

# Governance in Queensland: Thirty Years On

**The 2017 Griffith University Tony Fitzgerald Lecture, 6  
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The Hon Margaret McMurdo AC

For a mind blowing 60,000 years or so before European settlement less than 200 years ago, this region's first peoples prospered here in Kurilpa. They would certainly have held meetings to discuss best ways to govern their communities. I honour their elders, past and present, as we continue that ancient tradition. Tonight, I feel doubly honoured. First, I am privileged to have been invited by Griffith University to deliver the Fitzgerald Lecture. It helps fund a scholarship to support a PHD student to conduct a research project reflecting the ethos of the Fitzgerald Inquiry. It also informs Queenslanders who were too young to know the pre-Fitzgerald era of the corruption which can fester when the separation lines between arms of government are severed. This year marks 8 years since the lecture and scholarship were initiated and 30 years since the Fitzgerald Inquiry commenced, just as Brisbane prepared for its moment on the world stage with Expo' 88.

Second, I am honoured by the presence this evening of both Tony Fitzgerald QC AC and his talented wife, Kate. Even if the Fitzgerald Inquiry were excluded from his CV, Tony Fitzgerald would be recognised for his outstanding contribution to Australian public life. But, rightly, it is for his leadership of the Inquiry which bears his name that he is especially revered.

In tonight's lecture, I will speak about the Fitzgerald Inquiry and its recommendations, review happenings in governance over the 30 years since, and provide a report on current governance in Queensland: Parliament; the Judiciary; and the Executive, concentrating on the Queensland Police Service (QPS) and the Crime and Corruption Commission (CCC). I will conclude with a few words about the Fourth Estate, the media. As I only have 45 minutes or so, this will be necessarily a brief and incomplete overview.

### **THE FITZGERALD INQUIRY**

Many members of the Queensland parliament, executive, judiciary, legal profession and media strongly suspected police corruption in the 60's, 70', and 80's, but successive public inquiries failed to expose it. Respected black letter lawyer, Mr Justice Harry Gibbs, later Chief Justice of Australia, conducted one such failed inquiry in the 1960s. He became infamous as the only bloke in Brisbane who could not find a prostitute in the National Hotel!

But with the assistance of whistle-blowers like Nigel Powell, and journalists like the Courier Mail's Phil Dickie and the ABC's Chris Masters, Tony Fitzgerald, his Deputy Commissioner, Gary Crooke QC, and their team sliced the top off the rotten pineapple that was 1987 Queensland. The Inquiry revealed toads, vipers and maggots thriving in a cesspit of corrupt governance. This Spooner cartoon says it all. Tony Fitzgerald and his inquiry team, the journalists who broke and reported the story, the whistle-blowers, and their families were all under enormous pressure. Their lives were in danger. We owe them a great debt.

After more than two years of gruelling investigations, public hearings, and analysis, the Fitzgerald Report made recommendations for sound governance, including:

- establishing an Electoral and Administrative Review Commission (EARC) to reframe boundaries and restore public confidence in the gerrymandered electoral system;
- striking a balance between protecting civil rights and providing sufficient police powers to combat sophisticated crime;
- noting that Queensland's lack of Freedom of Information legislation limited the availability of public information on the workings of government;

- replacing the then police culture which endorsed fabrication of evidence and taking bribes or benefits with a community focussed, professionalised, well-trained and educated, merit-based and accountable police service;
- establishing an independent and apolitical Criminal Justice Commission (CJC) to advise parliament on reform of the criminal justice system; witness protection; investigation of official misconduct including of police officers; and overseeing criminal intelligence relating to major or organised crime and
- bringing laws on public assembly into line with other states

The Report also warned the media not to become a mouthpiece for vested interests by uncritically depending on orchestrated government leaks or releases from publically funded Government media units.

Premier Mike Ahern promised to implement the reforms, 'Lock, stock and barrel', despite strong resistance from many in his party. But Russell Cooper successfully deposed Ahern and fought the pending election on an anti-reform platform. Despite the gerrymander strongly favouring the National Party, Cooper was defeated.

When Premier Wayne Goss was elected in December 1989, he further cemented the Fitzgerald reforms

which have become a blueprint for sound governance, not only in Queensland but throughout Australia and internationally. The Inquiry resulted in the prosecution and conviction of a number of Government office holders including the 14<sup>th</sup> Queensland police commissioner, Sir Terence Lewis. On evidence discovered at the Inquiry, he was found to have accepted bribes totalling \$700,000 to protect brothels and illegal gambling and to prevent the legal introduction of poker machines. He was sentenced to 10 and a half years imprisonment and lost his knighthood. Bjelke-Petersen Ministers including former special branch police officer, Don Lane, were convicted and sentenced to imprisonment for falsifying ministerial expense accounts.

