

**From Deep North to International Governance Exemplar:
Fitzgerald's Impact on the International Anti-Corruption
Movement**

Author

Sampford, Charles

Published

2009

Journal Title

Griffith Law Review

Rights statement

© 2009 Griffith Law School. The attached file is reproduced here in accordance with the copyright policy of the publisher. Please refer to the journal's website for access to the definitive, published version.

Downloaded from

<http://hdl.handle.net/10072/33845>

Link to published version

<https://www.tandfonline.com/toc/rlaw20/18/3?nav=toCList>

Griffith Research Online

<https://research-repository.griffith.edu.au>

FROM DEEP NORTH TO INTERNATIONAL GOVERNANCE EXEMPLAR Fitzgerald's Impact on the International Anti-Corruption Movement

*Charles Sampford**

In pre-Fitzgerald Queensland, the existence of corruption was widely known but its extent and modes of operation were not fully evident. The Fitzgerald Report identified the need for reform of the structure, procedures and efficiency in public administration in Queensland. What was most striking in the Queensland reform process was that a new model for combatting corruption had been developed. Rather than rely upon a single law and a single institution, existing institutions were strengthened and new institutions were introduced to create a set of mutually supporting and mutually checking institutions, agencies and laws that jointly sought to improve governmental standards and combat corruption. Some of the reforms were either unique to Queensland or very rare. One of the strengths of this approach was that it avoided creating a single over-arching institution to fight corruption. There are many powerful opponents of reform. Influential institutions and individuals resist any interference with their privileges. In order to cause a mass exodus from an entrenched corruption system, a seminal event or defining process is needed to alter expectations and incentives that are sufficient to encourage significant numbers of individuals to desert the corruption system and assist the integrity system in exposing and destroying it. The Fitzgerald Inquiry was such an event. This article also briefly addresses methods for destroying national corruption systems where they emerge and exist.

Introduction

To a liberal observer who was born in Queensland but who grew up in Victoria, pre-Fitzgerald Queensland appeared to my colleagues and me as the 'Deep North' — a democratic enigma characterised by repressive policy and legislation, succinctly and eloquently described by Colin Hughes:

* Charles Sampford is Director of the Institute for Ethics, Governance and Law (a joint initiative of the United Nations University, Griffith, QUT, ANU and the Center for Asian Integrity in Manila). This article is based on parts of 'Global Transparency: Fighting Corruption for a Sustainable Future: From National Integrity Systems to Global Integrity Systems', the overall conference discussion paper for the 13th International Conference Against Corruption in Athens (31 October 2008), commissioned by Transparency International, and 'From Deep North to Global Governance Exemplar: Fitzgerald's Impact on the International Anti-Corruption Movement', paper presented to plenary session, Australian Public Sector Anti-Corruption Conference, Brisbane, 30 July 2009. The author wishes to thank Ms Carmel Connors, IEGP Publications Manager, for her work on the second paper and this article.

[A] journalist's catchphrase Australia's 'Deep North' — authoritarian, racist in its dealings with Aborigines, heavy handed to the point of violence in its dealing with political dissidents, vulnerable to the pressures of multinational mining groups, and right wing groups opposed to liberal social trends, which have been at work in post war Australia, sensitive to states' rights and deeply suspicious of national politicians and bureaucrats to the point of employing the antiquated machinery of the imperial connection with London against changes coming out of Canberra, ready even to contemplate secession from the Commonwealth of Australia.¹

Queensland was a state that had had a one-house parliament since 1922 and lacked an independent parliamentary committee system to oversight the operations of government. By the time Bjelke-Petersen was elected Premier in 1968, the four-zone gerrymander, set up by the ALP when in office and bitterly criticised by the then Country Party, was retained and refined into the most potent electoral weapon in the nation.²

Distinctive characteristics of the Bjelke-Petersen premiership were the close personal links between business and politics and a political culture that was autocratic, authoritarian, racist and oppressive.³ The *modus operandi* of government included a *laissez-faire* attitude to development unencumbered by environmental or moral constraints, a police force that was viewed as an extension of government, a vicious administration that ruined the lives of tens of thousands of people such as Aborigines and Torres Strait Islanders, civil libertarians and trade unionists, as well as ordinary citizens — including small-l liberals who had the audacity to oppose his administration — a blatant use of religion, and a patent disregard for the doctrines of ministerial responsibility or the separation of powers.⁴

Supporters of Sir Joh point to the rapid development of Queensland during his record 19-plus years as Premier:

Throughout his premiership Bjelke-Petersen and his government sought to be perceived as forcefully promoting Queensland's economic development and its status as the last bastion of free enterprise, at the same time staunchly protecting and defending the state's moral and political values.⁵

The existence of corruption was widely known during this period, but its extent and modes of operation were not fully evident; when uncovered by the Fitzgerald Inquiry, Sir Joh's premiership was found to have ushered in a culture of

¹ Hughes (1980), p 10.

² Stanaway (1987), p 5. After analysing the results of the 1974 election and determining the uniform swing required to change government, a colleague and I were surprised to find what is now called a 'two-party preferred vote' of around 50 per cent would have caused a change of government. We then realised that the gerrymander was primarily directed at the Liberal Party to ensure that the National Party would dominate the Coalition even when it won significantly fewer votes.

³ Walter (2003).

⁴ Fitzgerald (2005), p 14.

⁵ Coaldrake (1989), p 3.

corruption that some critics believe only paralleled that of the New South Wales Rum Corps almost 200 years ago.⁶ At the time, it may have appeared as a surreal period in Australia's political history — though examination of other systems indicates that we should not give Joh and his colleagues any back-handed medals for originality.

