Lyne could write of this distinctly New South Wales phenomenon:

> No Government in New South Wales is free from charges of this nature. At one period or other of the existence of all Ministries, acts savouring of corruption are alleged against them. The charges are not proved; except, perhaps, by those whose natures prevent them from thinking anything but evil of their fellows, they are not believed; but, nevertheless, they do a certain amount of harm. They give rise to a feeling of dissatisfaction and of unrest, and they assist all movements of a directly hostile character against the Government.[24]

Royal Commissions on Corruption

The first minister of the Crown to be investigated for corruption in office was the colourful (former) Lands Minister, Paddy Crick, in 1905. By the turn of the century, New South Wales' land laws were a bewildering maze, and a class of land agents had grown up to guide the citizenry of the State through this legal nightmare and through the lobbies of the Department of Lands. Among these land agents was William Nicholas Willis, a member of Parliament, a close friend of and, it was alleged, sometime bagman to the former Minister.

The subsequent muddle of royal commissions and trials is too complex to outline more than briefly here.[25] Very early in the Royal Commission, Willis fled the State, placing himself beyond the jurisdiction of the inquiry. He was arrested in Western Australia trying to leave the country, but successfully defeated extradition proceedings and left for South Africa on the next mail steamer. More than a year passed before he returned to stand trial - a source of no small political embarrassment to the Government. During the life of the inquiry, Crick was tried twice for corruption, and twice walked away free, once from a directed acquittal, once from a hung jury. He refused to answer questions put to him at the Royal Commission. He prosecuted the Commissioner for illegally administering an oath.

And, following suspension from the service of the House, Crick was in the end, physically removed from the Legislative Assembly by the sergeant-at-arms while threatening an action in assault.

In spite of his best efforts, the Royal Commission finally brought down a finding of corruption. Crick was struck off the roll of solicitors, although he was successful in his assault case against the sergeant-at-arms. He died at home in August 1908 after a day at the Rosehill races.

Crick raised for the first time, many of the problems inherent in the corruption royal commission - the use of indemnified informants, witnesses excusing themselves from the jurisdiction, protection of the rights of persons who may later be charged criminally.

And speaking as I am, at a time when the Independent Commission Against Corruption (ICAC) is accused of being an unprecedented threat to civil liberties, it is interesting to note that it was in the midst of this inquiry that the New South Wales Parliament amended its *Royal Commissioners Evidence Act* to empower the Commissioner to compel the production of self-incriminating evidence.

During a subsequent Royal Commission in 1914, into corruption in the Lands Department - again involving members of Parliament acting as land agents - the Government was once again to expand the powers of the Commissioner to compel the taking of evidence from witnesses and to punish for perjury.[26]

The following two or three decades were to see royal commissions used extensively for investigating corruption and, for the first time in New South Wales at least, the appointment of royal commissions with narrow terms of reference for the purpose of covering up.

From the election of the first Labor Government in 1910 until the fall of the Holman Nationalist Government nine years later, the New South Wales Government went into business to challenge the so-called "trusts" and "combines", and to fulfil Labor's philosophical commitment to nationalisation.

During these years, the Government acquired a baking enterprise, several blue metal quarries, a brickworks, a joinery works, sawmills, a timberyard, a trawling fleet, and the State Monier Pipe and Reinforced Concrete Works. Investigations were also made into the possible nationalisation of the steel and petroleum industries. Of these, the bakery, the timberyard, the trawling enterprise, the pipe works and the mooted monopoly of petrol involved successive premiers in no less than seven corruption royal commissions.

Queenslanders are familiar with the corruption that surrounded these early nationalised industries. But fifteen years before Mungana Mines brought down Ted Theodore, the Labor party's first martyr to alleged corruption in the new state-owned enterprises was Arthur Hill Griffith, the New South Wales minister for Public Works.[27]

Corruption as Conflict of Interest

In the midst of the political cut-and-thrust surrounding these inquiries, among the allegations of muck-raking and the cries of cover-up, we are able to trace new developments in the line between public duty and private interest.

It is during one of these royal commissions that we see argued, for the first time in Australia I suspect, corruption as a breach of public trust: "The Minister has undertaken a public trust ... and if he deliberately and intentionally commits a breach of his public duty, and wilfully and unlawfully exceeds the powers conferred upon him, without due regard to the public interest, then he is clearly guilty of maladministration as is the private trustee ..."[28]

So radical was this proposition, so unknown to the law in Australia at that time, that the judge who was conducting the inquiry missed the point entirely and dismissed the commission after two days, on the basis that no criminal charge of corruption had been alleged.

It was also during this turmoil surrounding Arthur Griffith that the concept of a ministerial code of conduct first emerged in Australian politics.

While the New South Wales Parliament had been struggling with corrupt public works contracts, the House of Commons was grappling with the Marconi share scandal. Marconi was, as it turned out, a comparative peccadillo on the part of several senior ministers in Asquith's administration, but it became a cause celebre because the Government tried to cover up. As one newspaper put it at the time, even "the most harmless facts will hurt if they are drawn out like teeth". In the midst of the debate over Marconi shares, Asquith delivered his speech on ministerial "rules of obligation".[29]

And in September 1913, barely four months later, the New South Wales Opposition was arguing their application to the Minister for Public Works, Arthur Griffith.[30] While they were not formally adopted by the New South Wales Government at that time, Asquith's rules are significant in that they became the foundation of the ministerial codes of conduct that have been adopted in Australia in later years.

Developments in the Law on Bribery

In July 1914, there was another development in the law on bribery which, although it took place in the Court of Criminal Appeal in England, was of such moment that it cannot be overlooked here. The Court confirmed the conviction of Lieutenant-Colonel Charles Whitaker for conspiracy to bribe.[31]

Whitaker was the officer commanding the Second Battalion of the King's Own Yorkshire Light Infantry and, in return for the payment of several hundred pounds a year, had awarded the regimental canteen contract, not once, but several times, to Lipton Limited, a London catering firm.

His defence was that the common law did not recognise an offence of bribing a public official employed in a ministerial (as opposed to judicial) capacity. Bribing judicial officers was a crime. So was the sale of bribes.

But here in England in 1914, was one of His Majesty's Counsel seriously arguing that it was not an offence at common law to bribe a public ministerial officer. As it emerged, the judge did not accept this line of argument, but there was not, as he claimed, "ample authority" to support his decision. Indeed of the three cases which he relied on, one was a case of election bribery and another the sale of offices.

The case was not especially significant for the United Kingdom, which had, by now, long specific statutes to deal with bribery. In New South Wales, which to this day is still governed by the common law on bribery, the case was a crucial one.

Bribery of Members of Parliament

At about the same time in New South Wales, several landmark judgments on the bribery of members of Parliament were being handed down. The New South Wales Supreme Court had already in 1875 ruled in R. v. Edward White[32] that payment of a member of the Legislative Assembly for his vote in the House was a bribe at common law.

The decision is noteworthy for several reasons. It appears to be the first such case in English law; secondly, because two of the judges couched their decision in terms of "public trust"; finally, because of Sir James Martin's reply to the defence that bribing members of Parliament was customary:

> It has been suggested that in times gone by, members of Parliament have been notoriously corrupted by bribes of various kinds, and that the practice cannot be said even at the present day to be wholly discontinued. It is urged that the notoriety of such transactions, and the absence of any prosecution in connection with them, is a strong reason for holding them to be cognisable by Parliament only. I cannot admit the force of such an argument. It may not be an uncommon thing for a member of the Legislature to have his conduct influenced by benefits given or promised, but the difficulty of proving that to be a bribe which the parties interested profess to regard as a just attention to the wishes and arguments of proved and steady supporters, may well account for the fact that there has been no

> conviction for an attempt to bribe a member of Parliament. That such an attempt is a Common Law misdemeanour cannot, in my opinion, admit of any doubt...[33]

In 1914 the Boorabil Royal Commission considered yet another case involving members of the New South Wales Legislative Assembly acting as land agents. Commissioner Pring, who had become something of a full-time royal commissioner under the McGowen and Holman Governments, issued a stern caution about this practice and the conflict in which it placed members when matters came before the House.[34] The following year, a civil action was taken to the High Court by two of these members who were seeking payment from one of their customers for services rendered.[35] The High Court held the contract to be contrary to public policy and therefore void: "The law cannot supervise the conduct of members of Parliament as to the pressure they may bring to bear on Ministers, but if they sell the pressure the bargain is, in my opinion, void as against public policy."[36]

Eight years later, the High Court once again addressed this question in R. v. Boston, yet another case involving payments to a member of the New South Wales Legislative Assembly over Crown lands.[37] This was a criminal case, an unusual charge of conspiracy to corrupt a public officer, based more on the common law offence of public mischief than that of bribery.

The question before the High Court was whether a member of Parliament commits a criminal offence by taking payment to lobby ministers and the departments of State. The court's answer was that he did. As it was put by Mr Justice Higgins: "By agreeing to take the money, he puts himself in a position in which his interest and his duty conflict. It does not matter for this purpose whether the acquisition of the particular land by the Crown is in fact a good thing for the public or not; it is enough that the member by his agreement incapacitates himself from performing his duty to exercise his true judgement."[38]

It is fair, I think, to say that the law on bribery, insofar as it affects the duties of members of Parliament, has not progressed much further since 1923. In 1983, in keeping with the modern focus on conflict of duty and interest, the New South Wales Parliament did amend the *Constitution Act* to introduce a public register of members' interests.

But as the gaoling of the former minister for Corrective Services, Rex Jackson, showed, such a register is unlikely to be effective against members who are bent on abusing their positions of trust.

Election Bribery

One of the reasons why corruption largely ceased to be a problem in the New South Wales Parliament, was the advent of a strong party system, where the individual votes of members are of less importance. Where allegations of bribery did surface in later years, most notably in the 1930s, was in the Legislative Council where the major parties have had greater difficulty in maintaining control.[39]

But the shift of power from the individual member to the party brought with it a corresponding shift in concern about corruption, and election funding took on even greater significance. Where, as in the case of Sir Robert Askin, a premier does not have a close working relationship with the party machine, and accepts political donations personally, then the concern is even greater.

In a recently-published defence of Askin, the former premier's press secretary, Geoff Reading, has acknowledged that: "The Premier maintained a record of donations handed to him personally in a little exercise book he kept in the top drawer of his desk... He kept money so received in a separate bank account, and, insofar as it was possible, away from Liberal party headquarters."[40] It is hardly surprising that the people of the state should have misunderstood the status of accounts kept in a little exercise book in the top drawer.

New South Wales introduced laws on the public funding of elections and the disclosure of political donations in 1981. It is, nevertheless, clear from the 1988 prosecution of the NSW secretary of the Labor party, Stephen Loosley, and recent proceedings before the ICAC, that the boundary line between public duty and private interest in this most difficult area has not yet been clearly settled.

Confirmation of the uncertainty which still exists at this political interface, is the decision late last year of the NSW Court of Disputed Returns, Scott v. Martin.[41] In the March 1988 general election for the New South Wales Parliament, the ALP candidate, Bob Martin, had won the seat of Port Stephens by a margin of ninety votes. The Liberal Party candidate, Scott, claimed that in the weeks prior to the election, Martin, who was a candidate for, but not yet a member of Parliament, handed out $38,000 in unsolicited donations from various government departments to local groups and organisations. Scott alleged that this amounted to bribery under the *Parliamentary Electorates and Elections Act*.

Mr Justice Needham found that Martin's actions did amount to bribery within the meaning of the Act and declared the election void: "(Martin's) actions were not, in my opinion, corrupt in the ordinarily accepted meaning of that word; unfortunately, in modern times, there seems to be an accepted view that public moneys are in the unrestricted gift of those in power. In some cases, the

temptation is to use such resources for purposes of party political advantage. That, in my opinion, is what had been done in the present case...'[42]

If the judge had known his legal history a little better, he would have known that this was not a modern but a very ancient practice.

Recent Developments in the Law on Bribery

Following developments in the United Kingdom and other Australian States, the NSW Parliament passed a *Secret Commission Prohibition Act 1919*, which made criminal, payments made to an agent without the approval of his or her principal. Although it also dealt with public officials, the Bill was debated entirely as a reform to the commercial law and was little used in subsequent years to prosecute corruption in government.

Following an abortive police investigation into alleged corruption in the Transport Workers Union, the Unsworth Government repealed the Act and inserted a new secret commissions offence in the *Crimes Act 1987*.

The new provision made this offence indictable rather than summary, extended the farcical six months limitation period indefinitely, and did away with the reverse onus of proof. It had the effect of both strengthening and weakening the law on secret commissions, making it easier to prosecute, but more difficult to prove.

A more encouraging development was the *Darling Harbour Casino Act 1986* which borrowed from an American statement on the law of bribery, and overcame many of the deficiencies of common law bribery. It also extended bribery, which has traditionally been associated with public officers, to include private people exercising public functions under that Act.

The *Independent Commission Against Corruption Act 1988* defines corruption in the very widest terms and picks up the concept of public trust for the first time in New South Wales statute law.

Scrutiny of the Executive

Another development in recent decades which has no doubt had an effect in suppressing corruption, has been the trend to place the Executive Government under closer public scrutiny. The Askin Government introduced the *Ombudsman Act 1974* and although the office was not intended specifically to pursue corruption - in fact, successive Ombudsmen have chosen not to do so - there can be no doubt that the exposure of "wrong conduct" has had a positive effect. Likewise, although the *Freedom of Information Act 1988* is expected to make dishonest and improper

decision-making by the Executive more difficult, it is not primarily an anti-corruption measure.

Commissions of Inquiry

Finally, some comment should be made about the recent history of commissions of inquiry.

One black moment in the development of the royal commission as a weapon against corruption, was the *Sydney City Council (Disclosure of Allegations) Act 1953*. As the title suggests, the Labor-dominated council had been under siege for several years over alleged corruption among aldermen and employees.

No doubt sick and tired of the persistence of these stories, and the political harm which they were causing, the Cahill Government refused demands to set up a royal commission. Instead, in late November 1953, it hastily enacted legislation which had the effect of requiring any person who made corruption allegations against the Council, to justify them before a Supreme Court judge, with a penalty of twelve months imprisonment for the failure to produce the information on which the allegations were based. It was a blatant attempt to silence critics of the Council. Predictably, it had a hostile reception from the Opposition and the Sydney press. The Act was eventually repealed in 1976.

In recent years, growing public concern about corruption and repeated Opposition and media demands for royal commissions, have led to quite different responses. The Wran Government introduced the *Special Commissions of Inquiry Act 1983*. It was directed not towards discovering and exposing the facts of a matter - as the *Royal Commissions Act* is - but to determining whether there is sufficient evidence warranting the prosecution of any person. The Legislation was used twice successfully, in the investigation of the prisoner early release racket and the police investigation into the murder of Donald Mackay, and twice in controversial circumstances, to inquire into allegations made by investigative journalist Bob Bottom and the then federal leader of the National party, Ian Sinclair.

Then in 1984, implementing an election undertaking, the Wran Government appointed a Commissioner of Public Complaints, to act as a clearing house for allegations of corruption. The Commissioner was not empowered to investigate the agencies against whom corruption allegations had been made, but could use royal commission powers to examine the person making the complaint. Not surprisingly, no one rushed forward with complaints.

The ICAC is the most sophisticated attempt by any Australian Government so far to come to terms with corruption among officials and, in spite of a great deal of rhetorical nonsense about the extent of its powers, is nothing more than a

standing royal commission. In this sense, the ICAC was a natural next step. Royal commissions, with their quite formidable powers, have been a basic part of the armoury in the fight against corruption since as long ago as 1905.

This is neither the time nor the place to expound the virtues of the ICAC. It has been operational for less than twelve months, and with less than a full complement of staff, it has already produced remarkable results. No one doubts that it is scrupulously independent and that it will conduct itself entirely without fear or favour.

The Future

In conclusion, I should perhaps briefly discuss where this line between public duty and private interest will be drawn in the future.

Firstly, I believe that standing anti-corruption agencies will become an accepted part of public sector administration in Australia. Queensland and Western Australia have already moved down this road, although not as far as New South Wales. And it is not widely known that Mick Young, while he was the responsible minister, considered an ICAC federally. The Australian Democrats early in 1989 unsuccessfully moved for the introduction of an ICAC in South Australia.

Secondly, in the short-to-medium term we will see an updating of the law on bribery, for example, to cover non-pecuniary benefits more clearly, and to pick up what I refer to as "ambient corruption" - the situation where the "bribee" is not paid for a particular act, but is kept on a retainer or given gifts every Christmas by the briber. I expect that our law will lean increasingly in an American direction, in particular, by introducing criminal offences for serious conflicts of duty and interest. And, given the growing awareness of the hitherto obscure law of official misconduct, I would expect some statutory definition in that area.

I would add that the New South Wales Government is at present in the midst of just such a review of its bribery and official misconduct laws.

I am also confident that there will be more of the concept of public trust in the law on corruption. There is a long history of judges importing the fiduciary obligations of private trustees into the law regarding public officials, and as some of the old common law notions about bribery fall away, equity is offering a robust and eminently adaptable model.

Partly for this reason, and partly because the historical distinctions between public and private sector corruption are largely artificial in any case, I believe that these two threads of legal precedent will converge in the years ahead. England broke down that distinction in the latter part of last century, and the Hong Kong ICAC is, quite deliberately, concerned with both government and commerce.

Indeed, in recent years, the major thrust of the Hong Kong body's work, has been in the corporate world and less and less in government.

And, in spite of the review of the law of bribery being carried out in New South Wales, I anticipate that greater emphasis in the future will be placed on systemic and management solutions to corruption, rather than on traditional criminal remedies. Both the Hong Kong and the NSW ICACs place a high premium on corruption prevention work, and the Office of Public Management, located within the NSW Premier's Department, has shown particular interest in introducing anti-corruption measures into the mainstream management systems of government. The Australian National University has a research program on ethics in government - again, a cultural, rather than a criminal solution.

Political donations will remain a vexed question in the short term at least, and there is already a renewed emphasis around Australia in registers of members' interests, public funding laws and the publication of the sources of political donations. As a result of the disclosures in the Fitzgerald Inquiry and before the ICAC, I believe that there will be renewed pressure for the registration of lobbyists, although this must always remain a partial solution.

In closing, I would plead for a little objectivity on the subject of corruption. As I said at the beginning of this paper, I can understand the emotion which accompanies the discovery of corruption in high places; as I said, I believe that it serves a most useful social purpose. But, if we are to combat corruption successfully, especially syndicated and high level corruption, then it seems to me to be fundamental that we see the problem as it really is.

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Part 2

The Media and Corruption

2

Who Sets the News Agenda: The Turkeys or the Chooks?

Bruce Grundy

What follows should not be seen as an apology. It is an attempt at explanation. Conventional wisdom suggests that everything wrong with Queensland can be sheeted home to one enduring and essential failing in the Sunshine State - its gutless media. If only, the argument goes, Queensland media had performed their Fourth Estate role, none of the nasty things that have happened here in the past twenty to thirty years would have happened. But, compliant, cringing and uncritical, the Queensland media have allowed the excesses of the last quarter century and beyond to flourish. They let the turkeys run the show. The question is: true or false? The answer is: a bit of both.

The turkeys ran most of it, but not all, and the chooks have been having more of the say lately - none of which is to deny, for example, that Tony Koch and Matthew Fynes-Clinton brought about the Sturgess Report,[1] that the media stuck to their guns in the matter of "the wife of a senior public servant" and some people like Des McWilliam[2] named names (when others were not prepared to do so), that Paul Bongiorno[3] won all his four Walkley Awards for stories about funny things in the Sunshine State and Phil Dickie[4] his award for stories about even funnier things in the Sunshine State. But despite these examples, (and there are others) the turkeys made the running.

It is interesting that part of the problem of how the media in Queensland handled itself during the Bjelke-Petersen days, is the similarity they exhibited to some of the less endearing characteristics of the Bjelke-Petersen style of government. They saw no need for introspection, no need really to examine what it was that they were on about, and how they operated. They rejected criticism as stupidity and then they denigrated their critics and went right on in the know-all fashion in which they had always operated, for the most part, arrogantly confident in their performance. And, for the most part, not a lot of that has changed.

Back in 1986 when criticism of the media anywhere in Australia was

regarded by the media as "quaint", to say the least, I said a few things about the state of journalism in Queensland on Quentin Dempster's documentary on "The Sunshine System". That program turned out to be, as was suspected, quite prophetic. What I said then went something like this: "Queensland journalism is very good at reporting what goes on day by day. But simply reporting other people's lies is not enough. There has to be more to journalism than that". And, of course, there was, even then. But not much. There has been more since, but not enough.

So, if you want to talk about who is setting the agenda, let us start by talking about attitudes toward what the media should be on about and attitudes toward journalism.[5]

The Role of Journalism

There is a view among some journalists that the function of the reporter is just that - to report. End of story. If people in power tell lies, it is up to the Opposition (for instance) and not the reporter, to say so. And anyway, politics is all about lies so what is new about people who indulge in telling them. If Bjelke-Petersen, or anyone else in the newsmaker category, says that black is white, report it. He is the premier. You can chase the Opposition for a contrary view if you like. But, that done, you can rest easy knowing that you have done your job because that is all the job involves.

Such a view of journalism has little in common with the Fourth Estate proposition that some people see as the role of journalism in a democracy such as ours.

The second point is, what happens if you go beyond the above mentioned role of the journalist? What do you get then? Well, first of all you get writs. And if you want to talk about who is drawing up the agenda, you had better talk about that.

The Law

The fear of writs has been a problem in Queensland. There has been a view, at some management levels at least, that to get a writ (or even a threatening letter from a firm of solicitors) is a sign of incompetence. And the serving of a writ all too often has been regarded as a finding of guilt - when it is no such thing. I know some radio newsrooms where a solicitor's letter would bring the station managers out in boils.

In many cases the reason for taking out a writ for damages is its "stopper" value - Assistant Commissioner Graeme Parker's writs against the *Courier-Mail* for instance.[6] A pious claim for respectability when no such respectability existed. But, he must have figured his writs would prevent the issue revealed by the paper from being ventilated further.

There are also defences against writs. Not very good ones perhaps, given the lack of uniform defamation law that we have in this country (what is defamatory in one state may not be in another). But, in general, Queensland defamation law is not as bad as we may have been led to believe.

Peter Applegarth, Brisbane barrister, and one who took part in proceedings before Commissioner Fitzgerald, pointed out that, "at a superficial level Queensland defamation law would appear to inhibit the media less than the defamation laws of other states".[7] Commissioner Fitzgerald also took up the point made by Lawrence (1983) that, "few actions ever are tried. The damages awards and legal costs paid by media organisations are a fraction of their southern counterparts".[8] Applegarth (and Lawrence) were writing prior to the $400,000 deal.[9] Applegarth then talks about what the real problem of the media has been, as I shall outline later.

I should say that the issue of legal action and the threat of legal action are causing the local media some concern, as they get more into the murky areas of Queensland life and have a look at what the turkeys have really been up to. For instance, in a paper on our defamation laws recently, Gareth Evans, Editorial Manager of Queensland Newspapers, made the point that in 1986, Queensland Newspapers received 8 writs; in 1987, 19; in 1988, 28; and so far in 1989, 35.[10] So the pace has picked up by 400% in three years. Since 1979, Queensland Newspapers has received a total of 140 writs; 100 in the last four years, 40 in the previous six years.[11] By comparison, Adrian Deamer, Legal Manager for John Fairfax and Sons, told me a couple of weeks ago that he was overseeing progress on 160 current active actions for Fairfax.

While not excusing the media's performance, Applegarth acknowledges that the cost involved in the defamation area is significant. He said in 1986, "Even large (Queensland) organisations, such as Queensland Newspapers Pty Ltd, lack the finance which the publishers of the *Sydney Morning Herald* and the *Age* commit to investigative journalism and defending defamation actions."[12]

Ironically, hand in hand with this fear of writs, has been an attitude of timidity on the part of the media in having anything done about the defamation laws, or any other laws that impose restrictions on freedom of speech and the right to know. This is a curious situation. But I find it less than comforting to hear the media blame the "stacked deck" that the defamation laws present the crusading journalist when the media have never really conducted a campaign to have the

wretched things changed. With the possible exception of John Dowd, Attorney-General in New South Wales, to rely on politicians to do so is to believe in the tooth fairy. Journalists cannot have it both ways. If they were scared of the defamation laws, they at least had the means to campaign for change. But they did not.

And they still do not. No one in Queensland that I know reported Dowd's recent statements at a conference in Queensland, at which the media was significantly represented, that he intended to reform the defamation laws in New South Wales. He even spelled out what reforms were proposed. Nor have I seen Wayne Goss asked what he plans in the area of freedom of information (FOI) after the election, least of all Russell Cooper or Angus Innes. I checked with the Labor camp and they said FOI was on the agenda but they did not know anything about defamation law reform. I acknowledge that Peter Charlton, Associate Editor of the *Courier-Mail*, called on the Ahern Government to initiate reform so that the media could "report on the public activities of public officials".[13] Clearly, the lack of such legislation and reform has impeded the media in Queensland. *But really, where is the demand for change.* It does not exist. Some of our founding editors must be spinning in their graves. So on one or other of those counts, intimidation or failure to seek reform, the charge of gutlessness sticks. The media cannot have it both ways.

Resources

Applegarth mentioned the cost involved in legal action. That surely is a problem. But it is not the only one. When you are talking about resources there just is not time, and there just is not money for all this Woodward/Bernstein stuff. That limits the media's ability to set the agenda. On the other hand, there is an outfit in town with no shortage of money - it is called the government.

What is more, the pressures we create to have more and more news rather than better news leaves us totally vulnerable to the well-oiled PR machine. They are members of our own union and they are only trying to help. So we crank up the treadmill and away we go, news on the hour every hour, no story is a story unless it has got an actuality grab and so on.

Enter a government PR juggernaut. According to Juanita Phillips "the State Government is second only to Queensland Newspapers as the State's biggest employer of journalists".[14] I tried to check the claim and contacted the government's media and information office. After being shunted around I ended up in the public service area. I was told that my request was not a problem - twenty minutes to write a program to interrogate the computer, an overnight run and I would have the answer tomorrow. But there was one thing, did I have $100-

$150 to pay for it all? I told him I was from Bond University. It did not help.

The government has a formidable media machine - press secretaries for the ministers, public relations officers of all sorts in the various departments and quangos, the Public Relations and Media Office within the Premier's Department - churning out PR material, advertising, promotions and the like.

Fitzgerald recommended an all-party parliamentary committee to monitor the cost and working of ministerial and departmental media activities, including press secretaries, media units and paid advertising.[15] Perhaps one check on the possible excesses of such operations might be to even up the balance a bit. After all, a healthy parliamentary democracy relies a great deal on the strength of the opposition. If we spend millions of dollars to keep the public informed about what the government is doing, perhaps we should spend a bit more on what the opposition thinks the government is doing and what the opposition thinks it might do. I did discover that the Queensland Opposition and the Liberals have one publicly-funded press secretary each.

And you ask who ends up setting the news agenda?

One of the really sad things about a public relations job (and I had a PR function among others, with the Reconstruction Commission in Darwin) is the ease with which you can get a story run. You need contacts, of course, and you also need to be well regarded. But it is true and I am not talking just about 1974. I am talking about the 1990s.

There are cosy relationships that exist between ministers and others and journalists. We have all heard the story of the minister who could phone in with a story and after a brief word with the journalist, get put straight through to the copy taker. What is so bad about that, when actuality grabs are recorded by PR staff and phoned through to eager, perhaps lazy, but probably understaffed radio station newsrooms? Where is the journalism in that? It happens - at least it has happened. Not everyone is like that. Some certainly are not. But the pressures are there for a story, a better story than yesterday, and a better story than that of the person at the next desk. These pressures totally subsume any concern on the part of journalists to sit down and analyse what their relationships are with their sources and what they should be. These pressures of daily journalism are partly responsible for the arrogant lack of interest in self analysis and navel gazing.

Culture of Journalism

Commissioner Fitzgerald spent some time discussing the police culture that has operated in Queensland for as long as anyone can remember and how it is perpetuated.[16] A not dissimilar culture operates in journalism. Both groups operate the "cadet" system which sees young people inducted in their late teens and trained in the tried and true methods of how to do the job and how to get on.

Journalism does take some outsiders and even some graduates. But that is a recent development. For the most part, intakes over the past twenty years have been heavily weighted in favour of cadets.

The culture has been, and still is, passed on through the shop floor socialisation process. News values and attitudes toward sources, among other things, are handed on to newcomers by more senior staff. There is no encouragement to self criticism or reflection. The ways of the past are the ways of the future. Clearly it is time for a change. Too many people are tired of beat-ups and second best. And the old arguments about deadlines, subbing stuff-ups, ratings and circulation battles are worn out. They are not good enough any more. It is time for a change. But as I keep saying, you cannot go on blaming the media. Our other institutions let us down too.

The Queensland Backdrop

The political system, so keenly developed by Labor in government, was turned against it with devastating consequences. The Opposition became irrelevant, devoid (at least until now) of leadership and wracked by constant attempts at harikiri. The courts and commissions of inquiry even served to work against us. Why, if the National Hotel Royal Commission and the Southport bookie case failed to get at what was really going on, why is it so obvious that the *Courier-Mail* should have done so? It had no power to compel or subpoena. No FOI. No indemnities to offer. And this is where the charge falls down. The *Courier-Mail* deserves no more blame than any number of other players in the game. Sure, it deserves some blame, but not all of it by any means.

In weighing up the media's performance during the Bjelke-Petersen years one has, at least, to consider the environment in which the media has operated. To start with, the attitude was spread (and the media was instrumental in that process) that to criticise anything about Queensland (apart from the Labor Party) was un-Queensland, unpatriotic, and treacherous. Anyone who criticised Queensland was a ratbag. Any media outlet who did, could expect reaction and retribution, both official and unofficial. Such retribution embraced certain ridicule, possible loss of audience or circulation, loss of access to information, and loss of revenue from government sources.

All the issues just mentioned occurred, and they were always in the background (if not very much in the foreground) for any journalist wanting to get in and have a go. In explaining the realities of life for a media organisation in Queensland, Applegarth noted back in 1986: "The Queensland media has some aspirations to act as a Fourth Estate ... but is incapable of fulfilling that role because in Queensland there is no liberal consensus to legitimate such a critical

and instrumental function."[17]

The Queensland syndrome was not just a state of mind that directed the people running the show in George Street, Brisbane. The Queensland syndrome permeated the State. This Queensland culture produced a most unhealthy situation where the Opposition was treated very badly by the media. If the Opposition put out a press statement, reporters would seek a reaction to it from the Premier even before giving it a run as newsworthy in its own right. This kind of journalism was common in the early to mid-1980s - and probably earlier.

Wallace certainly thought so back in the late 1970s. He said: "The real story could well be that the Queensland news media has failed to play a politically responsible role; that it has failed to take responsibility for the quality control of the news it publishes; that it has left itself open to manipulation by well-positioned sources and public relations personnel, and, most importantly of all, that Queensland journalists have minimal awareness of this."[18]

Heavy stuff. But would John Wallace know? He was a teacher of journalism.

Interestingly what he was talking about is the kind of journalism about which the National Party Government complained during the 1989 election campaign. They could not get a run with any good news, they said, because the media were only interested in what Wayne Goss had to say.

It is as well to remember that the *Courier-Mail* was not the only media outlet in Queensland during the Bjelke-Petersen era. There was not a lot else, but there was *Nationwide*, for instance, on the ABC; *Today Tonight* on Channel 9; and *A Current Affair* on Channel 7. And as a former member of that team has said, "We tried but we failed." No one was really interested, least of all the people of Queensland. Warm in the everlasting sunshine, full bellies, big mortgages, content and apathetic Queenslanders. She'll be right mate. Who gives a damn?

You have to do better than blame the *Courier-Mail*. None of the others did a lot better. Even when they tried. *Nationwide* produced the Kingsley Fancourt story, for instance.[19] All we got in the end was the Police Complaints Tribunal and what did that produce? And what did Fancourt and Campbell get for doing their civic duty? Simply put, they got a message - get out of town. And they did and Queensland got on with the good life. So you cannot just blame the media. But why did this story not take off? Is it the media who sets the agenda? Again, the turkeys had a victory because of some of the media attitudes toward competition.

Competition

The competition that has existed between the various outlets has not worked necessarily to everyone's advantage. There has not been enough support from

some media for someone else who got onto a good story - a story like the Fancourt revelations. Indeed, it often seemed to be the case that a story would not be touched by one organisation purely on the grounds that it had been broken by another organisation. The stories that were followed up were not always the ones that mattered - or might have produced results. That form of competition is stupid and serves journalism very badly. Again the National Party Government in earlier days was a past master at denigrating anyone who got onto a good story. That did not help the cause of journalism either because it became fashionable to snort at programs like *Nationwide* and Jane Singleton. Many stories died for these reasons.

The reverse is true, but, oh so infrequently, and no better example exists than the media's performance during the ten days between Russell Cooper's ascendancy to the throne and his eventual decision to implement Fitzgerald's recommendations. There is no doubt in my mind at least, that the media was mightily influential in helping Mr Cooper make up his mind. There is also no doubt that had some of his ministers, who simply could not wait to shoot off their mouths, shown more discipline, the media might not have been nearly so valuable and influential. And that is the worry. It took a lack of discipline to set the media baying. Had foot and mouth disease not struck Mr Lester, Mrs Chapman and Mrs Nelson and lock-jaw Mr Cooper, we might not have seen such a worthwhile result - although that is not a foregone conclusion. But in the end, the Nationals were dragged kicking and screaming to support the Fitzgerald process rather than its preferred option of seeing it "go to buggery".[20]

Here was a case of the media actually performing - putting people on the spot, hitting them with questions and actually appreciating the import (or stupidity) of their answers. They did not roam as a pack, but they were following the breaks created by others. And when you have a minister like Mr Lester, everything is on your side. You have just to keep bowling them up and the chances are he will hole out sooner or later.

The other aspect of competition, the concentration or diversity of outlets, needs to be considered as well. There was no real newspaper competition throughout the Bjelke-Petersen reign. And the newspaper is most important in considering the setting of agendas. The electronic media look to the newspaper for their daily raw material - not totally, I know, but significantly. And there was only Queensland Newspapers. When the *Daily Sun* arrived, there was a change in Bowen Hills and for a time there was an atmosphere of competition abroad. I do not get the feeling that there is any more.

The Queensland Government tried to exploit the situation by switching its advertising away from Queensland Newspapers because it was not sufficiently under the thumb. We needed more competition than we had and we need more than we have.

Tomorrow's Agenda

Clearly some people in the media have adopted a new approach. There are more challenges now to the pronouncements of government and a much less fawning attitude on the part of reporters who once used to giggle (or was it cackle) when the premier of the day focussed a derisory attack on one of their colleagues. The *Courier-Mail* has a reporter doing nothing else but Fitzgerald follow-up stories. ABC radio has toughened up its local afternoon current affairs output. But radio and television news do not have or do not allow the time to deal with anything in detail. Local current affairs on television has been pretty much handed over to *The 7.30 Report* and it has not had a record of doing much at length. So it is better, but not vastly - and it could all change in a trice.

What we can expect is that journalists might reflect on their performance in the last two decades, and on what they do in their daily working lives. There is not enough self-examination in all sorts of areas of media practice and convention. We simply are not nearly as good as we think we are.

The body politic in Queensland has gone through the Fitzgerald wringer and look at what was squeezed out. Just imagine what would happen if we put the media under the microscope of a royal commission as Ranald Macdonald suggests.[21]

Who sets the agenda is one thing, and the newsmaker has as much advantage as the news reporter. But it is who sets *the standard* that is important, as much in the media as in politics, and there is not enough concern about the standard.

There are three things on tomorrow's agenda - no more cosy journalism, the best FOI legislation we can get, and defamation law reform.

Notes

1. D. Sturgess QC, chairman, Commission of Inquiry into Sexual Offences Involving Children and Related Matters *Report* (Brisbane: Queensland Government Printer, 1984).
2. At the time, McWilliam was News Director of Channel O, Brisbane.
3. Television journalist with Channel O.
4. Brisbane *Courier-Mail* journalist whose articles on massage parlours and illegal casinos set the scene for Chris Masters' expose "The Moonlight State" which precipitated the Fitzgerald Inquiry.
5. An extensive literature on agenda setting exists. The best definition of the term was provided perhaps by Cohen who said, "the press may not be

successful much of the time in telling people what to think, but it is stunningly successful in telling its readers what to think about". B.C. Cohen, *The Press and Foreign Policy* (Princeton: Princeton University Press, 1963).

6. Mr Parker was the most senior police officer to admit corruption before the Fitzgerald Inquiry.
7. P. Applegarth, "Self-censorship of the media in Queensland", *Social Alternatives*, vol. 5, no. 3, (1986): p. 60.
8. *Ibid.*
9. A settlement between Alan Bond (the Nine Network) and Premier Bjelke-Petersen which was the subject of investigation by the Australian Broadcasting Tribunal.
10. G. Evans, "Why Defamation Actions are on the Rise", *Australian Journalism Review*, vol. 11, (1989): pp. 4-9.
11. G. Evans, Private communication.
12. Applegarth, "Self-censorship of the Media".
13. *Courier-Mail*, 7 July 1989, p. 9.
14. J. Phillips, "The Changing Face of PR", *Courier-Mail*, 4 March 1989, p. 27.
15. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), para. 3.9.3., p. 142.
16. *Ibid.*, para. 7.7, p. 211.
17. Applegarth, "Self-censorship of the Media", p. 61.
18. J. Wallace, "Reporting the Joh Show: The Queensland Media", M.J. Cribb and P.J. Boyce in eds, *Politics in Queensland 1977 and Beyond* (St. Lucia: University of Queensland Press, 1980), p. 205.
19. Kingsley Fancourt and Robert Campbell presented on *Nationwide* first hand evidence of police corruption in Queensland, based on their experience in the Police Force.
20. Statement attributed to Queensland National Party Police minister, Vince Lester at a country police gathering shortly before the 2 December 1989 State election.
21. Former Managing Director, David Syme and Company, Melbourne. Mr Macdonald has spoken in favour of such an inquiry for many years - most recently at a conference on media reputation sponsored by the Australian Press Council at Bond University, 25 October 1989.

3

The Role of the Media

Evan Whitton

The Fitzgerald vision for reform turns, and rightly turns on parliamentary democracy, which we may define as honest government by the will of an informed public. Even a cursory examination of the elements in that definition will show that parliamentary democracy is a rare, if non-existent, commodity anywhere, but thanks to the heroic efforts of, amongst others, Bill Gunn, Mike Ahern, Ian Callinan QC and Tony Fitzgerald QC, Queenslanders now have a chance to make a new beginning. The role of the media will be crucial in making it happen.

It must be said that the Fitzgerald Report may seem to be just a tiny bit out of balance; it assigns roles to lawyers that may go some way towards bankrupting the State, but does not appear to understand the media's historic role in the development of parliamentary democracy. Indeed, it dismisses the media in a few rather perfunctory and partly inaccurate paragraphs. This is a matter for no more than mild regret; ignorance of the true function of the media may be hardly less usual among practitioners of journalism than amongst lawyers.

The challenge is thus to set down a few simple ideas and then to try to communicate them to the citizenry, including the politicians and the lawyers. We can but try.

Simple Idea Number 1: *There is only One Electoral System That Can Begin to Achieve Parliamentary Democracy*

The Australian Constitution requires that members be "directly chosen by the people". Perhaps we can all agree on that. If we do, a respectable argument could be mounted that all Commonwealth elections are unconstitutional. By definition, a system in which electorates return only one member disfranchises nearly half the voters; their views are not represented in the House. The Senate has a better

system, but there electors can basically vote only for a party, not directly for individual members.

It follows that electorates should have more members than one, and they should be elected by a form of proportional representation to allow various shades of opinion to be represented. The best forms of proportional representation are those used in Tasmania, which has successfully been using the system for more than eighty years, since 1907, and in Ireland since 1937. The best indication of the value of the Irish system is that the politicians have twice tried, by referenda in 1959 and 1968, to change it, but each time a majority voted to retain it.

The only problem with the Tasmanian method is that it is called the Hare-Clark system. Having, for my sins, at one time been a newspaper editor, I can advise that the attention span of some in that unfortunate calling necessarily averages about 2.4 seconds. Mention Hare-Clark and the eyes glaze over; it all seems too complicated to comprehend; let alone convey to the readers. Politicians are grateful for this. News executives should thus devote 2.4 seconds of their time to directing some harmless grudge on the staff to bone us on the system and present it clearly to readers (or audience).

The system in fact, is not complicated at all. Tasmania has five electorates corresponding to the five Federal seats. Each electorate returns seven members. Voters have a voice in filling casual vacancies; they are filled according to preferences marked on the ballot paper. The major parties thus field almost double the number of candidates they expect to get elected. The system obliges the parties to offer voters a wide potential choice among their candidates. "Robson's Rotation" - printing ballot papers in batches so that each candidate gets a turn in various positions on the ballot paper - ensures that the "donkey" vote does not distort the result. There are no safe seats.

Interested parties trot out all sorts of arguments against the Hare-Clark systems. I do not have time to rebut them here, but they are all spurious.

I cannot imagine why Tony Fitzgerald QC, having got a commitment from Messrs Ahern, Goss and Innes to implement his recommendations, did not simply recommend the Hare-Clark system. Had he done so, any competent parliamentary draftsman could have had the legislation ready on 4 July, the day after Fitzgerald reported. The simplest approach would be to join every two of the twenty-four Federal electorates into twelve State electorates, and to have seven members in each. Everybody in the electorate except lunatics, and perhaps even them, could thus hope that at least one of the seven might roughly represent their views.

As for the politicians and the not entirely faceless people who appear to direct them, I trust that my colleague, Quentin Dempster, will, in his devastating way, individually interrogate them along these lines.

Question: Do you believe in parliamentary democracy?
Answer: Yes.
Question: Then you will recommend the Hare-Clark system of proportional representation?
Answer: No.
Question: Then you don't believe in parliamentary democracy?
Answer: You mongrel! I know you are out to get the National Party/Liberal Party/Labor Party.

A word of warning: if the media perform their role properly and public pressure obliges politicians to accept the logic of proportional representation, their fallback position will be to recommend a variation of it, called the "party list" system, which is the one mostly used in Europe. When you hear the words "party list", you should reach, if not for your gun, at least for that excellent weapon, the egg, used by the good citizens of Warwick against that scoundrel Billy Hughes. The "party list" does not give voters a choice of candidates within parties; it leaves that privilege to the machine, in effect, probably Sir Robert Sparkes (President of the Queensland National Party) or his equivalents in the other parties.

Simple Idea Number 2: *The Press Invented the Institution of Parliamentary Democracy*

All media proprietors, editors, reporters, and teachers of journalism should have those words stuck permanently in their hats and on the walls of their offices and should meditate on them for a minimum of 2.4 seconds daily. The assertion may come as a surprise to some, including Tony Fitzgerald but its validity is easily demonstrated by reference to pages 153-155 of that useful work of reference, *Can of Worms II*, and in a paper delivered in November 1989 at the Fourth International Anti-Corruption Conference. I crave the indulgence of the author in briefly replicating here some of that data.

The modern British Parliament was invented in 1689. So far from engaging in parliamentary democracy, the Parliament instantly became a centre of organised crime, as defined; a group fo people acting outside the law on a continuing basis for some benefit, including money, and which uses corruption as fundamental part of its modus operandi. Politicians in the eighteenth century used bribery to get a seat; accepted bribes for their votes; and, as a matter of routine, took part in criminal arrangements. As the American journalist, H.L. Mencken observed, accurately you may think, the only way to look on a politician is down.

A necessary adjunct of corruption is secrecy. This was immediately threatened when Daniel Defoe, as the first leg of his great quinella (the other being his invention of the novel fourteen years later), invented modern journalism in 1704. My mentor, S.C. Chandler, put it this way; the oldest, and sadly most forgotten, rule of journalism is to tell the readers what is really going on. The battle, in which the trade of authority had all the heavy artillery, was joined. The politicians used four weapons to prevent scrutiny of their corruption; they bribed such proprietors as were amenable, and sought, by taxation, privilege and the libel laws, to intimidate and break those who were not. All those weapons, except overt taxation, are still in use.

When journalists and printers sought to report the parliamentary debates, the politicians claimed it was a breach of privilege, punishable by prison, to do so. (In Queensland, no less than elsewhere in Australia, a simpler method and happily less painful to reporters is used; the House rarely sits.) Some who persisted went to Newgate prison. It was not until 1771 that pressure of public opinion in London obliged the politicians to throw in the towel. By this victory, and against the will of corrupt politicians, the press invented a measure of parliamentary democracy.

Thwarted on that point, the politicians were still able to use their other weapons against the press. Overt taxation, by way of the *Stamp Act 1712*, was not abolished until 1855. Walpole used the forerunners of MI5 to pay out more than 50,000 pounds (sterling) to newspapers in the ten years from 1732 to 1742. Pitt induced the Irish Government to vote its own extinction in 1800 by bribing Irish politicians with 3 million pounds (sterling) in cash, more than fifty new peerages, and government sinecures. Patriotic Irishmen who objected were shipped out to Australia. Alas, this had an unfortunate consequence; some of the descendants of the patriots, who became dominant figures in Labor Party machines in Queensland earlier and in New South Wales more recently, had as relaxed an attitude to corruption - as just part of the rich tapestry of life - as the traitors, and this has had a deleterious effect on parliamentary democracy. Bribery is no doubt as much in vogue as ever; certainly in the 1930s, even the late Adolf Hitler was able to buy, for $400,000 a year, the editorial policy of a major United States chain of newspapers.

And if all else failed, there was always the libel laws. The modern English writer, Reyner Heppenstall asserted that the laws exist for the protection of rogues in high places; John Alman, publisher of the *London Magazine*, put it this way in the eighteenth century: "A man had better make his son a tinker than a printer. The laws of tin he can understand, but the law of libel is unwritten, uncertain and indefinable. It is one thing today, another tomorrow. No man can tell what it is. It is sometimes what the King or Queen pleases, sometimes what the Minister pleases, sometimes what the Attorney-General pleases."

And, he might have added the judges. Although the independence of the judiciary was nominally invented by the *Act of Settlement 1701*, Lord Francis Williams observes in *Dangerous Estate* that "newspapers were at the mercy of judges who often scarcely bothered to conceal their readiness to act as agents of Ministers".

In the circumstances, it is not surprising that the people of the United States cut themselves adrift from the rottenness of England, its Parliament, and its legal system. In 1791, the United States Congress passed the First Amendment to the Constitution: "Congress shall make no law ... abridging the freedom of speech or of the press ..." This is the cornerstone of freedom of opinion, and hence of parliamentary democracy in the United States. Australia is not so fortunate: the defamation laws in this country derive from the wretched English laws. There can be little doubt that the situation in Queensland would have got to the state it did, if the media had the protection of the United States First Amendment.

There are three major planks in any program of checking the corruption of rogues in high places and the activities of their colleagues in organised crime; a standing commission on corruption; freedom of information legislation, and a media unshackled by the laws of libel. Fitzgerald recommended the first two, but, although he offered some disobliging remarks on politicians' use of the libel laws to stifle criticism, he unaccountably neglected to recommend the third.

Simple Idea Number 3: *Having Invented the Institution of Parliamentary Democracy, the Media have a Responsibility to Maintain or Restore it in the Face of Those who would Subvert it by Corruption*

We are all conservatives now. Indeed, it seems to me that, whatever political allegiance journalists may claim - and I believe they should have none - they are by the traditions of their trade, properly conservative in this area.

That good Dalby boy, Gary Sturgess, Director-General of the NSW Cabinet Office, who, as architect of the NSW Independent Commission Against Corruption (ICAC) and freedom of information, is a hero of all who believe in parliamentary democracy, asserts that culture is as significant in the persistence of corruption as structures may be in checking it. That is to say, an old lag in the trade of authority, in a culture tolerant of corruption, can get a result by way of the wink and the nod. Thus, however effective the new structures in Queensland may prove, the media's role will remain crucial.

Sturgess' new state, true heir of the English system, was as rotten from 1792 as Queensland was from 1859; both offer important case studies of what happens

when the media does not adhere to its responsibilities, and what happens when it does.

The following chapter by Chris Masters, whose historic role in extirpating corruption in both States could not possibly be overestimated, suggests some strategies for tackling corruption. I add a few thoughts on this subject. It seems to me that events in the past two decades suggest that the major requirements of the media in reporting corruption - persistence and stamina, adequate time for reporters, and two types of disclosure journalism, disclosure of facts and disclosure of pattern - run in parallel.

Robert Bottom has persisted in reporting corruption and organised crime since 1971. His work has been conducted at some risk to his life, but that is a professional hazard. As Lord Francis Williams observed: "The estate of journalism is a dangerous one. It ought to be so both for those who work it, and those they scrutinise." I offer no adverse remark on the stamina of some who may appear to succumb to fatigue after a couple of years at the work. There are very few Bob Bottoms in journalism anywhere in the world, and as few outside it. Bottom's stamina on the other hand has achieved nothing more than a role in obliging governments, without notable enthusiasm, to initiate more than a dozen major inquiries touching on corruption and organised crime and along with the work of Chris Masters and others, in changing the climate on corruption in New South Wales and Queensland.

The techniques of such as Bottom and Masters include building up a network of sources in the trade of authority who accept their responsibilities to the institution of parliamentary democracy by being prepared to break, on a daily basis if necessary, spurious confidentiality enshrined in the local equivalent of the *Official Secrets Act*. I pause here to note that the Fitzgerald Report, which heaven help us, does not have an index, was scathing on reporters who are "leaked" information and who "delude themselves that they are not being used ... Both the journalist and the source have a mutual interest: both want a headline ... 'leaks' ... become a way of making the media act as a mouthpiece for factions within the Government."[1] That may be, but it strikes me as a seriously limited view of the way such as Bottom and Masters operate, and of the motives of them and their sources.

The techniques of the second type of disclosure journalism, that of a pattern, are summed up by the recent Pultizer Prize winner, Jim Steele, of the *Philadelphia Inquirer*: "The challenge is to gather, marshal and organise vast amounts of data already in the public domain, and see what it adds up to." If the typical sound of the fact-discloser is that of tireless feet crunching in the gravel, that of the pattern-discloser is of files rustling.

Over time, this sort of work may have a cumulative effect on the climate and the culture. The work of Phil Dickie in the early months of 1987 seems to me to have had elements of both techniques, and so prepared the climate for Chris Masters' thunderclap of 11 May, 1987 to have the effect it did. In this context, I should also note Quentin Dempster's great piece of pattern journalism in March 1986, "The Sunshine System", which revealed a pattern of rottenness going back seventy years. The only thing wrong with that documentary was that the ABC did not have sufficient care for parliamentary democracy to repeat it every week until its message was absorbed in the hinterland.

As it happens, I have done a little pattern journalism myself, but, as may be imagined from the fact that I am essentially a reporter on Rugby Union, my contribution was quite modest. However, I was pleased to be apprised of the apparent effectiveness of the method when an eminent lawyer rang up to complain about a little traverse I had made of something or other: "Why are you ringing me?", I plaintively asked, "I'm just a harmless drudge scrabbling among the yellowing files." "I don't know about 'drudge'," the eminent lawyer said (I have to be careful about the gender here), "but you're certainly not harmless."

In combination, the various disclosures of Bottom, Masters, Dickie, Dempster and others had an ineluctable logic that emerged in this State in 1987 and in New South Wales in 1988. In New South Wales, prompted by Gary Sturgess, Nick Greiner ran an election campaign on a platform that included restoring parliamentary democracy via the three major anti-corruption planks noted above. Nick Greiner may also have been encouraged in these noble undertakings by Sturgess' assessment that a crucial four per cent of voters are thought likely to change their vote solely on a perception of the parties' attitudes to corruption. Everything else being equal, this would theoretically turn a 50-50 result into a landslide 54-46. Greiner has thus far implemented the first two (to some embarrassment among some of his Cabinet colleagues), but his draughtsmen appear to be finding the libel laws as complex as Mr Alman and his tinker found them in the eighteenth century. Even so, the Greiner Government may thus appear, at least theoretically, to be as close to offering parliamentary democracy as any in the world.

We may hope that the local media, mindful of the fact that the press invented parliamentary democracy and so has an obligation to restore it, adheres to its responsibilities sufficiently to ensure that Queensland shortly follows suit.

ADDENDUM

1. *On using the media to buy respectability.*

People in the media generally, and very often among the public, have an idea who the crooks are, even if they cannot prove it. But the media can at least prevent the crooks from buying respectability cheap.

Social pages are mostly a thing of the past in newspapers round the world; in some places, to buy respectability you now have to actually spend a sizeable sum, such as endowing a university chair. In Brisbane, the social pages live on; it is still a cheap way to buy respectability by throwing a party and inviting the media. The resulting photographs and breathless prose indicate that the person who threw the party is a social leader, socially acceptable.

Media chiefs have an obligation not to allow their organs to be so cynically used, and their customers to be so cynically abused. It also does their own credibility no good at all among such of their customers as have a pretty good idea that the person who got a flattering "write-up" is a crook.

2. *On use of the "This is bullshit" slug.*

David Halberstam, in his book on the Vietnam War, *The Best and the Brightest*, noted that the Saigon press corps religiously attended briefings by military flacks who asserted that they were winning the war. The press knew the statements were nonsense; they called the briefings the "five o'clock follies", but they dutifully reported their false assertions without comment.

Looking back, Halberstam thought the reporters were remiss in their duty to their readers; they should have instructed the typesetters to insert a slug saying, "This is bullshit", after every fourth paragraph.

Looking back over the Bjelke-Petersen years, it seems clear that the Bjelkist regime's longevity derived in part from the media's failure to find some way of using the equivalent of the bullshit slug. Even in these more enlightened days, we still see the most outrageously false assertions being reported deadpan. This may help the credibility of the speaker, but it does nothing for the credibility of the media.

Notes

1. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. 142.

4

Tackling Corruption – Some Strategies

Chris Masters

There was a strategy for making it happen, for ensuring the *Four Corners* program "The Moonlight State" had some effect. I cannot pretend it existed in my broad consciousness when we were preparing the program, but it lurked somewhere in the half-light and now, with hindsight, reveals itself a little more clearly.

I lived and worked in Queensland for some time and was familiar with an annual cyclone of media reports about the excesses and hypocrisies of the Bjelke-Petersen administration. They usually crossed the coastal border from the south, rattled the window panes for a moment and disappeared, requiring a minimum of mopping up. I used to puzzle about the lack of effect. The evidence was often powerful. Joh would splutter some indigestible alphabet soup defence and nothing changed. If anything, there was a slight, perceptible improvement in his popularity. If the reporting was perceived as another snide, smart-arsed assault by the southern media, then the southern media brought comfort to the enemy. In my time in Queensland, I had seen how irritating the smart-arsed southern media could be. I was anxious to avoid making the same mistake. We had to be fair and we had to be seen to be fair.

It goes without saying the report also had to be powerful and accurate. The slightest error was like a dead mouse in a delicatessen. It would be swept up and eagerly dangled before the public as evidence that everything was contaminated.

I think *Four Corners* was also reasonably well served by a certain wariness about public inquiries. We had been through a few before. Lawyers hired by a government to inquire into a matter of potential grave embarrassment to that government are not likely to forget who is paying the bill. There are a hundred ways to ensure these things fail. The lawyers can fail to call the proper witnesses and fail to ask the proper questions. The police assigned to conduct the field enquiries can actively corrupt proceedings or through subtle mischief, ensure the

silence of important witnesses. We anticipated such an inquiry, and in the post-script to the program, we said so.

There were some anxious days soon after the program was broadcast. Throughout the entire three months of research, a stumbling legion of morally exhausted former policemen told me to go home. They had little patience for the exercise, seeing only more pain. "Today's news is tomorrow's wrappings. The public don't care anyway", they told me wearily down the telephone. A half-baked expose could cause even more harm. Witnesses who were encouraged to come forward would be shot to bits, thereby ensuring no other fool would take a similar risk for at least another decade.