Given Queensland's governance history, it was by no means certain that the Fitzgerald reforms would be ongoing. As Irish orator, wit and judge, John Philpot Curran, said in the late 18<sup>th</sup> century, some years before Europeans had settled in Queensland:

“It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt.”

This lecture series, together with journalist and author Matthew Condon's acclaimed trilogy, *Three Crooked*

*Kings, Jacks and Jokers, and All Fall Down*, help present and future Queenslanders who did not live through the period of toads, vipers and maggots understand why only eternal vigilance will ensure our governance does not revert to servitude and the cesspit.

### **THE THIRTY YEARS SINCE THE FITZGERALD INQUIRY**

Not all Queensland governments over the past 30 years have been committed to the Fitzgerald reforms. The Goss government, which was returned in 1992, incrementally and conscientiously, continued the reform process commenced by Ahern. *The Judicial Review Act 1991 (Qld)*, *The Peaceful Assembly Act 1992 (Qld)* and *The Freedom of Information Act 1992 (Qld)* were enacted. The QPS was overhauled; the tape-recording of police interviews became mandatory; the tainted Police Complaints Tribunal was abolished; and the CJC was established. Once the EARC completed its task of reforming the legislative assembly electoral system and related issues, it was disbanded.

The 1995 election was nail-bitingly close. At first it seemed Labour had won by one seat, Mundingburra, and by just 12 votes. But after the Court of Disputed Returns ordered a by-election which Labour lost, Premier Rob Borbidge formed government for the National Liberal coalition.

Matt Conden in *All Fall Down*<sup>1</sup> reports that disgraced former Commissioner Lewis, now a prisoner, was excited about the by-election's potential for a change in government. He spoke by phone to Bjelke-Petersen. Lewis recorded in his now notorious diaries:

"... if change of government [Bjelke-Petersen] wants to attack the putrid way that Fitzgerald handled the Inquiry".

Just over a week later they spoke again, with Lewis recording that they discussed:

"... Fitzgerald, Crooke and their mongrel group; Gunn, Ahern, Dickie and other left-leaning journalists; need for loyalty".

Later in 1996, the CJC instituted an inquiry led by retired NSW judge, Ken Carruthers QC, to investigate an alleged deal in a memorandum of understanding between the National Liberal coalition and the Queensland Police Union to provide benefits for union members in return for votes. Counsel assisting the inquiry, Mr Hampson QC, submitted there was enough evidence to support a charge under the Electoral Act against then Police Minister Cooper. But Peter Connolly QC, a retired Queensland Supreme Court judge and former Liberal member of State parliament, advised Cooper that there was insufficient evidence to

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<sup>1</sup> UQP, p523-4

prosecute him. Cooper placed Connolly's opinion before the inquiry.

A few days later, with the CJC- Carruthers inquiry into the Cooper – police union affair still continuing, the Borbidge government announced an inquiry into the CJC and appointed as commissioners Peter Connolly QC and another retired Queensland Supreme Court judge, Kevin Ryan QC. The commissioners decided to investigate Carruthers' conduct of his inquiry.

Carruthers was affronted at this attack on his integrity and the independence of his inquiry and resigned in protest. His inquiry was completed by others who ultimately recommended that no action be taken against Cooper.

Meanwhile, Carruthers and the CJC alleged bias and sought an injunction in the Queensland Supreme Court against commissioners Connolly and Ryan in the conduct of their Inquiry. The allegations of bias on the part of Connolly were based primarily on:

- the fact that he had so recently acted as counsel for Cooper;
- Connolly's public statements including, "Now that our side of politics is back in power we can do a proper critique of the Fitzgerald experiment", which showed his continuing favour for one side of politics;
- and Connolly's intemperate manner of conducting the Inquiry.

Justice Thomas granted the injunction, finding overwhelming evidence and a strong case of ostensible bias on Connolly's part. A fair minded and informed member of the public, Justice Thomas found, could reasonably apprehend Connolly's lack of impartiality. Ryan, Justice Thomas considered, no longer had power to continue the Inquiry alone and, in any case, a fair minded and informed member of the public would have a reasonable apprehension about Ryan's impartiality, given his close association with Connolly in the conduct of the Inquiry.<sup>2</sup>

The Inquiry into the CJC was not renewed but in late 1997, the Borbidge government introduced concerning legislative amendments making the CJC subject to the supervision of a government appointed Criminal Justice Commissioner and setting up a new Crime Commission, with barrister, Tim Carmody, as Crime Commissioner, to take on the CJC's crime function and also investigate paedophilia. Both the Crime Commission and the CJC were responsible to a government minister instead of parliament.