A New Model for Fighting Corruption: From the Hong Kong Model to the Queensland Model

Twenty years ago, the Hong Kong model (a strong law and a powerful anti-corruption agency) was the preferred model for fighting corruption. In 1988, the election of a Coalition government under Nick Greiner brought a new broom sweeping through public administration in New South Wales.⁷ The result was the Independent Commission Against Corruption, Australia's first dedicated corruption watchdog. This 'watchdog body' was created just months before the *Report of a Commission of Inquiry Pursuant to Orders in Council* (the Fitzgerald Report)⁸ was handed down. The report's 121 recommendations contained Fitzgerald's vision for reform. Electoral and administrative, criminal justice, and police were the three areas on which the recommendations were structured. The major recommendations of the report were the establishments of the Electoral and Administrative Review Commission (EARC) and the Criminal Justice Commission (CJC), restructuring of the Police Department along regional lines, 'scrapping' of the Police Department's Internal Investigation Unit, abolishing the police Complaints Tribunal, and revising police rules compelling police to report misconduct to the CJC on a confidential basis.⁹ Fitzgerald recommended that EARC and the CJC report to Parliamentary Select Committees.

In his report, Tony Fitzgerald identified the need for reform of the structure, procedures and efficiency in public administration in Queensland. To provide a firm foundation for his reform, Fitzgerald's recommendations included the creation of a new body whose role was to discharge those criminal justice functions not appropriately carried out by police and other agencies. This body was the Criminal Justice Commission. Fitzgerald recommended that the CJC be an independent body — independent from the police, the judiciary, the government and the opposition, but reporting to a parliamentary committee. It was given the mission of 'investigating and reducing the incidence of police misconduct and public sector corruption, monitoring and reviewing reform of the police service, and playing a central role in effective reform of the criminal justice system'.¹⁰ The CJC (now the Crime and Misconduct Commission) continues to be a spur to public service accountability. Its inquiries over the years have exposed accountability 'sore spots'. Consequently, all governments have attempted to either influence or reorder the focus of the commission. The commission is the most public, and probably the most

⁶ Sir Joh was loathed and loved (2005).

⁷ Salusinszky (2009).

⁸ Fitzgerald (1989).

⁹ PC (1990), p 244.

¹⁰ PCJC (1997), p ii.

testing, ground for the endurance of the ‘Fitzgerald spirit’, and has been a major aid to achieving better government.¹¹

The Fitzgerald vision for EARC was for that body to undertake an independent and comprehensive review of administrative and electoral laws and procedures.¹² EARC reviews began with the release of issues papers to stimulate debate, followed by periods during which the public could make submissions — all of which were published. Once EARC released its reports, the parliamentary committees took further submissions before making recommendations to parliament. Notable EARC proposals included the *Peaceful Assembly Act*, broadening the scope of judicial review of administrative decisions, and reviews of the electoral system and local government electoral boundaries.¹³ It was the EARC process that took Queensland out of the era in which politics and public administration were largely unaccountable.

What was most striking in the Queensland reform process was that a new model for combatting corruption had been developed. Rather than rely upon a single law and a single institution, existing institutions were strengthened and new institutions were instituted to create a set of mutually supporting and mutually checking institutions, agencies and laws that jointly sought to improve governmental standards and combat corruption. Some of the reforms were versions of those tried elsewhere — involving the creation or strengthening of institutions¹⁴ or the passage of a package of administrative laws following the Commonwealth model.

Some of the reforms were either unique to Queensland or very rare — the *Public Sector Ethics Act 1994* and its associated regime of ethical standard-setting; the *Legislative Standards Act 1992*, which provided a means for the protection of human rights in the legislative process rather than just a judicial backstop; a powerful Scrutiny of Legislation Committee; an Integrity Commissioner to provide advice on conflict of interest and potentially other ethical issues affecting ministers and their advisers.¹⁵

Identifying and Popularising the New Model

I found this process fascinating, and in my various papers and seminars sought to describe it. I called it an ‘ethics regime’.¹⁶ One of the strengths of this approach was that it avoided creating a single over-arching institution to fight corruption. There are dangers with a single, powerful institutional approach:

¹¹ Preston et al (2002), p 128.

¹² Preston et al (2002), p 104.

¹³ Preston et al (2002), p 127.

¹⁴ The Auditor-General, parliamentary committees, the Office of the Parliamentary Counsel, the Public Sector Management Commission (which has evolved into the Public Service Commission), the Ethical Standards Command of the Queensland Police Service, the Office of Government Owned Corporations, the Director of Public Prosecutions, Legal Aid, the Electoral Commission, the Ombudsman.

¹⁵ Preston et al (2002), p 156.

¹⁶ See, for example, Sampford (1994a, 1994b, 2000, 2001, 2002, 2005); Sampford and Connors (2006); Sampford et al (2005); Sampford and Wood (1993).

- Such an institution might be so powerful as to be a threat in itself.
- The corrupt only have to capture one institution to capture the fight against corruption.
- A single institution cannot address the problem from as many directions.
- Combatting corruption is not enough — the goal is to make governments effective and a multidirectional approach is more likely to succeed.

