WHISTLEBLOWING IN QUEENSLAND

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INTRODUCTION

Whistleblowers Australia has a primary interest in the reform of the public service in all Australian jurisdictions.

This contribution to the analysis of the Post Fitzgerald Era has a focus on this theme, and expresses views held about the contribution that the Fitzgerald Inquiry and its Report made to reform of the Public Administration in Queensland.

The criteria set for this analysis are based on both the merit of the theories and arguments behind what the Inquiry recommended, and also the effectiveness of its outcomes.

Regarding the gap between the intent of the Inquiry and the outcomes that its recommendations achieved, the paper offers possible causes for those gaps.

INTENTIONS AND OUTCOMES

Reform of the Queensland Police Service [QPS]

The Fitzgerald Inquiry addressed influences tending to corrupt the QPS that came from both outside the public sector as well as those arising from within the public sector.

External influences arose from enforcing laws pertaining to prostitution[1]and gambling.[2] Those influences have been displaced to a significant extent by a government 'takeover' of these businesses – a TAB franchise is now adjacent to the bar at most hotels, a principal business location for the agents of SP bookmakers in the times before the Fitzgerald Inquiry; a casino now resides where once the Treasury was officed; registration of brothels has been troublesome but is part of the regulatory jurisdiction.

The Fitzgerald Inquiry advanced the debate on legalization and decriminalization[3]. Some achievement of the Inquiry's intent, albeit narrowly defined, could be recognized with respect to these external influences upon the integrity of the QPS.

Internal influences were also addressed. Principal amongst these was 'the Police Code'.[4]

To the Police Code and the Police Culture, the Report attributes power and influence:

- *in conflicts between the law and the code, the code prevails… Most* (police) *do not participate fully,…, but many acquiesce*[5] – a qualification upon the integrity of the QPS
- *members of the elite* (senior officers, union officials, detectives) *have been the major beneficiaries of the culture which they promote and exploit*[6]

[1] Fitzgerald Report p190
[2] ibid p194
[3] ibid p188
[4] ibid pp200 - 205.
[5] ibid p200

- *the culture has withstood all challenges…, commencing with the National Hotel Royal Commission and including the years of the Whitrod administration*[7] – there is a history of the QPS elite outlasting reform initiatives.

Central to the mutual loyalty and support demanded by 'the code' is the following:

> ***Under the code it is impermissible to criticise other police. Such criticism is viewed as particularly reprehensible if it is made to outsiders. … Any dissidents are able to be dealt with for a breach of the code, with the approval of other police***[8] .

These are largely narrations and deductions about 'the Police Code'.

The three particular insights about 'the code' that can be credited to the Report are:

1. *Whitrod could not have succeeded unless he changed the culture of the Police Force* [9]. This insight recognizes that culture, which is at the centre of the strength of the problem, is central to reforming the QPS
2. *honest police did nothing because they did not know where to turn*[10] . This insight acknowledges that the forces of integrity within the QPS were neutralized because all places to which they (including Whitrod) could disclose wrongdoing were perceived to be captured
3. *One of the most obvious and distressing manifestations of the strength of the code is that, even now, there is no indication of widespread remorse*[11]. A lack of remorse is a first indicator of the worst category of a bully organization. Remorse, or sorrow, is also the hallmark criteria for establishing the religious concept of contrition.

<u>The whistleblowers experience, since 3 July 1989, is that little if anything of substance may have changed in the QPS regarding the allegiance of the QPS elite to 'the Police Code'.</u>

The demonstrations of this view include the actions and inaction by the QPS elite in responding to two of Australia's five Whistleblower Cases of National Significance. Those two cases are:

- Inspector Colin Dillon
- Kevin Lindeberg .

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[6] Fitzgerald Report p200
[7] ibid p201
[8] ibid p202
[9] ibid p201
[10] ibid p205
[11] ibid p205

These cases were disclosed to and required the attention of senior officers and detectives of the QPS (Fitzgerald's 'elite'), rather than to and of the frontline of the QPS.

There is one counter-indication to this summary view, and this is occurring while this paper is being outlined. To this development the paper will return after the earlier background to the main perspective is presented.

Inspector Colin Dillon

Under the heading, *Criticism of other Police*, the Fitzgerald Report[12] cites the unacceptability to the QPS elite of police officers criticizing other police or the police administration.

> *Administrative punishments, such as unfavourable transfers, have reinforced the official view,*

the Report declares.

The Report adds,

> *Again, one example is sufficient.*

The position put forward by Whistleblowers Australia, that nothing has changed 'since Fitzgerald', is demonstrated by the *one example* case of Inspector Colin Dillon.

The Courier Mail Special Edition featuring the 'Headlines of the Century' included a page for the Fitzgerald Inquiry. The page selected, dated 18 September 1987, featured two policemen. They were Assistant Commissioner Parker who admitted to receipt of corruption payments[13], and Sergeant Colin Dillon, universally accepted as 'the honest cop', who pleaded for his honest colleagues to also come forward with their evidence to assist the Inquiry. Both policemen, their photos on the front page, their respective headlines, with the words describing their respective deeds, imaged the contrasts between the leadership that had been provided by the QPS elite, and the leadership that the Queensland community wanted in its Police Force.

What ever happened to Col Dillon, in the new order police force that followed the Fitzgerald Inquiry and the imprisonment of the then serving Commissioner of Police?

The first Head of the CJC, Sir Max Bingham, returned to Queensland in 1996 to head a review into the post-Fitzgerald Police Service. The Review Report, made to the Police Minister, dated July 1996, described the treatment of Col Dillon in his employment with the QPS as 'anomalous in the extreme'.