In June 1998, Premier Peter Beattie, with the support of Independent MP, Peter Wellington, formed a minority government. Shortly before the February 2001 election, a CJC Inquiry headed by retired Supreme Court judge, Tom Shepherdson QC, found that Labour

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<sup>2</sup> *Carruthers v Connolly* [1998] 1 Qd R 339

MPs and activists had breached the *Electoral Act* by falsely enrolling people in internal party preselection ballots. Beattie acted quickly, forcing those responsible, including Deputy Premier Elder, to resign. Promising to restore integrity to the party, he won the election with 66 of the 89 seats, the biggest majority Queensland Labour had ever held.

Later in 2001, the Beattie government established the Crime and Misconduct Commission (CMC), replacing both the Crime Commission and the CJC. Like the original CJC, it would fight both crime and public-sector misconduct.

Beattie retired from State politics in 2007 and was replaced by Premier Anna Bligh who in 2009 became the first female Premier to be popularly elected. To Bligh's credit, she introduced ground breaking Right to Information legislation, drafted by governance expert, Dr David Solomon. The *Right to Information Act 2009* (Qld) required the release of information to those requesting it, unless contrary to the public interest<sup>3</sup>. Bligh also banned the unseemly practice, long followed by politicians of all political persuasions, of payment for access.

But Labour was racked by a series of scandals including the problematic health payroll, the thefts of the 'Tahitian prince', assets sales without mandate and the

prosecution of former Minister, Gordon Nuttall. It had been in office for almost 14 years and the public was ravenous for change. In March 2012, Premier Campbell Newman swept into power with an overwhelming majority for the now merged Liberal National Party, leaving the decimated Labour opposition with a mere seven seats. And Queensland had had no upper house since 1922.

Newman did not know pre-Fitzgerald Queensland, having been neither born nor raised here. In a speech the day after his election he praised Bjelke-Petersen as Queensland's greatest Premier and expressed a desire to emulate him.

Senior judicial figures and leaders and members of the legal profession and academy warned against the excesses of the Newman Government's legislation on law and order issues. Who could forget the pink onesies for bikies convicted under the VLAD Act.<sup>4</sup> The Supreme Court of Queensland's Court of Appeal found unconstitutional the government's attempt to pass legislation which would enable the executive to overrule a court's decision that a prisoner be released. The legislation was a clear interference with the separation of powers, a tenet fundamental to our democracy.<sup>5</sup>

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<sup>4</sup> Vicious Lawless Association Disestablishment Act 2013 (Qld)

<sup>5</sup> A-G v Lawrence [2013] QCA 364; [2014] 2 Qd R 504

The controversy about and the extraordinary publicly-known events leading up to the appointment of Chief Magistrate, Judge Carmody, as Chief Justice of the Supreme Court of Queensland in July 2014 are documented in the book, *The Tim Carmody Affair: Australia's Greatest Judicial Crisis*, by respected academics Rebecca Ananian-Welsh, Gabrielle Appleby and Andrew Lynch.<sup>6</sup> I will not repeat them tonight. It was a dreadful time for the Supreme Court but the judges of the Trial Division and the Court of Appeal were united in their resolve to continue to independently serve its litigants and the people of Queensland

Newman announced that retired High Court judge, Ian Callinan QC, assisted by Queensland legal academic, Professor Nicolas Aroney, would review the legislation establishing and regulating the CMC. Some of the review's recommendations were worrying. Ultimately the government put forward the *Crime and Misconduct and Other Legislation Amendment Bill 2014 (Qld)* which went even further than the review recommendations in dismantling the Fitzgerald reforms.

Tony Fitzgerald's submissions to the Parliament's Legal Affairs and Community Safety Committee on the Bill said it all:

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<sup>6</sup> New South 2016

“In their brief time in office, [the government has] embarked on unprincipled attacks on courts and the judiciary, which, by virtue of their independence and authority, are obstacles to political excess, and enacted radical, profoundly mistaken laws which were not mentioned prior to the last election, including laws aimed at the subordinating the criminal justice system to political interference and a flurry of extreme ‘law and order’ legislation.

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There are ... troubling signs that the Liberal National Party’s huge majority has re-enlivened old, bad habits. ... The Government’s majority must be respected but it does not have a mandate to obliterate reforms which were necessitated by the Liberal National Party’s predecessors’ criminality and abuse of power or to return Queensland Governance and public administration to their parlous state in the 1980s. ...This Committee’s advice to Parliament that the Bill in its present form is a gross abuse of power would provide a good start.”

