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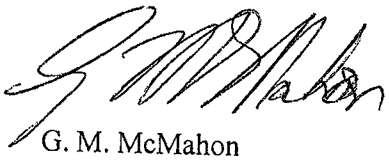
23 January 2010

CMC Review of Ministerial Office / Public Servant Interaction
GPO Box 3123,
BRISBANE Q 4001

Dear Sir / Ms

Below please find the submission to the subject Review

Yours faithfully



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SUBMISSION TO
CMC REVIEW OF MINISTERIAL OFFICE / PUBLIC SERVANT INTERACTION
BY
WHISTLEBLOWERS ACTION GROUP QLD INC

1.1 CONTEXT

1.1. There are some aspects of context for the issue under inspection. These need agreement for the design of some approach to dealing with the issue.
1.2. Below we submit aspects of context that Whistleblowers Action Group [WAG] believes are impacting upon the bureaucracy in the Queensland Public Service.

1. 2. Politicization.

1.2.1. The Queensland Public Service has been politicized. It functions under a unicameral parliamentary system. The process appears to have been started by the proposition, adopted with little opposition that was reported, that Ministers needed a Director-General or CEO with whom the Minister could [various synonyms for] develop a positive working relationship. The process was progressed through:

- the adoption of a Senior Executive Service[SES] for which there was no process of inspection for appointments;
- by a large number of appointments of officers from bureaucracies in other states with the same political context; and
- through the rationale that politically appointed CEO's also needed positive working relationships with the SES.

1.2.2. In management terms, the politicization had strong impacts upon the dynamics of the public service organisations. This was true with respect to the structures within the organisation. It was also true with respect to the sources of power available to senior operatives within the strategies, processes and procedures followed and decisions made within the politicized organization.

1.2.3. Regarding organisations, the non-political agency has four organizations:

- The Formal structure, of course, but also three informal structures, namely
- The Power structure;
- The Prestige or Status structure; and
- The Social Organisation.

1.2.4. By comparison, the politicized bureaucracy has a further or fifth structure, namely the Political Structure.

1.2.5. The Political Structure is not an informal structure. The Political Structure is a formal structure, integrated into the formal structure of the public service department or agency.

1.2.6. With respect to the power structure within any organisation, the management text book will describe three sources of power:

- **Organisational Sources**, such as the **authority formally delegated** to a position in the hierarchy, the **location** within the formal structure, such as a 'star' to whom others must go for, say, information, or a 'gate' through which others must go for access to, say, resources, and **job importance** determined, say, by what are the core activities of the organization, or which operations raise the most income.

- **Individual Sources**, such as **expertise** (if it is not easy to replace), **personal characteristics**, say, personality, charm, wit, oratory skills and physical attractiveness or charisma, or willingness to do the 'dirty work', and **permanency** of tenure in any position, versus, say, a tenure that is probationary, casual, acting, or where the boss is perceived to be a transient on the way to promotion or retirement, versus, say, the long serving deputy

- **Group sources**, such as with natural coalitions, say, technical groups, where individuals can be replaced but the type of group can not be replaced

1.2.7. With respect to the politicized agency, however, there exists a further source of power, namely, the Political source:

- **The Political Source** in a formal political structure has many of the above characteristics arising in the agencies formal structure.

- **The Political Source**, however, has the additional characteristic that it is connected to a structure, group and set of individuals outside of the organisation, not visible or audible to those in the organisation who are not politically connected.

1.2.8. Any manager, following relevany management theory, say, about stakeholder engagement or client service, needs to come to a point where what is happening in that power source and in that political part of the formal structure is visible and audible to the manager. Otherwise the manager becomes situationally unaware. Managers, more so than staff, are drawn into the political connectivities, both inside and outside of the agency organisation, even if it is only by reliance on a political insider for information about events and statements.

1.2.9. A primary candidate for the manager to obtain such information is the ministerial adviser.

1.3. Ministerial Advisers [MA].

1.3.1. These people are typically handpicked by the Minister and the Minister's political allies.

1.3.2. Commonly, in the politicized bureaucracy, they are allowed to roam free amongst the public servants, approaching SES officers and lower officers direct, giving instructions from the Minister (or allegedly / purportedly by the Minister), and demanding information.

1.3.3. They have always been part of the Ministers Office, but in the non-political public service, directions went through the Director-General, and the latter organized for quick turnaround of Ministerial requests for information and for responses to directions from the Minister.

1.3.4. The role of Ministerial Adviser has always been on the pathway to a political career, but it has also come, in a politicized public service, onto the pathway for bureaucratic careers, as well as for academic careers on politicized academic campuses.

1.4. Heads of Public Service Departments.

1.4.1. The Head has been appointed for some attributes and characteristics that will provide for a positive working relationship with the Minister, according to the justification for political appointments of Director-Generals.

1.4.2. It takes the efforts of both the Minister and the Head to ensure that the positive working relationship is not interpreted by either one to include questionable activities.

1.4.3. The first test of that relationship is the working arrangements for Ministerial Advisers, in particular, the access given to MA to the SES and others within the staff under the Head of the agency.

1.4.4. If and when the Head sets boundaries, the Head can be perceived by the MA to be putting up barriers to the MA's ability to get the MA job done. And the MA can have more access to the Minister on the Political Formal Structure, and a more highly developed political relationship with the Minister, than the Head has through the Formal Agency Structure.

1.5. Departmental SES.

1.5.1. Because there are, in the politicized public service, two formal structures, the departmental environment becomes essentially a matrix structure, with the public service agency along one axis of the matrix and with the political structure along the other axis of the matrix.

1.5.2. The manager, following well credentialed management theory, will seek to understand which of the two formal structures is on the major axis, and which is on the minor axis.

1.5.3. Managers listen hard, and observe closely, events above them in the matrix, so as to determine which of the two formal structures is the major axis of their workplace matrix.

1.5.4. Where the political structure is on the major axis, managers, again following sound management theory, can adopt three approaches towards their effort to respond to the agendae on the major axis:

- A risk-taking approach, say, making suggestions themselves of actions that could be taken that also have political benefits, pre-guessing the political assessments that will be made – this approach is in essence competing with the MA, and thus becoming one of them;
- A risk neutral approach, say, finding out what the political perspective might be for a particular action – this approach uses the MA, for which a relationship with the MA needs to be developed;
- A risk-averse approach, say, by not taking any action until a direction is given or a decision taken – this approach is essentially compliant with whoever has the power, namely the MA.

1.5.5. All three possibilities, from management theory, lead to an unhealthy relationship between the SES and the MA.

1.6. Departmental Internal Watchdogs.

1.6.1. Internal auditors, human resource managers, inspectors, chief legal officers, investigation officers, harassment officers, FOI Coordinators and similar are appointments that perform a watchdog role within their agency or department.

1.6.2. They are in a similar situation to the SES Manager when the political structure is on the major axis of the matrix environment within their agency.

1.7. Staff below SES.

1.7.1. The level of politicization appears to correlate generally, across all agencies, with the level of officer who is capable of adding reports or summaries or opinions to

Agency records accessible through FOI. Typically, for the Queensland Public Service, the level of politicization has certainly included officers one level below the SES, and widely has reached to two levels below the SES.

1.7.2. Particular functions may require the level of politicization to go deeper, where, say, the department is engaged in questionable practices at the frontline of the departmental operations.

1.8. Knowledge & Perspective.

1.8.1. Public servants who deal with Ministers and their MAs are in the higher half of the Departmental hierarchy. They attend Ministerial prioritization and consultation events, strategic planning workshops and management meetings. Important reports are distributed to them. They are networked in with other managers at their level, and their bosses are networked in at the higher level. They get to perform as investigation officers, and are included in higher level briefings about issues across the public service.

1.8.2. Such public servants, who are the target of recommendations coming from this review, are well informed about how decisions are made both within their own agency and in other parts of the public service that interact with the agency.

1.8.3. Included in the set of those interacting agencies are the watchdog authorities important to oversight of the proper functioning of their department.

1.9. Models of organisational corruption.

1.9.1. There are a number of forms of corruption that can develop in organisations.

1.9.2. Just as with any other system incorporated into the operations of an agency, like quality management, project management or leadership, corruption can enjoy a spectrum of stages of development.

1.9.3. Ad Hoc Corruption is the least developed form of corruption that can exist in an organisation.

1.9.4. Figure 1 is a representation of **'ad hoc'** wrongdoing. The wrongdoers are in black, their supervisor is in yellow or marked with a cross, and those with review authority above the supervisors are marked in blue or with the Greek letter theta.

1.9.5. Wrongdoing, in this category, is occasional and sparse, involving an individual, or a small group of individuals.

1.9.6. The wrongdoer could be in a supervisory or managerial position. Ethical codes and whistleblowing procedures are driven by management to ensure that

wrongdoing is disclosed, that it is quickly eradicated, and that the ethical workers who have assisted the organization by their disclosures are protected.

1.9.7. Figure 1 has not envisaged that the corrupt individual or small group of individuals would be at the top of the politicized organisation, that is, in the Minister's Office. If it did, ten the top box under 'Agency' would be black, not blue, and the only effective review authority (or blue box) would be the 'Watchdog'.

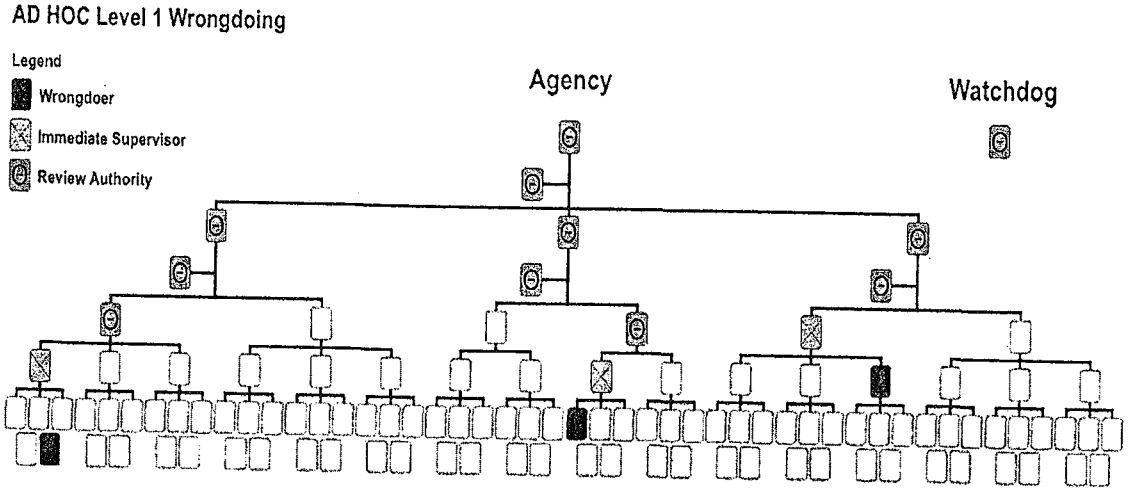

Figure 1: A Representative Mapping of 'AD HOC Wrongdoing in an Organisation

1.9.8. Let us return to Figure 1 as drawn. When the potential whistleblower in Figure 1 looks up at their organization, they see a 'sky' of blue review authorities above them. Most line managers, senior managers, the CEO and Minister, and the relevant watchdog authorities are not involved in the wrongdoing (they are coloured in 'blue', or marked with theta's, on Figure 1).

1.9.9. Staff officers who have a role supporting the integrity of the organization (internal auditors, equity officers, human resource managers, investigation officers, and the like) are also not involved in the wrongdoing. These Staff appointees are free to review any disclosed wrongdoing and any failure by a manager to properly supervise a wrongdoer (they are also coloured blue or marked with theta's on the diagram).

1.9.10. This situation is termed the 'blue sky' organizational scenario. This is the situation most favourable to a good outcome for persons reporting suspicion of wrongdoing. If the supervisor is involved in the wrongdoing, or the supervisor acts to cover-up the wrongdoing by a subordinate in order to save themselves embarrassment at their lack of supervision, the situation is still not lost for the ethical staff member. The whistleblower only needs to refer their complaint to the next higher authority, or to the watchdog. In any eventuality their disclosure will

receive proper investigation from one of the several 'blue' review authorities above the blockage.

1.9.11. When ethical conduct or whistleblowing is suppressed in these situations, it is presumed that the problem lies, not with the intent of the review authorities above the wrongdoing, but with:

- Awareness, training and education levels of managers and staff;
- Processes developed or not developed by the agency or organization;
- Resources available to responsible organizational authorities to handle the disclosures and the protection of the whistleblowers;
- Perceptions by whistleblowers and by managers that are incorrect.

1.9.12. This is in contrast with the any of the 'black sky' organizational scenarios, where the Executive and / or the watchdogs are involved in the wrongdoing. When the ethical staff member looks up at their organisation, an organisation affected by systemic corruption, the ethical staff member sees black boxes, not blue.

1.9.13. The 'Nested' form of what is termed the INTEGRATED Wrongdoing scenario (a Level 4 Corruption scenario) is depicted in Figure 2. An example of INTEGRATED systemic corruption, say, could be the repeated falsification of hydrologic and economic information, in order to justify proposals to build more dams and thus elongate the existence of the dam building organization.

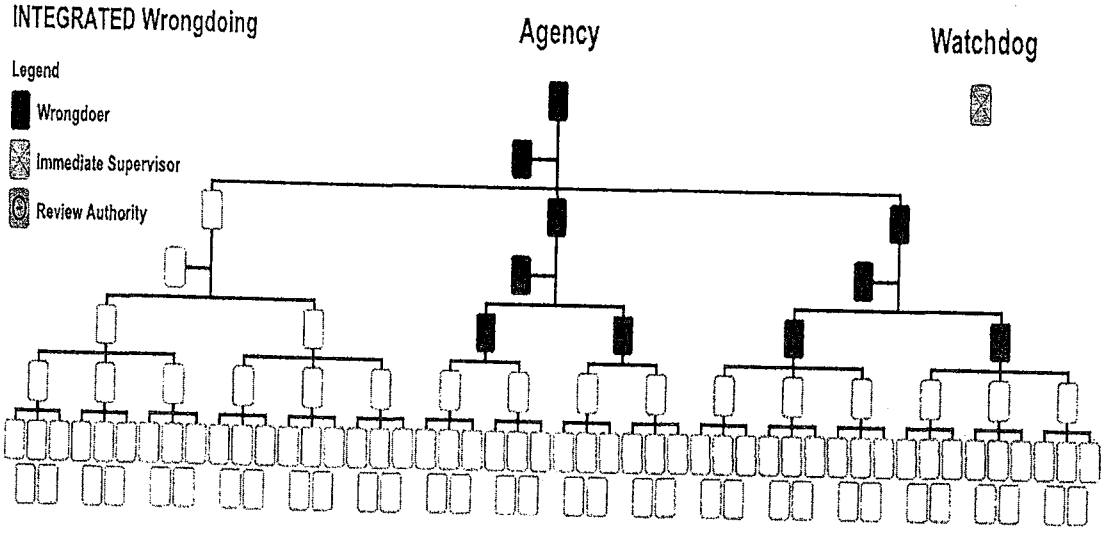

Figure 2: A Representative Mapping of Nested 'INTEGRATED' Wrongdoing in an Organisation

1.9.14. The practices become a part of the organisation's methodology, as can the practices used to cover-up and to protect the cover-up of the practice seen as essential to the strategic survival of the agency. They can involve the Minister's Office where, say, a dam is built in the Minister's electorate.

1.9.15. In Figure 2 for a politicized agency, the boss, be that the Minister and / or the CEO, and a majority of the Executive Team, with the bulk of the Staff Officers who have a role in reporting the wrongdoing, including the most senior of these officers, are also involved, by commission or by omission, in the wrongdoing.

1.9.16. The situation where a watchdog refers a disclosure against an organization back to the organization that is the subject of the allegation, may show an integration of the wrongdoing processes into the processes of the watchdog.