After the Inquiry, Sergeant Dillon had been passed over for promotion. The administration of an 'outsider elite' (that led by Commissioner Newnham) intervened to correct the anomaly, and Dillon was promoted to Inspector. With the departure of the outsider, Newnham, however, the QPS elite transferred Inspector Dillon to a position

[12] Fitzgerald Report p79
[13] ibid p78

reporting to a more junior AO7 public servant. That is the anomalous situation where Bingham found this hero figure from the Fitzgerald Inquiry.

After several months of inaction by the new order QPS elite concerning the Bingham Report, Inspector Dillon sought an explanation as to why the anomaly was not being addressed. Inspector Dillon, however, was told not 'to make waves'. No change was made to Inspector Dillon's work situation, and the recommendation of Sir Max Bingham was simply ignored.

A secondment for three years as ATSIC Commissioner rescued Inspector Dillon from this demeaning situation, and demonstrated his leadership capacities. When, however, he returned from the ATSIC appointment, the QPS elite failed to give Inspector Dillon a task or even a desk, and he was left to wander the corridors of the 'reformed' Force until a colleague offered him a spare desk and chair.

Not even the heroes from the Fitzgerald Inquiry have been allowed to escape the traditional practice of 'expelling' whistleblowers. The tactics used were to place the whistleblower in lower level responsibilities reporting to junior staff, and then to assign him to a 'gulag'. In this respect at least, nothing has changed with the QPS elite since the Fitzgerald Report described the

> *diminished prospects for promotions, appointments and other opportunities, disadvantageous transfers, and ostracism*[14]

that were used to mistreat honest police officers that were in the Force 'before Fitzgerald'.

Reform of the Public Sector

The Fitzgerald Inquiry saw that the causes to major problems in the QPS were public sector wide issues - the boundaries of the Inquiry's gaze did not end at the boundaries of the subject department - and the Inquiry pursued these public sector wide issues.

> *This Inquiry began with comparatively narrow terms of reference, which were expanded as it became clear that police corruption was widespread, and part of a bigger problem.*[15]

The is the most commendable aspect of the Fitzgerald Inquiry, that marks it above other Inquiries such as the Forde Inquiry into Child Abuse in Queensland Institutions and, it appears, the Davies Inquiry into Queensland Health.

Of the public sector wide matters addressed in the Fitzgerald Report, this paper seeks to bring focus upon the following:

- Official misconduct
- Administrative review
- Freedom of Information (FOI)

[14] Fitzgerald Report p205
[15] ibid p357

- Politicisation
- Appointments, appeals and contract employment
- Parliamentary privilege
- The media
- Whistleblower protection, and
- Court administration

The Inquiry's Report comes directly to the essential threats posed to the administration in Queensland by particular practices in some of the above matters:

- *The Ombudsman is limited to making recommendations … there is no general process of independent determinative external review of administrative action in this State.*[16]
- *If any Attorney-General is motivated by political consideration to decline to act, there is often nothing that the average citizen can do, with the result that, practically speaking, the Government is placed beyond the reach of the law in these situations.*[17]
- *Cabinet Ministers should not be concerned with public service appointments, promotions, transfers and discipline…*[18]

Useful comments were also provided about the independence of the judiciary[19], judicial reviews[20], the 'watchdog' role of the media[21], misuse of Hansard[22], Cabinet secrecy[23] and partiality in the exercise of the Attorney-General's powers[24].

The Report might have been a report on the Families Department or the Health Department[25] when it penned, under the heading of *Politicisation*, the consequences of a politicized bureaucracy :

> *More junior public servants rapidly become aware of the need to please politicians and senior officials who can help or damage their careers, and not to provoke displeasure by making embarrassing disclosures. The advantages of co-operation and discretion and the disadvantages of any other course are manifest …*
> *One of the first casualties in such circumstances is the general quality of public administration*

and

[16] Fitzgerald Report p128
[17] ibid p128
[18] ibid p131
[19] ibid p134
[20] ibid p129
[21] ibid pp141-142
[22] ibid p333
[23] ibid pp358-359
[24] ibid p359
[25] Eg, see Courier Mail, 'Culture of incompetence. Bullying, cover-ups target of criticism', 1-2 October 2005

Not only are wrong decisions made, but some are tainted by misconduct.[26]

The Fitzgerald Inquiry established, with these considerations and analysis, the Criminal Justice Commission (CJC). The CJC was recommended by the Inquiry, with the purpose of

overseeing the reform of the Police Department, implementing the changes recommended in this report and continuing the work of this Commission.[27]

Kevin Lindeberg

The intentions of the Fitzgerald Report for the CJC to drive a continuing reform agenda within the QPS elite and within the wider public sector did not eventuate. Exactly the opposite occurred, it is here argued.

Again, one example is sufficient.[28]

For the uninitiated, Mr. Lindeberg's Public Interest Disclosure concerned the deliberate destruction of public records by Executive Government of Queensland to prevent their use as evidence in anticipated judicial proceedings.

It has been subsequently discovered that the records contained evidence about the abuse of children in the State-run John Oxley Youth Detention Centre (JOYDC), including the pack rape of an indigenous female child[29]. Information also exists tending to show that members of the Executive Government allegedly may have known, at the time that the destruction of the documents was ordered, that the documents described abuse of children[30]. The subject documents are termed *the Heiner Documents*, after Magistrate Noel Heiner who had gathered the documents in an Inquiry into the JOYDC.