The Fitzgerald Report emphasised the important role of the media in ensuring sound governance.

Immediately following Newman’s election, David Fagan was editor in chief of both *The Courier Mail* and *The Sunday Mail* and Michael Crutcher was editor of *The Courier Mail*. In the absence of both an upper house of review and an effective opposition, these newspapers,

under the editorship of Fagan and Crutcher, took on the role of government watchdog. They were especially critical of the sacking of 14,000 public servants. There was the usual, healthy tension with the courts over the reporting of cases but, at this time, these papers generally respected and accepted judicial independence.

That changed one week in June 2013 when, according to Crikey.com, Rupert Murdoch was in town. Fagan was removed as editor in chief and not replaced; Chris Dore took Crutcher's job as *Courier Mail* editor; and Peter Gleeson, editor of *The Gold Coast Bulletin*, became editor of *The Sunday Mail*. The papers' editorial direction took an about turn. The papers became enthusiastic supporters rather than critics of the government. For example, they were largely sympathetic to the controversial appointment of Chief Justice Carmody. Many were worried that elements of the media were actively supporting the Newman government's attack on the independence of the Supreme Court.

Fortunately, leaders and members of the legal profession like Walter Sofronoff QC, the Presidents of the Queensland Law Society and Bar Association, and retiring and retired judges, including Tony Fitzgerald, were not, in Judge Curran's words, 'indolent or prey to the active and powerful'. They were vigilant and spoke in defence of the Court.

Despite the government's huge majority, it was defeated in the March 2015 election with Newman losing his seat. Exit polls showed that governance and the appointment of the Chief Justice weighed heavily with voters. It was heartening to know that sound governance and the separation of powers were vitally important to electors.

In July 2015, after less than a year in office, Chief Justice Carmody resigned as Chief Justice. He remains a Supreme Court judge but does not sit in the Supreme Court.

In September 2015, the Honourable Justice Catherine Holmes was appointed Chief Justice of the Supreme Court of Queensland, with the full support, admiration and respect of her fellow judges, the profession and the public.

These post-Fitzgerald events in the governance of Queensland are a stark reminder of the wisdom of Judge Curran's plea for eternal vigilance.

Queenslanders cannot assume that the reform process will continue without constant, thorough and fearless scrutiny from parliament, the judiciary and legal profession, academia, the media and the public.

## **CURRENT GOVERNANCE IN QUEENSLAND – THE PARLIAMENT**

I turn now to the present state of governance in Queensland. First, the Parliament.

Premier Anastasia Palaszczuk's minority Labour government repealed the worst of the Newman government's legislative excesses. Those pink onesies, made at a cost of \$10,000 and worn by only 27 prisoners, were auctioned for charity. One is in display in the State Library's current exhibition, "Freedom Then, Freedom Now".

The post-Fitzgerald Electoral Act is working apparently satisfactorily through an independent Electoral Commission, as intended by EARC. Under the latest amendments, Parliament will have 93 seats with future four year fixed terms and full-preferential rather than optional preferential voting.

To its credit, the Palaszczuk government reformed laws relating to political donations. Those over \$1000 are disclosed in real time through the Electoral Commission. And following the CCC's recent damning reports into local government<sup>7</sup>, Palaszczuk committed to banning political donations from developers at State and local level.<sup>8</sup>

Queensland's Right to Information scheme is amongst the best in the nation but Journalist Kerry O'Brien in his 2017 Solomon Lecture on Right to Information Day warned, like Judge Curran, of the need for vigilance as recent past governments had undone reforms and

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<sup>7</sup> Crime and Corruption Commission, Operation Belcarra Report and Managing and Responding to conflicts of interest involving council employees Report, October 2017

<sup>8</sup> Australian Financial Review, 5 October 2017, Mark Ludlow and Michael Bleby, 'Queensland to ban developer donations'.

legislation was easily repealed. In the panel discussion following, Dr Solomon persuasively argued that Queensland's Right to Information scheme should be extended to Parliamentary departments so that all parliamentary expenses are subject to, and no longer hidden from, public scrutiny.