When ‘sleaze’ threatened to bring down the John Major government in the United Kingdom, the government established a joint Select Committee on Standards in Public Life chaired by Lord Nolan. When I outlined the Queensland approach to Lord Nolan and his committee and committee staffers, they included a version of the model in their own report.¹⁷ Of more lasting impact was his support for this approach at the OECD and its public management (PUMA) group.¹⁸ These organisations were involved in assisting new entrants to the EU to improve governance standards. The OECD and PUMA called the approach an ‘ethics infrastructure’, a term that was adopted in several jurisdictions and by the United Nations.¹⁹ The idea, however, was most effectively proselytised by Transparency International (TI).²⁰ When its CEO, Jeremy Pope, visited Queensland, he proclaimed that this was the way to fight corruption and coined the term ‘national integrity system’,²¹ typically involving a number of ‘pillars’.²² TI and later the World Bank and other aid agencies adopted this term and approach. The integrity system was neither national nor particularly systematic, but the choice of the term ‘integrity system’ rather than ‘anti-corruption’ system was inspired.

Corruption (the abuse of entrusted power for personal gain) is a derivative concept and a derivative goal.²³ One cannot know what an abuse is without knowing what the legitimate uses of those powers are. Integrity (the use of entrusted power

¹⁷ Nolan (1995). I was the first person consulted by the Nolan Committee in 1994 and he acknowledged the source of the Queensland example and the source of the advice in addresses to the OECD in a workshop on Public Sector Ethics in November 1997, the Ethics in the Public Service Network conference in Leiden in 1998 and in a lecture tour of Australia in 1999.

¹⁸ OECD (1996, 1997a, 1997b, 1998).

¹⁹ UN (1990, 1997).

²⁰ Pope (2000).

²¹ This story has been told many times by Jeremy Pope and others — most recently in an *ABC Background Briefing* report, www.abc.net.au/news/stories/2009/10/09/2710033.htm.

²² Legislature, Executive, Judiciary, Auditor-General, Ombudsman, Watchdog agencies, public service, media, civil society, private sector and international actors — traditionally shown as pillars of a Greek temple, though I later suggested a different visual metaphor of a ‘bird’s nest’ in discussions and papers for the World Bank and Transparency International. See Sampford et al (2005).

²³ This is the most commonly used definition. There is an ongoing debate, however, about corruption definitions — specifically, what defines a corrupt act and in what circumstances. The definition of corruption is therefore complex and contested. For a fuller discussion of the arguments, see for example Génaux (2004); Philp (1997, 2002); von Alemann (2004); Sampford et al (2006).

for publicly justified ends) is primary.²⁴ While it is not true that all power corrupts, it has to be recognised that it will not only attract those who wish to exercise it for its publicly justified purpose, but also those who wish to use it for their own purposes. 'Personal' gain is very widely construed. It extends beyond personal enrichment and includes benefits to the power-holder's family, associates, political party²⁵ — indeed, anyone other than those who are the publicly intended beneficiaries of that power.

If the only goal was to avoid government corruption, in theory perhaps that could be achieved by not having government and, in practice, instituting anti-corruption methods that encourage government inaction. The potential for corruption is built into all institutions because of the dynamics of collective action and agency.²⁶ Institutions collect power, people and resources for publicly justified purposes, but that concentration of powers can be used for other purposes.²⁷ We want effective institutions that deliver at least a significant proportion of the benefits they claim to deliver.

The reason why we create and support governments, joint stock companies and international NGOs is because it is believed that more can be achieved collectively than individually with the pooling of people power and resources for shared goals.²⁸ That decision, however, opens the possibility that institutional leaders may turn that entrusted power to their own benefit or use against their citizens/stockholders/bondholders.²⁹

A NIS evolves to increase the probability that entrusted powers will be used for its publicly justified and democratically endorsed ends, and reduce the likelihood that those powers are abused. NIS will vary from state to state, with similar functions being performed by different institutions. A NIS can vary in completeness and effectiveness, but there is almost always some base upon which it can be built.³⁰

A New Insight: Corruption Systems

While National Integrity Systems³¹ were seen to be the answer to corruption, Transparency International's early comparative studies generated some surprising

²⁴ Integrity is defined as the use of entrusted power for publicly justified ends. See Dobel (1999); Sampford et al (2005).

²⁵ In politics where very large donations are required for political campaigning (e.g. the United States) or rewards for constituents (e.g. Japan), politicians may engage in corrupt behaviour while not benefitting personally.

²⁶ Heidenheimer (2004); Montinola and Jackman (2002).

²⁷ Sampford (1990).

²⁸ This approach is important when we examine the various domains of corruption that can exist even within a strong democracy, and the potential effects. See, for example, Warren (2004).

²⁹ See Keohane (2006) for his vision of a pluralistic, global accountability system and his analysis of the extent to which democratic principles can be applied to world politics and the implications for combating corruption.

³⁰ Sampford et al (2005); Pope (2008).

³¹ Transparency International (2000).

results. While countries with stronger national integrity systems were generally less corrupt than those with weak national integrity systems, the correlation was not as great as might be imagined. Some countries with very low levels of corruption seemed to lack institutions that TI's model of a national integrity system seemed to need. Some highly corrupt countries appeared to have all the elements of the TI model — and some new ideas and improvements of their own that should have made their integrity systems even more effective.