The alleged assault against the child fell under the legal category of "criminal paedophilia" under section 6 of the *Queensland Crime Commission Act 1997*.

Lindeberg alleged that the order to destroy the records to prevent their known use as evidence in a judicial proceeding may have breached section 129 of the *Criminal Code*[31].

Lindeberg took his complaint to the QPS in early 1994. He alleged that a cover-up was occurring inside the CJC[32]. He further argued that, as there was a *prima facie* breach of

[26] Fitzgerald Report p129-130
[27] ibid p358
[28] ibid p79
[29] Exhibit by B Grundy to the House of Representatives Legal and Constitutional Affairs Committee: Crime in the Community, 2003/04
[30] Channel Nine, Interview with P Comben, 'Queensland's secret shame', Sunday, 21 February 99
[31] "*Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years*";
[32] The Lindeberg Petition to the Queensland Legislative Assembly, tabled on 27 October 1999.

the *Criminal Code*, his PID enlivened the QPS's jurisdiction under the *Police Service Administration Act 1990* to enforce the *Criminal Code*.

As the years passed, the PID's gravity increased. The perception of a possible cover-up persisted and extended further into the system, drawing in other accountability arms of government.

The allegations of cover-up now cut across all Queensland's law-enforcement and accountability arms, reaching into Parliament, the Qld Police Service, the Office of Premier and Cabinet, the Office of the Director of Public Prosecutions, Office of the Attorney-General, Office of Crown Law, Queensland Audit Office, Office of the Parliamentary Ombudsman and the Office of State Archives[33].

The Shredding of the Heiner Inquiry documents is well known throughout world. It has been categorized by the world recordkeeping community as one of the 14 greatest shredding scandals of the 20th century, standing alongside the infamous Iran/ContraGate shredding affair and others of similar ilk.[34] Its significance to proper recordkeeping, and other disciplines like law, political science, governance and journalism, sees the Heiner Affair now being taught in some 20 major universities throughout Australia and the world.[35]

Capture

Three propositions used by the CJC to excuse the government of any wrongdoing in the Heiner Affair have raised the concern of international and national communities of jurists and public administrators. These propositions are taken in turn.

First Proposition - the CJC argued that, under their interpretation of section 129 of the *Criminal Code*, evidence could be deliberately destroyed up to the moment of the expected writ being filed and served, and done for the purpose of preventing their use in those (anticipated/expected) proceedings[36].

It is a proposition of such legal absurdity that it would invite the 'world without evidence' vista debated post the McCabe and Enron disclosures about document shredding[37].

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[33] The Lindeberg Petition to the Queensland Legislative Assembly, tabled on 27 October 1999, and Lindeberg submissions to the House of Representatives Legal and Constitutional Affairs Committee: Crime in the Community, 2003/04

[34] See major academic 340-page book entitled *"Archives and the Public Good – Accountability and Records in Modern Society"* published by Quorum Books Westport Connecticut (USA) and London in July 2002

[35] E.g. Manitoba, British Columbia, Amsterdam; Liverpool (UK), Cape Town, Moi (Kenya), Simmons College (USA), Botswana, Michigan, Toronto, Pittsburgh, Melbourne, Edith Cowan, Queensland, Bond, Salamanca (Spain).

[36] Lindeberg Exhibit No 36 to the Senate Standing Committee on Unresolved Whistleblower Cases 1995, and Senate Hansard, 23 February 1995, p104/5 – evidence by M Barnes, Chief Complaints Officer, CJC.

[37] Cameron and Liberman, 'The Destruction of Evidence before Proceedings Commence: What is a Court to do?' *University of Melbourne Law Review*, Volume 27, 2003.

The interpretation contradicted legal precedent available when the CJC dismissed Lindeberg's allegation in its decision of 20 January 1993. Those legal precedents on the interpretation of sections 119 and 129 of the *Criminal Code* included *R v Rogerson* of July 1992, *R v Selvage and Anors* of 1982 and *R v Vrones* of 1891.

In March 2004, a District Court jury found a Minister of Religion, Pastor Ensbey, guilty of the crime of destroying evidence under section 129 of the *Criminal Code*. The matter was taken to the Queensland Court of Appeal[38]. Their Honours, Davies, Williams and Jerrard JJA, decided, in respect of section 129, to confirm the legal correctness of Judge Nick Samios' direction to the District Court jury, which was as follows:

> *…I direct you there does not have to be a judicial proceeding actually on foot for a person to be guilty of this offence.*

By what process did the CJC come to, and then keep to, its erroneous interpretation, in the face of plain English explanations of its error, by eminent QCs asking the CJC to simply read *R v Vrones* to *R v Rogerson*? [39]

The Second Proposition – the CJC argued that, because the Queensland Government purportedly acted on Crown Law advice, any offence could not be found against the members who ordered the destruction of the known evidence[40].

This CJC claim would allow any Government, so long as it can wave around a piece of wrong advice at law, to act contrary to the rule of law with impunity.