1.9.17. Such arrangements may act to deny access to a watchdog and to a fair, thorough and proper review of disclosures by an ethical manager or worker. Systemic 'trucking' of documents to cabinet meetings to gain the 'cabinet exemption' may also show systemic corruption processes, integrated into pre-existing FOI procedures of the agency and into the processes of the Cabinet.

1.9.18. Codes of Conduct and Whistleblowing procedures in organisations displaying the Integrated level of systemic corruption are designed, typically, to force the disclosure to be directed to a 'safe' officer ['safe' meaning protective of the wrongdoers].

1.9.19. From the safe officer, any threat can be controlled by Denial, Delay, Destroying of evidence and Discrediting / Dismissal of the ethical worker. This 'Safe Officer Catch' of the ethical worker extends the integration of the wrongdoing from operations into the Human Resource Management functions of the organization.

1.9.20. A description of the full five levels of corruption within organisations is provided at appendix I.

1.9.21. If we return to the Public Servant / Ministerial Office situations to be considered by the CMC Review, there are at least two different sets of circumstances that can be analysed consistent with the 5 levels model of systemic corruption in organisations:

- The Ad Hoc wrongdoing scenario, where ***the occasional and sparse wrongdoing, involving an individual, or a small group of individuals*** is occurring within the Ministerial Office;

- The Integrated Wrongdoing scenario, where commission of and compliance with the wrongdoing within the Ministerial Office has been extended into the agency, to the Agency's Head and to the majority of the SES.

1.9.22. If we re-look at Figures 1 and 2 again for these two scenarios, both become the same figure with respect to the critical review function - in both figures, there is only one body with authority above the source of the wrongdoing – the watchdog.

1.9.23. This emphasizes the importance of the watchdog to the processes for dealing with both situations of wrongdoing in the Ministers Office – the 'Ad Hoc' wrongdoing and the 'Integrated' wrongdoing scenarios.

1.9.24. Corruption or wrongdoing in the Ad Hoc Wrongdoing scenario may **not be systemic,** for example, the rogue MA.

1.9.25. The INTEGRATED Wrongdoing scenario, however, is a case of **systemic corruption.**

1.10. Acknowledgement of systemic corruption.

1.10.1. To deal fully with the problem of Ministerial Office/Public Servant interactions, it follows, there needs to be a recognition of the possibility that not all improprieties in a Ministerial Office will be 'Ad Hoc' in nature.

1.10.2. The CMC and its predecessor, the CJC, have a long history, in the view of their critics including whistleblower organisations, of understating the seriousness of wrongdoing in the Public Service in Queensland since the Fitzgerald Reform Processes have been 'adopted' by government.

1.10.3. The most recent example of this apparent blindness to the realities of the corruption levels in the Queensland Public Service is the study into whistleblowing conducted by the Griffith University during 2005 to 2008.

1.10.4. This Study was steered by the CMC with other watchdogs.

1.10.5. The Griffith University Study [GUS] gained a rating as 'Dangerous' with respect to the recommendations that the Study gave regarding the treatment and management of whistleblowing (McMahon, 2009).

1.10.6. One of the principal reasons for the 'Dangerous' rating was that GUS almost entirely disregarded the possibility that agencies could be systemically corrupted. Recommendations founded upon an assumption that corruption in agencies was only and always 'Ad Hoc' can be very dangerous for the ethical manager or staff worker when the agency and/or watchdog has become systemically corrupt.

1.10.7. GUS was, however, rated as 'Valuable' with respect to certain descriptors it gave of the behaviour of public servants confronted with the levels of corruption that exist in the various agencies from which data was drawn.

1.10.8. An analysis of this data is given in Appendix 2. The conclusion is very strong, that systemic corruption does exist in a significant number of the agencies

surveyed in the Study. The strength of that conclusion appears to be three times that of any conclusion that corruption is 'Ad Hoc'.

1.10.9. This current review, if it too presumes that any corruption involving Ministerial Offices is only 'Ad Hoc', may also gain a rating of 'Dangerous' to ethical managers who act or are forced to act on any course of action based on this presumption, when the Ministerial Office is itself systemically corrupt or carries out a part of a function that has been corrupted systemically.

1.11. Reaction to Freedom Of Information Legislation.

1.11.1. This legislation is a key candidate as the cause for the increase in corruption levels in the Qld Public Service announced by Col Dillon in 2007 and by Tony Fitzgerald in 2009.

1.11.2. With the 'Minister for Everything', Russ Hinze, from the National Party Government in the days before the politicization of the Qld Public Service, public servants were not subjected to reprisals for reporting fearlessly. If Hinze wanted, say, to go ahead with an infrastructure proposal where a public servant had recommended against the proposal, Hinze would get another report done by a private enterprise consultant, and act upon that advice. Hinze appeared to value knowledge of the problems with proposals.

1.11.3. Minister Hinze, however, never had the concern that members of the community could make an application for all Departmental documents dealing with the proposal. Since the FOI legislation has come into force, many practices have arisen to ensure that politically sensitive material does not get into the hands of the opposition, either by direct FOI application or by FOI through the media application or by application by community members or by whistleblowers. Those tactics include:

- **Nil generation of documentation**, allegedly, say, at planning meetings for electricity supplies, all records being on whiteboards with minimal or no minutes
- **Destruction or disposal of the documents**, allegedly, say, by a direction or agreement coming back from the Premiers Department for an originating document and all copies held by the stakeholder agencies and the Premiers Department to be destroyed, where the document was critical of, say, discharges from a new development into a dam,
- **Hiding of documents**, allegedly, say, by Secret Codeword files not included in FOI searches, files held in the cars and homes of public servants, files posted to private persons, other organisations like unions or consultants or to lawyers for safe-keeping, parallel files held at the Office of the Crown Solicitor with documents some of which are not on the file available for FOI, and in switching the documents across drawers of

Service Agencies providing document management for multiple departments, and

- **Seeking exemptions** available under FOI, allegedly, such as 'commercial in confidence', say, to justify denying the victim of an accident the names of witnesses to the accident when the agency is allegedly insuring itself against such claims

1.11.4. The FOI reaction can also fuse with the past alleged corruption with respect to the destruction of the Heiner documents. The CJC had allegedly told a whistleblower, codenamed 'RAINBOW' by the Agency at issue, that the CMC would not investigate RAINBOW's disclosures about the agency's alleged disposal of documents sought for legal proceedings, if RAINBOW was going to criticise the CJC. Before RAINBOW went in to the CMC for interview, RAINBOW wanted the CMC to clarify its position over destruction of documents wanted for court proceedings, given the wide criticism by eminent legal authorities of the CMC's position over the Heiner documents. RAINBOW was in fact making a disclosure to the CMC of alleged suspected official misconduct by previous CMC / CJC officers over the Heiner Affair. This denial of an investigation of RAINBOW's claims appeared to be, WAG alleges, a reprisal by the CMC / CJC – it appeared to be a disadvantage imposed against RAINBOW for the reason that RAINBOW was making disclosures about the wrongdoing by the CJC in the interpretation of the law that the CJC had adopted over the Heiner Affair.

1.11.5. The essential situation was that the CJC / CMC would investigate destruction / disposal of documents required by RAINBOW for litigation, if RAINBOW did not criticise CMC's assertion (during the Heiner Affair) that such destruction was quite legal. This was yet **another 'Catch 22'** – the CMC would investigate if the whistleblower agreed that there was no breach of the law, but if the whistleblower maintained that the law was broken when documents wanted for legal proceedings were destroyed, the CMC would not investigate.

1.11.6. It is strongly open to suggest that this conduct may have been a self-serving position benefitting the CMC (and its predecessor the CJC) while disadvantaging both the whistleblower, other would-be whistleblowers caught up in a similar prima facie obstruction of justice disclosure, and the public interest. It is simply unarguable that the deliberate destruction/disposal, by the government itself, of documents known to be required in pending/impending judicial proceedings does not undermine the administration of justice or public confidence in government (See *R v Ensbey*; *R v Murphy*, and *R v Rogerson*].

1.12. Summary.

1.12.1. The context to the problem being addressed by the CMC Review may have the following essential elements:

1. The issues are arising within a politicized bureaucracy, which may be superimposing its structure and power relationships upon the public service agency

2. The corruption that can occur in an agency can become systemic

3. Whether the level of corruption is systemic or non-systemic, the relevant watchdog is critical to dealing with that corruption

4. The ethical managers interfacing with the Ministerial Offices are in a very good position to know what the corruption situation and extent is within the agency, the administrative function, the public service, the government and the agency's relevant watchdogs

5. Political efforts to prevent politically damaging information getting to the Opposition may have built up a system that lies ready to be used for other purposes. Already and recently, these devices appear to have played a part in allegedly covering-up suspected manslaughter and other forms of mistreatment of patients at Hospitals. The other purposes may have included the prevention of evidence surfacing regarding reprisals against ethical Managers who challenge Ministerial directions of questionable character. The ethical Manager would be expected to know this, and be reminded about it during the trial of Dr Patel, because of the adverse findings made by the related Davies Inquiry against public servants in managerial roles (Davies 2005).

In the Health Inquiry into events at Bundaberg Hospital, Commissioner Davies gave five deficiencies that caused the problems in Queensland Health. The fifth deficiency was what Davies described as ***'the culture of concealment in Government'*** (Davies, 2005).

This **Fifth Deficiency** was the cause Davies attributed to **the reprisals** that he found had occurred in the Health arm of the Public Service.

2. PROCEDURES.

2.1. The procedures that appear relevant to the issue, against these points of context, are:

- Procedures within the Agency, namely:
  - Disclosure procedures, to express the challenge or to question the inappropriate direction;
  - Referral procedures, to admit the watchdog to the issue where required by law; and,
  - Grievance procedures, to address any reprisal arising therefrom, and,
- Procedures within the Watchdog Authority

2.2. Disclosure Procedures.

2.2.1. These exist, and they allow the ethical manager to disclose to the Head of the agency or to the relevant watchdog.

2.2.2. If the Watchdog returns the disclosure to the Ministerial Office or to the Head of the Agency, however, that endangers the ethical manager. The Watchdog is more likely to do this where it lacks independence or itself has been politicized.

2.2.3. The ethical Manager, facing the situation with the Ministerial Office, is likely to be able to gauge what is likely to happen, and the extent of politicization of the Agency and of the Watchdog. The ethical Manager will be able to judge whether there is any real chance of the Head of Agency, or the Watchdog, responding properly to the disclosure and/or carrying out or allowing reprisals against the ethical Manager.

2.2.4. In Queensland currently, it may be very dangerous, we allege, for an ethical manager to rely on the watchdogs, Office of the Ombudsman [OMBO], Office of the Information Commission [ICO], State Archives, Office of the Public Service [OPS] or CMC, without a well informed analysis of the political will regarding the issue and regarding the Ministerial Office.

2.2.5. A classic integration of agency and OMBO and CMC procedures, allegedly corrupting the system of ethical and public interest disclosure procedures, is for the 'independent watchdog' to receive the disclosure and 'post' it, in inappropriate circumstances, to the agency about whom the disclosure has been made. It is termed the 'post office' tactic.

2.2.6. The OMBO and the CMC engage regularly, some say almost exclusively, in the 'post office' tactic of sending disclosures back to the agency. Whistleblowers allege that this has occurred in inappropriate circumstances.

2.2.7. Where they have the statutory authority to act on a matter, the watchdog may refer the matter to a political authority in lieu of acting in accordance with their statutory role. That is politicization in action. The statutory role may only be applied with politically based approval.

2.2.8. The CMC, for example, have received advice from the Police Commissioner that the destruction of the Heiner documents may need to be reconsidered in the wake of the 2004 *Ensbey* verdict which exposed the nonsense of the CJC/CMC's earlier interpretation of the law used to clear the alleged wrongdoers of their alleged (shredding) wrongdoing. When asked by WAG why the CMC had not acted on the matter, the CMC stated that they could not act as the Director of Public Prosecutions [DPP] held the responsibilities for prosecutions. On contacting the Department of Justice, the Attorney General, a political appointment, replied in

2009 that it was not in the public interest to pursue the matter of the destruction of the Heiner documents.

2.2.9. In this sense, this CMC Review may be about how the CMC can itself be helped to question this direction from the politically filled justice position at the Office of the Attorney General. Or it might be about how to assist cabinet secretaries to handle a situation when Cabinet decides to destroy documents being sought for impending judicial proceedings. Or it might be about how to assist commissioners of inquiries to refuse interference fromPremiers with into what their inquiry will take evidence

2.2.10. An improvement would be established with the setting up of a further watchdog, a **Whistleblower Protection Authority** [WPA], separated from the above watchdogs. It is recommended that the establishment of an independent watchdog, a **Whistleblower Protection Authority** [WPA] be adopted. The WPA would report directly to Parliament in the same manner as do the Ombudsman and Auditor-General, with its head appointed as an officer of the Parliament and only capable of removal in the same manner as may occur with the Ombudsman and Auditor-General.

2.2.11. The WPA would provide an additional avenue for making disclosures anonymously, if it too was not politicized or compromised by a political appointment. It could also report watchdogs that engage in 'post office' tactics inappropriately, and watchdogs that have referred, to politically filled positions (i.e. the Attorney-General), decisions for which the watchdog held statutory authority to act.

2.2.12. Unless an independent authority like the recommended WPA is established, it becomes unavoidable and necessary that the independence of the Attorney-General, as 'guardian of the public interest", should be revisited. EARC (and Commissioner Fitzgerald) recognized this in 1992-93. The review would be to see whether or not this important accountability/rule of law function would better to exist outside the constraints and considerations of Cabinet. An unacceptable tension presently exists between the Attorney-General's two roles as (a) a member of a 'political' Cabinet involving Cabinet solidarity and confidentiality, and (b) "guardian of the public interest" as first Law Office of the State. A matter concerning government by the rule of law may arise whereby a choice has to be made between the two and, in 'unicameral' Queensland, a history exists showing that political expediency prevails over obedience to the law.

2.3. Referral Procedures.

2.3.1. These exist, but it appears that they may be being selectively applied.

2.3.2. The worst examples appear to come from the record of the ICO and OMBO, which allegedly may have refused to refer any suspected official misconduct to

the CMC. Other watchdogs, such as the Queensland Industrial Relations Commission, may have allegedly followed the example and the argument of the ICO and OMBO – to the ethical Manager, the message from these watchdogs appears to be "*Do it yourself*!", in alleged breach of the (Criminal Justice Act previously and now the) Crime & Misconduct Act.

2.3.3. The OPS, on the other hand, can cite examples of where it has referred matters to the CMC.

2.3.4. A classic integration of OMBO and CMC procedures, to overcome any referrals by the OPS, and allegedly corrupting the system of whistleblower protection procedures, is as follows:

- The CMC refuses to consider a matter referred to it, claiming that the matter does not give rise to a suspicion of official misconduct, but that it may concern maladministration, the province of the OMBO. The CMC does not itself refer the matter to the OMBO, but requires the whistleblower to do the referral;
- The OMBO refuses to consider the same matter, because it is associated with allegations of suspected official misconduct, which is the province of the CMC. The OMBO does not refer the matter to the CMC, but requires the whistleblower to do the referral;
- Both the CMC and the OMBO do this in the knowledge of each others claims and inaction.
- Both the CMC and the OMBO then reply to any further correspondence from the whistleblower with the decree that the matter will not be considered by them again.

For example, the disclosure by an ethical Manager that she has been transferred to a lower level position or to a gulag because the ethical Manager made a disclosure against the Minister, MA or Agency Head-

The CMC can state that the allegation is not suspected official misconduct, say, because the CMC has no evidence before it that the reason for the transfer was because the ethical Manager had made the earlier disclosure – the CMC decides not to investigate

The OMBO can state that the alleged maladministration (forced transfer to a lower level position) is associated with an allegation of suspected official misconduct (the reprisal), and requires that the ethical Manager refers the allegation to the CMC – the OMBO decides not to investigate

2.3.5. An improvement would be to establish a Whistleblowers Protection Authority that could report watchdogs that engage in alleged 'Catch 22' or other elegant forms of alleged systemic corruption of their roles. The WPA could also report:

- failures by the OMBO, ICO, QIRC, the Courts and other watchdogs, as well as failures by agencies, to refer suspected official misconduct to the CMC, and,

- failures by the ICO and the CMC to refer suspected maladministration to the OMBO

2.3.6. There are some other circumstances about the referral procedures of the watchdogs that would concern the ethical Manager.