We have a State election later this month and a Federal election will be upon us in no time. Recent polls, studies and surveys show that electors' trust in their politicians is at an historic low.<sup>9</sup> Perhaps, like me, they have been watching Netflix's fictional *House of Cards*. More likely, they are concerned about real issues such as the Palaszczuk government, despite its pledge before the last election to follow the Bligh government's positive initiative, continuing to allow cash for access. Wealthy Queenslanders seeking government largesse pay substantial sums to attend functions with powerful politicians. According to a June 2017 report by Mike Willacy for the ABC, Queensland ministerial diaries show nearly 60 companies, including banks, accountants, developers, miners and resource companies, paid at least \$5000 each for meetings with Cabinet Ministers under Labour's Business Observers' Program, with \$218,000 raised in 2016. As disgraced former Minister, Gordon Nuttall, said at his trial for

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<sup>9</sup> *The Case for a Federal Corruption Watchdog*, Discussion Paper, Accountability and the Law Conference, August 2017, Hannah Aulby, the Australia Institute

receiving secret commissions in office, “Nothing is for nothing.”

Tony Fitzgerald’s Deputy Commissioner and former Queensland Integrity Commissioner, Gary Crooke QC, has publicly lamented what he described as the moral bankruptcy of the major parties in Queensland: cash for access; law and order populism; and the cynical abuse of unrestrained executive power in the appointment of Chief Justice Carmody.<sup>10</sup>

The NSW Court of Criminal Appeal recently considered the obligation of members of parliament to act in the public interest. It upheld the conviction for misconduct in public office of former member of the NSW Legislative Council, Eddie Obeid, approving Rich J’s observations made almost 100 years ago:

“Members of parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit.”<sup>11</sup>

The Court also approved this statement of Rich and Isaacs JJ:

“The fundamental obligation of a member in relation to the Parliament ... is *the duty to serve* and, in serving,

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<sup>10</sup> Gary Crooke, Qld election: bipartisan ethical bankruptcy, The Drum, ABC, 23 January 2015; Look inside the culture of secrecy around Queensland’s political donations, 21 January 2015.ABC, Mark Wilacy and Mark Solomons

<sup>11</sup> *R v Obeid* [2017] NSWCCA 221, [66]; *Horne v Barber* (1920) 27 CLR 494,591.

to act with fidelity and with a single-mindedness for the welfare of the community.”<sup>12</sup>

If politicians, whatever their political persuasion, conscientiously fulfilled those obligations, their public trust would be restored. With the support of the Australia Institute, a group of prominent Australians, including David Harper AM QC, Paul Stein AM QC, George Williams AO, Nicholas Cowdery AM QC, the Hon Peter Wellington MP, and Gary Crooke QC, have suggested politicians can regain this lost public trust and confidence by assuring voters they will follow the ethical principles of governance suggested by Tony Fitzgerald in 2015. The Fitzgerald Principles are to:

- act honourably and fairly and only in the public interest;
- treat all citizens equally;
- be truthful;
- not mislead or deceive;
- not withhold or obfuscate information to which voters are entitled;
- not spend money except for public benefit; and
- not use the position or information gained from it for personal benefit or for family, friends, a political party or a related entity

With a State election in a few weeks, wouldn't every candidate want to ensure voters of her or his

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<sup>12</sup> Above, [68]; *R v Boston* (1923) CLR, 400, cited with approval in *McCloy v State of NSW* (2015) 257 CLR 178, [169]-[170] and *Re Day* [2017] HCA 14, [49]-[50], [179] and [269].

commitment to these unimpeachable principles? And if not, wouldn't voters be right to ask, "Why not?" and vote for a candidate who was?

## **CURRENT STATE OF GOVERNANCE IN QUEENSLAND – THE JUDICIARY**

Next, the judiciary. Queensland's Supreme Court, under the fine stewardship of Chief Justice Holmes whose independence, diligence and legal ability is unquestionable, continues delivering timely, impartial justice to its litigants, as it did even in the darkest days of the Newman era. Our other courts and tribunals also continue to function efficiently. Queensland courts are regularly assessed by the Commonwealth Productivity Commission as delivering amongst the cheapest and most timely access to justice in the nation. This is particularly impressive, given the challenges to affordable governance caused by Queensland's unique decentralisation.

That is not to say we could not do better. As our population grows and law and order legislation and policing practices result in more charges before the courts, good governance requires the criminal justice system to be adequately resourced. We need more judicial officers at all levels, and adequate resourcing for the Director of Public Prosecutions and Legal Aid Queensland.

I see three other areas for improvement. First, judicial appointments. Until recently, Queensland judicial

officers were appointed by the Executive, the Governor in Council on the recommendation of the Attorney-General, with no transparent process.