The decision in to *Ostrowski*[41] demonstrates this second absurdity in reasoning by the CJC, wherein Callinan and Heydon JJ, said:

> *…A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law, as an excuse for breaking it…*

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[38] R v R V Ensbey; ex parte A-G (Qld) [2004] QCA 335 at 15-17 September 2004

[39] Eg, see *Senate Hansard*, Senate Select Committee on Unresolved Whistleblower Cases, p40, 23 February 1995, for statements by Callinan QC regarding the CJC's interpretation of section 129 of the *Criminal Code*:

> *Not one case is cited for that, not one legal authority in an area in which authorities commenced in the 1880s … it requires application to the legal authorities, and that was not done here by the CJC. The matter is merely dismissed.*

[40] Eg, see *Senate Hansard*, Senate Select Committee on Unresolved Whistleblower Cases, p120, 23 February 1995, for statements by M Barnes, Chief Complaints Officer, CJC regarding the proper interpretation of section 129:

> *I do not know the final answer to that. I know that the Crown Solicitor in 1990 had one view of it. Mr Callinan … put to you another view of it … I do not know what the answer is; and, with respect, it is not really our function when we are assessing complaints to work that out. If we see that a departmental officer acts consistently with Crown Law advice, then we are going to come to the conclusion fairly easily that that departmental officer has not been guilty of official misconduct.*

[41] *Ostrowski v Palmer*[2004] HCA 30 (16 June 2004)

Pastor Ensbey's legal team, before the trial commenced, sought from the Office of the Director of Public Prosecutions (DPP) agreement to have their client relieved of the charge under section 129. The lawyers cited the interpretation used by the Office of the DPP[42] in respect to the destruction of documents in the Heiner affair. That is, as with the Heiner documents, at the time that Pastor Ensbey destroyed the documents, no judicial proceeding was ***on foot***. The DPP dismissed the Ensbey application, citing the plain reading of section 129, and *R v Rogerson*.[43]

The legal advice used to excuse the government over the destruction of the Heiner documents was dismissed out of hand by its source when that source applied its legal reasoning to Pastor Ensbey. This duality is information tending to indicate a double standard may exist when it comes to the interpretation of the *Criminal Code*.

The Third Proposition – the CJC argued that the Lindeberg PID had been investigated to the nth degree – this later developed into the *ten inquiries* defence[44]. This proposition was that any further inquiry was not merited, as it had been exhaustively investigated already, and nothing unlawful had been found by those past inquiries.

Far from a defence, the *ten inquiries* argument is the most powerful statistic tending to suggest the possibility of capture of the CJC and other watchdog authorities on the Heiner Affair. The *ten inquiries* statistic begs the question– how could the CJC, DPP, State Archives, Office of Ombudsman, Information Commission and QPS elite, amongst others, get it so wrong when the law was so clear.

Especially, a concern arises where the Office of the DPP knew and understood, before the trial and thus before Judge Samios' direction to the jury, the true interpretation of section 129 of the *Criminal Code*. The Office demonstrated this knowledge in dismissing the application for the charges against Pastor Ensbey under section 129 to be dropped, an application based on the erroneous interpretation of section 129 used previously by the Office in dismissing the Lindeberg allegations. There had been no change in the legal landscape since the time Lindeberg first lodged his complaint – so why had there been this issue of opposite opinions from the one Office.

It was not until 18 May 2004 that an investigation finally did take evidence from Magistrate Heiner and other first hand witnesses for the first time. This was done by an authority external to the Queensland jurisdiction, namely the Federal Government's Standing Committee on Legal and Constitutional Affairs, which was investigating Crime in the Community.

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[42] Lindeberg submission to the Senate Standing Committee on the Lindeberg Grievance, p70, 28 May 2004, and Letter dated 23 March 1995 from the Office of DPP to Shadow Minister for Justice and the Attorney General

[43] Lindeberg submission to the House of Representatives Legal and Constitutional Affairs Committee: Inquiry into Harmonizing Legal Systems Relating to Trade and Commerce, para 3.15, 7 July 2005.

[44] CJC submission to the Senate Standing Committee on Unresolved Whistleblower Cases, February 1995.

In August 2004, this Federal Parliament Standing Committee, in an unprecedented landmark report in the history of Australian political life, recommended that criminal charges be laid against the entire Cabinet of a State jurisdiction.

> *... the Committee has no choice but to recommend that members of the Queensland Cabinet at the time that the decision was made to shred the documents gathered by the Heiner inquiry, be charged for an offence pursuant to section 129 of the Queensland Criminal Code Act 1899. Charges pursuant to sections 132 and 140 of the Queensland Criminal Code Act 1899 may also arise.*

The relative prospects that the system in Queensland may have been captured by interests benefiting from the incorrect interpretation of section 129[45], or that certain practices of the law within Government may have been captured through incompetence[46], or that the procedures of inquiry used by Government lawyers did not require the inquiry to consult relevant case law[47], or that the procedures were closer to an adversarial stance for government in lieu of a stance judicially separated from government[48], were considered by commentators.

The Fitzgerald Inquiry, to its credit, understood the problem that a presumption of incompetence brings to efforts to uncover misconduct when officials fail to act as they should. The Report suggested a

> *...provision of punishment for incompetence in relation to officials who should have known about misconduct, but did nothing.*[49]

Other watchdog organizations responded to the Heiner affair in ways that have also caused concern about the possible capture, or the perception of capture, of those organizations by political interests. Three examples of note are:

- The Office of the Information Commission;
- The Office of the Parliamentary Ombudsman and
- The Queensland media

Office of the Information Commission

The Office of the Information Commission, in *Re Lindeberg v Families, Youth and Community Care* Decision [No.97008, 30 May 97] made certain assertions about the

[45] Eg, as alleged by Lindeberg
[46] Eg, see emphatic evidence regarding incompetence of the subject legal advice by A MacAdam, Senior Lecturer in Law at QUT, to the Senate Select Committee on the Lindeberg Grievance, 11 June 2004
[47] Callinan QC argued that this practice was occurring
[48] Chair of the Parliamentary Crime and Misconduct Committee raised this issue (regarding other advices) on ABC Radio with S Austin on 16 March 2004
[49] Fitzgerald Report p361

provisions of the *Freedom of Information Act* pertaining to the exemption of documents that had gone before Cabinet. The Commission found that *even if the documents at issue were to contain evidence of a crime or fraud,* the Commission would find them exempt and not be able to disclose those documents.