- When the OPS refers a disclosure to the CMC, the CMC can claim that it was 'sent' or 'discussed' with the CMC, rather than 'referred' to the CMC
- The ICO and the OMBO can claim that they can only come to suspect official misconduct, in a disclosure made to them, if they read the disclosure for that purpose. These Offices claim further that they would never do that, as suspected official misconduct is not within their jurisdiction
- When these Offices read any disclosure for matters within their jurisdiction, they claim the ability only to recognize that allegations made are associated with allegations of suspected official misconduct, but not that their readings give rise in them of such a suspicion.

2.3.7. These claims may be alleged systemic corruption, because coming to a suspicion that official misconduct may have occurred is within the responsibility of every Agency Head, every public servant and every watchdog authority where the information disclosed gives rise, reasonably, to any suspicion. This duty arises, not because the reader has to investigate the claim, but because the reader has the duty to refer any suspicion to the CMC. Whereas on individual cases a suspicion might not be formed, the general claim that suspicions will not arise except through a particular process may be a systemic avoidance of the duty to refer those cases where the suspicion may arise. Blatant disclosures, say, a document by an officer admitting to having disposed of a document being sought under discovery procedures of a Court case, should, upon its mere reading by an officer with skills and abilities sufficient to be appointed to ICO or OMBO, give rise to at least the suspicion. The serious issue of the offence, willful blindness, appears to have no ethical bind on such investigative officials, let alone the mandatory duty on them under the (defunct) *Criminal Justice Act 1989* and the *Crime and Misconduct Act 2001* to refer any suspected official misconduct which may come to their attention in the course of performing their public duty. It may often be the case here of - *there are none so blind as those who wish not to see.*

2.3.8. Systemic corruption of the duty to refer to the CMC may also arise where procedures are adopted requiring the allegation of official misconduct to be proven to have occurred before a referral is made, rather than the lower requirement of a reasonable suspicion that official misconduct may have occurred.

2.4. Grievance Procedures.

2.4.1. The ethical Manager, because of their position in the organisation, will likely know whether or not the agency responds to grievances in a thorough, fair and

impartial manner. These grievance and appeal procedures are available to officers below the SES who get caught up with wrongdoing by the Ministerial Office. They will know of the support or otherwise that the agency gets from the OPS if and when the agency decides not to investigate grievances.

2.4.2. A classic integration of agency and OPS procedures, allegedly corrupting the system of agency grievance and OPS Fair Treatment Appeals or equivalents, is as follows:

- The Grievance lodged by the ethical Manager is not investigated or replied to by the Agency Head, effectively dismissing it without detailed reasons required by natural justice. It is dismissed in effect if the Manager does nothing more
- If the ethical Manager appeals the grievance to the OPS, the Manager goes into the Appeal process without the reasons upon which to base their appeal, a significant disadvantage in preparing for the appeal. The reasons can be given during the hearing, which the appellant would need to deal with 'off the cuff'
- If the Manager appeals not the Grievance, but appeals instead the Failure to Investigate the Grievance [or FIG], seeking an order to be given to the Agency Head to comply with the Grievance procedures and thus to investigate the Grievance and give reasons for any decision, the OPS can:
    - Hear the appeal about the Grievance, not the FIG appeal, even though this Grievance appeal has not been lodged
    - If the ethical Manager refers to the section of the legislation that states that the OPS can only hear the appeal that is lodged, the OPS can state that they need to hear the original Grievance in order to judge the FIG decision not to investigate the original grievance
    - The OPS then
        - hears the appeal that has not been lodged, and
        - makes a decision on the appeal that has not been lodged, and then
        - directs the agency to give the ethical Manager the reasons for the agency decision on the Grievance which has already been heard and decided before the appeal was lodged

2.4.3. The ethical Manager gets the Agency's reasons, but only after the whole grievance and appeal process has been completed. Some call this 'process reversal', but those that carry it out may see it for its 'elegance'.

2.4.4. Managers at a level or in a position of importance are likely to know the practices of the OPS in supporting or undermining the Grievance and Appeal procedures when it comes to the issues of the Agency.

2.4.5. The ethical Manager is likely to know of any working relationships developed between the HR Manager at the Agency and the Appeal operatives at OPS, and whether this relationship is used to warn OPS of 'troublemakers' and other likelihoods of pre-judgment.

2.4.6. The ethical Manager is likely therefore to be in a position to appreciate whether the system is likely to support any appropriate questioning of inappropriate directions from the Ministerial Office.

2.4.7. An improvement would be to establish a Whistleblowers Protection Authority that could report watchdogs that engage in process reversals and other forms of process denials, with respect to complaints about reprisals or maladministration diminishing their employment.

2.5. Summary

2.5.1. A consideration of the protocols, procedures and constraints that might be applied to address the issue shows that the procedures already exist.

2.5.2. The problem is that they are not being applied in many instances, by either the agencies or by the watchdogs.

2.5.3. In particular, the watchdogs, seen from our consideration of context as critical to the management of the Ministerial Office/Public Servant interaction, have a poor record in support of such public servants.

2.5.4. Whistleblowers have shared their experiences of the watchdogs. The SES and other staff in important locations within agencies also have seen more of the detail as to how watchdogs behave in a politicized public service.

2.5.5. GUS showed some value where it identified the following characteristics about wrongdoing in the Public Service:

> The managers with the lowest opinions of organisational success in protecting whistleblowers had the most accurate opinions about their organisations [GUS I, p34].
>
> The senior staff and the managers suggested that an agency that has developed whistleblower procedures is more likely to perform poorly in protecting whistleblowers:
>
> > ***...senior staff were more confident of the likely management response in agencies with less comprehensive procedures, and were less confident in those agencies with stronger procedures.*** [GUS I, p122; see also GUS II, p253-4]
>
> The best aspects of the existing whistleblowing procedures are those dealing with reporting, but
>
> > ***The weakest areas were those associated with whistleblower protection and support.*** [GUS II, p246 & 257]

2.5.6. The senior staff and managers are savvy to what agencies and watchdogs intend. They are above the spin, and, like the community of whistleblowers (but from the other side of the table) have seen, read and heard the reality.

2.5.7. A **Whistleblower Protection Authority [WPA]** would assist ensuring that the procedures that do exist, pertaining to the making of disclosures and to the protection of ethical Managers, would be thoroughly, fairly and impartially applied without elegance or tricks.

2.5.8. The WPA can be infiltrated by politicization too. While it can achieve independence, it can ensure that the ethical Manager survives, as while the Manager survives, so does the disclosure and the pressure upon the agency to address the wrongdoing.

3. EMPOWERMENT

3.1. The issue of 'understanding their obligation', as proposed by the third question that the CMC would like to answer from this Review, may be misplaced.

3.2. The senior staff and managers have a good understanding of the natters essential to their decision-making whether or not to challenge questionable directions from and practices by Ministerial Offices.

3.3. One whistleblower was code named 'Warrior' by the relevant agency who removed the documentation from the personnel file of Warrior and placed it on a secret 'Warrior' file. This is another tactic to avoid FOI, now Right to Information legislation, used or encouraged allegedly by Justice authorities within the Qld Public Service with respect to ethical Managers who have made serious disclosures.

3.4. Warrior has recalled a moment of truth that Warrior had with the agency senior management. At that time, 'Warrior' was allegedly under continual harassment and victimization at the hands of senior managers, after Warrior had made public interest disclosures about the agency, the watchdogs and the Minister. Warrior was in the 'departure lounge' being threatened, allegedly, with being sent to 'a gulag'.

3.5. One day, Warrior was called to the office of a senior manager. Expecting more harassment, Warrior was surprised to be offered a cup of tea and biscuits. The Senior Manager then informed the whistleblower that the CEO was very concerned about (alleged) actions by the Minister to interfere with female staff in the Ministerial Office. It was an utter disgrace, and someone should report the Minister to the authorities. The invitation was put to Warrior regarding how the matter should be addressed.

3.6. Warrior recalled that Warrior's decision-making was based on a judgment as to what would happen to Warrior if Warrior did what was being asked, and disclosed the actions of the Minister to appropriate authorities.

3.7. There was no lack of understanding of procedure, but there was a lack of credibility held by the CEO and the senior officer, and a lack of trust held by Warrior in the CEO. The watchdog was also knowledgeable as to how the watchdogs had performed in support of the major whistleblowers Dillon, Lindeberg and Leggate.

3.8. Warrior did not make any disclosure about the Minister's alleged behaviour.

3.9. The Dillon, Lindeberg and Leggate cases, all pursued in the media during 2009, render the credibility of the political independence of the CMC a major factor to decision-making. The three cases were very much alive in the logic used by Warrior. The three cases would remain alive in the minds of any ethical manager contemplating disclosures against a Minister or Agency Head.

3.10. Description of relevant matters of these cases is provided to account for what a savvy manager would be expected to have learned about the watchdog, CMC, concerning its handling of allegations of suspected official misconduct.

3.1. Dillon.

3.1.1. The savvy ethical Manager would know, from media coverage, that

- Dillon was a hero whistleblower under the National Party Government who made disclosures about police corruption that provided momentum to the Fitzgerald Inquiry;

- Dillon acted as Chair on the CMC's A&TSI Consultative Committee, and pressured the CMC to conduct inquiries into alleged mistreatment of indigenous peoples, including the multiple pack rape of an aboriginal girl at the John Oxley Youth Centre by other male inmates during a supervised bush outing;

- Dillon in 2006 resigned his position as the Senior Advisor on Indigenous Affairs in the responsible Qld Government Department. At that time Dillon expressed condemnation of the failure to adequately investigate the Death In Custody of a prisoner at Palm Island. The investigation was allegedly conducted along the lines of police mates investigating fellow police mates, which was contrary in every respect to a principal recommendation arising out of the Royal Commission into Aboriginal Deaths in Custody (Muirhead & Johnston, 1991).

- Dillon further claimed, in 2007, that corruption in the Queensland Government was then worse than it had been under the National Party Government. The Police authorities, through the media, challenged Dillon to come forward with his evidence of corruption, and the CMC through the media opined that Dillon would not have current knowledge of what was occurring in the Police Force. Dillon stated in reply that the

allegations about the destruction of the Heiner documents would make a good start. The Heiner documents allegedly gave evidence, inter alia, to pack rape of a 14-year-old female indigenous child that Dillon had raised with the CMC on the A&TSI Consultative Committee. The Police, who have suggested themselves to the CMC that this matter should be reconsidered, made no further response through the media or privately, on an allegation upon which the Police and Dillon appear to agree. The CMC, who now hold the private recommendation from the Police Commissioner and the media-related recommendations from Dillon, made no further statements, public or private, about the currency of Dillon's knowledge about corruption in Queensland. The Police and CMC appear to have withdrawn from any challenge to Dillon, and, where Dillon has already accepted their challenge, appear unwilling to meet with him. Dillon's claim, that the system of government is now more corrupt than it was before Fitzgerald Inquiry, no longer has anyone speaking against Dillon's proposition

- Dillon's claims about the extent of corruption were supported in 2009 by Tony Fitzgerald (during his inaugural address to the Griffith University Fitzgerald Foundation) at how the administration of government was being conducted in Queensland, that it was showing signs that it had returned to the practices under the National Party Government; and

- Dillon's specific concerns about the Heiner Affair were supported, at a Corruption Conference in Brisbane during 2009, by former Head of ICAC, the CMC equivalent in NSW, the Hon Barry O'Keefe QC.

3.1.2. The Police Force allegedly acted to remove Dillon from the Police Force by harassment.

3.1.3. After the Fitzgerald Inquiry, Sgt Dillon was promoted to the rank of Inspector, but only after a successful grievance procedure following his being passed over by far more junior and less experienced officers. Then Dillon was placed in a position reporting to a non-uniformed public servant which was a clear departure from the traditional policing practice of reporting through his own policing ranks. Inspector Dillon was also then reporting to a public servant employed on a lower classification and pay scale to Dillon's rank of Inspector.

3.1.4. The anomaly and the impropriety of this treatment was recognised in writing by the first Head of the CJC, Sir Max Bingham, in a report on his Review of the post-Fitzgerald Police Service, made to the Police Minister, dated July 1996. After several months of inaction by the new order Police Commissioner concerning the Bingham report, Dillon sought an explanation as to why the anomaly was not being addressed. Dillon, however, was told by his superior officer, a Superintendent of Police, to whom Dillon should have been reporting to in the first instance, to return to his office and stop creating 'waves'.

3.1.5. No change was made to Inspector Dillon's work situation, and the recommendation of Sir Max Bingham was simply ignored.

3.1.6. The CMC had two representatives on the Committee that steered the Bingham Review, and the QPS had a senior officer who was the link between the QPS and the Committee. Yet nothing was ever done by the CMC or by the QPS to rectify Dillon's position which the Bingham Review and its Committee had termed as being 'anomalous in the extreme'.

3.1.7. This may have given a signal to the Qld Police Force, which later assigned Dillon to a 'corridor gulag', with no job, no office, no desk, no phone.

3.1.8. Pursuit of justice for Dillon by WAG, with the Parliamentary Crime & Misconduct Commission in a triennial review of the CMC, led to the PCMC releasing the WAG submission with all references to the Dillon experience whited out.

3.1.9. The point is, this is a well known performance by the CMC, and is a demonstration that:

- where an investigation by an eminent person had been completed (Bingham was the first Head of the CMC);
- where a finding had been made that a well credentialed ethical Manager was receiving 'extreme' mistreatment;
- where this report went to the Police Minister;
- where nothing was done within the Police Force to relieve the situation for Dillon after the disclosure was made by Bingham to the Police Minister;

the CMC failed to act to address the 'extreme' anomaly.

3.1.10. The first failing of the CMC is to carry out actions to protect whistleblowers where mistreatment of them is demonstrated and reported.

3.1.11. The savvy ethical Managers, faced with a questionable direction coming from the Minister's Office, will include in their appreciation of the situation that the CMC acted or failed to act in this way concerning another ethical Manager of national eminence.

3.2. Leggate.

3.2.1 The Leggate disclosures were that the Department of Mines, allegedly, had a policy of non-enforcement of the lease conditions given to mining companies or certain mining companies in Queensland.

3.2.2 Leggate disclosed a potential $2billion tax payer bill to rehabilitate abandoned mine sites and pollution sources for coastal streams that fed water supply aquifers and that flowed into waters over the Great Barrier Reef. The work, Leggate disclosed, should have been carried out by mining companies in accordance with the conditions of their mining leases.

3.2.3 The alleged reprisal against Leggate was to forcibly transfer him to a unit in another Department, in a lower level ungazetted position, reporting to an officer at the same classification level as Leggate.

3.2.4 Regarding the failure by the Department of Mines to enforce the environmental laws of the state, the CJC excused the authorities of suspected official misconduct. The CJC did this by claiming that the non-enforcement did not constitute official misconduct, because everyone knew that the Qld Government had a policy of non-enforcement.

3.2.5 This argument is a nonsense. There is no provision at law that excuses or allows criminal activity on the basis that 'everyone' knows that the law-breaking was being allowed by policy.

3.2.6 Mr. Tim Carmody QC - later to become the head of the Queensland Crime Commission - explained the legal situation associated with the Leggate Disclosures when Carmody was representing Counsel Assisting the 1996/97 Connolly-Ryan Inquiry. Mr. Carmody found that the Leggate disclosures did constitute a *prima facie* allegation of official misconduct.

3.2.7 Regarding the forced transfer, the CMC appear disinterested in making the investigation necessary to prove or disprove the disadvantage suffered by Leggate in his employment.

3.2.8 The CJC (now CMC) misstatement of the law occurred while referring to Mr Leggate's complaint about an earlier opinion given by CJC officer Thomas (Mr. Barry J Thomas opined to the Senate Select Committee on Public Interest Whistleblowing that Mr. Leggate had made a 'voluntary choice, clearly motivated by difficulties within the department' to accept the transfer).