Unfortunately, the strength of a national integrity system is not the only relevant variable determining the level of corruption.³² It is quite possible that the more significant variable is the strength of the 'national corruption system' (NCS) — which is, in many states, better organised, better resourced and more effective than the NIS. This may explain why some states with apparently limited 'integrity systems' are relatively free from corruption and some states with apparently extensive 'integrity systems' remain highly corrupt. Coalitions of leaders are needed to create, reinforce and integrate the institutions of the NIS and to coordinate their activities.³³ While a NIS may be seen as the best way to promote integrity, the corrupt are often far more organised and in some states national corruption systems may be better organised, better resourced and more effective — with long-established patterns of behaviour, strong institutions, clear norms, and effective positive and negative sanctions. The NCS will seek to disrupt and corrupt the NIS. As a corollary, the NIS should positively react. It should not merely seek to deter, detect and prosecute bribe-givers and bribe-takers but should first set out to map and understand the corruption system then plan how to disrupt and destroy it.³⁴

³² See Doig and McIvor (2003). This article builds on a Transparency International (TI)-sponsored research study funded by the Dutch government into the National Integrity System (NIS) in practice. It assesses the findings of the study to consider how the approach can work in practice, and what the approach can reveal about the causes and nature of corruption as well as the implications for reform.

³³ See Sampford and Connors (2006). This was a major conclusion of the first World Ethics Forum held in Oxford in 2006.

³⁴ Note that the approach based on ethical standard-setting, legal regulation and institutional reforms that have been variously called an 'ethics regime', an 'ethics infrastructure' or a national integrity system concentrates on institutions and norms. I am cautious about explanations of varying levels of corruption based on 'culture' for a number of reasons. First, there seems little evidence that either the citizenry or public service of relatively corrupt countries is in any way pleased about the level of corruption. They may be resigned to corruption and even take part in it as a way to 'feed their families'. However, if given a hope of reform, they frequently demonstrate a dislike of corruption that is heightened by their regular experience of it. Second, much of the corruption involves the toxic interaction of different governmental systems, each with its own logic and integrity (e.g. with the interaction of 'big man' local politics and Westminster systems of government practised remotely at the capital). As I heard one Papuan minister put it: 'Swiss bank accounts are no part of traditional culture.' Third, using culture is as often an excuse by corrupt leaders for their behaviour, a justification by Westerners for supposed superiority, or a counsel of despair for those wanting to give up attempts at reform. Finally, even if culture is a key factor, it can rarely just be changed directly. Eliciting ethical norms, passing formal laws, setting incentives, and making corruption difficult and integrity easy are effective in combination when it

Organised crime (whether gangsters or corrupt cliques) will always attempt to suborn or intimidate police, judges and any official or institution within the NIS. A corollary, however, is not always noted. The task of the NIS is not just to prosecute corrupt individuals. It is to disrupt the corruption system so that it is difficult for it to function. Corruption flourishes in well-established networks where trust is present on both sides of the exchange relationship. This phenomenon is as old as human civilisation, its forms subject to continual change and redefinition. Too often, moral accusations are aimed at the failings of individuals, thus distracting attention from institutional and structural patterns of corruption. Systemic, pervasive sub-systems of corruption can exist, and indeed have existed, across a range of historical periods and geographic areas, as well as religious, political and economic systems. A key operating feature of corruption sub-systems is that they are relatively stable networks that survive changes in personnel.³⁵ Such networks support the common good of particular elites or social groupings rather than uphold the national public good. The failure of public trust leads to solidarity networks within a state. It is important to understand how corrupt and unethical sub-systems operate in order to reform and change them. We can certainly recognise a well-organised corruption system in 1980s Queensland and in many other jurisdictions.

Revisiting Fitzgerald: An Object Lesson in the Destruction of a Corruption System

The difference between Queensland and many other jurisdictions that suffered under corruption systems is that the corruption system in Queensland is no more.³⁶ That this is so is not the result of the Fitzgerald-inspired EARC reforms. Long before the integrity reforms were put in place, the state's corruption system had effectively been destroyed by the Fitzgerald Inquiry. That inquiry exposed the system of corrupt deals and payments — from pimps paying off individual police and developers paying bribes to intermediaries, to the chief of police, and the Premier:

comes to reducing corruption. They may also change culture indirectly — almost certainly the only way of so doing.

³⁵ See Nielsen (2003). Nielsen identifies examples of exclusive corruption networks as criminal organisations such as the Mafia and the Japanese Yakuza and more subtle types of corruption networks, known as 'crony capitalism', as informal networks of large family businesses and where government officials control activities such as large loans from state bank that are not repaid, preferential government contracts, protected monopolies, investment banking and brokerage conflicts of interest, auditing, and consulting conflicts of interests.

³⁶ This is not to say that corruption was completely eradicated. Pockets of corruption persisted within the police service and within local government. However, the system of corruption with senior police and ministers playing a pivotal role and protecting the rest was at an end. When two ministers did appear to engage in abuse of power for personal gain, they were prosecuted and jailed — with a new round of reforms to tighten the system.

The Inquiry revealed that over the years links had developed in Queensland between criminal and political networks. It also showed that ... crime and corruption had become widespread across a range of activities including bribery, prostitution, the operation of sex parlours and brothels, tax evasion, illegal gambling, SP betting, the rorting of ministerial expenses, protection rackets, money laundering, and probably drug running.³⁷

The exposure was so complete that the corruption system operating within the state was effectively destroyed and could no longer function in its previous form. In the beginning, the inquiry probed allegations of police misconduct and activities but eventually expanded to become a wide-ranging investigation into the entire institutional framework of the state.