So can capture be perceived to have occurred? The FOI legislation was favoured by the Fitzgerald Report as a support mechanism to its reform program. A principal tenet of that reform program was that officials be obliged to report official misconduct[50]. Yet the requirement to report official misconduct has been negated, for the Information Commission, by the way in which an exemption[51] concerning Cabinet documents has been interpreted.

Thus a principal tenet for achieving the reforms envisaged by the Fitzgerald Report has been captured by an ancillary procedure of a support mechanism.

This Office of the Information Commission has also used the argument, since the *Ensbey* decision, that the decision of Judge Samios in the Ensbey trial was just *a view* of the interpretation of section 129, and a *differing* view from that of the Office of the DPP[52]. That is how easy it can become for legal authority to be overcome by the bureaucracy – the procedures of legal reasoning used by the bureaucracy, to treat rulings of the Court as just one lawyers view, to be compared with the views of other lawyers, can capture the administration of law in an entire jurisdiction.

The Office of the Parliamentary Ombudsman

Procedures at this Office also can avoid the principal tenet in the Fitzgerald Report for officials to report official misconduct.

This Office has refused on significant matters to refer suspected official misconduct to the CJC. The Office has directed the complainant about maladministration to refer any associated suspected official misconduct to the CJC themselves (with the state of knowledge of the complainant) rather than the Office take up the Fitzgerald tenet (with the state of knowledge **and the authority** of the Ombudsman's Office – and of the Information Commission when these were joined)[53].

The Queensland Media

The Courier Mail had exhibited reasonable coverage of the Heiner Affair up until about 2000. On 14 June 1999, for example, the paper published an article by Michael Ware that exposed the holes in the *ten inquiries* defence. The article explained that no Government

[50] Fitzgerald Report p361
[51] The exemption was brought in as an amendment to the FOI Act in March 1995
[52] Decision by Information Commission in Kevin Lindeberg and Department of Premier and Cabinet, 30 July 2004
[53] Eg, see para 170 of the Lindeberg Petition to the Queensland Legislative Assembly, tabled on 27 October 1999

inquiry had ever sought the information necessary for a proper investigation, some never touching the matter at all, or ever reporting anything.

By 18 May 2004, the time that an investigation finally did take evidence from Magistrate Heiner for the first time (the Federal Government's Standing Committee on Legal and Constitutional Affairs investigating Crime in the Community), *The Courier Mail* was perceived to have a different editorial position.

A major disparity was discernable between the coverage that had been given by *The Independent Monthly* and by *The Courier Mail* concerning the significance of the Standing Committee's recommendations, and of the ruling in Queensland's Court of Appeal in *Ensbey* regarding section 129 of the *Criminal Code*.

The question of any capture of *The Courier Mail*, surprisingly, was raised by a columnist in that paper (before dismissing it). The column appeared in the wake of *ABC Australian Story's* coverage of Lindeberg's 14-year struggle for justice[54] in which University of Queensland journalist-in-residence Mr. Bruce Grundy also featured. The program filmed Grundy working the affair for *The Independent Monthly* with students.

On 21 May 2004, just after *Australian Story's* screening, journalist Terry Sweetman roundly criticized Grundy's long standing commitment to the affair[55]. Sweetman defended *The Courier Mail* against what he saw as an inference that his paper might be part of a conspiracy to cover-up the Heiner Affair, because that paper was not running with the story-lines being run by *The Independent Monthly*.[56]

It is likely that the Davies Inquiry will address this section 129 of the *Criminal Code* again, because of the order by a Health Department official to destroy an embarrassing report. The Courier Mail and Mr Sweetman may get another chance to bridge the logic from any action under section 129 taken by Commissioner Davies to the inaction taken with similar facts over the Heiner Affair.

Dillon and the CJC

Opinion about the influence of the Fitzgerald Report's reforms upon the CJC suffered further, where the Fitzgerald Report's watchdog demonstrated other failures to act:

- The CJC had representatives on the Bingham Review Committee that found the treatment of Inspector Dillon to be 'anomalous in the extreme'. The CJC did nothing that caused the anomalous treatment to be ended and corrected
- Ex-Inspector Dillon still awaits answers from the CJC (now part of the CMC) to Mr. Dillon's complaint about major deficiencies in the QPS investigation into the pack rape of the indigenous child at the John Oxley Youth Centre. Dillon raised the issue when serving on the Indigenous Reference Committee of the CJC/CMC as a representative of the indigenous community.

[54] The story was entitled "*Three Little Words*" and it was screened on 17 May 2004.
[55] Courier Mail, 'Foolish to plough barren ground', 21 May 2004
[56] Personal communication by author with Terry Sweetman

It is a regret of Dillon and other whistleblowers that, in the early years, they sent some fine people, and went themselves, with disclosures to the CJC. The disclosures, and some of these people, were destroyed by the procedures of that body.

It is also a regret that the government has never consulted with the whistleblower organisations about whistleblower protection issues. The bureaucracy offered a consultative role to Whistleblowers Action Group (WAG) led by Inspector Dillon during the debate associated with the Whistleblowers Protection Act 1994. That offer was conditional upon WAG withdrawing its support for whistleblowers Lindeberg and Harris. WAG refused, and the organisation has been shunned by the government since.