3.2.9 The CJC, the second time around, before the Connolly Ryan Inquiry, had to admit that Mr Leggate 'had little say in the matter', but then invented a new argument to support the 'Do nothing' option regarding the transfer. This new argument was that whether Mr Leggate had a choice or not was 'semantics' and 'irrelevant'.

> *whether or not Mr Leggate was afforded any real choice is irrelevant – no person can be said to have committed any act of official misconduct.*

3.2.10 This clearly might not be the case, because transfers could only be forced upon an officer if the transfer was to a position at the same level as the position held.

3.2.11 Ostensibly, Leggate was paid the same salary. Salary level paid to the officer, however, does not determine the responsibility level carried by the position - it goes the other way round – responsibility levels determine the salary. If the new position does not have the classification level, based on responsibilities of the position, to justify the salary paid, the transfer would not be 'at level'.

3.2.12 To prove the classification level, the CMC would need to get an evaluation done of the position. If the evaluation process rated the position at a responsibility level below a PO4 level, the transfer would NOT have been 'at level'.

3.2.13 There was cause to make this evaluation, as Department of Primary Industries documentation described the position to which Mr. Leggate was transferred as a PO3 level position, reporting to a PO4 level officer. The job to which Leggate had been appointed at the Mines Department was a PO4 level position. Prima facie, the position to which Mr Leggate was forced to transfer was at a lower level than the position in the Mines Department from which Leggate had been transferred

3.2.14 The savvy ethical Manager would likely know about the alleged mistreatment received by mines inspector, Jim Leggate, who said 'No' to the Minister who allegedly may not have enforced the rehabilitation of mine sites. This expectation exists because:

1. Jim Leggate is one of the eleven cases included in Quentin Dempster's book, 'Whistleblowing'. Dempster recognized Leggate as the first whistleblower to demonstrate the phenomenon of Regulatory Capture. 'Regulatory Capture' occurs where a watchdog, such as an Office of an Ombudsman, is turned from investigating wrongdoing by agencies to protecting the agencies from investigation of alleged wrongdoing

2. The disclosures by Leggate before the Matthews Inquiry (Matthews QC, 1994). heavily influenced the leading work on 'Regulatory Capture' by Briody and Prenzler, one of whose papers on the phenomenon was complimented by the West Australian Royal Commission on Finance Broking (Temby QC, 2001)

3. The Leggate disclosures featured in several rounds of national media interest, one being when Leggate was re-appointed to a position in the Mines Department, only to have the appointment quashed, allegedly, before Leggate took up the position, and another when Leggate's supervisor allegedly admitted on a TV interview the reason for removing Leggate

4. Leggate's disclosures obtained further acknowledgement in the media in 2009, when a Minister in Queensland was jailed for receiving bribes from mining interests, and faces charges in 2010 for bribes from other mining interests. Certain of the parties are linked to mines about which Leggate made disclosures

3.2.15. The Leggate case may be information tending to show that, allegedly:

- The CMC may have used rogue legal opinions to dismiss any wrongdoing disclosed by an ethical Manager about politicians in power, and
- The CMC may have avoided the obvious enquiry that would establish wrongdoing against the ethical Manager by politicians in power

3.2.16. There are many other cases that give rise to concerns about the intentions of the CMC. Not all could be expected to be generally known by senior staff and Managers in all agencies because these other cases did not get the national media exposure that Dillon and Leggate did receive. Each agency may have their own special cases known to the senior staff of that agency.

3.3. CMC Inquiry into OPS.

3.3.1. One further case that would be known, however, is the CMC Inquiry into the Commissioners at the OPS. During that inquiry, the Equity Commissioner resigned and the Public Service Commissioner, it appears, may have been demoted.

3.3.2. Ostensibly, this would seem to be action tending to support the CMC's intentions to deal with wrongdoing. Whistleblowers, however, obtained an insight to the CMC during that time that may detract from that assessment.

3.3.3. A number of whistleblowers approached the CMC with information about alleged reprisals and breaches of procedures that had occurred when other disclosures had been taken to the same two commissioners. In every case known to WAG, the CMC stated that they were not opening their inquiry to other similar allegations.

3.3.4. In this case, these refusals are information tending to show that the CMC may have seen its role as containing the disclosures about the way that the OPS may have been operating, rather than have seen its role as seeking out any similar fact evidence of threats and denial of process towards ethical Managers.

3.3.5. This is what allegedly happened with the 1998/99 Forde Commission of Inquiry into child abuse in Queensland institutions, in particular, at the John Oxley Youth Detention Centre. The Forde Inquiry refused to investigate the actual shredding of evidence of known child abuse, the shredding allegedly undertaken by order from the Queensland Cabinet in March 1990. The Forde Inquiry

claimed that the shredding purportedly fell outside the Inquiry's terms of reference. The Forde Inquiry stated that it would investigate the incidents of child abuse at John Oxley Youth Detention Centre, but would not investigate the destruction of evidence of such abuse. Any plain reading of the Forde Inquiry's terms of reference cannot sustain such an 'exemption' claim [see Terms of Reference A, and B(i)]. The exemption was, however, adopted against the background of the Queensland Government, declaring in the media beforehand, that the Government's own shredding conduct was out of bounds. It is open to suggest that such alleged 'instructions by media' from a politician (see article by Morley, *The Courier-Mail,* 8 August 1998, Premier Beattie said "*...the machinations that followed a previous, ill-fated inquiry into the John Oxley Youth Detention Centre have been ruled out of bounds*"), or anyone, may represent serious *prima facie* unacceptable interference with or attempt to influence the proper conduct of a lawful authority's function, and ought to have been ignored.

3.4. Other Watchdogs

3.4.1. The Office of Ombudsman also has practices of which the savvy ethical Manager would likely be aware.

3.4.2. With the 'Post Office' tactic, or 'Pass the Parcel' as it is also termed by nurses and teachers, the OMBO refers a complaint about an agency back to the agency. Typically, the whistleblower then suffers a punitive transfer or other mistreatment.

3.4.3. The OMBO has shown to many ethical Managers little interest in disclosures of alleged punitive transfers, as were allegedly imposed on both Col Dillon and Jim Leggate, which allegedly forced them to resign.

3.4.4. The agencies typically effect the transfer by maintaining the whistleblower's pay, but put them in jobs with lower levels of responsibility, with no office or desk (Dillon), or with a desk half in the corridor (Leggate), allegedly. Disclosures of such transfers went to the Office in its role as Ombudsman, and in its role as Information Commission, when these roles were joint roles, and the whistleblower was seeking information about the forced transfer.

3.4.5. As described with the Leggate case, the agency claims that the new position has the same level of responsibility, because it is being paid the same salary. The agency needs to argue this, because the power to force a transfer exists only if the new position is at the same level. The OMBO, like the CMC, has failed to investigate the level of the new position, using the approved classification methods.

3.4.6. There have been cases where the whistleblower has produced evidence, including having paid for an expert to evaluate the level of the position. Where the evidence has tended to show that the level of the position is lower, the OMBO

has replied, it has been alleged, that the action to transfer may have been 'technically' wrong, but that the agency acted in 'good faith'.

3.4.7. The CMC recently took action against police officers for this type of 'noble cause' or 'good faith' wrongdoing. The OMBO, however, appears to be unfettered in the use of this alleged wrongdoing, it is alleged.

3.4.8. When then a whistleblower has disclosed information tending to show bad faith by the agency, the OMBO / ICO has argued, allegedly, that it can not believe that public servants would all act in that way. The reliance on the belief held by these Offices as to what occurred, rather than a reliance on the information to the contrary, has aroused suspicion as to whether these Offices of OMBO / ICO have been subjected to 'capture' on some issues with some cases.

3.4.9. One alleged practice by the Office of Ombudsman with respect to allegedly punitive transfers is of great concern should the Ombudsman become the protector of whistleblowers. Here, the CJC/CMC refuse to investigate the punitive transfer (as a reprisal) because, it argues, the improper transfer may be maladministration, the province of the Ombudsman. The Office of Ombudsman allegedly refuses to investigate the transfer as maladministration, because it is associated with allegations of official misconduct (the reprisal), which is the province of the CJC/CMC. The ethical Manager would then be 'snookered', with no where to take the disclosure. A 'Catch 22' situation can be developed, where no investigation of the punitive transfer is done by either watchdog, with full knowledge that the other watchdog is also refusing to investigate.

3.4.10. The Ombudsman's role in this alleged obstruction is primary, because the allegation of maladministration is the easier to prove. The argument by the Office of Ombudsman has the effect of inducing the ethical Manager to withdraw the allegation of reprisal. If the whistleblower withdraws the allegation of reprisal, the allegation of maladministration then may have to survive the gauntlet of arguments from the OMBO based on 'noble cause' or 'good faith' wrongdoing, 'technical' wrongdoing and the Office's 'beliefs'. If the allegation of reprisal is not withdrawn, the merits of the matter are never addressed.

3.4.11. This alleged practice by the OMBO / ICO and the CMC has the features of a system in which allegations of reprisal associated with punitive transfers can not survive without a separate Whistleblower Protection Body alerting the government to any Catch 22 decisions by the two Investigatory bodies.

3.5. Summary.

3.5.1. The savvy ethical Manager is likely to have received sufficient information on the performances of relevant watchdogs to give the Manager cause for concern in any action taken for which the Manager may need to rely on watchdogs for protection, or survival.

4. CONCLUSIONS

4.1.1. The problem is sourced in the politicization of the public service, the worst aspects of which appears:

- to have been initiated by a refusal to accept the Freedom of Information Act (now the Right to Information Act), and a proliferation of improper procedures to overcome that Act, including reprisals against ethical officers who disclose information to appropriate authorities;
- to have been facilitated by the veil over activities of agencies that the anti-FOI procedures have effected;
- to have been driven by Ministerial Advisers acting with unrestrained Ministerial authority within the agencies; and
- to have escaped correction from watchdog authorities when excesses including maladministration, and criminal acts have occurred and when ethical Managers have been mistreated to extreme levels

4.1.2. The senior staff and managers, in positions with a level or importance that has caused them to be interacting with the Ministerial Office, can be expected to be as knowledgeable and as understanding as whistleblowers as to what can happen if they too make ethical disclosures.

4.1.3. That knowledge and expectation dissuades such public servants from acting as Dillon, Leggate and Lindeberg did.

4.1.4. The solution appears to be focused on reversing the poor performances of watchdogs who stand discredited by their performance. This alleged return to integrity would be assisted by:

- A veto with specified accountabilities and penalties being placed regarding improper procedures being used by watchdogs

- The establishment of a new watchdog, a **Whistleblower Protection Authority**, independent from all existing authorities (not even in the same suburb as the Ombudsman who is asking for the role), one duty of which would be for the WPA to report on any new or continuing improper mechanisms being used by agencies and watchdogs. The WPA would report directly to Parliament in the same manner as do the Ombudsman and Auditor-General, with its head appointed as an officer of the Parliament and only capable of removal in the same manner as may occur with the Ombudsman and Auditor-General

- An inquiry into at least the Dillon, Leggate and Lindeberg cases, by an authority that has the power to recommend prosecutions and measures for restorative justice for these ethical Managers

4.1.5. As Harris (2006) stated:

> *"...The CMC has for the last ten years been part of the problem with criminal justice in this State, not part of the Fitzgerald solution.*
>
> *The CMC is in need of substantial reform.*
>
> *It must establish its independence from powers and authorities external to the organisation, and it must establish legal expertise and integrity within itself for the thorough, fair and impartial completion of its investigations.*
>
> *The Fitzgerald solution needs whistleblowers. Whistleblowers need the protection of a well resourced Whistleblower Protection Authority and balanced Whistleblower Protection Legislation. Only 'the Shield' of these two mechanisms will ensure that whistleblowers will not be subjected to reprisals for the disclosures that they make in the public interest.*
>
> *The Whistleblower Cases of National Significance, those of Messrs Dillon, Lindeberg and Leggate, including the disadvantages that they suffered in their careers because of the disclosures that they made for the benefit of the public interest in Queensland, should be the focus of an inquiry into the treatment of whistleblowers in this State."*

4.1.6. Extracts from Harris (2006), giving further detail and arguments along the themes expressed in this conclusion, are offered in Appendices 3 to 5.

G Harris
President

APPENDIX 1 TO
WAG SUBMISSION TO
CMC REVIEW OF MINISTERIAL INTERACTIONS

EXTRACT No. 1 from
'BLOWING THE WHISTLE ON THE WHISTLEBLOWING PROJECT'
A CRITICAL REVIEW OF THE GRIFFITH UNIVERSITY STUDY INTO WHISTLEBLOWING

[McMahon, 2009]

The Level of Systemic Wrongdoing. This question is another example of the type of insight available from a study of major whistleblower cases. The information gathered on grievances by the TWP survey is less likely to describe situations of systemic corruption than would information gathered from the major whistleblower cases.

Figure 7 is a representation of what is termed **'ad hoc'** wrongdoing. The wrongdoers are in black, their supervisor is in yellow or marked with a cross, and those with review authority above the supervisors are marked in blue or with the Greek letter theta. Wrongdoing, in this category, is occasional and sparse, involving an individual, or a small group of individuals. The wrongdoer could be in a supervisory or managerial position. Whistleblowing procedures are driven by management to ensure that wrongdoing is disclosed, that it is quickly eradicated, and that the ethical workers who have assisted the organization by their disclosures are protected.

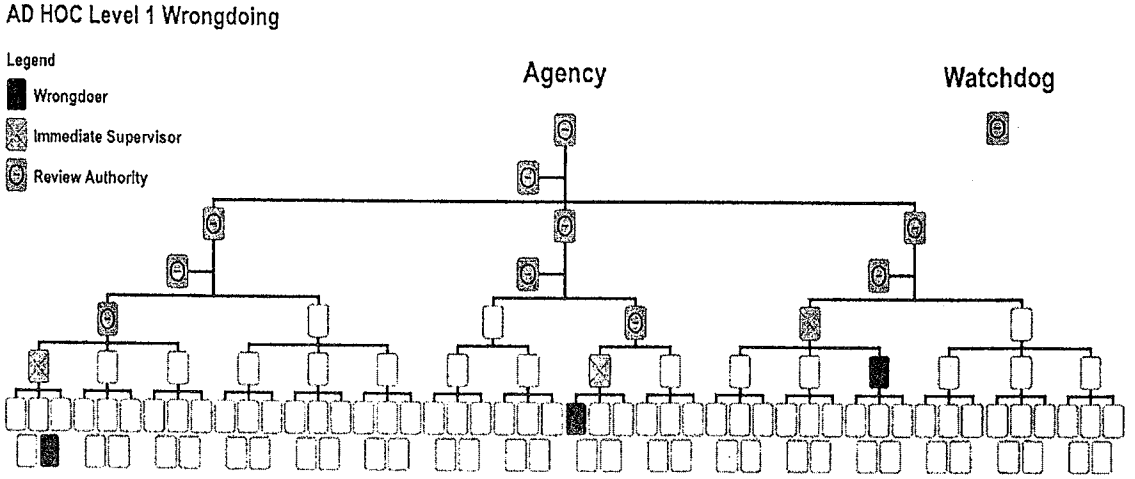

Figure 7: A Representative Mapping of 'AD HOC Wrongdoing in an Organisation

When the potential whistleblower in Figure 7 looks up at their organization, they see a 'sky' of blue review authorities above them. Most line managers, senior managers, the CEO and the relevant watchdog authorities are not involved in the wrongdoing (they are coloured in 'blue', or marked with theta's, on Figure 7). Staff officers who have a role supporting the integrity of the organization (internal auditors, equity officers, human resource managers, investigation officers, and the like) are also not involved in the

wrongdoing. These Staff appointees are free to review any disclosed wrongdoing and any failure by a manager to properly supervise a wrongdoer (they are also coloured blue or marked with theta's on the diagram).

