SUBMISSION TO THE LEGAL AFFAIRS AND COMMUNUTY SAFETY COMMITTEE: CRIME AND MISCONDUCT AND OTHER LEGISLATION AMENDMENT BILL 2014

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OVERVIEW

A thorough review of the Crime and Misconduct Commission (CMC) was long overdue. A body as powerful as the CMC should be subject to a regular, intensive review by a body of experts reporting to Parliament. The great pity is that the Electoral and Administrative Review Commission (EARC) was not available to undertake a review.

In the 2013 Open Government Forum, the Premier said that he wanted Queensland to have the most open, transparent and accountable government. He acknowledged the Fitzgerald Report was 'a game changer' but that much has happened over the last 20 years and it is timely to properly reflect on the journey since. I agree that the Fitzgerald Report is not holy writ. The Premier's aspiration will not generally be met by going back to the report and finding a part of 'the lock, stock or barrel' that was not implemented. But, it is a good departure point for consideration of what was done well and what could be done better.

The single most important measure in meeting the Premier's goal would be to reinstate a body similar to EARC as recommended by Fitzgerald, implemented by the National Party, disbanded by the ALP and not reinstated either in full or in the limited form that I and others have privately advocated. (I do not say this from any political motivation, but as a matter of institutional regret and institutional timeliness.)

EARC was established as a non-partisan body appointed by a bi-partisan process reporting to a committee including all parties before going to the floor of Parliament In my view, all integrity agencies should be reviewed by a body similar to EARC at least once every 10 years:

a. Such reviews should consider the functions the integrity agencies are intended to perform; how well they perform them; and, how well they assist other integrity agencies in performing their functions.
b. An advantage of an enduring body is that it would develop expertise in the operation of the integrity system and its agencies – including strengths, weaknesses, gaps, overlaps and co-ordination problems. This process would help address systemic problems as well as examine the particular issues generated by individual agencies.
c. Like the original EARC, the body should not only include lawyers but other disciplines with relevant knowledge of how public institutions work.
d. If EARC had continued, it would have built up a deep and extensive knowledge of the various integrity institutions and the integrity system as a whole. It would be cognisant of all the interactions, checks, balances, mutual supports and overlaps. It would have undertaken at least two extremely thorough, expert and interdisciplinary reviews during the period. If these reviews had occurred, there would be now less to do, fewer issues to cover and the issues likely to be much less controversial.

I very much hope that the Queensland Parliament, led by the Newman government, will decide to return to a version of the reform process that served us so well in the 1990s, and I make that my first and most earnest recommendation. However, I have been invited to comment on the Crime and Misconduct and Other Legislation Amendment Bill 2014 (the Bill) that has been produced by the current process and will do so. By way of introduction, I want to address what I understand to be the great mischief to be avoided and the best means for addressing it. The practice of publicly stating that you are taking a complaint to the CMC, whether for political or other reasons, should be very strongly discouraged. But I would suggest that the best way of doing this is by requiring complainants to keep their complaints confidential. Breaches of confidentiality should be a criminal offence and, probably more importantly, should void any privilege otherwise enjoyed by the complainant. I argue that this is far preferable to the Bill's approach of raising the threshold for all complaints (statutory declaration, reasonable suspicion of a criminal offence etc.) and criminalising those deemed 'improper'. There are a number of detailed points I will make but I would suggest that we apply the 'crime stoppers' test: would we contemplate these measures for citizens reporting ordinary crime? If not, why would we do so for much more complex crimes in which clever people are at great pains to hide all evidence of their criminality? It is axiomatic in normal police work that public information is the lifeblood of successful policing.

I will also make submissions on a number of other issues concerning this Bill: numbers of complaints; research, education, ethics and prevention functions; the new hierarchy of purposes; and ending the requirement for bipartisan support for commissioners.

While I will make a number of detailed points about this last issue, the simplest of all is to recognise that there is a temptation to appoint to anti-corruption commissions those who will go much harder on the opposition than the government. This temptation involves a major governance risk that has materialised in other jurisdictions. The simple question is whether Members of this Honourable House would trust a future government led by their political opponents to put this temptation behind them. If they do not so trust their opponents, then they should opt to retain the current requirement of bi-partisan support. If they do trust them, why not share that power of appointment. It will certainly increase the trust of the public in this critical institution.

QUEENSLAND'S CONTRIBUTION TO GOVERNANCE REFORM:
FROM FIGHTING CORRUPTION TO BUILDING INTEGRITY

In 1989, Queensland awaited the report from what was possibly the most dramatic and influential Commission of Inquiry in Australia's history.[1] The two major parties had attempted to outdo each other in promises to fully implement its recommendations, torturing their thesauruses to find ways to circumvent mathematical inevitability that there is no way to go beyond 100 per cent. Queenslanders were keen to find out what had gone wrong. But they were also very keen to find out what Commissioner Fitzgerald thought they should do about it. It was in the latter that he achieved the most lasting influence locally and internationally.