In response to public demands following the Carmody affair, Attorney-General D'Ath introduced a judicial appointments protocol. Whilst such appointments remain, as in all Australian jurisdictions, the gift of Executive government, vacancies, and the protocol adopted in filling them, are now advertised on the courts' website. In the interests of diversity, women, Indigenous people and those from culturally and linguistically diverse backgrounds are encouraged to apply. Eligible candidates must submit an expression of interest. There is now a Judicial Appointments Advisory Panel of at least four, whose task is to select a shortlist of suitable candidates (between 4 and 8), with supporting reasons. The Panel comprises a retired judicial officer from the court to which the appointment is to be made, the Presidents of the Bar Association and Law Society or their nominees, and up to two individuals (at least one of whom is a lawyer) to represent community views and with expertise in the justice system relevant to the selection of judicial officers, for example, the Anti-Discrimination Commissioner or a representative of the Women Lawyers Association of Queensland. The Attorney General consults with heads of jurisdiction and may put forward names to the panel. The uncontroversial,

merit-based criteria for appointment are those of the Australian Institute of Judicial Administration.

So far, the process works satisfactorily with the appointment of suitable judicial officers, including many women, to vacancies. Appointments have been relatively timely, once the Panels were engaged. The protocol is a promising start but I suggest four improvements to further enhance community confidence in the legitimacy and independence of the process.

First, at present the membership of each ad hoc panel is not made public. This should be remedied.

Second, there is very limited lay involvement, if any. The risk is that the public will view the process as courts continually self-replicating their current membership instead of embracing renewal and positive change. Distinguished commentators like Sir Gerard Brennan<sup>13</sup> and Justice Ronald Sackville<sup>14</sup> have recommended judicial appointments commissions with much more substantial lay membership.

Third, the protocol has no legislative basis so that it can easily be abandoned by a new administration.

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<sup>13</sup> Sir Gerard Brennan, *'The Selection of Judges for Commonwealth Courts'* in Department of the Senate, *The Senate and Accountability, Papers on Parliament No 48* (January 2008), 14.

<sup>14</sup> Sackville, *'The Judicial Appointments Process in Australia: Towards Independence and Accountability'*, (2007) 16 *Journal of Judicial Administration* 125, 137. See also Professor Andrew Lynch and Dr Gabrielle Appleby, *Submission to Judicial Appointments Review*, Department of Justice and Attorney General, Queensland, 12 December 2015, 14.

Fourth, and most importantly, the protocol does not inform the public if a judicial officer is appointed from outside the panel's recommendations. In such a situation, the confidentiality-bound panel is a toothless tiger. I consider that if an Attorney wants to appoint a judicial officer who is not on the panel's list, the Attorney should first refer the name to the panel for consideration. If the panel's list still does not include that name, the Attorney may appoint the person but must state publicly that the person was not on the panel's list<sup>15</sup>.

The second needed reform relates to complaints against judges. Allegations of official corruption against Queensland judicial officers are referred to the CCC<sup>16</sup> which can investigate but not discipline. Consistent with the separation of powers, judges may be removed under section 61 *Constitution of Queensland 2001* only by the Governor in Council on the address of the Legislative Assembly, for proven misbehaviour or incapacity, based on the findings of a tribunal established under an Act. Unlike New South Wales or Victoria, there is no transparent process to deal with complaints falling short of corruption. The judges of the Supreme Court have long favoured the adoption in Queensland of a Judicial Complaints Commission

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<sup>15</sup> Lynch and Appleby, n5, 20 and Justice Philip McMurdo, 'Hot topics', Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014, 12

<sup>16</sup> Crime and Corruption Act 2001 (Qld) s15, s20 and s49

modelled on that in New South Wales, with necessary adaptations, as recommended by the Judicial Conference of Australia.<sup>17</sup> This would enhance the courts' accountability, transparency and legitimacy. The third need I see for reform relates to the curious colonial practice of the Queensland Chief Justice or next most senior judge, in the Governor's absence, acting as Governor, that is, as head of the Executive, often while continuing to perform judicial functions. This is plainly inconsistent with the separation of powers. It is true that this is the practice in many Australian jurisdictions; is accepted as legitimate; and, as yet, has not been subject to constitutional challenge.<sup>18</sup> But it is an unattractive anachronism in the 21<sup>st</sup> century when we pride ourselves on our democracy with its separation of powers. To see those leading the judicial arm of government acting as head of the Executive and rubber-stamping ministerial decisions is apt to undermine public confidence in the Office of Chief Justice and in the judicial branch of government. The Chief Justice and other senior judges have extremely busy and demanding roles and court resources are limited. In Queensland, a judge acting as Governor takes care not to sit in cases in which the Crown is a litigant. This includes all criminal cases. It is

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<sup>17</sup> Judicial Conference of Australia, 'Reports of the Complaints Against Judicial Officers Committee' 2009-2010

<sup>18</sup> Rebecca Ananian-Welsh and George William, 'Judges in Judicial Roles', Judicial Conference of Australia, 2014, 50.

an imposition on the efficient operation of the courts for senior judges to also take on the gubernatorial function. The unedifying practice of judges acting as Governor can easily be avoided under s 40 and s41 Constitution of Queensland which provide for the appointment of a non-judicial Lieutenant-Governor to fill the gubernatorial role when the Governor is absent or incapacitated. It should be utilised.