This situation is termed the 'blue sky' organizational scenario. This is the situation most favourable to a good outcome for the whistleblower. If the supervisor is involved in the wrongdoing, or the supervisor acts to cover-up the wrongdoing by a subordinate in order to save themselves embarrassment at their lack of supervision, the situation is still not lost for the whistleblower. The whistleblower only needs to refer their complaint to the next higher authority, or to the watchdog. In any eventuality their disclosure will receive proper investigation from one of the several 'blue' review authorities above the blockage.

When whistleblowing is suppressed in these situations, it is presumed that the problem lies, not with the intent of the review authorities above the wrongdoing, but with:

1. Awareness, training and education levels of managers and staff
2. Processes developed or not developed by the agency or organisation
3. Resources available to responsible organizational authorities to handle the disclosures and the protection of the whistleblowers
4. Perceptions by whistleblowers and by managers that are incorrect

This is in contrast with the any of the 'black sky' organizational scenarios, where the Executive and / or the watchdogs are involved in the wrongdoing. The 'Nested' form of what is termed the INTEGRATED Wrongdoing scenario (a Level 4 Corruption scenario) is depicted in Figure 8. Whistleblowing procedures here are designed to force the disclosure to be directed to a 'safe' officer, ['safe' meaning protective of the wrongdoers]. From the safe officer, any threat can be controlled by Denial, Delay, Destroying of evidence and Discrediting / Dismissal of the ethical worker.

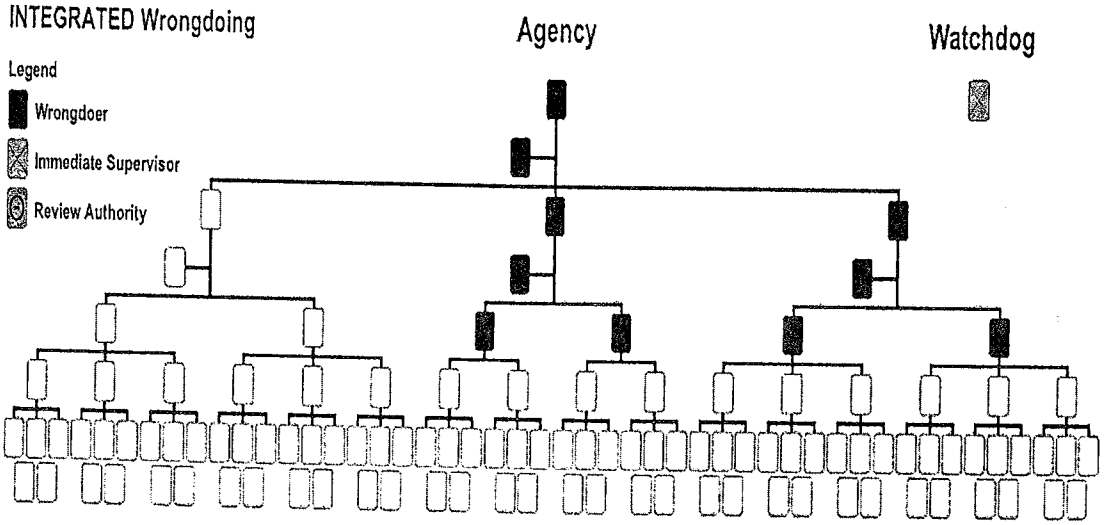

Figure 8: A Representative Mapping of Nested 'INTEGRATED' Wrongdoing in an Organisation

In Figure 8, for example, the CEO and a majority of the Executive Team, with the bulk of the Staff Officers who have a role in reporting the wrongdoing, including the most senior of these officers, are also involved by commission or by omission in the wrongdoing.

Corruption or wrongdoing in the AD HOC Wrongdoing scenario is **not systemic.**

The INTEGRATED Wrongdoing scenario is a case of **systemic corruption.** The full set of systemic corruption scenarios within organizations can be described as the following:

- **PLANNED** systemic corruption, as with, say, making 'friendly' appointments to the bureaucracy, to watchdog authorities or to the judiciary, or the setting of self-limiting terms of reference for investigations, or failures to carry out regulatory inspections. In this form of systemic wrongdoing, control of the organization is not held by the wrongdoers, and each wrongdoing thus needs to be planned [see Figure 9]
- **MANAGED** systemic corruption, as with, say, Police practices protecting criminals for a share of the profits, as exposed by then Sergeant Col Dillon during the Fitzgerald Inquiry. – the practices are conducted without interference or the threat of interference from higher management [see Figure 10]
- **INTEGRATED** systemic corruption, as with, say, the repeated falsification of hydrologic information, in order to justify proposals to build more dams and thus elongate the existence of the dam building organization. The practices become a part of the organisation's methodology, as can the practices used to cover-up and to protect the cover-up of the practice [see Figure 11]. The situation where a watchdog refers a disclosure against an organization back to the organization that is the subject of the allegation, shows an integration of processes that may act to deny a fair review
- **OPTIMISED** systemic corruption, where the watchdogs are themselves involved. Reprisals against whistleblowers, or cover-up of criminal acts, can draw this level of systemic wrongdoing – for example, two watchdogs, one charged with investigating crime, the other with investigating maladministration; each tells the whistleblower that the disclosure is the responsibility of the other watchdog, and neither watchdog investigates, in full knowledge of the position taken by the other [see Figure 12].

PLANNED Level 2 Wrongdoing

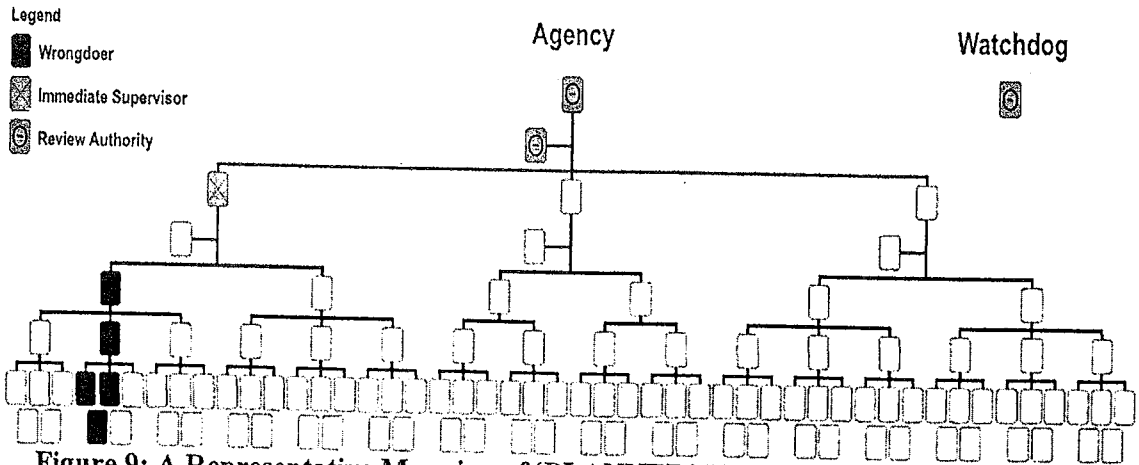

Figure 9: A Representative Mapping of 'PLANNED' Wrongdoing in an Agency

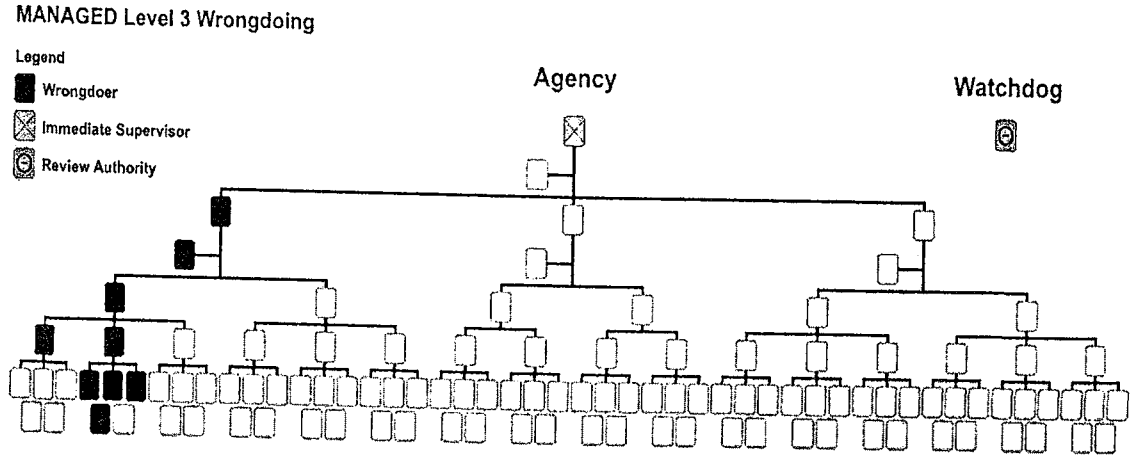

Figure 10: A Representative Mapping of 'MANAGED' Wrongdoing in an Agency

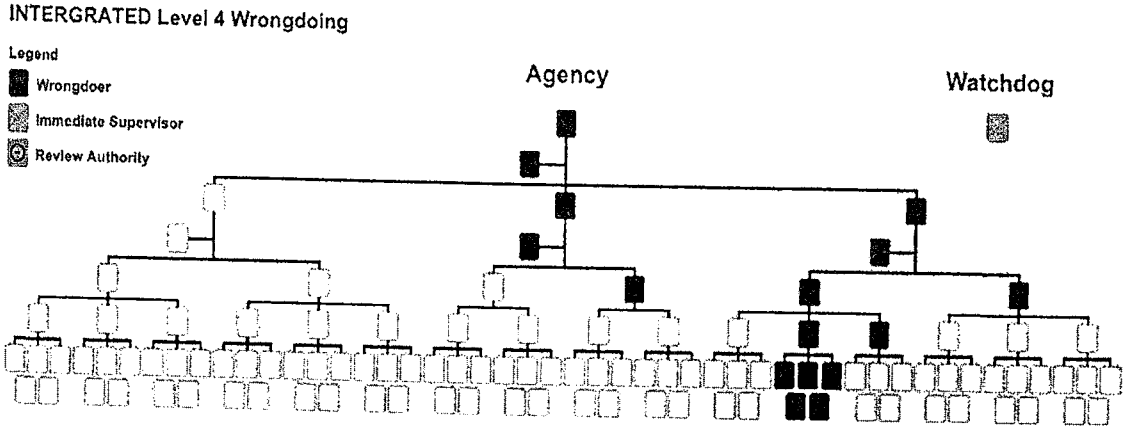

Figure 11: A Representative Mapping of Vertically 'INTEGRATED' Wrongdoing in an Agency

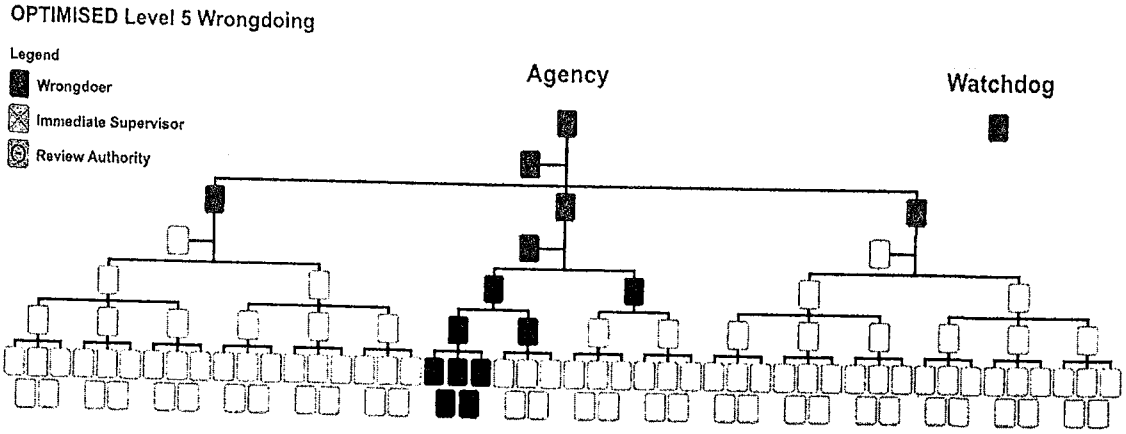

Figure 12: A Representative Mapping of 'OPTIMISED' Wrongdoing in an Agency

APPENDIX 2 TO
WAG SUBMISSION TO
CMC REVIEW OF MINISTERIAL INTERACTIONS

EXTRACT No.2 from
'BLOWING THE WHISTLE ON THE WHISTLEBLOWING PROJECT'
A CRITICAL REVIEW OF THE GRIFFITH UNIVERSITY STUDY INTO WHISTLEBLOWING

[McMahon, 2009]

In the 'blue sky' organisational scenario, the act of disclosing wrongdoing is more likely to be against a colleague or subordinate. This whistleblowing situation has been colloquially termed 'dobbing'.

In the 'black sky' organizational scenario, the act of disclosing wrongdoing is more likely to be against more senior executives, against the organization, and against failures by the relevant watchdog authority. Such acts are termed 'dissent', 'resistance' or 'dissidence'.

The TWP has not reported any questioning in the survey about whether the parent organization of the respondee exhibited systemic wrongdoing. The analysis of the results from the questions that were asked appears to assume that a 'blue sky' dwelt above the whistleblower – the problems for the whistleblower, TWP presumes, had to be the result of education, communications, resources, processes, perceptions and the like.

The watchdogs too are favourably treated. They are termed ***'integrity organisations'***, and have not been categorised or analysed.

Only when questioned by this author, about the 'Well-intentioned-Agency' versus the 'Ill-intentioned-Agency' assumption, did the TWP add one comment upon its analysis – but the survey answers were already in, and any commenting about the Ill-intentioned Agency assumption was attempted without the benefit of survey data specifically addressing the systemic corruption issue.

TWP is substantially a survey into the 'dobbing' form of whistleblowing. Little inquiry has been made into the 'dissent' perspective to the same whistleblowing phenomenon.

Again, it is not clear as to whether the TWP took this 'Well-intentioned-Agency' assumption because of its experience or inexperience with whistleblowing situations, or because of the influence of the watchdog authorities represented on the steering committee. The host for the first meeting of the steering committee, CMC chair Needham, declared at the beginning that other research titled 'Speaking Up' had shown

> ***that investigating authorities can and do take internal disclosures seriously***
> (CMC 2005)

GUS I, II, III, and IV have not questioned that announcement by Needham, not even when the TWP findings suggested the opposite, in large measure. Such questioning may have put the TWP in a ***truth to power*** predicament with its Partners.

The TWP did provide data from a large number of public servants. If systemic corruption is real within the Agencies, their watchdogs and the Public Services, then there should still be the symptoms from that systemic wrongdoing in the results from TWP's survey, albeit that the survey may be flawed.

The TWP should still be a source for evidence of the presence, amongst the agencies and watchdogs, of systemic wrongdoing, if systemic corruption is a significant part of the public sector in Australia.

Systemic wrongdoing, of the severity and continuity alleged by whistleblower organizations and by many, many individual whistleblowers, should have some impact upon the results.

The Ishikawa procedure for analyzing the causes of problems uses a test that might be applied to the results of the TWP, so as to predict the likelihood of systemic corruption in the agencies surveyed.

We should be able to make predictions about what the results of the questions that were asked might be if a substantial number of the agencies were engaged in or affected by systemic wrongdoing.

If those predictions prove accurate, then the systemic corruption or 'Ill-intentioned-Agency' thesis may be supportable from the data that the TWP did assemble. At the very least, predictions that prove accurate should deny TWP any justification for ignoring or failing to address the systemically corrupt agency and / or watchdog scenario.

The Ishikawa Analysis. In this approach, derived for identifying the likely real causes of a problem, the question is asked;

> ***If systemic corruption was a major cause of the wrongdoing problem that we are addressing, what else would this systemic corruption cause?***

The problem solver then looks for these other symptoms of the systemic corruption hypothesis. If, then, these symptoms are found, confidence is gained that the postulated cause is a real force in the outcomes that are being observed.