Dillon and the Media

In spite of his record of selfless public service, no effort was made by the media to check with Inspector Dillon before defaming him in late 1998. The Courier Mail published its retraction on 14 August 1999, under the heading, 'Apology for False Claim', including the words that Dillon was:

> *a man of unblemished character and integrity who has devoted much of his professional career to fight corruption*

Summary

The conclusion offered by the community of whistleblowers is that:

- the procedures of the watchdogs within the Queensland jurisdiction, since the Fitzgerald Inquiry, may have displayed the characteristics of regulatory capture
- the perceptions of capture of those systems and procedures appears to be so strong and so complete that the jurisdiction appears to have lost the capacity to reform itself – only external authorities are having any effect.
- the Fitzgerald Report foresaw many of the dangers to the administration in Queensland that were within the procedures evident at the time of the Fitzgerald Inquiry
- the recommendations that the Report made, however, for the continuing reform of the systems of government considered by this paper, have been unsuccessful and counter-productive.

It was a whistleblower, Deputy Premier Gunn, who caused the Fitzgerald Inquiry to occur. A whistleblowing Deputy Premier today would be required to take his or her disclosures to the CJC (now CMC), and that is how the post-Fitzgerald system has been structured. Nothing like the Fitzgerald Inquiry has ever come from the CJC (or CMC).

Queensland may need further external exposure and intervention if its public sector is to be retrieved from its current parlous state of inefficiency and incompetence, which conditions are occasioning levels of misconduct that have become alerts to the other democracies of the world.

FACTORS LIMITING REFORMS

There are reasons for this unhappy result. Those reasons lie both within the Fitzgerald Report itself, and also within events and actions taken that were outside of the influence of the Fitzgerald Inquiry.

Factors outside of the Fitzgerald Inquiry

Three sources of problems from outside of the influence of the Fitzgerald Inquiry had a negative impact upon the reform initiatives. These included:

- Some **early mistakes** made by the incoming Government
- The **selections and rejections** made by the incoming administration from the ideas offered by the Fitzgerald Report
- The **notion of political sensitivity**, as this notion was applied to the reformed Queensland Public Service.

Early Mistakes. Three actions by the incoming reformist government indicated to the public sector that nothing may have changed. These were:

- The sending of public servants in large mass to **'gulags'**. This signal indicated the likely fate of officers suspected of having political views or associations other than the governments.
- The **destruction of the Heiner documents** and the sacking of union organizer Kevin Lindeberg. The authorities would brook no criticism, not even from 'the faithful', was the perception.
- The **selection processes used for** appointments to the five most senior positions in **the Department of Health**. Allegations of cronyism caused the Electoral and Administrative Review Commission (EARC) to investigate the allegations. EARC found no evidence of deficiency in the processes but protested *the lack of surviving documentation recording the panel's deliberative processes*[57]. The set by the reforming Public Sector Management Commission, whose Chair was on the selection panel, contributed greatly to perceptions about the integrity of future processes.

Selections and Rejections. A few instances here demonstrate the procedures followed by watchdog authorities that cause concerns about the possibility of capture:

- **Freedom of Information** legislation was passed by State Parliament. FOI was seen by the Fitzgerald Report as a benefit to the public and to Parliament, in that it had the potential to make administrators accountable[58]. A system of exemptions,

[57] Courier Mail, 'PS selection methods to be tightened', 1 April 1992
[58] Fitzgerald Report, p129

assisted by procedures such as *wheeling refrigerators* of documents to Cabinet meetings, have amounted to a rejection of the Fitzgerald Report's ambitions on information, and a mechanism for possible capture of the FOI legislation.

- **The Ombudsman's Office** remains limited in *practical effect*[59]- Queensland has judicial review of, say, FOI decisions, but not administrative review of the merits. The Office appears also to have limited itself in other ways – for example:

  > *… employment related cases … technically are whistleblowing, but I believe are not meant to be categorized as such*[60].

  Employment related actions constitute the reprisals against whistleblowers described by the Fitzgerald Report, but, in the procedures of the Office of the Ombudsman, such cases have not been categorized as whistleblowing nor received the protections merited under legislation.

- **The Independence of the Judiciary** appears to be under threat. The Chief Justice has voiced his concerns about procedures for appointments to the judiciary, as has the current Health Inquirer, the Hon Geoff Davies QC[61]. The Fitzgerald Report emphasized repeatedly the importance of an independent judiciary[62].

- The Fitzgerald Report stated that **previously raised allegations** by serving prisoners (regarding verballing) were deserving of review[63]. This followed expectations by the Report of patterns to 'verballing' practices by police over many years. Similar situations arose for whistleblowers in the Public Service, for example, when the CJC made findings about the conduct of the Public Service Commissioner and Equity Commissioner. Whistleblowers who had made previous complaints about actions by these Offices sought action by the CJC to re-open investigations of their complaints, but this was refused. The findings of the Health Inquiry may re-invigorate claims for past allegations of destruction of documents by bureaucrats to be reviewed.

- **Parliamentary privilege**, according to the Fitzgerald Report, should allow interrogation upon statements reported in *Hansard*[64]. The use of Parliamentary privilege to defame whistleblowing nurse Wendy Erglis, months before the full scope of the waiting lists malady in the Queensland Health was exposed by the Morris and the Davies Inquiries, showed the use to which all privilege would be applied by a desperate Health administration[65].