Despite my stern call for a proper public inquiry, I cannot say I was particularly optimistic. After three months, I had caught some of their defeatism and cynicism. As anticipated, my telephone rang constantly for a week after the program was broadcast. This is something else experience had taught us. A report like this can act as a lightning rod for more valuable information. We were careful to have people there to take the calls. Most of these callers are nutters and the exercise can be tedious, but it was worthwhile and it did deliver more helpful evidence.

The next problem was figuring out what to do with the evidence. The summons to Queensland to appear before this fledgling inquiry was not met with enthusiasm. Like the Queensland Government which appointed him, I knew little of Tony Fitzgerald and expected even less. The ABC legal department, with wisdom and fiscal courage, appointed a Brisbane barrister, Bob Mulholland QC, to offer us some protection. Mulholland is an excellent barrister and a good man. I suspect he was happy to work "with the angels". Certainly, he did so for a much smaller fee than he would have attracted elsewhere.

The most important strategy we learned was to withhold some important evidence. The best way to peel back a layer of whitewash is to be in a position to produce the very evidence they say does not exist. Our research uncovered a range of people in the brothel community angry enough to talk if they felt it was safe to do so. The evidence was sufficient probably, to have allowed us to name three policemen.

Two were connected to the Licensing Branch: Sergeant Harry Burgess and Inspector Allan Bulger. The other was their superior, Assistant Commissioner Graeme Parker. One reason I left them out, particularly in Burgess' case, was that I felt they would be held up as sacrifices. They could be publicly punished while the system which created them escaped unscathed. We were certain the system was more the villain than the individuals, but the evidence on the individuals was, at the least, a good starting point for a serious inquiry. Some of this evidence came

our way before the program was broadcast. Some more filtered in following the transmission.

I left our Sydney office dragging my feet to the "Inns of Court" building in Brisbane. When I emerged from the lift I was met by a lawyer of slight acquaintance, who grabbed me by the lapels and told me with fierce sincerity, that if I did not have strong evidence, I would be carried out of town on a stake. I began to get an inkling some of the lawyers here at least, might be allies rather than enemies. There was an unexpected motivation within Brisbane's legal community to correct some obvious public ills. I was not used to lawyers demonstrating a great degree of collective public conscience.

Mulholland did a good job encouraging me to cooperate with Fitzgerald and his team. I was equally forceful in persuading the lawyers to be very careful about the police assigned to assist the Inquiry. It was naive to imagine all of them could forget their loyalties overnight. It was reasonable to presume some would be required to report the progress of their investigations to the Queensland police hierarchy. Ultimately, the Fitzgerald lawyers received courageous and loyal service from the police investigators but the initial caution was justified.

One obvious problem was that the witnesses in the criminal community, those in the brothel and illegal gambling trade were not going to cooperate with police, when they knew police were part of the same corrupt system. Some of the witnesses could be persuaded, with difficulty, to meet the lawyers.

I have often thought the first such meeting, which occurred weeks after "The Moonlight State" was broadcast, every bit as important as anything within the program. Two women who worked as receptionists at a brothel agreed to a meeting. I arranged for them to collect me. They arrived in a gleaming BMW, a pair of well dressed Brisbane "yuppies". One had taught high school, the other was a sensible, successful businesswoman. The lawyers were impressed too. The women were excellent witnesses, speaking cogently and without embellishment of the murky details of the brothel trade and the police protection system. I felt the loss of innocence in that room.

A good month of hard work followed that program. This is time and space the media does not normally provide. Mostly, we have to clock on to the next story. *Four Corners* travelled about Brisbane and the hinterland meeting new witnesses. When appropriate and possible, we introduced them to the Fitzgerald lawyers.

My role wound down as the Inquiry hearings got underway. Colleagues like Evan Whitton and Quentin Dempster did a marvellous job shadowing the inquiry developments and helping make the rest of Queensland as angry as they were. Quentin sensibly encouraged me to cooperate with Phil Dickie of Brisbane's *Courier-Mail*. As far as I was concerned, the image of the *Courier-Mail* and Phil

Dickie as modern heroes, belonged more to the realms of popular fiction than anything derived from fact. I was angry about some things and unjustifiably jealous about others. Suffice to say there was value in cooperating rather than tearing each other to bits.

I moved on to other stories with a little less energy, but a little more confidence, believing I had polished some of these "anti-corruption" skills. The next time it did not go so well. A report about corruption in the South Australian police force whimpered while Queensland roared. There are numerous reasons for this. My report had a premature birth being pushed to air before I could collate all the available facts. The South Australian Government brought off a pre-emptive strike by announcing an inquiry by the National Crime Authority before we went to air. Now, eighteen months after the report, a comparatively small police corruption problem, certainly by Queensland standards, is still awaiting effective action. One lesson of the Fitzgerald Inquiry which echoes through the cabinet rooms across the land, is never play a wild card like Fitzgerald again.

So now we have to devise new strategies and it will not be easy. The next time a government agrees to an inquiry which precipitates its own demise, it will be an even greater miracle than the last.

5

The Media – A Lot to Answer For

Phil Dickie

I believe it is appropriate for me to tell you my basic position on some of the issues I deal with in this chapter. First of all, it is my belief that the job of the media is to tell the public what is really going on. For the working journalist, this must be done under considerable constraints, be they technical, legal or institutional. If I can borrow a phrase used by Evan Whitton, the art is one of "getting it in, without committing either libel or adultery".

This is a multi-level process, with the first level being the reporting of what happens day to day. This is the bread and butter of the media and I suppose we do a fair to middling job of picking the significant occurrences out of a host of daily announcements, happenings in courts and parliaments, selective leaks and so on.

There is another level where what is occurring is being obscured from the public view for a host of reasons that can include national security, commercial confidentiality and outright criminality. Here the journalist's job is to ferret out the facts that someone, somewhere does not want revealed, and report those facts. It should come as little surprise to anyone that those occurrences are not nearly as well reported as the facade of announcements and events, and that a proportion of such facts only comes to light years after they occur. This is the enterprise known generally as investigative reporting.

The final level is where a journalist sits down, assembles and works out what isolated occurrences add up to. This, which could be called reporting the overall pattern, is the sort of journalism most feared by those with something to hide. It needs a great deal of space, which often is not particularly available on the broadsheet or the broadcast band. It also runs the risk that readers and viewers are often perceived to have a greater attention span for new revelations about the loves of a distant royalty or members of the acting fraternity, than they have for

detailed analysis of the doings of supposedly respectable businessmen, elected public officials or public servants.

This might be categorised as the conflict between an entertainment function and an information function in the media. This intrudes also into another style of journalism which is often misnamed investigative journalism. I call it the "breathless" style of reporting and it consists of sensationally worded "revelations" of nothing at all. The hallmarks of it are that an unnamed source alleges that unidentified villains, have been, are, or are about to be, involved in unspeakable actions which are never quite specified. At its worst, this is an excursion into fiction. At its best, it is still an expression of laziness in that the journalist, who may be identified by a large byline with "exclusive" written over it, has done no checking of his or her own, into the source or the allegations. Even if the allegations have some basis in something, this type of story, identifying no one and being specific about nothing, has all the impact of a marshmallow cricket bat.

There have been plenty of these stories about corruption in Queensland. They have achieved nothing. When the first edition of my book *The Road To Fitzgerald* was released, one Melbourne bookseller promoted it under the headline: "Queensland. Beautiful one day, corrupt the next." The reality is that Queensland has long been corrupt but only recently perceived to be so. This failure of perception is a failure of the media. I have been asked to describe how the media brought on the Fitzgerald Inquiry. I make no apologies for including the media's failures as well as its successes.

The starting date for this analysis is the mid-1950s, when Labor governments who had presided over and participated in corruption for decades, gave way to a coalition of the Country and Liberal Parties. Some members of the Queensland Police Force were then engaged in, among other activities, collecting bribes from SP bookmakers, organising robberies and fencing stolen goods. Some of the money collected as bribes in country towns is alleged to have found its way into something loosely called a "Premier's Fund".

One of the first tasks of the new Government was to appoint a new police commissioner. It chose the Criminal Investigations Branch (CIB) superintendent Frank Bischof, possibly because he was a Protestant and it had long been agitating about Catholic influence in the police force and public service. More significantly, Bischof was chosen despite complaints from at least two police officers that he was corrupt. These complaints were known to the Australian Labor Party Opposition and quite probably to some journalists. The dominant impression one gains from reading the news reports of the time is, however, that Bischof was a public spirited man much given to lecturing wayward juveniles on the error of their ways. Bischof later gave this job to a protege, one Terry Lewis. Both earned the accolade

"Father of the Year". This was remarkable in quite another way as well - Bischof had no children of his own, or at least not with his wife.

Some of Bischof's other proteges, one Tony Murphy and one Glen Hallahan, were acquiring the media reputations of being the best detectives. These police often associated with journalists in hotels, racetracks and clubs. It is a point worth making, that some police who are later suspected or revealed as corrupt have cultivated journalists to the extent that they have become almost media legends. Later, as in the case of Fred Krahe (New South Wales) and Glen Hallahan (Queensland) some of these police, even when retired in semi-disgrace, were able to use their contacts to land short term jobs in the media. I took a close look at this milieu in Bischof-era Queensland and found a group of associations around one particular hotel which included detectives, journalists, SP bookmakers and nightclub managers. Some of the people in that particular fraternity went on to notable careers in the police force, the media, politics, crime and development. Now I am not saying that these associations are necessarily sinister, but their ramifications can be detected through the years. It is interesting to note an Australian Institute of Criminology paper of a couple of years ago found that journalists who have exposed police corruption generally worked outside the usual police rounds.

Bischof and some of his troops got themselves into a spot of bother over supposed goings-on at another hotel, and this was the subject of the Gibbs Royal Commission into the National Hotel Allegations 1963-64. The rorts that were the subject of the Royal Commission's Terms of Reference were said to be common knowledge at the time and do seem to have been the actual state of affairs. The Commission found to the contrary, possibly partly through being subverted by the police and not assisted by the public. The media restricted itself to reporting the evidence faithfully. When Shirley Brifman exposed the police rorting of the Inquiry years later, no one in the media went back to the original reports of the commission to see how her claims stood up. This exercise was actually done, by citizen Peter James who privately published a book, *In Place of Justice*. The book itself should have aroused wide media interest but its release was generally ignored. Another opportunity for going back and re-examining the Royal Commission was lost when the media contented itself with simply reporting Tony Murphy's perjury trial, Brifman's suicide and Murphy's comments after the case.

When Whitrod was appointed, the media was quite amenable to being used uncritically in the various police union campaigns against him. No journalist, except later Evan Whitton, drew the connections between some notable union figures, their statements and campaigns, and Whitrod's campaign against

corruption. Some of Whitrod's senior police are still quite bitter over their treatment by the media in this period. However, the Scotland Yard Inquiry and the Southport case, where those accused of corruption successfully employ the tactic of accusing their accusers of corruption, was extremely well reported. To honest police in those days it very much seemed that the media favoured the corrupt and their fellow travellers.

In 1978-79 and later, two inspectors named Hicks and Jeppesen both contacted a number of journalists and found them reluctant or unable to take up their allegations. Articles to the detriment of both found their way into the newspapers at critical times, however, and not surprisingly, both declined to have anything further to do with journalists, including Chris Masters and myself, in later years. Murphy appears to have exaggerated in the media his role in the *Anoa* and Mr Asia drug affairs in this period, but Keith Wright's remarkable parliamentary statement on SP bookmaking was just blandly and fairly briefly reported along with denials from police superintendent Atkinson and SP bookmaker, Stan Saunders. To my mind, which might be coloured by hindsight, there were enough details and leads in this statement to form the basis of a media investigation. Properly done, this could have forced some action; instead it became another missed opportunity. There was always a story lurking in police promotions and non-promotions, particularly for those journalists aware of the old Consorting Squad dynamics in pre-Whitrod days.

Junior officers in the Narcotics Bureau provided a lead to media stories and parliamentary comment that led to the extension of the Williams Royal Commission. The Royal Commission's Report left a host of unanswered questions and leads which themselves could have been followed up, but were not until I did so eight years later with the Fitzgerald Inquiry in full and spectacular swing.

The Mareeba area drug connections, just as potentially potent as the Griffith area drug connections, have received only fitful attention over the years, most competently from a freelance reporter named Greg Chamberlin, now editor of the *Courier-Mail.*

The media performed rather better in the period 1982-85, initiating, rather than just reporting, some allegations of corruption. Investigations begun were not, however, generally persisted with nearly long enough. I started work as a journalist in this period and have to plead an element of *mea culpa.* Labor politician Kevin Hooper's allegations (not all of them correct) were reported rather than investigated, although the *Courier-Mail* did take the trouble to locate and describe the illegal casinos that were said to exist. The ABC *Nationwide* (Fancourt-Campbell) reports of March 1982 were good journalistic work which did

result in the Police Complaints Tribunal. There was a missed opportunity here, however, in that noone detailed the links between the "mafia godfathers" named by Hooper, and the involvement of the same persons in the Fancourt-Campbell allegations of payments. The writs flowed in and the stories stopped. But the statements of claim lodged by Murphy and Lewis told their own story - eventually - after Evan Whitton and I dug them out of the Supreme Court registry.

In 1985 *Courier-Mail* reporter Tony Koch did some excellent work on male brothels in Brisbane and helped provoke the Sturgess Inquiry into Sexual Offences Involving Children and Related Matters 1985, Koch's work made the advance of tying in legwork of his own to what was gleaned from his informants, but the investigation could have gone much further. If he had taken the references to "Hector" as a lead for a tramp through Corporate Affairs and the Titles Office, he could have anticipated the Sturgess Report and my own profiling of the vice syndicates. The Moore-male brothels scandals showed how effectively media investigations and politicians using parliamentary privilege could complement each other.

This is one important factor in why Queensland's media has not performed as well as that in other states. There an allegation will be raised in one forum, kicked along a bit further in the other, and this process will continue until the scandal is more or less sufficiently exposed. In Queensland, Parliament has been a relatively ineffective forum sitting for lunatic hours over well-separated periods of derisory duration. The minuscule periods of "question time" have been and still are, effectively stuffed with Dorothy Dix questions and long rambling dissertations by ministers. Adjournment debates after midnight are not likely to be well reported in the media. There were no all-party committees of review and the Auditor-General, in theory an officer of Parliament, has, in fact, answered mainly to the Executive. A general style of auditing (called flick and tick) that focuses on whether amounts add up correctly and are charged against the correct account, is also unlikely to detect gross impropriety. Far better that the auditor also asks how and why money is spent.

What Sturgess said on the vice industry quagmire was again reported at the time and insufficiently followed up. His code numbers cried out for identification but no journalist turned to the task. A year later I started my overall investigation of vice, casinos and the Licensing Branch, but I had identified the players through searching the public records before I realised I had duplicated the Sturgess work. If I had been a bit more alert a year earlier, I could have saved myself something of a slog.

What I have said about the reporting of allegations against police was also true of allegations about political figures. There was some highlighting of the

strange influence of Sir Edward Lyons, with his drink driving charge, TAB shenanigans, judicial lobbying and National Party wheeler dealing. *Sunday Mail* journalist, Cedric Allen had a lot to do with digging out some of the facts and quite a bit was leaked in Parliament, to the great advantage of the probable leaker, Russ Hinze. But the journalist who put it all together was Evan Whitton and his work was published in a series in Sydney and generally ignored where it mattered, which was in Brisbane.

Quentin Dempster of the ABC did an excellent job of detailing how the State worked in a television program going under the title, "The Sunshine System". That program was something of a watershed, but Queensland's other media greeted it with a resounding silence. The same thing generally happened with some excellent *Four Corners* episodes over the years. The national media broke the story; the Queensland media failed to follow through.

And that was one of the differences in 1987, when media enquiries did produce a result. Key elements of the national and the local media were then working along the same track. There were other important differences from the media work on corruption of earlier years. One of those differences from my point of view, was that I was not reporting allegations and their inevitable denials. I was detailing the results of prolonged investigations. What was being said in the articles was factual and undeniable. The other difference was persistence. I was not about to let the story die - it was a matter of building a case, brick by brick. One story led to the next. Each publication brought forward fresh informants. After a while, each publication was producing a reaction which itself demonstrated the nature of the system, whether it was an illegal casino hastily moving house or a police assistant commissioner issuing a writ. And all the time the *Four Corners* cameras were rolling away preparing for their decisive intervention. Evan Whitton has referred to "The Moonlight State" as a program that was "detonated" rather than merely shown. It is a fairly apt description.

To recap briefly: Sir Joh Bjelke-Petersen and the National Party confounded the pundits by winning a second term in office in their own right in November 1986. Chris Masters, who was then with the ABC *Four Corners* program, had been to Queensland to spy out the lie of the land after receiving information about an attempt by one Queensland Bureau of Crime Intelligence officer to bribe another. In that period *Four Corners* had also done an excellent program on the inadequate performance of the Queensland Police Complaints Tribunal which, as usual, had been largely ignored by the Queensland media.

My background was one of living on the fringes of Fortitude Valley, having taken a National Party backbencher on a tour of the area and as a result, engaged

in a paper dispute with a senior police officer on how styles of enforcement lent credence to generalised allegations of corruption.

After the election, a chief of staff, with his mind on a story intended as sensationalist trivia more than anything else, asked one journalist then another to find out who owned a building which contained Brisbane's most prominent brothel. He called the building "Sin Triangle". The job was passed down to me and I used it as the excuse to do a wide-ranging investigation on who controlled the vice industry.

In a newspaper article on 12 January 1987, I identified those people and a proportion of their interests. The Deputy Premier and then Police Minister, Mr Gunn, he who so often now claims credit for the Fitzgerald Inquiry in the pages of a certain credulous tabloid newspaper, dismissed that story with the immortal observations that there was no evidence that massage parlours were used for prostitution and there was no evidence of any organised crime involvement in them. This was a response of the time-honoured kind and in Queensland it had usually meant that that was the end of the story. However, in this case it was not - the train started heading downhill and in due course a lawyer named Tony Fitzgerald who may not have even read that article over his breakfast table, was called in to be the driver.

The general media response to the article was as usual - Brisbane's television stations set up cameras outside brothels to record the police raids that would close them. Of course, they were not closed. To my mind the only thing to do was to quietly continue the investigation. From that point on, however, I had some help, first from an ex-Licensing Branch officer, one Nigel Powell, and later and less directly, from an ABC *Four Corners* team, which bounded back up to Queensland demanding to know who had written this article.

The three elements had come together - a whistleblower or two, one tiny part of the local media, and an influential part of the national media. I wrote a further succession of articles building on that first one and *Four Corners* detonated a program which forced a response from the Government. The legal profession then exerted its influence to ensure the inquiry was a real one, not a whitewash.

The Fitzgerald Report recommended wide ranging institutional reform in Queensland. The media is undoubtedly one of the significant institutions. To my mind, Fitzgerald could have been much more critical of the institution of the media than he actually was. There have been some improvements in the media as a result of the Fitzgerald process, but not nearly enough.

My own work and that of *Four Corners* demonstrates the value of proper investigative work by journalists. That is, do not rush straight into print with just a politician's or informant's word, but corroborate and corroborate.

This is time consuming, expensive and often leads down dead ends. Overall, it is not fostered by any of Queensland's media organisations.

My own experience is this. I have had support from some individuals within Queensland Newspapers (notably editor Chamberlin) but the organisation as a whole has been tolerant rather than supportive (that is, I can work in this way if I so insist, but have to fight and struggle for resources as basic as secure filing or a desk. Never mind that those doing equivalent work in the *Sydney Morning Herald* and the *Age* have offices of their own and can call on the support of other staff. But if you win an award or write a book, we will blow the trumpet). The toleration of investigative work by individuals is not, in my book, a commitment to investigative journalism.

I believe that an effective commitment to investigative journalism by media organisations is one component of the long term campaign against both organised crime and institutional corruption. Another is better journalism overall, particularly that which militates against the bland reporting of statements without even the most cursory examination as to their truth or probability. The media should not be so content to be so used by public figures.

Journalist selection and training would also seem to be in need of some attention, though here I cannot speak from first hand experience - I was never educated or trained in the profession. It does, however, seem to me that talented and committed youngsters often miss out because they do not know the right people or have the best school pedigree. Journalism has an image as a glamour profession - a lot of recruits who are disappointed that the reality does not match their image pass through to ludicrously well-rewarded pseudo-journalism in government, television or public relations.

I am not particularly competent to comment on television, but my impression is this: if newspapers cover important issues in a trivial way then the coverage they get on television is yet more trivial (*Four Corners*, Quentin Dempster's *7.30 Report* and some other programs are emphatically exempted from this gross generalisation). Triviality does, however, seem to be rewarded by ratings success. It is a conundrum, but full marks and support to the strivings of the Australian Broadcasting Tribunal.

Defamation actions do not prohibit investigative journalism as is sometimes supposed, but they do inhibit it, probably for proprietors more than journalists. Many writs result from careless or sloppy journalism or sub-editing and the writ here is usually as indefensible as the original article. A glance down the list of those who have sued shows, however, that the writ for defamation is a favourite resort of villains and that politicians and police officers are two of the largest categories of people who sue.

There are strong cases for significant reform of the law, basically because,

while it is extensively resorted to by villains, it also fails to protect anyone without significant financial resources from unfair treatment by the media. The issue was studied by the Australian Law Reform Commission but no government of any political complexion has seen fit to take up the Commission's recommendations or do anything much other than host numerous seminars on the subject. It is undeniable that writs, even where ultimately defensible, are a large cost, time and resource drain on any form of investigative journalism. Reform would be welcome and should be a priority of any government claiming to be accountable.

Part 3

The Fitzgerald Commission of Inquiry

6

Judicial Culture and the Investigation of Corruption: A Comparison of the Gibbs National Hotel Inquiry 1963-64 and the Fitzgerald Inquiry 1987-89

Ross Fitzgerald

Dr Fitzgerald made the following statement prior to the delivery of his paper at the *Fitzgerald Vision for Reform Conference*, 29-30 November 1989, in response to media reports that files compiled by the Queensland Police Department's Special Branch had been destroyed.

PROLOGUE

Secrecy is the bottom line of corruption. Let me repeat! Secrecy is the bottom line of corruption.

What I am about to say distresses me more than most of you would care to realise, but at a conference dealing with Fitzgerald's vision for reform, it is crucial to put what follows on the public record.

As a citizen and an historian concerned with telling the truth about what has happened in the past, the recent irretrievable destruction of Queensland special branch files, days before a state election and before the Liberal or Labor parties could bring in Freedom of Information legislation, appalled me beyond belief.

When I listened to Sir Max's defence of this action, like many others I was speechless.

As Sir Max is a person of absolute integrity, I can only assume his support of the shredding was either an error of judgment resulting from Sir Max's lack of knowledge of the political history of this State, especially since 1949, or that he was grossly misadvised as to the nature and content of the files.

How can one learn from the mistakes of the past if the public record is destroyed? And do not be mistaken, those 22,000 or so files would have produced ample evidence, at the very least, that the state special branch of the highly politicised

Queensland Police Force acted not as a servant of the law, but as an arm of the National Party Government of the day; as, in effect, a secret police.

It is saddening to say so, but such a precipitate destruction of the special branch files seems to me to be a notably inauspicious start both to cleaning up the cesspit that was Queensland's political culture, and to bringing about a situation where, as Tony Fitzgerald wished, the truth about the workings of this state can be told and rendered intelligible.

But it is not possible to learn from the past if the record does not exist.

"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." Lord Atkin, Ambard v. the Attorney-General for Trinidad and Tobago, 1936.

A central dilemma facing those investigating corruption is determining what procedures - political, investigative and judicial - can be used to detect, expose, and excise corruption from public life. A fundamental problem is that networks of organised crime and corruption are built up in and sustained by existing political, police and judicial routines. Corruption does not so much work against the prevailing social system, as work with it, finding a protective niche in its routines. The Hon. Gerald Edward (Tony) Fitzgerald QC has, for example, pointed to the existence of a police culture. Its assumptions and unwritten codes of behaviour shielded the corrupt who used their extensive working knowledge of routine investigative, administrative, political and judicial procedures to further their collective aims.[1]

In adopting certain innovative procedures in conducting the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, it could be argued that Fitzgerald was also implicitly addressing the role of what I shall call a "judicial culture" in the investigation of corruption. Fitzgerald recognised the need for commissions of inquiry to be quasi-judicial; that is, to be effective they demanded stepping outside the normal bounds of judicial procedure. The fundamental task of a commission of inquiry as Fitzgerald understood it was not to determine the guilt or innocence of individuals; rather, it should be an inquisitorial attempt to determine the truth. It must be a wide-ranging inquiry, rather than the investigation of particular allegations conducted on an adversarial basis.

When the structures of reform in the criminal justice system of Queensland are being put into place, it is vital that the effects of judicial culture on the conduct of public inquiries be subjected to more explicit debate. This is so for a number of reasons.

Firstly, the Fitzgerald Inquiry did not address the role of judicial culture as explicitly as it did the police culture. This is understandable given the priority of

investigating police misconduct. Nevertheless, the idea of a judicial culture - a set of assumptions and codes of behaviour governing the judiciary - was implicit in the formulation of the innovative procedures by which the Inquiry was run. Specifically, these innovations addressed the failure of the formalistic judicial procedures, adopted by Justice Harry Talbot Gibbs in the 1963-64 National Hotel Inquiry, to remove key corrupt players from the field of play in Queensland and beyond.

Fitzgerald also made explicit reference to the judiciary in his recommendations for a Criminal Justice Commission (CJC).[2] A good deal of this section in the Report deals with Mr Angelo Vasta QC, who was permanently removed from the Supreme Court following the Parliamentary (Judges) Commission of Inquiry conducted by three retired judges: the Rt Hon. Sir Harry Talbot Gibbs, the Hon. Sir George Hermann Lush, and the Hon. Michael Manifold Helsham. Indeed, the fallout surrounding Vasta, the Fitzgerald Inquiry, and the Parliamentary Judges Inquiry raises some further questions regarding judicial culture. Briefly, if a comparison of the National Hotel and Fitzgerald Inquiries demonstrates that judicial culture is inimical to the success of commissions of inquiry, then that problem is compounded in the case of inquiries into the behaviour of judges. As it turned out, the Parliamentary Judges Commission has confused rather than clarified the public's perception of the judicial culture's own understanding of appropriate standards of conduct.

Indeed, if there is a common thread to be found in a comparison of the National Hotel Inquiry, the Fitzgerald Inquiry, and the Parliamentary Judges Inquiry, it is the complete inappropriateness of the application of formalistic judicial procedures and the judicial ethos to inquiries into corruption. Consequently, a discussion of judicial culture must be part of any context-based approach to structural and procedural reforms in criminal justice.

The National Hotel Inquiry

Continuing to play the game is not the way to get corrupt players off the field. This is the central procedural lesson to be learnt from the failure of the National Hotel Inquiry. In hindsight, that failure can be seen as monumental. Rather than exposing corruption, it probably had the opposite effect of emboldening key corrupt players.[3] Hence, in his Report, Fitzgerald observed that the list of police officers represented at the National Hotel Royal Commission included many who were again the subject of allegations in 1987 and 1988; for example, John William Boulton, Graeme Robert Joseph Parker and Jack Reginald Herbert "who have now admitted corruption, although Parker and Boulton deny, unconvincingly, that

they were corrupt at the time of the National Hotel Inquiry."[4] Such a comparison of personnel only confirms, in hindsight, the degree of failure. But even without the benefit of hindsight, the National Hotel Inquiry was doomed to ineffectiveness by narrow terms of reference,[5] inadequate investigative powers and procedures, and the absence of witness protection or indemnities.[6]

The Inquiry had been set up to investigate specific allegations of police misconduct at the National Hotel, initially raised in the Parliament by lawyer and ex Deputy Mayor of Brisbane, Colin Bennett, Labor MLA for South Brisbane. At the end of a speech on conditions in the police force on 29 October 1963, Bennett made a passing claim that senior police officials were drinking after hours and condoning prostitution at Brisbane's National Hotel.[7] On 11 November it was announced that a Royal Commission of Inquiry under Justice Harry Gibbs was instructed to look into the allegations. After conducting the Inquiry for seven weeks, commencing on 2 December 1963 - that is, with virtually no time at all for preparation - the Commission concluded that the laws relating to the sale of liquor had been breached without the detection or intervention of the police, but found that "... there is no acceptable evidence that any member of the Police Force was guilty of misconduct, or neglect or violation of duty in relation to the policing of the hotel, the conduct of the business or the operations or the use of the hotel, or the enforcement of the law in respect to any breaches alleged or reported to have been committed in relations thereto."[8]

Fitzgerald comments: "It is easy to understand those findings. Nothing in the terms of reference or structures of the Royal Commission, including the range of parties represented before it, the assistance and facilities available to it, and the evidence which it received, or in the social and political environment of the time, would have alerted it to the possibility that it confronted an orchestrated 'cover up' based on, and supported by, institutionalised police attitudes and practices."[9]

Evan Whitton is less generous: "It is proper for a judge to operate, as it were, *in vacuo* in a court action, but a person holding an inquisition might be expected to bring to bear a keen perception of men and events. Indeed, if intelligence as to (Police Commissioner) Bischof's true character had penetrated even the Toowoomba monastery in which (Whitton) was then cloistered, it may seem that Gibbs, in making the positive finding that neither Bischof nor any officer had been guilty of misconduct, must have led a spectacularly secluded and innocent life at the bar and on the bench."[10]

Whatever the status of the above, the important point is that it has now become clear that the way in which the Inquiry was set up and conducted meant that the truth could never be known. Gibbs, for example, was provided with Counsel Assisting, but was not given any real investigative resources. It is

interesting to note that, by his own admission, Don Lane was one of the members of the Queensland Police Force who assisted Gibbs by "making inquiries for the Commission and (serving) subpoenas on its behalf".[11] This was despite the fact that D.F. Lane was also one of those Queensland police officers listed as being "represented at the National Hotel Royal Commission".[12]

Gibbs was also constrained by exceedingly narrow terms of reference. His enquiries, as Ian Callinan has pointed out, were confined to "what was alleged to have happened at one hotel, over one specified period only".[13]

Narrow terms of reference lend an incidental aura to an Inquiry; that is, the focus of such investigations is on discrete events. Corruption, on the other hand, can be rather uneventful - consisting as much of a network of relationships and a system of influence, as of specific misdeeds.

Allegations of specific misdeeds can also be denied. In adversarial litigation, opponents and witnesses can be simply discredited. Indeed Counsel McGill, acting on behalf of the National Hotel and its licensee, could not accept Justice Gibbs' view that some evidence from a witness might be true even though other aspects of their testimonials were false. McGill offered the opinion that "once you substantially shatter a witness, the witness is gone".[14]

The procedures of the courtroom can play into the hands of those who want to prevent the fullest and widest inquiry into the truth. Commenting on the National Hotel Inquiry, Fitzgerald observed a typical *modus operandi* among corrupt Queensland police for dealing with investigations: "In a pattern that has been repeated many times since, police closed ranks behind those being investigated. Evidence was collected to demonstrate that the National Hotel had been the subject of conscientious police attention, and to discredit those who made allegations against police and their interests."[15]

A key witness of the National Hotel Royal Commission, prostitute Shirley Brifman, stated on television in Sydney in 1971 that police had persuaded her to perjure herself at the Inquiry. Jack Herbert also later admitted to Fitzgerald that he had given "entirely fictitious evidence" regarding John Komlosy, one of the witnesses against the police. Herbert had falsely claimed to Justice Gibbs that Komlosy said that he wanted to "get even" with the hotel's owner.[16] This demonstrates the point: corrupt police know how to work judicial procedures for their own purposes. Police were able to "verbal" their opponents, with devastating effect because the Inquiry was conducted on an adversarial basis.

The possibility of adversarial intimidation was undoubtedly one reason why very few members of the public came forward with information at the Inquiry. But witnesses to the misconduct of others were also not indemnified from prosecution for their own transgressions. As Evan Whitton explains, Gibbs had to work with "defective legislation". He "could not compel witnesses to give self-incriminating

evidence; he could not give them immunity from prosecution; and he could not chase them across the border".[17]

While conceding that the legislation was defective, it is also clear that Justice Gibbs, for his part, did not take full advantage of the flexibility available within the legislation effecting commissions of inquiry. He chose to run the Inquiry along familiar lines, fully aware that the legislation did not demand it: "Although in my enquiry I was not bound by the rules of evidence (Section 17 of *The Commission of Inquiry Acts 1950-54*), I did endeavour to adhere to those rules as far as possible. I received some hearsay evidence on the basis that it might lead to the discovery of further admissible evidence to indicate what other persons might usefully be called as witness. As a general rule, however, I did not allow hearsay statements to be admitted for the purpose of proving matters the subject of inquiry which were in dispute."[18]

He added: "In the nature of things it is often difficult when conducting a Royal Commission to determine what evidence will prove relevant and it is therefore particularly necessary to be rigourous in excluding evidence that is plainly irrelevant."[19]

According to Ian Callinan, this "formal" approach was "not likely to be effective".[20] Comparison with the Fitzgerald Inquiry suggests that this assessment is correct. Nevertheless, it misleads if we simply conclude that judicial conservatism was at fault. Justice Gibbs' procedural claims should be examined in context.

A closer look at the conduct of the National Hotel Inquiry indicates existence of a judicial ethos rather than application of strict procedures. One of the witnesses against the police, John Komlosy, was, for example, subjected to sustained attacks by counsel for the police, the cabinet, and the National Hotel. There was a great deal of hearsay evidence, and accusations - much of which was later asserted by Brifman and Herbert to have been false - by counsels for the police. At the same time, requests by Komlosy to have counsel represent him were repeatedly refused. According to Peter James, Komlosy was "told by the judge that the proceedings of the Royal Commission could not be held up while a counsel was found".[21] James argues that there was, however, plenty of time for irrelevant questioning; Gibbs himself even asked Komlosy to bring in his Junior certificate for perusal!!! A frustrated Komlosy, again, according to Peter James, "replied that he was getting fed up producing things, and, 'I am objecting most sincerely. Not one gentleman has asked me anything about the National'."[22]

Although Gibbs preferred to conduct a commission of inquiry within the familiar atmosphere of adversarial contest, he would have been aware that the *Queensland Commission of Inquiry Acts, 1950-54* did not require adherence, vigorous or otherwise, to judicial procedures:

Section 17. Commission not to be bound by rules as to procedure or evidence

A Commission, in the exercise of any of its functions or powers, shall not be bound by the rules or practice of any court or tribunal as to procedure or evidence, but may conduct its proceedings and inform itself on any matter in such a manner as it thinks proper, and, without limiting in any way the operation of this section, the Commission may refer any technical matter to an expert and may accept his report as evidence.

The abandonment of this statutory flexibility and the prevalence of a judicial ethos meant that the National Hotel Inquiry was conducted according to those procedures within which the corrupt had learned to work. As such, this inquiry inadvertently played into the hands of the corrupt.

It is perfectly understandable that a judge conducting an inquiry would lean towards the familiar ethos of the courtroom. But this is to miss the fundamental point, and perhaps the most contentious in regard to the role of judicial culture in the investigation of corruption: commissions of inquiry should be *inquisitorial*, not adversarial, in character.

While, to thoughtful observers, this may now seem obvious, it is also a logical implication of the conditions which prompt the call for commissions of inquiry in the first place. "Usually (not always) commissions are established because more conventional measures have failed: breakdowns in proper procedures have occurred, and propriety in public life has failed: such circumstances call for unconventional remedies."[23]

Indeed, concern about the relationship between the judiciary and commissions of inquiry is not new. In 1923, Sir William Irvine, the Chief Justice of Victoria, "thought it inappropriate that Supreme Court Judges be appointed Royal Commissioners". His main argument was that the principal duty of judges was "to hear and determine issues of fact and of law between the King and a subject, presented in a form enabling judgment to be passed upon them ..." Informal inquiries "though presenting on their face some features of a judicial character, result in no enforceable judgment, but only in findings of fact which are not conclusive and expressions of opinion which are likely to become the subject of political debate". Sir William held that inquiries into specific misconduct could be the subject of judicial determination in the courts. The matters before commissions of inquiry on the other hand, were seldom so limited and could not therefore logically be the subject of judicial determination.[24]

According to Ian Callinan, the ghost of Irvine was recalled when a commission of inquiry was being empowered to investigate the allegations of police misconduct in Queensland.[25] Such systematic misconduct was graphically presented in Phil Dickie's reports in the *Courier Mail* and in Chris Masters' ABC *Four Corners* program "The Moonlight State".

The subsequent Inquiry was headed, not by a judge, but by the Hon. Mr G.E. Fitzgerald QC. It is, however, important to remember that the Queensland-born Fitzgerald had been a judge from 19 November 1981 to 30 June 1984, in the Federal Court of Australia (and during the same time in the Supreme Court of the Australian Capital Territory), before resigning to return to limited private practice.[26]

While twenty-four years earlier, Gibbs had started with little more than "a throwaway remark in state parliament", Dickie and Masters (aided by incorruptible ex-Licensing Branch Constable Nigel Powell) had gathered a mass of documentation Fitzgerald could use.[27] Hence, the Fitzgerald Inquiry started from a much better base than the Gibbs' Royal Commission. Fitzgerald gave himself plenty of time before his Inquiry began. He also set up his own investigative staff, which became virtually a small police force of its own. A master tactician, he did not have to rely on Queensland police files and police services, as Gibbs had, almost exclusively.

From the very beginning, it seemed that the Fitzgerald Inquiry was being organised with a particular view to learning the lessons of the past. A number of specific improvements were sought, including expandable terms of reference, the provision of adequate investigative and administrative resources, indemnity for witnesses, and a willingness to conduct an open and public inquiry.

These innovative procedures cannot rightly be assessed without considering their context; that is, we must understand the underlying principles which guided the choice of tactics. Most centrally, Fitzgerald had a clear and *operational* understanding that the aim of a commission of inquiry was to be inquisitorial in the best and proper sense of that word. In contrast, Gibbs - who has a fine legal mind but was quite legalistic in his approach - thought of himself as a judge when he was conducting his commission.

The failure of the National Hotel Inquiry to remove corrupt players from the field (or even to identify them) had produced a valuable and simple lesson: judicial procedure could miss the wood for the trees. For Fitzgerald there was no question of pursuing questions of individual guilt or innocence in regard to specific misdemeanours. Instead, he aimed to uncover and bring to light the social, political and systemic conditions under which corruption could occur and to offer recommendations for the reform of these social, political and administrative contexts. The terms of reference, therefore, specifically included inquiry into,

"Whether existing legislation and procedures are adequate to ensure that conduct of the kind referred to ... is detected and reported to appropriate persons".[28]

Fitzgerald clearly understood the procedural implications of the fact that organised crime and corruption is not simply a chaotic manifestation of disorder, but is also the dark-side of existing economic, political, social, and judicial structures. To conduct his Inquiry successfully, the nexus between current institutionalised practices and organised corruption had to be broken.

To take one example. In the National Hotel Inquiry, according to Callinan "A very strong counsel Sir Arnold Bennett QC, acted on behalf of the members of Cabinet but treated the police force and the Ministers as if ... the two were monolithic, that is without any different interests."[29] This had the effect, as we have seen, of heightening the adversarial character of proceedings and intimidating witnesses. Fitzgerald, on the other hand, broke the institutional nexus at this point by adopting the practice that "any Cabinet Minister or policeman or official against whom a real basis for a case to answer was established, obtain his own separate representation".[30]

The most controversial tactic used by Fitzgerald was undoubtedly the granting of indemnities to corrupt witnesses. To many members of the public, thinking simply in terms of fingering the guilty and punishing wrong-doers, this was often mystifying. Some believed that indemnities were only given so that "bigger fish" could be netted. More correctly, the indemnity tactic was integral to a context-based Inquiry; that is, it was thoroughly consistent with Fitzgerald's intention to uncover corrupt systems rather than to prosecute individuals. Concerning the highly controversial granting of indemnity to one of the "big fish", Jack Herbert, Fitzgerald stated: "It is ... vital that whatever steps are available be taken to maximise the prospect that the truth is told. If individuals escape, even important criminals, even if all escape, but a basis is laid for a new and better future, that is preferable to a continuation of the past. Every effort must be made to obtain a Police Force which can effectively combat crime".[31]

The importance of removing the players from the field was paramount as Fitzgerald's comments on former Assistant Commissioner Graeme Parker chillingly confirm: "Many of the offences for which indemnity was granted would otherwise never have been discovered, let alone prosecuted. It is fanciful to pretend that those indemnified would otherwise have all been sentenced to lengthy prison terms. Parker, for example, would probably still be an Assistant Commissioner, quite possibly in line for appointment as Queensland's next Commissioner of Police."[32]

Fitzgerald's purposeful adoption of the inquisitorial style in the context of a public inquiry inevitably created tension. It seemed to some, not least to those mentioned adversely at the Inquiry, that the innocent could become too easily

embroiled. Fitzgerald's solution was openness: individuals were given the freedom to present their point of view and deny allegations, but without any procedural impulse to engage in adversarial contest.

A problem which arose for Fitzgerald in adopting this tactic was that there were no guarantees that an open inquiry would not be selectively reported. Allegations were often taken out of context, and insufficient attention was given to reporting the full context. Fitzgerald would often address members of the media on this issue.[33] Another unfortunate by-product of the inquisitorial style was public perception that a large degree of evidence was hearsay. Fitzgerald was keen to correct this public misperception, fed by the media's bias towards reporting controversial allegations. He declared in his report that the majority of evidence brought before the Inquiry was of a kind that would be admissible in a court of law.[34]

Clearly, Fitzgerald has proved that the battle against corruption requires a carefully controlled (and suitably checked and balanced) set of non-routine procedures. Law-enforcers and judiciary must at times step outside formal zones and legalistic procedures to pursue and bring to justice the corrupt.

The problem arises, however, that while the inquisitorial style is manifestly applicable in the case of police misconduct, the judiciary seems to be a limiting case. It claims a liminal zone of its own; that is, because its "independence" ought be preserved at all costs, it represents a threshold beyond which it is improper to pass. This seems to place the judiciary outside the "normal" boundaries of proper inquiry. Justice Angelo Vasta of the Supreme Court (as he was then), for example, argued that the independence of the judiciary would be compromised if he was forced to appear before the Fitzgerald Inquiry.

Indeed, Fitzgerald made detailed reference in his report to Vasta's lack of cooperation. He argued the judge's actions distracted and jeopardised the Inquiry at its most crucial stage, when key political figures were appearing before it.[35] This point was also taken up in public debate by Quentin Dempster, who argued that the Inquiry melee surrounding Judges Vasta and Pratt was a bonus for the real targets. "Let's get back to chasing the crooks", he wrote.[36]

We need not take up the issue here of Vasta's motives and propriety. Clearly, however, the tension between the inquisitorial demands of public inquiry and the set of assumptions which guide behaviour in the judicial culture was not completely resolved in the Fitzgerald Inquiry.

The Judicial Culture

As far as Fitzgerald was concerned, the behaviour of judges legitimately fell within his terms of reference.[37] His purpose was to delve as widely as necessary to

determine the truth. "Truth", he argued, "does not cease to be truth because prominent citizens are involved, and an investigation which aims to find the truth cannot be curtailed or circumscribed to exclude categories of persons from its purview."[38] He continued, "Any contention that any investigation (except an inquiry which has been appointed by the Parliament to recommend whether a judge should be removed) which comes up against some matter in which the behaviour or relationships of a judge arises for consideration should be abandoned or curtailed is unrealistic and untenable in practice."[39]

Those judges named in the Inquiry (Vasta and District Court Judge Eric Charles Ernest Pratt) were offered the same rights as others to appear before it and to make statements. Vasta particularly resented the intrusion, and claimed that to appear before the Inquiry struck at the heart of that focal symbol of judicial culture, the independence of the judiciary. Vasta also vigorously and publicly questioned whether Fitzgerald, as a QC, was qualified to inquire into the behaviour of a Supreme Court judge.

The ethos of judicial culture, which had procedurally undermined the effectiveness of the National Hotel Inquiry, now threatened to disrupt Fitzgerald. Indeed, Fitzgerald was so dismayed at Vasta's attacks on the Inquiry that he contemplated abandoning it.[40] Judicial independence was being drawn upon to claim that judges could exclude themselves from participating in an inquisitorially-based inquiry. This was a severe challenge to the integrity of a context-based inquiry, from which no one else had been excluded.

In a letter to the premier, Fitzgerald recognised his dilemma:

> The independence of the judiciary is undoubtedly the most important feature associated with Mr Justice Vasta's position. A commitment to equal treatment for all may have to yield if such an approach would imperil the judiciary's independence. Conversely, especially having regard to the public concern at what had been revealed in the Inquiry, care must be taken to ensure that concern for the judiciary's independence does not lead to a less thorough scrutiny of judicial conduct, create a public perception that there are special rules and perhaps "cover-ups" available for a privileged few, or possibly cause a failure to dispel any doubts which may exist concerning judicial integrity.[41]

It could be argued that Fitzgerald's concern for the independence of the judiciary led to him to forego his full inquisitorial rights. For reasons which need not be examined here, he gladly handed over the task of inquiring into the behaviour of the judges to a Parliamentary (Judges) Commission of Inquiry, to be carried out by three retired judges: the Rt Hon. Sir Harry Talbot Gibbs (Presiding

Member); the Hon. Sir George Hermann Lush; and the Hon. Michael Manifold Helsham. (This Inquiry bore considerable similarity to a body set up in 1987 by the Commonwealth Parliament to examine matters concerning High Court Justice Lionel Murphy; Sir George Lush was also a member of that body.)

The problem of the relation between inquisitorial public inquiries and judicial culture is compounded in the case of inquiries into judicial misconduct. Fitzgerald, however, still questioned whether an inquiry seeking to determine whether a judge should be removed from office needed to be "effectively adversarial".[42] Vasta was certainly demanding an adversarial style contest. Fitzgerald had remarked in a letter to the premier: "Many who have been caught up in the Inquiry share Mr Justice Vasta's wish to be excluded from such a process and to be called upon to face particularised allegations of which evidence is already available."[43] Indeed, it could be argued that Vasta achieved his wish, to a degree, in the Parliamentary Judges Inquiry. It is doubtful given his fate, however, that he achieved it to his satisfaction.

The conclusions reached by Gibbs et al, in the Parliamentary Judges Inquiry, however, raise a serous question as to whether an inquisitorial style will be adopted in the future. The Parliamentary Judges Inquiry was, in part, a retreat into the formalistic and familiar ethos of the judicial culture. Gibbs et al, for example, chose to firmly establish what, at the beginning of their inquiry, they called a "civil and curial" basis for hearing evidence.[44] And while they did recommend that Parliament remove Vasta from office - largely but not entirely because of the improper dealings of Vasta's family company Cosco Holdings (a toilet paper manufacturer in Brisbane) - in their Summary of Conclusions they trenchantly voiced doubts about the value of wide-ranging inquiries: "The Commission, as a result of its experience in conducting this inquiry into Mr Justice Vasta and into Judge Pratt, has formed the clear opinion that the holding of an inquiry into the question whether "any behaviour" of a judge warrants removal is open to grave objection. It is one thing to inquire into specific allegations of impropriety but it is quite another to conduct an inquisition into all aspects of a judge's life."[45]

"Why not?" one might ask. Gibbs et al, concluded, "an inquiry of the latter [that is, an inquisition], kind exposes the judiciary to unacceptable risks that pressure will be applied to its members and becomes especially dangerous if instigated by pressure groups or as a result of media clamour".[46]

Why the judges questioned the value of an inquiry into judges is not entirely clear when viewed in the context of the whole Fitzgerald Inquiry. Their parting shot seems to hint at sinister external factors - pressure groups and media clamour. But as Evan Whitton has commented: "Are Gibbs et al, saying it is better to have

the judiciary sprinkled with such types as Vasta, who, in their opinion, had engaged in fraud on the revenue, rather than pry into their private lives."[47]

At one level the question of whether judges should inquire into judges again raises its head. The concept of self-regulation was certainly a major casualty of the Fitzgerald Inquiry. At another level, a deeper problem is at work. In the light of what may be learnt from a comparison of the National Hotel and Fitzgerald Inquiries, we need to ask how realistic is it to expect that inquiries conducted by judges will be inquisitorial? The pressure on Gibbs in 1963-64, and on Gibbs et al in the Parliamentary Judges Inquiry, shows how easy it is for those steeped in the judicial method to adopt the adversarial position. A person whose training has been in such a method must display special singularity and courage in order to overcome this and assume an avowedly inquisitorial stance, as Fitzgerald so ably did in his Inquiry.

It is worth noting that the Gibbs panel found that "there is no evidence to suggest that there was anything improper at all" to be inferred from the various entries in sacked Police Commissioner, Sir Terence Lewis' diaries referring to Angelo Vasta. On the question of possible perjury in relation to his denial of his alleged friendship with Sir Terence Lewis in the 1986 *Matilda* defamation case, Gibbs et al accepted Justice Vasta's explanation that "his acquaintance or friendship" with Sir Terence was not one which would interfere with the discharge of his official duties.

Accepting that the judge deliberately gave false evidence to them about what became known as the Administrative Appeals Tribunal (AAT) matter, the panel found that there was "a very strong reason" to explain why Justice Vasta should give a false account, namely that he had previously committed himself to an absolute denial of the matter in the 1986 defamation case.[48] Remarkably, although the judges found Vasta's denial before them was "false, and deliberately so", they noted that Vasta gave his evidence to them after the Act, under which they were inquiring, came into force and, in the absence of submissions on this point, said that it would be "quite wrong ... to reach a conclusion" about whether Vasta's evidence before them constituted misbehaviour warranting his removal from the Supreme Court bench.[49]

Whether or not the Parliamentary Judges Inquiry played into Vasta's hands, the door has been left wide open in the future for a return to the demonstrably ineffectual formalistic adversarial procedures of the past - at least for judges.

Ironically, it was precisely the wide terms of reference, in particular, the reference to "any behaviour", which was responsible for Vasta's demise. The question of influence between Lewis and Vasta was quickly dealt with; there rarely is any hard evidence for such things. Yet, despite their conclusion that judges should only be required to face specific allegations, Gibbs et al were of the

opinion that it was not necessary for them to determine whether any specific behaviour "in itself" was enough to warrant his removal. Taken together, however, they were.

On the one hand, then, Gibbs et al were claiming the desirability of abandoning an inquisitorial style in the case of judges and dealing only with specific allegations. On the other hand, they refused to determine whether any specific behaviour of Vasta warranted his removal from the bench.

It is fair to say that the Parliamentary Judges Inquiry conclusions have not clarified the issue of judicial standards. They have raised more doubts than clarity concerning the role of the judicial culture in investigating misconduct and corruption.

The return to formalism has created a disturbing public perception that there is in judicial culture a concern for the tree-and-leaf detail, which seems to miss the woods for the trees. In the end, as Quentin Dempster wrote, it appears that the retired judges had beaten Vasta with a feather - his alleged tax fraud.[50]

As well as not determining whether, for example, Vasta's stance in the *Matilda* defamation case was in itself misconduct warranting removal from office, the retired judges also determined that there was no evidence that Vasta's judicial judgment had been affected by his transgressions. Evan Whitton points out that it is not entirely clear whether the judges based this determination upon any detailed examination of the transcripts of Vasta's cases.[51]

The wider community has every right to be confused. Judges claim the right to independence and the respect of the wider community as exemplars of fair play. Yet a panel of three retired judges at a cost of $3,000 a day each, cannot give any specific guidance as to whether alleged acts of deceit, fraud and giving false evidence of themselves are condonable behaviours for a judge.

A public understanding of the basis for judicial ethics, including what comprises "acceptable friendships" for a judge, is no clearer after the Parliamentary Judges Inquiry. Yet, it is precisely such a clarity which, according to the Hon. Mr Justice Thomas, is the most urgent necessity in regard to judicial ethics. In his book, *Judicial Ethics in Australia*, Justice Thomas offered insights into the judiciary's self-understanding of the misconduct question. His basic position is that in Australia at least, informal processes have worked well up to now. (Unfortunately, this is somewhat like Bertrand Russell's luckless "verification turkey" who believed in its own perpetual existence until Thanksgiving morning.)

Thomas also examined in some detail overseas experience in regard to independent judicial misconduct commissions. He questions their value. Where independent commissions exist, he claims, a good deal of time is taken up by unsatisfied litigants. He argues somewhat dubiously, that the existence of judicial order commissions have not decreased the amount of judicial misconduct and so

are superfluous.[52] By the same logic, however, it could be argued that courts do not decrease the crime rate and judges could also be dispensed with.

The unpalatable alternative to judicial self-auditing, for Thomas, is the growth of bureaucracies full of public servants concerned with "empire building". Finally, he argues that independent commissions produce a situation in which "judges are under siege". Consequently, "... the best judges will no longer accept appointment to the bench and the system progressively degrades".[53] This image of barristers quaking in fear of being offered an appointment to the bench is surely hard to sustain with any seriousness.

If Gibbs et al have called into question the value of an "inquiry into judges", what will happen in the future? Will they, for their part, not make themselves available? Will they accept Sir William Irvine's advice and stay out of commissions of inquiry? Or when it comes to investigating judicial misconduct, will the pressures within the judicial culture to exclude non-judges from the field of play be too great to withstand?

As far as the general community is concerned, it does expect its judges to be of the highest calibre, but this is not guaranteed by the office itself, nor is it a genetic attribute of those called. What we have learnt of our police applies also to judges. Tony Fitzgerald claimed that the police are "likely to reflect the general social culture, including its weaknesses (for example materialism) and also to include a roughly representative proportion of individuals who break the law".[54] Yet judges too are drawn from the wider community and presumably are also prone to every human weakness. According to Fitzgerald "unpalatable though it may be, the harsh reality must be faced that a community, especially an affluent and quite widely corruptible community, may occasionally throw up a corrupt judge".[55]

This is an honest starting point. The best way to ensure the independence of the judiciary is to develop effective mechanisms which will guard and protect it. This means not only recognising the possibility that judicial misconduct may occur, but also developing enlightened strategies for dealing with it. In Fitzgerald's words, "The mechanisms for preventing and detecting official misconduct must be able to operate in such regrettable circumstances, and must not be obstructed by some approach which places judges effectively above and beyond any scrutiny."[56] At the forefront of the development of such strategies must be the honest recognition that there are contexts in which formalism with regard to judicial procedures may inhibit reforms.

Judicial independence is crucial to ensuring that upright men and women of high character and standards administer the law fairly and without bias. But independence must never be confused with insularity or idiosyncrasy. Paradoxically, judicial independence cannot be treated in isolation from the social

and political context. We have already seen how the corrupt have adapted to judicial procedures and found protective niches within it. It would be an irony if the independence of the judiciary prevented the widest possible implementation of a contextual approach to dealing with public corruption.

The rest of the community has no cause for complacency. According to Fitzgerald, the routine practices of the media, for example, played their part in the Queensland social context.[57] And, yes, even historians, have at times concentrated on the application of quasi-judicial procedures of verification and evidence to the exclusion of questions of social and political context.

Most importantly, these issues continue to be relevant. Already, judges have been at the forefront of attempts to modify the Fitzgerald recommendations for a Criminal Justice Commission (CJC).[58] This is despite the fact that Fitzgerald himself, aware of the need for "special sensitivity" regarding the judiciary, recommended that the authority of the Chairman of the Criminal Justice Commission should be required and that the Chairman ought to consult with both the Chief Justice and the Attorney-General before initiating any inquiry into the official misconduct of a judge.[59] His Report also made clear that any such investigation should be confined to allegations which, if established, might warrant removal of a judge from office.[60] Interestingly, while the *Criminal Justice Commission Act*, which came into operation on 4 November 1989, incorporated these suggestions, it omitted any reference to the Attorney-General.[61]

The Queensland community has learnt valuable lessons from dealing with police culture. By comparing the National Hotel Inquiry and Fitzgerald Inquiry, it has also witnessed the relative value of context-based inquisitorial inquiry over formal judicial procedures. In the light of these lessons, the community must judge whether in the investigation of corruption the judicial culture and its claims to independence should remain untouched. In the end, it will be of little use reforming legislation and structures if the codes and assumptions employed by the judiciary do not take full advantage of flexible procedures.