The methodology was instructive. Judicious grants of immunity were given to those who were prepared to disclose their activities.³⁸ While immunities allowed certain witnesses to escape prosecution, without indemnities it is unlikely that evidence would have become public.³⁹ The inquiry started near the bottom of the corruption chain, encouraging the 'small fish' to disclose in return for immunity and then worked up the hierarchy of 'bagmen' until the whole picture was exposed. At a certain point, it was announced that the inquiry was interested in hearing from those who could tell them something they did not already know — and could offer immunity from prosecution.⁴⁰

Such strategies are not new. The key to success is to set incentives so that it will be in the perceived best interests of most members of the corruption system to disclose to preserve their interests. The risks to jobs, freedom and assets of keeping silent are greater than the risks of disclosure. If those incentives are set correctly, sufficient numbers will volunteer information and the rest will have an incentive to do so because of the likelihood of exposure. This outcome was the experience of the Fitzgerald Inquiry approach.

³⁷ PC (1990), p 244.

³⁸ Ray Whitrod (a former Queensland Police Commissioner whose attempts to eradicate police corruption were blocked by Joh Bjelke-Petersen and whose resignation was forced by the latter's appointment of the corrupt Terry Lewis as his Deputy Commissioner) in the Foreword to Phil Dickie's book, *The Road to Fitzgerald and Beyond*, wrote: 'The revelations of the Fitzgerald Commission were unexpected because of the sterility of earlier official inquiries. The conscientious and competent approach of this commissioner must have dumbfounded many who thought themselves in no danger of exposure.' Cited in Dickie (1989), p viii.

³⁹ Ransley (2001), p 7; Dickie (1989).

⁴⁰ The admissions would not, of themselves, be admissible. The offer of immunity was effectively an invitation 'for the rats to leave the sinking ship' — leaving ropes for them to do so, but warning them not to hesitate in case someone else gave the same information before them. The tactic worked because the individuals offered immunity believed that the risks of non-cooperation were much greater than the risk of cooperation.

Three Ways to Destroy a National Corruption System

There are many powerful opponents of reform. Influential institutions and individuals resist any interference with their privileges. In order to cause a mass exodus from an entrenched corruption system, a seminal event or defining process is needed to alter expectations and incentives that are sufficient to encourage significant numbers of individuals to desert the corruption system and assist the integrity system in exposing and destroying it. Fitzgerald successfully pursued one. I would like to suggest that the same logic could be applied to make amnesties or truth and reconciliation commissions effective means to the same end.

Sequential investigation with immunity

The Fitzgerald model operated under a system of sequential investigation, and offered general immunity as part of a public inquiry. The visibility of the hearings made them a powerful form of public disgrace for indemnity applicants that in important ways mimicked the exposure of a criminal trial. However, the real goal is to get sufficient 'little fish' to come forward to expose the 'big fish' and help the public and prosecutors understand what the corruption system is and how it works, and thus enable to prosecutors to set about dismantling it.

Amnesties

An amnesty for corruption-related offences would offer a much broader remedy in which all those who have been engaged in corruption but admit to their part in it are given immunity from prosecution and, depending on the extent of their corruption and their position, may even keep their jobs or keep some of their ill-gotten gains. However, the terms of the amnesty should not merely involve forgiveness for any corruption admitted. It should be based on the principle that full immunity is given if there is full disclosure. Failure to declare all means that no immunity is provided. Selective reporting of corruption is not acceptable.

An extra incentive to disclose could be in allowing those who disclose to keep a proportion of the proceeds of the corruption and to receive a proportion of the proceeds of corruption of others which is proven. Three different kinds of case are envisaged for such amnesties:

- 'small fish', for whom corruption was what gave them a living wage — those engaging in full disclosure will not have to disgorge proceeds of corruption and keep their jobs;
- 'medium-size fish', for whom corruption was genuinely profitable and gave them more income than they could reasonably have expected;
- some very 'big fish', who might not be offered amnesty at all — we can find out about them from the disclosures of others. If exempted, it would offend our sensibilities to allow them to go free — for example, those who took the most, or held particular public office, or who had taken funds beyond a certain amount.

One could even imagine a formula such as the following:⁴¹

<i>Amount of corrupt payments disclosed</i>	<i>% age disgorged</i>
\$0–50,000	0
\$50–100,000	10
\$100,000–1,000,000	20
\$1–10 million	30
\$10–50 million	40
\$50–100 million	50
\$100–500 million	75
\$500+ million	95

Truth and Reconciliation Commissions

The third mechanism would be a form of Truth and Reconciliation Commission (TRC).⁴² TRCs are one important element in the growing transnational institutional apparatus behind international human rights and humanitarian law. Truth Commissions are not courts of law, but resemble them in important aspects: some have had subpoena and forced seizure powers; many have published reports apportioning individual responsibility; a few have awarded compensatory damages and submitted information to courts.⁴³ Such a commission should operate with an institutional form of general amnesty⁴⁴ and within a public process that ensures procedural fairness.⁴⁵

TRCs have a number of advantages over sequential investigation and amnesties. They are able to identify far more perpetrators than a reliance on investigations and prosecutions would have uncovered.⁴⁶ Second, they allow for a greater public and systematic account of corruption in a jurisdiction than an amnesty, and allow for further investigation beyond merely a receipt of the information under an amnesty. Finally, TRCs can be very useful and potentially transformative where there is a practice or collective experience that most want to put behind them. It allows national recognition of a form of wrongdoing and a

⁴¹ This formula operates similarly to a tax on corrupt payments with a steeply progressive tax rate. We may have a higher rate of disgorging for officials who keep their jobs. One might also provide a percentage of the sums recovered from others who had not disclosed but of whose corrupt activity they had provided evidence.