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[59] Fitzgerald Report p128
[60] Ombudsman's 23rd Annual Report 1996/97, p38, 30 October 1997
[61] Eg, Courier Mail, 'Judges plead for removal of secrecy over appointments', 9 September 2004
[62] Fitzgerald Report p328
[63] ibid p332
[64] Ibid p333
[65] *Courier Mail*, 'Court judgement impacts on MP's privilege rights', 3 July 2004

Political Sensitivity. The notion was espoused by the reformists in government that, in a modern public service, senior public servants needed to be politically sensitive if they were going to be effective in carrying out the programs of the elected government. The notion is attributed to the then Chair of the PSMC, Dr Coaldrake, who has asserted that what he had been advocating, namely *sensitivity to the policy agenda of government ...* and *... taking account of the political aspects of policy ... is not to be construed as an invitation to engage in politically partisan intrigue*. [66]

While the Fitzgerald Report expressed its concerns about political 'bias', political 'palatability' and such, the term, 'political sensitivity', had not been used. The choice of a new word seemed to allow the practices of 'political sensitivity' to evade the warnings in the Report about *political palatability*. Any consideration that the new word, 'sensitivity', was closer to the Fitzgerald Report's concern regarding *palatability,* than it was to Dr Coaldrake's concern for *partisan intrigue,* was not given or was ignored.

Dr Coaldrake and his PSMC colleague, Professor Glyn Davis, are having to defend the notion of *political sensitivity* to this day[67]. The recent headline, *Political Sensitivity a Prescription for Secrecy*[68], reciting evidence given at the Health Inquiry over the palatability of statistics on the State's hospitals, educates all to 'the spin' that has been given to the public for over a decade about its modern public service.

Factors within the Fitzgerald Report

Three aspects to the arguments made in the Fitzgerald Report contributed to the failures in the Fitzgerald Reform Program, it is proposed:

- Certain flaws in the Fitzgerald Report analyses and recommendations, including
- Omissions made in the same analyses and recommendations, and,
- Principal contradictions in the set of proposals made by the Report.

Flaws and Omissions. With the assistance of hindsight on some issues, a review of the discussion in the Fitzgerald Report can identify flaws and omissions in the Report's consideration of measures to dissuade maladministration and corruption

- The role of **ministerial advisors** in breaking down or bypassing any protocols between the department of public servants and the ministers office has not been appreciated by the Report. Direct tasking by ministerial advisers of managers on contract, reviews of the work of contracted managers by ministerial advisers, ministerial advisers sitting on selection panels, appointments of ministerial advisers to contracted Senior Executive Service positions – all had an impact on the relationship between public officers and the ministerial office. The advent of bullying practices in the public service culture drew upon the methods of

[66] *Courier Mail*, 'Don't get involved, PS chief tells bureaucrats', 11 July 1994
[67] *Courier Mail*, 'Crushed independence', 15-16 October 2005
[68] *Courier Mail*, 'A Sick System', 23 September 2005

ministerial advisors to a significant degree, in the whistleblowers' experience. The Fitzgerald Report foresaw the problems of politicization, but did not forsee this major mechanism for growth of the politicization problem.

- About **contracts, and promotion by merit alone**, the Report expressed the view that:

  > *Contracts do not make political interference or bureaucratic partiality any more likely, nor does it decrease the chances of public servants reporting misconduct*

  and

  > *If the wrong people are appointed for the wrong reasons to senior positions they will only be there for limited periods. There will be reduced opportunities for the bureaucracy to be politicized to a degree which is difficult, if not impossible, to reverse*[69].

  These judgements underestimated the influence of political sensitivity in practice Political sensitivity gained the status of 'merit', it became a selection criteria in forms such as 'flexibility', 'teamwork', 'strategic direction', and then it became something that had to be 'demonstrated', and to be added to the CV and to the job application. An extract from the successful job application for a senior decision-maker in a watchdog authority exemplifies the influence:

  > (Where referring to the applicants experience handling complex and politically sensitive appeals) *while an indepth knowledge of the law is necessary, it was equally essential to be aware of the political context in which the decision had been taken.*

- Regarding the **independency of the judiciary**, the Report opined that

  > *It would be an over-reaction at this time to create some special body to select and nominate a panel of suitable persons for consideration in relation to judicial vacancies*[70].

  Queensland Chief Justice the Hon Paul de Jersey and former Appeal Court Justice Davies QC have gone to print on their concerns about *political meddling in the appointment of judges*[71] or similar. A lack of alarm in the Fitzgerald Report about a small number of tainted appointments ignored the principal concern of whistleblowers about the present judicial system today – how are decisions made to appoint particular judges and magistrates to particular cases which are politically sensitive.

- With respect to **judicial appointments**, the Fitzgerald Report paid attention to decision-making about the appointment. Similar attention was not paid to the acceptance and acceptability of the terms of reference for judicial inquiries. Because the Fitzgerald Inquiry expanded its terms of reference (TOR) in order to pursue the causes of the problems with the QPS, the Report did not contemplate that other Inquiries might be restricted to the TOR that they receive. The Forde

[69] Fitzgerald Report p132
[70] Fitzgerald Report p133
[71] *Courier Mail*, 'Cool hand in hot seat', 22-23 October 2005

Inquiry, for example, inquired into the cover-up of child abuse by State-run and church-run institutions, but claimed that its TOR restricted it from looking into any cover-up through the destruction of the Heiner documents[72]. Terms of Reference can become a procedure that could be used to capture Inquiries.

- The concept of an **all-party Parliamentary Committee** was lauded by the Report as one mechanism that would ensure that the administration of criminal justice would be independent of Executive controls[73]. The Parliamentary Criminal Justice Committee demonstrated the character of its procedures in its triennium review of the CJC – a submission by the Whistleblowers Action Group was tabled only after all references in the submission to the treatment of Inspector Colin Dillon were blacked out.