The bitter lessons of the past must be learnt. If they are not, Queensland could well see the need for another Fitzgerald Inquiry within the next twenty four years, or even less.

Notes

1. For discussion of police culture see, G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), pp. 200-217.
2. *Fitzgerald, Report*, pp. 323-30.

3. Evan Whitton, *The Hillbilly Dictator* (Crows Nest: ABC Enterprises, 1989), p. 11.
4. *Fitzgerald, Report*, p. 33.
5. The complete list was included in *Fitzgerald, Report*, pp. A239-40.
6. Ian Callinan, "Commission of Inquiry: A Necessary Evil?" Paper delivered at the *Tasmanian Bar Association Conference*, Hobart, 5 November 1988, p. 12.
7. For the historical, social and political context of the National Hotel Inquiry see, R. Fitzgerald, *From 1915 to the Early 1980s: A History of Queensland* (St Lucia: University of Queensland Press, 1984), chap. 5. For specific reference to the National Hotel Inquiry, see pp. 227-29.
8. *Fitzgerald, Report*, p. 34.
9. *Ibid*.
10. Evan Whitton, "Harry and the Judges: Inquiries Open to 'Grave Objection'?" *Justinian*, no. 59, October (1989): p. 14.
11. Letter to the Editor, *Courier Mail*, 25 November 1987.
In accordance with the express wish of Commissioner Fitzgerald QC, I have refrained from making any comment on matters before his inquiry other than denying any impropriety in regard to the allegations made against me.

> However, there is one other matter, an historical matter, which has received some currency in the media as a result of poor research by journalists. I feel obliged to put this erroneous reporting to rest before it is repeated by other media outlets in the face of established fact.
>
> The matter concerns the repeated mention I have received as having "featured" in the National Hotel Royal Commission held in Brisbane in 1963-64. My contact with the National Hotel Royal Commission was as a detective constable of police assigned as a partner to Detective Sergeant Brian Hayes to make inquiries for the commission and to serve subpoenas on its behalf.
>
> The mention of my name in an appendix of the report merely listed the names of all police officers who were nominally represented by Mr J Douglas QC and Mr Macrossan. There were 89 such people, comprising those officers who had performed duty in the Consorting and Licensing Squad at some time during the relevant period. In fact, for a substantial part of the period I was stationed in far north-west Queensland at Mount Isa and Cloncurry.
>
> If proper research was undertaken as to my part in the Royal Commission, it would clearly show that *I was assigned to the*

> *commission staff in a similar fashion to those legal staff and police officers now attached to the Fitzgerald inquiry.* - D.F. Lane, Minister for Transport, Brisbane. [my emphasis.]

12. See, "List of Police Officers represented at the National Hotel Royal Commission" *Fitzgerald, Report*, p. A239.
13. *Callinan, Commission of Inquiry*, p. 6.
14. James, *In Place of Justice: An Analysis of a Royal Commission 1963-64* (Deception Bay: Shield Press, 1974), p. 105.
15. *Fitzgerald, Report*, p. 33.
16. *Ibid.*, p. 34.
17. Whitton, *Hillbilly Dictator*, p. 10.
18. *Callinan, Commission of Inquiry*, p. 8.
19. *Ibid.*, p. 49.
20. *Ibid.*, p. 12.
21. *In Place of Justice*, p. 44.
22. *Ibid.*, p. 49.
23. *Callinan, Commission of Inquiry*, p. 4.
24. *Ibid.*, pp. 19-21.
25. *Ibid.*
26. Fitzgerald became a QC in Queensland in 1975; he later took out silk in New South Wales and Victoria. He was also a part-time member of the Australian Law Reform Commission from 1 July 1981 to 30 June 1984. Fitzgerald, it should be noted, was the first Federal Court Judge to be appointed from Queensland. Moreover he actually established the Federal Court in Queensland. On his return to private practice, Fitzgerald confined himself to advising and did not appear in any trials.
27. See P. Dickie, *The Road to Fitzgerald* (St Lucia: University of Queensland Press, 1988), p. 186.
28. *Fitzgerald, Report*, p. A26.
29. *Callinan, Commission of Inquiry*, p. 13.
30. *Ibid.*, p. 25.
31. *Fitzgerald, Report, p.* A218.
32. *Ibid.*, p. 13.
33. *Ibid.*, p. A183.
34. *Ibid.*, p. 11.
35. *Ibid.*, p. 328.
36. *Sunday Mail*, 30 October 1988, p. 24.
37. *Fitzgerald, Report*, p. 322.
38. *Ibid.*, p. 323.
39. *Ibid.*, p. 324.

40. *Ibid.*, p. A220.
41. *Ibid.*, p. A222.
42. *Ibid.*, p. 323.
43. Letter to Premier, 26 October 1988, p. 2.
44. *First Report of the Parliamentary Judges Commission of Inquiry*, 12 May 1989, pp. 11-13.
45. *Second Report of the Parliamentary Judges Commission of Inquiry*, 19 July 1989, p. 89.
46. *Ibid.*
47. Whitton, *Harry and the Judges*, p. 14.
48. Two Canberra High Court correspondents, Bill Goff and Roderic Campbell, told the Vasta Inquiry that they shared a taxi with the judge and his wife in Melbourne in 1985 and in a discussion about the AAT (Administrative Appeals Tribunal) the judge had allegedly remarked: "I thought TAA had sold that off years ago". Justice Vasta was ridiculed in a *Matilda* article over the remark. In a defamation hearing Vasta described the article as a fabrication. Flatly denying Goff and Campbell's evidence, Vasta said he had never met them at any time.

    Significantly the three judges accepted the word of two journalists over that of a Supreme Court judge and his wife. The panel found: "If the commission is satisfied that the incident took place, then the denial of its occurrence by Mr Justice Vasta must be rejected. *There being no room for mistake, it means that that denial is false and deliberately so"* (my emphasis). The panel found there was a strong motive to explain why Justice Vasta should give a false account: "There was no way to qualify the absolute answer given about the conversation in the (1986) defamation proceedings. He had a very strong reason to adhere to it". See Quentin Dempster, unpublished paper on Vasta and Pratt, 17 May 1989.
49. *First Report of the Parliamentary Judges Commission of Inquiry*, p. 33. "The Commission does not accept as true the evidence given by Mr Justice Vasta to this inquiry in relation to the AAT matter."
    Also see 3.4.26:

> The evidence given about the same matter to this inquiry creates a difficult problem. The Commission did not seek any submissions about whether conduct occurring after 17 November 1988 could constitute behaviour under the meaning of s.4 upon the true construction of the Act, nor have any been made to it. It would be quite wrong in the absence of any such submissions for the Commission to reach a conclusion about this (meaning whether

> Vasta's 'false evidence' that occurred in March 1989 was misconduct within the meaning of the Act dated 17 November 1988), and constraints of time caused by the statutory (*sic*) obligation to report by 12 May 1989 did not enable any public hearings to be resumed after the Commission adjourned on 29 April.

Section 4 of the Act stated: "The Commission shall inquire and advise the Legislative Assembly whether - (a) in the opinion of the members of the Commission any behaviour of the Hon. Mr Justice Angelo Vasta since his appointment as a Judge of the Supreme Court constitutes such behaviour as, either of itself or in conjunction with any other behaviour, warrants his removal as a Judge of the Supreme Court."

50. *Sunday Mail*, 14 May 1989, p. 22.
51. "Shock! Journalists' evidence preferred to judge's", *Justinian*, July 1989, p. 10.
52. J.B. Thomas, *Judicial Ethics in Australia* (Sydney: Law Book Company, 1988), p. 97.
53. *Ibid*., p. 91.
54. *Fitzgerald, Report*, p. 200. This is a direct reference to the police. For specific comments on the judiciary see *Fitzgerald, Report*, pp. 328-30.
55. *Ibid*., p. 330.
56. *Ibid*.
57. *Ibid*., p. 141.
58. *Courier-Mail*, 19 October 1989, p. 11.
59. *Fitzgerald, Report*, pp. 328-30.
60. *Ibid*., p. 329.
61. **Section 2.20 (3) Conditions for investigation of a Judge by the Chairman of the Commission**

    (3) To the extent that an investigation by the Division is, or would be, in relation to the conduct of a judge of, or other person holding judicial office in, a court of the State, the authority of the Division to conduct the investigation -

    (a) is limited to investigating misconduct such as, if established, would warrant his removal from office;

    (b) shall be exercised by the Commission constituted by the Chairman;

    (c) shall be exercised in accordance with appropriate conditions and procedures settled in continuing consultations between the Chairman and the Chief Justice of the State.

7

Fitzgerald – How the Process Came Unstuck

Brian Toohey

The Fitzgerald Commission was established in accordance with long established practice in Australia. It gave early promise of proceeding along normal lines with greater skill - and to greater effect - than most of its predecessors. The radical departure occurred when it came to the final Report which refused to make findings on the evidence. I wish to argue that this tradition has been abandoned at severe cost to the reform process.

Fitzgerald's Terms of Reference set him squarely within the category of commission described by the Australian Law Reform Commission as, "first and foremost, fact finding bodies called on to investigate and make recommendations as to alleged abused in public affairs, alleged serious crimes or derelictions of duty affecting the public at large."[1]

Fitzgerald certainly did not spare himself when it came to the part about recommendations. It is just that he skipped the part about making findings on facts. What is more, many of the observations and recommendations that he did make were about matters on which he had taken little or no evidence. Unhappily, the common belief that the Fitzgerald Commission demonstrated the existence of high level corruption within Queensland before setting out detailed recommendations on how to deal with the problem is not borne out by even the most cursory reading of the final Report.

At the hearing stage, the technique of offering indemnities to senior police produced confessions of corruption that might otherwise have taken months of exhausting, and possibly inconclusive, investigation. These early breakthroughs, plus the process of hearing most of the evidence in public, helped create a level of media support, even adulation, that has rarely been achieved by other commissions. On those occasions when sections of the media turned fractious, they were reminded rather firmly of the contempt provisions available to a commissioner. At one stage, Fitzgerald took the bizarre step of demanding that

the *Courier-Mail* hand over all financial records relating to the money it had made from escort service and massage parlour advertising along with copies of all articles it had run on the Commission. Doubtless some moral point was being pursued here, but coming from a member of a profession which will take money from any client, no matter how despicable, it seemed to lose some of its force.

This minor aberration aside, however, the conduct of the Commission for the greater part of its life was a significant success. Admittedly, time was wasted on trivial examples of low level police corruption, but that is not unusual as a commission thrashes about in search of larger prey. Ultimately, what was disappointing was the failure to ask crucial questions of senior politicians and the refusal to call witnesses, particularly businessmen, who could throw light upon important evidence. In contrast to the hearings, the final Report is remarkable for the way in which it simply ignored the requirements of the initial terms to report upon the behaviour of named individuals such as Gerald, Antonio, and Vincenzo Bellini, Vittoria Conte, and Hector Hapeta.

After the Terms of Reference were widened, Fitzgerald heard serious allegations against politicians and senior police and managed to uncover pertinent documentation about certain questionable financial transactions. He did not, however, build upon this evidence to produce an overall picture of corruption, let alone provide findings about specific examples in the police force or the political and business spheres.

Fitzgerald did not lack resources or adequate personal recompense for his task. The Commission cost $24 million of which $2.3 million were fees paid to Fitzgerald himself for a little over two years' work. This would appear to be about 400 per cent more than a top silk could earn at the Brisbane bar and almost 1,000 per cent more than the average judge is paid.

The failure to make findings on the evidence before him is all the more surprising in view of the undertakings given in what Fitzgerald liked to call "homilies" delivered as part of the hearing process. On 19 October 1987, he said:

> I accept that there will be an obligation on me when I ultimately represent a report to the Government to ensure to the best of my ability that any unsubstantiated allegations are put to rest. The efficacy of that step to redress any possible damage to an innocent person's reputation must await publication of that report, but, once that occurs, I consider that both the community and innocent people who are named in evidence will be better served by freedom to publish the evidence as it is given than by restrictions which will occasion continued cynicism or lingering suspicions that there has been a cover-up...[2]

These words were repeated on 26 October.[3]

Fitzgerald also promised that he would deal with those who, upon consideration of the evidence, were regarded as guilty. On 31 August 1987 he said: "Once a process such as this is started, it must be carried to a satisfactory conclusion. If significant culprits escape the net, they are to some extent 'sanitised' and in an even stronger position to pursue their activities and escape detection in the future."[4]

The Deputy Commissioner, Patricia Wolfe, in a homily of her own on 20 June 1988, gave a graphic depiction of the sort of behaviour being dealt with: "The demimonde with which the Inquiry is concerned is not a jolly place peopled by happy-go-lucky fun lovers sampling the pleasures provided for them by generous benefactors. It is a world of greed, violence, corruption and exploitation, where the weak and the immature are preyed on even to the extent of the indescribable evil of the peddling of addictive drugs by which youthful lives are destroyed".[5]

Strong language, indeed! But any expectation raised by this robust statement that the Commission might make findings on the evidence regarding greed, violence, corruption, or drug dealing in its final report was not fulfilled. In the words of his own homily, it appears that many culprits will be "sanitised" by the omissions of Fitzgerald's Report, or, as he puts it with admirable frankness in the Report itself, "the guilty will be delighted no conclusions have been reached".[6]

Instead of carrying out the promises made in the homilies, Fitzgerald contented himself with the assertion that everyone was entitled to be considered innocent unless a court found otherwise. Nonetheless, the legislation under which Fitzgerald was operating makes plain that a commission's inquiries are to take precedence over those of any court.[7] His refusal to make findings means that much of the conflicting evidence taken during the hearings will remain unresolved with any harm to innocent people's reputations continuing unabated. His justification, in summary, was that it was no use dwelling on the past and that the more important task was to erect structures for the future to combat corruption in Queensland. A further argument is that adverse findings could prejudice a future trial. The potential for prejudice may exist but there are numerous examples from the past where courts have not taken such a view of the findings of a royal commission. The Slattery Commission, for example, drew adverse conclusions against former NSW Corrective Services Minister, Rex Jackson, but this was not considered by the courts to have prejudiced his subsequent trial.

Fitzgerald did not consider the problem to apply to the unfavourable publicity surrounding evidence given about several witnesses in the course of his Inquiry, although he could, of course, claim that findings by him carried more weight in a juror's mind. Many would argue that the situation is no different to committal proceedings in which jurors might be influenced by a magistrate's

decision that sufficient evidence exists for someone to stand trial or to the upshot of findings from the NSW Independent Commission Against Corruption (ICAC) that led to criminal charges. Others would argue that jurors are quite capable of concentrating their minds on the evidence before them rather than being mesmerised by something they might have read two or three years before.

From the writer's perspective, the success of a royal commission need not be judged on the extent of punitive court action that ensues in its wake. There may well be cases where there is little public benefit in attempting to send some old men to gaol. Detailed findings about how corruption actually worked might bring about more public awareness of the need for reform than the often narrow and protracted business of a trial. In any event, it is for the courts - not prosecutors or investigators - to decide whether a fair trial is possible.

Not only did Fitzgerald refuse to make findings about individuals, he declined to make findings about the general pattern of corruption in Queensland. He confined himself to a supposed neutral summary of parts of the evidence. Given the substantial resources available, it should have been feasible to bring down a four volume report: the first meeting his initial terms of reference on brothels and the like; the second outlining corruption in the highest ranks of the police force (there was no need to chase down every constable who had received a "freebie" from a freelance prostitute); the third assessing the probity of the relations between politicians and the various businessmen with whom they had financial relations, and the fourth setting out his recommendations for the future. As Professor Clem Lloyd puts it:

> Without analysis and assessment, the structure falls to the ground and the summary is virtually useless for inculcating into the public mind the basis for the transfiguring of the political and administrative culture of Queensland. The summary doesn't do the job that Fitzgerald demands of it ... Fitzgerald makes much of his Commission's mission to inform the public and establish in the community the basis for urgent reform. It is fair to judge the Report on the basis of the educative and propagandist roles claimed for it, and on both counts it largely fails ... There seems no valid reason why Fitzgerald should not have properly analysed the historical, causative elements and made appropriate findings upon them. Indeed, his laudable aspirations for quick and substantive reform would seem dependent on such a procedure. Fitzgerald conceived his Report as a 'catalyst and platform for continuing reform' designed to restore public confidence and improve political processes - 'the focus is on the future, not the past'. The problem is that without sufficient understanding of the past, it is difficult to design a blueprint for the future and to make it stick. By

playing down past abuses, the refusing to make findings upon them, Fitzgerald erodes his case for reform.[8]

Fitzgerald's decision not to make any findings about individuals, critical or otherwise, still leaves the question of what happens to those whose behaviour might not warrant criminal proceedings but nevertheless amounts to public impropriety. Lloyd draws attention to the 1930 Royal Commission into the behaviour of two former Queensland premiers, Ted Theodore and Bill McCormack, in the purchase of the Mungana mines. Historians who have since examined the issue considered the Royal Commission findings of impropriety soundly based although court action did not succeed at the time. For example, K.H. Kennedy writes in *The Mungana Affair*: "that the Crown failed to obtain a verdict in a civil suit, and would almost certainly have failed in a criminal prosecution, in no way alters the fact that the defendants had acted in collusion to profit dishonestly at the Crown's expense, in flagrant disregard of their public duty."[9] The Labor lawyer and historian, Michael Sexton, came to similar conclusions in a paper delivered to a Canberra conference in 1984.[10]

Even if it were considered desirable to remain silent about those who might be subject to criminal charges somewhere down the track, this is not a reason to refrain from comment on those who fall outside the scope of the criminal law but are in breach of normal ethical standards of public conduct. Limits in the law relating to secret commissions, for example, might prevent charges of bribery being laid without removing the possibility for a significant conflict of interest whose existence could well fall within the bounds of appropriate comment from a royal commissioner.

The issue was given sharp relief in the evidence taken by Fitzgerald about various financial transactions between businessmen and politicians in Queensland. Details were given of large loans, often repayable at an indeterminate time in the future, made to Russell Hinze by property developers and others who were seeking decisions within his ministerial discretion. The Report notes that in the four years to 30 June 1987, over $800,000 were described as "loans forgiven" or "loans written off" in the Hinze Group financial accounts.[11] Hinze was a man of considerable assets, yet none of the businessmen was called to explain why he should have received such generous treatment.

Unfortunately, Fitzgerald's comments in his final Report did not rise above the trite. He says: "Those (businessmen) with whom dealings took place may have neither sought nor received preferential treatment and no conclusions of impropriety have been drawn."[12] The businessmen "may" (or "may not") have done lots of things in their dealings with Cabinet ministers in Queensland. Some "may" even have been that old fashioned type who expected a return on funds outlaid.

Expensive royal commissions are established, however, because questions have been raised about what "may" have occurred - at the end of the process of inquiry the public can reasonably expect answers that explain what actually has happened. Yet Fitzgerald did not even seek in some of these transactions to go beyond the corporate entity used to find who were the principals.

Sometimes we get a name but little more. Why did the Cowrie Corporation, for example, which wrote off a loan of $80,000 to Hinze's Waverley Park Stud Pty Ltd, not make a greater effort to get its money back? All Fitzgerald tells us is that the loan had been made by a Victorian, Roger John Burt, and that Hinze had said he did not know Burt, or whether Cowrie Corporation was acting as agent or principal, and if an agent, for whom. In fact, the Cowrie Corporation is associated with a distinguished Melbourne businessman who had development interests on the Gold Coast. Even if Fitzgerald would not draw any conclusions about the propriety of the transaction, why could the public not be told who was involved?

Fitzgerald's handling of a $3million loan from the European Asian Bank to a Bjelke-Petersen family company is even more difficult to justify. Sir Joh's friend, Sir Edward Lyons, and Sir Joh himself had been involved in the negotiations for the loan. A report from a European Asian Bank official produced in evidence said that it had been told that granting the loan would help it get government business and that refusal would have a negative impact on its future in Queensland. Although the loan went ahead, Fitzgerald contented himself with recording that Sir Joh denied that he had "provided any basis for those comments".[14]

What happened? Did the Bank make it all up? Alternatively, who was it who provided the basis for the comments and were they authorised to do so? Fitzgerald does nothing to enlighten us, simply giving Joh's denial and leaving the Bank's credibility hanging in the air. Even if Fitzgerald did not wish to draw any conclusions, calling someone from the Bank to give its version of this crucial memo would seem to have been a task well within the time available to him as well as a simple requirement of fairness.

Fitzgerald repeated the formula used in regard to direct transactions between politicians and businessmen when it came to political donations: "Persons or organisations who made donations to the National Party of Australia (Qld) may have neither sought nor received preferential treatment and no conclusions of impropriety have been drawn."[15] Fitzgerald's apparent faith in the purity of the human spirit in business transactions with governments may be touching, but it does not appear to be shared by Adrian Roden QC, in comments he has made in the course of the inquiry he conducted on behalf of ICAC into various land dealings on the northern New South Wales coast.

While Fitzgerald refused to make findings on the evidence before him ·

something for which he was trained as a lawyer - he was happy to take up much of his Report with essays on police culture and possible management structures for the force that could have been written without the whole process of a royal commission and probably better written by someone with more expertise in these areas such as a sociologist, public administrator, or criminologist. Similarly, although he took no evidence on the topic, he was not deterred from making recommendations for an electoral redistribution which has become the main focus of the reaction to his Report. Getting rid of the gerrymander has merit but it hardly ranks at the core of dealing with corruption - New South Wales has managed to have a flourishing corruption industry for decades without rigged boundaries.

Unfortunately, one of the most superficial sections is on organised crime, in which he repeats all the stereotypes without the slightest attempt to anchor it in the evidence before the commission. According to Fitzgerald organised crime "is like a Hydra, and the removal of some of its heads will not kill it". [16] Its architects, we are told, hide behind a "veneer of respectability"[17], while the profits of organised crime are used to "buy skilled services from expert lawyers, accountants, financial and other advisers. That money also buys sophisticated technology ... (which) includes electronic communications, interception and monitoring equipment, secure information processing and storage systems, good transport and the best weaponry".[18]

The notion that subjects of Fitzgerald's investigation such as Hector Hapeta, could use anything more sophisticated than a telephone, let alone "secure information processing and storage systems" is simply fanciful. If Fitzgerald found anyone further up the line who remotely fitted these breathless caricatures of organised crime figures, he singularly fails to share his discovery with us. That, unhappily, is the result of his decision to depart from the normal requirements of a royal commission to make findings on the evidence and to concentrate instead on musing about a new administrative structure for Queensland.

Notes

1. Australian Law Reform Commission, Issue Paper no. 4.
2. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), pp. A190-1.
3. *Ibid.*, p. A193.
4. *Ibid.*, p. A185.
5. *Ibid.*, p. A210.
6. *Ibid.*, p. 8.

7. *Ibid.*, p. A4-5.
8. C. Lloyd, "Honest Graft? Aspects of Queensland's Fitzgerald Report", *Politics*, vol. 24, no. 2, November, (1989): pp. 128-9.
9. K.H. Kennedy, *The Mungana Affair* (St Lucia: University of Queensland Press, 1978), p. 122.
10. M. Sexton, "Royal Commissions and the Australian Political Process", unpublished paper, 1984, quoted in C. Lloyd, *Honest Graft*, p. 126.
11. *Fitzgerald, Report,* pp. 103-016.
12. *Ibid*., p. 86.
13. *Ibid*., pp. 105-6.
14. *Ibid*., p. 92.
15. *Ibid*., p. 91.
16. *Ibid*., p. 162.
17. *Ibid*.
18. *Ibid*.

8

Did Fitzgerald Go Too Far? A Response From the Queensland Law Society

Greg Vickery

Did Fitzgerald go too far? The question is one of great complexity. Counterbalancing the vigorous assertions of those who are of the view that the Report did go too far are the equally held views of those who believe that it did not go far enough. This chapter will examine some of the reasons why these diametrically opposed views can be so strongly held.

At the outset, it is necessary to examine briefly the Terms of Reference of the Fitzgerald Inquiry, the ambit of which was enhanced markedly during the Inquiry. The initial Terms of Reference required the Commissioner to inquire into the conduct of five named individuals in respect of corrupt conduct.[1] Further, the Commissioner was required to report in general terms whether existing legislation and procedures were adequate to ensure that corrupt conduct was detected and reported.[2]

A month after the Commission of Inquiry was established the period to be investigated was extended from June 1982 back to January 1977. An additional fourth Term of Reference was added requiring the Commission to report on any other matter arising out of the existing Terms which seemed proper and in the public interest.[3]

On 25 August 1988, this fourth Term of Reference was expanded, inviting a report by the Commissioner of any matter or thing "concerning possible criminal activity, neglect or violation of duty or official misconduct or impropriety, the inquiry into which to you, shall seem meet and proper in the public interest".

Thus Commissioner Fitzgerald's Terms of Reference were changed from a most specific inquiry regarding certain persons alleged to be involved in particular, and identified illegal activities, to an extremely wide-ranging brief to examine any

possible criminal activity, official misconduct or impropriety "as appeared to the Commission to be in the public interest".

This chapter will look first at the views of those who believe the Report did not go far enough, in that it did not address each of the specific References. Those who looked to the Report for a clear statement concerning the criminality or otherwise of the conduct of the individuals names in the initial Terms of Reference may have been disappointed. To them, the response of the Queensland Law Society is that one of the greatest risks of commissions of inquiry and royal commissions, as perceived by lawyers, is the potential of such inquiries to jeopardise the proper administration of criminal justice by adversely affecting the prospects of a fair trial of persons indicted as a result of the findings of such commissions. In addition, there is grave risk of destruction of the reputation of persons named in the proceedings of the commission without such persons ever being charged with an offence or being afforded the chance to restore their reputations.

The competing merits of open or closed hearings and questions relating to the publication of detailed findings, are issues of polarised debate. Commonwealth Director of Public Prosecutions, Mark Weinberg QC, recently queried the wisdom of having public hearings at corruption commissions given the attendant media publicity. He remarked that the rules of evidence do not apply to the conduct of such hearings and it followed that allegations based upon nothing more than hearsay, or hearsay upon hearsay, could be aired and reported without any finding having been made as to their veracity.[4]

The contrary view has been argued by Adrian Roden QC, Assistant Commissioner of the New South Wales Independent Commission Against Corruption (ICAC). He was of the opinion "that justice done behind closed doors is open to abuse and must be beyond question. Public confidence in the administration of justice cannot be maintained within a context of secrecy ..."[5] Tony Fitzgerald QC, took the view that the proceedings before his Commission should, for the most part, be open to the public.

The further problem that a commission of inquiry may raise for the general administration of criminal justice is the publication of the Report itself. On this question the Government hesitated for some time before resolving to table and publish the Report as soon as it was received.

The two factors - the public conduct of the greater part of the Inquiry and the publication of the Report - are to be commended, but such a course once adopted requires its own specific constraint if a fair trial is to be available to those subsequently charged.

Much of the material likely to jeopardise the fair conduct of future trials has not been published or examined in detail in the Report. That material instead has been passed to the office of the Special Prosecutor, which was created prior to the completion of the Commission and before the establishment of the more recently enacted and embryonic Criminal Justice Commission (CJC).[6]

It is the view of the Law Society that the difficult problems which confront any royal commission have been adequately addressed by the style of the proceedings and Report of Commissioner Fitzgerald and the procedures subsequently adopted in relation to the prosecutions which have been or will be commenced as a result of the Inquiry.

It is more difficult to address the suggestion of those who maintain the Report goes too far. It is certainly true that few Queenslanders who studied the initial Terms of Reference given to Commissioner Fitzgerald would have anticipated that the final Report would recommend the creation of a permanent Criminal Justice Commission (CJC) or the more unlikely Electoral and Administrative Review Commission (EARC) with its recommended task, *inter alia*, of a review of the State's electoral system.

It is believed that few, if any, Queenslanders would have had any comprehensive appreciation of the extent of the activities examined in the Report under the heading "Some other aspects of recent politics in Queensland". That section deals at some length with instances involving ministers of the Crown in numerous activities in circumstances where the Report suggests a real or apparent conflict of personal interest and public duty may have arisen.[7] It will be seen by many as adequate justification for the EARC recommendation.

The Queensland Law Society sought and obtained leave to appear before the Fitzgerald Commission and made submissions upon those References relating to the adequacy of existing legislation to detect and deal with official misconduct and corruption.

The Society submitted that the evidence received by the Commission had revealed a need for the creation of an independent commission against corruption and asked for the establishment of such a commission for a term strictly limited by a sunset clause of approximately three years. The Society's submissions used as a model, the 1988 New South Wales legislation creating an independent anti-corruption commission in that State (*New South Wales Independent Commission Against Corruption Act 1988*), and recommended the adoption of similar legislation in Queensland, subject to a number of relatively minor but significant amendments.

The Society's submissions also examined the work of the New South Wales Ombudsman in the investigation of complaints against police for the three years to August 1987. As a result, the Society also recommended retention and restructuring of the Police Complaints Tribunal (Queensland). Specifically, the Society suggested that the procedures and legislation in place in New South Wales (*The Ombudsman Act*) and the Police Regulations (*Allegations of Misconduct Act*) had demonstrated that allegations of misconduct against serving police officers could be dealt with effectively by carefully selected serving officers seconded to an independent investigatory body, provided that such a body was given the necessary legislative powers and, more importantly, adequate financial resources. The Society, previously a vehement critic of the relatively ineffective Police Complaints Tribunal in Queensland, believed that, with the necessary injection of resources and power, it could develop into a specialised and effective body which could attract and enjoy public confidence.

Assessment of Fitzgerald Recommendations

This section deals principally with the recommendations for the creation of a criminal justice commission, with its enabling legislation (*Criminal Justice Commission Act 1989*) and the extent of the justification for the extraordinary powers which are to reside in that permanent commission. The Report recommended the creation of a permanent commission to bring together a number of functions not properly addressed in Queensland at present. It will provide a mechanism for the continuation of investigations into official misconduct in this State. It will oversee reform of the police force. It will maintain and develop criminal intelligence services. It will monitor the administration of criminal justice generally *and* it will generate proposals for reform of the criminal law. In short, it has a broad charter in all aspects of the criminal justice system and some of the functions given to it may not necessarily sit comfortably with others.

The function of initiating criminal law reform was not one which the Society had contemplated as appropriate to an anti-corruption commission at the time it made submissions to the Fitzgerald Inquiry. The Society has, of course, since had the benefit of the written report and has considered the numerous findings of Commissioner Fitzgerald in relation to the unsatisfactory aspects of the present legislative processes in Queensland, particularly in areas of criminal law and general public order legislation. The Report examined the ramifications of the politicising of the administration and observed that a system which had provided the Executive Government with comprehensive control over the careers of public

officials had created special pressures upon them as a result of which merit had been ignored often and political loyalty had in some cases been rewarded.[8] As a result, the independence and impartiality of the public service had been eroded and the Parliament had been deprived of the opportunity to consider all relevant factors in making important legislative policy decisions.

The Report found that a major consequence of politicising the bureaucracy was a reliance on inappropriate considerations in the decision making process. The Report identified both inadequate critical assessment by government of draft legislation and lack of an adequate mechanism by which new or contrary views could be expressed.

It has long been of concern to the Society that detailed commentary and submissions to government in relation to proposals for the amendment of legislation, particularly in relation to public order and criminal law matters, have often gone unheeded. The submissions have been dispassionate and have been intended to draw attention to the unwarranted or the unintended results of proposed legislative changes or have drawn attention to the iniquitous or unjust provisions in existing legislation, (*The Drugs Misuse Act*). They have on occasions in the past failed because of opposition from those in public service who are charged with the administration of the existing law.

Much of this legislative reform is now placed in the hands of the CJC. The Commission, however, is also charged with an important role in the enforcement of the criminal law (in conjunction with the Director of Prosecutions and the Special Prosecutor). Great care will be needed to ensure that future amendments to the criminal law are not biased towards facilitating new methods of intrusive investigation and the prosecution of the accused at the expense of basic civil liberties.

On this point, the Society draws attention to two legislative changes which have occurred in conjunction with the work and report of the Fitzgerald Commission. Both changes have the potential to alter substantially the balance which as been established over many years between the rights of the citizen and those of the State in the administration of criminal justice.

Firstly, the amendment to Section 14 of the *Commissions of Inquiry Act 1950-89* which occurred on 16 March 1989. This section had previously provided that anyone who answered questions or produced documents before an inquiry under compulsion of the Act was protected from self-incrimination in relation to such "statements or disclosures" in any subsequent civil or criminal proceedings. It is contended that this amendment has dramatically reduced the traditional immunity from self-incrimination by removing the protection previously afforded

to statutory declarations by witnesses tendered in response to the questions of a commission of inquiry. The Society had no opportunity to comment on the amendment prior to its enactment because, like so much public order legislation in this State in recent years, it passed through all stages in the House the day after its introduction as a result of Standing Orders being suspended. The Society subsequently urged repeal of the amendment and has been informed by the Special Prosecutor that he would not seek to introduce in evidence a self-incriminatory statutory declaration provided in response to a question asked under compulsion at the Commission of Inquiry.

While the commendable attitude of the Special Prosecutor provides a satisfactory practical result, the criminal law should not have to rely for its operation upon the attitude of senior officers charged with its enforcement. The amendment remains most unsatisfactory.

A not dissimilar machinery provision is to be found in Section 20 of the *Special Prosecutor Act 1988*. This section provides absolute protection to the Chairman of the Commission of Inquiry and any person assisting the commission from any requirement to produce in any proceedings, any document or material in the possession of the commission or to divulge any information to any person. The Commission was at the same time, permitted to communicate such information to the Special Prosecutor but was able to direct the Special Prosecutor in turn, not to further divulge that information. Section 21 endeavours to provide the machinery to ensure that such material in the hands of the Special Prosecutor, if necessary for the fair trial of an accused, would be available or admitted upon that trial.

This complex provision seeks to restore some of the common law rights removed by Section 20. The machinery provided by the section is imperfect but the Society does not propose to canvass in detail the problems that may arise in its satisfactory operation. It is sufficient for the purposes of this paper to observe that Section 21 does not provide any machinery to access material in the hands of the Commission when that material has not been communicated to the Special Prosecutor. In such circumstances, the accused may have no knowledge of the existence or nature of the material. Even if the existence of the material was suspected and in the course of a prosecution, it became relevant to the fair trial of the accused, there is no machinery by which that material could be brought to the attention of the court because of the comprehensive protection afforded by Section 20.

This section was the subject of an unsuccessful objection in submissions by the Society prior to the enactment of the legislation. A recent case serves to bring the Society's concerns into focus. One of the significant powers of the Fitzgerald

Commission was to facilitate the granting of indemnities from prosecution to those who appeared before it. The case referred to arose from the evidence of one such indemnified witness and provides an example of the dangers inherent in the section in the Special Prosecutors Act referred to.[9]

In that case it was alleged that the evidence of an indemnified witness which was sought to be used in the prosecution of an accused was so tainted by threats and inducements offered to the witness that it should not be admitted. The Fitzgerald Commission at first took steps to resist the discovery upon subpoena of the material which disclosed the nature of the dealings between the investigating officers and the indemnified witness. By agreement, however, tape recorded material did subsequently come before the trial judge.

The trial Judge, de Jersey J., in ruling against the prosecution found that attempts to instil fear in the witness, notwithstanding his repeated denials, were such that there was a very grave risk that the witness' statements were not truthful but were "his response to what he felt the Inquiry officers wanted him to say".

If Section 20 of the Act had been in force at the relevant time, there would have been no power to force any production of the tapes which revealed the circumstances in which the indemnified witness made statements incriminating the accused. The case serves to highlight the dangers which may flow from the concentration of extraordinary inquisitorial powers in one body or commission.

There is a general tendency to favour the state in important changes in the balance between state and citizen in the administration of criminal justice. As was indicated previously the Society has submitted that an independent commission should be created to investigate public corruption, but *such a body should be subject to a sunset clause*. It is that point which will now be enlarged upon.

Commissions of inquiry in this country traditionally are armed with extraordinary powers. However, the limited life and the specific (and public) Terms of Reference of such commissions tend to act as an inbuilt safeguard against three potentially grave problems, namely: the abuse of power; external corruption influences; and improper or inappropriate intrusion by government.

The Society has supported the creation of a commission to complete the matters raised by, but not finalised by the Fitzgerald investigations. The Society does not, however, believe that there is a case for the establishment of a permanent commission with the wide powers proposed in the Criminal Justice Commission Bill. The permanent nature of the CJC and the broad and general ambit of its Terms of Reference may lead to a greater risk of susceptibility to the three problems referred to already.

What avenue does a person with a genuine grievance against the CJC now pursue? Without effective review procedures in place, how will public confidence be sustained in a permanent body when allegations whether they be true or malicious are brought against it?

It is the concern of the Society that there is no fail-safe mechanism which will ensure that a permanent commission does not fall victim to the ills which were examined and identified in other arms of government by the Fitzgerald Commission.

There is, unfortunately, a recent history of many abuses of the criminal justice system in Queensland. Such instances identified in the Fitzgerald Report and by earlier inquiries include cases where criminal elements in the police force have brought false charges, have fabricated evidence or have intimidated both members of the public and other serving officers. There are examples of politicians zealously calling for massive applications of police resources to perceived problems which are essentially moral issues or revenue matters rather than matters which are truly criminal in nature. The Fitzgerald Report has identified this tendency in many varied examples and controversial issues such as abortion, the banning of obscene publications, and SP bookmaking. It is self-evident to the Society that as the powers to police the criminal law become more arbitrary and more intrusive, there follows a greater risk of abuse of those powers and the reduced prospect of detection of such abuse.

The Terms of Reference of the Fitzgerald Commission in respect of the illegal drug trade in Queensland have been mentioned previously. The Report, however, does not canvass significantly the extent of the drug trade in Queensland. It does observe that the huge profits from drugs and the number of organised criminal suppliers are matters of notoriety in the State and that attempts to stamp out this illicit traffic have consumed extraordinary resources, but have largely failed here, as in the rest of the world.[10] The Report further states that those attempts have caused more incursions on the civil liberties of people and revealed more corruption than has been the case in policing any other criminal activity.

If the statistics of law enforcement agencies are to be accepted, then the illegal drug trade is both the most profitable and most dangerous criminal activity in modern society, and is the most capable and effective in subverting the agencies created to control it. There have been many recorded cases in this country demonstrating the success of those involved in the illegal drug trade in corrupting individual law enforcement officers and agencies, including corruption at the highest level.

On balance, the Society has come to the view that the Fitzgerald Report has gone too far in that the CJC is not the subject of a sunset clause. The Society would have preferred a sunset clause so that Parliament could examine the reports and recommendations of its monitoring committee at the expiration of the fourth year of the life of the CJC. Unless Parliament then resolved to extend its term, the CJC would automatically wind-up at the end of the fifth year of its term, and the tasks given it would then be referred to those authorities previously responsible for them or to any new bodies which may then be established.

In conclusion, the Society has been gratified by the response to the detailed submissions which it has made in relation to the structure and powers of the CJC. A considerable number of the Society's submissions were adopted in the amendments to the Bill which passed through the House in October 1989. The Society understands the legislation will be further reviewed next year and additional amendments could be anticipated. It is to be hoped that the need for a sunset clause will be re-examined at that time.

Notes

1. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. A25.
2. *Fitzgerald, Report*, ref. no. 3.
3. *Fitzgerald, Report*, p. A27.
4. *Australian Law News*, November, (1989): p. 18.
5. *Ibid.*, p. 19.
6. *Special Prosecutor Act (1988)*.
7. *Fitzgerald, Report*, pp. 85-118.
8. *Ibid.*, p. 129.
9. *R. v. Falzon*, Supreme Court of Queensland, July 1989, (unreported).
10. *Fitzgerald, Report*, p. 194.

9

The Fate of Inquiries: Will Fitzgerald Be Different?

Scott Prasser

This chapter focuses on the sorts of issues confronting the Fitzgerald Commission, as a public inquiry, in having its recommendations not only accepted by government, but also implemented.[1] By implementation we mean, "to carry out, accomplish, fulfil, produce, complete."[2]

Implementation is the "making it happen" part of the public inquiry process - a process that begins with the inquiry's initial appointment, the setting of terms of reference, selection of members and goes on to include investigation, research, and analysis until it culminates in the formal presentation of the inquiry's written report. Implementation is the next step. Implementation is putting action to recommendations. No matter how long and winding the road was for an inquiry in preparing its report, the real task is in translating the inquiry report into action. As Frank Costigan, who chaired the Royal Commission into the Painters and Dockers Union warned on the eve of the Fitzgerald Report's release: "One thing needs to be understood. Really, the easy job has been done (i.e. the preparation of the inquiry report) ... The hard work is to be done from now on ... that's the implementing of it."[3]

This chapter is not concerned with the substantive content of the Fitzgerald Report. Rather attention is given to identifying the key prerequisites required for the successful implementation of an inquiry's recommendations, and comparing these with the Fitzgerald Commission.

The Importance of Implementation

The inevitable test of an inquiry's success is whether its recommendations have been implemented, or perceived to be implemented. No matter how competent an inquiry report, how well it did its investigations, how much publicity it received or the status of its membership, in the final analysis the extent to which an inquiry's

proposals are carried out becomes for many, the final and only criterion of assessing whether an inquiry is a success or not. Implementation of recommendations is every inquiry's dream waiting to be fulfilled and every inquiry's nightmare it wishes to avoid. This concern with implementation arises for a number of reasons.

Foremost amongst these, is that successful implementation of an inquiry's recommendations would dispel some of the cynicism by commentators and the public about public inquiries in general. J.C. Courtney's comments about the dissatisfaction with Canadian royal commissions is a good summation of this: "... royal commissions have proved popular targets for criticism ... It is claimed that royal commissions ... are frequently appointed to relieve the government of pressure ... that the government does not seriously intend to implement the commissioners' recommendations ... that the ... commissioners ... are not detached from and unsympathetic towards the ... government of the day ... are too costly and ... the reports ... do little else but gather dust in archives ..."[4]

In the United Kingdom, A.P. Herbert believed that royal commissions and other types of inquiries were appointed "not so much for digging up the truth as for digging it in".[5] In Australia the lack of action by governments provoked one journalist to conclude that public inquiries were "a wilful waste of public money and private time".[6] Non-implementation has given inquiries a bad name. As Martin Bulmer observed, "the greatest degree of dissatisfaction with royal commissions has been at the implementation stage".[7] Sheriff reinforces this view: "... the achievement of a Royal Commission or Committee cannot be judged only on the basis of the intrinsic or absolute value of their recommendations, but also on the extent to which the changes they propose are implemented".[8]

Slow or non-implementation of inquiry reports seems an occupational hazard of inquiries. The pattern always appears the same. Some crisis, serious allegations of impropriety, or accumulated criticism provokes a government to appoint a public inquiry. Prominent persons are appointed, public hearings held and government support for the inquiry seems strong and unequivocal. The final report is released amid much publicity and government statements of apparent unreserved acceptance of the recommendations. Inevitably this proves in many cases to be a false dawn. By its temporary nature the inquiry is disbanded and its members dispersed. Without the ongoing drama of public hearings or the newsworthy nature of public revelations media and public interest lapses. Nothing happens.

Mr Justice Moffit's comments about the lack of government action concerning his (into Corruption in New South Wales) Justice Woodward's (Drug Trafficking) and Frank Costigan's (Painters and Dockers) Inquiries reflect the frustration by inquiry members about the non-implementation of their reports:

"Genuine decision and action is ... postponed and often avoided altogether. General recommendations ... have been made by a succession of inquiries but ... the response has largely been negative, at best piecemeal on isolated matters, usually in a watered down form. An inquiry, being complete, some matters may be taken up, but otherwise the reports and recommendations are pigeon-holed."[9] This lament is not atypical. Many of those involved in the various federal and state inquiries in the areas of corruption and administrative reform have stated similar concerns and frustrations.[10] Indeed, the repeated number of inquiries in these areas (and other areas of public policy) indicates the lack of action on the different reports.[11] Inaction it seems begets further inquiries.

This pattern is also the case in Queensland. The Fitzgerald Commission was to some extent the culmination of the lack of government action concerning other royal commissions and inquiries into police and related areas during the preceding two decades.[12] As Coaldrake and Wanna comment about these other pre-Fitzgerald inquiries in Queensland: "The occasional inquiry had been established ... But such inquiries were limited in their terms of reference, and their findings or recommendations were either politically marginalised or simply neglected. Demands for action ... were systematically ignored."[13]

Another reason why implementation of inquiry reports is deemed to be important is that governments are often judged by their willingness to accept, almost without question, an inquiry's recommendations. Whether the report got it right is often ignored in this demand for "action". Delay by governments is frequently portrayed as sabotage, conspiracy and a gross dereliction of duty on the part of governments. The government's right to assess, test and evaluate a report is too often ignored in the demand for 'action'. When governments reject inquiries, commentators are apt to infer from this that although the government established an inquiry it did not really have an open mind on the matter. A course of action was already decided. The inquiry was only some symbolic act to promote a perception of consultation and openness. As Michelle Grattan observed, the Gruen Assets Test Inquiry failed to have its unanimous recommendations accepted because "it did not give what was wanted".[14] Professor Fowke's comment on this demand is worth noting: "With our modern cult of progress and of activism we can apparently never admit the possibility that under certain circumstances the best action may be no action at all."[15]

This editorial from the *Courier-Mail* on the release of the Fitzgerald Report highlights the demand for unconditional acceptance of the Fitzgerald Report: "Now that Mr Fitzgerald has given the Government guidelines ... they must be followed without deviation ... Mr Fitzgerald has discharged a difficult duty in an admirable fashion. Now it is up to the Government to restore public confidence in those institutions which have been so damaged for so long."[16]

Indeed, the particular nature of the Fitzgerald Report and its immense public impact had forced the Queensland Government under Premier Ahern to accept its recommendations "lock stock and barrel" a year before it was released.[17] This is unprecedented with inquiries. Controversial inquiries such as the Costigan Royal Commission and others investigating ministerial impropriety during the last twenty years have not received such *carte blanche* endorsement before they have actually reported. The implications of this open door policy and the expectations it raised concerning the acceptance and implementation of all aspects of the Fitzgerald Report regardless of their suitability needs to be appreciated.

Lastly, implementation verifies that an inquiry got it right concerning the particular issue it was investigating. Failure to implement, for whatever reason, reflects badly on the inquiry and its members. It is for this reason that those who chair inquiries often lay great stress on the need for their recommendations to be fully carried out without deviation, modification or compromise. This is a combination of belief in the report, and the desire to show how much influence the inquiry, and they personally have in government circles.

Commissioner Tony Fitzgerald believed his Inquiry had got it right. He stressed the connection between implementation of his recommendations and the solving of Queensland's corruption problems: "The recommendations in this report are aimed at allowing permanent institutions and systems to work properly ... This report endeavours to identify the major problems. It refers to issues which show the need for the introduction of new structures and systems, and revision of the old ones, as foundations for reform."[18]

Like many an inquiry chair before him, Fitzgerald warned against any piecemeal adoption of his recommendations: "This report proposes a package of reform, comprising a number of elements. Each element has advantages and disadvantages, but the whole is aimed at achieving the best balance between competing considerations. Each component is vulnerable to selective criticism ... Acceptance of any such selective criticism could lead to an altered and reduced package, perhaps worse than useless."[19]

This now brings us to the fundamental issue of identifying the prerequisites needed to ensure successful implementation of a public inquiry report and comparing these to the Fitzgerald Inquiry.

Prerequisites for Implementation

Regardless of the prestige and publicity concerning the Fitzgerald Commission and its now perceived place in Queensland's political history, the fact remains that it is a public inquiry. Its strength and limitations are set by its basic structural form as a public inquiry and the place of such bodies in our political system. For instance,

public inquiries in the Australian political context have no formal constitutional standing. Unlike the Swedish system[20] public inquiries in Westminster democracies exist at the whim of governments. Their appointment , membership, terms of reference, resources and deadlines are decided by the government of the day, not by any prescribed constitutional rules or set out formula. What happens to an inquiry report is very much dependent upon the government. There is no requirement (unlike Federal parliamentary committee reports)[21] for governments to respond formally to an inquiry report.

Governments in our political system have a range of techniques at their disposal to thwart the implementation of inquiry recommendations, such as:

- *Nip in the bud* approach by giving an inquiry limited terms of reference, unreasonable deadlines, poor resources (e.g. Gibbs Royal Commission into the National Hotel Allegations) and at times also, careful selection of the inquiry's members ;[22]
- *Ignoring them*, whereby no formal response is ever given (e.g. Sturgess Inquiry into Sexual Offences Involving Children and Related Matters);[23]
- *Find flaws* response by which the report is not condemned outright, but faults are found and further investigations are either suggested or initiated (e.g. Evatt Royal Commission into Agent Orange);[24]
- *Open attack* technique by which a government publicly attacks the veracity of the inquiry report and in some cases the chair (e.g. Fraser Government's response to the Woodward Royal Commission into the Australian Meat Industry);[25]
- *Bureaucratise them* response by which a number of committees or task forces are established within the bureaucracy, ostensibly to make an inquiry "happen", but with the knowledge (or hope) that normal inter-departmental rivalries and professional jealousies would either strangle or at least slow down the implementation process (e.g. Lucas Committee of Inquiry into Enforcement of Criminal Law in Queensland);[26]
- *We fully accept, are doing it, or have done it* strategy by which a government removes demand for action over an inquiry report by repeatedly stressing how implementation was or is in the process of occurring (e.g. Premier Neville Wran's responses to criticisms from Justice Woodward concerning Royal Commission into Drug Trafficking).[27]

Given these circumstances and the general disillusionment about the impact of public inquiries already highlighted, is implementation of an inquiry report a lost cause? Dr Peter Wilenski, who chaired and was a member of several inquiries, believes not. "Determined efforts", he states, "can in the right

environment create major change in systems of public administration."[28] For Wilenski, the problem has been that attempts to develop, "prerequisites of reform and to pursue a strategy to overcome anticipated resistance", have been "rarely pursued".[29]

So implementation of inquiry recommendations is not automatic. Successful implementation of inquiry reports requires all or some of the following prerequisites to be met:

1. Adequate time, resources and terms of reference.
2. Sufficient public and political interest both during and after the inquiry to ensure the report can be sustained on the political agenda.
3. Continuing role of the inquiry and its members in the formal implementation phase.
4. Active promotion and publicity of the report by inquiry members.
5. Creation of new institutions and procedures to oversee and take responsibility for implementing the recommendations.
6. Recruitment of new personnel into existing and new institutions.
7. Legislative backing for the recommendations.
8. Nature of recommendations.
9. Political will and support.[30]

Each of these will now be examined in relation to the Fitzgerald Inquiry.

1. *Adequate Time, Resources and Terms of Reference*

Adequate time, resources and appropriate terms of reference are needed to allow an inquiry to get to the hub of the problem. Although public inquiries are technically "independent" from government as noted, their terms of reference, resource allocations and reporting deadlines are in fact set by government. Justice Woodward, who headed the NSW Royal Commission into Drugs lamented that "unpleasant results can be avoided by refusing to extend the terms or the time ..."[31] Similarly, Frank Costigan, chairman of the Royal Commission into the Painters' and Dockers' Union sought (unsuccessfully) an eight month extension to his investigations, which he said, unless granted would make it impossible, "... to maintain the thrust of my investigations or to hand them over to a new crime authority in an efficient and sensible manner".[32] Other examples can be cited.[33]

In this regard, the Fitzgerald Commission has differed from most other public inquiries established in Australia. Initially it was envisaged as a brief six week inquiry. As the then Justice Minister Paul Clauson stated at the time, "We would not like the inquiry to become a major production."[34] The Labor Party

Opposition saw such statements and restrictive deadlines as making the inquiry as ineffective as its many predecessors.[35] Once the Fitzgerald Inquiry began and because revelations were made public, it became unstoppable. Within a month of its original appointment, its Terms of Reference were expanded. Its deadline was extended. In the end, the Commission set its own deadlines. Six months after its establishment, the *Commission of Inquiry Act 1950-1989* was amended to give the Fitzgerald Inquiry additional powers such as to electronically monitor premises, subpoena witnesses from interstate and to compel witnesses to answer questions. Fitzgerald asked for, and received extra assistance in the form of assistant commissioners, research staff and an apparently unlimited budget.[36] As one journalist commented, "the inquiry has blossomed from mini series to mega production dimensions".[37] Indeed, the Fitzgerald Commission became the titan of inquiries. It cost more, ran longer, employed more staff than almost any other inquiry in Australia's history[38] - another first for Queensland?

2. *Sufficient Public and Political Interest*

The reason why the Fitzgerald Commission was so successful in gaining adequate powers and resources brings us to the second prerequisite for implementation - sufficient public and political interest. Once established, many inquiries and the topics they are investigating quietly disappear from the political agenda. Indeed, inquiries are often seen as an important technique used by governments to control the political agenda and to render controversial issues harmless.[39]

This does not always have to be the case. Inquiries can adopt certain strategies to overcome these limitations. For instance, holding public hearings and promoting media reporting of the proceedings can help highlight the activities of the inquiry and thus promote public interest and political support.

The Fitzgerald Commission appreciated this and developed appropriate strategies to promote interest and support. As the Fitzgerald Report explains: "This Inquiry could not have proceeded without public confidence, co-operation and support. That meant the Inquiry had to be as open as possible, so that the public including people with information, could see that it was a genuine search for the truth. Such a course was also necessary so that the Inquiry could generate enough momentum to overcome any attempt which might have been made to interfere."[40]

Hence, explains Fitzgerald, "apart from one brief sitting ... all the evidence of the Inquiry was heard in public",[41] and "with a few exceptions, all exhibits were made available to the media".[42] Without this openness and despite the adverse effect it had on some individuals because of hearsay evidence, the Commission concluded it "could not have got as far as it did".[43]

The Fitzgerald Inquiry was in contrast with the previous Queensland inquiries into corruption (Gibbs Royal Commission and Lucas Inquiry).[44] These were largely conducted behind closed doors and did not gain the public exposure and interest to sustain them after their investigations were completed. With the Fitzgerald Inquiry the public hearings became a focal point of media attention and the nature of the evidence given at these hearings meant that public interest was both sustained and heightened.[45] The culmination of this media and public interest was seen on the actual release of the Fitzgerald Report on the 3 July 1989. There was intense media coverage of the Fitzgerald Report unprecedented for an inquiry in Queensland or Australia.