⁴² ‘Truth commissions invariably, and appropriately, focus primarily on direct acts of physical violence. However, some have examined other forms of repression too, including expropriation of property without compensation, unjust dismissal and government harassment, and forced displacement.’ Freeman (2006), p 14.

⁴³ Freeman (2006).

⁴⁴ It is not necessary to offer amnesty to all. Those who have stolen more than a certain amount or those who have held particular kinds of office — for example, judges — should perhaps be excluded.

⁴⁵ See Freeman (2006). He sets forth standards of procedural fairness aimed at protecting the rights and interests of those who come into contact with Truth Commissions.

⁴⁶ Blumenson (2006).

national decision to move on from it — with perpetrators admitting wrongdoing individually and collectively, and seeking forgiveness from victims individually and collectively. Whereas the forms of wrong doing covered by TRCs are generally concerned with physical violence, they could achieve the abovementioned ends for corruption.

As with the version of amnesty suggested, full disclosure should be required to secure immunity. However, it is also useful to operate on the principle that the first to report should obtain more favourable treatment.⁴⁷ This would avoid creating an incentive to hang back and see what else comes out.

The different mechanisms would require different levels of support. The sequential investigation model requires the support of key prosecutors or corruption fighters. It will also require a means for protecting those who have disclosed significant evidence of corruption (the whistleblowers). This is especially the case in countries where violence is used to silence opponents. In such cases, the protection systems for those who disclose should be, literally and figuratively, ‘bullet proof’.

Amnesties and TRCs of the kinds suggested would require more widespread support than sequential investigations. They would require:

- strong leaders committed to reform, needed to bring about the cultural change that is required;
- a real likelihood that prosecutions will be successful — preferably from recent and public experience;
- procedural fairness;
- sufficient investigatory resources to follow up the information generated;
- the political will to drive and support the change, which may be generated by the process (as in Queensland) rather than preceding it. In some cases, public demands may precede political will.

Generalising the Methodology: The Prisoner’s Dilemma⁴⁸ Writ Large

All three methods (the sequential investigation by Fitzgerald and the form of amnesty and TRC suggested) are based on an exchange between the individually corrupt and the state (and its citizens). The individuals have information that the state wants — knowledge of individual corruption and of how the corruption system operates. The state has the capacity to grant immunity, and with it liberty. The individuals also have something that they would like to retain and that the state would like returned — the proceeds of corruption. One of the central goals of all three methods of smashing corruption is to achieve an exchange of information for

⁴⁷ A system could exist where a sliding scale operates so that a witness before such a commission may get to keep some of the proceeds of corruption, depending on whether they were a ‘small fish’ or a ‘big fish’ in the corruption system. For clean individuals who report what others have done, a reward system could apply. In the case of wrongdoers, future unlawful activity will produce full prosecution for previously admitted corruption and any future corruption.

⁴⁸ See Prisoner’s Dilemma (2007): ‘Much of the contemporary literature has focused on identifying conditions under which players would or should make the “cooperative” move corresponding to remaining silent.’

retained freedom. While the state would like a return of ill-gotten gains, it is important to recognise that its greatest interest is in destroying the corruption system, and it is better to receive a smaller or even token amount if this can be achieved.

If the corruption system is strong, then neither the ‘big fish’ nor the ‘small fish’ will see a need to admit that they were involved in corruption. The ‘big fish’ feel a sense of impunity because there are a number of defences they can deploy before they have to see the inside of a prison cell. They can:

- bribe a prosecutor;
- threaten any witnesses or co-collaborators who are tempted to give evidence against them;
- kill the witness if the threat is unsuccessful;
- bribe a judge;
- secure political protection;
- obtain a pardon.

The ‘small fish’ have an incentive to stay silent because the proceeds of corruption, while small, are important to them because they receive so little. More importantly, there is the risk to them. The goal must be to achieve a radical change in the incentives and disincentives surrounding disclosure. It must be apparent that the risk of exposure is significant and the rewards for disclosure outweigh the risk of remaining silent. If possible, it should simply be too hazardous for rational officials or rational business executives to remain silent and compliant.

For this to happen, it is essential that there really is a hazard — that prosecutions can be carried out successfully. The best way to demonstrate this is for recent prosecutions to have succeeded, meaning that it might be better to start with sequential investigation rather than an amnesty/TRC. The former can make the latter effective. However, the latter without the former might mean that the threat of prosecution and conviction are hollow.

Provided the threat of prosecution is credible, one way to achieve the right balance of incentives is to build on the fact that corruption almost universally requires more than one person. The state should try to create a set of incentives and disincentives so that, in the corrupt individual’s mind, disclosure benefits them no matter what their accomplices do, while silence benefits the others no matter what that player does. The state should seek to create something analogous to the prisoner’s dilemma⁴⁹ — without the dilemma.

If the majority of those involved (generally ‘small fish’) will keep most of the assets and lifestyle they have and are not likely to be killed for such revelations,

⁴⁹ ‘A slightly different interpretation takes the game to represent a choice between selfish behaviour and socially desirable altruism. The move corresponding to confession benefits the actor, no matter what the other does, while the move corresponding to silence benefits the other player no matter what that player does. Benefiting oneself is not always wrong of course, and benefiting others at the expense of oneself is not always morally required, but in the prisoner’s dilemma game both players prefer the outcome with the altruistic moves to that with the selfish moves. This observation has led David Gaunthier and others to take the Prisoner’s Dilemma to say something important about the nature of morality.’ Prisoner’s Dilemma (2007)

then it is in their economic interest to disclose. Failure to do so would cost liberty, assets and lifestyle. Silence achieves little if everyone else involved is silent too, but is catastrophic if at least one other person discloses.