- On **whistleblower protection**, the Report made conclusions about the effectiveness of the proposed independent body that was to receive disclosures –

  > *Its ability to investigate the disclosures made to it and to protect those who assist it will be vital to the long term flow of information upon which its success will depend* [74].

  These words turned into witness protection (say, at a hide in a convent) rather than whistleblower protection at the workplace. The Report further focused on legislation to provide the protection, rather than a properly resourced single purpose Whistleblower Protection Body (WPB) – when it came to new watchdogs, the Fitzgerald Report focused on the construction of a CJC to investigate suspected official misconduct (the SWORD) rather than a WPB to preserve the whistleblowers and their evidence of official misconduct (the SHIELD).

The Contradictions. There were also some telling contradictions across the analyses and the recommendations made by the Fitzgerald Report.

The Report recommended that public authorities should rely on processes for ensuring that reforms are effected in public administration, but the Report chose to rely on people for the reform of the Police Force. The Report recommends particular post-Inquiry appointments for two members of the Commission team, Jim O'Sullivan and Peter Forster, in most complimentary terms – O'Sullivan was recommended for *immediate promotion* in *fitting recognition* of the fact that he had *jeopardized his career when he accepted appointment … to assist this Commission*[75]; Forster had joined the Commission *by great good fortune,* and had *made major contributions in relation to the compilation of*

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[72] The TOR's isolating eye can be seen in the advice forwarded by C Holmes, Counsel Assisting:

> *Essentially … the Inquiry is limited to consideration of … whether any breach of any relevant statutory obligation has occurred during the course of the care, protection and detention of children in those institutions. To seek to expand its inquiries to consider the manner in which documents concerning questions of abuse of children were dealt with… would go beyond that frame of reference* [underlining is in the original advice].

[73] Fitzgerald Report, p366

[74] ibid p134

[75] ibid p338

this report (but not this section)[76]. The appointments of particular people (O'Sullivan p343; Forster p19) were important to the implementation of the Report's recommendations – processes (e.g. competitive, merit based) were not needed.

Both people favoured for appointment by the Report, O'Sullivan and Forster (from Internal Operational Audit), were **investigators**. All police are investigators, but not all pre-Fitzgerald Inquiry police officers were **whistleblowers**. While the Report talks in definite terms about the jeopardy to O'Sullivan (and risk to his team of investigators[77]), the threats to Police whistleblowers, Powell, Slade, Deveney, Di Carlo and Dillon were *claimed*, the Report stated[78].

When referring to **whistleblowers in general**, however, rather than to whistleblower individuals, the Report expresses more alarm about the fate of whistleblowers:

> *Police suspected of misconduct, or even those charged and acquitted, have not been impeded in their careers, while those making allegations have been punished and held back*[79].

This thesis has been the basis of a major Police Reform effort in New South Wales by the Internal Witness Advisory Council (ICAC, Ombudsman, St James Ethic Centre and Whistleblowers Australia), following the Woods Royal Commission. The career statistics of whistleblowers, of the police they blew the whistle on, and of a control group of non-whistleblowers, have been mapped for over a decade. Action has been taken to reverse the career disadvantages faced by the whistleblowers, with a turn in the statistics detected towards the end of the Ryan era. The research bent of the Fitzgerald Report did not take this route, and has not influenced the implementers of the Fitzgerald Reformers to emulate the NSW initiative.

The **conduct** of some persons in the Commission of Inquiry organization caused honest police to walk away from that organization, whistleblowers allege. The true Honour Role of officers who assisted the Commission may be the list of members of the organization whose names are not included in the lists given by the Report. The list of persons who were part of the teams of the Commission of Inquiry, but whose names were omitted in the Report, is headed by then Sergeant Colin Dillon. Observing procedures at the Commission that the Commission was trying to eradicate from the QPS, if this was what happened, gave the few most principled a signal that little had changed or would be changed through the Fitzgerald Inquiry.

For a Commission that relied on people more than processes, the major contradiction or irony may be that the Inquiry may have chosen some of the wrong people, and lost most of the best.

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[76] Fitzgerald Report p19
[77] ibid p20
[78] ibid p204
[79] ibid p363

The Counter-indication

In May 2005, Police Commissioner Atkinson informed the Queensland Opposition that Kevin Lindeberg's allegations, put to the QPS in 1994 concerning the destruction of the Heiner documents, may need to be revisited in the wake of the *Ensbey* ruling.

Atkinson claimed that, as Mr. Lindeberg complaints had been transferred to the CJC, the Opposition ought to contact the CMC. It may be argued that Commissioner Atkinson thus joined Inspector Colin Dillon (and ex-Commissioner Newnham) in this position. Like Dillon, he has made his disclosure, and recommended that it go to the Crime and Misconduct Commission (CMC).

In July 2005, the CMC informed the Opposition that it was not in the public interest to reconsider the Lindeberg allegations on the destruction of the Heiner documents.

The CMC is the organization that draws its origins and parentage from the Fitzgerald Commission of Inquiry. The CMC's response to Dillon and now Atkinson over the destruction of the Heiner documents encapsulates precisely where the recommendations of the Fitzgerald Inquiry have brought the public administration in Queensland.

Is the CMC response one born of poor procedure, political context or sensitivity, a differing view, balance and insight, or justice?

The answer is a demonstration of the effectiveness of the Fitzgerald Inquiry, its Report and its reforms agenda.