Finally, I mention the worrying and increasing tendency of politicians and elements of the media to disparage decisions of judges, particularly in controversial matters like sentences, and bail, sometimes before cases are finalised. This phenomenon, justified as anti-elitism, has been named, “the Campaign against the Courts” and has migrated from the USA to Australia.<sup>19</sup> As Commonwealth politicians, Health Minister, Greg Hunt, Human Services Minister, Alan Tudge, and Assistant Minister to the Treasurer, Michael Sukkar, learned recently in Victoria, the patience of the Australian judiciary has limits. Courts will use their contempt powers, for a campaign against the courts is a campaign against democracy.

There is no reason why Parliament, the Executive and the Judiciary cannot work together in providing sound governance, whilst respecting each other’s independent role.

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<sup>19</sup> Tanya Josev, “The Campaign against the Courts” Federation Press, 2017.

## **CURRENT STATE OF GOVERNANCE IN QUEENSLAND – THE EXECUTIVE**

Next, the Executive and its most powerful elements, the police and the governance watchdog, the CCC. The QPS has adopted the Fitzgerald reforms in that fabrication of evidence and the taking of bribes or benefits is no longer endemic. It has made real progress towards becoming a well-trained and educated, merit-based professional service. But Judge Curran's warning is ever apposite.

Former police officer in England and Queensland and Fitzgerald whistle-blower, Nigel Powell, recently expressed his fears that, as the QPS has never had the sound policing culture of an independent agency of law enforcement, it was now a lackey government department following the populist whims and fancies of the Minister of the day. Powell was critical of s4.6 Police Service Administration Act 1990 (Qld) which requires the Commissioner to comply with the Minister's directions. He saw placing the Commissioner on a contract rather than giving tenure as the antithesis of independence. Powell envisioned a QPS with legitimacy arising not from increased powers or the use or fear of physical force, but from public confidence that police will apply the law independently, fearlessly and courteously.<sup>20</sup>

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<sup>20</sup> Nigel Powell, 'Lessons of History- Keeping politics out of policing' GRIFFITH REVIEW Edition 57: Perils of populism,

These are points well worthy of consideration. Unquestionably there is a need for highly trained, well educated, community friendly police officers with an understanding of their role in governance, determined to stop the QPS from reverting to its corrupt past. And they should come from the diverse backgrounds reflected in our community, include recruits trained outside the QPS, and be appointed and promoted on merit. Officers must be loyal to their oaths or affirmations of office and not to misguided notions of mate-ship to corrupt officers, even senior officers, which reigned in the pre-Fitzgerald era.

Hopefully the Queensland Police Union has learned from the Carruthers Inquiry of the dangers to its members and to sound governance from alignment with politicians or a political party. Hopefully, it would never misuse confidential QPS information.

Whist the Fitzgerald reforms require officers to report the unlawful actions of other officers, there is reason to ponder whether the QPS has fully come to terms with its shameful history. By way of illustration, the Police Museum publishes on-line vignettes about former Commissioners. Whitrod's says nothing about his pre-Fitzgerald efforts to reform a corrupt police service. And the whole of one of Whitrod's five paragraphs is given over to a detailed account of his refusal to allow the 21 year-old Wayne Bennett leave without pay to attend a Rugby League training camp.

Lewis's entry is accompanied by his photo at dinner with other police officers and partners in February 1975 at – would you believe- The National Hotel! The first four paragraphs glowingly refer to Lewis's career achievements. The last begins:

“In 1980 the great honour of ‘Father of the Year’ was bestowed upon Mr Lewis, and in 1986 he was honoured with a Knight Bachelor by The Queen for police service. It was 1987 when Sir Terence Lewis' luck changed.”

After three lines referring to the Fitzgerald Inquiry and Lewis's conviction, it concludes:

“Lewis, whilst Commissioner, had once wished he was back in Charleville – said he had fewer problems there.”<sup>21</sup>

I hope you understand my concern.