The 'bigger fish' will have to disgorge some of their gains but still retain enough to maintain a more modest but desirable lifestyle. However, the more they have gained, the more people with whom they are likely to have had corrupt dealings. Only one of them need disclose for the 'bigger fish' to lose everything.

The approach to the 'biggest fish' may vary widely depending on the confidence of securing information from 'smaller fry'. One may want to maximise the chance of securing the truth and achieving reconciliation. On the other hand, if enough evidence can be secured from the others, there may be no need for them to disclose for the public to know. They will then become symbols of the crushing of corruption (the system's Sir Terry Lewis)⁵⁰ and possibly a useful source of revenue.

Such calculations should be made and will not be easy. The one thing I will say is that it is better to err on the side of generosity. The systemic benefits of identifying and stopping corruption clearly make it worthwhile. If the incentives are structured so that rational people would be expected to choose the path of disclosure, then it operates at two levels as a 'double reason for action'. The favourable balance of incentives and disincentives means that an individual is likely to disclose. However, the fact that he or she knows it is in the interests of others who were involved in their corruption and who know of their involvement gives a further reason for deciding to disclose. This is what generates such a powerful incentive to disclose and would make a corruption TRC so much more effective.

Conclusion

Tony Fitzgerald is rightly recognised for the set of reforms that were introduced in Queensland following the EARC process he suggested. This was his main goal and his most lasting legacy. As he explained:

The main object of the report and its recommendations is to bring about improved systems and structures. The past misdeeds of individuals are of less concern, except as a basis for learning for the future.⁵¹

And in a later interview:

[I]t would be mistaken to believe that all or even a significant part of the misconduct was exposed. My intension was rather to try to establish better systems for the future and a basis for changed attitudes in the community.⁵²

The EARC process systematically overhauled existing public institutions and, where there were institutional gaps, created new ones. The presence of many

⁵⁰ The Queensland Commissioner of Police, who succeeded Ray Whitrod, was the principal beneficiary of police corruption but lost his money, his reputation, his freedom and his knighthood.

⁵¹ Fitzgerald (1989), p 8.

⁵² Fitzgerald, cited in Coleman (1989), p 3.

interconnected integrity bodies and strategies facilitates integrity as a part of daily life in our major organisations, not least because diverse institutions are also able to hold each other accountable.⁵³ Since then, many jurisdictions have developed ‘national integrity systems’ that rely not on one major anti-corruption institution to protect public integrity, but rather on an array of institutions and procedures.⁵⁴ In this way, Queensland moved from being seen as an ethical bad joke to being viewed as a global exemplar. The importance of this new approach and its replacement of the previously predominant Hong Kong model have been so widely recognised that Fitzgerald’s prior achievement and its general applicability may not be recognised.

The biggest variable in determining levels of corruption and the success of anti-corruption campaigns is the strength of the ‘national corruption system’ (NCS) — which is, in many states, better organised, better resourced and more effective than the NIS. This explains why some states with apparently limited ‘integrity systems’ are relatively free from corruption, and some states with apparently extensive ‘integrity systems’ remain highly corrupt.

The success of Fitzgerald-inspired EARC reforms should not obscure Tony Fitzgerald’s earlier triumph: the exposure and destruction of the Queensland corruption system and the way he went about it. Indeed, further reflection demonstrates that the methodology behind his approach is applicable to three ways of tackling corruption head on: rolling up the system with judicious grants of immunity, amnesties and TRCs. The method or methods that are chosen should depend upon the internal politics of the state concerned. Whichever is chosen, they would do well to look to Tony Fitzgerald, the seminal service he performed for Queensland and the lessons that can be learned from the way in which he did it.

References

- E. Blumenson (2006) ‘The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court’ 44 *Columbia Journal of Transnational Law* 801.
- Peter Coaldrake (1989) *Working the System: Government in Queensland*, University of Queensland Press.
- J Coleman (1989) ‘Fitzgerald: The Price of Offending the Powerful’ *The Catholic Leader*, 29 October, p 1.
- Frank Costigan (2005) ‘Australia’s National Integrity Systems: Introducing a New Blueprint’ 64 *Australian Journal of Public Administration* 40.
- Phil Dickie (1989) *The Road to Fitzgerald and Beyond*, University of Queensland Press.
- J Patrick Dobel (1999) *Public Integrity*, Johns Hopkins University Press.
- Alan Doig and Stephanie McIvor (2003) ‘The National Integrity System: Assessing Corruption and Reform’ 23 *Public Administration and Development* 317.
- Gerald E (Tony) Fitzgerald (1989) *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, (Fitzgerald Report), GoPrint.

⁵³ Costigan (2005), p 41.

⁵⁴ Costigan (2005), p 40.