We repeat Figure 7 (the ***'blue sky'*** situation) and Figure 8 (one ***'black sky'*** situation) for use in this Ishikawa Analysis.

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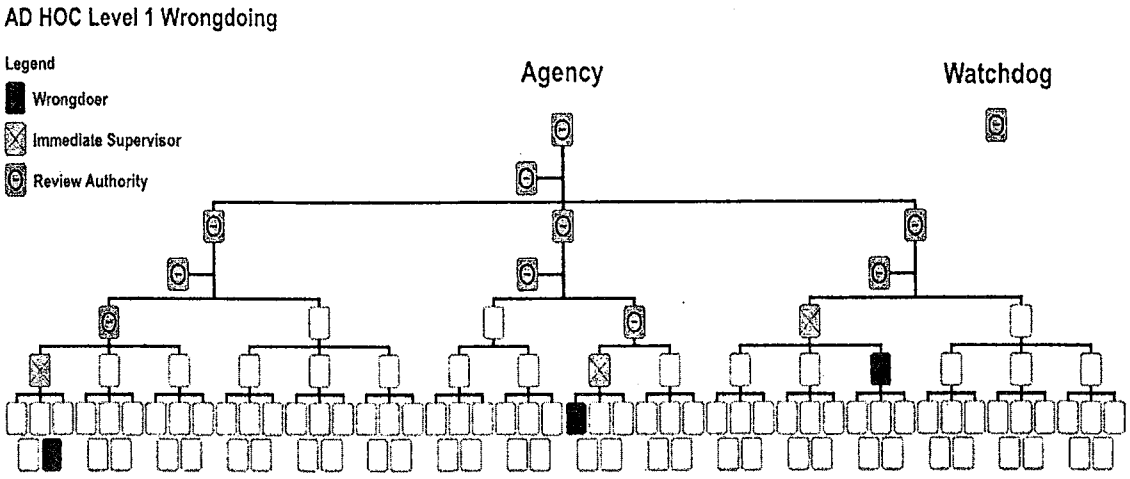

Figure 7 (repeated): A Representative Mapping of 'AD HOC Wrongdoing in an Organisation

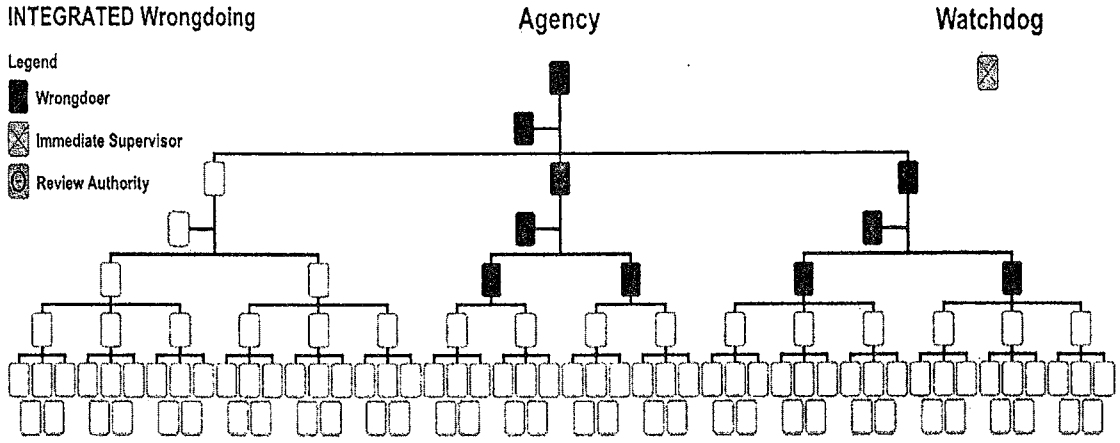

Figure 8 (repeated): A Representative Mapping of Nested 'INTEGRATED' Wrongdoing in an Organisation

We will take a modified or comparative Ishikawa approach, put down the results on significant factors that TWP did report, and ask:

> ***Which of the above scenarios is more likely to have caused these major statistics from the TWP survey?***

Finding A: 71% of respondents have witnessed or have direct evidence of wrongdoing, and 61% witnessed wrongdoing that was somewhat serious and occurred in the last 2 years [GUS II, p28-30]. Is such a high figure more likely where wrongdoing is ad hoc or where it is systemic? Would so many witness wrongdoing in an Ad Hoc scenario?

Finding B: 57% [GUS III, p36] or 61 % [GUS II, p31] of public servants who observed wrongdoing did not report the wrongdoing. This is the Whistleblower Silence Situation. Would so many hesitate in the employ of a well intentioned agency? Is it a lack of ethics amongst the employees, or a presence of deterrents in the agency, that may have caused so many to turn away from making disclosures?

Finding C: :80% of public servants who did not report wrongdoing that they saw decided to remain silent because they expected that nothing would be done about the disclosure or about protecting them from reprisals [GUS I, p49]. May not this figure tend to show a consistent close-out being effected upon integrity reporting?

Also, 82 to 91% of public servants, who gave fear of reprisal as their reason for not reporting, were referring to a fear of reprisals from senior managers [GUS II p73-74]. For these public servants, is this fear factor not consistent with a 'black sky' scenario and / or inconsistent with the 'blue sky' scenario?

Finding D: 44% of a selected whistleblower group (termed 'internal witnesses) 'believe' that their disclosures were not investigated [GUS II, p112] – 'believe' is used as 68% of selected whistleblower group were not informed or not very informed about the outcome of their disclosure [GUS II, p118]. May not this figure tend to show a close-out being effected upon feedback to integrity workers who made disclosures?

Finding E: No effective action was taken to address the wrongdoing in 81% of disclosures which, upon investigation, did detect wrongdoing [GUS II, p115]. May not this figure tend to show a close-out in place upon adverse findings from investigations?

Finding F: 29% of whistleblowers were 'role reporters', that is, Staff officers who held responsibilities for reporting wrongdoing in their organizations [GUS II, p35]. Does this mean that 71% are not looking for wrongdoing, are looking but have found nothing (in their role reporting responsibilities) to report, or are not reporting what they have found? Are these results linked to Findings C, D and E?

Finding G: 51% of public servants, and 61% of the selected whistleblower group, who made a first disclosure, did not disclose a second time [GUS II, p90-91, & III, p50]. In combination with Findings C (silence rates), D (investigation rates) and E (corrective action rates), why did these whistleblowers stop after their first disclosure?

Finding H: Extract GUS II, p156:

> When the number of internal reporting stages was restricted to one, reporters were much less likely to indicate poor treatment. Where persistence attracts worse treatment, does this not indicate that there may be no 'blue sky' above the wrongdoing?

Finding I: Risk of bad treatment increases by a factor of 4 to 5 if the investigation did not remain internal [GUS II, p149-150]. May not this figure tend to show a close-out being effected upon integrity reporting to external watchdogs?

Finding J: 78% of reprisals are initiated by managers, against 25% being initiated by colleagues, (with no exploration of cases where the colleagues are reprising at the instigation of, or through coercion by, the manager) [GUS I, p88]. Does not the comparison indicate that the interests being threatened by the whistleblower, three times out of four, are those of the management of the organization? Is this fear factor not consistent with a 'black sky' scenario and / or inconsistent with the 'blue sky' scenario?

Finding K: 31% of the selected whistleblower group held CEO's mainly responsible for the deliberate bad treatment and harm that they received [GUS II, p130]. For a large portion of agencies, is this judgment not consistent with a 'black sky' scenario and / or inconsistent with the 'blue sky' scenario?

Finding L: 89% of all agencies do not have whistleblower support systems, and 98% of agencies do not have procedures that comply with the Australian Standard [GUS II, p230 & 235].This is recorded more than a decade after the introduction of whistleblower protection legislation in most jurisdictions in Australia. Are not these statistics consistent with a 'black sky' scenario and / or inconsistent with the 'blue sky' scenario? May not these figures tend to show a close-out being effected upon whistleblower protection?

Finding M: 11% of public servants (and 30% of selected whistleblowers) make disclosures to external bodies (ie watchdogs) [GUS II, p90-91]. Given the failures of internal reporting systems indicated in Findings B, C, D, E, I, J, K and L, may not these figures also tend to show a close-out being effected upon integrity reporting to external watchdogs?

Finding N: 66% of the selected whistleblowers group, 38% of whom went external in their reporting of the wrongdoing within their agency, reported bad treatment [GUS I, p84-86; p62 & GUS II, p124-128]. May not these figures also tend to show that, the greater the proportion of a population that make disclosures externally, the greater is the proportion that suffer reprisals. May not then these figures also tend to show a close-out being effected upon integrity reporting to external watchdogs?

Finding O: The most accurate opinions from the different sets of managers and case handlers came from those that had the lowest opinion of the success of organizations- that is, the lowest reporting rates and the highest inaction rates [GUS I, p34]. May this trend be extrapolated to suggest that, if the respondees had an even lower opinion of agencies, including the view that they exhibited systemic corruption, the opinions received would be more accurate again?

Finding P: Extract GUS III, p52:

> Many integrity agencies adopt a policy of filtering reports received and referring some of those back to the agency where the reporter was employed.
>
> As one manager explained the situation:
>
> > ***It's very rare for*** (the integrity agencies) ***to investigate ... essentially it's rare for them to investigate.***

May not this opinion from a manager also tend to show that, given the failures of internal reporting systems indicated in Findings B, C, D, E, I, J, K, L, M and N, a close-out is being effected upon integrity reporting to external watchdogs as well, and that the usual actions by watchdog authorities are a part of that close-out effect?

Finding P may be tending to show **Level 5 OPTIMISED Wrongdoing**. Of course, when systemic corruption has been optimized, the 'black sky' environment would, by definition, have been successful in painting itself 'blue'.

That is the role of government 'spin', to paint 'black' situations as 'blue'.

Albeit the strengths of the above results may have been diluted and or distorted by structural flaws in the survey, namely-

- the wide inclusions in the definition of whistleblowers,
- the failure to test for any stratification in the results with the seriousness of the wrongdoing disclosed, and
- the 'soup' of results mixed across all agencies irrespective of whether they exhibit AD HOC wrongdoing or degrees of systemic wrongdoing-

the reported TWP figures do provide results that are supportive of the 'black sky' organizational scenario more so than they reflect the 'blue sky' scenario.

On the above Findings, the 'black' hypothesis, that 'black sky' or systemic corruption environments may dominate some agencies amongst the agencies surveyed, is about three times more persuasive than the 'blue' hypothesis, that agencies are troubled mainly by non-systemic or AD HOC patterns of wrongdoing.

The principal criticism that can be directed at the TWP is that the figures tend to show that the 'Well-intentioned Agency (and Watchdog)' assumption may not be consistent with these results. Therefore the alternative scenario of the 'Ill-intentioned Agency (and Watchdog)' should have been incorporated into the survey, with and alongside the 'Well-intentioned Agency' situation. If all legitimate scenarios had been included in the survey, the results might have captured the breadth and the detail of the agency and watchdog environment faced by integrity workers. It might also have assessed the environment faced by managers and Staff officers in agencies and watchdogs who do have integrity.

The 'dobbing' phenomenon, on the weight of evidence from TWP's own surveys, appears to be a minor scenario. It would not be 'minor' for the whistleblower suffering reprisals. In the sense of relative occurrences of the different sources of reprisals, however, the reprisals fro co-workers is a secondary source within agencies,not the primary source.

The major scenario, possibly three times stronger than the 'dobbing' or Ad Hoc Wrongdoing scenario, appears to be the 'dissent' whistleblowing scenario. Exposure by disclosure, of wrongdoing by upper and / or top management, and by the relevant watchdog, must be a possible cause of the retaliation patterns uncovered.

TWP has used the phrase, 'systemic' wrongdoing, in its report; for example:

> ***The nature and characteristics of the perceived wrongdoing appear pivotal in determining when whistleblowing will result in a bad experience. ... the wrongdoing ... was more likely to be more frequent or systemic; to involve more people in the organization; and, most importantly, to involve people more senior than the whistleblower.***
>
> The only parameter in this argument that has not been directly or indirectly measured, to any degree by the structured questions in the TWP survey, appears to be the phenomenon of ***systemic*** wrongdoing.

The TWP, and its definition and categorization of whistleblowing, appear not to understand the predominance of dissent in the phenomenon of whistleblowing occurring within public sector agencies within Australia.

The TWP appear not to have pursued the logic in that direction. The TWP appears not to contemplate the systemic corruption hypothesis, not even to dismiss it.

When TWP discover the above findings, they are described as 'unexpected', the results are stated to be 'new', but the Ad Hoc Wrongdoing assumption is not critically examined.

The 'blunder' that TWP has made is attributed by TWP to others. Whistleblower organizations and UoQWS are criticized for the irrelevance of their 'anti-dobbing mentality'. TWP also asserts the existence of a 'wide belief' that whistleblowing is about 'dobbing' on co-workers and reprisals from co-workers [GUS II, p 121 & 143].

The organizations criticized by TWP, however, are on the public record about the dominance of 'dissent' whistleblowing rather than 'dobbing' whistleblowing in the grief that is brought upon integrity workers. They have drawn the attention of the public to the allegations of systemic corruption of agencies, and of the regulatory capture of watchdogs. TWP actually cites Lennane (from Whistleblowers Australia) and de Maria (from UoQWS) as the sources of the notion of 'organizational dissent' [GUS I, p6]. TWP could have cited former President Brian Martin who has a website for access to his many writings on whistleblowing and dissent (Martin 1993-2009). The author of this review as National Director of Whistleblowers Australia has followed these themes (McMahon 2001, 2002, 2005). De Maria in particular is poorly served by the remark, having a decade previously written reviewed papers with titles like

- 'Quarantining Dissent: Queensland Public Service Ethics Act' (Australian Journal of Public Administration December 1995) and
- 'Eating its own: the whistleblower's oganisation in vendetta mode' (Australian Journal of Social Issues, vol 32, no 1, February 1997)

In this respect, TWP may be doing itself discredit, which does not gain the credibility that might be a pre-requisite for any thesis on integrity systems. The error of assuming AD HOC Wrongdoing in agencies and watchdogs, without allowing for Systemic Wrongdoing in these same bodies, denying the historical knowledge that we have of such organizations, was TWP's error alone.

Miceli & Near (1984), from where TWP selected its definition of 'whistleblowing', discusses the situation where ***'an organization is dependent on a questionable practice'*** (a situation of systemic wrongdoing), and organizations have been ***'well socialized to believe that organisational dissidence is undesirable',*** (a reference to the dissidence or dissent whistleblowing situation). TWP clearly read this paper, and can reasonably be held to have known about the presence of systemic wrongdoing scenarios and of dissidence or dissent whistleblowing in the literature.

It is not clear as to whether the TWP took its own course because of its experience or inexperience with whistleblowing situations, or because of the influence of the watchdog authorities on the steering committee, or because of the milestone forums and workshops that TWP conducted with the agencies.

Having recorded the higher retaliation rates that were imposed by senior managers, TWP realized the error in their assumption. The association of the unexpected results with systemic corruption, however, was not made. Instead, explanations were canvassed by TWP only as to how such results could come from well intentioned agencies.

Corollaries.

A corollary to the above mistake is a second mistake by TWP. TWP excluded the responses from Staff officers who had responsibilities in their organizations for disclosing wrongdoing (termed ***'role reporters'*** by TWP).

In the dissent whistleblowing scenarios, these Staff appointees are situated amongst the 'black clouds' of the systemic wrongdoing. The 'systems' for perpetrating the wrongdoing, and for maintaining the cover-up of the wrongdoing, depend greatly on the complicity, by omission or commission, of these Staff. Their input should be insightful to the whistleblowing situations associated with dissent whistleblowing – how many if any had long periods acting in the role before permanent appointments, interactions with ministerial advisers, interference with investigations, rewrites of reports by senior line managers, and other mechanisms of control, agreed destruction of all copies of documents to avoid possible release of them through Freedom of Information.