I turn now to Queensland's anti-corruption body, the CCC. Its powers to investigate corruption in units of public administration including the QPS, which were removed after the Callinan/Aroney inquiry, have been returned. It is again overseen by an all-party PCCC to which it reports every two months. It is also subject to audits and inspections by the Parliamentary Crime and Corruption Commissioner on behalf of the PCCC. I have already mentioned its two recent and disturbing reports into local government corruption. The CCC

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<sup>21</sup> My Police Museum, From the Vault, <https://mypolice.qld.gov.au/museum>, Georgia Greer, CoP Raymond W. Whitrod; Terence Murray Lewis

seems to be meeting the Fitzgerald Report's hopes for the CJC.

In my preparation for this lecture, I met with the CCC's chairperson, Mr Alan MacSporran QC. He regards an important role of the CCC as educating the public, the police, Indigenous communities and public servants at State and local government level about the need for good governance and how to achieve it.

He is confident there is no present embedded police corruption of the pre- Fitzgerald kind. But he, and the criminal defence barristers to whom I have spoken, confirmed that police misuse of information, power, and physical force remain problematic.

MacSporran conceded that ideally it may be preferable for investigators assisting the CCC to be appointed from outside the QPS, avoiding the perception of police investigating themselves. This is the position in the Victorian Independent Broad-based Anti-Corruption Commission (IBAC). But he emphasised:

- the QPS was a convenient source of trained investigators who were not easy to find;
- service in the CCC was considered a positive QPS career move;
- officers returned to the QPS with an anti-corruption mind-set, educating others and strengthening the QPS as a whole; and
- the CCC had the power to terminate an unsuitable police officer's contract without reason.

He is generally content with the CCC's present powers as appropriately balancing civil liberties and the tools to combat corruption and organised crime, as envisaged in the Fitzgerald Report. He cautions, however, that it may be necessary to broaden the definition of 'corrupt conduct' in light of the High Court's construction of that term in *the Cuneen*<sup>22</sup> case. He rightly emphasises the need for adequate funding. An integrity commission strangled for funds cannot function effectively.

Like Judge Curran, MacSporran prudently recommends eternal vigilance to maintain good governance in Queensland.

## **THE MEDIA**

I will conclude with a brief word about the media which plays a vital role in exposing flaws in governance, as it did leading up to the Fitzgerald Inquiry.

It is a problematic time for commercial journalists and their employers as the internet makes it increasingly difficult for traditional media to attract lucrative advertisers and paying customers. Good governance will certainly be diminished if the quality and quantity of investigative journalism is reduced. I encourage you to financially support your preferred commercial media sources.

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<sup>22</sup>*Independent Commissioner Against Corruption v Margaret Cuneen and Ors* [2015] HCA 14

I have already mentioned the Campaign against the Courts, which migrated from the USA and has been embraced not only by the far right of politics but also by elements of the media. Do not let this Campaign continue unchecked. It is apt to diminish community respect for and the authority of the courts as they perform their vital democratic role in ensuring citizens have access to the rule of law, unswayed by populism, the rich and influential, or political or executive power. That campaign should be called out for what it is: a campaign against the people and democracy.

And then there is the influence on the democratic process of the instancy of social media; the terrifying manipulation of on-line data; and fake news. These phenomena make it more important than ever to have trusted and effective news sources and independent competent, reliable journalists.

With this in mind, the current attacks on our independent and respected Australian Broadcasting Commission are especially worrying. I invite you to work to ensure the preservation of an independent, adequately resourced and functional ABC.

And I urge all involved in the media, old and new, to accept the challenge highlighted in the 2107 Solomon Lecture to responsibly exercise your considerable power for the betterment of democratic governance.

**CONCLUSION**

I end by returning to the common thread throughout this presentation, Judge Curran's wise words which are as apposite today as they were 220 years ago: eternal vigilance.

Although these days I seldom quote *The Courier Mail* with approval, I am in furious agreement with its July 2003 editorial following the death of former Queensland Police Commissioner, Ray Whitrod AC CVO QPM:

"Mr Whitrod's story should have been an uplifting one for the state. Instead, Queensland had to wait another 12 years for Tony Fitzgerald, QC, to expose the rot that had invaded many of its institutions.

...

Mr Whitrod's memory would best be served if the government, the judiciary, bureaucracy and, yes, the media of the day continued to recognise that a return to corruption is not only possible, but inevitable without proper vigilance."<sup>23</sup>

With a State election looming and a Federal election never far away, I invite each of you to join a fresh campaign: The Campaign Against Bad Governance. Perhaps we can help it migrate to the USA!

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<sup>23</sup> Matthew Condon, *All Fall Down*, UQP 2015, 545.