- Ross Fitzgerald (2005) 'A Corrupt and Vicious Regime: Joh Bjelke-Petersen: 1911–2005' *The Australian*, 25 April, p 14.
- Mark Freeman (2006) *Truth Commissions and Procedural Fairness*, Cambridge University Press.
- M Génaux (2004) 'Social Sciences and the Evolving concept of Corruption' 42 *Crime, Law and Social Change* 13.
- Arnold J Heidenheimer (2004) 'Disjunction Between Corruption and Democracy? A Qualitative Exploration' 42 *Crime, Law and Social Change* 99.
- Colin A Hughes (1980) *The Government of Queensland*, University of Queensland Press.
- Robert O Keohane (2006) 'Accountability in World Politics' 29 *Scandinavian Political Studies* 75.
- Gabriella Montinola and Robert W Jackman (2002) 'Sources of Corruption: A Cross Country Study?' 13 *British Journal of Political Science* 147.
- Richard P Nielsen (2003) 'Corruption Networks and Implications for Ethical Corruption Reform' 42 *Journal of Business Ethics* 125.
- The Right Hon Lord Nolan (1995) *Standards in Public Life: First Report of the Committee on Standards in Public Life*, HMSO.
- OECD (1996) *Ethics in the Public Sector: Current Issues and Practices*, OECD.
- OECD (1997a) *PUMA Draft Checklist*, Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries.
- OECD (1997b) *Survey of Anti-Corruption Mechanisms in OECD Countries*, Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries.
- OECD (1998) *Council Recommendations on Improving Ethical Conduct in the Public Service — Background Note*, OECD.
- PC (1990) 'Political Chronicles' 36 *The Australian Journal of Politics and History* 244.
- PCJC (1997) *Three Yearly Review of the Criminal Justice Commission*, Queensland Parliamentary Criminal Justice Committee 55.
- Mark Philp (1997) 'Defining Political Corruption' 45 *Political Studies* 436.
- Mark Philp (2002) 'Conceptualising Political Corruption', in AJ Heidenheimer and M Johnston (eds), *Political Corruption: Concepts and Contexts*, Transaction.
- Jeremy Pope (2000) *Confronting Corruption: The Elements of a National Integrity System (The TI Source Book)*, Transparency International.
- Jeremy Pope (2008) 'National Integrity Systems: The Key to Building Sustainable, Just and Honest Government' in B Head, AJ Brown and C Connors (eds), *Promoting Integrity*, Ashgate.
- Noel Preston, Charles Sampford and Carmel Connors (2002) *Encouraging Ethics and Challenging Corruption: Reforming Governance in Public Institutions*, Federation Press.
- Prisoner's Dilemma (2007) *Stanford Encyclopedia of Philosophy*, Stanford University Press, <http://plato.stanford.edu/entries/prisoner-dilemma>.
- Janet Ransley (2001) 'The Queensland Fitzgerald Inquiry and EARC: a Case Study in Legal and Administrative Reform', in KCELJAG and TI (eds), *Australian National Integrity System Assessment: Queensland Handbook*, KCELJAG and TI, p 7.
- Imre Salusinszky (2009) 'Watchdog's Tale', *The Australian*, 12 March.
- Charles Sampford (1990) 'Law, Institutions and the Public Private Divide (Keynote Address)', Australasian Law Teachers Association Conference, Brisbane.
- Charles Sampford (1994a) 'Law, Ethics and Institutional Design: Finding Philosophy, Displacing Ideology' 3 *Griffith Law Review* 1.
- Charles Sampford (1994b) 'Institutionalising Public Sector Ethics', in N Preston (ed), *Ethics for the Public Sector: Education and Training*, Federation Press.

- Charles Sampford (2000) 'Opening Address: Queensland Integrity System', Joint Key Centre/Transparency International workshop on the Queensland Integrity System, Brisbane.
- Charles Sampford (2001) 'Australian National Integrity System Assessment', in KCELJAG and TI (eds), *Australian National integrity System Assessment: Queensland Handbook*, KCELJAG and TI.
- Charles Sampford (2002) 'Institutionalising Ethics', in EOLSS (ed), *Encyclopaedia of Life Support Systems*, EOLSS.
- Charles Sampford (2005) 'Integrating Integrity: Opening Keynote Address', World Ethics and Integrity Forum, Oxford.
- Charles Sampford and Carmel Connors (eds) (2006) *World Ethics Forum Conference Proceedings*, World Ethics Forum, Griffith University, Brisbane.
- Charles Sampford et al (2005) 'From Greek Temple to Bird's Nest: Towards a Theory of Coherence and Mutual Accountability for National Integrity Systems' 64 *Australian Journal of Public Administration* 96.
- Charles Sampford and David Wood (1993) 'The Future of Business Ethics: Legal Regulation, Ethical Standards Setting and Institutional Design', in C Sampford and C Coady (eds), *Business Ethics and the Law*, Federation Press.
- Charles Sampford et al (eds) (2006) *Measuring Corruption: Law Ethics and Governance*, Ashgate.
- 'Sir Joh was Loathed and Loved' (2005) *The Age*, 23 April.
- J Stanaway (1987) 'Testing Crime's Place in the Sun', *Sydney Morning Herald*, 27 July, p 5.
- Transparency International (TI) (2000) *TI Source Book 2000: Confronting Corruption: The Elements of a National Integrity System*, Transparency International.
- United Nations (1990) *Corruption and Government and Government*, UN Department of Technical Cooperation for the Development and Centre for Social Development and Humanitarian Affairs.
- United Nations (1997) *Corruption and Good Governance*, United Nations Development Programme.
- Ulrich von Alemann (2004) 'The Unknown Depths of Political Theory: The Case for a Multidimensional Concept of Corruption' 42 *Crime, Law and Social Change* 25.
- James Walter (2003) 'Johannes Bjelke-Petersen: The Populist Autocrat', in D Murphy et al (eds), *The Premiers of Queensland*, University of Queensland Press, p 304.
- Mark Warren (2004) 'What Does Corruption Mean in a Democracy?' 48 *American Journal of Political Science* 328.

Legislation

Public Sector Ethics Act 1994

Legislative Standards Act 1992

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.