3. *Continuing Role of the Inquiry and Members*

A continuing role for an inquiry and its members in the actual implementation process is seen as essential for success. However, this rarely occurs with public inquiries. As Martin Bulmer concluded in this regard about the British experience of inquiries, there was usually: "an absence of any machinery for follow-up ... A commission goes out of existence once its report is produced and plays no part in the implementation of its proposals. Individual chairmen and members do continue to campaign for its recommendations, but in a personal capacity".[46]

Inquiries are transitory in nature. They lack constitutional status and powers. There are no requirements for governments to either formally respond to inquiry reports, or to allow an inquiry and its members to have any ongoing role in implementation. In these circumstances, says Wilenski, governments can "ignore a report until its recommendations become obsolete".[47] Alternatively, the report may be given to the public service for both assessment and implementation. Too often public servants are "preoccupied with their continuing functions"[48] to take on an additional duty with much energy. Also, the public service or parts of it, may have been the cause of the inquiry's establishment. If so, there will be a reluctance to accept an inquiry's proposals. This has been a greater problem for inquiries concerned with institutional corruption. Where and to whom in the existing public bureaucracy should such inquiry reports be lodged? In such cases, without any ongoing role for inquiry members, it would be easy for the inquiry report to be "hijacked", by the more permanent institutions of government. The Fitzgerald Commission itself noted how the Lucas Inquiry (1976) was not only "hijacked" by the key departments of the Queensland Public Service, but also one of its key members, Des Sturgess was never later contacted or consulted: "In a cynical exercise of obfuscation and delay, the Government set up a committee comprising Lewis, the then Solicitor-General, and the then Under-Secretary Department of Justice, to review the Lucas Report. For practical purposes that was the end of the

matter for over a decade. Sturgess was never again contacted by anybody representing the Government about the Report, which was effectively ignored."[49]

Not only does the lack of any continuing role for an inquiry mean its recommendations may be ignored, but also it means an inquiry does "not have the opportunity of defending its report against criticism or rebutting criticism."[50] Its recommendations may, in these circumstances be misinterpreted or misunderstood. This was precisely the complaint of Sir Ernest Savage who chaired the Queensland Public Sector Review Committee (1987). He argued that the Queensland Government's failure to implement his four most important recommendations was because: "counter proposals were put to ministers in private and/or in circumstances where the original reform proposals had no advocate. Sadly, there are some who are interested not only in maintaining a power base, but in extending it - sometimes over matters which were outside their perceived area of responsibility".[51]

Because the problems identified by the Fitzgerald Report were the "products of long term deficiencies in public administration",[52] these issues of sabotage are even more pertinent. The Fitzgerald Inquiry appreciated this and proposed that: "To facilitate a timely handover of control of the information system and its accommodation and to ensure continuity of the investigative process it will be necessary for this Commission of Inquiry to remain functional until the CJC [Criminal Justice Commission] and its essential elements are established and capable of providing continuity of operations."[53]

For the Fitzgerald Commission, the release of its initial report was not the end of its role, but the beginning as "the work started by this Commission of Inquiry has not been completed".[54] Its real task was "to found the process of reform",[55] and "much remains to be done".[56]

Other inquiries such as the Costigan Royal Commission have made similar comments about the breadth of the problems discovered and the need for continuity. It was Fitzgerald's firm demand for an ongoing role of the Commission in its actual report, combined with the Queensland political environment at the time whereby the National Party Government could not politically afford to refuse its requests, that made the Fitzgerald Commission so different and successful in this regard. Consequently unlike other inquiries, the Fitzgerald Commission did not disband upon the release of its report, but continued as an interim organisation until the CJC and Electoral and Administrative Reform Commission (EARC) were established.

In relation to a continuing role in the implementation process of key Fitzgerald Inquiry members and staff, there was a mixed result. Certainly, many staff involved in the Inquiry's data gathering and investigative activities did remain with the Interim Commission and have subsequently been appointed to the CJC

and EARC. Doug Drummond QC, who had initially joined the Commission as a Senior Counsel Assisting, and was later appointed Special Prosecutor, has continued in this role. Peter Forster who acted as a consultant to the Commission was subsequently appointed to head the Special Implementation Unit (see later). However, the Inquiry's Chairman, Tony Fitzgerald, quickly disengaged himself from any formal role in the implementation process. He refused offers to serve as interim chairman of the CJC, and within a month of the Report's release he resigned without public explanation his consultancy to the Implementation Unit. Understandably, given Fitzgerald's dominant role in the whole inquiry process, his lack of any continuing role provoked some public concern as this editorial from the *Australian* highlights: "Mr Fitzgerald ... has been at the centre of attempts to reform corruption in Queensland ... By agreeing to act as a consultant for the Government on electoral reform he consented to remain at the centre of that process. Mr Fitzgerald's resignation has cast doubt on the thoroughness and effectiveness of the reforms ... His desire to retreat from the limelight is understandable. But in the circumstances he has one more duty to perform."[57]

Fitzgerald appears to have rejected this duty. Exacerbating Fitzgerald's non-involvement in the implementation process was the subsequent resignation, two months after the Report's release, of Deputy Commissioner and Interim Commissioner, Gary Crooke QC. Similarly, the other Deputy Commissioner, P.M. Wolfe ceased any continued activity with the Inquiry after its release. Such omissions of key personnel does raise concerns about continuity and whether the major thrusts of the Fitzgerald Report will be both implemented and understood. It puts special pressure on the new chairs of the CJC (Sir Max Bingham) and EARC (Tom Sherman) as to whether they will correctly interpret the Fitzgerald recommendations. Indeed, the lack of involvement by Fitzgerald and others makes the appointment of the CJC and EARC chairs and members particularly important. Only time will tell whether these have been right. Certainly, Fitzgerald missed an opportunity rarely given to an inquiry chair to fully oversee implementation of his recommendations.

4. *Active Promotion and Publicity of the Report by Inquiry Members*

Not only should inquiry members and personnel have an ongoing role in implementation, but also there needs to be active public promotion to maintain general interest and pressure. As Bulmer says, inquiry "chairmen and members should be prepared to remain active after the formal end of the work in order to develop or maintain public interest ... and to ensure that it is not ignored by the government".[58]

As discussed, in our system of government inquiry members have no such formal ongoing role unless invited by the government. There is no guarantee this will happen. Some who chair inquiries do take on the responsibility of actively promoting the report as a result of their personal commitment to the inquiry and belief in its veracity. Justice Phillip Evatt believed the findings of his Royal Commission into Agent Orange ought to be "shouted from the rooftops".[59] He and his assistant John Coombs were active in defending the Royal Commission against criticism.[60] Similarly, former Justices Woodward and Moffit were willing to promote their reports and criticise governments for their inaction.[61] There are also precedents for inquiry members to be formally and directly involved in the implementation process concerning their reports. Dr Peter Wilenski, for instance chaired the task force to oversee his report on the New South Wales Public Service.

Tony Fitzgerald did not embrace such a public role. He gave no formal press conference on the release of his report, wanting instead to "return to the anonymity of his legal profession."[62] As highlighted, Fitzgerald quickly disengaged himself from the formal implementation processes of the Inquiry. Except for a couple of brief public comments criticising the implementation process and admitting that he had been a "fool to lead the Inquiry"[63] Fitzgerald has not been active in promoting his Report. Fitzgerald seems to have wanted to have it both ways - seek and demand full implementation, condemn the government for its failure to do so, while avoiding any participation in the implementation process or public promotion of the Report which would have assisted this. Such reticence may considerably limit implementation should public controversy develop over particular proposals.

5. *Creation of New Institutions and Procedures*

A fifth prerequisite for implementation is the creation of a "new institution which, once created within the bureaucracy, will continue at least for a time, to promote ... change".[64] This goes beyond an inquiry continuing on for short time after its report has been completed. It is also more than just the inquiry members either informally or officially promoting the report in public or providing advice to governments. It is about giving an inquiry report some bureaucratic 'home' so that it will not be dismembered quite so quickly and easily by existing bureaucratic interests and priorities. As R.J.K. Chapman concluded in his survey of inquiries involved with public sector reform, "the best mechanism is to leave implementation to a newly created body".[65] Indeed, public inquiries in seeking to ensure implementation of their proposals often suggest, if not special

implementation units, then new structures to take over new and existing functions.[66]

To ensure the success of the special implementation units or new structures to oversee an inquiry's recommendations, certain conditions have to be met. Such units need to have a high level of political and bureaucratic authority. Their status must be unambiguously linked with the influential and powerful. Status opens many doors in the public bureaucracy sometimes regardless of in-line formal responsibilities. Such units also need defined powers so that where persuasion fails, orders can follow. There is the need for these units to work laterally with government departments by informal contacts with all levels of staff and not just senior officers. Such connections require considerable and subtle negotiating skills, collegiality and openness, as well as a sound knowledge of the system, processes and key personnel. Only in this way will an implementation unit really know what is happening and whether the recommendations are filtering through to the "coal-face" without distortion or misinterpretation.

The Fitzgerald Commission developed several strategies in this area.

First, it proposed a special implementation unit to be established in the Premier's Department. Its rationale for this unit was that: "There are matters of urgency arising from the recommendations ... which cannot await the formal establishment of the CJC. It is therefore essential that immediate action is initiated to establish a small consulting cell reporting to the Premier to function as an implementation unit for urgent activities."[67]

The Commission, in a way unusual for a public inquiry, even went so far as to recommend the person to head this new implementation unit - Peter Forster, a management consultant and former senior Queensland public servant who had worked for the Fitzgerald Inquiry.

This recommendation was quickly accepted by the Ahern National Party Government. In terms of the criteria discussed above, the Implementation Unit appeared to meet all the requirements for success, having status, authority, appropriate personnel and reporting directly to the Premier.

However, the role of the Implementation Unit was soon thrown into doubt by Ahern's successor [68], Russell Cooper who established an Independent Commission for Change and Reform to be headed by well known businessman and experienced public inquiry chair, Jim Kennedy. This new Independent Commission seemed to be taking over some of the functions originally prescribed in the Fitzgerald Report for the Implementation Unit such as the formation of the CJC and EARC yet without totally absorbing Forster's Unit which was to report to the Kennedy Commission.[69] This change was seen by then Opposition leader Wayne Goss as a "sell out of the Fitzgerald Report's recommendations".[70] This may have been premature. Cooper's initiative here may have reflected his desire

to appoint someone with whom he has had a good working relationship[71] and a desire to get things done, rather than any attempt to circumvent the Inquiry. Proper assessment of the Independent Commission has not been possible because it was quickly abolished by the Goss Labor Government in December 1989.

Second, the Fitzgerald Report proposed two other mechanisms to assist with implementation which were to be established "as soon as possible".[72] These were the CJC and EARC. Fitzgerald's rationale for these two bodies was as follows: "The establishment of each of those bodies will provide a firm foundation for reform. It is those permanent bodies which will have the opportunity and the resources to continue the work of this Commission with respect to electoral, administrative and criminal justice reforms. Those bodies, and not this Inquiry, will provide the appropriate forum for debate and determination of what specific reforms should be made."[73]

Fitzgerald wanted to avoid the fate of previous inquiries by attempting to establish two triggers of action for the implementation process. First, by proposing the CJC and EARC and making them permanent and legislatively backed organisations he was effectively bypassing the existing Queensland Public Service of which his report was so critical. Second, giving the CJC and EARC further areas to investigate and specific matters to monitor, Fitzgerald sought to make his Inquiry and its major thrusts less fixed in time and more on-going. Agencies like the CJC and EARC, if properly staffed and resourced, can both implement the basic recommendations of the Fitzgerald Report and at the same time go beyond the inevitable boundaries of an inquiry report. In Fitzgerald's terms these new structures symbolise the Inquiry's aims of becoming a "catalyst and platform for continuing reform".[74]

In Wilenski's terms, these changes and the new reporting mechanisms proposed (e.g. the Police Commissioner to the CJC, the CJC and EARC to the two new parliamentary committees on Electoral and Administrative Review and Criminal Justice), the enhanced role of parliamentary committees in general and the greater emphasis on accountability, represent major changes to the Queensland system of government. These proposals, combined with the other reorganisations proposed by the Fitzgerald Report to the Police Department, the office of the Attorney-General and Justice Department will, in Wilenski's framework, help to "redistribute power"[75] within the bureaucracy.

6. *Recruitment of New Personnel*

A sixth prerequisite for implementation is the "recruitment of new people into existing institutions".[76] This is needed, stressed Wilenski, because new personnel bring with them "a commitment to change, a freshness and enthusiasm while being

unencumbered either with debts to people in the organisation or with attachments to existing processes or programs".[77] The Fitzgerald Report has added considerable impetus to this process of opening up the system in two ways.

First, there are the new organisations of the CJC and EARC already mentioned and the open recruitment of staff from outside the Queensland Public Service to fill the many positions now needed to support these bodies. Exactly how many is difficult to assess, but as Peter Faris of the National Crime Authority (NCA) observed "the CJC is going to be an enormous organisation - maybe a staff of a thousand."[78]

Second, the Fitzgerald Commission, directly addressed the issues of public service recruitment and political neutrality. It argued for a more independent process of staff selection and appointment.[79] In some areas, such as the Police Department the Fitzgerald Report specifically recommended the early retirement of senior officers such as Acting-Commissioner Ron Redmond.[80] It also suggested that the new Police Commissioner and other senior positions should be filled on an interim basis.[81] Significantly, great emphasis is given in the Fitzgerald Report to the development of an independent process of staff selection. To facilitate this, the CJC was to have a major overseeing role in the selection of personnel in the Police Department.[82] The Fitzgerald recommendations aim to establish a more open system whereby competent outsiders as well as capable existing staff have a fair chance in seeking positions.

7. *Legislative Backing for the Recommendations*

A seventh prerequisite for change to occur is the enactment of new legislation. Wilenski sums up the need for this: "Public servants may ignore a general exhortation from government or a circular from the head of the civil service. There are many such circulars and exhortations, sometimes conflicting ... this allows much room for interpretation and delay. Laws however, must be given priority and their interpretation must be given priority. Public servants are, in general, law abiding and laws do change behaviour in a lasting way, particularly where avenues are open for judicial review of administrative actions."[83]

Legislation, *per se*, cannot change the behaviour of public servants or politicians overnight. Corruption cannot be made to disappear by simply passing legislation. However, the existence of specific legislation can over a period of time modify behaviour. Legislation gives formal backing to certain practices (e.g. freedom of information) and can take issues away from the direct intervention or manipulation of government. Consequently it has been suggested that every inquiry report, "should have draft legislation prepared and appended to it"[84] as this would make "chances of implementation higher".[85] Not only would such legislation

give legal support for inquiry proposals, but also by being drafted by the inquiry it would more accurately reflect the inquiry's intentions. In practice, few inquiries do this. Inquiries usually only make general recommendations. They may suggest legislative changes or amendments, but rarely draft their own. Such tasks are left to the government and the public service.

In the case of the Fitzgerald Inquiry, it did prepare legislation relating to some of its recommendations. The draft legislation for EARC and the CJC were penned by the Inquiry. Parts of this were later modified by the National Party Government following criticisms from the Queensland Law Society and civil liberty groups. Because there was bipartisan support for the resulting amendments they cannot be regarded as significantly reducing the impact of the Fitzgerald proposals.

Elsewhere, the Fitzgerald Inquiry sought to reinforce its recommendations by proposing either completely new legislation modelled on the laws of other states or nations (e.g. freedom of information, whistleblowing) or amendments to existing Acts (e.g. *Public Service Management and Employment Act 1988*, the *Financial Administration and Audit Act 1977-88*, *Reform Commission Act 1968-84*, and the *Police Act*). Underpinning these legislative proposals is the role (as discussed) of EARC and the CJC in the development of the new legislation and overseeing the amendments. Thus, Fitzgerald showed an awareness of the importance and need for legislative backing for his recommendations. Yet, much depends on the effectiveness of EARC and the CJC as to whether the legislation and amendments will reflect the real spirit and thrust of the Fitzgerald Report.

8. *The Nature of the Recommendations*

R.J.K. Chapman noted that the nature of an inquiry's recommendations will have a great impact on the ease or otherwise of their implementation.[86] Inquiries face a range of options in framing recommendations. They can be specific or concerned with general principles. Being specific with little regard to broader concepts may make inquiries appear practical. Preoccupation with specifics will mean recommendations may date quickly as events, individuals and organisations change. At the same time, an emphasis on general principles may make inquiry recommendations appear too remote, too long term, too irrelevant. Inquiries also have the option of providing a comprehensive or limited range of proposals. Comprehensive reports become difficult to digest. This was the basis of the criticism of the Coombs Royal Commission into Australian Government Administration (1976).[87] Lastly, inquiries have the choice of making politically safe proposals, avoiding controversy and keeping within the mainstream of thought

on a subject. Alternatively they can take a more radical approach which may impede implementation.

In relation to the Fitzgerald Report the issues it raised about the system of government and the electoral system were controversial. They were also unexpected given the terms of reference. What throws into doubt the implementation of these proposals is not their controversy, but rather their lack of preciseness. While the Inquiry raised concern about electoral laws, suggested consideration of whistleblowing and freedom of information laws it does not define what it wants. Instead, the Inquiry proposed that these, and many other matters be given further examination by the CJC and EARC. After all, says Fitzgerald, its aim is to "ventilate the problems - recommend approaches and mechanisms rather than make unsound attempts to prescribe solutions to complex problems".[88]

For some this approach may mean the problems will continue to be ventilated, but the solutions will never be found. The lack of preciseness in the Fitzgerald Report on certain key areas will mean there will be considerable debate as to whether the Fitzgerald Report is being implemented or not.

Another criticism of the Fitzgerald recommendations is that its section on the Police was too concerned with management and organisational issues. Policy and corruption issues should have dominated here. Reorganisation matters may be beyond the brief and competence of an inquiry like the Fitzgerald Commission with its dominance by legal professionals and its major focus on corruption. Consequently, implementation of the recommendations in this section could be affected by the viability of these proposals.

Lastly, is the enormity of the range of proposals and their potential costs. Some inquiries are very conscious of these aspects and trim their recommendations accordingly. This does not seem to be the case with Fitzgerald. Peter Faris of the NCA sums up the complexity and expense of the Fitzgerald proposals: "I think the task is huge ... The CJC is going to be very large ... There is the EARC, combined with an administration law appeal commission ... and a complete restructuring of the police force ... it's enormous ... It's going to cost a lot of money."[89]

In the rush by all political parties to accept the Fitzgerald Report "lock stock and barrel" without any critical assessment of the proposals, these aspects of complexity and costs have been initially ignored. Although the political context at the time made government (and opposition) endorsement of the Fitzgerald Report inevitable, it is foreseeable that as the full implications (and costs) of the recommendations become more apparent and the political environment changes, future governments may lose their enthusiasm for implementing all the recommendations. In this regard, the Fitzgerald Report has failed. The Report is too wide ranging and too open-ended.

9. *Political Will and Support*

Political will and support are the ultimate determinants of whether inquiry recommendations will be implemented. This political aspect may be irksome to some inquiry members who believe the worth of their proposals puts them above the political process. However, as Brian Smith observed, administrative reform is "political rather than organisational. It has a moral content, in that it seeks to remedy an abuse or a wrong, to create a better 'system', by removing faults and imperfections ... Reform is politicized change".[90]

The Fitzgerald Inquiry showed an appreciation of this point. It concluded that "the outcome of this Inquiry and Report must be determined by the political process, as should be the case in a democracy".[91] At the same time the Fitzgerald Report also stressed how the political process in Queensland "has been one subject which this Commission has had to consider".[92] Can implementation of inquiry recommendations be expected if they propose fundamental changes to the way government works and which are detrimental to existing power holders?

Scepticism by, some such as journalist Chris Masters concerning the willingness of a National Party Government to implement the Fitzgerald Report seems well founded.[93] After all, the Inquiry was forced upon the Nationals and soon gathered a momentum of its own which was too great for them to stop, slow or divert. The Report was highly critical of the nature and style of government in Queensland under National Party control. The Fitzgerald Report's emphasis on accountability, public interest, open government, administrative review, ministerial responsibility, the role of parliament, and the Westminster system were all an anathema to both National Party Government practice and the National Party's own internal structure and ideology.[94] Then Premier Ahern was right when soon after the release of the Fitzgerald Report he declared that "the whole thing won't work unless there is a basic commitment by political leadership ... If there is integrity in the political leadership then it flows down to the grass roots ..."[95] The problem, as the Fitzgerald Report highlights, is that there has not been that "integrity" in Queensland Government in the past. Could there be any under the post-Fitzgerald Nationals?

Despite Premier Ahern's promise to implement Fitzgerald "lock, stock and barrel", subsequent events showed how difficult it was for the Nationals to fully grasp, comprehend and accept the recommendations and underlying rationale of the Fitzgerald Report. For instance, despite the Report's concern about land rezoning, Cabinet a fortnight after the Inquiry's release approved large scale rezoning on the Gold Coast that appeared to benefit a National cabinet Minister.[96] National Party President Sir Robert Sparkes questioned whether acceptance of

EARC and the CJC was tantamount to the abdication of elected government.[97] Then there was Premier Cooper's Independent Commission for Change and Reform as discussed previously. Subsequent comments by Premier Cooper that CJC and EARC proposals might be rejected "for very good reasons"[98] and that the Fitzgerald Inquiry had failed to produce any real concrete results concerning corruption[99] raised doubts about a National Party Government's will to implement Fitzgerald.

Moreover, the process developed by the Nationals to implement Fitzgerald, while meeting the formal requirements, missed the intrinsic criticism in the Report about the poor state of Queensland Government. Thus, parliamentary debate of the Fitzgerald Report was limited to one day and night. The two special parliamentary committees recommended to oversee the EARC and CJC were not established. The suggested consultation with the Opposition parties concerning the senior appointments to the EARC and CJC was inadequately done. The National Party response increasingly appeared, like so many other government reactions to inquiry reports[100], more about "how do we minimise the political damage" than "how do we make it happen".

The Fitzgerald Report stressed that "reform will not happen if attitudes do not change".[101] The examples above suggest that despite the rhetoric of acceptance, the National Party's attitude to government had not changed. It may also be a case that after being in office for so long, and with its emphasis on leadership rather than debate, the Nationals were suffering from "cognitive dissonance" - an inability to hear or perceive alternative views.[102] Had the Nationals continued in office, it is very probable that like poor Basil Pascali's spy reports to the Turkish Sultan in Barry Unsworth's novel, the Fitzgerald Report would have "vanished into some kind of mighty pit ... aimed to reduce all verbiage, however densely written, however solidly informative, to sludge",[103] and would not have been read, kept or understood.

The election of the Goss Labor Government in December 1989 has the potential to change all this, to give the Fitzgerald Report the political support it needs. Not only did the Labor Party make implementation of Fitzgerald one of the major planks of its election campaign, but also its interests are more coincidental with those of Fitzgerald. Parliamentary, electoral and administrative reform have been key elements of the Labor Party agenda. The Labor Party, like any new party in office is looking for ways to change existing practices, personnel, and structures. The Fitzgerald Report offers a means to this - partly as a blue-print for action, and partly as a catalyst and rationale for change. Rightly or wrongly the Fitzgerald Report will be evoked in many future press releases by Labor ministers announcing one change or another.

Certainly, the change in government does not mean that controversy will cease concerning the Fitzgerald proposals. Many of these are open to wide interpretation. Many have been left to EARC or the CJC to develop. Whether or not these will be in the spirit of Fitzgerald will not always be easy to say. Electoral reform is a case in point. Nevertheless, the election of a new government, untainted by scandals and with little vested interest in defending past practices or existing arrangements, will give the Fitzgerald Report a far more favourable political environment for implementation. Indeed, Tony Fitzgerald's willingness to head an inquiry established by the Goss Government, into logging on Fraser Island, symbolises this new political context.[104]

Conclusion

So, will the Fitzgerald Inquiry be different from other public inquiries concerning the implementation of its recommendations? Overall, the answer to this question is "Yes" for a variety of reasons: partly because the Fitzgerald Inquiry itself addressed the issue of implementation and sought to develop appropriate mechanisms; partly because of the way the Inquiry was conducted and the public and media attention it attracted. Important as these factors are, a more fundamental reason why Fitzgerald will be more successful than other inquiries is the way it dominated the political agenda at a critical juncture in Queensland's history. It was released when a general election was almost due and a shift in power to a new government imminent. Rarely in Queensland's or Australia's history has a public inquiry become such a focus of public attention and the issue of implementation become the major issue in an election campaign. Try as they might, the Nationals during the 1989 election campaign could not divert attention from the issue of corruption and the implementation of the Fitzgerald Report. Indeed, the election came to be about which party was best to implement the Fitzgerald recommendations.[105]

The Goss Labor Government's actions since coming to office appear to indicate the voters were right in their choice of the party to implement the Fitzgerald Report. Not only has there been considerable action on the organisational structures proposed by Fitzgerald (e.g. the establishment of the two parliamentary committees), but also the spirit of the Inquiry in terms of government openness, consultation (e.g. concerning the Chair of the EARC) and accountability seems to be occurring. Certainly, divergences between Fitzgerald and the Goss Government's actions will, and have started to occur (e.g. establishment of a Senior Executive Service in the Public Service). Such divergences may not be an attempt to block or undermine Fitzgerald, but rather part of the normal process of government grappling with the realities of day to day

administration and interpreting an inquiry report, which is but one view about how things should be done. No doubt, the longer the Goss Labor Government is in power, the less enthusiastic it may become about certain aspects of the Fitzgerald Report (e.g. freedom of information). Nevertheless, if only half the recommendations are implemented then Fitzgerald will have done considerably better than the many other inquiries into corruption. The prospects for this are good.

Notes

1. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989).
   A public inquiry is defined as those inquiries which are:
   - non-permanent, *ad hoc* organisations;
   - appointed by government;
   - discrete organisations - not part of any existing government agency or department or permanent advisory body;
   - actively promoted with clear terms of reference;
   - able to make their findings public.
2. J.L. Pressman and A. Wildavsky, *Implementation* (Berkeley: University of California, 1973), p. XIII.
3. F. Costigan QC, *Four Corners*, 3 July 1989.
4. J.C. Courtney, "In Defence of Royal Commissions", *Canadian Public Administration*, vol. 12, no. 2, (1969): p. 201.
5. A.P. Herbert, "Anything but Action: A Study of the Uses and Abuses of Committees of Inquiry" in R. Harris, ed., *Radical Reactions* (London: Hutchinson for Institute of Economic Affairs, 1961), pp. 263á4.
6. R. Gittins, "Would You Head a Government Inquiry?" *Sydney Morning Herald*, 22 January 1981.
7. M. Bulmer, "Increasing the Effectiveness of Royal Commissions: A Comment" *Public Administration*, vol. 61, Winter, (1983): p. 441.
8. P. Sheriff, "Factors Affecting the Impact of the Fulton Report" *International Review of Administrative Sciences*, vol. 36, no. 2, (1970): p. 215.
9. A. Moffit, *A Quarter to Midnight: The Australian Crisis: Organised Crime and the Decline of the Institutions of State* (North Ryde: Angus and Robertson, 1985), p. 19.
10. For Justice P. Woodward's comments a *Four Corners*, "The Mafia in Australia and the Killing of Donald Mackay" 23 June 1986; and in "Too Hot to Handle" *Australian*, 18 March 1989.

11. Some of the different inquiries into corruption and administrative impropriety include:

Commonwealth

- Costigan Royal Commission on the Activities of the Federated Ship Painters' and Dockers' Union*;
- Williams Inquiry into Drugs**;
- Royal Commission into Electoral Redistribution;
- Royal Commission into the Australian Meat Industry;
- Inquiry into M.J. Young's Customs Declarations;
- Special Parliamentary Inquiry into the Conduct of the Hon. Justice Murphy;
- Stewart Royal Commissions into the Activities of the Nugan Hand Group, Drug Trafficking and the Alleged Telephone Interceptions (Age Tapes).

* Commissioned by Commonwealth and Victorian Governments.

** Commissioned by Commonwealth and four State governments.

New South Wales

- Moffit Royal Commission into Organised Crime in Clubs in New South Wales;
- Woodward Royal Commission into Drug Trafficking;
- Nagle Royal Commission into New South Wales Prisons;
- Lusher Inquiry into the New South Wales Police Administration;
- Street Royal Commission of Inquiry into Certain Committal Proceedings against K.E. Humphreys;
- Cross Special Commission of Inquiry into Certain Allegations by the Right Honourable Ian McCahon Sinclair;
- Slattery Special Commission of Inquiry into Certain Allegations by R. Bottom.

Victoria

- Beach Board of Inquiry into Allegations Against Members of the Victorian Police Force;
- Gowan Board of Inquiry into Certain Land Purchases by the Housing Commission and Questions Arising therefrom;
- Frost and Ellwood Royal Commission into Certain Housing Commission Land Purchases and Other Matters;
- Nicholson Board of Inquiry Relating to Certain Matters within the City of Richmond.

12. *Queensland*

- Gibbs Royal Commission into the National Hotel Allegations (1963-64);

- O'Connell Inquiry into the Southport Betting Case (1975);
- Lucas Committee of Inquiry into the Enforcement of Criminal Law in Queensland (1976);
- Sturgess Inquiry into Sexual Offences Involving Children and Related Matters (1984).

13. P. Coaldrake and J. Wanna, "Not Like the Good Old Days: the Political Impact of the Fitzgerald Inquiry into Police Corruption in Queensland" *Australian Quarterly*, vol. 6, no. 4, (1988): p. 406.
14. *Age*, 2 June 1984.
15. V.C. Fowke, "Royal Commissions and Canadian Agricultural Policy" *The Canadian Journal of Economics and Political Science*, vol. XIV, no. 2, May, (1948): p. 165.
16. Editorial, *Courier-Mail*, 4 July 1989.
17. "Qld Government Pledges Back-Up for Inquiry" *Australian Financial Review*, 5 July 1988.
18 *Fitzgerald, Report*, p. 6.
19. *Ibid*., p. 7.
20. P. Premfors, "Social Research and Government Commissions in Sweden" *American Behavioural Scientist*, vol. 26, no. 5, (1983): pp. 623-642.
21. Since 1978, the Federal Government has given an undertaking that parliamentary committees would receive a formal response to their proposals within six months of the tabling of their reports.
22. *Fitzgerald, Report*, pp. 33-34.
23. *Ibid*., p. 68.
24. See *Age*, 23 August 1985, for comments by Senator Gietzelt, then Federal Minister for Veteran Affairs criticising the Evatt Royal Commission.
25. P. Grabosky, "The Meat Substitution Scandal of 1981" in P. Grabosky and A. Sutton, eds, *Stains on a White Collar* (Annandale: Federation Press, 1989), pp. 60-75.
26. *Fitzgerald, Report*, p. 48.
27. "Woodward Claim Fantasy: Wran" *Sydney Morning Herald*, 25 June 1986.
28. P. Wilenski, "Administrative Reform - General Principles and the Australian Experience" *Public Administration*, vol. 64, Autumn, (1986): p. 275.
29. *Ibid*., p. 262.
30. *Ibid*., pp. 264-267.
31. *Australian*, 18 March 1989.
32. *Sydney Morning Herald*, 19 September 1984.
33. For instance, the Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam, chaired by Justice Evatt had

disagreements with the Hawke Labor Government concerning the completion date and the availability of resources for a special survey. Justice Evatt regarded such limitations as interference with his Royal Commission (see *Courier-Mail*, 8 August 1984, and 14 July 1984).

34. *Age*, 19 May 1987.
35. *Ibid*.
36. *Fitzgerald, Report*, pp. 3-4.
37. S. Nolan, "Strange Tales from Brisbane", *Australian*, 12 September 1987.
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41. *Ibid*.
42. *Ibid*.
43. *Ibid*., p. 11.
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45. P. Dickie, *The Road to Fitzgerald* (St Lucia: University of Queensland 1988), pp. 192-222.
46. M. Bulmer, *Royal Commissions and Departmental Committees of Inquiry: The Lessons of Experience* (London: RAIPA, 1983), p. 16.
47. P. Wilenski, "Administrative Reform" p. 262.
48. *Ibid*.
49. *Fitzgerald, Report*, p. 48.
50. F. Thompson, quoted in A.D.J. Flowdew, "A Commission and a Cost-Benefit Study" in M. Bulmer, ed., *Social Research and Royal Commissions* (London: Allen and Unwin, 1980), p. 104.
51. *Australian Financial Review*, 19 November 1987.
52. *Fitzgerald, Report*, p. 14.
53. *Ibid*., p. 347.
54. *Ibid*., p. 13.
55. *Ibid*., p. 14.
56. *Ibid*., p. 26.
57. Editorial, *Australian*, "Fitzgerald Final Act", 26 August 1989.

58. M. Bulmer, "Increasing the Effectiveness of Royal Commissions: A Comment" p. 441.
59. *Australian*, 23 August 1985.
60. *Sydney Morning Herald*, 24 May 1986.
61. "Judges bitten, bite back", *Sydney Morning Herald*, 15 June 1985.
62. *Courier-Mail*, 4 July 1989.
63. *Sunday Sun*, 1 October 1989.
64. P. Wilenski, "Administrative Reform" p. 265.
65. R.J.K. Chapman, "Implementation: Some Lessons from Overseas" in R.F.I. Smith and P. Weller, eds, *Public Service Inquiries in Australia* (St Lucia: University of Queensland 1978), p. 292.
66. For instance the Commission of Inquiry into the Current Health Status of the Australian Population (Canberra: Australian Government Printer, 1986), proposed the establishment of the Better Health Commission to implement its recommendations.
67. *Fitzgerald, Report*, p. 348.
68. Mike Ahern was replaced as Premier by Russell Cooper, Minister for Police in September 1989.
69. Tony Koch, "Premier's Task Force to overrule Fitz Group" *Courier-Mail*, 27 September 1989.
70. *Courier-Mail*, 27 September 1989.
71. As Minister for Corrective Services, Cooper had appointed Jim Kennedy to head the Commission of Inquiry into the Queensland Prisons system.
72. *Fitzgerald, Report*, p. 347.
73. *Ibid*., p. 14.
74. *Ibid*., p. 357.
75. P. Wilenski, "Administrative Reform" p. 266.
76. *Ibid*.
77. *Ibid*.
78. P. Faris, *Four Corners*, 3 July 1989.
79. *Fitzgerald, Report*, pp. 131-132.
80. *Ibid*., p. 339.
81. *Ibid*., pp. 339-343.
82. *Ibid*., p. 339.
83. P. Wilenski, "Administrative Reform" p. 264.
84. M. Bulmer, *Royal Commissions and Departmental Committees of Inquiry*, p. 17.
85. *Ibid*.
86. R.J.K. Chapman, "Implementation", p. 288-290.

87. T. Matthews, "Implementing the Coombs Report: The First Eight Months" in R.F.I. Smith and P. Weller eds, *Public Inquiries*, p. 271.
88. *Fitzgerald, Report*, p. 5.
89. P. Faris, *Four Corners*, 4 July 1989.
90. B.C. Smith, "Reform and Change in British Central Administration" *Political Studies*, vol. 19, no. 2, (1971): p. 216.
91. *Fitzgerald, Report*, p. 7.
92. *Ibid*.
93. C. Masters, the *Four Corners* journalist who originally compiled "The Moonlight State" program which caused the establishment of the Fitzgerald Commission commented when the Report was released that there was "a long step from review to reform ... behind Premier Mike Ahern stands the National Party machine ... As sincere as the Premier may be, it is hard to believe that he will be able to deliver" (*Public Eye*, 11 July 1989).
94. The Queensland National Party has been characterised by strong leadership at organisational and parliamentary levels and its intolerance to dissent both within and outside the Party. See M. Cribb, "Queensland" in B. Costar and D. Woodward, eds, *Country to National* (Sydney: Allen and Unwin, 1985).
95. M. Ahern, *Four Corners*, 4 July 1989.
96. *Australian*, 13 July 1989.
97. *Australian Financial Review*, 3 August 1989.
98. *Sydney Morning Herald*, 18 October 1989.
99. "Fitzgerald Findings Just Smears - Cooper" *Australian*, 25 November 1989.
100. See S. Prasser, "Public Inquiries in Australia: An Overview" *Australian Journal of Public Administration*, vol. XLIV, no. 1, March, (1985): pp. 1-15.
101. *Fitzgerald, Report*, p. 358.
102. L. Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press 1957).
103. B. Unsworth, *Pascali's Island* (London: Penguin, 1980), p. 47.
104. *Courier-Mail*, 28 February 1990.
105. Editorial, "Corruption and Performance Suggest It's Time for a Change" *Courier-Mail*, 1 December 1989, and P. Coaldrake, "Labor to Power in Queensland" *Current Affairs Bulletin*, vol. 66, no. 8, January, (1990): pp. 16-21.

Part 4

Reforming the Police

10

Blowing in the Wind

Nigel Powell

The Harm of Greed

T'an Sun

The reason why the people are starving
Is that the officials "eat their taxes" too much.
That's why the people are starving.
The reason why the people are difficult to rule
Is that authorities resort to interference.
That's why the people are difficult to rule.
The reason why the people make light of death
Is that they are too eager for high living.
That's why the people make light of death.
Those who have nothing to make life pleasurable are worthier
than those who value high.

by Lao Tau

On 14 November 1975, at the Ryton-on-Dunsmore Training Centre I passed out as top student of my course of 180 officers from police forces all round England. Halfway through his address to us newly trained officers, the guest speaker, the Deputy Chief Constable of West Mercia Constabulary, said something like this: "Now I want to address my next few comments to you, the men and women who have just completed your initial training. I want to tell you that when you get out onto the streets the biggest enemy in your job is not the burglar, the rapist or the car thief as you may think - it is the man in blue sitting next to you".

In 1978 I migrated to Australia. I returned to England seventeen months later, having spent less than a year in the Queensland Police Force. My last five months were in the Police Licensing Branch. I could not handle the Australian culture.

When I got back to England I found the newspapers full of the inquiry into the death of a New Zealander, Blair Peach. He had been hit on the head by a

truncheon during a violent demonstration in London. He subsequently died. A post-mortem found that he had a congenital paper thin skull. No offending police officer could be identified. But the inspector in charge of the Special Patrol Group unit for that area was being held responsible and was, to my mind, being crucified in the media and by the investigating authorities. The violence in my home town, Birmingham, had not diminished in my absence.

I knew that even with the limited overseas experience I had, together with my previous record, I would be marked for quick promotion, provided I passed my exam. I reasoned - why should I put myself in that position? Get an ulcer and lose more hair when I could go back to sunny Queensland, adjust to the laid back lifestyle, lack of discipline and be on a better salary. I returned to take the easy option and within six months was back in the Licensing Branch for two and a half years.

New Year 1982-83 I was working from 6.00 p.m to 2.00 a.m. I spent from 1.00 a.m. to 8.00 a.m. in Hollywoods, an unlicensed nightclub owned and run by Vic Conte and Gerry Bellino. I drank Baileys and ice; and I did not pay for a drink all morning. I was not sober when I left. *In the 1983 election I voted National.*

I tell you these things not through any sense of confession, but because I feel it is important for you to have some idea of where I come from. Those events and many more are my context. I feel one of the mistakes we often make when we assess situations is to remove people or events from their context. If anything, that is my aim - to attempt to put police reform back into some sort of context, albeit incomplete.

I must admit I have found it very difficult to address this topic. As I wrote I found myself becoming increasingly critical of police and politicians. I get angry with the politicians who have been and are prepared to use the police force for their own ends of retaining or gaining power. I get furious at the conservative siege mentality of a police force that cannot see that it is part of the community and not superior in any way. And I get furious with a new Commissioner who does not understand that the future is to some extent determined by the past. We have to learn from and acknowledge the past before we can successfully move on.

Mr Newnham[1], you have lost a golden opportunity to show that the police force does not have to be inward looking and defensive. It can be open and responsive to public needs. There are many in Queensland who have been victims of unjust times. Of course, it is inappropriate and powerless to play the victim role as many activists are doing at present. But it is also inappropriate not to be understanding when you are in a position of authority and power. What harm could have been done by releasing the Special Branch files? By shredding them, Mr Newnham, you have only increased suspicion and enhanced the divisive "us and them" attitude that is characteristic of the police force.

But I suppose I am most critical of myself. Somehow I still have not completely resolved the ease with which I became a part of a stinking system - a police culture that not only acts as judge and jury on others, but has wreaked havoc in the lives of many who are least able to look after themselves. It is unlikely that any of us will be treated like a grub from Inala, a boong from Musgrave Park or a slope from Darra. But that is how many police think and act towards people I suspect you and I have little contact with. And personally, I do not think there is much difference between that approach and you or I treating the check-out operator or the parking attendant without respect. We are all human beings. We are all citizens of this planet and we do not act in isolation. We are responsible for the results of our actions or, more importantly, in most cases, non-action. It is our lust for power and our fears that cause most of our problems in today's world.

There are people out there who are being tortured and murdered for the sake of personal power. There are whole eco-systems being destroyed for the sake of material power. There are children who are starving to death for the sake of political power. There are species being lost for the sake of economic power.

By this stage, I guess you could be feeling patronised, bored or even thinking what the hell has this got to do with reforming the police force. It is important to put our considerations of the Fitzgerald Report in perspective, give it a context. You see, too often, by not considering the context, we deal with problems in isolation and we end up applying a band-aid to staunch an arterial flow. I certainly do not intend to be patronising and I do not think I have said enough to be boring yet.

Context has got a lot to do with changing one of the most conservative institutions in our society - the police force; a group that by its very nature resists change and yet is made up by and large of very ordinary people - that is, if anybody is ordinary; a group riddled by racism, bigotry, sexism and over all presides that unquenchable desire for wealth - yes, not much different from the community at large. Cynical?

Remove the police force from its context - society - and inevitably any reform will be incomplete, lacking relevance. Fitzgerald did not do this nor did he remove his look at government from its context or his look at tendering. He put his neck on the line and presented a report that not only offered structural reform but had a spirit. And he gave us a report that is readable by all - not just a few lawyers or academics. This has engendered a feeling of belonging in many Queenslanders because, despite the political and media attempts to subvert the Inquiry and the Report, many have bought it, read it, understood it and now own it.

To me it is Brian Toohey's criticism (see chapter 7) that is out of context. He has failed to account for the intangibles that dictate the mood of the time. To

sit back now and say he could have done better - he failed - is to suggest:

1. inquiries in the past have cleaned up corruption;
2. there are no continuing actions by commission staff;
3. it does not take into account the atmosphere in political, police and judicial circles, to name a few.

But to return to my topic. The worst aspects of police culture are not unique to Queensland. Only a few weeks ago I received some press clippings from a friend in England. It appears the Chief Constable of my first police force has recently suspended fifty-two detectives over various and persistent allegations of verballing.

I feel like an albatross. Mr Fitzgerald and his team have named the beast but I still do not feel that we understand just how tight the culture is and, more particularly, how it is a symptom of our culture. Until we tackle the broader context, reform will be doomed to a short life.

The biggest complaint I heard from police during the Fitzgerald Inquiry was the treatment of the hearings by the media and in particular, the use of the word "police" when talking about corrupt officers. They wanted journalists to use the phrase "some police". Now of course, they have a point - as with sexist language it is often a betrayal of deep rooted attitudes and certainly does not help to solve the problem. But it is noteworthy that this aspect aroused so much venom. Sure, many police would be simply trying to strike back blindly, but I feel it goes deeper and returns us to the problem we have with power and the exercise of power.

Criticism has not worried the police force hierarchy unduly for years, because its members have felt content to have their consciences stroked by political patronage. And, in any case, the police have the power - to deprive a person of his or her liberty, whether by lawful or unlawful means, and they have a whole range of sanctions below that to employ on those who do not accede to what they perceive as the norm. The salvation of the citizen - the law - has been castrated by verballing, by inappropriate behaviour between some magistrates and police prosecutors, and castrated economically by the legal profession.

But I think it is really noteworthy because here we have big tough police officers seemingly impervious to criticism - the domineering spirit of the police force is crumbling around their ears. They are hearing day after day of not just allegation, but fact. Corruption has become a part of the fabric of the police force and this was perpetrated by officers and they are spitting chips about what journalists say, a breed I might add, they have almost absolute contempt for. *Why*?

They are fragile little souls - like most of us. Police, like the judiciary, the legal profession, politicians, the media - the list goes on - have cut themselves off

from the rest of society. They, like the others, think they see the big picture but their actions belie their thoughts. We have serving police standing for parliament and we have blatantly political meetings being held at police stations. Judges, who place themselves above others in society protest that their private conduct is somehow sacrosanct and of no bearing on their fitness for public office. We pay these people.

Professional or job isolation is our adult security blanket. Once we get into a safe environment that gives us some degree of support and comfort, we feel constrained to protect it. We then slowly lose our objectivity. The rate and degree of the loss is determined by our individual need for security and acceptance and the nature of the group we have joined.

The police force is a classic example. A male dominated hierarchical institution, its members often in conflict with those outside of the organisation, band together tightly for mutual support. This is because in the vast majority of cases they have not thought through their reason for being police and what their proper role is.

For example: I came from England - a "Pom" - *one down*; a bit reserved and used to discipline - *two down*; arrested a detective in the first month of service - *take off all brownie points*. By the time I got to the Licensing Branch, despite my age and previous experience, I wanted to fit in. Keith Jackson, a former Kiwi police officer, identified the same pressure. Imagine the pressure on a green nineteen year old to conform when an embittered old sergeant says: "Come on, son - don't worry about that - look you've got to forget all that bullshit they taught you at the academy".

There are ways in the police force of being accepted and feeling secure other than drifting along with the tide. One can play up to the stereotype - be as tough as anyone else, drink as much as anyone else, play-up, swear. But the most lasting and important effect of police culture is the alienation of the police force from the community, and vice versa. The remedy? Well, Mr Fitzgerald has made some fine recommendations - increase the intake of women, community policing, more regional control, reforming the management structure, the vital promotion by merit, and more.

These are all structural changes that are necessary - but do not forget the context. While we continue in society to be driven by the lust for wealth and power, and continue to be manipulated by our fears, the police force will do the same, only more so. And no matter how much power the Criminal Justice Commission (CJC) is given, and the Commissioner to oversee and refashion the police force, it will only provide the terminally ill patient with a comparatively brief respite. Unless we all change.

The natural state is balance. Nature has an inbuilt harmony. In the

relatively short time that we as a species have been on this planet, we have slowly built up ways of promoting consistent imbalance in our societies and our environments.

Lasting change can never be imposed or even legislated for. Lasting change will occur only if we as individuals decide we want change. The large problems of society that our culture has inadvertently but inevitably fostered have not been solved so far.

Corruption - the abuse of power - is one of those problems.

I have no faith whatsoever that the great gods of our societies - technology, materialism, and domination by the right of strength - will come to our rescue other than with a sophisticated but doomed band-aid. We have to change, and that means education - of ourselves primarily, and of others. And that does not mean finding out more and more about less and less. It means trying to get a hold of the big picture, seeing things in context and, most importantly, a quest for self-knowledge - a hard road to follow. And it means not imposing our ideas but offering them, and not to the converted alone. For the police force - and community alike, education is the only tool that will permanently break down the defensive walls and build bridges.

I suppose what I am saying is that I have come to believe in the shining light of life and of humanity. There are many ways we can obscure and try to blow this out and deny it but it will eventually come through to restore balance. Idealistic? I have seen many corrupt men and women. I have yet to see a truly happy one. I have seen many who strive earnestly to improve our society; I have yet to see a truly happy one. I have seen few who truly seek self-knowledge; they have a light in their eyes. I believe that the big problems of our society, and corruption is one of those big problems, are eventually going to get so large that we will have to change. Nature will restore its balance. We can all play our own part.

Being a child of the fifties and sixties, I took the title of this essay from the famous Bob Dylan peace song, not as you may have thought in any sense of pessimism, but in a sense that nature and its force is inevitable. I really do think the answer is "blowin' in the wind".

Notes

1. Mr Noel Newnham was appointed in 1987 as the new Queensland Police Commissioner.

11

The Police Culture — Implications for the Reform Process

Jill Bolen

Commissioner G.E. Fitzgerald QC, dedicated a chapter of his Report to "Police Culture" and associated issues. For the purpose of this chapter, I will use the term "culture" to mean: "the prevailing pattern of values, myths, beliefs, assumptions, and norms; and their embodiment in language, symbols, and artifacts, including technology, in management goals and practices, and in participant sentiments, attitudes, activities and interactions".[1]

I would agree with many of the assertions about the negative aspects of police culture made by Commissioner Fitzgerald in his Report. I note, however, that little evidence was presented of the positive aspects of the police culture, although the observation was made that "many officers retain their integrity and provide meritorious and usually unrecognised service".[2] In this paper, I will outline some explanations for, and facets of, the police culture.

Corruption is one form of misconduct; it can be part of the values, myths, assumptions and norms that prevail in a police department. It does particular damage in a number of ways that will be explored in this paper. At this stage there has been no meaningful examination of culture or measure of the organisational climate within the Queensland Police Department against which changes can be gauged. The reform process can be hindered or helped by the culture existing when change is being implemented.

As noted in the Report, community values can be reflected in the police culture. Therefore, it is to be hoped that meaningful change will occur both in the police force and in the community.

Explanations for Police Culture

Much has been written in recent years about police culture. Some observers believe that the personality traits of police officers are significantly different from

other members of the public even before they join the police force.[3] I would also argue that the occupational socialisation of police actually begins prior to their entry to a police force.

By the time recruits enter a training establishment, many of the values, myths, beliefs and assumptions about the job have been internalised from sources such as the media, films, and possibly their own interactions with police. Many of the views portrayed on television are more figments of the script writers' imaginations than reality. The amplification that is given to an event and the police role in it may lead to the misconception that such behaviour is the "norm". Perhaps the best example of this is the misconception that the major role of police is to "fight crime".

Research shows that less than forty per cent of police time is taken up with crime and related matters, though this observation would not apply to specialist areas such as the Criminal Investigation Branch (CIB). In general, police perform a "service" rather than a crime-fighting role; suggestions have been made that the various police departments be renamed the "Police Service" rather than the "Police Force".[4]

Another view suggests that the attitudinal and value differences of police, compared with members of the public, can be traced to the socialisation of police once in the job.[5] This hypothesis also suggests that police are not more authoritarian in their attitudes or value systems than the general population from which police are drawn.

The third view is that, depending on a number of factors such as intelligence, personality, motivation etc, the job will affect police officers.[6] Police, I believe, do have their own view of reality which they attempt to impose on those with whom they work. This is particularly so in relation to the values and attitudes which it takes to succeed within the police organisation.

Because of the myths surrounding the police role, the set of values and attitudes may vary among geographical areas, branches, and even gender. To be sure, the values and attitudes of the urban police will be vastly different, in many instances, from those of police who choose to serve in rural areas - particularly in one and two person stations. The sub-culture of the Traffic Branch differs from that of the CIB; also, within the CIB there may be a difference of attitudes and values between members of various squads.

There are also differences between the culture of police performing clerical and administrative duties, and those with operational duties. I also consider that differences between policemen and policewomen can be identified. While no specific study has been completed on the attitudes of policemen to policewomen in Queensland, linking my reading of the literature from elsewhere to the experiences

of myself and some of my colleagues, I would assert that there are no significant differences between the local attitudes and the situation overseas.

Part of the reason for the bias against policewomen by policemen is attributable to the myth of what police actually do. Almost universally, negative attitudes towards policewomen by policemen have been found - to a larger or lesser degree.[7] As a result, women police may either modify their values and attitudes to fit the prevailing male-dominated organisational culture or resign.[8] Fortunately, it has been my experience to find that overt and covert forms of discrimination have been reduced, but not eradicated, over recent years.

Some Facets of Police Culture

Although they are generalisations, it is worthwhile to explore some of the values, myths, beliefs, assumptions and norms that make up the police culture. The following summary has been taken from a report prepared by Harrison, Hohenhaus and Pitman for the Queensland Police Department in relation to the Fitzgerald Inquiry.[9]

1. Characteristics which support the notion of "solidarity through secrecy" include:
   - Police protect the actions of their comrades and see little in them that is bad.
   - The vehicle of self-protection is the rule of silence-secrecy. The vehicle of attack is the emphasis on the maintenance of respect for the police.
   - The "dog" (or "whistleblower") is an outcast among the police. *Secrecy is loyalty. Secrecy is solidarity.*
   - Secrecy constitutes one of the most important definitions and is represented in the rule of silence. Law enforcement is subordinate to the ends of the group.
   - Police conceive of violence as an instrument to be used for the support of personal goals, and only incidentally as a restricted source of power given to them to facilitate their legal function.
   - The use of violence is willingly used illegally to force respect and to elicit information, and the group endorses this procedure. There is also a willingness to abrogate it to achieve other ends, as evidenced by the withdrawal of protection.
   - There is a willingness of police officers to cease enforcing the law if the Chief of Police indicates such a desire.

- Apprehension of the criminal appears as a major value of the police and is the major source of satisfaction that police gain in the occupation.
- The rule that "the end justifies the means" in the apprehension of the criminal is demonstrated as an occupational norm of the police in its utilisation as a basis for legitimating violence.
- The police officer conceptualises a criminal as a person who has abrogated his basic rights as a citizen, and as a personal challenge to the officer.
- Police consider themselves to be persons without particular worth and to be failures when they state they don't want their sons to become policemen, that they want them to become successes.[10]

2. Punch analyses corruption scandals in various cities and has made the following observations:
   - The police organisation is not a harmonious integrated entity with a comforting consensus, but is rather characterised by a deeply divided pattern of semi-autonomous and often conflicting units.
   - The occupational culture defines the norm surrounding work in terms of "real" police work, based on action and excitement, and of the incompatibility between legal and administrative requirements on one hand and the reality of working the streets on the other.
   - Police work is a matter of negotiation based on contextually relevant meanings where the law is used as a resource for solving practical, situational dilemmas. In practice, an array of evidence indicates that the demands made on the police are so diffuse and contradictory that the police task is unworkable and this leads to an atmosphere of "duplicity and hypocrisy" and of methods bordering on "trickery and stealth".[11]
3. Police tend to be cynical.[12] Faced with the duty of keeping people in line and believing that most people are out to break the law and do them harm if possible, they always look for the selfish motive.[13]
4. Cynicism also stems from the police perception of the use and abuse of power by some other segments of the social order, in particular, politicians and members of the legal fraternity. In this regard, no other "working class" group has a wider or deeper access to social power structures.
5. Isolation and segregation from the community are evident in police life.[14]
6. Police officers are volunteers who have offered their services by choice. This action can be motivated by a sense of community service, a desire for adventure, sometimes by a sense of patriotism or for job security.

7. Police officers will accept discipline and display loyalty provided they can trust the leaders. The standards, performance and keenness of police officers will be directly related to the standard of leadership under which they operate.
8. For the most part, loyalty is directed primarily to the work group.
9. Police officers have pride in the force as well as personal integrity. However, these qualities tend to be belittled.
10. Police officers have a good sense of humour (some would say they must have it), although it is often regarded by the community as callousness. It is used to relieve tension when the going is tough.
11. With the volume of work to be completed, there is a tendency to take short cuts in the performance of various duties.
12. Police officers have difficulty in admitting weakness and they tend to blame the system or others.
13. During periods of frustration, there can be a tendency to sabotage resources or the organisational image as a way of getting back at the system.

Despite these generalisations, it is not difficult to discern why the police culture is what it is. Some examples can be useful. In protecting individual rights secrecy can be considered an integral part of integrity. Also, in order to charge a person with a criminal offence, police must have a reasonable belief that the suspect committed the crime.

Police who only suspected their peers of offences may have been fearful of repercussions, particularly when no mechanisms were available to piece together the evidence of various officers about the activities of a "crooked cop".

Misconduct and Corruption

Goldstein has asserted that police misconduct falls into three categories - legalistic, moralistic, and professional.[15] Using that model, with legalistic misconduct equated with corruption, it has been argued that corruption does particular damage in the following ways:

- it undermines the confidence of the public;
- it destroys respect for the law;
- it undermines departmental discipline; and
- it harms police morale.[16]

Policing depends on the support of the community. This is made obvious in the case of information given by the public in order to apprehend criminals or

when community based policing is the major policing strategy. Public confidence can be lost in both the police and public authority generally as a result of the exposure of corruption. Respect for the law is vital, both from the public and the police - it can make the difference between anarchy and democracy. If police hold the law in contempt, members of the public may question why they should obey it.

The third point is particularly relevant if supervisors are corrupt (or believed to be corrupt), they will lack the moral authority to compel obedience. Morale will decline after a major corruption scandal unfolds. The honest officers will be angered by those whose involvement has brought disrespect on all police because many people often assume that more police are involved than the ones who are caught. Distrust is common between those who are attempting to do their jobs well and those who are in any way corrupt.

Policing after Fitzgerald

So what are the prospects for policing in Queensland after Fitzgerald? The purpose of the Fitzgerald Inquiry was clearly set out. Many honest police feel let down by some aspects of the Report. They ask why all the bad things about the organisation and the police? I do not consider the Fitzgerald Inquiry had a charter to review the positives of policing. It was established to review, inter alia, the wrongs in the department. Some innocent police got hurt in the process and that hurt was felt by the family of the officer - "police family", as well as parents, wives and children.