A further corollary to the systemic corruption scenario is the rationale that agencies may have when the agency rewards the whistleblower, versus when they punish the whistleblower. Under the 'black sky' versus 'blue sky' situations, do some public officers benefit in their employment after and because of their disclosures, or does the benefit arrive after and because they ceased to make further disclosures (when they took the cues given to them by the corrupted organization, and / or they realized that the agency was not going to act)? The NSW Police Department, allegedly suffering from systemic corruption, apparently benchmarked, in their NSWIWP study, the employment events for whistleblower police officers against those of officers who were not whistleblowers.

The TWP does not come near to this issue. All rewards appear to be assumed, by TWP, as legal, normal, well intentioned and deserved.

A third corollary concerns the purpose to which agencies, in the 'black sky' systemic corruption scenarios, put the whistleblowing procedures that the organizations do publish and use. The Findings from the TWP indicate that a Dead Hand response can be given to disclosures made internally, and that a Hard Hand response can be made when disclosures are made externally. The Dead Hand / Hard Hand result leads a pattern to the listed Findings that appears strongly suggestive of a possible systemic close-out strategy being applied to whistleblowing.

A dissenting whistleblower can show dissent to the strategy adopted by management to close-out the whistleblower's disclosure. The 'dissent' hypothesis, that agencies allow workers to make one disclosure internally, but will apply adverse treatment if the worker does not accept the Dead Hand placed upon that first disclosure, appears to be consistent with the results from the survey by the TWP.

Further, the pattern to the many instances of public servants, either

- not making any disclosure of observed wrongdoing or of
- making only one disclosure of observed wrongdoing, and remaining silent thereafter,

may be a group behaviour displaying the phenomenon of **compliance,** rather than an aspect of whistleblowing.

The TWP has failed to survey for any of these corollaries, it appears from GUS I, II, III and IV.

APPENDIX 3 TO
WAG SUBMISSION TO
CMC REVIEW OF MINISTERIAL INTERACTIONS

EXTRACT A (with modifications) from
SUBMISSION FROM WHISTLEBLOWERS ACTION GROUP TO PARLIAMENTARY CRIME AND MISCONDUCT COMMITTEE UPON THE THREE YEARLY REVIEW OF THE CRIME & MISCONDUCT COMMISSION
[Harris, 2006]

PROBLEMS WITH CURRENT SITUATION

The Health Inquiry. Commissioner Davies gave five deficiencies that caused the problems in Queensland Health. The fifth deficiency was what Davies described as ***'the culture of concealment in Government'***. This Fifth Deficiency was the cause Davies attributed to the reprisals that he found had occurred in the Health arm of the Public Service.

It is the watchdog authorities in Queensland, like the Office of the Ombudsman and the Crime and Misconduct Commission, WAG submits, who must accept responsibility for this ***'Fifth Deficiency'***.

These failures, upon the many other failures documented in past submissions to your Committee's Reviews, have reinforced allegations that the CMC has been ***captured*** by the public authorities that the CMC was meant to oversee. The capture of the CMC by public authorities wanting to maintain this culture of concealment acts to reinforce that culture.

The CMC want to be 'pals' with the administrations over which the CMC has responsibilities, rather than at arm's length, it appears from the announcements by the CMC. The CMC needs to withdraw from this approach.

'Capture' of the CMC. The CMC has shown itself to be now of very little account in any influence that it might have on integrity in the Public Service. It was not trusted to do the Davies Inquiry, and it provided little to the *Post Fitzgerald Era National Conference*. It will surprise if there is another triennial review. The likely re-emergence of past sins, and the disclosure of additional travesties, while your Committee might omit them from what is tabled, will probably slide an already diminished organisation into a memory of a past embarrassment.

There must be, however, a list of lessons learnt for any new approach to reinstating a minimum level of integrity into a failing Public Service. WAG offers these observations

The CMC has shown itself to be selective rather than 'thorough, fair and impartial' in the way that it has carried out its responsibilities, it is alleged. Examples demonstrating this

feature of the record of the CMC (previously the CJC) will follow shortly. The CMC appears to have displayed the weaknesses of a 'captured regulator', as described in the paper quoted at the top of this position.

Those weaknesses may be, WAG repeats to your Committee, the following:

- The CJC appears to lack independence, and to be driven by fears
- The CJC appears to lack integrity in their processes
- The CJC appears to be marked by a lack of internal complaint or whistleblowing
- The CJC appears to lack energy and effort in the meeting of the organisation's purpose
- The CJC appears to lack expertise in areas important to its role, and,
- The CJC appears to bully those that it does not fear.

Reviews of police corruption prior to the Fitzgerald Inquiry also demonstrated the properties of 'capture'. The most memorable might be the publicity event by the then Minister Russel Hinze, who reported to the media his failure to find any illegal casinos in Brisbane after a car ride through the city – in which the Minister failed to get out of the car when he was driven past 'the Bath House'.

What helped Queensland escape this arrogance was the ability of one honest politician, Acting Premier Gunn, to refer relevant allegations to a reputable investigator willing to act without fear or favour.

The avenue to a thorough, fair and impartial inquiry, opened by Bill Gunn to trigger the escape by Queenslanders from police corruption, has been closed for most matters since. It took the deaths of a hundred patients at a single hospital to return Queensland to such an inquiry. No-one had any expectation that the CMC could provide an independent inquiry into a Government fiasco, and produce findings and recommendations for which the people of Queensland would have confidence.

In the absence of a hundred bodies in any other wrongdoing done by public authorities, the only chance for a 'thorough, fair and impartial' investigation of alleged corruption and misconduct is if the CMC is thorough, fair and impartial. The CMC needs to be capable and willing to conduct its duties without the 'fear and favour' that the CMC appears to have shown in its treatment of past and current allegations, allegations that have a primary significance to the integrity of the Queensland criminal justice system

Where these alleged actions of favour remain uncorrected on the record of the CMC (previously CJC), any confidence held in the CMC must be downgraded. The CMC is failing to maintain the independence of inquiry that was established by Acting Premier Gunn & Commissioner Tony Fitzgerald.

The Failure to Protect Whistleblowers. Clearly, the mini-industry in criminal justice in Queensland that has attached itself to 'Post-Fitzgeraldism' has forgotten the primary role paid by whistleblower police officers. Principal amongst these was then Sergeant Col Dillon. Your Committee even went so far as to cross out what follows when you tabled

WAG's submission to the last review. Your Committee's treatment of this message is the indicator WAG uses to analyse your Committee's value to anti-corruption purposes in the Queensland Justice system.

Col Dillon's effort in the witness box before Mr Fitzgerald is held to have been the testimony that turned a failing inquiry into the success that it became. An investigation can be neutered by the lack of evidence. This was happening to Fitzgerald's Inquiry. Col Dillon is attributed with giving the example that led honest police officers to trust Fitzgerald, and give their own evidence to the Inquiry

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?

Col Dillon was promoted to the rank of Inspector, but only after a successful grievance procedure following his supersession by junior, less experienced officers. Then he was placed in a position reporting to a non-uniformed public servant employed on a lower classification and pay scale than the hero of the Inquiry. The anomaly and the impropriety of this treatment was recognised in writing by the first Head of the CJC, Sir Max Bingham, in a report on his review of the post-Fitzgerald Police Service, made to the Police Minister, dated July 1996. After several months of inaction by the new order Police Commissioner concerning the Bingham report, Mr Dillon sought an explanation as to why the anomaly was not being addressed. Mr Dillon, however, was told by his superiors 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 Collins from this demeaning situation. When, however, he returned from the ATSIC appointment, the new order police force and its leadership 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 allegedly 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 in the police force that mistreated honest police officers that were in the force 'before Fitzgerald'.

All the 1994 'Senate whistleblowers' from the Queensland Public Service have now been forced out of the QPS, the last being sent to a 'gulag' for four months and then forcibly retrenched in 1999.[More about this whistleblower later, information about whom has been kept secret until last November2005 by the alleged use of a code word, **'RAINBOW'**, to keep documents from access through Public Service grievances and appeals and from access through FOI procedures].

Whatever the written law, the police, public service and CMC authorities appear able within themselves to ignore the law. There is no whistleblower protection authority that

empowers whistleblowers to require these authorities to obey the law. Further examples will follow shortly.

The CJC and CMC have been seen to come to an unofficial but publicly stated position that it is impossible to protect whistleblowers. Without the support of a leadership motivated to protect whistleblowers, the availability of evidence about corruption in the Public Service (evidence such as that which served Mr Fitzgerald in his Inquiry and Messrs Morris & Davies in their more recent Inquiries) cannot be assured.

The CMC has become part of the corruption problem in the Public Service, WAG will herein argue. The CJC / CMC has done this by refusing to 'get out of the car' in its investigations of disclosures made by whistleblowers about wrongdoing in particular parts of the Public Service. In most significant instances, the CJC has become the protector of the wrongdoer rather than the protector of the wronged.

Whistleblowers will not be maintained in their employment within the Public Service unless

- They have the support of a properly funded and capable Whistleblower Protection Authority
- They have the right to a thorough, fair and impartial investigation if they can establish a prima facie case of maladministration or reprisal affecting their employment
- The investigation is undertaken in good time after any complaint is received, statements are taken and documents retrieved and stored safe from loss and destruction or disposal
- Witnesses in any investigation are given the same protection

The cases cited below allegedly demonstrate the capacity of the CMC (previously CJC) to deny whistleblowers a thorough, fair and impartial investigation, by alleged methods that include

- Wilfully misstating the law
- Wilfully misstating the evidence
- Failing to achieve thoroughness, fairness and impartiality in the conduct of investigations
- Failing to advance and complete investigations in good time.

MAJOR FAILURES BY THE CJC

The two cases that continue to give information tending to show the alleged lack of integrity of which the CMC can be capable, in their treatment of whistleblower disclosures and the rights of whistleblowers, are

- The disclosures concerning the direction by the Queensland Cabinet to destroy the Heiner documents, requested for an intended civil court case by the lawyers of public officer Peter Coyne – **the Lindeberg disclosures**
- The disclosures concerning the refusal by the Qld Department of Mines to enforce the licence conditions of major mines regarding environmental management, with

disclosures that Mines Inspector Jim Leggate was allegedly subjected to a punitive transfer to the Department of Primary Industries because he continued to report to the Mines Department the breaches by mines of the environmental conditions of their licences – **the Leggate disclosures**

Both sets of disclosures have been brought to the attention of whistleblowers and / or the public by recent events and disclosures. Included in these disclosures are documents emerging describing what happened to whistleblower **'RAINBOW'**. These documents have come from the Information Commission since the Information Commission was freed from the alleged control of public service professionals with involvement in decisions relating to the Heiner Affair.

These recent public interest disclosures point to future complications for our criminal justice system because of the improper precedents created by the CMC when the CMC / CJC appeared to be avoiding the implications of the Leggate and Lindeberg disclosures.

RAINBOW DISCLOSURES

Whistleblowers have been especially frustrated by the alleged refusal by the CMC to force the Ombudsman's Office to refer suspected official misconduct to the CMC. This alleged breach of the Criminal Justice Act by the Office of the Ombudsman is at the heart of all concerns about the spread of officers with involvement in decisions relating to the Heiner Affair. This spread of Heiner professionals is a concern for any force that it may have in allegedly cultivating a culture of concealment within Government that undermined the Fitzgerald Inquiry reforms and now is undermining Morris / Davies Inquiries.

The Office of the Ombudsman recommended to Commissioner Davies that a 'new' system be established where public interest disclosures of maladministration be required to go to the Ombudsman's Office while disclosures of suspected official misconduct go to the CMC. The Ombudsman is the former CJC Misconduct Division principal.

This **Dual Disclosure Net** sounds reasonable, and the lawyer, Commissioner Davies, recommended this approach. Davies Paragraph 6.510 has sold out whistleblowers, WAG submits, consigning whistleblowers and their disclosures to the control of a partnership with the CMC that may ensconce the culture of concealment within the Government rather than mitigate it.

Commissioner Davies, like your Committee, refused to test his ideas on whistleblower protection against the experience of whistleblowers, despite multiple submissions put to his Inquiry. Commissioner Davies has preferred the self-serving submissions of an Office of lawyers, and did not pause to obtain feedback on an idea to trust again two watchdog authorities which were acting as though they had no part in the alleged ruination of Queensland Health.

Project RAINBOW showed whistleblowers the traps involved in the Dual Disclosures Net idea.

'RAINBOW' was the code name given by the Queensland Government to a Senate Whistleblower from Queensland who had taken legal action against the Queensland Government. The Queensland Government allegedly withheld documents from discovery and disposed of other documents both after and before litigation was afoot, in circumstances very similar to the Heiner Affair. This document will use the same codeword, 'RAINBOW', to refer to the whistleblower

The CJC found no suspected official misconduct in the Government's action regarding the treatment of RAINBOW, and refused to investigate what would have been another Heiner type affair (at least with respect to the destruction / disposal of documents wanted for court proceedings). The CJC suggested that the matters may be of interest to the Ombudsman's Office

The Office of Ombudsman found that the allegations of maladministration were associated with allegations of official misconduct, and refused to investigate that maladministration because of that association. The Office also refused to refer the matters to the CJC/CMC, and required third parties to take the maladministration to the CMC / CJC.

The Dual Disclosure Net then acted not to 'catch' an investigation of the disclosures. The Dual Disclosure Net was allegedly turned into a 'Catch 22' for any investigation, so that no investigation occurred. Both the Office of Ombudsman and the CMC knew of each others refusal to investigate.

This is a principal demonstration of how the Fifth Deficiency would thrive in the CMC - Ombudsman's Dual Disclosure Net.

Still, why could not RAINBOW take the maladministration to the CMC.

Firstly, the CJC had stated that the maladministration should go to the Ombudsman

Secondly, the CJC had allegedly told RAINBOW that the CMC would not investigate RAINBOW's disclosures about disposal of documents if RAINBOW was going to criticise (that is, to make disclosures about) the CJC's position of disposal of documents adopted by the CJC over the destruction of the Heiner documents. This denial of an investigation of RAINBOW's claims were, WAG alleges, a reprisal by the CMC / CJC against RAINBOW for the reason that RAINBOW was making disclosures about the wrongdoing by the CJC in the interpretation of the law that the CJC had adopted over the Heiner Affair

So, the CJC / CMC would investigate destruction / disposal of documents required by RAINBOW for litigation if RAINBOW did not criticise CMC's assertion (during the Heiner Affair) that such destruction was quite legal. This was yet another 'Catch 22' –

the CMC will investigate if the whistleblower agrees that there was no breach of the law, but if the whistleblower maintains that the law was broken when documents were destroyed, the CMC will not investigate.

Finally, just prior to the release of documents previously withheld, allegedly, from RAINBOW during Supreme Court discovery procedures, the CMC advised RAINBOW that, even if the Ombudsman did refer suspected official misconduct to the CMC, the CMC would not now investigate it as the RAINBOW allegations had already been ventilated at your Committee

Your records will demonstrate whether your predecessor Committee has ever seen let alone considered Project RAINBOW and the RAINBOW Report.

Project RAINBOW was a $50,000 study on the methods and risks of terminating RAINBOW's public service employment because of the 'provocative' court action RAINBOW had taken. RAINBOW was sent to an alleged 'gulag' and terminated. The so termed 'provocative' court action was taken at the recommendation of the Senate Select Committee that was inquiring into whistleblower cases in Queensland during 1995.

The Report on Project RAINBOW was only released allegedly after the Information Commission was removed from the control of the Heiner professionals within the Office of Ombudsman. This was 8 years after Project RAINBOW was undertaken, and also repeats the wrongdoing of ignoring Public Service Regulation 99 as happened allegedly during the Heiner Affair.

The Heiner Affair remains at the cause of continuing efforts by Government in Queensland to maintain the Fifth Deficiency, the culture of concealment by Government that Commissioner Davies identified. That is why whistleblowers nationwide have made the destruction of the Heiner documents a Whistleblower Case of National Significance.

The Government does not view the culture of concealment identified by Commissioner Davies as a deficiency at all, for it still holds back investigation of the alleged rape of girls at John Oxley Youth Centre, and it worked against RAINBOW.