Some police may therefore be defensive about the positives of the job and the people in it. With recent criticisms about the cost of the Inquiry, it could have been alleged that writings of the positives would represent a whitewash and a waste of dollars. The police are already starting to use the recommendations of the Fitzgerald Report as a means of changing parts of the system which they themselves saw as defective. They will use the Report as an innovative vehicle that will have positive results for the communities they serve, the organisation, and themselves. Police are rising, like a phoenix from the ashes, to the challenge to upgrade their professionalism and enhance their image.

Balch asserts that "attracting better people to the same old job is not necessarily an improvement".[17] Fortunately, the reforms recommended by Fitzgerald encompass structure and a switch to the primary strategy of community-based policing. It is to be hoped that the new culture that emerges, albeit directed in some instances, will mean that recruits attracted to the police force will not be going to the "same old job".

The new human resource management strategy proposed by Sergeant Denise Burke will have a major impact.[18] Perhaps it could be argued that with

promotion by merit, police will be more inclined to report the breaches of law and unethical behaviour (including breaches of discipline) of their colleagues. The decentralisation of authority and responsibility for decision-making has the propensity to minimise the scale of any misconduct. Participation by the community in the evaluation of policing will also assist. But through this process, no-one should seek to destroy the positive aspects of the police culture.

Part of it, for example, involves "sticking by your mate". When applied to misconduct this becomes a negative trait, but when the call goes out over the police radio "officer in trouble", the culture dictates that anyone who can respond, does respond. Hence, at the untimely death of P.C. Brett Handran, two young police put themselves in danger to "stick by their mate". Yes, some members of the community also put themselves at risk that day, and I guess that is what community-based policing is about - caring for each other.

With the advent of community policing, and bearing in mind the comment that police officers can reflect the community standards, it will be vital to "set in stone" some definition of ethical behaviour. Public confidence in the police may be eroded if ethical conduct is not practised by police; but it is also important to have a high standard of morality and ethics within the community at large.

At his recent swearing-in, Commissioner Newnham publicly subscribed to a Code of Ethics. The suggestion that all police reaffirm their Oath of Office or publicly subscribe to the new Code of Ethics, was supported by members of workshops established to train personnel to be change agents in the reform process.

I have appended the Code of Ethics subscribed to by Commissioner Newnham. It should be noted that the application of a code of ethics is relevant to both the personal and professional lives of police. Pressures for reform are being brought to bear on police from a multiplicity of directions; many of the police are wanting change as much as anyone else in the community.

Overall, however, the process will not be rapid or without its problems and, as we know, the journey of 1,000 miles begins with the first step. Professor Harmon outlined three forms of responsibility that are relevant to members of my department. They are, political, professional, and personal and Harmon examined the tensions that can develop among police that have to be regulated.[19] He asserted that each of the various forms can develop or exhibit certain pathologies requiring an appropriate response.[20] Some of the tensions will be relieved by strong leadership, or applying sanctions to those who abrogate or use unwisely, the responsibilities placed on them. The new Criminal Justice Commission may also assist.

Conclusion

In this chapter, I have set forth some theoretical explanations for the police culture, some facets of it, the impact of misconduct, and my perception of the prospects for reform. Many police were angered by the comments by Fitzgerald on the police culture. Whether that is a function of their naivety or the fact that precious little credence was given to the positive aspects of it, is a moot point. What has been said, or left unsaid, cannot be changed.

Perhaps one of the most positive experiences for me in my sixteen plus years of police service was to participate, as a facilitator, in the workshops to train police as change agents for the forthcoming reforms. Let me assure you that the quality of the outputs from police and public servants at the workshops has been extremely encouraging.

As a participant in the change process, as a tertiary student, and as a member of the broader community, I am optimistic for the future of policing in this State. There is a Hindi proverb which says, "The lotus blossoms out of the mud". Commissioner Newnham has gained the support of members in the department committed to change, and it is hoped will gain the respect and confidence of the community at large.

I trust that it will not be too long before the Queensland Police Department, like the lotus "blossoms out of the mud" and that we make it an ethical, effective and efficient police service. But the reform process needs the support and encouragement of all Queenslanders, not just police, if it is to succeed. We must become involved, where possible, and bring to heel those who impede the process, irrespective of their status or profession.

CODE OF ETHICS

by Commissioner Newnham

As a member of the Queensland Police Force, I have a duty to:

Protect life and property;
Preserve the peace;
Prevent offences;
Detect and apprehend offenders; and
Help those in need of assistance.

At all times,

I will carry out my duties without fear or favour, malice or ill will;
I will act honestly and with the utmost integrity;
I will make every effort to respect and uphold the rights of all people in the community regardless of race, social status or religion;
I will strive for excellence and endeavour to improve my knowledge and professionalism;
I will keep confidential all matters which I may learn in my official capacity, except as necessary in the course of my duties;
I will practice self-discipline in word and deed both on and off duty;
I will resist the temptation to participate in any activity which is improper or which can be construed as being improper;
I will not misuse my office for personal gain;
I will accept responsibility for my own actions and for acts which I may order;
I accept the desirability of these ethics as an integral part of my personal and professional life.

Notes

1. W.L. French, F.E. Kast and J.E. Rosenzweig, *Understanding Behavior in Organizations* (New York: Harper and Row, 1985), p. 525.
2. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. 200. Fitzgerald did however, note that many police acquiesce while not participating fully in the various forms of misconduct which form part of the culture.
3. R.R. Bennett, "Becoming Blue: A Longitudinal Study of Police Recruit Occupation Socialisation", *Journal of Police Science and Administration* vol. 12, no. 1, (1984): pp. 47-58. The author quotes the hypotheses of Rokeach, et al 1971 in this regard and explains that within this hyoptheses is the notion that persons with such traits seek out enforcement careers where the traits will be accepted and even rewarded.
4. J. Avery, *Police - Force or Service?* (Sydney: Butterworths, 1980). As the title suggests, Avery looks at the role of police in Australia and of the co-operation that must exist between the community and the police in preserving the peace and in the prevention and detection of crime. Data provided by Queensland police in the mid-1970s showed that telephone calls to the police communications centre in Brisbane were categorised as thirty per cent for crime, fifty per cent for service, and the remainder for peace-keeping.
5. R.R. Bennett, "Becoming Blue," p. 47. Bennett cites a number of authors in this regard but concludes the article by suggesting that further research must be undertaken to "better understand" the cognitive changes that accompany "becoming blue".
6. C.L. Vincent, *Policeman* (Canada: Gage Publishing, 1979). Vincent maintains that similarities are intensified because the recruits and police with deviant or alien personality types are weeded out or weed themselves out by selective attrition. He noted however, that those who remain, nevertheless differ markedly on a wide variety of matters and, at the same time, share many attitudes and behavioural tendencies.
7. J. Balkin, "Why Policeman Don't Like Policewomen", *Journal of Police Science and Administration*, vol. 16, no. 1, (1988): pp. 29-38. Research undertaken by a former colleague C.F. Lidgard involved an examination of Australian Bureau of Statistics Census data for 1971, 1976, 1981 and 1986. It showed that the percentages of women police officers in Queensland and the position relative to other Australian Police Departments were 1971 - 1.1% (lowest in Australia), 1976 - 8.5% (highest in Australia), 1981 - 6.6%

(fourth highest in Australia) and 1986 - 5.7% (lowest in Australia). Irrespective of the achievements of women once they are within the police department, this blatant discrimination against women entering the job, was cause for concern. Thankfully, the position has been reviewed in the last eighteen months and a more positive approach to the recruitment is being taken. However, it should be noted that young women are still not eligible to enter the Police Force through the cadet system (i.e. on completing year twelve of secondary schooling). Women are restricted to joining as adult recruits in the probationary system.

8. C.F. Lidgard, "Women Policing in Australia", unpublished paper presented at the *Annual Conference of the Sociological Association of Australia and New Zealand*, Canberra, 29 November - 2 December 1988.

9. A.E. Harrison, G.R. Hohenhaus, and G.A. Pitman, "Queensland Police Department Submission" to the Fitzgerald Inquiry. This unpublished report was prepared by three serving members of the department for the then Acting Commissioner of Police, Mr R.J. Redmond, QPM.

10. W. Westley, *Violence and the Police: A Sociological Study of Law, Custom, and Morality* (USA: Colonial Press, 1970). In the forward to his book, Westley alludes to the malevolent effects of police "culture" and "image" in the following way: "Out of their experience men create the world in which they dwell. In this world, illusion and reality merge, and man sees himself in the shadows of his peers. The Policeman's world is spawned of degradation, corruption, and insecurity. He sees man as ill-willed, exploitative, mean, and dirty; himself a victim of injustice, misunderstood and defiled. Hungry for approval, uneasy as to his own worth, wrathful and without dignity, he walks alone - a pedestrian in Hell." It will be vital to the success of the community policing strategy that the police perception of isolation from the community be addressed.

11. M. Punch, *Conduct Unbecoming: The Social Construction of Police Deviance and Control* (London: Tavistock, 1985). This author also stated in his book that the book was about policemen and their work as he had not found any examples of corruption in policewomen.

12. D. Lester, T.M. Lewis, and B. Swanton, "Cynicism, Job Satisfaction and Locus of Control in Australian and American Police Officers", research note. This research note is held in the Queensland Police Academy Library. Responses to the police cynicism questionnaire (Neiderhoffer, 1967) were collated from a group of Queensland police officers attending in-service courses and compared with American municipal police officers attending similar courses. The results showed that whilst Australian police officers showed as being more cynical in relation to the usefulness of a

university education, American officers registered as more cynical with regard to arrests, dedication to duty, efficiency of the police force, police professionalism, disciplinary hearings, fairness of rules and regulations, and, sensitivity of police officers. This has implications for the application of overseas research data to the Queensland setting, although it is my opinion that the differences are minimal.

13. Westley, *Violence and the Police*, p. 111.
14. This alienation or isolation results in the us (police) versus them (the community) mentality, and is particularly prevalent when police are called on to enforce unpopular laws or laws to which the community itself pays scant regard.
15. H. Goldstein, *Police Corruption: A Perspective on its Nature and Control* (Washington DC: The Police Foundation, 1975). Legalistic misconduct is commonly called corruption; moralistic misconduct concerns attitudes of the police officers and whether they deliver impartial service to the law; professional misconduct may range from verbal to physical abuse of a member of the public.
16. P.V. Murphy, "Corruptive Influences", in B.L. Gamire, ed., *Local Government Police Management,* (Washington DC: Local Government Police Management, 1977).
17. R.W. Balch, "The Police Personality: Fact or Fiction?" *The Journal of Criminal Law, Criminology and Police Science*, vol. 63, no. 1, (1972): pp. 106-19.
18. D. Burke, *Police Career Management: Whose Responsibility*? (Brisbane: Police Departmental Printer, 1988). Sergeant Burke's work is visionary and has been accepted in various police departments as an effective model for human resource planning and management.
19. Quoted in I. Thynne and J. Goldring, *Accountability and Control - Government Officials and the Exercise of Power* (North Ryde: Law Book Company, 1987), p. 215.
20. *Ibid.* Harmon's works also addresses the effectiveness of codes of conduct/ethics. He asserts that the potentially negative effects of the standards and values encompassed in a code not be overlooked.

12

Community Policing – Gently Does It

Jeff Jarratt

For much of this century policing has been premised on three basic strategies - random patrol, rapid response, and retrospective investigation. In the 1970s, researchers, particularly in the United States, began to question the effectiveness of these strategies.[1] In the 1980s a number of police departments began to recognise the limitations of these strategies in reducing crime, lessening fear of crime, and providing community satisfaction.

Numbered among those departments is the New South Wales Police Service, which in 1987, began to move to community-based policing to involve the community in its own problem-solving, protection and fear reduction. This strategy is simply recognition that there are limited private and public resources to devote to the provision of a safe environment, be it road safety, personal safety, family safety or property safety.

The strategy behind the change in New South Wales was threefold; attack corruption first, then build an accountable corruption-resistant management team and organisation and focus on the community-sensitive responsive service as the keystone of policing in the State.[2]

The vehicle used in the shift to a community-based strategy is a decentralised, multi-skilled, service delivery model. This has involved a major restructuring known as regionalisation. Two years after its commencement, some significant inroads have been made in its implementation, but there remains much to be done. However, to appreciate fully where New South Wales is in policing today, it is necessary to look at where it has come from. This involves highlighting some of the forces which have influenced the course the organisation has taken in the past decade or so.

In the 1970s, the New South Wales Police Force relied heavily on its reputation as Australia's premier operational police agency. However, accusations of corruption and malpractice in the form of "verbals" abounded. As well, the

administration and management of the organisation were said to be a century behind the times.[3] For a period, this situation was compounded by open conflict between the cliques at the senior levels of the organisation.

The resignation of Commissioner Wood in 1979, following accusations of conspiracy to pervert the course of justice with the now disgraced former Chief Magistrate, Murray Farquhar, began a series of events which changed the course of policing in New South Wales. First of all, at that time, the Wran Government commissioned the Lusher Inquiry into the structure, organisation and management policies of the police force. The 1981 Lusher Report provided the impetus for much of the change which was to follow.[4] Change, however, is said to come when preparation and opportunity meet. The opportunity had arisen, but there was no one in a position to provide the leadership required. Still further leverage was needed to get the organisation moving.

During this time, Deputy Commissioner Bill Allen, who was being groomed to be Wood's replacement as Commissioner, was to go before the Police Tribunal on serious departmental charges relating to corrupt activities. Allen was found guilty, de-commissioned by the Governor-in-Council, reduced to the rank of Sergeant First Class, and dismissed.

Frustrated by the intransigence of the police on reform and shocked by the circumstances of Allen's decline, Premier Wran invoked a recommendation of Lusher to create a Police Board. In the *Police Board Act 1983*, Parliament took up the essence of the Lusher ideas, requiring the board:

1. to promote the improvement of the police force and to ensure the maintenance of an efficient and effective police service;
2. to formulate plans for the provision of a comprehensive, balanced and coordinated police service;
3. to make recommendations to the minister on policy matters, financial resources, property management, priorities and allocation of finances;
4. to ensure the development of modern personnel practices;
5. to initiate research into new police methods and other research related to law enforcement generally;
6. to consider applications and make recommendations to the minister in relation to all appointments of persons to the rank of superintendent and higher positions;
7. to make a recommendation to the minister in relation to each appointment to the rank of inspector; and
8. to make recommendations in relation to all transfers at the rank of superintendent.[5]

The Commissioner retains responsibility for the superintendence of the police force, its operational command and day-to-day management. The Commissioner is required to implement, by exercise of his/her functions in accordance with law, decisions of the Board.

Commissioner Abbot, who was the New South Wales Police Commissioner from 1981, felt the Board was an imposition and retired on his sixtieth birthday in August 1984. The Board sought a successor who in the words of Sir Gordon Jackson "was incorruptible and who could manage change."[6] It recommended as Commissioner, John Keith Avery, MA DipCrim, who was three years younger than Abbot.

Avery brought with him a philosophy of policing developed in the early 1970s. His book, *Police Force or Service* sets out a notion of policing with community consent and involvement - community based policing became the principal operational strategy.[7] However, while Avery had done the preparation, the opportunity had now passed to bring about major reform.

In 1984, the organisation was inward-looking and seemingly operated on the premise of competent men and women of action knowing what they were about, being frustrated by an unknowing bureaucracy and public. This attitude was based on myths which, in essence, held that input from people other than police was interference from lesser mortals, be they politicians, lawyers, minority groups or ordinary citizens. As well as requiring community input into policing, Avery sought to secure a place in the organisation for creative, thoughtful people, who were not slaves to routine and the status quo, but who were ready to seek out new and better ways of doing things.[8]

Before embarking on any reform, it was essential to remove the stigma of corruption. The first step was to admit that corruption was an issue, and to set about its eradication. In confronting the issue, Avery began by asking people to reflect on the nature of the problem. No forms of corruption were ignored, but initial emphasis was necessarily on those more ingrained aspects, the type identified by Lusher three years earlier.[9]

The Police Board was and is, instrumental in Avery's continued thrust against all forms of corruption. At the same time, the Board recognises that corruption is not peculiar to police.[10] Avery focused on some particularly notorious officers, with little or no support from the majority of police. Many of the senior officers he inherited were openly opposed to his stance, not necessarily based on tolerance of corruption, but largely because of ignorance aided by natural resistance to change.

The approaches taken to reduce and, if possible, eliminate the corruption included:

- tough, fair investigations and sanctions;
- creation of a high profile Internal Affairs and Internal Security;
- actions intended to be an object lesson to others;
- creation of professional role models;
- improved training at the Academy; and
- support for the role of the Ombudsman.

The outright attack on corruption tended to polarise certain internal elements. The Board and Avery took the view that, if it was hurting then it must be doing some good. At the same time, by adopting a tough stance in relation to corruption issues, Avery saw public confidence grow in the capacity of police to operate within the law.

Aware that not all the senior administration were disciples, Avery quickly moved in coalition with the Board and Labor Police Minister, Peter Anderson to introduce a merit-based promotion system for officers of commissioned rank, from 1 October 1984. The limited introduction of the changed promotion system was critical to Avery's chances of getting people of integrity and capacity into positions of influence relatively quickly to sustain the momentum which he and the Board were seeking to generate.

He quickly learned to value those who joined the cause early, though some of them were possible misfits.[11] In the interim, he established a small cadre of relatively junior people which was termed the Commissioner's Policy Unit to think about and work on many of the changes which he wished to introduce. Avery has an innate capacity to be tender to those who try, even if they are incompetent. He treasures each one who is competent and loyal.[12]

The next step was to get the organisation ready for major structural change. From the outset, the NSW Police Force had been highly centralised, militaristic and hierarchical in structure. Emphasis had been on many supervisory layers and central control to limit corruption. Avery's view was that the existing management structure took little account of the needs of the clients, the citizens of the state, and certainly had limited success, if any, in containing or removing corruption.

Initial reaction to many of Avery's reforms was reserved, if not negative, based on the premise that he would only be around for a couple of years and then "the good old days" would return. There was much to support this view, because since Norman Allan, there had been four commissioners in twelve years. There was no particular reason to expect Avery to be different. However, there was a difference - the Police Board. The Board provided enormous moral support to Avery at a time when there was quite significant opposition coming from within, particularly elements of the Criminal Investigations Branch (CIB) which was the

focus of much of the attention on corruption, and headquarters elements which had established "comfort zones".

The Avery approach, which many police officers at all levels found very hard to accept, was to remove the insularity which had so dominated and restricted the growth of the organisation for so long. He astounded long-serving police officers by openly admitting he did not have the answer to their every question.[13] Instead, he adopted a multi-disciplinary approach and asked that the community, other departments and, heaven forbid, junior officers be consulted in developing solutions to problems which arose. This notion is highlighted by Eddison when he refers to the "need to increasingly shift departments of State away from performing the role of safe havens where particular professions can indulge themselves, constantly feeding on their own mythology, towards the notion of a multi-disciplinary policy development, implementation and review role".[14]

The intransigence and the relationship of corruption to the disabling nature of the structure was there to be seen.[15] Dual lines of accountability pervaded the organisation. To achieve the "regionalisation" (which involved a shift from a functional structure to a geographic base) and make accountability unequivocal, four assistant commissioner positions were recast from crime, traffic, general and state emergency services to four region commanders. The deputy commissioner (administration) position was disestablished and the deputy commissioner (operations) position became the State Commander. Eight districts were created while two were disestablished, leaving a total of twenty-six districts.

Each of the four regions occupy about a quarter of the State and are seen to be similar in a number of respects, such that valid comparisons can be made on performance. The regional commands are designed to be a microcosm of the Commissioner's job, while being limited to implementing policy laid down by the Commissioner, on advice. Otherwise, they are largely autonomous. Each region has either six or seven districts.

A significant step in the restructuring was to follow when the century-old CIB ceased to exist and the detectives were divided among the four regions, responsible directly to the region commanders. Although there have been claims of a conspiracy to undermine Avery's position, detectives have gradually accepted the first phase of the restructure.[16] The next phase will involve moves to make detectives really "community-based", while retaining a core of experts at region level.

The restructuring halved the number of levels in the organisation, but at a ministerial planning meeting in May 1988, it was agreed to further reduce the number to a total of five - from commissioner to constable. This involved the creation of some 182 patrols, which are the community based strategic business units of the service, in place of the old divisions and sub-stations. The patrols are

the centre-piece of the organisation's operations - the strategic business units of the corporation.

In terms of strategy, the NSW Police Force was little different from many other western police departments. The normal operating position was premised on responding to daily incidents and occurrences. The reactive orientation is probably natural, because police have been required to respond rapidly to a changing operational environment, without particular reference to or direction from the people, through the elected government. It follows then that their strategies and planning would reflect such a standard.[17] However, Avery recognised that if police were to deal with disorder to reduce fear and crime, they must have the consent of the community for legitimacy and to get the assistance required to perform effectively.[18]

To gain an appreciation of the realisation that Avery had come to in trying to redirect the strategy of the NSW Police, it is necessary to explore the standard operating strategies which have hitherto applied. From the 1960s to 1980s policing emphasised rapid response, random patrol and retrospective investigation.[19]

Rapid response strategies have been strongly supported, if not encouraged, by changes in technology.[20] This is particularly so in regard to motor vehicles, portable radios and computers. With computer aided dispatch, portable radios and fast cars, police have been able to lower response times to about two to three minutes in urban centres, such as Chicago in the United States.[21]

The significant thing about rapid response is that a substantial body of research now suggests that people seeking police help (including victims) do not contact police for up to half an hour after an incident.[22] In fact, in most case, victims contact at least one friend or relative before making contact with police.

The widely held belief that rapid response leads to arrest of more offenders and thus greater community satisfaction is not empirically supported.[23] Also of interest, is the view of long term operational police who, while sceptical of such a notion, generally concede that to catch a person "in the act" is rare.

Extensive police resources are devoted to rapid response. Yet citizens seeking police assistance often contend that they are dissatisfied with the service received upon arrival of police. Community-based policing focuses on satisfying community demands and needs, rather than simply the speed of response. A recent survey of citizen attitudes in New South Wales showed about twenty per cent of citizens were dissatisfied with the police service received.[24] The majority said police "not caring" or "not taking them seriously" was the reason for their dissatisfaction.

A police promise to attend "as soon as possible" (which can be a few minutes to a few hours) leaves many citizens frustrated and wondering. Many times the attending officer meets an irate customer who is more upset about the

delayed response than the original reason for the call. The frustrated customer then often seeks ombudsman intervention in the issue, which generates a huge bureaucratic procedure and further obscures the original issue. Keeping the caller informed can remove much of the problem.

Herman Goldstein, noted American researcher, has been a significant contributor to the discussion of the use of police time.[25] His argument is essentially that police should be problem solvers rather than incident reactors. That is, police tend to return to similar incidents at the same locations, time after time, and treat them as separate incidents, not as a continuing problem.[26] George Kelling of Harvard and North-Eastern Universities, notes that "beat officers ... have known intuitively what researchers ... have confirmed - fewer than ten per cent of locations calling for police service generate over sixty per cent of the total calls for service during any given year".[27]

In summary, police are rapidly responding to seemingly unconnected incidents, quickly (and sometimes inadequately) dealing with each of them and moving on to the next. The result is citizen dissatisfaction with the level or lack of personal service and police dissatisfaction with the ricocheting style. Random patrol by car was thought to create a sense of police omnipresence, making bicycle and foot patrol or beat police obsolete.[28] The real effect has been to build a barrier between police officers and citizens. Police "putting a few miles on the clock" by driving in an undirected fashion provide no sense of security or feeling of safety for citizens, nor any feelings of achievement for police.

Again, research in the United States and United Kingdom suggests that citizens are largely unaware of variations in the level of police patrols. In the Kansas City experiment conducted by Kelling, three types of patrolling were trialed over a whole year - random, saturation and directed.[29] Random is the old strategy of undirected driving around; saturation has three times the number of police in the area; and directed has the usual number, but waiting in the station until called and immediately returning to the station upon completion of the job.

Police believed that random and saturation patrolling would leave citizens feeling more secure, impressed by the high police profile and noticing lower crime levels in designated areas. In the three trial areas in Kansas City, no difference was reported in crime levels, citizen fear levels or perceptions of police presence. Nor was there any in the other cities in the United States where the experiment was replicated.

Of note to police commanders is that directed response required far fewer officers to achieve the same result. That is, directed patrol maintains the same level of citizen confidence with much lower resource commitment. Noted police tactician and Research Fellow in the Program of Criminal Justice at Harvard University, Robert Wasserman, commented that "every shred of evidence is that

rapid response and patrolling in cars doesn't reduce crime, increase citizen satisfaction, or reduce fear."[30]

Notwithstanding, it is important to maintain a rapid response capacity for emergency circumstances. However, there is no requirement to build the whole police response on the odd emergency call. In New South Wales, emergency calls for service constitute less than one per cent of all calls, according to figures from the NSW Police Radio Operations Centre. Thus, split level response, encompassing a combination of quality reactive and community-based police response, is the ideal for which New South Wales is striving.

In terms of retrospective investigation, television detective shows depict criminals being apprehended following brilliant investigation. Empirical reality has it that police mainly arrest and convict criminals on evidence of citizens. That is, forensic and crime scene evidence, dogged investigation and clever interrogation of suspects provide valuable corroborating evidence, *but* in a significant majority of instances, criminals are convicted primarily on the evidence of citizen witnesses.[31]

There has been, and always will be, need for highly skilled investigators, interrogators and analysts to gather and piece together the many parts of a criminal investigation for presentation to a court. It is, however, critical to keep an open line to the main sources of information on criminal activity, the citizens, and to have the means of converting that information into intelligence and then into admissible evidence. This latter aspect has been somewhat neglected in New South Wales.

Confronted with overwhelming evidence that current operational practices were at least to be seriously questioned, Avery made a choice of strategy which is built around the professional *community-based police officer* working with the particular community of his or her beat to solve (or contribute to the solution of) local problems. The beat constable in New South Wales is offered much freedom to work with his or her community on a whole range of problems. Almost the whole of the remainder of the department has as its role support of the "general practitioner" in everyday contact with the community.

Just as medical general practitioners developed a preventive model which addresses the health of the whole person, rather than a specific illness, it is intended that the police "general practitioners" will work in the preventive way in their communities to generate feelings of citizen personal safety, improve security and decrease crime. Expert support is still required from detectives, crime scene analysts, intelligence analysts, highway patrollers, fingerprint analysts, traffic researchers, helicopter crews, dog handlers, tactical response and special weapons operators, radio operators, prosecutors, accident investigators and so on. Community based approaches are, however, limited because these "scarce"

resources are often effectively unavailable to patrols. This, and the development of broad skills by general duty police officers, provides a future challenge for the Avery administration.

Notwithstanding this challenge, it is expected, based on overseas experience - particularly Flint, Michigan - that such beat police will lower community fear and apprehension.[32] As well, locally-based beat police are expected to raise the level of information fed to police for analysis by intelligence units. The role of intelligence in police planning and operations is increasing. A network of police with skills in analytical and logical techniques is being built throughout commands to give early warning of issues and problems, as well as provide information which can be converted into admissible evidenced.

The net effect of the rational reallocations of resources is increased community satisfaction and improved police performance. The Police minister has indicated that one thousand police will be working beats in New South Wales by 1992. Currently, there are fifty-seven.

While the majority of NSW Police resources are being directed to community-based policing activity, organised crime must also be combated. The efforts to reduce this insidious influence are based on a multi-disciplined task force approach. Each task force incorporates intelligence assessment and allocation of specific resources to pursue the principal criminals to conviction. Management and leadership of these task forces is critical, regardless of the particular type of organised criminal activity.

On the subject of leadership, in Avery, the Police Board chose a leader whose values are old-fashioned as well as modern; who adheres to old-fashioned ideas of honesty and duty as well as to modern ideas of policing as a service. He is steadily winning acceptance by police of those values.[33] To give life to those values, Avery has publicised and widely circulated a statement of values as a gauge for judging police performance and behaviour.

The values are that each member of the NSW Police Service acts in a manner which:

- upholds the rule of law;
- preserves the individual's rights and freedoms;
- places integrity above all;
- seeks to improve quality of life by community involvement in policing;
- strives for citizen and police personal satisfaction;
- strives to capitalise on the wealth of human resources; and
- husbands public resources - both money and authority.

Integrity above all is the theme, but unequivocal professional standing in the community is the objective. Efforts to change the operating culture of the police service, in the short term, have met with public scepticism and internal cynicism. It is well recognised that such a standing will not come quickly or easily. The Avery administration, however, is seeking to imbue every member with a value based outlook while simultaneously making the whole organisation value driven.

Steadily the values are being accepted but only time and leadership will see them unanimously regarded as more than a document on the wall or items to be included in a plan or an application.

Finally, a large lesson from the New South Wales experience is that reform takes much longer than you think. Change in the law and other events must be supported by processes sustained over a long period. Appropriate forces must be arranged against inevitable resistance to change. Opportunities must be recognised and acted upon.[34] As Paterson so wisely put it - "it can be a long and costly process, but change by osmosis, by absorption of environmental influences, appears to be overwhelmingly the predominant source of organisational reform".[35] In other words, gently does it.

Notes

1. Notably George Kelling, Herman Goldstein, David Bayley and James Q. Wilson.
2. *NSW Police Service - 1984 to 1988 to... - An Overview*, unpublished, May 1988, p. 6.
3. One public servant described the New South Wales Police Department as "rushing headlong into the nineteenth century".
4. E.A. Lusher, chairman, Commission to inquire into New South Wales Police Administration, *Report* (Sydney: New South Wales Government Printer, April 1981).
5. G.J. Jackson, "Reform of Policing New South Wales", *Conference of the Society for the Reform of the Criminal Law*, 19-24 March 1989, p. 1.
6. *Ibid*., p. 2.
7. J.K. Avery, *Police - Force or Service?* (Sydney: Butterworths, 1981).
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Part 5

Reforming the System of Government

13

Overview

Peter Coaldrake

In some circles it is becoming fashionable to belittle the contribution made by Tony Fitzgerald QC, to Queensland public life. I, for one, do not subscribe to this trend. To be sure, there are deficiencies in certain aspects of Mr Fitzgerald's recommendations. It is also vitally important that the Report itself is subject to the closest scrutiny.

Yet those who do feel genuine disappointment with the Fitzgerald Report (as opposed to those who are threatened by its recommendations and are therefore hostile anyway) should also reflect on the changes which have taken place in Queensland over the last two years. For such reflection will make plain the extent of Fitzgerald's impact as an agent of change. What started out as a limited probe into allegations of police misconduct became, in effect, a wide-ranging investigation into the way the business of government has been conducted in Queensland over a long period.

One of the more important of Mr Fitzgerald's findings was the link between Queensland's electoral system and the spread of corruption. Although some contest such a link, it is a reality that for many years, Queensland's zonal electoral structure provided the State Government with a buffer against the possibility of political defeat. This was understood by those working within or close to the Government and engendered a view of the relative invulnerability of the position of the ruling party. In turn, the effect was to reinforce longstanding values about what were supposedly the important elements in Queensland politics. In particular, it underlined the already longheld disregard for the fate of those institutions, such as the parliament, the public service, the police force, and the judiciary - whose role it is to ensure that government operates with a measure of efficiency, accountability and regard for the public interest.

Worse, these institutional structures increasingly came to be regarded by successive governments not so much as vehicles for protecting the public interest, but rather, as impediments to progress and development. In that context, it is perhaps not so surprising that governments sought to neutralise the impact of these institutions.

Apart from factors common to other Westminster-derived systems (for example, the development of the party system) the erosion of Parliament's authority in Queensland was hastened over the years by several indigenous factors. These include the absence, since 1922, of a Legislative Council. The major effect of this absence was not so much the removal of legislative scrutiny and review (the Legislative Council's performance in those terms had been very poor) but rather, the discernible effect of the Council's absence on Queensland's political character. Specifically, the absence of the Upper House worked to discourage the notion of political compromise, in particular, any sense that there were limitations to the authority of parliament or government.

Queensland's raw political style also influenced very significantly the shaping of Parliament's role and, especially, relationships between the Executive and the Legislature. For most of this century Queensland politics were dominated by long periods of stable and unbroken rule, and by a series of strong, sometimes authoritarian, political leaders. A tradition thus developed whereby Queensland's political life has been, and still remains, dominated by party leadership and the cult of personality. As a result, the Parliament did not develop as a focus of political authority, except in those unusual circumstances where a complete party breakdown occurred.

There is also little doubt that institutionalised misunderstandings of the roles of government and parliament contributed significantly to the malaise of the Parliament's position. As a consequence, the distinctions between "party" and "government", and between "parliament" and "government", became badly blurred, if not lost altogether.

Over the years, too, the Queensland Public Service became politicised. Apart from anything else, public servants were aware that the protection afforded to the Government by the State's electoral arrangements meant, in effect, that the ruling party (parties) represented "the only game in town". There was no prospect of a change in government and changes in administrative practice were not encouraged because they could threaten the longstanding cosiness of arrangements between the government and its administrative advisers. The politicisation of the public service, then, was not so much in a directly partisan sense (though in recent years there has been some incidence of the beneficial effects of possessing a "green and gold" [party membership] pass) but rather in the way the Public Service as an

institution came to share the "values" of its political masters, and the "benefits" of office, as well as the threat potentially posed by government defeat at the polls.

The enduring benefit of the Fitzgerald Inquiry will be in convincing ordinary people that issues such as these, which for a long time were treated as worthless, are important for maintaining a healthy community fabric. Perhaps, too, the Inquiry has helped people appreciate that cronyism and corruption do have a cost, a cost against society as well as direct economic cost against the community.

14

Immorality May Lead to Greatness: Ethics in Government

Michael Jackson

When a government is perceived to be corrupt it loses legitimacy in the eyes of the governed. Corruption can take many forms, ranging from malfeasance to the unethical. Current developments in Eastern Europe, the Soviet Union, and China are partly a response to perceived corruption.

If all societies are subject to corruption, Alexis de Tocqueville, that profound observer of early American democracy, drew the conclusion that democracies are susceptible to a particularly virulent form of corruption. He put it this way: "the corruption of men who have casually risen to power by birth has little affect on the wider society ... What is to be feared is not so much the immorality of the great as the fact that immorality may lead to greatness."[1]

He goes on to explain that in a democracy, private citizens see a person of their own rank rise from obscurity to power and riches. This spectacle excites surprise and envy. To attribute the rise of such a person to merit would be implicitly to acknowledge that one lacks such merit. It is far easier to impute the success of others to their vices rather than to their virtues. This imputation is latent in democracy and it grows when it is vindicated, as it all too often is. When vindicated, this cynicism causes in some observers the desire to imitate it. In Tocqueville's words, "to pillage the public purse and to sell the favours of the state are arts that the meanest villain can understand and hope to practice in his turn".[2]

The misdeeds of the great are incomprehensible to the ordinary person, but the misdeeds of someone who has asked for our vote are easy enough to fathom. Australian political culture has long prided itself on "lopping tall poppies" in the name of egalitarianism. In so doing, the public agenda as expressed by the media addresses the misdeeds of the great. In a migrant society without a traditional aristocracy, greatness is defined by and large by wealth and income. Of course, once office has been achieved, elected and appointed office holders are often exposed to a similar prurient interest. The media will lavish attention on the salary and benefits of the director of the opera or the prime minister, but will not delve very far either into the capacities of the person selected or how the job is

exercised. A variety of excuses can be given for this fixation from "it's what viewers want" to "defamation laws leave little alternative".[3] The recent attempt to deflect attention from the evidence of the Fitzgerald Report to the income Mr Fitzgerald derived from his labours, found a responsive audience.

If immorality is a means to greatness, it goes a long way to encouraging the rest of us to act in the same way. Social (ethical) rules are inherently vague, and when our leaders act to blur them still more, we are on the slippery slope. Stuart Henry's study of the black economy in Britain makes clear the elaborate justifications people offer for unethical and illegal actions. Henry found that those who acted on the borderline offered mitigating circumstances: low wages; special need, if only for the moment; retribution for the tricks of business or government; and the assertion that "everyone else does it" or would do it in the same situation. In addition, Henry found a number of equivocations that neutralise formal standards of behaviour. Someone selling stolen videos would never describe them as stolen. Rather they "fell off the back of a truck" or are "bulk purchases". These neutralisations explain the low price of the goods offered.[4]

Almost no one ever will admit to acting unethically, or illegally. It was in this vein that Donald Frederick Lane (a former National Party minister) explained to the Fitzgerald Inquiry that "his wealth was [the result of using his] Ministerial privileges to gain personal financial benefit." Lane went on to say that "his activities accorded with the custom of his Ministerial colleagues".[5] We inevitably seek to justify our actions.

Ethics and Politics

It is this desire to justify our actions that makes us ethical.[6] Ethics is finally the "desire to be able to justify [our] actions to others on grounds they could not reasonably reject".[7] The boundaries within which we justify our actions constitute the political community. In Aristotle's Athens, where a distinction between the public and private was less clear than it is in our society, little distinction was made between ethics and politics. Political life was but one sphere in which the ethics of a people was expressed.

It is worth noting that Aristotle also said that "some think that we are made good by nature, others by habituation, others by teaching". These three remain the conventional explanations for ethical and unethical actions. Aristotle went on to claim that "it is hard, if not impossible, to remove by argument the traits that have long since been incorporated in the character". He supposed that habit and teaching, being within our control, must be where we concentrate our efforts. Ever the realist, he concluded that even where all three conditions favour virtue "we must be content if ... we get some tincture of virtue".[8] Aristotle wisely warns

against setting impossible standards. The best is the enemy of the good, and good is enough.

The popular doctrine held outside of Queensland is that it is the exception to the Australian norm. But, it is not obvious that Queensland is at odds with the other States or the Commonwealth as a whole in possessing the characteristics that made corruption possible. The news of the day brings stories of findings of the Independent Commission Against Crime (ICAC) in New South Wales, wheeling and dealing in Western Australia, and betrayals of confidence in the Commonwealth Government.[9]

We deny ourselves of the full teaching of the Fitzgerald Report if we do not use it as an opportunity to reflect on the whole society. If we are content to see it as confirming our fears about Queensland exceptionalism, we will have forsaken a rare opportunity.

I have argued that ethics is inherently a part of the political life of a community at a general level. It should be clear that I am using the word "political" and its derivatives, not to refer to the sound and fury of partisan conflict, but rather to refer to the form and nature of the constitution of the society, the way in which it is constituted. I prefer the definition of politics given by Jacques Maritain, as "the process by which a civil society achieves its common good through the agency of the state".[10]

There is a more specific connection between ethics and politics that arises in the light of the Fitzgerald Report, and that concerns the public service, standing between the partisan fray and the constitution of the society. Discretion is inevitable in any complex institution. Government is certainly one such institution. Kenneth Davis lists twelve instances of discretionary judgments within the administrative process.[11] They include plea bargaining, eviction from public housing for being "undesirable", delayed legal proceedings to allow a cooling off period, a warning to a traffic violator rather than a ticket, procurement negotiations in which it is suggested that a contract might be won if the bidder took a salary reduction for the duration of the contract, a social worker refrains from reporting that an ineligible client is receiving a benefit, a trade practices commissioner grants a merger approval to two corporations without a publicly stated reason, and so on.

As the scope of government has grown, so has administrative discretion. If that part of the argument is commonplace, perhaps it is less common to suggest that even if the size of government stops growing, administrative discretion may well continue to grow. If the climate of the times in the public service is "to let managers manage", I would expect ever more discretion to be passed down the hierarchy.

The history of regulation reflects this expansion of discretion. Legislation introducing regulation, persistently speaks in terms of "appropriate", "advisable", 'beneficial", "equitable", "reasonable", "sufficient", and their negations. I expect more of this. The irony is that just as legislation is increasingly drafted in such terms, the term "the public interest" is fading from use. It does not, for example, figure in the Commonwealth Government's *Guidelines on Official Conduct of Commonwealth Public Servants 1987*.[12]

Insofar as administrative discretion is a part of public service, John Rohr has argued that "bureaucrats participate in the governing process of our society".[13] He goes on to say that to govern in a democratic society without a mandate from the electorate raises serious ethical questions. This is a problem that inheres in democratic politics, as we shall see. It admits of no solution; it must be managed, not solved. Emphasising the role of public servants as individuals, emphasises the importance of personnel politics, a point to which later reference will be made.

Whatever may be unclear about administrative discretion, one thing is clear. When asked, citizens impose a higher standard of conduct on public officials, elected or appointed, than on ordinary persons. Research on corruption in the United States brings this point home. John Peters and Susan Welch surveyed several hundred members of state legislatures, finding that one factor that influenced their judgment of an hypothetical act was who did it. An instance of a petty crime, say stealing ten dollars, was judged less harshly if done by a citizen than if done by a public official, say in using stationery worth ten dollars.[14] Judges were found to have the highest standards set for them.

About a decade later, Michael Johnston made a similar finding in a survey of voters. He used twenty hypothetical situations, ten in private life and ten in public life. He found the mean response on a scale of 0 to 3 for the public examples to be 2.314, while for the private cases, it was 1.580.[15] This difference was statistically significant.

Other interesting findings emerged from both of these studies. Both the elite sample of legislators and the mass sample of voters made fine grained distinctions in their judgments. They took into account not only the deed, but the doer, and the beneficiary. In some cases perfectly legal acts were judged corrupt, while in other cases clearly illegal acts were deemed not to be corrupt. These are examples of what I referred to earlier in passing as relative judgments. Although in the jurisdiction in which Johnston polled, the provision of free food or drink to police officers on duty was a criminal offence, respondents did not judge it to be corrupt. On the other hand, respondents did think it corrupt when a public official uses the office telephone for private business, though this was perfectly legal.

That judgments are relative should not lead to the conclusion that all ethical judgments are irrational. Far from it, for in both of these studies and in

many others, respondents show a strong pattern in their judgments. There is a moral coherence to the world than we sometimes fail to realise.

What is Ethics?

I have used the word "ethics" a good deal in the preceding remarks. Though I ventured to define "politics", I did not try to define "ethics". I did so in part because I did not wish to turn this discussion into an argument about definitions at the expense of substance.

Trying to define ethics is like trying to define life; it is impossible, but we are alive. Whatever the difficulties of defining ethics, we do act ethically and we do value ethical conduct. The most eloquent testimony to this fact is the kind of rationalisations put upon unethical acts to justify them. For the moment it suffices to say something about what ethics is *not*, and later to make a more positive statement.

For many people the word "ethics", and even more the word "morality", conjures up images or puritanical self-righteousness of the order of New South Wales Parliamentarian *extraordinaire* Fred Nile. Such stereotypes are fuelled by such pronouncements as were made by former United States President Ronald Reagan, who opined that his was an administration of a high moral standard, as a former premier of Queensland might have said on occasion. At the time Reagan made that claim, more than one hundred senior officials of his administration, who had been appointed on his authority, were facing serious charges of illegal or unethical conduct. What President Reagan must have had in mind when he made that statement, was that his was an administration which, for example, opposed abortion.[16] Similarly, a tabloid headline on our declining moral standards almost surely heralds another diatribe on homosexuality, drugs, or divorce. It is unlikely to signal an account of corporate malfeasance, official nonfeasance, sexism, or the like.

When we hear the words "ethics" and "morality" we tend to think of one particular moral point of view, conflate that to the whole of morality, and react to that, negatively.[17] Larger, more encompassing notions of ethics and morality are consequently pre-empted:

1. Ethics is not mainly concerned with sex, even if we are. The ethics of sexual practices are subject to the general considerations that apply to all practices and decisions, namely, prudence, rationality, candour, sincerity, honesty, to name but a few.
2. Ethics is not an ideal system apart from reality. Ethics to be ethics must be rooted in our ethos, in us. Ethical injunctions are generalisations about our

intentions and arrangements. The search for justice through the courts is one example of trying to put flesh on the bones of the ethics of justice. When we discover that our practices do not measure up to the standards we accept, it is time to consider changing either the practices or the standards. Those who rationalise their illegal or unethical actions do neither. They pay lip service to the standards while abusing them. This is the tribute that vice pays to virtue.

3. Ethics is not limited to religion. There is virtue beyond religion, just as there is vice within religion. By the same token, as we have seen above, ethics is not exhausted by the legal. What is legal may be unethical; what is ethical may be illegal. If these preliminaries suffice for the moment, a more positive statement about ethics will be made later.

In the complexity of modern government, operating under daily pressure, the problem is that ethically good people will not always make ethically good decisions. This contention is best understood by an analogy. A technically competent team of engineers will not necessarily make technically competent decisions. To make technically competent decisions, team members must consciously and systematically follow a strategy that brings to bear their expertise to its best advantage. The same follows for the ethical aspects of decision making. Decision-makers must self-consciously and systematically consider the ethical aspects of their decisions by following a strategy that highlights these aspects and forces attention to them.

It is partly for this reason that ethics is increasingly taught in Master of Business Administration programs, as well as in Master of Public Policy programs, as well as in executive development units. The aim of this instruction is not to teach people how to be ethical, but to encourage them to take stock of their ethics and to explore ways for ethics to be built into the management structure of an organisation on the assumption that good ethics is good business. In this important sense, ethics can be taught.

This instruction may seem a momentary fashion to some. Such sceptics will suppose that ethics cannot be taught. After all, it is nothing but common sense and the integrity that we learn at the parental knee, if anywhere.

It is instructive to recall that exactly such scepticism greeted the earliest attempts to make business management into a profession. Through the nineteenth century, businesses were run by individuals who were unselfconscious of their actions. It was only at the turn of the century that an effort was made to analyse management and to distil its components. Business schools emerged to document examples of successful and unsuccessful management. In time, the case study method evolved to allow for the development of the experiences of the

participants. Sceptics scoffed at these schools, claiming that business was just common sense and get-up-and-go, which some people had and others did not.

Each time new subjects were introduced into business schools, these sceptics derided them. So, for example, when accounting was introduced, there were those who scorned it. Book-keeping, after all, was a simple matter of careful record keeping and good arithmetic. When industrial relations came along, it was greeted in much the same way. The same goes for advertising, strategic planning, and executive health and stress management and all the other courses that are now standard fare in business schools.[18]

The same problem bedevils schools of public affairs where public policy and administration are taught. There is still a substantial body of opinion according to which effective public service requires nothing more than common sense. As one observer has noted:

> One of the difficult problems of schools of public affairs is to overcome the old fashioned belief - still held by many otherwise sophisticated people - that the skills of management are simply the application of "common sense" by any intelligent and broadly educated person to the management problems which are presented to him. It is demonstrable that many intelligent and broadly educated people who are generally credited with a good deal of "common sense" make very poor managers. The skills of effective management require a good deal of uncommon sense and uncommon knowledge.[19]

This same scepticism no doubt applies even more to teaching ethics either in degree programs or in executive development courses. Yet it is clear that ethics is necessary and that in the sense outlined above, ethics can be taught.

The world is made of words. What we understand of the world, what we learn of the world, what we accomplish in the world - these are alone made real in words. Words are much more than bullets, in Bill Hayden's memorable quip. Words are the very stuff of the world. Ethics is one of the languages of the world. To be ethical we must use that language. If we do not, we risk losing it. Like learning effectively to use any language from French to Basic, learning to speak ethics takes time and practice.

Administrative Ethics

Earlier, I referred to the importance of personnel practices in the public service. It has been argued that "there are ... few men who can for any great length of time

enjoy office and power without being more or less under the influence of feelings unfavourable to the discharge of their public duties."

The same speaker went on to say that those who are secure in office are apt to look upon the public interest with indifference and tolerate conduct which an outsider would not countenance. In such a situation, public office has become a species of property rather than a public trust. He then declaimed: "The duties of public officers are or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance and I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience."

He then went on to propose that all in government employment be limited to four years in office. The result would be a rotation of public officials. Rotation was deemed consistent with the democratic principles of government in that it allowed all citizens to hope for the opportunity to have a turn in public office. This experience, it was also argued, would be a school of citizenship which would bring out the best in each of us.

Moreover, such rotation of office was argued to be consistent with democracy in another way. The fixed tenure of office of officials meant that any new regime would have the opportunity to appoint its own choices to any and all offices. In this way, the incoming government could give expression to its electoral mandate by staffing the government with those committed to its program.

Though these arguments may sound familiar, they are not contemporary. Rather they come from the United States in 1829, from President Andrew Jackson's explanation of his preference for the rotation of government offices.[20] It was a system that Jeremy Bentham praised.[21] Six years after Jackson's system had been introduced, Tocqueville wrote of the attentive and considerate nature of American public officials.[22]

Rotation in office was soon known by another name, the spoils system. As one of its defenders put it: "to the victor goes the spoils". That is, to the electoral victor goes the spoils of office. By 1867, the battle opened to reform the public service again, this time by making examinations the basis for recruitment.[23] This battle went on for two decades. To those who had grown up in it, the patronage system seemed perfectly natural. To those who were aware of the corruption it produced, it was anathema.

Faltering steps were made at reform, but no progress was made until the passage of the *Pendleton Act 1883*. Only after President John Garfield had been assassinated by a disappointed office seeker, was it possible to secure bi-partisan agreement that a change was necessary. The Pendleton Act was the first step in securing for the United States, a public service marked by merit recruitment, tenure, salaried, provided with pensions, and promoted on seniority. The purpose

of these reforms was moral reform - to end corruption. As an added benefit, such changes were also thought to effect a more efficient discharge of the public business.[24]

Passage of the legislation alone did not signal success. It allowed positions to be classified as public service. Those unclassified remained within the gift of the President. Over the next two generations, the struggle went on to increase the number of classified positions. Characteristically, incumbent governments strove to expand classification near the end of their term to secure the employment of those whom they had appointed. Opponents who hoped to win the forthcoming presidential elections mobilised resistance to expansion in Congress. One key factor in the successful expansion of classification, was the emergence of civil service reform associations throughout the country. These associations agitated tirelessly for reform, acting as much like schools of citizenship as government service was supposed to have done. Given that the Australian Constitution is a hybrid grown partly from American institutions, the American experience is resonant.

That the professional public service cannot be an effective barrier to corruption, seems to be the conclusion of the Queensland experience. Professional competence alone is not enough to equip public servants to defend the public interest. I make this remark without intending to cast doubt on the personal probity of any member of the Queensland Public Service. At the same time, I cannot help but suppose that many members of the public service were well aware of the misdeeds chronicled in the Fitzgerald Report. Many hundreds, even thousands of public servants work for and with the police for a start. Others were aware of the kinds of conduct that Donald Frederick Lane revealed. These people bore the heavy ethical office of witness to the less than ethical acts of others, often their superiors.

I have also argued with participants in degree programs and executive development training modules about the traditional conditions of employment for public servants. I have contended that these conditions of employment were intended to secure an ethical as well as a professionally competent service.[25] Invariably my interlocutors plead that these conditions of employment are not sufficient to allow them to withstand their political masters, even on the most serious of issues. Such an attitude is hardly surprising when one considers that even the *Guidelines on Official Conduct* of the Commonwealth Public Service offers a Faustian bargain: allowing public servants to participate in partisan politics and in return requiring their absolute commitment to the hierarchy, neglecting to mention even in passing, the public interest.

In the Fitzgerald Report it is said that: "There is a natural human inclination for a subordinate to seek to give effect to the wishes of a superior."

Coupled with this fact, is a system in which Executive government has control over the careers of public officials. The result is a public service that is compliant.[26]

If the traditional conditions of employment are insufficient, perhaps then it is time to do away with them. At this suggestion, my interlocutors usually demur. They advocate retention of these conditions of employment, but the grounds for retention are not made clear. At best, they might be that some conditions of employment secure competence. Selection by examination, for example, meets this need. But as the American survey data cited above show, the public wants more than competence from public officials.

The public expects administrative ethics of a high order. The term "administrative ethics" refers to the ethical issues that occur within administration where discretion occurs.[27] The development of a professional career public service was for the purpose of creating the condition in which civil servants could discharge their duties within the bounds of ethics. The conditions of employment that marked that professional development included merit selection and promotion, tenure, payment of a fixed salary, and superannuation. These conditions of employment were designed with the aim of insulating public servants from their political masters such as to allow for their uncorrupted service. The aim was to allow public servants to safeguard the public interest.

In the package of developments called the new public management, one implication is that the traditional conditions of employment have lost their usefulness at least at the higher reaches of the public service. Long gone are the days when it was not permitted by convention for a minister to appoint the permanent head of the department.[28]

What potential does the new public management hold for ethics in government? Contract employment at senior positions is intended to provide for flexibility in employment. It may also put those employed on contract in the position to offer more independent advice since they will not be risking an otherwise tenured and secure employment if they fall out of favour. On the other hand, those on contract employment may find that the incentives are even greater to win favour with those who hold the sway, in the hope of securing a renewal of contract. Certainly, experience to date with the employment of consultants by government does not indicate any general willingness on the part of incumbent governments to seek uncongenial advice or for it to be given. A more dubious practice is the New South Wales Government's recent notice that it will assist senior managers employed on contracts in minimising their tax obligation. This hardly seems a blow for public ethics in a time when the beleaguered tax system[29] is confronted by public indifference.

In the traditional public service, many public servants saw themselves as servants of the public interest that transcends the partisan conflicts of the day.

And, no doubt, a good many of them were. After long periods of rule by one party, which is, by the way, the norm in democratic political systems, the public service has always begun to take on the hue of the dominant party. New governments have correspondingly been frustrated by the perceived reluctance of the existing bureaucracy to embrace a new agenda. Each party has always blamed its predecessors and opponents for stacking the public service to create this situation. More recently it has been argued that the public system itself creates the problem, in that it is primarily concerned with its own stake rather than in defending the public interest. On this view, claims to defending the public interest are nothing more than subterfuges which an astute politician will have to see through, treating the public service like any other interest group in the lobbying process.[30]

Once the privileged position of the public service as defenders of the public interest is stripped, that title can pass only to the parliament. In an age when Executive government dominates parliament, the claim to sovereignty is acquired by the parliamentary leadership. The form of the argument is usually to fasten on to the two undeniable facts that bureaucrats do participate in government, as I argued above, regarding discretion, and that they are unelected. Election confers the only title of legitimacy in a democratic polity, or so it is assumed. (Such arguments spend little attention either on royal representatives or judges who enjoy no such status.) From this argument it is deduced that bureaucrats should conform themselves to the wishes of the government of the day.

What this argument fails to appreciate is, that no one elects the government of the day. In fact, what is elected is parliament. Unfortunately, over the years, the Executive in most parliamentary systems has established a dominance over parliament that would be the envy of any American president. As the Australian Constitution is a hybrid of Washington and Westminster, so is our political culture, for we now have presidential-style elections joined to a parliamentary system with one result being that parliament is almost completely excluded from the governing process. Australian parliaments do not control their own agendas, they do not set their own budgets, and most ministers regard their parliamentary duties with the distaste that most university lecturers regard their teaching - it is at best a duty to be done but not one's own work. Consequently, one of the chief values of the parliamentary system that ministers and the government of the day sit in the parliament and are accountable to it, has been lost. Those who have had the pleasure of sitting through some parliamentary debate or question time in any Australian capital city will appreciate these observations.

All members of parliament are elected, so if election is the sign of sovereignty, then it is parliament as a whole that is sovereign and not merely that portion of it that constitutes the government of the day. If opposition parliamentarians could interest themselves in the business of the government of

the day more and spend less time waiting for the great day when it is their turn to govern, improvements might be wrought. If parliamentarians on the treasury benches interested themselves more in the business of government and less in waiting for the great day when the chance to become a minister comes, more improvements could result. As long as ministers treat parliament with contempt there will be a leadership vacuum for the public service, for if their ministers treat the People's House with contempt, will not public servants follow suit?

One tonic to this erosion of Parliament is the development of estimates and public accounts committees. The role of these committees in probing the administration of policy, assessing the appropriateness of expenditures, offers some hope for parliamentary resurgence.[31]

Of course, these committees pose serious difficulties for the public servants called to testify before them. It is their role to explain and defend the government of the day in detail, often on highly unfavourable terms. The inevitable result of this will be to place the political spotlight on individual public servants in a way that has never occurred before in this country.

Conclusion

Earlier, I cited Aristotle's dictum that we learn to be ethical in three ways: we are born good, we learn to become good, and we are taught to be good. These three paths to ethics correspond to the three ways in which we have tried to combat corruption. The three conventional approaches to corruption are; one, to identify susceptible individuals; two, to arrange institutional incentives; and three, to promote public attitudes.

While we may agree with Aristotle that some people are born good, it does not follow that some people are born bad. To assume that corruption is produced only by "rotten apples" is, as the Fitzgerald Report says, much too simple.[32] There may certainly be bad apples who do unethical things, but the kinds of problems revealed by the Fitzgerald Report, the Costigan Report, the current investigations of the ICAC in New South Wales, and a host of other investigations goes well beyond that explanation. Reviewing this litany is one reason why I do not regard Queensland as exceptional, but rather as a caricature of general Australian practice. Australians pride themselves on being cynical about government, the Fitzgerald Report says.[33] But Australians are, in fact, quite tolerant of official misconduct and misdeeds, and that toleration contributes to the perpetuation of such malfeasance. This toleration may spring from a deeper feature of the Australian political culture and that is the spirit of *etatism* of preferring government action to private action in some many spheres of life.[34] Malfeasance is

accepted as the price of government intervention. If government intervention was once regarded as the lesser evil, it no longer is.

Obviously screening out individuals who are prone to go bad, would be highly desirable if it were possible. But even if it were possible and it were done, I would still expect the same problems to remain.

Far more significant to corruption and the toleration of corruption that makes it possible, are institutional incentives and public attitudes. Public attitudes shape the habits of mind that determine most of what we do and shape the expectations of those who become public servants.

Ministers must make it a priority to install institutional incentives for ethical conduct. Here is a place where public enterprise might well learn from private enterprise. Around the world many large corporations have appointed *angel's* advocates to the board of directors charged with the task of defending the public interest, acting like a corporate conscience whenever there is a danger of a slip. Many corporations have also devoted considerable resources to staff training to cope with demanding jobs. One gets the impression that the drive to let managers manage in the Commonwealth Public Service has not been accompanied by any systematic effort to train those now called managers to do the myriad of tasks that have now fallen to them. The result is that one is tempted to draw the cynical conclusion that the exercise has consisted mainly of the effort to push responsibility down the chain of command.

Most important of all is the role of public opinion in shaping a political culture in which unethical conduct is unacceptable. For those concerned about the health of the Australian political culture, the *1983 International Values Survey* offered precious little solace. In the Australian sample, less than half of the respondents were prepared to express confidence in either the Commonwealth Parliament or the Commonwealth Public Service. This was an extremely carefully conducted survey aimed at underlying attitudes and not ephemeral responses to issues of the day.

It is hardly surprising that such measures of legitimacy as admitted confidence in the principal organs of government are so low. During the Costigan Royal Commission, the Australian Tax Office admitted that it had not bothered to pursue the Painters and Dockers Union out of fear of reprisals, a rather breath-taking example of administrative discretion that hardly seems ethical.[35] The inability of various branches of government to come to terms with the bottom of the harbour schemes was another blow to public confidence.

If we want good government, we have to mobilise the community for it in the way that environmentalists have mobilised community opinion. We need good government associations to publicise and galvanise attention.

With the current drive to make government operate like business, a number of possibilities are opened. We may end up with a public service ethics of the bottom line. As managers manage, all that will count is the profit accrued; the means used will be neglected, at least until the political pressure mounts. In the course of many of these arguments, I have heard it said that putting government upon a business footing will clarify its operations. Why is this? Because in business, the market determines success and failure. And it is easy to see if a firm is succeeding or failing. Those who make such arguments obviously did not spend much time on the economics of the firm. A cursory glance at the research firms shows that there are no simple measures of success or failure. Dividends, rates of return on investment, profit, market share, all of these and more are used to assess businesses. There is no simple measure of success in business. But the belief that there is now seems contagious in government with what results we have to wait and see.

While on the subject of similarities and differences between government and business, another point needs to be made. Advocates of making government run like business usually cite unusual individuals like Lee Iacocca, who have never served in government.[36] They do not cite individuals like Donald Regan who did, and who, despite his enormous success in business, was a frustrated failure in government in his own telling.[37] These same people recoiled in horror when John Brown, as Minister of Tourism, ignored the advice and constraints of his subordinates in the manner that one can imagine our business heroes doing.[38]

When business leaders who have served in government compare their government experience with their business experience, they say that public management is more difficult than private management. Consider the reflections of the Americans, George Schultz, Donald Rumsfield, Michael Blumenthal, Roy Ash, Lyman Hamilton, and George Romeny.[39]

The Fitzgerald Report's account of its dealing with banks does not inspire confidence in the determination of central social institutions that operate under an implicit social contract to do anything to check the growth of corruption.[40] The Australian Bankers Association refused to become involved as a professional association. It deflected attention on to individual banks. Individual banks in turn sought an excuse for not cooperating and when finally left with no alternative pushed responsibility both for cooperating and for accepting the responsibility for anything uncovered down the hierarchy to local managers, individuals who were not trained in dealing with suspect deposits and who may not have been confident of support from the higher echelons had they brought such transactions to notice.

Perhaps O.P. Dwivedi is right. To have an administrative ethic it is necessary to have an administrative theology. In his view, such a theology would consist of four testaments. "The first and foremost condition of a public

bureaucracy in a democracy ought to be that public servants view the governmental process as a moral endeavour."

The second is that public servants resolve to serve all citizens. (Though Dwivedi says citizens, I do not suppose he means that term to exclude long term resident aliens, for, as John Rohr has pointed out, these people are usually accorded most of the rights and privileges of citizenship.)[41]

Third, public servants must exhibit a personal commitment to serve society. And to this I would add, in a moment of evangelical fervour, the requirement that public servants show some knowledge of the Constitution and the nature and purpose of government rather in the way that cameralism in middle Europe in the eighteenth century required of state servants.

Fourth, that in a conflict between democratic values and the government of the day that the public servant must prefer the democratic values. While I am not sure what such a preference would require in particular cases, I will close with a suggestion. The Royal Australian Institute of Public Administration (RAIPA) might consider the creation of the Vivian Creighton Award[42] to be awarded periodically to the public servant who has done the most to preserve the public interest. Since RAIPA is organised federally, this award would be best inaugurated in Queensland, named as it is, after a Queensland public servant from an earlier epoch who tried to serve the public interest to his considerable personal cost.

In conclusion, if the traditional conditions of employment of the public service have failed to secure such an administrative theology, the question now is whether the conditions of employment bruited by the new public management will do so.

Notes

1. A. de Tocqueville, *Democracy in America*, trans. H. Reeve (New York: Vintage, 1945[1835]), pp. 234-5.
2. *Ibid*.
3. P. Grabosky and P. Wilson, *Journalism and Justice: How Crime is Reported* (Sydney: Pluto Press, 1989).
4. S. Henry, *The Hidden Economy: The Context and Control of Borderline Crime* (London: Martin Robertson, 1978), pp. 48-8.
5. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), para no. 1.6.1., p. 17.
6. I use the terms "ethics" and "morals" and their derivatives as synonyms for the purposes of this discussion.

7. T. Scanlon, "Contractualism and Utilitarianism", In A. Sen and B. Williams eds, *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), p. 16.
8. Aristotle, *The Nicomachean Ethics*, book 10, chap. 9.
9. See, e.g., J.R. Nethercote, D. Challinger and H.F. McKenna, eds, "Fraud in the Public Sector", *Canberra Bulletin of Public Administration* no. 56, September, (1988): or the journalistic accounts of D. Hickie, *The Prince and the Premier* (Sydney: Angus and Robertson, 1985); and E. Whitton, *Can of Worms II* (Sydney: Fairfax Library, 1989).
10. J. Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951), pp. 1-27.
11. Although it is said that Australian regulation consists of minimum legislation and maximum enforcement, there is at least some reason to think that it might be a case of minimum legislation and minimum enforcement. See, e.g., P. Grabosky and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne: Oxford University Press, 1986).
12. Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants* (Canberra: Australian Government Publishing Service, 1987).
    Terms such as "reasonable" and "proper" do appear.
13. J. Rohr, *Ethics for Bureaucrats: An Essay on Law and Values*, 2nd ed. (New York: Dekker, 1989), p. 48.
14. J.S. Peters and S. Welch, "Political Corruption in America: A Search for a Definition and a Theory", *American Political Science Review*, vol. 72, no. 3, (1978): p. 976.
15. M. Johnston, "Right & Wrong in American Politics: Popular Conceptions of Corruption", *Polity*, vol. 18, no. 3, (1986): p. 376.
16. "The Reagan Legacy: More High Level Sleaze than High Morality", *Australian Financial Review*, 16 February 1988: p. 39.
    On the Australian penchant for supposing itself to be immune to corruption, see P. Robinson, "Tunnel Vision is Undermining Our Perception of Corruption and Sleaze", *Ibid*., p. 12.
17. P. Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979).
18. A. Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: Harvard University Press, 1977).
19. R. Miles, "The Search for Identity of Graduate Schools of Public Affairs", *Public Administration Review*, vol. 27, November, (1967): p. 350.
20. L.D. White, *The Jacksonians: A Study in Administrative History 1829-1861* (New York: Free Press, 1953), pp. 318ff.

21. Andrew Jackson, letter to him, 26 April 1830 in *The Collected Works of Jeremy Bentham*, vols, XI, ed., J. Bowring (New York: Russell and Russell, 1962), p. 40.
22. Tocqueville, *Democracy in America*, I, p. 262-3.
23. T. White, *The Republican Era, 1869-1901* (New York: Macmillan, 1958), pp. 280ff.
24. *Ibid*., p. 297.
25. Indeed, ethical consideration figures in the common definition of professional, see D. Emmett, *Rules, Roles and Relations* (London: Macmillan, 1966), p. 159.
26. *Fitzgerald, Report*, para. 3.5.1., p. 130.
27. The term derives from D. Thompson, *Political Ethics and Public Office* (Cambridge: Cambridge University Press, 1987), p. 194-5.
28. See R.A. Chapman, *Ethics in The British Civil Service* (London: Routledge, 1988).
29. M. Moore, "Top Public Servants Face Major Pay Cuts", *Sydney Morning Herald*, 4 October 1989, p. 4.
30. M. Pirie, *Micropolitics* (London: Wildwood, 1988), pp. 99ff.
31. J. Uhr, "Public Expenditure and Parliamentary Accountability: The Debatable Role of Senate Estimates Committees", *Australasian Political Studies Association Annual Conference*, September 1989.
32. *Fitzgerald, Report*, para. no. 7.4(b)., p. 208.
33. *Ibid.*, para. 5.1.1., p. 172.
34. The Australian penchant for creating public bureaucracies to what could be done privately, has long been commented upon a bemused fashion, but now that we are beginning to reap the whirlwind it is due for a more critical analysis. See, e.g., A. Davies, *Australian Democracy* (Melbourne: Longmans, 1958).
35. F. Costigan, chairman, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Interim Report No. 3* (Canberra: Australian Government Printer, 1982), p. 12.
36. The Ford Pinto was known as "Lee's car" when he was at the Ford Motor Company. The vehicle is passed over lightly in his autobiographical book *Iacocca* (New York: Bantam, 1984), pp. 171-2.
    For details see R. Lacy, *Ford: The Men and the Machines* (Boston: Little Brown, 1985), pp. 575-86.
37. D. Regan, *For the Record* (New York: Harcourt, 1988).
38. M. Grattan, "Brown Blames the Tall Poppy Syndrome", *Age*, 19 December 1987.

39. Their views were gleaned from "A Businessman in the Political Jungle", *Fortune* (January 1979); "A Politician Turned Executive", *Fortune* (September 1979); "The Ambitions Interface", *Harvard Business Review* (November-December 1979); and J.L. Perry and K. Kraemer, eds, *Public Management: Public and Private Perspectives* (Palo Alto: Mayfield, 1983).
40. *Fitzgerald, Report,* para. no. 4.3.3., pp. 165-6.
41. J. Rohr, "Second Class Citizenship", *Public Administration Review*, vol. 49, (1984): 135-40.
42. Vivian Creighton was head of the Queensland Lands Department from 1949-56. He was suspended and later dismissed from office by the then Labor Government because he had leaked information concerning the impropriety of his Minister, Thomas Foley. As a result of this leaking, the Townley Royal Commission was established and Foley was subsequently sacked.

    For further details of the Creighton case, see R.S. Parker, "Public Service Neutrality: A Moral Problem - the Creighton Case", in S. Encel, P. Wilenski and B. Schaffer, eds, *Decisions* (Melbourne: Longman Cheshire, 1981), pp. 245-68.

15

Freedom of Information: How Queensland Could Do Better than the Commonwealth, Victorian and New South Wales FOI Schemes

Paul Chadwick

In 1822, United States President James Madison said: "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 knowledge gives."[1]

In 1978, Malcolm Fraser declared that "too much secrecy inhibits people's capacity to judge the government's performance".[2]

In 1982, John Cain added that "when people are informed about government policies, they are more likely to become involved in policy making and in government itself".[3]

And in 1989 Fitzgerald chimed in, "the ultimate check on public maladministration is public opinion, which can only be truly effective if there are structures and systems designed to ensure that it is property informed".[4]

Aims of Freedom of Information

One of the structures Fitzgerald recommends to promote an informed public is a Freedom of Information Act (FOI).

Expression in the Australian context of the aims of FOI has been generally:

- to make more accessible the processes of government to the public affected by its actions;
- to improve the accountability of government to the electorate;
- to improve participation in government by the public.

These aims are pursued by a legislative scheme which:

1. Compels government agencies to publish information, including descriptions of their functions and powers, lists of reports held, and the internal guidelines used to administer published statutes (so-called "secret law").
   This part of FOI schemes has been credited with improving the records of management of agencies, and would have relevance for Fitzgerald's discussion of police information systems.[5]
2. Extends to every person a right to seek access to unpublished documents, subject only to exceptions and exemptions necessary to protect essential public and private interests. "Document" is broadly defined to include, for instance, maps, graphs, computer data and photographs. As may be expected, the hottest area of debate is the definition of exactly what "exceptions and exemptions" are necessary, both in the abstract and in particular circumstances.
3. Grants a right to seek amendment to one's personal file where it is incorrect, out-of-date or misleading. Where an applicant fails to have a record amended, he or she may nevertheless insist that a notation be added to the file explaining his or her claim.

Justification for FOI

Proponents of FOI have used three main arguments in support of the reform. First, they point to the divergence of the modern practice of government from the theory of the Westminster model. The increased power of the executive and the rigidity of the party system have reduced the capacity of parliament to be an adequate forum in which the executive may be held accountable. The sheer size and complexity of government mean that ministers cannot be responsible to parliament in a realistic sense.[6]

Secondly, FOI advocates recognise the need to improve avenues for public participation in government. As Fitzgerald observed: "No Government will have all the ideas, expertise and insight on a particular topic."[7]

Participation requires not just a willingness by government to consider the views of outsiders. It requires that the information gathered by government on given issues be made available *before* decisions are made by government on the basis of it. Only when outsiders share the basic data which is influencing government's mind, can they make informed and relevant comment. My favourite summary of this FOI principle comes from am American commentator who called it the need to let the public in on the take-offs as well as the crash landings.

The third justification, and this relates to the right of access and of amendment to one's personal file, is that the growth of data held by government about each of us, combined with technological developments, requires that individuals have the ability to check such data, ensure accuracy and, if necessary, challenge and have it corrected or at least notated.

To Fitzgerald's explicit arguments for freedom of information, we can add findings which implicitly support the first argument of proponents, namely, that the Westminster model does not work as it should. Already lacking an upper house, Queensland's Parliament was dominated by the Executive, and on top of that, Cabinet did much detailed administrative decision-making. "Discussion within Parliament has been stifled by the wide use of the subjudice convention in relation to current litigation",[8] said Fitzgerald, and "defamation writs have been used to silence critics of public administration outside Parliament."[9]

Development of FOI Laws in Australia

Commonwealth

In the 1972 election campaign Gough Whitlam promised a freedom of information act along the lines of the American Act of 1966.[10] His Cabinet referred it to the then Attorney-General, Lionel Murphy, and the proposal fell into the hands of an interdepartmental committee where it languished.

In 1976, a member of the Coombs Royal Commission into Australian Government Administration, Paul Munro, gave FOI a boost by including a draft bill in a minority report. The new Prime Minister, Malcolm Fraser, adopted FOI and another interdepartmental committee reported, with predictable lack of enthusiasm.

The first bill reached Parliament in 1978 and excited enough controversy to ensure it the usual fate of such legislation: referral to a committee. In the Senate Standing Committee on Legal and Constitutional Affairs, under the enthusiastic guidance of the late Liberal Senator Alan Missen and Labor Senator Gareth Evans, among others, much valuable research was undertaken and the revised legislation which emerged still represents in some ways, the highwater mark of FOI schemes in Australia. The Committee's deliberations were affected by the fact that the High Court at the same time made its landmark decision in Sankey v. Whitlam, narrowing significantly the scope for governments to withhold information under a claim of Crown privilege and not have such claims reviewed.[11]

The Fraser Government and the senior bureaucracy balked at implementing all the Committee's proposals; the Labor Opposition promised still greater openness if it were to be elected; the legislation was finally passed in

February 1982. Further bureaucratic stalling delayed its operation until 1 December 1982.

In 1983, the new Hawke Government, with Senator Evans now Attorney-General, implemented only some of Labor's long-promised improvements. In 1985, in a climate of increasing hostility towards FOI within government, an attempt to increase by regulation, the fees for access by up to 150 per cent was disallowed in the Senate after Alan Missen organised resistance. FOI remained relatively unknown among the general public and surprisingly neglected by the media - with honourable exceptions such as the Canberra *Times* and Melbourne *Age*. In 1986, the Commonwealth Government succeeded in increasing fees substantially by designating them a budget measure, which the Opposition had pledged not to block in the Senate.

In 1987, the Senate Standing Committee on Legal and Constitutional Affairs completed its first review of the operation of FOI.[12] Although some of its recommendations would improve the scheme if enacted, the report on the whole was disappointing, in that the committee did not apparently see itself as one of the few counterweights to the strong push against FOI from the Executive.

Debate about FOI in the Commonwealth sphere has been skewed by a rather obsessive concentration on costs, a matter dealt with below. Costs have been the preoccupation of the bureaucracy and some ministers, all of whom have cause to downplay the positives of the legislation.

The positives may outweigh the costs. As one submission to the Senate committee observed: "It is not unlikely ... that FOI pays for itself many times over in that it prevents wrong decisions being made by agencies."[13]

The Senate Committee summarised the benefits of FOI, of which two examples give an indication both of its potential to offset its cost, and to irritate the Executive:

1. The Australian Taxation Office informed the committee: "Perhaps the greatest benefit flowing from the impact of the FOI legislation on the operations of the Australian Taxation Office has been the introduction of the taxation ruling system. The benefits of this system have accrued to taxpayers and their advisers, to commercial publishing houses and to Taxation Office personnel...[It] has led to greater efficiencies in the Taxation Office and has provided the office with a better public image."[14]
2. When the Senate Committee on Foreign Affairs and Defence examined the Defence Department's aborted plan to acquire land for army training purposes in the Bathurst-Orange region in 1986, it reported that: "Throughout the inquiry, material obtained from the Department under the *Freedom Of Information (FOI) Act* by interest groups opposing the

proposals repeatedly contradicted or undermined evidence presented to the Committee by Departmental witnesses."[15]

Victoria

The *Freedom of Information Act* was passed by the Cain Government in December 1982 and has operated from 5 July 1983. In several respects more liberal than the Commonwealth legislation, the Victorian statute has provoked significant hostility from the Cain Government.

New South Wales

The Greiner Government passed a Freedom of Information Act less liberal than Victoria's in crucial respects such as appeals. In some respects, it is better than Victoria's; for instance, local government is partially covered by the legislation. It began operating in 1989; it is too early to chart trends.

Western Australia

A cautious approach by the Burke then Dowding governments produced no legislation. The Liberal Opposition leader released a private member's bill based on the Victorian Act on 20 September 1989.

South Australia

The public stance is to watch Victoria's experience. There is no legislation yet.

Tasmania

Commitment to FOI is a clause in Labor's 1989 election policy which was written into the Green-Labor Accord under which the Field government attained power with support of five Green independents. However, lack of government initiative has prompted the Greens to prepare their own bill which is yet to be released.

Queensland

Successive coalition and National Party governments have been hostile to FOI, not merely rejecting it for the State, but threatening to withdraw cooperation from various Commonwealth government agencies if documents supplied by Queensland or relating to Queensland, were to be disclosed under the

Commonwealth Freedom of Information Act. When the Senate Standing Committee on Legal and Constitutional Affairs conducted its first review of FOI in operation, the only recommendation for repeal of the legislation came from the then Queensland government. The lone dissenter on the Committee to many of its recommended improvements to the FOI scheme, was the Queensland Senator, John Stone, who in earlier years as Secretary to Treasury was a fierce critic of FOI.

The Queensland Labor Party under Wayne Goss has committed itself to implementing Fitzgerald's recommendations, among them FOI. But there is a lot of room for a government to move. Fitzgerald is surprisingly vague about the type of FOI scheme he favours. He recommends that the Electoral and Administrative Review Commission (EARC) consider as a matter of priority, the "need for FOI legislation".[16] Recommendation A.11 a. (i) and (ii) require EARC to consider and make recommendations for electoral and administrative reform, including preparation and enactment of legislation on FOI and administrative appeals.

The lack of detail is surprising because FOI has arguably the greatest potential of all the proposed reforms to improve the situation described. It transforms a presumption of secrecy into one of openness, grants a legally enforceable right of access to every person, and can remove from the hands of the executive and give to the judiciary, the ultimate power to decide whether documents will be released. A consistent theme of the Report is that many ills can be traced to secrecy, tight control of information and its manipulation, and lack of outlets for debate.

Experience has shown that the details of FOI schemes may dilute what are regarded as basic reforms. For example, under the *Commonwealth Freedom of Information Act*, in certain circumstances, the final say on disclosure still lies with the minister.

Recommendation A.3 says, "specialist consultants" should be used by EARC in preparing its proposals. In the FOI context, this is an important recommendation because it should ensure that the FOI debate is not distorted from the outset. The record of the Commonwealth bureaucracy in the preparation and, with exceptions, the administration of FOI does not inspire confidence that the eventual FOI scheme for Queensland would be adequate if advice about its formulation were to be sought exclusively from the public service. The public service is one of the targets for changes intended by FOI, and some of those changes, especially increased accountability, are discomforting. The natural response of the bureaucracy, particularly at senior levels, is hostile or, at best, wary. Outside consultants should be able to provide advice which will act as a counterweight to advice from the public service about FOI.

A Note About Timing

One of the truisms of FOI is that it is a cause for oppositions, not governments. When Gareth Evans became Attorney-General in 1983, he said he would have to convince his Hawke Cabinet colleagues of the merits of his promised strengthening of FOI quickly, before they developed their own secrets. (In several key areas he failed, and the amendments were diluted.)

Whitlam's advocacy of FOI came after Labor had been in Opposition for twenty three years. The Victorian Premier, John Cain, prepared his FOI legislation during the final stages of Labor's long period in opposition. Twenty seven years of frustration at being substantially shut out of government information flows acted as a kind of spur to Cain, the new Premier and Attorney-General, his ministers and their staffs. They began the FOI reform process at one of the first Cabinet meetings after Cain's election in April 1982 and the Act was passed nine months later.

In the current climate of antipathy within the Cain government towards FOI, it is sobering to speculate about whether FOI would now exist in Victoria had its introduction been delayed and Labor had settled into the habits of power, with memories of being an outsider dulled and a few skeletons of its own to hide.

The lesson here is not that expectations should be lowered but that pressure should be heightened. Opportunities for the enactment of sound FOI schemes, which require support from a government they will inevitably irritate are extremely rare. The post-Fitzgerald atmosphere is such an opportunity.

The Usual Arguments Against FOI and How to Respond

The introduction of FOI in the Commonwealth and Victorian jurisdictions met predictable resistance. Three main arguments raised against the reform, which continue to be raised to some extent and are likely to occur in Queensland, are discussed below.

Argument 1 - "FOI and the Westminster System are incompatible".

The 1979 Senate Committee devoted a chapter to addressing this argument and concluded that:

> A great deal of the talk about the Westminster system and how it would be altered by freedom of information legislation has been obscure and misleading. To a great extent, the term "Westminster system" has been used as a smokescreen behind which to hide, and with which to cover up

existing practices of unnecessary secrecy. Very often people have alleged that the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient way of doing things, immune from public gaze and scrutiny. We are indeed seeking to put an end to that.

What matters is not the inconvenience of Ministers or public servants, but what contributes to better government. The only feature of the Westminster system which cannot be in any way modified without fundamentally subverting that system is the need to ensure that members of the Executive Government are part of, and drawn from, the Legislature. Freedom of information legislation does not alter this one iota.[17]

It is important to recognise at the outset, that FOI is, in part, an acknowledgement that the Westminster model does not work well enough. It is *intended* to change it, to some extent, to match modern needs.

In Victoria, the Premier has been engaged in a long battle to establish that the courts may not go behind a decision of the government to attach a conclusive certificate to a document which it asserts is a Cabinet document. A conclusive certificate is exempt from disclosure. The County and Supreme courts in Victoria, and the High Court, have ruled against the Premier.[18]

The Victorian Parliament's Legal and Constitutional Committee, in its recent report, assessed the government's argument and concluded that a decision by the courts about the status of a document under the *Freedom of Information Act* was a legal matter properly to be determined by the courts. The Committee pointed out that existing government structures were not as simple as the classic Westminster model of a premier and cabinet responsible to parliament, advised by a neutral public service and accountable to the electorate through regular elections. (This understatement is still more true of Queensland, as shown by Fitzgerald's analysis of the concentration of power with the Premier and Cabinet, the weakness of Parliament, politicisation of the public service, and an unfair electoral system.)

The Committee's chief justification for its view that court review, even of Cabinet documents, was proper, was the doctrine of the separation of powers. It pointed out that the "Westminster system describes only partially the interaction between key components of the Constitutional framework."[19] Under a system in which the legislature makes the law, the executive administers it and the courts interpret it according to the rule of law, any dispute under the FOI Act was a legal dispute properly the subject of interpretation and determination by the courts. The committee said "the Executive is responsible to Parliament with respect to formulation of government policy and its implementation. At the same time, it is

responsible to the courts for ensuring that its actions are taken within legal parameters set down by the constitution and conferred by the legislature."[20]

Such arguments can be both arcane and unnecessarily diverting. Perhaps the best answer to this argument, when it is raised against FOI, is to point out the lack of any evidence that Westminster-style government in Australia and Canada has been made unworkable by seven years' of FOI.

Argument 2: "FOI imperils the quality of public service advice. Bureaucrats become less frank and candid and the process of government is harmed by their unwillingness to commit themselves on paper."

Part of Fitzgerald's case is that open debate is healthy, suppression unhealthy. The greater the amount of information available, and the more easily it is released, the less significant will seem the morsels which have up till now been gleaned or leaked. As the London *Sunday Times* once observed in an editorial: "When all the doors are closed, the smallest chink of light seems very revealing. Yet it probably distorts the truth more than illuminating it."[21]

Anecdotal evidence from the Victorian Public Service suggests that some ministerial staff and bureaucrats have sometimes avoided the creation of documents that might be damaging to themselves or the government. They prefer instead, either to rely on oral decision-making and the memories of participants or to write potentially controversial parts of documents on yellow sticky-backed notepaper, so that such material might be peeled from a document if it becomes the subject of a Freedom of Information Act request. The extent of such evasion tactics is impossible to quantify or to eliminate. There will always be evasion, particularly in the early years of FOI, when the old regime of automatic secrecy has yet to be broken down. It was Peter Wilenski, former head of the Commonwealth Public Service Board, now Australia's ambassador to the United Nations, who once observed that "in Australia we tend to get the backlash before the reform."

In Queensland, it should not be a persuasive argument that government "unwillingness to write things down" is a reason for not having FOI. The problem already exists. Fitzgerald explains how, during his investigation of the Cabinet decision to provide public funding for ministers' defamation actions, "search of Cabinet records has failed to reveal any written submission or any formal record which explains the basis for the adoption of such a policy."[22]

The prospect that some bureaucrats will try to evade FOI cannot be a sound basis for rejecting FOI. That would be akin to repealing parts of the taxation law because some people try to evade or avoid them. The cry that the bureaucracy will come to a standstill and that officials will be driven by fear of FOI

to abandon the written word is plainly unrealistic. Government cannot work unless details are committed to paper. Words and memories are inevitably used for some highly sensitive matters (just as they always have been), but for the bulk of public service work a failure to keep adequate files is bad management and self-defeating. Key personnel move on to other positions and their successors must have records. Lapses of memory or absence of documentation can breed suspicion more damaging than the material originally omitted from a document.

When it is realised that the exemptions in FOI work well in keeping secret that which ought properly to be withheld (and more besides, given the breadth of the exemptions and the caution shown by appeal bodies), the tendency to be more circumspect, or to be less frank and candid, or deliberately to falsify records, will diminish.

Public service resistance to FOI must be expected, not mainly because the bureaucracy has something to fear, but for the rather banal reason that FOI does something bureaucracies tend to dislike. In Justice Michael Kirby's words, it "upsets settled ways of doing things". Fitzgerald touches on this aspect when he says: "People who seek to enter the walls of the forbidden city, where politicians and bureaucrats live in harmonious control, are resented and treated as impertinent outsiders." The context in which Fitzgerald made this comment is of particular relevance to the issue of public service reaction to FOI. Fitzgerald was discussing the adverse effect on the quality of public service advice of having the same government in power for many years. He suggests the process becomes incestuous and advice to government is not independent or impartial, but tends to be tailored to fit predetermined policies.[23]

The need for ventilation of such advice through FOI is obvious. But it is equally arguable that if a long-serving opposition were to be elected, with its unavoidably inexperienced minister, inevitably dependent on public service advice, FOI would also have a vital role in exposing that advice to wide and independent scrutiny.

Disclosure of public service advice is arguably a force for better public administration, not worse. Annual reports have repeatedly noted that agencies have found an improvement in both the quality and expression of advice since FOI was introduced because bureaucrats know that now their advice might one day be disclosed, perhaps to the subject affected by it.

Justice Mason (later Chief Justice) found in Sankey v. Whitlam, referred to above, that the risk that premature disclosure of internal documents would result in want of candour in future, was so slight that it may be ignored. Instead, he thought potential disclosure would deter "advice which is specious or expedient." After Sankey v. Whitlam, thought the Federal Court in one FOI case, it is doubtful

that the argument that "candour may be tempered with a concern for appearances" any longer carries weight as a basis for withholding.[24]

The blunt argument against secrecy based on the claim that potential disclosure will make public servants become less frank or candid, is that they are paid to provide frank and candid advice and the advent of FOI will not change that. If it is poor advice, it ought to be disclosed so that standards can be improved and action based on it averted.

If it is good advice it will withstand scrutiny.

Argument 3: "FOI costs government too much".

One of the misleading assumptions which has become entrenched in FOI debate in Australia, is that FOI is unreasonably expensive for government to run. Naturally, the reasonableness of expense will be in the eye of the beholder. The following table shows the cost to the Commonwealth and Victorian governments.

Table 1 : Cost to government of FOI ($)

	82-83	83-84	84-85	85-86	86-87	87-88
Federal						
Total	7.5m	15.1m	16.5m	15.7m	13.3m	11.5m
Average cost per request	1323	785	496	430	446	419
Victoria						
Totals	-	2.7m	2.3m	2.9m	n/a	n/a

The Victorian estimates are extremely vague and may be understatements. The Public Service Board, in the annual report on FOI has worried aloud about the imprecise methods of calculating the cost and has recommended in the last three successive years that a better system be considered. None has been devised, yet the alleged cost burden is a common complaint from government about FOI.

The reality is that no one knows how much FOI costs the Victorian Government, nor what proportion of these costs would be incurred anyway as part of non-FOI information and public relations practices, nor how much any costs are offset by the improvements in efficiency attributed to FOI.

The reliability of government claims that Commonwealth FOI costs too much, may be treated warily following the revelation that costs had been artificially inflated by about $5.5million in the first two and a half years of

operation. This was the result of calculating staff on-cost as eighty-eight per cent of salary instead of the more usual sixty per cent. An interdepartmental committee on FOI costs, found there had been double counting of some items in calculation of costs for early annual reports. In effect, agencies had been "blaming FOI" for costs they would have incurred despite the Act.

The manner in which this overstatement of FOI costs was disclosed, is itself instructive. Dedicated readers of the 1985-86 annual report could find details in footnote two, page seventy-five.

Whatever the details about how governments calculate FOI costs, it is strategically important not to be drawn into narrow debate on this issue. The onus should be on those claiming high costs to show how the price of FOI is, in fact, so onerous that it cannot be justified. FOI proponents might usefully emphasise several points:

1. Considering the principles it embodies, FOI is cheap. It is intended to do no less than improve the quality of democratic government.
   To import the "user pays" principle into FOI would be to ignore or understate the several important aspects of FOI which have nothing in common with other government activities for which users pay, such as electricity or water. FOI aims to improve accountability and participation, objectives which deserve substantial investment of public funds. Requesters provide the grist for the scheme, but they are not the only beneficiaries of it when it works successfully.
2. FOI ought to receive substantial resources on the basis that it is, in part, an investment in more efficient government.
   It is expected to produce a return to the taxpayer from its benefits from public administration. The Commonwealth and Victoria FOI annual reports and the annual reports of specific agencies, subject to FOI, cite benefits which may be summarised as including:

   - better records management;
   - improved internal communications, assessments and decision-making;
   - productive changes in personnel practices and other streamlining of administrative practices;
   - better communications between agencies and the public they serve;
   - greater public awareness of the role of agencies and the constraints under which agencies may work; and
   - greater accountability.

If charges are too high, the result for government may in a sense be a net loss. The Commonwealth experience of a hefty increase in fees has been a drop in FOI use. If the legislation is not given life by requesters, the benefits for government which it has spurred may also decline.

3. Any assessment of the costs of supplying information which the public has actually asked for under FOI, should consider the far greater amount spent on disseminating unsolicited information which the government wants the public to have. Benefits like those listed above do not necessarily result from many propaganda functions of government. The term "propaganda" is not used here pejoratively; such functions have their place, as Fitzgerald observed. He also suggests: "Consideration should be given to establishing an all-party Parliamentary committee to monitor the cost and workings of ministerial and departmental media activities, including press secretaries, media units and paid advertising. This committee could analyse whether the money is being spent on informing the public, or distributing propaganda for political gain."[25]

4. FOI will add little to public administration if the only requests which are deemed affordable are simple routine disclosures of mainly non-controversial personal records. These should be freely available outside FOI as a matter of sound administrative practice.

It is useful to put the "cost of FOI debate" in the context of demand. When Commonwealth FOI was being planned, one assertion from within the bureaucracy was that agencies would be swamped with requests, building up the costs of FOI and diverting resources from other tasks. The Department of Immigration and Ethnic Affairs, for example, told the 1979 Senate Committee on FOI that it estimated it would receive 100,000 requests or more annually. In fact, in the first full year of FOI (1983-84), the department received a total of 1,063 requests. The Australian Electoral Office warned of a "flood" of 86,000 requests a year. In the first full year, it got nineteen.[26]

Across the Commonwealth and Victorian governments, FOI has not resulted in a flood of requests, as "table 2" shows. There is no reason to expect that the chief tasks of the Queensland bureaucracy would be overwhelmed by the duties connected with FOI, especially after the initial introductory phase and burst of "novelty demand".

Table 2: Number of FOI requests received

	82-83 (7mths)	83-84	84-85	85-86	86-87	87-88
Federal	5669	19,227	32,956	36,512	29,880	27,429
Victoria	n/a	4,285	4,702	9,031	9,401	9,662

Note: Victoria recorded a ten per cent increase in total requests in 1988-89.

Making the Queensland FOI Legislation Better Than Existing Models

Experience in other jurisdictions provides several pointers for a State considering the introduction of FOI, either because of what has worked well or what has failed to work.

To my mind, Queensland's FOI scheme would, in several vital areas be better than those in the Commonwealth, Victorian and NSW spheres, if the following were considered:

Objectives

A clear objectives section is required. This should make plain Parliament's intention to improve the functioning of democratic government by the disclosure of information and be limited only by exceptions and exemptions necessary to protect essential public and private interests.

Discretion should be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost to requesters, maximum disclosure. This would make the rationale for FOI, as well as the way the scheme pursues that rationale, perfectly plain. The wording would be very similar to that of Commonwealth and Victoria sections 3.

Exceptions and Exemptions

Unlike existing FOI acts, no Queensland government agency or minister should be granted a total or partial immunity from the obligations of FOI. This includes the EARC and Criminal Justice Commission (CJC). All watchers need watching. The exemptions should be the only standards by which competing interests in secrecy and openness are balanced. The onus should always be on those who would withhold to make their case.

Simply copying the Commonwealth, Victorian or NSW models in the crucial area of exemption categories, and perhaps refining them to take account of various tribunal and court decisions, is by no means the most desirable approach. Queensland's advantage will be that it can plan fresh FOI legislation with the benefit of experience that the architects of the Commonwealth and Victorian models lacked. Examined afresh, the list of "usual exemptions" is unimpressive.

The unnecessary nature of some has been revealed by the extent to which agencies have neglected them. Some exemption categories have been broadened either by judicial interpretation or legislative means. For example, in the *Commonwealth Act*, Section 40, "documents concerning certain operations of agencies", was added in the 1983 amendments, clause (d), allowing agencies to withhold documents when they thought disclosure might "have a substantial adverse affect on the proper and efficient conduct of the operations of an agency". The government never attempted to justify the insertion of what seemed a dangerously broad category that would be vulnerable to abuse. The following year, 1984-85, thirty per cent of all exemption claims cited section 40, and in 1985-86 the proportion rose to fifty two per cent. Of the total of 11,836 section 40 claims, 3,097 or twenty-six per cent relied on clause (d).[27]

In deciding whether to import various exemption categories from other legislation, it seems to be desirable to keep uppermost in mind these questions:

- How would the documents described in this exemption section harm an essential public or private interest?
- Would another exemption, as it is or with modifications, do the job?
- How could the balance between openness and legitimate withholding be better struck?

The focus of any discussion over whether to exempt material should always be the content of documents, not where they were created, who wrote them or who received them. Victoria's long-running controversy over cabinet documents stems from the attempt to classify what actually is a cabinet document. This is necessary because the exemption says a document can be withheld merely by being in the class "cabinet documents" and regardless of its content.

It is worth considering whether an independently operating public interest test should be included in every exemption, so that maximum flexibility in favour of disclosure is built in. Existing acts have public interest tests in some exemptions but not others.

Fees

The fees which agencies may charge requesters can be a potent weapon in the hands of agencies which want to evade or obstruct FOI. This was the American experience immediately after its FOI law began operating in 1966. In Australia, some Commonwealth agencies appear to recognise the value of the tactic. In one case, the Australian Customs Service advised me that a single request could attract fees of more than $13,000.

The capacity of fees to undermine effective FOI was clearly demonstrated after late 1986, when the Commonwealth government introduced substantial fee increases for FOI and new charges for the making of appeals to the Administrative Appeals Tribunal (AAT) and the Federal Court, the FOI avenues of appeal. These are now $240 for the AAT and $360 for the Federal Court.

The effect of the fee increases was dramatic. The number of FOI requests dropped eighteen per cent in 1986-87 and a further eight per cent in 1987-88. Meanwhile, receipts from charges levied roughly doubled in both those years, from $75,464 to $161,490 (1986-87) then to $312,870 (1987-88).

Certainly, a requester can attempt to negotiate to reduce the potential cost, but in the end all the cards are held by the agency. It determines the extent of search time (at $15 an hour), and of decision-making time ($20) an hour). If the agency is inefficient or overly cautious or slow, the requester's bill grows.

It is not necessary to rely on the "worst-case scenario" to reject the idea of high charges. FOI ought to be within the reach of ordinary members of the community, not just the "information-rich" such as MPs, lobbyists and journalists employed by the main media companies.

The 1987 Senate Committee felt that "too much emphasis has been placed on economic factors such as cost recovery at the expense of the admittedly unquantifiable social and political benefits."[28] Yet the committee proposed that a person may be charged up to $540 for a request involving non-personal documents.[29] This is beyond most people, particularly when they cannot know in advance how much useful information will result from their investment. The fact that the Senate Committee found itself recommending such an unrealistic "limit" indicates the extent to which the debate over FOI costs has been distorted.

Existing legislation allows for fees to be waived where an applicant is "impecunious" or the intended use of the documents is "a use of general public interest or benefit". Agencies are not liberal in applying the "public interest" reason for waivers. In Victoria, in 1987-88, this factor was cited to support only 150 of the 3,818 separate decisions to waive fees.[30] However, agencies do often waive fees when personal files are sought, especially in cases where the cost of collecting fees would probably outweigh the amount received.

The 1979 Senate Committee thought the "public interest" waiver power is "likely to have a particular utility for community interest organisations and groups, working in such areas as environment protection, education, social welfare and civil liberties, who operate on shoestring budgets yet are intimately concerned with the kind of policy formulation in the public interest, that it is one of the basic objectives of any freedom of information legislation to promote."[31] The draft FOI bill and memorandum in the minority report of the Royal Commission on Australian Government Administration said its fee waiver power "covers the case of a newspaper or a public interest research group which is seeking information."[32]

Since experience shows that agencies are extremely reluctant to give effect to these intentions, and that fees have proved to be a significant barrier in Commonwealth FOI, there is a case to include an explicit statement along the lines included in a revision of the *United States Freedom of Information Act* in 1986 that would require agencies and ministers to waive fees where the applicant is a representative of the news media or non-profit group, and the intended use of the document is not primarily for a commercial use or the benefit of the applicant personally. For these purposes, it was made clear that FOI requests by a "for-profit" media organisation was not a commercial use.

Fees in Victoria have not been increased with the same destructive effect as in the Commonwealth sphere, nor applied with particular severity, although attitudes are toughening. The 1987-88 charges calculated for processing requests were $136,528, of which $81,504 or 59.7 per cent, was waived and the rest collected. In 1986-87 the percentage waived was 75.5. Agencies have noted that the administrative procedures required to calculate, levy, process and provide receipts for charges can exceed those charges - especially for agencies with little "client contact". To this extent the pursuit of FOI fees can be a net cost to government.

But there is little doubt that the single most important factor in preventing fees being used in Victorian FOI to deter requests, as they have been used under the Commonwealth law, has been the $100 statutory maximum (Vic. S.22(1)j).

The Cain Government recently argued before a Parliamentary committee that the $100 "cap" be removed; the committee was not persuaded. It recommended retention, with automatic increases in line with the Consumer Price Index. Nor did the committee approve the government's wish to introduce a new application fee of $15 per request (half the Commonwealth application fee). The committee said it "believes that the introduction of an application fee may encourage government agencies to treat all requests for access to information as FOI requests. The FOI annual reports indicate that, as a result of greater openness in government, there is a trend towards making more information

routinely available to the public outside the FOI system. The committee is of the view that this trend should be encouraged".[33]

Secrecy Provisions in Other Enactments

Both the Commonwealth and Victorian Acts have an exemption provision. This allows the many secrecy clauses in acts which pre-date FOI to be revived to hinder, or to raise questions of consistency with the new standard of openness/secrecy which FOI aims to set. A document which may not be covered by any other exemption may nevertheless be withheld if it fits a secrecy clause in any other enactment. The exemption was ominously popular with Commonwealth Agencies until the Federal Court restricted its reach. Its popularity in Victorian FOI has recently grown markedly.

If it is thought desirable to retain some specific secrecy clauses, for example, the adoption law might be a special case, it is preferable to use the Canadian method. That country's *Access to Information Act* requires a review of all secrecy provisions and the addition of a schedule to the FOI Act containing only those secrecy provisions which will have force in the future if triggered.[34]

Appeals Structure

It is vital that any FOI scheme includes provision for an independent, properly resourced, cheap (for applicants) and informal appeals system. Fitzgerald recognises that FOI is part of the administrative law reform package and also wants the EARC to recommend the shape of an AAT. The predictable reaction against FOI disclosure by some ministers and parts of the bureaucracy means that requesters' recourse to an independent appeals body in the early stages of FOI is crucial to its longer term value. Unless the exemptions are subject to independent interpretation quickly, their use may become habitual and/or excessive and disenchanted requesters will stop using FOI in those relatively few but important cases where it is the most appropriate tool to enforce accountability.

How FOI Has Worked

Annual reports indicate that the bulk of FOI users are individuals seeking their personal files. The Commonwealth per centage is between seventy per cent and eighty per cent of all users. In Victoria, the proportion is around sixty per cent.

Those seeking policy documents, or non-personal data, include MPs, journalists and activists such as conservationists or prison reform advocates whose

intended use of the material might be termed, in a broad sense, "political". Another substantial category is the "commercial" user, such as the solicitors who use FOI to try to obtain from government agencies information which may be useful in litigation, and insurance companies which seek the fire reports kept by the Melbourne Metropolitan Fire Brigade.

"Table 3" shows the success/failure rates in Commonwealth and Victorian FOI use.

Table 3: Results of access requests (% of total)

	82-83	83-84	84-85	85-86	86-87	87-88
Granted in full -						
Commonwealth	62	68.7	68.7	66.8	69.6	76.5
Victoria	n/a	51.4	58.7	63.8	62.9	61.5
Granted in part -						
Commonwealth	24.8	24.7	25.1	28.0	25.7	20.4
Victoria	n/a	21.1	22.1	25.2	24.8	25.1
Denied in full -						
Commonwealth	13.2	6.6	6.2	5.2	4.6	3.1
Victoria	n/a	27.5	19.2	11.0	12.3	13.4

It is important to bear in mind several factors when considering these figures. First, the relatively high proportion of requests granted in full reflects the high proportion of total requests which seek non-controversial personal files. It is arguable that these sorts of requests should now be met outside of FOI procedures and granted as a matter of course and of sound administrative practice. If they were to be sifted out of the success/failure figures, and it became possible to compile a separate success/failure rate for applications for non-personal documents, then the "granted in full" and "granted in part" totals would almost certainly be less than the combined figures indicate.

The description "granted in part" can be misleading because it is used to describe agency responses in which almost all the material sought has been declared exempt. The material which has been released - that is, "granted in part" - may be simply the sections of documents containing information already public or even such useless material as addressee's name and the salutations of letters with all the rest blacked out.

How FOI Has Been Used Successfully

In providing examples of successful use of FOI, I have concentrated on the accountability role of FOI. My selection naturally reflects my own experience as a journalist.

Shedding light on the public actions of government officials.

In 1985, a by-election for the Victorian Legislative Council seat of Nunawading offered Labor the prospect of a majority in that House for the first time since it had been elected in 1982. The by-election was necessary because in the election, the Labor and Liberal candidates had tied. In such circumstances, the preferences of minor parties would obviously be crucial. The Nuclear Disarmament Party decided not to recommend preferences on its how-to-vote card, but instead to leave the order of preference to its supporters' discretion. After the poll, which the Liberals won, the Nuclear Disarmament Party complained to the Chief Electoral Officer that on the day of voting, some people had distributed to voters entering the polling stations, a how-to-vote card headed "Voters for Nuclear Disarmament". Unlike the official NDP card, this other card did indicate how preferences should be distributed by the voter and the method shown favoured Labor.

The Chief Electoral Officer requested a police investigation which found that certain Labor Party members, including ministerial staff and the State Secretary of the ALP, had been involved in the printing and distribution of the "Voters for Nuclear Disarmament" card. The Chief Electoral Officer had sole discretion to decide whether to prosecute under the *Electoral Act*. After he announced his decision not to prosecute, I sought access under the *Freedom of Information Act* to the legal advice upon which he had relied.

The request was denied, with the government relying mainly on the exemption covering "legal professional privilege", but this decision was substantially overturned by the President of the Administrative Appeals Tribunal. The documents thus forced into the open by the FOI process disclosed that the Chief Electoral Officer had sought nine legal opinions from six different lawyers. All but one opinion advised that there existed *prima facie* evidence of a breach of the law. The majority view included opinions from the Director of Public Prosecutions. Only the advice from the Solicitor-General was firmly of the view that there was no basis for a prosecution.

In his decision, the AAT President, Judge Rowlands, said in part: "Disquiet has arisen because of uncertainties in the electoral law, the asserted but by no means clear 'independent position' of the Chief Electoral Officer, the number of opinions sought, the circumstances in which they were sought, and the decision not to prosecute against the apparent weight of advice. These matters have persuaded

me that the total picture the documents for release provide should be available for scrutiny."[35]

Potential disclosure through FOI a spur to change

1. A journalist at the *Age* was tipped off about a long-running episode of apparent administrative neglect at the Melbourne General Cemetery. He requested relevant material under FOI and received from the Health Department a large file showing various investigations and recommendations for action spread over many years. But there was no record of action having been taken. The most recent memorandum in the file was from a senior bureaucrat to the then minister advising him that action should be taken urgently "because the *Age* has made a *Freedom Of Information Act* request for the file".
2. Another *Age* journalist was interested in the amount of rent the State Government received from the Royal Australasian College of Surgeons for use of a government-owned prime city site. Refused an answer, she applied under FOI but her request was strongly opposed on grounds of commercial confidentiality. A change of personnel at the relevant government department however, led to a reversal of the decision and a copy of the lease was disclosed. Dating from last century, it showed that the government was still charging the college one pound per annum. The figure had been adjusted since decimal currency to one dollar a year. Following publication of this fact on page one of the *Age*, the responsible minister quickly announced that negotiations had begun with the college about payment of a more substantial rent.

FOI disclosure as an adjunct to traditional accountability measures

During the long-running dispute over contracts for the Expo at Brisbane, the then Commonwealth Tourism Minister, John Brown, made various answers in Parliament to questions from the Opposition. The Liberal backbencher, Neil Brown, at the same time, made FOI requests about the issue. By citing departmental documents disclosed under the *Freedom of Information Act*, Neil Brown was able to demonstrate that the minister had mislead Parliament. John Brown resigned, maintaining that he had not deliberately misled the House.

Role of the Media in Development of Effective FOI

It is difficult to overstate the importance of the media in freedom of information. Both as individual professionals and as organisations, journalists to my mind have a responsibility to educate themselves and the community they serve about FOI. Their role goes far beyond merely using FOI. In case exhortations about responsibilities seem pompous, let me try an appeal to self-interest. At almost every point that the law intersects with journalism in Australia, journalism is weakened. Defamation, contempt of court, contempt of Parliament, suppression-of-evidence orders - the operation (as distinct sometimes from the intent) of these areas of law usually constrains or punishes journalists. In FOI they actually would have a law which assists disclosure and is aimed at making the public better informed about government. To the extent that journalists fail to seize the opportunity to try to turn the force of the law toward openness, not suppression, they let themselves down as well as the public.

Some of the potential roles for the media in FOI are:

- as constructive critics during enactment of FOI, reporting closely the attitudes of the politicians and independently researching experience elsewhere so that the debate feeds on more than the sometimes incomplete or selective material offered by official inquiries;
- as educators of the public in the importance and use of FOI. The details - even the concept - of FOI will be new to Queenslanders, yet the success of the scheme will eventually depend on the vigour with which the public uses it. Disuse and ignorance of FOI by the voters will make easier the inevitable governmental backlash against FOI;
- as scrutineers of how FOI is working and how it could be improved;
- as FOI Act users. Not only will active, organised use of FOI enrich the amount, quality and credibility of media reporting of government, it will increasingly educate journalists about the process of government. Sometimes this will assist those in government, because their critics will better understand the pressures under which government agencies operate;
- as litigants with both the motive and resources to ensure that government use of FOI exemptions is tested and the Act is exposed early in its life to interpretation by higher courts where necessary.

Conclusion

Fitzgerald, by recommending FOI as part of the response to the ills of government in Queensland which he uncovered, has provided a marvellous opportunity. FOI is

not just a measure which will assist the immediate reform process. If it works, FOI will enrich Queensland public life in many areas and over the long term.

But the challenge goes beyond the enactment of better FOI legislation than that of the Commonwealth, Victoria or NSW. Spigelman put it well in 1972:

> No statute or simple set of decisions will alter generations of received tradition. A new tradition of open government will emerge only through the practice of open government itself.
>
> The adjustment of the political sub-culture of the Public Service will inevitably be gradual. The very questioning of every example of secrecy is the beginning of such a process of change.
>
> The cumulative experience of ministers accepting the irrelevance of traditional concepts of responsibility; the exercise by public servants of whatever rights to freedom of speech may be recognised; the continued pressure of Parliamentary review of official secrecy; the use that may be made of whatever rights of access to information that may be created; the cumulative impact of the release of information which has traditionally been withheld; the effect on the Public Service of more rigid procedural requirements for (secrecy) classification - it is through processes such as these that a new tradition of open government will emerge.[36]

Notes

1. I. Brant, *James Madison: Commander in Chief 1812-36* (Indianapolis: Bobbs-Merrill, 1961), vol. 6, p. 450, cited in Australia, Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information* (Canberra: Australian Government Printer, 1979), p. 23.
2. J.M. Fraser, "Responsibility in Government", *Australian Journal of Public Administration*, vol. XXXVII, no. 1, March, (1978): pp. 1-2.
3. J. Cain, speech on FOI legislation, October 1982, cited in *FOI Annual Report 1984*, Victorian Law Department, (Melbourne: Victorian Government Printer, 1984), p. 3.
4. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. 126.
5. *Ibid*., pp. 268-72.
6. For excellent reviews of the argument, see the 1979 Australian Senate report, chap. 4-5, p. 18 and Appendix 2.B, and H.C. Coombs, chairman, Royal Commission on Australian Government Administration, *Report* (Canberra: AGPS, 1976), Appendix vol. 2.

Victoria, Parliament, Legislative Assembly Legal and Constitutional Committee, *Report Upon Freedom of Information*, tabled 16 November 1989, not yet formally printed.

7. *Fitzgerald, Report*, p. 123.
8. *Ibid.*, p. 117.
9. *Ibid.*
10. Whitlam's private secretary, Jim Spigelman, was influential in developing awareness of the distorting effect of secrecy and of FOI as a potential response, particularly through his book *Secrecy - Political Censorship in Australia* (Sydney: Angus and Robertson, 1972).
11. Sankey v. Whitlam and others (1978), 142 CLR 1.
12. Australia, Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *Report on the operation and administration of the freedom of information legislation* (Canberra: Australian Government Printer, December 1987).
13. *Ibid.*, para. 2.39.
14. *Ibid.*, para. 2.36.
15. *Ibid.*, para. 2.38.
16. *Fitzgerald, Report*, p. 360.
17. Senate Standing Committee (1979) *Freedom of Information*, para. 4.62
18. Public Service Board v. Wright (1986), CLR 145; Birrell v. Department of Premier and Cabinet (1988), VR 73.
19. Victoria, Legal and Constitutional Committee, *Report upon Freedom of Information*, para. 3.1.
20. *Ibid.*, para. 3.7.
21. Quoted in *Coombs, Report*, p. 174-5.
22. *Fitzgerald, Report*, p. 119.
23. *Fitzgerald, Report*, p. 130.
24. See J. Beaumont in Harris v. Australian Broadcasting Corporation (1983), 50 ALR 551. Another High Court decision dealing with the limits of official secrecy has been Commonwealth v. John Fairfax & Sons (1981), 147 CLR 39. It relates most directly to the Cabinet and national security, international relations and defence exemptions in FOI.
25. *Fitzgerald, Report*, p. 142.
26. Attorney-General's Department, *FOI Annual Report 1983-84* (Canberra: AGPS, 1984), 1979 Senate Committee Report, Appendix F, para. 6.12-13.
27. Federal-Attorney's Department, *FOI Annual Report_1984-85* (Canberra: AGPS, 1985), para. 3.16.2.; Federal-Attorney's Department, *FOI Annual Report 1984-86* (Canberra: AGPS, 1986), para. 3.16.2.
28. Senate Standing Committee *(1987) Freedom of Information*, para. 19.5.