But it would not have worked as well against RAINBOW without the Catch 22 disclosure and investigation mechanisms allegedly implemented by the CMC and other authorities now staffed by Heiner professionals

It worked so well that Offices influenced by Heiner professionals are allegedly proposing to formally establish the Dual Disclosure Net as a continuing mechanism for disposing of selected whistleblowers. This is especially the case, it is alleged, for whistleblower cases that have the potential for allowing the international debate about the Lindeberg Disclosures of destruction of the Heiner documents ('Shreddergate') to become active within any part of the Queensland Government.

APPENDIX 4 TO
WAG SUBMISSION TO
CMC REVIEW OF MINISTERIAL INTERACTIONS

EXTRACT B (with modifications) from
SUBMISSION FROM WHISTLEBLOWERS ACTION GROUP TO PARLIAMENTARY CRIME AND MISCONDUCT COMMITTEE UPON THE THREE YEARLY REVIEW OF THE CRIME & MISCONDUCT COMMISSION
[Harris, 2006]

THE LINDEBERG DISCLOSURES

The CJC, in its processing of the Lindeberg disclosures, excused the Queensland Cabinet from the allegation of criminal wrongdoing. The CJC did this by claiming that it was not against the law to dispose of evidence relevant to a court case if the disposal is effected before the legal writ is lodged and /or served, that is, before the legal action is afoot. This argument was penned in a letter drafted by Mr N Nunan, approved by Mr Barnes, dated 20 Jan 93, with the words (see attachment A, side flag A1):

> *As no judicial proceeding was underway at the time of the destruction of the documents I am of the view that no member of Cabinet has committed the criminal offence referred to.*

The CJC maintained this position in face of multiple legal opinion, based at that time on the decision of the High Court in *the Rogerson case,* that the CJC legal opinion was wrong at law.

In 2002, the issue of destroying evidence prior to serving of a writ or laying of a charge was addressed before the Victorian Court of Appeal in *the McCabe case*. The decision reaffirmed the law in Rogerson, emphasising the error in the CJC's misinterpretation of the law on this point.

In 2003, the Queensland Police Department was successful in having a Minister of religion committed for trial on criminal charges, allegedly because the accused destroyed evidence of child abuse. The destruction occurred six years before the victim of the alleged abuse initiated a complaint. This prosecution was brought before the courts on the 13 March 2003 by the Office of the Director of Public Prosecutions. A conviction was recorded and the conviction confirmed by Queensland's Court of Appeal [known as the **Ensby Case**]

Both the Queensland Police and the Director of Public Prosecutions have had before them the Lindeberg allegations. Neither has acted to address the allegations against Ministers of the Crown, in any way consistent with their actions over similar fact evidence against a Minister of God. The disparity in actions by these criminal justice authorities, faced with similar fact evidence concerning two types of Ministers, is tending to show the alleged corruption of the Police, DPP and the CJC / CMC with respect to the

Lindeberg allegations. The CMC is allegedly avoiding taking action by maintaining a position regarding the law that is without any foundation, and by sticking to a legal position that has been consistently contradicted by every court in Australia.

More is to come. The Heiner documents described allegations of abuse of children in the Qld Government run John Oxley Youth Centre. There is now before the Queensland Courts legal action by a former child inmate at John Oxley during the relevant time, alleging multiple pack rapes of her at the Centre. The question could arise before the Court as to what happened to evidence, taken at the time by Mr Heiner, concerning abuse at the Centre and about these particular abuses of the plaintiff. This may be an occasion causing authorities to contemplate further wrongdoing, piled upon past wrongdoing, in order to avoid the alleged illegality of the original destruction of the evidence.

The integrity of the criminal justice system in Queensland has been degraded by this inconsistent treatment, and by the continuing refusal by relevant authorities to admit to and apply the correct interpretation of the law regarding the destruction of evidence for legal proceedings. At the origin of that degradation has been the CJC (now CMC) and its continuing adherence, as an apparent matter of will not law, to assert as lawful an act that is a blatant breach of the law.

The CJC is simply misstating the law, repeatedly, and this misstatement allegedly is protecting a privileged group of public officers from inspection of their actions according to the law

Most significantly, the Qld Police Commissioner has broken ranks, now suggesting that, since the Ensby Case, the destruction of the Heiner documents may need to be reconsidered. The Police Commissioner, however, has dumped the issue of investigation into the lap of the CMC

Your Committee now has also to make the decision recently made by the Police Commissioner. The Police Commissioner has opted to distance himself from rogue legal opinions by the CMC that are denying the illegality of the destruction of documents required for litigation.

The Police Commissioner is allegedly attempting to avoid his responsibilities to investigate alleged criminal acts associated with the destruction of the documents, by claiming that the CMC have this responsibility.

A reformed Police Service would not have acted in this way, WAG asserts. The Police Force is not reformed, WAG submits. WAG knew this when Inspector Dillon was expelled, for reformed administrations do not expel their most honest members – thus the value of the 'Colin Dillon' indicator used by WAG

The failure to prevent the expulsion of Inspector Dillon by the CJC, or to redress it by the CMC, is the indicator that the CJC / CMC has failed to carry out the Fitzgerald Reforms

of the Police Service. The aforementioned alleged avoidance by the Police Commissioner is just one outcome of the CMC's failure.

This submission to your Committee will be evidence that these matters were disclosed to your Committee and its members and its staff, and that all were told of the disclosures made by Mr Lindeberg. Commissioner Davies was duped over the issue of the Dual Disclosure Net, but his Report created new benchmarks of the standards of response required of Ministers and senior bureaucrats when disclosures have been made to those officers.

At the Post Fitzgerald Era National Conference, the question was put to the CMC Commissioner Needham whether he knew of the change in the Police Commissioner's position on Heiner. Commissioner Needham was asked whether the CMC could manage the situation of being the 'Last Man Standing' opposing a criminal investigation of the Lindeberg Disclosures over the destruction of the Heiner documents.

Commissioner Needham passed the ball to the Director of Public Prosecutions, stating that, while comment on individual cases could not be given, the DPP held the responsibility for prosecutions, not the CMC.

The alleged avoidance and weakness in this response demonstrates that the CMC is only a nuisance to good governance of the criminal justice dollar. The CMC is disrespected, losing allies and suffering public embarrassments whenever their officers are engaged by ordinary people over the alleged injustices that the CMC has imposed on Queensland's justice system.

At the hands of the CJC and now the CMC, Queensland's justice system has become like Mississippi mud, and allegedly worsens with each justice or judicial appointment of a Heiner professional who has not renounced CMC law on Heiner and has not embraced instead the law of the High Court of Australia in ***Re Rogerson*** and in ***Ensby***

APPENDIX 5 TO
WAG SUBMISSION TO
CMC REVIEW OF MINISTERIAL INTERACTIONS

EXTRACT C (with modifications) from
SUBMISSION FROM WHISTLEBLOWERS ACTION GROUP TO PARLIAMENTARY CRIME AND MISCONDUCT COMMITTEE UPON THE THREE YEARLY REVIEW OF THE CRIME & MISCONDUCT COMMISSION
[Harris, 2006]

THE LEGGATE DISCLOSURES

The Non-enforcement Policy

No movement has been taken by the CMC in the last three years to address the injustices committed against Mr Leggate

Regarding the failure by the Department of Mines to enforce the environmental laws of the state, the CJC excused the authorities of suspected official misconduct. The CJC did this by claiming that the non-enforcement did not constitute official misconduct because everyone knew that the Qld Government had a policy of non-enforcement.

Quite literally, this argument is nonsense. There is no provision at law that excuses or allows criminal activity on the basis that 'everyone' knows that the law-breaking was being allowed by policy

Commissioner Davies set out the policy of concealment used by successive Governments regarding the state of Queensland Health, and described all the Ministers and bureaucrats and staff who knew that the Government had this policy. Davies did not allow the fact that all these Governments, Ministers and bureaucrats knew of the policy of concealment to excuse the Governments, Ministers and bureaucrats who implemented this policy

Mr Carmody QC, later to become the head of the Crime Commission, explained the legal situation associated with the Leggate Disclosures when representing Counsel Assisting the Connolly-Ryan Inquiry. Mr Carmody found that the Leggate disclosures did constitute a prima facie allegation of official misconduct:

> *I wouldn't like to be held to the strength of the evidence of a criminal offence, but it was something that could have been investigated to see just whether or not the criminal offence existed. But it may have been a conspiracy that Mr Atkinson submitted under the Criminal Code or a breach of section 200 or even section 92 of the Criminal Code, which I don't think has yet been referred to but it's the old common law offence of misfeasance in public office which reads, briefly and relevantly, "Any person who being employed in the Public Service does or directs to be done, in abuse of the authority of his office, for an arbitrary act prejudicial to the rights of another, is guilty of a misdemeanour".*

So what you would have to find is that someone had given a direction, in abuse of the authority of his office, for an arbitrary act which would be, say, a policy determining that directions weren't to be given in any circumstance, even in appropriate circumstances, that prejudiced the rights of other. Who that other person is might be difficult to identify, it may well be the public generally or it may be a particular adjoining land holder or somebody else. But these would be factual matters that would have had to exist before the criminal offence could be constituted. But theoretically there was something perhaps that the CJC had to investigate and it wasn't so far from their jurisdiction that they could dismiss it as maladministration.

.....

Essentially, what we say is that there was a factually sufficient basis to give the CJC jurisdiction to investigate it. What it ultimately would have found is problematic, but Leggate raised a prima facie allegation of official misconduct is the submission that Counsel Assisting makes.

Mr Carmody goes on to suggest a possible answer that the CJC might have made:

What it would have done, had it investigated it and whether or not prosecutions would have ensued again is a little hypothetical. I mean it has a reporting function and it may have seen fit again in the proper discharge of its function to simply give a report to the relevant Ministers and departmental officers to say, "Well technically speaking this is official misconduct. Obviously it's a policy in good faith but you're in danger of being in breach of the criminal law or the Criminal Justice Act if you don't look at the the law and bring some conformity or bring your policy into conformity with the law".

The mistreatment of children at John Oxley and Neerkol, for example, have come to the Courts many years after the alleged wrongdoing was committed. So it will be with the wrongdoing that was and is the subject of the Leggate disclosures. Decades now of acid waters and other pollutants have been poured into the river systems of Queensland, and decades of pollutants are to come.

There is now, in the results of tests of water and plant and soil, results held by the Government, the '*factual matter*' that Carmody held would be necessary '*to exist before the criminal offence could be constituted*'.

Two cases exist where mines, identified in the Leggate disclosures as offending mines (with the environmental impacts that each mine would cause), have made out-of-court settlements for the harm caused to '*a particular adjoining land holder or somebody else*'. These cases are now available, and others will inevitably become available. For the CJC, however, to find this information, information tending to show criminal acts by Mr Leggate's superiors, the CJC will have to be forced 'out of the car' to do a thorough, fair and impartial investigation.

The Punitive Transfer

The CJC's misstatement of the law on the issue is contained in their refusal to investigate the 1991 transfer of Mr Leggate from the Department of Mines to the Department of Primary Industries.

The blind eye turned by the CJC and now CMC to the punitive transfers imposed on Jim Leggate (and Fitzgerald Inquiry hero Inspector Col Dillon) allowed the same tactic to be used against 'RAINBOW' during the period when the Government and Crown Law were withholding documents from the discovery processes undertaken by 'RAINBOW' before the Queensland Supreme Court

The CJC misstatement of the law occurred while referring to Mr Leggate's complaint about an earlier opinion given by CJC officer Thomas (Mr Thomas opined to the Senate Select Committee on Public Interest Whistleblowing that Mr Leggate had made a 'voluntary choice, clearly motivated by difficulties within the department' to accept the transfer). The CJC, second time around, had to admit that Mr Leggate 'had little say in the matter', but then invented a new argument to support the 'Do nothing' option. This new argument was that whether Mr Leggate had a choice or not was 'semantics' and 'irrelevant'. In a 24 page report dated 20 April 2001, the CJC concluded that :

> *With respect, this issue appears to have descended into one of semantics centred upon whether Mr Leggate was truly able to negotiate his transfer, or whether he had little say in the matter. Quite clearly, the tenor of his discussion with Mr Taylor on 7 October 1992 confirms that he was given little choice.*

Immediately, the CJC found a definition of 'choice' that typifies the degree to which the CJC is the captive of the departments that the CJC is supposed to 'watchdog'

> *However, the contemporary documentation does reveal that the department and Mr Leggate were dealing with each other on the basis of there having been made an offer of transfer (with an ultimate acceptance of that offer). Furthermore, there is evidence that it was Mr Leggate himself who, as early as 3 March 1992, raised the possibility of transfer. Whether the term used is offer, invitation or negotiation, the reality is the same: Mr Leggate had a choice of accepting the pre-arranged transfer, or face 'alternative courses of action'.*

WAG accepts this description of the reality faced by Mr Leggate, but disputes that this reality constituted any choice, other than in the sense that people joke about the practice of the mafia in 'making an offer that he couldn't refuse'. The CJC may also have felt uncomfortable about the audacity of their definition of choice, for they argued in the next sentence

> *In any event, regardless of the form of negotiation, the evidence cannot reasonably support a suspicion of official misconduct. The evidence is overwhelming that the department harboured concerns about Mr Leggate's ability to provide satisfactory continued service, and that such concerns were the catalyst for the Department's endeavours to remove Mr Leggate. In those*

circumstances, whether or not Mr Leggate was afforded any real choice is irrelevant – no person can be said to have committed any act of official misconduct.

This clearly is not the case, and anyone who 'gets out of the car' to investigate the transfer will find:

- DPI documentation shows that the position to which Mr Leggate was transferred was a PO3 level position, reporting to a PO4 level officer
- Section 24 of the then operating Public Service Management and Employment Act 1988 stipulates that Mr Leggate could not refuse the transfer if it was 'at level', that is, it must be a transfer to a position with the same classification level as substantively held by Mr Leggate. Consistent with this restriction, transfers to lower level positions must be by agreement
- Mr Leggate held a substantive PO4 level position in the Department of Mines
- Mines did not have the power to force the transfer of PO4 level officer, Mr J Leggate, to a PO3 level position, they could only transfer him to that position if they got his agreement
- Subsequent to the effected transfer of Mr Leggate to the PO3 level position, DPI and Mines Department claimed in correspondence that the PO3 level position was a PO4 level position, and these claims were not true
- Mines and DPI appear to have used deceit and a falsehood to deny knowledge that the two departments did not have the power to force the transfer
- There can not be any pretence of any agreement when one side is threatening the other side with consequences if agreement is withheld
- There can not be any pretence of agreement if one side is misrepresenting the nature of the new position and failing to advise of important aspects about the new position

It is beyond belief that any qualified lawyer would not be aware of the law relating to agreement

Dishonesty by public officers in the use of their authority can constitute official misconduct. Forcing a transfer upon an officer when there was no power to do so is an abuse of the power and use of a power that is not held. Use of a fraud to hide the fact of the abuse is also a deceit in the use of the power.

An improper motive for this abuse and this deceit adds to the wrongdoing. Should the reason for the transfer be Mr Leggate's disclosures about the non-enforcement policy, and should Mr Carmody be correct, then the two departments have subjected Mr Leggate to a punitive transfer because he disclosed what may have been criminal activity by the Department of Mines. This too would be misconduct, which the CMC is trying to avoid, by avoiding the prospect that the non-enforcement policy is or may be a breach of the Criminal Code.

As a result of the CMC position in the Leggate transfer, there is a precedent faced by all whistleblowers, whereby tacit approval has been given to CEOs and Commissioners to forcibly transfer whistleblowers to lower level positions. CEO's have been encouraged to

this reprisal because the CMC undertakes to define 'choice' to include 'offers that officers cant refuse', and where the CMC has indicated that it will not interfere.

Something very close to this description of undertakings appears to have been relied on when Col Dillon was sent to his demotion and to his gulag

The failure of the CMC to address the punitive transfers forced upon Messrs Dillon, Leggate and RAINBOW is facilitating this tactic against all public servants. It becomes a primary weapon to force a culture of concealment upon the Public Service

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