29. *Ibid*., para. 19.48.
30. Victorian Law Department, *FOI Annual Report 1988* (Melbourne: Victorian Government Printer, 1988), para. 2.8.4.
31. Senate Standing Committee (1979) *Freedom of Information*, para. 11.42, p. 146.
32. *Coombs*, *Report*, Appendix vol. 2, p. 80.
33. *FOI in Victoria*, para. 6.35, but see generally, paras. 6.17-46.
34. The 1987 Australian Senate Committee, para. 12.31, recommended the Canadian method for the Federal Act.
35. Victorian AAT, No. 860579, Chadwick v. Department of Property and Services, 28 May 1987, p. 28.
36. Spigelman, *Secrecy*, p. 175-6.

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Legal Protection of Whistleblowers

John McMillan

The Fitzgerald Proposals

The kind of corruption now known to have flourished in the Queensland government was not exceptional, not by Australian nor by international comparisons. Revelations of corruption occurring elsewhere during the last decade illustrate graphically that it riddles political systems as diverse as those in Tokyo, Washington, Sydney, Panama, Manila, Bonn, Beijing and Bucharest. As that international dimension illustrates, corruption will not be stopped simply by prosecuting those directly responsible. Reforms that touch deeply on the framework of government are clearly necessary to establish a more permanent barrier to periodic corruption.

The Fitzgerald Report reflects that insight, in the very diverse range of recommendations for reform which it makes. The list includes revitalising parliamentary scrutiny of administrative activity, reforming the electoral system, creating administrative law review mechanisms such as an Administrative Appeals Tribunal (AAT) and a freedom of information regime, establishing new government agencies like the Criminal Justice Commission (CJC) and the Electoral and Administrative Review Commission (EARC), enacting new criminal offences to punish corruption and to compel its disclosure and investigation, and restructuring the police force.

Another novel and seemingly radical recommendation is to create legal protection for "whistleblowers". Specifically, Fitzgerald recommended that the proposed EARC should prepare legislation "for protecting any person making public statements *bona fide* about misconduct, inefficiency or other problems within public instrumentalities, and providing penalties against knowingly making false public statements".[1] The recommendation has substantially been implemented in the *Electoral and Administrative Review Act 1989 (Qld)*, which lists the following item among the matters which the new commission is to investigate: "16. Protection from victimization of persons because of statements made in good

faith concerning dishonesty, misconduct, inefficiency, or other deficiency in public administration, and penalizing persons who make wilfully false statements concerning such matters."

In explaining its recommendation, the Fitzgerald Report referred to the recent enactment of similar legislation in the United States - the *Whistleblower Protection Act 1989* - and commented that there was an "urgent need' for similar legislation in Queensland.[2] The following brief argument was given in support of this recommendation:

> Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.
>
> It is enormously frustrating and demoralizing for conscientious and honest public servants to work in a department or instrumentality in which maladministration or misconduct is present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority ...
>
> If either senior officers and/or politicians, are involved in misconduct or corruption, the task of exposure becomes impossible for all but the exceptionally courageous or reckless, particularly after indications that such disclosures are not only unwelcome but attract retribution.[3]

The interesting point about the Fitzgerald recommendation is that it went beyond suggesting that employees with knowledge of internal fraud or corruption should be encouraged to report their knowledge to the law enforcement authorities. Fitzgerald recommended that such a person should be protected as well if he or she makes a *bona fide* public statement - or, as it is popularly called, blows the whistle.

The practice of whistleblowing is one that has attracted great popular interest, partly because of the spectacle of a person publicly being disloyal to the organisation to which he or she belongs, and partly too because whistleblowers have often focused public attention on a hidden membrane of corrupt behaviour. Their moral courage in confronting those forces has bestowed international fame on many whistleblowers.[4] Among the more famous are Daniel Ellsberg, who released US government documents that reported how the public had been misled over the Vietnam War; Clive Pointing, a British civil servant who gave to an Opposition member of Parliament information showing that the government had misled Parliament about the sinking of the Argentinian ship, *General Belgrano*; Frank Serpico, who testified to the Knapp Commission that his New York police

colleagues had been corrupted into crime; Stanley Adams, who exposed that his employer was illegally fixing prices in the European Economic Community; Karen Silkwood, who was killed in a puzzling car accident on her way to provide to a journalist evidence of falsified nuclear safety records by her employer, Kerr-Mcgee; Ernest Fitzgerald, a US Defence employee who gave testimony to a US Congressional committee of a $2 billion cost overrun on the Lockheed c-5A transport plane; in Australia, Phillip Arantz, who was sacked from the New South Wales police force after disclosing the deliberate inaccuracy in published government statistics on crime clean-up success; and, as a general case, the growing band of former security intelligence officers who have disclosed the extent of unlawful domestic surveillance and wire-tapping that intelligence agencies have carried on within their own countries.

A point underlying the Fitzgerald recommendation is that whisteblowers, unless they are given formal legal protection, will suffer reprisal from the organisation to which the whistleblower belongs. As one writer has put it, "employees learn that to confront authority is to invite retaliation".[5] The means available to many employers to punish or intimidate a disloyal employee are numerous. The organisation has commonly responded with personnel disciplinary action, such as a reprimand, transfer, demotion, or even dismissal; with legal action, like a private law action for defamation or breach of confidence, or in the case of government whistleblowers, a criminal prosecution for unlawful disclosure or possession of government documents; or, most likely, with an informal response, such as systematic aversion or subtle abuse in the workplace by management and other employees, exacting scrutiny of time sheets and other work records, demanding orders, referral for psychiatric assessment or treatment, and repeated threats of demotion or dismissal for some unrelated misdemeanour.

The fate of whistleblowers was graphically illustrated by the experiences of a group of 233 whistleblowers studied in the United States:

- 90% lost their jobs or were demoted
- 27% faced lawsuits
- 26% faced psychiatric or medical referral
- 25% admitted alcohol abuse
- 17% lost their homes
- 15% were subsequently divorced
- 10% attempted suicide
- 8% went bankrupt.[6]

Obstacles to Legal Protection of Whistleblowers

The case for respecting or admiring the public spirit and achievements of whistleblowers is reasonably clear. The more difficult challenge is to justify the enactment of whistleblower protection legislation. There are obstacles in point of theory and of practice.

It would be odd, in an institutional sense, for a government to legislate to protect those employees who have been publicly disloyal to the government organisation. Governments like all large organisations, operate more effectively when the internal lines of authority and responsibility are respected, and when employees display qualities such as loyalty and confidentiality towards the organisation. It defies that experience, the argument runs, to bestow on individual employees the right unilaterally to gauge the merits of their own complaint and to choose when public discussion of the issue is appropriate. For a parliament to bestow that right on government employees would seemingly constitute a recognition that the system of government had such potential for irrational or uncontrollable behaviour that its salvation lay ultimately in individuals defying the body politic.

A difficult practical problem may be to distinguish the genuine whistleblower from the malcontents and the pretenders within an organisation. It is already a problem for many organisations that people who are disaffected with its ideals or discipline will claim to have been victimised for pursuing the truth. Introduce legislation which offers formal protection for any person who is classified as a "whistleblower" and there is a danger of encouraging internal dissension that will achieve little besides destroying internal harmony and efficiency.

It must be doubtful too, whether it is possible to design a workable administrative or legislative scheme that can protect whistleblowers. They are, by definition, people who are in conflict with their own organisations. As stated above, many organisations have a limitless capacity to isolate those who have defied it, can draw on many subtle techniques to tarnish or intimidate the internal dissident. Proving a causal relationship between the whistleblowing disclosure and the organisational retaliation could pose many legal difficulties. That internal conflict may be apparent too in its effect on the whistleblower's emotional or psychological balance. Isolating the whistleblowing behaviour and treating it as an activity warranting separate protection will pose difficulties once again.

The conclusion favoured by some is to protect whistleblowers by some means other than a formal legislative scheme. Options for reform might include the development of internal codes of ethics that tolerate dissension and encourage oversight, creation of fraud hotlines within an organisation, strengthening internal

grievance procedures, vigilance by unions and professional societies to support beleaguered members, and increased reliance on existing legal doctrines to protect employees against unjust dismissal.

The United States Whistleblower Protection Model

Belief in the efficacy of whistleblower protection schemes exists most strongly in the United States.[7] The US has led the way, with the Congress and as many as thirteen States enacting legislation that formally protects public employees who blow the whistle. Private as well as public sector employees are also protected by as many as thirty different statutes that protect employees who disclose potential violations of laws in areas as diverse as environmental protection, mine safety, labour regulation, health and safety standards, transport safety, and civil rights.

The most interesting US model, and the one to which the Fitzgerald Report made specific reference, is the federally-enacted *Whistleblower Protection Act 1989*. A whistleblower is described for the purpose of the act as a present or former federal employee who discloses information "which the employee reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety". There are three principal themes or objectives that are dealt with in the act: it ensures that allegations of illegality, mismanagement or wastage against federal agencies or officials are properly investigated; it provides protection for the employees who make those allegations; and it ensures punishment of any official who victimises another for making such an allegation. Those objectives are achieved mainly through a statutory agency, the Office of Special Counsel (OSC).

As to the first objective, the OSC operates as an early warning and detection system, by receiving complaints from employees against agencies, and ordering the agencies to investigate the complaints which appear to have some merit. Very rigid time constraints and reporting requirements are set down within which the OSC must decide whether to refer an allegation to an agency, and an agency must investigate and report back. Allegations or findings may also be referred in special circumstances to other institutions, such as the Attorney-General, the President, and the Congress.

The OSC's function of protecting whistleblowers is discharged, in the first instance, by making a preliminary determination as to whether a federal official has been the subject of adverse personnel action by reason of having complained or disclosed evidence of illegality, mismanagement or wastage. If an agency fails to take suitable corrective action, the OSC may file (and pursue) a complaint with another agency, the Merit Systems Protection Board. An aggrieved official may

also approach the Board directly in some circumstances. The function of the Board is to determine, after a hearing at which the OSC may appear, whether the whistleblowing disclosure was "a contributing factor" that the agency would have taken that adverse action in the absence of the disclosure. If a complaint is substantiated, the Board may order such corrective action as it considers appropriate. A range of other specific protections for whistleblowers is also created by the Act - among them, the Board is authorised to make an order to protect a person from harassment, or to stay the implementation of adverse personnel action; the Act ensures that the OSC will protect the confidentiality of whistleblowers, in some circumstances even from the agency in which a person is employed; and the Act ensures that whistleblowers may be given a limited right or preference to be transferred to some other job in the federal bureaucracy.

Lastly, the OSC may refer to the Board a preliminary finding that an official has wrongly taken personnel action against a whistleblower. After a hearing, the Board may impose disciplinary action, including demotion, dismissal, or a fine of $1,000 or less.

The Case for Legal Protection

The concept of whistleblower protection should not be dismissed too readily as another fashionable American device that is inappropriate for transportation to the different political and cultural context in Australia. Many comparable kinds of protection exist here already. There are, for example, common law doctrines that may protect an employee against disciplinary reprisal or dismissal on account of disclosing some crime or civil wrong of the employer.[8] There are many statutes too that protect a person against prosecution or victimisation by reason of having reported corruption to a royal commission, to an anti-corruption body like the New South Wales Independent Commission Against Corruption, the Inspector-General of Security, or the National Crimes Authority. Probably the most far-reaching expression of that protection is section 2.25 of Queensland's *Electoral and Administrative Review Act 1989*. Where it appears to the Commission that a person may suffer disadvantage after disclosing information to the Commission, the Commission is under a statutory duty to "make such arrangements and take such steps as are necessary and open to the Commission to avoid the occurrence of such prejudice, intimidation or harassment".

Nor is the notion of "dobbing in" a cultural anathema. Government-sponsored schemes like "Operation Noah" and "Neighbourhood Watch", and government taxation and welfare agencies urge people to embrace the philosophy that reporting the illegal activities of others (even of friends and colleagues) is a form of behaviour that strengthens rather than undermines the public interest.

What we do lack in Australia, however, is the specially designed scheme of the kind which Fitzgerald had in mind, which can more suitably adjust the complex legal, administrative, behavioural and sociological factors that can potentially arise in any conflict between a whistleblower and his or her employer. The mutual accommodation of those interests may be complex, and best undertaken by legislation.

On one side of the balance are the interests of the employer - being protected, for example, against malevolent and reckless attacks, and being shielded from an internal workplace ethic of suspicion and mistrust. Those risks are real, but can probably be minimised by an appropriately drawn scheme. That was the conclusion of a Canadian Law Reform Commission which undertook an extensive study of the issue, recommending the adoption of a modified form of the US model for a governmental system that is not dissimilar to our own.[9] It should be remembered too that a central feature of the US model is that it confines complaints initially to a private and confidential channel, and to that extent, protects an organisation from potentially damaging and premature public disclosure of fraud allegations. Relevant here too, is the Fitzgerald recommendation that a whistleblower protection scheme should include penalties for those who wilfully make false allegations.

Part of the balance, so far as an employer or government agency is concerned, must also be its interest in detecting and containing corrupt behaviour. A whistleblower protection scheme makes it possible for an employee to report corruption without being stifled by superiors who have a greater interest either to deflect controversy or to conceal corruption from which they or their colleagues will benefit. That is, whistleblowers can be an important strategy in the fight against crime. Those working within an organisation will often be the first - and sometimes the only ones - to know of any illegal or corrupt practice committed by or within the organisation. It is likely too, that an organisation will be less prone to internal wrongdoing if it is known that an effective mechanism exists by which other employees can report the activity without fear of retaliation.

Another advantage for an organisation could be a strengthening in morale and confidence, born of the knowledge that the employer's ethical and organisational standards will be protected. Here again it was the view expressed in the Fitzgerald Report that debilitation of an organisation is more likely to occur when employees perceive that corruption and misconduct will thrive, and honesty and courage will be punished.

The other major line of argument in favour of whistleblower protection schemes focuses on the rights and interests of the whistleblower. The genuine whistleblower will usually be a person who has made an ethical or conscientious choice to regard their obligations to the society as superior to their loyalty to an

employing organisation. Most, in addition, are people who have rejected the anonymous leak, choosing instead to give their complaint the support of their conviction. Telling the truth should be neither difficult nor costly. Employment in an organisation should not require that a person accepts complicity in all activities which the employer has decided to pursue or to conceal. To accept that employees can be persecuted for honesty, loyalty, or upholding the public trust undermines some of the legal and moral principles on which a society is necessarily based. Common are the legal dictums which emphasise that organisations have an unqualified duty to obey the law, that individuals cannot escape criminal liability by claiming to have acted under superior orders, and that people have a conscientious duty to defy inhumane laws.

The point on which this chapter began is also the point on which to end. When corruption has flourished to the point that it has become a driving force in a system of government, and when an organisation has lost its capacity or energy to distinguish in any civilised way between what is proper and what is illegal, conventional solutions can be ineffective. Exceptional measures that defy orthodox theory may be the solution. Allowing a person to blow the whistle on a corrupt organisation might sound the signal that will attract the sterilising gaze of public attention.

Notes

1. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. 370.
2. *Ibid*., p. 134.
3. *Ibid*.
4. For discussion of examples, see e.g. R. Nader et al *Whistleblowing*, (New York: Bantam, 1972); and M. Glazer and P. Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* (New York: Basic Books, 1989).
5. H. Nevill, "Calling the Tune on Whistleblowers", *Canberra Times*, 21 August 1986, p. 6.
6. Study of D. Soeken, quoted in the *Age*, 8 August 1988, p. 11.
7. S.M. Kohn and O.G. Kohn, "An Overview of Federal and State Whistleblower Protections", *Antioch Law Journal*, vol. 99, (1986); and G.E. Caiden and J.A. Truelson, "Whistleblower Protection in the USA",

Australian Journal of Public Administration, vol. XLVII, no. 2, June, (1988): pp. 119-129.

8. J. McMillan, "Blowing the Whistle on Fraud in Government," *Canberra Bulletin of Public Administration*, no. 56, September, (1988): pp. 118-123.
9. Ontario Law Reform Commission, "Political Activity, Public Comment and Disclosure by Crown Employees" (1986).

17

Reform of the Bureaucracy — An Overview

John Nethercote

My focus in this chapter is to address the government and public administration aspects of the Fitzgerald Report. In the main these are embraced in chapter three of the Report, inadequately and in some respects misleadingly entitled "The Political Context".[1]

What Fitzgerald is on about here is parliament, the executive, electoral laws, administrative review, the administration, financial controls, financial interests, law reform, the media, criticism and dissent, and electoral and administrative reform. It is a confused, rambling chapter embracing a range of issues tangential in varying degrees to the main themes of the Report; police and the criminal law.

Most public reports have such a chapter though not usually so prominently located. These chapters are more often than not weak, superficial, and under-researched. This is particularly so with this catch-all chapter of the Fitzgerald Report.

It might not in ordinary circumstances be necessary to disclose such a reaction to a tangential component of a report except that in this case the chapter has an heir in the form of what Fitzgerald chose to call the Electoral and Administrative Review Commission (EARC): choice of the word "review" rather than "reform" is not uninstructive. This body has enormous scope, from parliamentary, ministerial and electoral matters; through administrative tribunals, freedom of information, public service appointments and promotions, and whistleblower legislation; to judicial administration, the role and resources of the Auditor-General, the Law Reform Commission and the Parliamentary Counsel, pecuniary interests of office-holders, and the law relating to public demonstrations.[2]

Fitzgerald himself is conscious of the disparate character of the body whose creation he has recommended. The commissioners, except for the chairman, are not to be employed full-time. It seems that he envisages that the Commission's work will be done by consultants, directed and viewed by commissioners.

More to the point, the omnibus character of this Commission seems to have concerned Opposition Leader Wayne Goss for in his "Public Sector Reform"

document, he posits creation of a Public Sector Management Commission (PSMC) whose task will be to complement the work of the EARC in the public sector management field. Goss is absolutely right to be concerned. The macro-constitutional issues to be addressed by the EARC hold enormous public interest and almost certainly will be the subject of intense scrutiny and controversy. They will fully absorb the energies and the attention of the EARC. They are the prestige issues. They are in many respects substantially distinct from the administrative issues. There are few people in Australia whose range of expertise is sufficient to encompass the full scope of the mandate, or anything like it.

Moreover, if the EARC and PSMC cooperate, they will largely duplicate each other's work; if they do not, they may well negate and nullify each other's endeavours.

Goss, therefore, should not be frightened of his analysis. He should split the EARC. Those responsibilities relating to the institutions of government and representative democracy including especially the principles of electoral representation; the location of the judicature in the government structure; and the expression of public opinion, should be assigned to one body. The proposed PSMC should assume responsibility for all other matters in the public administration field.

Goss, it might be added, is optimistic in his belief that the proposed PSMC will be able to work without significant increases in the resources of the Office of Public Service Personnel Management which it is to replace. Especially in the first couple of years of government the load on this organisation will be enormous; what Premier Goss should do is ration not its staff but the time it has to do the job.

The situation created by Fitzgerald is, accordingly, far from irretrievable, and there can be no doubt that even in this rambling chapter he furnishes a check list of issues calling for considered attention in what could amount to the reconstruction of democratic representative and responsible parliamentary government in Queensland. This is not a task from which any government should resile. Over the past half decade Queensland government has had, as they say, a bad press. Few governments can prosper when their reputations are as sullied as Queensland's has been of late. At the very least there is a major task of refurbishment if not reform to be undertaken.

In confronting this task it would be wise to keep a clear head about the context. Fraud and corruption are not by any means unique to Queensland. Only a few years ago we frequently heard as much talk of the McCabe-Lafranchi and the several reports from the Costigan Royal Commission to the Painters and Dockers Union, as we now hear of Fitzgerald. And followers of New South Wales politics will be only too well aware of the current proceedings of the Independent Commission Against Corruption (ICAC) in that State. The traditions of the Rum

Corps are indeed alive and well down south. The Commonwealth itself has major problems with fraud of various types. At least some of the deficiencies in Queensland Government, therefore, find their counterparts elsewhere.

In the world of modern government "integrity" in many guises is becoming an active issue which ministers and their advisers ignore at their peril. Fitzgerald has brought this home very forcefully to the Queensland public, but it is a message which others have been learning perhaps for more than a decade.

For many years, perhaps generations, Westminster-based governments took a not-so-quiet pride in the probity and fairness with which administration was conducted. Absence of corruption was seen as one of the many happy contrasts which could be drawn between the Westminster-style and that of the rival Washington approach. It bred a complacency which cannot be justified in terms of experience in the 1980s.

A second consideration which is not unimportant is the relatively confined limits of criticism in the Fitzgerald Report. It is of some interest that the police aside, it is a small number of ministers whose conduct is most criticised. The State's corps of administrators are relatively untouched and I have heard only a little hearsay commentary that this represented a major omission on Fitzgerald's part. It would probably be foolish to imagine that all is rosy in the public service garden, but it would seem that the foundations for better government may be available to build upon. In the business of government and administrative reform it is well to build on available strengths and it does seem that this is a distinct prospect for Queensland as it enters the final decade of this century.

These contextual considerations lie at the heart of further disappointments with chapter three of the Fitzgerald Report. It should have been a cogent, coherent exposition of the basic framework of the Queensland polity and principles according to which it ought to operate. Instead, what the Commissioner provides is a batch of jottings, not always logically connected to each other, on different aspects. Those familiar with issues of government and its institutions will be struck by the formal and often quaint, even archaic, character of those jottings. I suspect that those for whom government issues are not a daily concern will find the chapter hard to follow.

Not at any stage does the Commissioner expound the underlying doctrines of the Westminster method of government, clarify the meaning of the separation of powers for the initiated as well as the uninitiated, nor explain the various connections between the parts of the machinery of government - parliament, cabinet, ministers, the public service, departments, tribunals, corporations and, of course, the courts. His Report was the essential place for doing so for it is unlikely that the reports of EARC will have the public standing or the publicity to

communicate these ideas to the public in general. It was, hence, a lost opportunity, given the Commissioner's decision to move into these broader fields.

More seriously, the Commissioner was unduly formal in what he had to say. His treatment of parliament furnishes but one example of this failing. In seeking to support, strengthen and protect parliament from an over-mighty ministry Fitzgerald calls for an "impartial Speaker". The Speaker, according to the Report: "cannot afford to adopt a partisan role, either voluntarily, or in order to retain the confidence and support of the Government party. If the Speaker enters the arena, there is a risk that Parliament will not be able to make the Government accountable".[3]

These are views which most observers of government would support. But in Australia, presiding officers with the exception in some degree of the President of the Senate, are very much party figures (usually of a second order). It is hard to see how, in one of Australia's weakest legislatures, the Speakership can be so strengthened that it will become a bulwark able to defend a restored parliamentary democracy which Fitzgerald sees as a condition of enduring reform. It is likely to proceed in reverse order: the Queensland Parliament once strengthened may be able to offer support to a greater measure of independence for the Speaker.

Likewise, most will endorse his exposition of the opposition role in parliament. The members of the opposition are, he writes with a nice turn of phrase, "the constitutional critics of public affairs".[4] But no Australian parliament has ever made much progress in entrenching opposition rights and prerogatives in its procedures (and certainly not to the extent that the House of Commons has done).

In the past decade Australia has witnessed the curtailing of such rights for specious reasons in the New South Wales Legislative Assembly by the Wran Government. And the Commonwealth House of Representatives in the life of the present Parliament has seen a substantial deterioration in Question Time at the expense of the Opposition as well as relatively easy diminution of the parliamentary role by the simple expedient of minimising meetings of the House. Deputy Opposition Leader in the House, Wal Fife, has made some effort to get these unhappy developments before public notice through letters to newspapers but the impact has been negligible. Parliaments in Australia are weak bodies. If the Queensland Legislative Assembly is to claim for itself a place in what is not a very bright sun, then something more than a few platitudes was needed.

Both Greg Vickery[5] and Peter Coaldrake[6] have made reference to the procedural weaknesses of the Queensland Parliament and the way that absence of a second chamber further weakens the law-making process. The Commissioner, given that he had ventured into these fields, might usefully have suggested provisions of a constitutional character to ensure that, as an invariable matter of

course, there is at least in formal terms, a little more to legislating than simply wielding the rubber stamp. At the very least Fitzgerald should have contemplated the capacity of the Queensland Parliament to fulfil the role he envisaged for it. He should also have pondered whether a parliament which places its own revitalisation in the hands of an outside body, however eminent its members, has started from the right place: the whole technique smacks of the autocrat ordering subjects to be free.

Fitzgerald's analysis of cabinet practice, including cabinet's role in the awarding of contracts, is likewise meandering. He is clearly concerned about contract procedures,[7] but seems unable to formulate the point he is trying to make. The drift - it is little more than that - of his analysis seems to point to the desirability of an autonomous contracts board separate from cabinet and removing such matters from direct cabinet/ministerial control. But the exposition is decidedly confused and where it leads to, indeterminate. He places some faith in the parliamentary Public Works Committee but the links are not drawn.

His discourses on administration and personnel practice are likewise vacillating.[8] He gives some praise to the 1988 public service legislation but has a few quibbles, mostly detailed and possibly of minor significance.[9] These relate to exemptions to an obligation to advertise vacancies, extensions of appeal rights, and the determination of appeals.

He spends some time supporting the new system of contract employment for senior officials. He is quite unconvincing in the claim that: "contract employment, rather than permanent tenure, does not make political interference or bureaucratic partiality any more likely, nor does it decrease the chances of public servants reporting misconduct."[10]

He makes other claims which are at best problematical: "If the wrong people are appointed for the wrong reasons they will only be there for limited periods."[11] I frankly find that view optimistic. And he chooses to ignore the fate of the right people appointed for the right reasons who also find themselves *in situ* for a limited period only. Similarly, his assertion that a contract system will reduce "opportunities for the bureaucracy to be politicized to a degree which is difficult, it not impossible, to reverse"[12] needs some empirical testing. Nor is it at all easy to have much confidence in the statement that "contract employment may well lead to greater independence for public officials."[13] These views, to me, portend not an unpoliticised public service but, rather, one which may be wide open to appointments on a spoils basis.

In general, his treatment of a contract system would have been more convincing if he had tackled the question of higher level pay in public services and the detailed terms of contracts. Certain types of contracts may have the effects he envisages; others may have the reverse effect. Just what he was trying to achieve

by the glib overview in Section 3.5.3 is very obscure indeed.[14] And writing off tenure as he does may make some sense from the perspective of a practicing barrister but those familiar with public administration are unlikely to be particularly reassured. Tenure still has its place in public administration (as in judicial administration) and it would have been well for Fitzgerald to give some weight to the traditional approach at least as a balance for his enthusiasm for contracts. Some of the reasons for tenure in public administration are comparable to those used to justify judicial tenure.

In his approach to administration Fitzgerald does not always distinguish clearly between measures designed to maintain integrity and those aimed at promoting efficiency or better performance. His half page treatment of "Ethical Considerations", for example, ends up with a paragraph (one out of six in all) on monitoring "the effectiveness of an individual employee's effort or the impact of departmental performance."[15]

This really confirms a broad impression that Fitzgerald only has a tenuous grasp of the nature of public administration and its place in the machinery of government. His treatment betrays little sign that he has any significant concept of the respective roles of ministers and officials; the functions of cabinet, ministers and departments in decision-making and management; nor of appropriate administrative and personnel practices which could promote the values of ethics, integrity and fairness in government. These are all matters which he seems content to leave to EARC and its consultants.

For a report with so pronounced a moral orientation, his handling of ethics and integrity in public office is frighteningly discursive. He seems reluctant to provide a strong lead. One such important example comes in the section on induction training for police:

> Organisational and management changes and the introduction of professional staff management may partially overcome the problem of police misconduct.
>
> Additionally, training must include an ethical component as an integrated aspect of all matters taught. Case studies and practical exercises in which ethical decisions have to be made are now an integral part of the training of many professionals (for example, medical students) and play an important part in introducing people to ethical dilemmas and choices.[16]

Queensland's recent experiences apart from anything else illustrate just how fragile the quality of integrity can be in public office. And it is very naive to believe that a remedy is to be found in "organisational and management changes", "introduction of professional staff management",[17] and training with an ethical

component. It is also naive to believe that people will be good except when led into temptation.

Some of his measures would help to create an environment which might foster and reinforce honest and fair behaviour. These include freedom of information and administrative review procedures.

The lead needs to come from the Premier in both word and deed. Fitzgerald is concerned about pecuniary interests and that is reasonable enough. Attention needs also to be given to post-employment activities of former office-holders and government employees particularly given keenness for using contracts at higher levels.

Selection practices are certainly critical. Much as the stress on merit is to be welcomed, weight also needs to be given to qualities of character and even in some cases reputation. The constitution of selection boards is therefore a key issue.

The ideal of service is long overdue for resurrection in the guiding philosophies of Australia's public services. Not the least depressing aspect of current preoccupations with pay and remuneration in our public sectors, and the relentless rhetoric on performance, is the virtual disappearance of notions of dedication and public interest. Getting value for the tax dollar is rightly a high priority these days. But the stress which has been laid on this goal has brought severe dysfunctions with it. It has brought an ethic in which dollar judgments too easily hold sway, an ethic in which acquisition of wealth has become the sole test of worth whether on an individual or a policy basis. So pronounced has this ethos become, not least under Labor governments, that it is a puzzle to comprehend why many of the protagonists remain in public administration at all. Queensland's experience as revealed by Fitzgerald has been profoundly disturbing but, again, it would be wrong to believe that the problems here are distinctive.

One of the more interesting and more encouraging aspects of Australian government in the 1970s and 1980s has been the active campaign of the Australian Taxation Office (ATO) to safeguard the integrity of the national tax system. It is undoubtedly vulnerable to all manner of pressure, fraud and corruption. And yet the ATO has been insistent in its endeavours to encourage legality and discourage illegality and sharp practice. It is not beyond criticism, some of it fair; there are even dangers in the zeal which it brings to the task. But *pro tem* it furnishes an important example of conscientious management determined to maintain an administration which is honest, fair, even if often firm. A study of ATO practices in the 1970s and 1980s will be of great value to all interested in maintaining the integrity of public administration in Australia.

No-one should envy the task ahead of those in leadership in Queensland in the next decade. Whether at the parliamentary, ministerial or administrative level,

they confront a situation in which survival with reputation intact will be the test of success, every bit as much as achievement. And it is upon their shoulders that the burdens rest. On the broader scene they do not get much help from Fitzgerald, save maybe from the fortitude he brought to the accomplishment of a miserable assignment. They are not likely to get much assistance from the EARC either.

Which brings me to my conclusion. Public sectors are not islands unto themselves. They are part of the communities they are constituted to serve. If the community is not interested in integrity, promoting fair play and cutting down rackets, there is no need to expect miracles or even palliatives from government. Fitzgerald, in his chapter on "The Political Context", does not mention political parties. They are rarely exemplary bodies but they are the blood of democracy. Electoral law reform, if it is enlightened, will apply itself to issues of how they can be prompted to contribute to democracy. Reforming government without moulding a constructive role for the parties will not have a promising future. Party attitudes will, of course, be a critical element in the revitalisation of parliament.

Notes

1. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), pp. 123-145.
2. *Ibid.*, pp. 144-145
3. *Ibid.*, p. 123.
4. *Ibid.*
5. G. Vickery, "Did Fitzgerald Go Too Far: A Response from the Queensland Law Society", chap. 8.
6. P. Coaldrake, *Working the System* (St. Lucia: University of Queensland Press, 1989).
7. *Fitzgerald, Report*, pp. 125-126.
8. *Ibid.*, pp. 129-33.
9. *Ibid.*, p. 131.
10. *Ibid.*, p. 132.
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*, p. 133.
16. *Ibid.*, p. 249.
17. *Ibid.*

18

The Senior Executive Service: A Model for Reform From the Top?

Andrew Hede

The Senior Executive Service (SES) is a concept borrowed from the United States where it was introduced as part of a major reform of the Civil Service in 1979. Essentially, an SES is a group of public sector executives with high level management skills who are both responsible for and accountable for the implementation of Government policies. The SES was introduced into Australia in 1982 by Victoria, followed by the Commonwealth (1984), Western Australia (1988), and New South Wales (1989). New Zealand has also introduced an SES (1988). There is considerable variation in the different SES models that have been implemented, but in all cases, the SES was introduced to *reform* the public service by improving managerial competence and accountability.

The Queensland Labor Party's 1989 election campaign was based on a reformist platform which included the introduction of an SES.[1] However, the Queensland Public Service underwent major reform in 1988 with the implementation of the *Public Service Management and Employment Act 1988*. This Act which has been generally endorsed in the Fitzgerald Report, did not provide for an SES, so is there a case for introducing one now?

Senior Management in the Queensland Public Service

Savage Report

The *Public Service Management and Employment Act* incorporated almost all of the recommendations of the Public Sector Review Committee chaired by Sir Ernest Savage in 1987. The Savage Report devotes all of four sentences to an evaluation of the SES concept![2]

The Savage Committee had received a submission from the Public Service Board recommending the introduction of an SES, and a submission from a unit in the Treasury recommending against an SES. The only argument the Savage

Report gives for recommending against a formal SES is that it "could be seen as an elite corps, and to ambitious officers who did not reach its ranks, it could act as a disincentive".[3] This disincentive notion is based on a lack of understanding of the nature of human work motivation. There is evidence that Australian managers strive to reach goals which increase their sense of achievement and their self-esteem.[4] Far from decreasing their motivation, the SES would act as a strong incentive for the high-achievers in the non-executive ranks. Low-achievers would be unaffected rather than de-motivated by an SES.

The other aspect of the Savage argument against an SES is elitism. However, the anti-elitist argument against the SES is not compelling. Although most Australians would tend to value egalitarianism, there is wide acceptance throughout the workforce of differences in rewards for those at different levels of skill and responsibility. The elitism argument seems based on the notion that it is alright to pay senior managers more, and even to give them bigger offices and other perquisites, but that attention should not be drawn to this by giving them membership of a special group. Of course it is possible to operate an SES as an inequitable elite, a group of privileged people who are given special status and conditions not necessarily because of their merit or responsibility. But it is also possible for senior executives to regard themselves as an elite "higher class" without having membership of a formal SES. Those who are disposed to behave in an elitist manner are likely to do so when they reach the coveted 1-15 classification in the Queensland Public Service.

The Savage Report also notes that the existing Australian SES schemes were "still in the experimental stages".[5] Although no thorough assessment had been made of an Australian SES at the time of the review in early 1987, it is hardly appropriate to describe the Victorian and Commonwealth SESs as "experimental", given they had been in operation for several years, or to reject the concept on such grounds.

Finally, the Savage Report asserts that the aims of the SES can be achieved without establishing a separate formal structure. To assess this claim, the features of Queensland's senior management can be compared with those of the SES schemes in other public services. Such a comparison indicates that Queensland's current senior bureaucracy could be classed as a *de facto* SES which has features comparable with other SES models, particularly that in New South Wales[6]. Before addressing the question of whether Queensland should introduce a formal SES, let us consider the current nature of its public administration.

Politicisation and Cronyism

"The Public Service is not politicised. It's just that few, if any, of us senior public servants have ever worked for a non-conservative Government." This is how the Bjelke-Petersen appointed chief executive of a statutory authority recently attempted to justify in an "off-the-record" interview, the cosy relationship that has developed over a long period between the bureaucracy and the National Party Government in Queensland.

The Fitzgerald Report points out that under a Westminster-based system, it is easy to blur the distinction between the government's creation of policy in which political considerations are legitimate, and the Public Service's implementation of that policy in a manner which is supposed to be apolitical. After thirty-two years without a change of government, Queensland has developed a cadre of senior administrators and policy advisers who are adept at giving what Commissioner Fitzgerald calls "politically palatable advice", rather than the fearless impartial advice the Westminster system is meant to foster.[7] The blinkered view of politicised policy advisers prevents them from canvassing the full range of options required for effective decision-making.

As Whitton elegantly puts it, the Fitzgerald Report gives us only "a fleeting glimpse of the nexus between politicians and bureaucrats".[8] However, Coaldrake discusses a number of practices that illustrate the politicisation of the Queensland Public Service:[9]

- Accelerated promotion to senior public service ranks for former ministerial staff;
- Personal and political scrutiny by cabinet of contenders for senior posts;
- Public service appointments for former government politicians, and for relatives and friends of ministers;
- Victimisation of public servants who have privately opposed the government;
- Collusion between politicians and public servants in rorting the expenses system;
- Code of silence by senior public servants over abuses of ministerial expenses.

Coaldrake concludes his discussion of politicisation with the observation that: "the public service as an institution came to share the 'values' of its political masters. It thus became politicised, not so much in a directly partisan sense but by way of sharing the benefits of office and the threats posed by government defeat at the polls".[10]

Wiltshire argues that politicisation of the Queensland public service increased with the denial of appeal rights against appointments. He notes that this practice began in the 1960s and has become "a trend that has particularly insidious overtones", adding that "such a practice can open the door to political and administrative patronage".[11] Patronage or cronyism occurs when senior appointments are made on the basis of political or social allegiance rather than on merit. It is likely that the cronyism has been a factor in many senior appointments in Queensland over a long period.[12]

As in other public services which have had a system of "jobs for the boys", the Queensland Public Service has few female executives. Even without blatant and deliberate discrimination, cronyism can be manifested in the subtle cloning process which influences much of public service staff selection. *Cloning* occurs when an individual who does not share the same ideological values as the top echelon of the public service is passed over for a more "compatible" person who has weaker credentials for the job. After so long without a change of government, cloning has no doubt contributed to the Queensland senior bureaucracy's being almost exclusively male and predominantly politically conservative.

One way to limit politicisation and cronyism in the public service is to have an independent review of senior appointments and promotions. At present, this review is carried out by Cabinet. Far from preventing politicisation and cronyism, such a process serves only to institutionalise these practices.

Termination of employment is another way in which politicisation and cronyism may be manifested. If senior public servants in Queensland prove not to fit the established mould or persist in giving unpalatable advice, there is nothing to prevent a chief executive from terminating their contracts without explanation. There is no appeal in such cases, although an individual may submit a response via Cabinet to the Governor-in-Council. Again, this process does not adequately protect from politically-based action against senior public servants.

The Fitzgerald Report and Public Sector Reform

The Fitzgerald Report assesses the 1988 Savage-inspired reforms of the Queensland Public Service as follows: "All the reforms are consistent with modern theories of public administration: the reduction in the role of central agencies such as the Public Service Board, the increase in responsibility for efficient administration by chief executives, the employment of people by contract, the creation of a redeployment/redundancy scheme, and promotion by merit alone."[13]

I would argue that the first three of the above reforms endorsed by Commissioner Fitzgerald have the effect of *entrenching* rather than eradicating

politicisation and cronyism in Queensland. Let us briefly examine these questionable reforms.

Reduction in central agency control

Public service boards in Australian public services have long been the subject of complaint by both bureaucrats and politicians. As the central personnel agency, the boards typically exercised a high degree of control over the whole public service. They usually interpreted their role as one of policing the implementation of rigid rules governing every aspect of public sector employment. They certainly placed severe restrictions on the discretion of chief executives. Not surprisingly, most boards have been disestablished. The Victorian Public Service Board has managed to survive only by adopting more of a consultancy and monitoring role rather than a policing role.

The Queensland Public Service Board also was widely criticised, and was abolished in 1988 on the recommendation of the Savage Committee. It is notable that Cabinet rejected the Savage recommendation for a part-time board, but implemented the recommendation to establish the Office of Public Service Personnel Management. Under the Act, the main functions of the Office are to recruit basegrade clerks, to redeploy redundant officers, to develop personnel guidelines, and to advise on personnel practices.[14] Importantly, the guidelines are merely *advisory* - the Office has no monitoring role. Thus, personnel policies and practices in the Queensland Public Service have no form of effective ongoing control.

It is relevant that the Commonwealth replaced its Public Service Board with a Public Service Commission. Although the current Commission is less rigid and restrictive than the former board, it still exercises considerable control and closely monitors the implementation of personnel policies which it has statutory responsibility to develop. In particular, the Commission plays the primary role in appointing senior executives and in overseeing the operation of the SES. The rationale for this role is clear from a recent statement by the Public Service Commissioner: "An important reason for the Commission's involvement in the management and development of the SES is *to ensure that the SES remains free from patronage, nepotism and political and other interference*." (emphasis added)[15]

When it abolished its Public Service Board, Queensland threw the baby of merit-based employment out with the bathwater of excessive centralist control! To extend the analogy, it also threw out the monitoring soap needed to keep the employment baby clean. Although the 1988 Act provides for a merit-based personnel system in Queensland, the purely advisory Office of Public Service

Personnel Management cannot be fully effective in ensuring protection against politicisation and cronyism.

Increased chief executive responsibility

Many of the recommendations of the Savage Committee were designed to increase the responsibility of chief executives with regard to personnel matters. The 1988 Act devolves most of the Public Service Board's personnel functions to chief executives. Although modern management theory calls on regulators to "let the managers manage", it is inappropriate in the public service to make them virtually unaccountable! Chief executives are obliged by the Queensland Act only to "have regard to" guidelines issued by the Office of Public Service Personnel Management.[16] Nor are they even required to report to the Office on their personnel policies and practices.

It is particularly in relation to the hiring and firing of senior public servants that Queensland has gone too far in delegating powers to chief executives. Chief executives are able to appoint someone to a senior position without bothering to go through any formal selection process, with no involvement of an independent person, and with no obligation to account to anyone for their decision. Further, a chief executive can negotiate a starting salary and a performance agreement with the appointee, and keep this and other aspects of the appointment confidential. Unsuccessful applicants have no right of appeal against the appointment. The appointee's performance is assessed using whatever criteria chief executives choose, and any performance payment is at their complete discretion. Chief executives can terminate the person's appointment with one month's notice and are not required to give any explanation. In short, there is nothing to prevent today's chief executives from continuing the cronyism of the past!

Contract employment

The Fitzgerald Report advocates contract employment for senior public servants, arguing that it "does not make political interference or bureaucratic partiality any more likely" and that it "may well lead to greater independence for public officials".[17] Commissioner Fitzgerald does note that the independence of public servants will be enhanced if superannuation payouts on termination include employer contributions, and this apparently has been recently introduced in Queensland.

A clear distinction must be made between public servants who serve the government of the day, whatever its political colour, and staff recruited specifically to the personal staff of ministers. The Fitzgerald Report acknowledges that the

close personal contact and confidence required of ministers' personal staff justify such appointments being "properly influenced by purely personal considerations".[18] Such ministerial appointments should be on a contract basis.

As a result of the 1988 public service reforms in Queensland, contract rather than tenured employment currently applies to all senior public servants above classification level 1-15 (i.e., Bands 1-3), although, if a Band 3 contract is terminated, officers have the option of reverting to their former tenured level. But, as Coaldrake points out, "the move toward contracts in Queensland is widely interpreted within the public service not so much as a means to develop an efficient and flexible system of public management, but as a further and very blunt attempt at politicisation".[19]

Experience in other public services shows that the threat of termination makes contract public servants very susceptible to political influence. Public servants are much more able to resist improper influence if they know they cannot be summarily sacked. The majority of public servants see their careers as involving only public employment - a recent survey of Commonwealth executives indicated that only eleven per cent aspired to a position in the private sector or their own business.[20] Most public servants come to share a value system and an ethos that virtually *binds* them to the public service. A threat of being forced to work outside the public sector would put great pressure on such people to succumb to political influence. Entitlement to a large superannuation payout would in no way eliminate the pressure imposed by a possible thwarting of their career aspirations.

This is not to say that tenure provides absolute protection against political pressure. Tenured public servants can be made to toe the party line by denying them promotion, by transferring them to the unattached list, or by redeploying them to units often referred to euphemistically as "special projects branch". No doubt there are some who would find the threat of tenured hibernation much more onerous than termination of contract. These are the ones who could well feel more independent on a contract as Commissioner Fitzgerald suggests. But they would be a very small minority of executives, typically those recruited directly at a senior level from outside the public service, who are highly mobile in their careers, and who would be quite prepared to leave rather than compromise their principles. Nevertheless, for the vast majority of public servants, contract employment would increase their susceptibility to political influence.

The Case for a Queensland SES

We have seen that the Queensland Public Service has been plagued by politicisation, cronyism and lack of accountability. We have also seen that the 1988 reforms have not provided adequate protection for a merit-based personnel

system, despite the general endorsement of Commissioner Fitzgerald. Clearly, further reforms are needed.

Reform of the bureaucracy can be achieved most effectively using a top-down approach. The values and administrative competencies of senior public servants determine whether the effects of a reform process will be thorough and long-lasting or superficial and short-lived. Therefore, Queensland needs reform from the top. But should this be in the form of a Senior Executive Service?

We have observed that Queensland's senior bureaucracy already has many of the features found in other SES models. You may well ask, "What possible advantage could there be in applying an elitist name to a currently operating system"? Perhaps the main reason for Queensland to introduce an SES is to signify a clear break with politicisation and cronyism. As Halligan points out, "The Senior Executive Service has been significant as a symbol and facilitator of change."[21]

However, the name is important only if it signifies fundamental changes in how the senior bureaucracy operates. A comparison of features indicates that Queensland has a *de facto* SES almost identical to the New South Wales model. But it can be shown that this is a completely inappropriate model for Queensland. For effective reform, Queensland should look more to the Commonwealth and Victorian SES models than to those in New South Wales and New Zealand. Many of the features in Queensland's current senior bureaucracy serve to *prevent* reform rather than promote an impartial merit-based public service. Such inappropriate features are the lack of a unified group of top managers, the use of contract employment, the inordinate amount of discretion by chief executives, and the excessively low level of central control. A reformist SES for Queensland should have the following features:

Unified group

The members of the new SES would need to develop a sense of allegiance to the public service, not just to a particular agency. They should be encouraged to be mobile within the service. SES members should see themselves and also be seen, not as an elite who have special privileges, but as a group of very competent high performers who are charged with special responsibilities. They should provide an example to non-executive public servants of high performance standards, strong commitment to the principles of merit and equity, high responsiveness and accountability to both their minister and the community they serve, and well-developed ethical standards.

Contract versus tenure

All senior executives should be tenured at a level below that of their current appointment for which they should be contracted. Performance against agreed goals should be assessed annually and contract renewal should be subject to satisfactory performance as well as continued need for the position. This combination of tenure and contract ensures that senior public servants have the incentive to give high performance, but are less vulnerable to improper political influence under threat of contract termination. In fact, this system could effectively be extended to middle management.

Redundancy

The vast majority of SES members would be career public servants who are redeployed if their job becomes redundant. This does not entail keeping people on when there is no work to do, or retaining poor performers indefinitely as "the dead wood that has floated to the top". A small proportion of executives would be employed on contract for specific limited-term projects. Redundant tenured executives who have a satisfactory performance record should be given assistance in finding other positions. A procedure that has been used successfully in Queensland to relocate officers in cases of machinery-of-government changes is to provide agencies with extra funds to employ redundant staff. Thus, half the executive's salary could be provided to the employing agency in the first year, reducing in subsequent years.

Chief executive discretion

Chief executives need to be given the responsibility to manage their agencies. However, to protect against cronyism and arbitrary action, there have to be appropriate restrictions on their discretionary powers. Chief executives should be required to develop fair and open selection procedures, but should have the final say in executive appointments. Other personnel policies and procedures should be within established guidelines. Any decision to terminate an executive's appointment should be reviewed by an independent public service commission.

Central control

The operation of the SES should be controlled by a central agency, the Public Service Commission which should replace the Office of Public Service Personnel Management. The Commission would play a facilitative role in ensuring fairness and efficiency in personnel management. The

broad personnel policies for the public service should be the responsibility of the Commission. The implementation should be delegated to agencies but should be monitored by the Commission. Chief executives should be required to report to the Commission on their SES appointments and performance appraisals. SES members should be able to appeal to an office of merit protection for an independent review of a chief executive's action affecting them. Victoria has had such an office since 1984 and Western Australia introduced one in 1989.

Executive development

A high priority should be given to the professional development of SES officers. As well as giving them training in management procedures, the aim of executive development programmes should be to enhance their policy advisory skills and their responsiveness. Those at the top of the non-executive ranks should also be given training to enable them to make the transition smoothly to higher levels of responsibility.

Conclusion

The Savage Report specifically rejected the introduction of an SES in Queensland, mainly on the dubious grounds that it was elitist. This and most of the other recommendations of the Savage Committee were adopted in the 1988 reform of Queensland public administration. Although the Fitzgerald Report generally endorses the 1988 legislative changes as being consistent with modern management theory, it has been shown here that a number of current practices have the effect of *increasing* rather than decreasing the level of politicisation and cronyism in Queensland.

It is concluded that Queensland's senior bureaucracy should introduce further changes designed to promote a merit-based personnel system and to increase accountability. These are the creation of a unified group of top-level performers charged with special responsibility, the introduction of a system of combined tenure and contract employment, a better balance between discretion and accountability for chief executives, increased central agency control to ensure merit without restricting efficiency, and high priority on executive development.

In addition to having these reformist features, the senior bureaucracy needs the reformist name *Senior Executive Service* to signify a complete break with the politicisation and cronyism that have been the hallmarks of Queensland's Public Service in the past.

Notes

1. State Parliamentary Labor Party, "Return to Westminster: Public Service Reform Policy under a Goss Government", *Policy Paper,* August, 1989.
2. E. Savage, chairman, Public Sector Review Committee, *Report* (Brisbane: Queensland Government Printer, 1987).
3. *Ibid*., p. 54.
4. G.E. Popp and H.W. Fox, "What Rewards do Australians Say They Want From Their Jobs", *Human Resource Management Australia*, vol. 23, (1985): pp. 41-44. See also, A.J. Hede, "A Follow-up Survey of the Victorian Senior Executive Service", Unpublished paper, University College of Southern Queensland, 1989.
5. *Savage, Report*, p. 54.
6. A. J. Hede, "A Critical Comparison of Queensland's Senior Bureucracy and Models of the Senior Executive Service", *Canberra Bulletin of Public Administration* (submitted for publication).
7. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. 130.
8. E. Whitton, *The Hillbilly Dictator* (Crows Nest: ABC Enterprises, 1989), p. 182.
9. P. Coaldrake, *Working the System* (St Lucia: University of Queensland Press, 1989), pp. 71-81.
10. *Ibid*., p. 80.
11. K. Wiltshire, "The Public Service" in A. Patience, ed., *The Bjelke-Petersen Premiership 1968-1983: Issues in Public Policy* (Melbourne: Longman-Cheshire, 1984), p. 187.
12. Coaldrake, *Working the System*, p. 74.
13. *Fitzgerald, Report*, p. 131.
14. Queensland, Parliament, *Public Service Management and Employment Act 1988*, Section 36(1).
15. J.D. Enfield, "The Commonwealth Senior Executive Service: The Central Agency Perspective", *National Colloquium on the Senior Executive Service*, Canberra, October 1989, p. 1.
16. Queensland, Parliament, *Public Service Management and Employment Act 1988*, Section 12(2)(d).
17. *Fitzgerald, Report,* p. 132.
18. *Ibid*., p. 133.
19. Coaldrake, *Working the System*, p. 76.

20. N.A. Jans and J.M. Frazer-Jans, "The Commonwealth SES: Senior Executives' Perspectives on their Work, Careers and Organizations", *National Colloquium on the Senior Executive Service*, Canberra, October 1989.
21. J. Halligan, "A Comparative Lesson: The Senior Executive Service in Australia", manuscript to be published in P.W. Ingraham and D.H. Rosenbloom, eds, *Reform and Change in Public Bureaucracy: The Impact of the Civil Reform Act of 1978*, p. 23.

19

Pecuniary Interest — Is There a Conflict?

Eric Thorne

An intelligent reading of the Fitzgerald Report will indicate that public administration in Queensland left a lot to be desired. Yet it is significant to note that the administration of local government was not, in itself, subject to any critical examination by Mr Tony Fitzgerald QC. Despite this there are several examples given in the Commissioner's Report which do involve local government administration.

So, to what extent are there irregularities within the area of local government administration in Queensland? Pecuniary interest is covered in the *Local Government Act* by Section 14(4) for members. Officers of local authorities are required to declare their pecuniary interests under Section 17(5) of the *Local Government Act*. The provisions covering officers are the same as those for members. However, it is interesting to note that an officer is specifically prevented from exacting or accepting any fee or reward other than his proper remuneration simply by virtue of his or her office (Section 17(5) (ii)).

Members of council have a fiduciary relationship with the council they are serving. This means that members are not at arm's length from their councils. Because of this, all members owe to the council they are serving the *utmost good faith*. There are two main features of the fiduciary relationship. These are:

1. each member must use his or her power for proper purposes, and;
2. each member must avoid situations where individual *personal* interests conflict with individual responsibility and duty to the council each serves.

What is a proper purpose? After all, local government is a sphere of government and therefore political factors are present. Most members have a keen desire to be re-elected by the community they serve, which means they wish to avoid upsetting constituents. As well, all members are under a legal obligation

to use the powers vested in them for the good of the council. This is usually translated as looking after the good of the community at large.

The necessity for the member to make decisions which are for the good of the community as the common law requires is given substantial reinforcement in statutory law. Before members can embark on the performance of their duties, they are required to make a declaration of office. That declaration demands that a member "will faithfully and impartially fulfil the duties of his office according to the best of that member's judgement and ability".[1]

Members cannot enter into any arrangements or place themselves in positions where personal interests conflict with the interests of council, such as using for their own advantage confidential information gained by virtue of office on receiving a reward for favours given in the course of awarding contracts. A conflict of interest could arise should any company which is a regular tenderer on council contracts offer rent free holiday accommodation along with a well stocked "free" refrigerator to any member or officer. The giving of gifts which is a regular and socially accepted norm in some Asian countries creates a perception of conflict in this country.

The common law in Australia, however, is still undergoing change because:

1. of the very nature of the numerous functions local government is required to perform;
2. of the number of local government councils in Queensland;[2]
3. of the number of elected members serving in local councils in Queensland;[3]
4. the very basis of local government is political;
5. corruption has often been shown to be associated with the political machine; and
6. local councils are merely a micro mirror image of society as a whole.

Turning now to the statutory provisions of pecuniary interest as they relate to local government in Queensland, there is no disqualification of members for breach of the pecuniary interests provisions. The only penalty provided for is a maximum fine of $500 for each offence.[4] As no sentence of imprisonment is imposed, there is no disqualification under Section 7(2)(iv) of the Act. The disqualification provision in the *1902 Queensland Act* was deleted in the *Local Government Act 1936.*

There is no statutory provision in the *Local Government Act* whereby a person who believes that a member has breached the pecuniary interest provisions of the Act can initiate legal action on his own account against that particular member. This is because without some statutory provision similar to Section 9 of

the *Local Government Act*, individuals have no legal standing. (Section 9 provides legal standing to individuals to initiate action in certain electoral matters.)

Because of this lack of legal standing, an individual who wanted to press legal action would need to make application to the Attorney-General for approval for a relator action. Of course, the Attorney-General could initiate action as the Chief Law Officer. However, the extent of the Attorney-General's ability to take such an action without some executive pressure being applied has to be questioned.

Certainly, Tony Fitzgerald QC, clearly indicated that:

> The Attorney-General has extensive powers and discretions which are intended to be exercised in the public interest, including power and discretion with respect to the initiation, prosecution and discontinuance of criminal proceedings. The Attorney-General also has primary responsibility for legal advice in relation to matters of public administration and government. The proper performance of such functions is dependent upon independence and impartiality and freedom from party political influences, which is threatened if the Attorney-General is subject to Cabinet control and Parliament is effectively dominated by the Executive.[5]

Fitzgerald went on to say that in Queensland, the risks of partiality were accentuated by the effective amalgamation of the offices of Attorney-General and Minister of Justice.[6]

Over the years, allegations of breaches of the pecuniary interest provisions have been made in the Queensland Parliament. However, no serious investigation or inquiry was made by the Minister for Local Government. (Section 4A(3) of the *Local Government Act* and certainly no legal action was initiated by the Attorney-General.

Up until April 1987, members were not able to vote for their own elevation to the position of chair or deputy chair where the occupant of those positions was paid a special allowance in excess of that paid to other members. The rationale was clear and simple - the member would have a pecuniary interest. As a result of a member's breaking this provision, the Queensland Government legislated to provide that in such a situation no pecuniary interest was involved.[7] In fact, the minister at the time made the statement that if this was a breach of the pecuniary interest provisions, then those provisions were stupid. In the light of this, it cannot be said that the government of the day had any appreciation of what constituted a pecuniary interest. Certainly the government failed to lead by precept or example.

The legislation gives a discretionary power to a council to pass a resolution to provide for the exclusion of a member from a meeting whilst the subject matter

in which that member has a pecuniary interest is under consideration.[8] Some local authorities adopt this policy as a matter of course, but there is not data available on how many councils have adopted this policy. Certainly some do not. However, it has been rumoured that even where a council had adopted such an exclusion policy, the excluded member participated in a discussion from outside of the Council Chamber!

Within local government, the greatest potential for malpractice is in the area of town planning and land development. However, great care must be exercised in identifying the real issues when involved in town planning and land development topics. The question needs to be asked whether the real issue is one of corruption or whether it is one of conflict of development philosophies.

In considering this question, many local authorities have themselves to blame for clouding the real issue. A systematic approach to separating the doughnut from the hole must be adopted:

1. Does the council have development control plans in association with its strategic plan and town planning scheme?
2. Has the council developed general policy statements covering the main issues arising from town planning and land development applications?
3. How much discretionary power has the council given itself in its town planning scheme and subdivision of land by-laws?
4. How often is this discretionary power used?
5. Are detailed reasons provided in the council minutes of why that discretionary power was used? If not, why not?
6. Has the council a policy that any member with an interest leaves the council meeting whilst the matter is under discussion?
7. Is that policy of leaving the meeting enforced?
8. How much personal influence with other council members has the council member who may have a conflict of interest?
9. How much lobbying has been done by the member with the conflict of interest outside of the meeting environment?
10. What "deals" have been done with other members which may secure a safe passage of application?
11. Do members appreciate that the council has a statutory responsibility to reach conclusions based on genuine planning considerations and *not* the shifting sands of local politics?[9]

Town planning and land development applications are fertile areas for "deals". No matter how honourable the intention of the parties, irrespective of the community benefits which may be obtained, the council has no right in law to enter

into deals of any kind. The council, as the planning authority, has a legal obligation to consider the application on its merits, and *not* in terms of additional benefits which may be derived for the community. The important principle was established very clearly in the case of Read v. Brisbane City Council (1986) 2 Qd R 22. Once a deal is made, it is extremely difficult for either party, especially the council, to defend satisfactorily any allegation of impropriety or corruption that may be made.

A sound strategic plan incorporating development philosophies would provide councils with a firm basis for decision making and a defensible stance if political or legal obligations occur.

However, that does *not* answer the question as to whether land developers, real estate agents or their spouses should be allowed to contest local government elections and, if successful, be members of a local council. There is no doubt that members and senior staff are privy to very sensitive and confidential information. Town planning approvals, be they consent approvals or rezoning, have a major impact on land values. As town planning approvals are attached to the land and not to the applicant, there is no doubt that scope for corruption does exist. Yet, if the electors know that persons contesting an election are land developers or real estate agents, why should such persons not be members of council, should that be the will of the electorate? After all, the principle of the presumption of innocence must surely prevail. The public could presume that these members will comply with both statutory requirement and common law.

I mentioned earlier that members of council have a statutory responsibility to reach conclusions based on genuine planning considerations. This is an essential element, one that cannot be disregarded because of mateship, past services rendered or for possible future political favours. A council cannot consign this responsibility to another body for any reason whatsoever. These points were clearly enunciated in Wyatt v. Albert Shire Council.[10]

Until recent times, the matter of public duty versus personal interest has been dealt with simply by depending on the sense of honour and integrity of the individual elected to public office. As a result of events over the last few years, it is clear that public figures no longer have the trust and respect of the public at large.

It would seem that the public has not decided to draw any distinction between the three spheres of government in this respect. As a result of this public mistrust, various countries including Australia have sought to find an answer to this vexed problem. Numerous inquiries have been conducted.[11] Numerous recommendations have been made. Some of these recommendations have been enshrined in legislation. Despite these measures, there is no evidence that corruption has been eradicated. As both Dr Dick Klugman and Sir James Killen have said, "... politicians as a whole are [not] any worse than the rest of the

community [and are no better]".[12] In any event, will a legal enactment make a dishonest person honest? Yet the public needs to have a mechanism whereby sanctions can be imposed on dishonest members.

The next question that needs to be posed is - is it possible for any legislation dealing with conflict of interest to be drafted in such a manner that is encompassing, clear yet definitive, and still provides the widest possible potential for citizen participation which is so essential in any democracy.[13] It was Alexis de Tocqueville who implied that institutions constitute the strength of free nations. A nation may establish a system of free government but without municipal institutions, it cannot have the spirit of liberty.[14] It is not possible to legislate in this situation. This is simply because the sheer variety of transactions to which the conflict rule applies makes it impossible to given anything like a comprehensive definition of "interest" for its purposes.[15]

From the local government viewpoint it is essential to realise that, for the substantial majority of members, their participation in local government is part-time. Consequently, there is a need for these members to earn an income. Because of the legislative provisions of the *Local Government Act*, all members are required to reside in the local authority area which they represent. It can be seen therefore, that to return to the *1902 Local Authorities Act* provisions whereby any person who was concerned with, or participated in, the profit of any contract with the local authority was not capable of being or continuing as a member, is far too restrictive.

Should society adopt the stand of Ulysses S. Grant when he said that "No personal considerations should stand in the way of performing public duty?" It cannot be realistically stated that a member of council should forfeit his right to conduct his own business. Spouses of members, irrespective of gender, must be entitled to go about their legitimate business with both dignity and privacy.

In addition to the above, there is an urgent need to ensure that members and council employees are not the subject of false innuendo and accusations. This must be balanced against total accountability of councils. We do not live in a perfect society.

From what has been said earlier, it is clear that the existing provisions of the *Local Government Act* are inadequate. In the interest of promoting public debate on this topic, the following suggestions are put forward:[16]

1. A Code of Conduct be prepared for both elected members and employees of local government and that such Codes be enshrined in the *Local Government Act* by way of Regulation.
2. The Declaration of Office currently detailed in Section 7(2A) be amended by inserting not only references to the Code but also a declaration that each

member has read and understood the Code and will faithfully implement the terms of the Code.

3. All employees be required to make a declaration similar to that made by elected members.
4. A Register of Members' Interests be established, such register to include details of:[17]
   (a) real property in which the member has an interest together with the nature of that interest, including information on all Trust Documents, Partnerships and Private Companies;
   (b) sources of income, including all forms of remuneration, gifts, stocks and shares, trust settlements, interest payments;
   (c) interests and positions in corporations, statutory authorities etc;
   (d) positions in trade unions, professional or business associations;
   (e) loan indebtedness;
   (f) discretionary disclosures.
5. A Register of Senior Officers' Interests be established along similar lines is a Members' Register. Employees who are to be defined as senior officers for the purposes of the Register include:
   - Clerks and their deputies;
   - Accountants and their deputies;
   - Chief clerks;
   - City, town and shire engineers and their deputies;
   - Town planners and town planning assistants at all levels;
   - Building surveyors;
   - Consultant engineers and planners.
6. The Code of Conduct and the Register be overlaid with a set of objectives which demonstrate the reasons for their existence.[18]
7. All Registers to be kept by the Clerk and to be available for inspection only by elected members of the council.
8. All Registers to be kept up to date, with penalties for late and non-disclosure.
9. The *Local Government Act* to be amended to enable individuals within the community to have legal standing in any action based on the breach of pecuniary interest provisions.
10. The *Local Government Act* to be amended to enable individuals within the community to have legal standing in any action based on the breach of pecuniary interest provisions.
11. The legislation be amended to provide that it be permissible for any member of the public to make an allegation of a conflict of interest to the Criminal Justice Commission or if the Commission is not established and

working, to the Auditor-General for investigation and institution of legal action.

12. The investigation body to have the powers necessary to subpoena and to administer oaths.
13. Legislation be enacted requiring any public official, either elected or appointed, to report any suspected conflict of interest to the investigating body for attention, with that public official being given appropriate protection against any form of reprisal.
14. Where a prima facie case of conflict has been established, the matter to be referred to a Court of competent jurisdiction for determination.
15. Conditional legal assistance to be made available from Consolidated Revenue to persons charged with a breach of the conflict of interest provisions.
16. Penalties for proven offences should be substantial, eg a heavy fine and/or sentence of imprisonment together with a substantial period of debarment from holding public office.[19]
17. The principal points of common law covering the two main features of the fiduciary relationship as they apply to local government be enshrined in the *Local Government Act*.
18. A public education campaign to be undertaken by the Local Government Association of Queensland, preferably in conjunction with the Department of Local Government, with a view to highlighting the importance of local government, the demands placed upon elected members and staff, the need for decisions to be made at the local level, and the vital role local government plays in the economic life and well-being of the area in particular, and the state in general.
19. All persons who offer themselves as candidates at a local government election declare the source of their income on their nomination form with the statutory provision that such data be published in newspaper circulating in the area.
20. That elected representatives be paid adequate allowances for performing their duties as elected members.
21. All elected members to undergo a training process by way of attendance at seminars where adequate instruction and information can be disseminated on all facets of local government activity[20] with special emphasis being given to:
    - the fiduciary relationship of members and employees,
    - meeting procedures,
    - the role, duties and functions of elected members and council

employees/consultants,
- public policy.

22. All invitations to tender to contain a warning against corruption.[21]
23. All tenders for public works in excess of $100 000 to be accompanied by a statutory declaration by the agent or contractor that no payments, gifts, or other inducements have been or will be offered by them or their agents to members or employees of councils where such offers could be reasonably construed as being for the purpose of obtaining any favour in connection with the contract.[22]
24. The practice of contract splitting be prohibited.
25. Public participation be encouraged in local government administration.
26. No member of a council be allowed to serve a period in excess of nine years (three terms) without having a minimum of one term off council.
27. The subject of ethics and philosophy be included in the curriculum of senior high school student, and in *all* undergraduate degree courses as specialist units.

The problem that we as a community have to face is growing concern about the integrity of public life. Local government is said to be the government closest to the people - the grass roots of democracy. It provides basic services; it can be an advocate for its residents; it can act as a barrier between its citizens and other spheres of government. As Michael Jones said "Whilst local governments should try to be efficient, their main aim is to provide sensitive, participative and responsive government."[23] This can be achieved provided that the elected members of councils make decisions which are in the best interests of the public at large and serve their communities with the utmost good faith.

Notes

1. Section 7(2A) of the *Local Government Act 1936* as amended.
2. 134 - Local Government Department - Members and Employees of Local Authorities July, 1988.
3. *Ibid*. 1323
4. Section 14(4)(iv) of the *Local Government Act 1936* as amended.
5. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Printer, 1989), p. 138.
6. *Ibid*.
7. Section 14(4)(ia) of the *Local Government Act 1936* as amended.
8. Section 14(4)(vii) of the *Local Government Act 1936* as amended.

9. Nagy v. Cairns City Council (1981), QPLR 148; Ingham v. Maroochy Shire Council (1983), QPLR 139.
10. (1986) QPLR 409.
11. The Riordan Committee of 1975; The Bowen Committee of 1979; The Salmon Committee (UK) 1976; Redcliffe-Maude proposed local government rules of conduct (1974); The New Zealand Ministers' Private Interests Committee (1956); to name but a few.
12. "Killen - Along the Road", *Courier-Mail*, 17 October 1983.
13. Sir James Killen in his keynote address to the *93rd Annual Conference of the Local Government Association of Queensland*, Townsville, 1989.
14. A. de Tocqueville, *Democracy in America*, trans. G Lawrence (New York: Harper and Rowe, 1966), p.61.
15. R. Finn, *Fiduciary Obligations* (Sydney: Law Book Company, 1977), para. 472.
16. Some of these recommendations have been canvassed in *Local Government Act Review, A Discussion Paper* (Brisbane: Queensland Government Printer, 1989).
17. Submission by Cr T.N. Quinn on behalf of the Woongarra Shire Council "Public Duty and Private Interests", vol. 1, March 1984.
18. *Ibid.*
19. Examples of penalties detailed in Section 229 of the Australian Companies Legislation provide a general indication of the seriousness of conflicts within the corporate sector. Penalties range from $5,000 to $20,000 or imprisonment for five years, or both.
20. Other topics which should be included are an overview of various functions of council, e.g. town planning, subdivision of land, building and health, environmental matters, budget, inter-governmental relations, industrial matters, contract law, project management.
21. Royal Commission on Standards of Conduct in Public Life (UK), 1976.
22. *Ibid.*
23. M. Jones, *Local Government and the People Challenges for the 80s* (Melbourne: Hargreen Publishing Company, 1981).

Part 6

Reforming the Electoral System

20

Problems and Prospects for Electoral Reform After Fitzgerald

Paul Reynolds

The electoral system in Queensland has long been the subject of contentious debate in Queensland politics. A version of the present zone system was introduced by the Labor Premier, Hanlon, in 1949 when the Australian Labor Party (ALP) was under electoral threat with the nationwide swings to the coalition parties in the late 1940s. Labor had held office in Queensland continuously since 1915 with a short break between 1929 and 1931 without any need, prior to then, for a zonal system. The irony was, however, that when Labor faced its severest electoral threat, following the ALP split in 1957, its zonal system not only failed to save it, but facilitated the coming to power of the coalition, being responsible for the then Country Party being the larger of the two coalition parties. The Country (later National) Party then, in 1958, proceeded to re-craft the zonal system with two cardinal objectives; to entrench the coalition parties in power and to ensure the Nationals' dominance over the Liberals.

The most recent redistribution, in 1985, two years after the collapse of the coalition, continued this trend. This redistribution, on which the 1986 and 1989 elections were fought, created safe seats for all parties, partly by increasing the size of the Legislative Assembly from eighty-two to eighty-nine seats, and partly by a re-crafting of the boundaries. The 1986 results attested to the nature of the re-distribution, with only three seats changing hands, two from Labor to the Liberals (Mt Isa and Ashgrove) and one from the Nationals to the Liberals (Toowong).

There are, at the time of writing, four zones with differential quotas struck for each zone.[1] The South East Zone ranged in seat size from Manly (22,982) to Mt Coot-tha (18,209), with an average enrolment of 20,056: The Provincial Cities Zone, from Port Curtis (14,675) to Thuringowa (21,569), with an average enrolment of 18,462: The Western and Far Northern Zone from Mt Isa (11,830)

to Roma (7,909), with an average enrolment of 9,270: The Country Zone from Gympie (14,908) to Carnarvon (11,996), with an average enrolment of 13,312.

Comparing the smallest seat (Roma) with the largest one (Manly) produces a differential of 2.9, while a comparison of the average seat size in the Western and Far Northern Zone with the average for the South East Zone, yields a differential of 2.2. Hence a vote cast in a Western and Far Northern Zone electorate is worth between two and three times that of one cast in an electorate in the South East Zone.

The Country Zone intersects the Provincial City Zone, dividing the provincial cities from their hinterlands, containing these city voters within the confines of their urban areas. The differential in the average seat sizes of these two zones is 1.4, thus the votes of those living a few kilometres beyond a provincial city are worth one and a half times that of adjacent city voters.

By contrast, the differential between average enrolments in South East and Provincial City Zone seats is minimal at 1.1. Hence the weightage of urban voters, whether in the south east or provincial cities (and rural voters in the South East Zone), is similar. It is, therefore, beyond argument that, both in effect and in deliberate intention, the zonal system is designed to weight rural votes relative to urban votes at rates between 1.5 and 3.0, depending on the zonal comparisons and those for individual seats.

This, it must be emphasised, does not happen by chance, nor does it occur randomly. Rather, is it the deliberate outcome of the long standing government policy, exacerbated by the provisions of the *Elections Act 1983-85* which require the electoral commissioners to conduct their deliberations in private, not to reveal their submissions and to report solely to the Premier, not to the Parliament.

The political results of the zonal system are equally apparent.

Table 1: Seats won by the political parties at the 1986 State election by zone

Party	Zones			
	South East	Provincial City	Western	Country Far Northern
National	23	5	6	15
Labor	19	8	1	2
Liberal	9	-	1	-
	51	13	8	17

Thus, by 1986, after twelve years of contesting urban and Brisbane seats, forty-three per cent of National seats were from the two rural zones and, while forty-seven per cent of their seats were from the South East Zone, over half of these were rural seats in that zone. By contrast, sixty per cent of ALP seats were from the South East Zone and a further twenty-seven per cent from the Provincial Cities Zone. Ninety per cent of Liberal seats were from the South East Zone. Thus, by weighting seats in the rural, western and northern parts of the State, the Nationals' rhetoric was that it was advantaging rural voters by ensuring them maximum representation. In reality, it was advantaging itself since, of the twenty-five seats contained in both zones, the Nationals, in 1986, held twenty-one of these (eighty-four per cent).

It is at this point that the recommendations of Tony Fitzgerald QC, become important. His findings and recommendations concerning the electoral system are quoted in full, as his text is important of itself, and because it has impacted heavily upon the parties, especially during the 1989 election campaign:[2]

> A fundamental tenet of the established system of parliamentary democracy is that public opinion is given effect by regular, free and fair elections following open debate ...
>
> The fairness of the electoral process in Queensland is widely questioned. The concerns which are most often stated focus broadly upon the electoral boundaries, which are seen as distorted in favour of the present Government, so as to allow it to retain power with minority support ...
>
> There is a vital need for the existing electoral boundaries to be examined by an open, independent inquiry as the first step in the rehabilitation of social cohesion, public accountability and respect for authority ... It should be allowed to do its task untitled by pre-determined restrictions.
>
> The inquiry must be permitted to reconsider basic assumptions which shape the present boundaries, such as whether there is genuine justification for a zonal system. If it finds that there is a justification for the present system, it should assess the appropriate zones and what, if any, special considerations ought to apply in different zones.[3]
>
> A properly authorised and satisfactorily resourced Electoral and Administrative Review Commission which reports directly to a Parliamentary Select Committee on Electoral and Administrative Review, as well as to the Premier is needed ... Matters of priority already mentioned include: ...

(c) A review of the electoral system, especially the fairness of electoral boundaries, the basis of representation, the processes of registration and counting and the distribution of electoral material at polling booths.[4]

At the first media interview he gave after becoming Premier, Mike Ahern was asked whether his "vision of excellence" included a reform of the zonal system. He replied that the subject was not on his agenda. After the Fitzgerald Inquiry had completed taking evidence, but prior to the Report being handed down, Mr Ahern repeatedly committed the Government to implementation, "lock, stock and barrel". Neither the Government, nor the National Party organisation anticipated that an inquiry into the zonal system would be a part of the Fitzgerald Report, let alone that it would be one of the cardinal recommendations. The Government was then handed a dilemma which was that it had locked itself into implementing Fitzgerald's recommendations, but at the cost of threatening its own electoral base. The upshot was that the new Premier, Russell Cooper, had legislation enacted to set up the Electoral and Administrative Reform Commission (EARC) and the Criminal Justice Commission (CJC), but did not appoint the chairperson or part-time members of EARC, this being held over until after the 2 December 1989 elections. Meanwhile, Sir Robert Sparkes signalled the National Party organisation's intention to make submissions to a subsequent EARC inquiry vigorously defending the zonal system and arguing its necessity for Queensland electoral politics.

The Fitzgerald Report had a similar impact on the other parties. By calling for an EARC inquiry, the Commissioner had effectively pre-empted Labor and Liberal policies to enact "one vote, one value" should the former win, or the latter be senior coalition party, as a result of the 1989 election. At the time of writing, therefore, the prospects for electoral reform look better than they have ever been, but the nature, extent and scope of the reform will clearly depend on the proposed EARC inquiry and on its recommendations. All three parties during the campaign, committed themselves to implementing the findings of such an inquiry, even if such findings were at variance with their stated politics. E.G. Whitlam may yet be proved correct when he asserted at an ALP function in Brisbane on 2 September 1989, that "whatever the outcome of the 1989 election, it will be the last state election in Queensland fought on crook boundaries".

In his victory speech on 2 December 1989, the incoming premier, Wayne Goss, affirmed that the EARC inquiry into the electoral system would be a "top priority" for the new ALP Government while, on 3 December 1989, Chris Griffiths for Citizens for Democracy reiterated that his organisation remained committed to "one vote, one value" for Queensland. Much then will depend on the

recommendations of the EARC inquiry, not least on its personnel, terms of reference and the nature of the submissions it receives.

Notes

1. The figures used are from the official "Details of Polling at General Election Held on 1 November 1986", Cmmd. 1987. Seat sizes according to "Number on roll qualified to vote".
2. G.E. Fitzgerald QC, chairman, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report* (Brisbane: Queensland Government Press, 1989).
3. *Ibid.*, p. 127.
4. *Ibid.*, p. 144.

21

How Unfair Is Queensland's Electoral System?

Malcolm Mackerras

Some forty years ago my schoolteacher explained to the class that there was a difference between the words "character" and "reputation". A man's character, he explained to the all-boy class, described what he was really like. For example, a man's character may be that he is hardworking but he may also have the reputation for being lazy.

These remarks are very relevant to the long-running debate about Queensland's electoral system. The character of that method is that it is a system of single member electorates with preferential voting, like that for the Commonwealth House of Representatives, like the systems used to elect the lower houses of New South Wales, Victoria, South Australia, Western Australia and the Northern Territory.

Queensland's electoral system is, of course, not universal, even for lower houses. It differs from the ways in which the Tasmanian House of Assembly and the ACT Legislative Assembly are elected. They employ systems of proportional representation.

Is Queensland's electoral system fair? Clearly not. Why not? Because it is a system of single member electorates and that system is notoriously unfair.

In my opinion, the above paragraphs constitute a reasonable description of the character of Queensland's electoral system. What about its reputation? Queensland's reputation is that it employs a gerrymander which is unique in Australia.

It is very easy for propagandists to prove that Queensland has a gerrymander. All they need do is quote a few statistics and hope the audience wants to believe in the existence of that gerrymander. However, propagandists find a problem if I am in the audience. I am altogether too sceptical and I do not believe in the existence of the so-called Queensland gerrymander.

For years we have been told by the media that Queensland must have a gerrymander because it is a proven fact that, under certain circumstances, it is possible for the National Party to win an election with only thirty five per cent of

the vote. Okay, I admit the fact. Under certain circumstances, it is possible for the Queensland Nationals to win with only thirty five per cent. That fact proves that Queensland employs a system of single member electorates with preferential voting.

When I hear the propaganda against the Queensland system, my reaction is to say that I do not believe that the Commonwealth boundaries are gerrymandered. Yet I am aware that Labor has 57.4 per cent of the seats in the present House of Representatives, but only won 45.8 per cent of the first preference vote at the 1987 election. The argument does not satisfy people. There seems to exist this ingrained assumption that it is democratic for a party to win if its vote is in the forties but undemocratic if its vote is in the thirties.

The assumption is silly. The truth is that the system of single member electorates is notorious for the way in which it over-represents the largest single party.

It is not easy to argue that the alleged Queensland gerrymander does not exist merely because there is no Commonwealth gerrymander. So I try another tack. Sir Henry Bolte was premier of Victoria from 7 June 1955 until his retirement on 23 August 1972, a period of just over seventeen years. Did he owe his place to a gerrymander? Not many would say so and nor would I. Yet his Liberal Party never won forty per cent of the vote, even though it always contested every seat, or nearly every seat. The Bolte record is set out in "table 1" and "table 2". Why did not a series of such outrageous results bring forth allegations of a gerrymander? The answer is that, throughout the period, the electoral enrolments were kept as nearly equal as was practicable. In the words of the slogan there was, more or less, "one vote one value". There was and is no gerrymander in Victoria. But there was and is a system of single member electorates with preferential voting.

Now let us come to the Queensland election which took place on 1 November 1986. Details are set out in "table 3". The result was very similar to all those Victorian elections except that the National Party was the beneficiary, not the Liberal Party.

If that 1986 Queensland election had been preceded by a redistribution based upon the objective of making electoral enrolments as nearly as equal as practicable, then the result would have been the same, or at least very nearly the same. It is highly implausible to suppose that the National Party would not have won the election outright under "one vote one value". It would not have won the election outright under proportional representation but that is a different matter altogether. Nor would Bolte have won his elections.

You do not need to suppose the existence of a gerrymander to explain the fact that the Nationals won a majority of seats with 39.6 per cent of the first

preference vote. It is really quite simple. After minor party preferences were distributed, the National Party won a majority of votes in a majority of seats. Furthermore, and this is the important point, that majority of seats contained a majority of the electors of Queensland.

This point is important to grasp lest we make the mistake of supposing that National Party rule in Queensland depended on the so-called gerrymander. The result of the 1986 Queensland election was that the Nationals won forty-nine seats containing 51.8 per cent of the electors (see "table 4"). When fresh enrolment figures were issued for 30 April 1989, it was discovered that National members represented 52.8 per cent of the electors. The reason was that the National seats were growing so much more rapidly than the others. However, the Brisbane seat of Merthyr switched to Liberal at a by-election on 13 May 1989. Consequently the situation now is that the forty-eight National members represent 51.4 per cent of the electors of Queensland.

You will notice that I do not pretend that the National Party won 51.4 per cent of the vote last time. I merely assert that National members represent 51.4 per cent of the electors. But I can easily show that the National Party did win a smidgin over fifty per cent of the three way vote in 1986.

Following those Victorian elections set out in "table 1" and "table 2", analysts said, in effect, that the Democratic Labor Party was a minor party with the vast majority of its preferences going to Liberal. Therefore, the Liberal Party really did win a majority of the votes. Therefore, Bolte was the rightful premier so no gerrymander need be presumed.

Quite so, and that is what analysts should have said about Bjelke-Petersen, following the 1986 Queensland election. The occasional analyst did say that, but such analysis was drowned by the clamour of those searching for the gerrymander.

The Liberal Party vote in Queensland in 1986 was really three quite separate votes. Nominally the Liberal Party won 230,310 first preference votes (or 16.5 per cent of the formal vote) but most of those votes were wasted as far as the Liberal Party was concerned. The three elements of that Liberal vote were: First, in Sherwood, the National Party candidate misunderstood the hour of close of nominations and so did not nominate. That left some 5,000 Nationals with the option of voting Liberal or Labor - and voted Liberal. Second, on my calculations, there were 57,225 Liberals who voted for the ten successful Liberal candidates. Third, the rest of the Liberal vote was a minor party vote, no different in status from the votes for the Democrats, the Socialists or the Independents. It went to the big party of the voter's higher preference. The great majority of that went to the National Party. Therefore, my calculation of the 1986 three way vote is 697,936 for National, 640,414 for Labor and 57,225 for Liberal.

Given that the system of single member electorates is notorious for over-representing the largest single party, it is not surprising that the Nationals won the election outright. That is why it is quite implausible to suppose that the National win suggests the existence of a gerrymander.

The most common form of propaganda against the Queensland boundaries is to draw attention to the fact that at the last State election, there were 7,909 voters in the National Party seat of Roma and 22,982 in the Labor seat of Manly. That sort of argument would be all very well if the two cases were typical. They are not. "Table 5" and "table 6" set out certain enrolments as at 30 April 1989. I think the tables are self-explanatory. The only point worth adding is that the area of Gregory is 443,250 square kilometres (considerably more than Victoria) while the area of Logan is 133 square kilometres. What the reader will notice is that the National Party dominates at both extremities of enrolment size.

The correct way to analyse this is to strike averages. If we take the enrolments as at 30 April 1989, but call Merthyr a Liberal seat (since it switched to Liberal on 13 May), then we find that the average enrolment in Labor seats is 20,558, in Liberal seats it is 20,010, and in National seats it is 18,459. (The average enrolment for all the seats is 19,350.) That is not a significant difference between the three parties.

It is true that Labor needs 51.5 per cent of the two-party preferred vote to win the election on 2 December 1989. The bias against Labor is 1.5 per cent which is the difference. My own view is that the best way to explain National Party success is to study "table 8". When these matters are properly understood it becomes clear that National Party power in Queensland is explained by the fact that a substantial number of Queenslanders voted for Joh. Under a system of proportional representation, Joh might well have been brought down ten years earlier. However, Queensland, like Victoria, has a system of single member electorates with preferential voting. That system sustained Bolte for nearly twenty years in Victoria and Bjelke-Petersen for nearly twenty years in Queensland. The malapportionment or gerrymander has virtually nothing to do with either case.

If Evan Whitton is a journalist, Peter Coaldrake is an academic. Coaldrake's book is much to be preferred to Whitton's.[1] Yet even Coaldrake cannot resist engaging in propaganda. Take, for example, his assertion that the Nationals in 1986 won the election "by collecting forty-nine seats with 39.6 per cent of the primary vote".[2] The assertion is correct. The context is not. It is preceded by lengthy descriptions of the gerrymander at work. It is all designed to give the impression that it was the gerrymander which gave the Nationals victory with 39.6 per cent of the primary vote.

Among his several examples, we have his description of the fact that the

Aboriginal reserve of Wujal Wujal is located in Cook rather than Barron River.[3] This is one of several attempts to prove that Queensland has both a gerrymander and a malapportionment. It may well be that the exclusion of Wujal Wujal from the marginal seat of Barron River was motivated by a desire to help the National Party retain Barron River. The crucial question, however, is this: How much difference does it make?

Cook is admittedly, an ultra-safe Labor seat. At the 1986 election, Labor's Bob Scott received 5,629 votes (66.7 per cent) while the National Party candidate received 2,816 (33.3 per cent) in a straight contest. In Barron River the National Party member, Martin Tenni, received 7,990 votes (54 per cent) while the Labor candidate received 6,795 votes (46 per cent), also in a straight contest.

And how did Wujal Wujal vote? Altogether, eighty-four valid votes were cast there, forty-three for Labor and forty-one for National. So the gerrymander of the boundaries between Cook and Barron River made not the slightest difference. I think I find the case put by Peter Coaldrake as unconvincing as the case put by Evan Whitton.

I will be quite happy if the Goss Government carries out a redistribution in which the number of electors in each electoral district shall be as nearly equal as is practicable. However, that will not mark the dawn of democracy in Queensland, because the State will still have the same electoral system as before.

Historians should describe the period from 1957 to 1989 accurately and should not be misled by propaganda.

Table 1: Victorian Legislative Assembly elections 1955-70 - percentages of first preference votes

Party	8 May 1955	31 May 1958	15 Jul 1961	27 Jun 1964	29 Apr 1967	30 May 1970
Liberal	37.8	37.2	36.4	39.6	37.5	36.7
Labor	32.6	37.7	38.6	36.2	37.9	41.1
CP	9.5	9.3	7.1	8.8	8.6	6.4
DLP	12.6	14.4	17.0	15.0	14.3	13.3
Other	7.5	1.4	0.9	0.4	1.7	2.2

Table 2: Victorian Legislative Assembly elections 1955-70 - seats won

Party	28 May 1955	31 May 1958	15 Jul 1961	27 Jun 1964	29 Apr 1967	30 May 1970
Liberal	34	38	39	38	44	42
Labor	20	18	17	18	16	22
CP	10	10	9	10	12	8
DLP	1	-	-	-	-	-
Ind	1	-	1	-	1	1
Total	66	66	66	66	73	73
Liberal majority	2	10	12	10	15	11

Table 3: Queensland Legislative Assembly election, 1 November 1986 results

Party	Votes %	Seats Contested	Seats Won
National	39.6	88	49
Labor	41.3	89	30
Liberal	16.5	63	10
Other	2.6	38	-

Table 4: Electors in seats won in Queensland, 1 November 1986

Party Winning Seat	Electors	% of Total
National	809,856	51.8
Labor	567,239	36.3
Liberal	186,199	11.9
Total	1,563,294	100.0

Table 5: Electorates with fewest voters (enrolments as at 30 April 1989)

1	Gregory	(NP)	8,204
2	Roma	(NP)	8,210
3	Balonne	(NP)	8,672
4	Warrego	(NP)	8,859
5	Peak Downs	(NP)	9,118
6	Flinders	(NP)	10,871
7	Bowen	(ALP)	12,204
8	Cook	(ALP)	12,284
9	Mt Isa	(Lib)	12,553
10	Carnarvon	(NP)	12,598
11	Warwick	(NP)	13,050
NP		8	
ALP		2	
Liberal		1	

Table 6: Electorates with most voters (enrolments as at 30 April 1989)

1	Logan	(ALP)	27,224
2	Landsborough	(NP)	27,028
3	Thuringowa	(ALP)	26,584
4	Manly	(ALP)	26,156
5	Cooroora	(NP)	25,936
6	Nicklin	(NP)	25,873
7	South Coast	(NP)	25,849
8	Albert	(NP)	25,433
9	Glass House	(NP)	25,357
10	Nerang	(NP)	25,170
11	Fassifern	(NP)	25,061
	NP	8	
	ALP	3	

Table 7: Bias for lower houses with single member electorates

Parliament	% Bias in Labor's Favour
South Australia	3.7
New South Wales	3.5
Western Australia	3.4
Commonwealth	1.7
Victoria	1.4
Queensland	-1.5
Average	2.0

Table 8: How the National Party vote has doubled

Party	Votes %	Seats Contested	Seats Won
27 May 1972			
Country	20.0	44	26
Liberal	22.2	53	21
Labor	46.8	82	33
Other	11.0	77	2
7 December 1974			
National	27.9	48	39
Liberal	31.1	53	30
Labor	36.0	82	11
Other	5.0	46	2
12 November 1977			
National	27.1	54	35
Liberal	25.2	51	24
Labor	42.8	82	23
Other	4.9	46	-

Cont'd.

Party	Votes %	Seats Contested	Seats Won
29 November 1980			
National	27.9	56	35
Liberal	26.9	64	22
Labor	41.5	82	25
Other	3.7	49	-
22 October 1983			
National	38.9	72	41
Liberal	14.9	53	8
Labor	44.0	82	32
Other	2.2	30	1
1 November 1986			
National	39.6	88	49
Liberal	16.5	63	10
Labor	41.3	89	30
Other	2.6	38	-

Notes

1. P. Coaldrake, *Working the System* (Brisbane: University of Queensland Press, 1989).
2. *Ibid.*, p. 52.
3. *Ibid.*, p. 50.

22

The Weighting Game: Do the Nationals Have a Case?

Rae Wear

Under the system of electoral weightage which operates in Queensland, the principle of "one vote, one value" has been rejected. Instead, the State is divided into four zones; the South Eastern, Provincial Cities, Western and Far Northern and Country Zones. Votes cast in the rural zones are worth up to three times the votes cast in the populous South East. This over-representation of rural areas operates to the considerable advantage of the ruling National Party and to the detriment of both the Labor and Liberal Parties. In the rural zones are the seats in which, as former Minister Russ Hinze indicated to the Fitzgerald Inquiry, "... all you have to do is get the National Party tag and you can win forever and a day."[1] The Nationals argue that by maintaining electoral weightage, they are doing no more than carrying on a tradition begun by the Labor Party. For example, after a Labor re-distribution prior to the 1935 State election, Sir Arthur Fadden claimed, in a fashion reminiscent of Russ Hinze at his best, that a seat like Kennedy became so safely Labor "that even Winston Churchill standing as a non-Labor candidate could not have won it".[2]

As well as using historical argument, the National Party justifies electoral weighting in three major ways; that weightage is necessary to overcome the difficulties in representation posed by a small population thinly distributed over a large area; that rural electorates produce a large proportion of Australia's wealth and export income and therefore deserve "reasonable representation in Parliament" and that representation based on "one vote, one value" would deprive rural people of the chance of reasonable representation.[3] Without electoral weightage, the Nationals suggest country voices would be drowned by the clamour of city voters whose interests and values are different from rural people. For these reasons, they claim that rural voters are deserving of special consideration from the electoral system.

The Nationals' arguments are premised on an under-standing of democracy as a system in which "... all sectors of a community are entitled to *an adequate voice and vote to protect their interests*".[4] Their contention is that the electoral system should provide a mechanism for the representation of minority sectors or interests, rather than for the equal representation of individuals, which is the view of the Liberal and Labor parties. The National Party's position is not necessarily anti-democratic in certain contexts and in certain conditions (a federal system is an obvious example), but it needs to be recognised that the Nationals are arguing for a deviation from the Westminster model of democracy which they avowedly support.[5] As James Kelly wrote on the subject of vote weightage and quota gerrymanders in Queensland nearly twenty years ago:

> The issue of pro-rural voting involves a conflict between two opposed interpretations of democratic representation. Electoral systems in Australia are ostensibly designed to give effect to the basic democratic principle of popular control of Governments by requiring them to seek majority support at periodic elections. The theory involves a view of electors as individuals, with equal political rights, and not as members of interest groups, communities or any other collectivity. That the system is fundamentally based on the equal political rights of individuals is recognised in the simple, but effective phrase, 'one man, one vote, one value'.[6]

In pressing for the retention of electoral weightage, the Nationals are asking that a mechanism usually associated with consensus models of democracy be imposed upon the essentially majoritarian Westminster system. Much of the debate on the issue of representation in Queensland occurs without acknowledging that two different models of democracy are being used.

This chapter will examine the Nationals' case in relation to relevant aspects of the Westminster model of democracy. It will then proceed to an examination of an alternative consensus model of democracy which has sectional representation as a characteristic.[7] Finally, the chapter will venture an assessment as to whether the Nationals have a case for electoral weightage.

The Nationals and the Westminster Model

It may be argued that to enter into debate over whether the National Party of Queensland has a case for electoral weightage requires a suspension of disbelief. It assumes the acceptance of the Nationals' arguments at face value and the banishing of the suspicion that the reasons which they give for electoral weightage are simply a cynical rationale for the maintenance of power at any cost. There is

certainly evidence for this position and it is one which a number of commentators take.[8] In a celebrated statement, former National Party Minister, Russ Hinze, made it clear that the distortion of electoral boundaries for partisan advantage was considered sensible in some quarters of the National Party: "I told the Premier, 'If you want the boundaries rigged, let me do it, and we'll stay in power for ever. If you don't do it, people will say you are stupid.' In South Australia, Steele Hall redistributed himself out of office. I don't think you'll be able to blame Joh or me for doing anything like that."[9]

Bjelke-Petersen's own conversion from vigorous opposition to the zonal system under Labor, on the grounds that it meant the majority would be ruled by the minority, to ardent supporter of the system under the Nationals, lends weight to the belief that pragmatic rather than ideological considerations are often at work.[10]

However, to dismiss the Nationals' arguments as nothing more than ex-post-facto justifications for holding on to power, is to underestimate the ideological nature of National Party support. Many rural voters believe that they will be disenfranchised if the weighting system goes. Further, they are of the opinion that this will be detrimental, not only to themselves, but to the wider society. Farmers in Queensland, like their compatriots in the rest of Australia, have long held the conviction that their economic contribution and moral worth make them indispensable to the rest of society. They also tend to believe that as a group, they have substantially different interests and values from urban dwellers. For these reasons, they argue that a truly democratic system should provide a mechanism to give them a voice and protect their interests.

As has been suggested, this is not *necessarily* anti-democratic, but it is different from the version of democracy accepted in Westminster systems. Despite the hybrid origins of our system of government which have led to some well-documented departures from Westminster, our democratic conventions are derived from British tradition.[11] The essence of that tradition is majority rule.[12] Westminster is a "winner takes all" system in which there is no formal mechanism to provide for minority participation in government.

This is considered to be unnecessary because, in theory, all interests in society have their ideas represented through either the government or the opposition. Despite the plethora of opinions in any society, the Westminster system assumes that all views can be gathered into two opposing political camps which take turns in government. Whilst there may be more than two political parties, "Considerations of government always tend to bring matters back to only two sides - the side of the Ins and the side of the Outs."[13] As Duverger has suggested, "A duality of parties does not always exist, but almost always there is a duality of tendencies."[14] This duality can be seen in Queensland in the division of

the three major political parties into Labor and non-Labor parties. Even though the Nationals and Liberals in Queensland represent different interests and have fought bitterly to determine ascendancy, they have much in common, especially a united opposition to Labor.

The Westminster system adopts the position that all interests are represented and protected by the two major political alignments. There is, in this view, no need to electorally "weight" sectors to ensure that their interests are protected. The principle of alternation in office, in conjunction with a tolerant society, ensures this. This principle of alternation, is, as Graham Maddox points out, fundamental to the Westminster model:

> According to the traditional way of looking at things, under the 'Westminster' model representative government cannot be said to be in a healthy condition unless there is a reasonable 'pendulum swing' between the two major alignments, so that one party, then the other, holds office for a time. In this way, a reasonable opportunity is offered to both sides to have policy implemented, and so in turn all groups within society can see the chance of having their points of view represented politically. Under the two-Party system the major alignments are aggregative institutions which bring together, on one side or other, the interests and concerns of all groups and individuals in society. [15]

Clearly, the system of electoral weightage which operates in Queensland acts to hinder this pendulum swing between the Labor and non-Labor alignments, although it has not been solely responsible for keeping Labor out of office.[16] However, it does build into the electoral system a deliberate and consistent bias in favour of the interests represented by the National Party. By its partisan nature, it is a distortion of a different order from those found in many electoral systems. It is not uncommon for electoral systems to produce disproportional results in which there is a failure to translate a majority of votes into a majority of seats.[17] Nor are considerable variations in the size of electorates uncommon, as the National Party's policy document on electoral weightage makes clear. It makes much of the fact that in other Westminster democracies there is wide variation in the size of electorates. The document cites the example of Great Britain, where, in the redistribution for the House of Commons election in 1983, the majority of electorates varied in numbers of voters from 50,000 to 70,000, with the largest electorate having a voting population of 94,236 and the smallest, 22,822. Eight electorates had more than 80,00 voters and three had less than 40,000.[18] Such distortions appear for a variety of reasons, such as the maintenance of a

geographical community, but they are not deliberately arranged to reflect a philosophy of sector or interest representation.

Special arrangements for minorities are considered to be unnecessary in the Westminster model, not only because of the formal recognition of government and opposition, but also because, "British democracy, although majoritarian, is tolerant and civil".[19] The Westminster model operates most effectively in stable and homogeneous societies in which the expression of different points of view fails to destroy the fundamental harmony of society. The conflict which occurs between the two major political alignments "concerns only secondary aims and means, whilst a general political philosophy and the fundamental bases of the system are accepted by both sides..."[20] Majoritarianism is not effective where the schisms in a society are so pronounced and the differences between groups so marked that majority rule becomes tyrannical and oppressive, a situation which arguably has occurred in Northern Ireland. In situations of severe, or potentially severe conflict, a case has been made for the weightage of minority interests.

The Consensus Model of Democracy

The arguments in favour of minority over-representation have rested largely on the contention that majority rule divides society into two great opposed interests, with the strong oppressing the weak. To counter this tendency, alternative "consensus" models which discard the majoritarian principle have been put forward. One of the most impassioned pleas for a consensus model of democracy came from John Calhoun, Vice-President of the United States from 1817 to 1825. Calhoun was a Southerner, and thus a representative of a sectional minority. He argued in favour of a system of concurrent, rather than numerical majorities. The concurrent majority gave equal representation to key sections in society, whatever their numerical size, rather than to individuals. His argument was that: "... governments of the concurrent majority have greatly the advantage. I allude to the difference in their respective tendency in reference to dividing or uniting the community. That of the concurrent ... is to unite the community, let its interests be ever so diversified or opposed, while that of the numerical is to divide it into two conflicting portions, let its interests be naturally ever so united and identified."[21]

Calhoun's credibility has always suffered from the suspicion that his elaborate model of government by concurrent majority was simply a device to defend the power of the South and protect its "peculiar institution" of slavery. He does, however, in the words above, raise one of the key arguments in favour of consensus models of democracy; that they unite, rather than divide different sectors or community interests.

The view has already been put that the majoritarian Westminster system does not divide society because it rests on an underlying consensus. If, however, there is no underlying consensus on the political philosophy or fundamental bases of society, a majoritarian system could be profoundly divisive. In such cases, a model of democracy which puts the case for minority representation has some validity. Such a model is the consensus or consociational model devised by Arend Lijphart. This is based on a study of the successful operation of democracy in a number of plural, or divided societies, which have multi-party systems. In these societies, the majoritarian model has been rejected on account of its potential to divide society by denying significant minorities access to power. It has been replaced by a consensus model. Instead of government by a majority, there is government by "a grand coalition of the political leaders of all significant segments of the plural society".[22] The reason for this is that majoritarianism in a society marked by pronounced religious and ethnic cleavages usually leads to the oppression and exploitation of minorities by a dominant majority. Worse, the disaffected minority often resorts to civil strife or attempts to break away, leading to instability and violence. In order to achieve harmony in divided societies, various devices are used. One of these is electoral weightage or the deliberate overrepresentation of certain sectors in society. An example of this occurs in Belgium where the cabinet must consist of equal numbers of Dutch and French speaking members, despite the fact that French speakers form a minority in Belgium.[23]

Although electoral weightage is a characteristic of consensus models of democracy, it is, as Queensland shows, not unknown in majoritarian systems. When over- representation is introduced into Westminster systems it is usually in order to favour a group which is seen as disadvantaged. New Zealand, for example, characterised by Lijphart as "a virtually perfect example of the Westminster model of democracy" uses a system of electoral weightage in favour of Maori voters.[24] Maori can register in either their own electorates, or in one of four special Maori electorates. Since 1943, the votes from these electorates have consistently favoured the Labour Party which supports the retention of separate Maori representation in Parliament. The maintenance of Maori seats has been defended on the "consensus" grounds that Maori have distinctive cultural values and interests, which need protection through the electoral system. It was feared that the operation of the majoritarian principle would significantly disadvantage them. For these reasons, a vote weighting mechanism was grafted on to the Westminster system. It is interesting to note that the *1986 Report Of The Royal Commission On The Electoral System* in New Zealand, rejected vote weightage on the grounds that: "If a minority group needs or is entitled to other protections for

its rights, these must be found outside an electoral system based on equality of the vote."[25]

In other words, the Royal Commission rejected the representation of interests (in this case an ethnic group) in favour of the representation of individuals. It found that vote weightage was inconsistent with the principles of a majoritarian, Westminster system. The commissioners found that even for so distinctive a group as Maori, electoral over-representation was inappropriate.

The Nationals' Case

This raises the question of whether electoral weightage of rural areas is appropriate in a state ostensibly governed on Westminster lines. The Nationals built their case by arguing that rural people are a distinctive group who contribute significantly to Queensland's wealth, and who have special needs because of the "tyranny of distance". They argue that electoral weightage is the most appropriate way to protect the values and interests of rural people.

There is little doubt that rural people are different in many ways from urban Australians. The fact that there is a rural-urban cleavage in Australia has been acknowledged.[26] Rural areas have been seen to have both a distinctive economic base and a distinctive political culture.[27] This culture involves a set of beliefs which have been variously labelled as "rural fundamentalism" or "countrymindedness". These beliefs combine a faith in the virtues of rural living, the conviction that the rural sector is uniquely productive and mistrust of the cities with social and religious conservatism. David Kemp, in a study comparing the attitudes of managers and executives, farm owners and managers, farm labourers and other manual labourers found that farm workers and their bosses shared conservative opinions on a range of social issues. For example, the two groups were the ones most in favour of the retention of capital punishment and of "God Save the Queen" as Australia's national anthem.[28] Farm labourers' views on these issues were closer to those of rural property owners than to those of urban workers. It must be noted, however, that the differences in opinion were not pronounced.

Whilst the evidence suggests that there are differences between country and city dwellers, those differences do not appear to be profound. It is difficult to find data which suggests that the rural-urban cleavage is so pronounced that rural people do not share in the general political philosophy of their fellow Queenslanders. The fact that federally, electoral weightage has been removed without causing conflict, lends weight to this view. On these grounds, electoral weightage appears to be unwarranted.

On the point of the rural sector's economic contribution, the Nationals' case can be dismissed. It is no part of any twentieth century model of democracy to assign votes according to productivity.

The Nationals also strongly emphasise the difficulty in representing a sparse population spread over a wide area. Undoubtedly, the wide empty spaces of Western and far Northern Queensland do provide challenges for the electoral system. However, it should be possible to meet that challenge other than through electoral weightage, with additional staff and support for rural members.

On consideration, the Nationals' case for electoral weightage fails. Whilst electoral weightage can be justified in some plural societies, it is extremely difficult to accept in the Queensland context. If electoral weightage were to be removed, it is hard to believe that rural Queenslanders would face tyranny and oppression at the hands of their city cousins or a non-National Party Government. Labor leader Wayne Goss has already acknowledged the importance of the rural and mining sectors and has in turn been reassured by rural leaders that primary producers would be able "to live with a Goss Labor Government".[29]

The consensus model of democracy suggests that the representation of interests is, in some cases appropriate. But in a community in which all political parties support the Westminster model, its use appears deviant. The Westminster model values open debate and political conflict built upon foundations of consensus. It is a system in which the alternation in office of the major political parties assures the representation of diverse views. Most importantly, it is a system tolerant of minority opinion.

These factors mean that the Nationals have no case for electoral weighting.

Notes

1. Quoted in P. Coaldrake, *Working the System* (St. Lucia: University of Queensland Press, 1989), p. 32.
2. Sir Arthur Fadden, *They called me Artie* (Milton: Jacaranda, 1969), p. 37.
3. J. Ahern, *The Electoral Weightage System* (National Party of Australia, Queensland, 1989): p.3.
4. *Ibid*., p. 2.
5. 1989 National Party electoral posters state the following: "We believe the laws and democratic government of Australia should result from a majority vote under the Westminster system ..."
6. J. Kelly, "Vote Weightage and Quota Gerrymander in Queensland, 1931-71", *The Australian Quarterly*, vol. 43, no. 2, (June 1971): pp. 39-54.
7. It is acknowledged that in practice, there are no pure examples of Westminster or consensus models of democracy. It is not uncommon for

elements of a consensus model to be found in Westminster systems and vice versa.

8. For example, see Coaldrake, *Working the System*, p. 30; and D. Jaensch, "The Bjelke-mander" in A. Patience, ed., *The Bjelke-Petersen Premiership 1968-1983 Issues in Public Policy* (Melbourne: Longman Cheshire, 1985), p. 241.
9. Quoted in D. Wells, *The Deep North* (Collingwood: Outback Press, 1979), p. 87.
10. Jaensch, "The Bjelke-mander", p. 247.
11. G. Maddox, *Australian Democracy in Theory and Practice* (Melbourne: Longman Cheshire, 1985), *passim*.
12. A. Lijphart, *Democracy* (New Haven: Yale University Press, 1989), p. 4.
13. E. Baker, *Reflections on Government* (Oxford: Oxford University Press, 1942), p. 55.
14. M. Duverger, *Political Parties* (London: Metheun, 1954), p. 215.
15. G. Maddox, *Australian Democracy*, p. 226.
16. P. Coaldrake, *Working the System*, p. 54.
17. A. Lijphart, *Democracy*, p. 166.
18. J. Ahern, "Electoral Weightage System", p. 2.
19. *Ibid*., p. 10
20. M. Duverger, *Political Parties*, p. 214.
21. J.C. Calhoun, *A Disquisition on Government* (New York: Liberal Arts, 1953), p. 36.
22. A. Lijphart, *Democracy in Plural Societies, a Comparative Exploration* (New Haven: Yale University Press, 1977), p. 25.
23. *Ibid*., p. 41.
24. A. Lijphart, *Democracy*, p. 16.
25. The Royal Commission on the Electoral System, *Report* (Wellington: New Zealand Government Printer, December 1986), p. 81.
26. D. Aitkin, *Stability and Change in Australian Politics* (Canberra: Australian National University Press, 1977), p. 180.
27. D. Jaensch, *The Australian Party System* (Sydney: George Allen and Unwin, 1983), p. 67.
28. D. Kemp, *Society and Electoral Behaviour* (St. Lucia: University of Queensland Press), p. 306.
29. "Goss reassurance: Mackechnie content", *Queensland Farmer and Grazier* November, (1989): p. 47.

Appendix

Fitzgerald Commission of Inquiry
Public Advertisement Inviting Submissions

COMMISSION OF INQUIRY

THE COMMISSIONS OF INQUIRY ACTS 1950 TO 1954

A Commission of Inquiry has been appointed by His Excellency the Governor with the advice of the Executive Council in relation to possible activities involving:

(i) prostitution,
(ii) unlawful gambling,
(iii) the sale of illegal drugs
(iv) associated misconduct by members of the Queensland Police Force; and
(v) payments by named persons to one or more political parties in Queensland and the purpose of any such payment.

The Order-in-Council by which the Commission of Inquiry was constituted was published in an Extraordinary Queensland Government Gazette on Tuesday, 26 May 1987 and copies may be obtained free of charge from the Commission.

Investigations are being carried out on behalf of the Commission into the matters in respect of which it is required to report and make recommendations.

Any person or organization with information or documentation which relates to any such matter, or which may otherwise assist the Commission, for example by indicating a possible line of investigation, is requested to communicate with the Commission as soon as possible.

All communications should be directed initially to the Secretary of the Commission either by writing to the address stated below or by telephoning the number indicated.

Procedures will be implemented within the Commission to ensure that confidentiality is maintained with respect to the identity of persons who assist the Commission and the information and documents which they provide in so far as that is appropriate and consistent with the discharge of the Commission's functions.

Further, any person who feels particular concern may upon request have his or her communication referred directly to Counsel Assisting the Commission.

The Commission's preliminary hearing was held at 10.15 a.m. on Friday, 12 June 1987 and it is presently anticipated that the full Commission hearings will commence on 13 July 1987.

The Commission's hearing will ordinarily be held in Court 29 on the 4th Floor in the District Courts Section of the Law Courts Building, George Street, Brisbane.

For additional information, contact the Secretary of the Commission, Mr. John Sosso.

The address of the Commission is:
Level 2, Watts House, 95 North Quay, Brisbane

The postal address of the Commission is:
P.O. Box 157, North Quay, 4002

The Telephone number of the Commission is: 221 2261

CORRUPTION AND REFORM

Leading commentators here present their views on what the recommendations of the controversial Fitzgerald Inquiry mean for Australia and for the Sunshine State. Journalists, public servants, lawyers, police administrators and political scientists canvass the broad range of issues that Tony Fitzgerald exposed in his Report . . . from police corruption to freedom of information legislation, the media and the public service. It includes along the way a tour of the history of corruption since Botany Bay.

The reporters who sparked off the inquiry, Chris Masters and Phil Dickie, are among those discussing the vital role of the media. Historian Ross Fitzgerald compares the Fitzgerald Inquiry of 1987-89 with the notorious National Hotel Inquiry of 1963-64. Evan Whitton proposes three simple ideas for parliamentary democracy. Malcolm Mackerras explains why the gerrymander is just propaganda. Brian Toohey voices his strong misgivings about the Report; and Nigel Powell, the policeman who blew the whistle on the Queensland Licensing Branch, makes his own special plea.

Uncompromising in their examination of the roots of corruption and the possibilities for reform, these arguments and opinions will stimulate and inform discussion on this most important of national issues.

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Reference

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