Fitzgerald did not recommend the then fashionable Hong Kong model for combatting corruption (a strong anti-corruption law and a strong Independent Commission Against Corruption or 'ICAC' to enforce it). While his proposal did include an ICAC type body, he recognised that ICACs were very powerful bodies which needed to be subject to regular review. Most importantly, he did not think Queensland should rely on anti-corruption laws and institutions alone. He realised that many other reforms were needed, but he did not set out to prescribe them. He did not claim to have all the answers. But he had a very good idea of what the governance questions were and a process for answering them. He recommended a process of reform that has not been bettered in any other jurisdiction. That governance reform process was led by an independent Electoral and Administrative Review Commission (EARC) chaired by a lawyer with wide experience beyond the law[2] and two other commissioners. On 21 different issues, EARC (a) did an in depth study with the assistance of expert consultants; (b) published an issues paper; (c) called for public submissions and held public seminars and hearings; (d) responded to public submissions; (e) produced a final report to parliament with its recommendations resulting in the formation of a the Parliamentary Committee for Electoral and Administrative Review (PCEAR or, colloquially, 'PEARC') which received further submissions and sometimes commissioned further papers and delivered its own report to parliament before the normal legislative process began. While it was appropriate for the Parliament to form its own conclusions, the recognition by all major parties that reform was necessary, the quality of EARC's work and the inclusiveness of the process meant that most of the proposals were accepted. EARC also had the benefit of looking at the whole system of governance in Queensland and could understand the way existing institutions operated and how new ones might fit. By examining all the relevant institutions, they could better understand how each interacted. The result was an integrated set of norms, laws and institutions that would improve the governance of Queensland, promote integrity and reduce corruption. Because of the strong ethical foundation and the prominence given to public sector ethics, I called that set of norms, laws and institutions an 'ethics regime'. Others recognised the value of this integrated approach and Lord Nolan[3] proselytised it. The Organisation for Economic Co-operation and Development (OECD) also adopted it but changed the name to 'ethics infrastructure'.[4] When Jeremy Pope, the first CEO of Transparency International visited Australia, he saw the same benefits in this approach and called it an 'integrity system'.[5] While the OECD, the UN and some others still use the term 'ethics infrastructure', the term that has enjoyed the widest usage is 'integrity system':[6] the term used by Transparency International, the World Bank and many others engaged in governance reform. It is the term that I will use in this submission.

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[1] Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry).

[2] First Tom Sherman a former Commonwealth Crown Solicitor and Australian Government Solicitor and later David Solomon (Press Secretary, the editor High Court Commentaries, and later a contributing editor with *The Courier Mail*). See, M. Lewis et al., "Integrity Reforms in Developing Countries: An Assessment of Georgia's Integrity System," *Public Integrity* 15, no. 3 (2013).

[3] The Right Hon Lord Nolan, *Standards in Public Life: 1st Report of the Ctte on the Standards in Public Life* (London: HMSO, 1995).

[4] C. Sampford, "From Deep North to International Governance Exemplar: Fitzgerald's Impact on the International Anti-Corruption Movement " *Griffith Law Review* 19 (2010).

[5] See, J. Pope, ed. *TI Source Book* (Berlin Transparency International, 2000).

[6] Jeremy Pope and I later agreed that the best term would have been 'integrity regime'. Integrity fits better as it is the obverse of corruption and regime is a better description of something that is never quite orderly enough to be called a 'system' – and benefits from its non-systematic qualities in being harder to take over.

Governance Reform Commissions

EARC was charged with considering the large number of governance reform issues listed in the Fitzgerald report and spelt out in the EARC legislation – a list of issues that had tripartite support. As indicated above, it generated the an integrity system that became something of a global gold standard for governance.

I have to say that I was enormously impressed with the process, being invited to speak at a number of public conferences organised by EARC and PCEAR. As a Queenslander who had grown up in Victoria and just returned to Brisbane as Foundation Dean of Law at Griffith, I remember my first appearance before PCEAR. While I knew, as a constitutional lawyer, that the Chairman came from the majority party, I did not know the party affiliations of the other committee members. After an hour of excellent questions and high quality discussion on important governance issues, I left the committee none the wiser about the political affiliations of the other members. This was an example of governance reform that was not only effective but inspiring.

I am not engaging in nostalgia for a past that seems better now than it ever was then. Nor am I ignoring the special dynamics of the time when the tri-partisan anger at past corruption led to an extraordinary degree of collaboration in, and commitment to, root and branch reform. However, the legitimacy secured for the process and the institution would have assisted EARC in making non-partisan contributions to the review, reform and development of the Queensland integrity system and its agencies. In my view, this legitimacy should not have been squandered and it was institutionally reckless to do so. (This criticism should not be seen as partisan – as you will see, in making criticisms and giving credit where I believe it is due, I tend to be an equal opportunity offender.) When consideration is given to changing the rules of the game, and the institutions through which they are played, there is no substitute for the bi-partisan consideration of non-partisan recommendations.

The task of reform is never complete. Anyone who thinks an integrity system has been perfected has placed a giant 'banana skin' in their path. Neither party was that complacent: and further reforms were introduced. Following a collaborative research project led by the Key Centre for Ethics, Law, Justice and Governance (which later became the Headquarters of our UNU institute), the Office of the Integrity Commissioner was established with bi-partisan support.[7] Our proposal for the leaders of the main integrity agencies to meet on a regular basis was rejected by the government but undertaken informally at state and later federal levels. One of the acts of the Bligh government was commissioning David Solomon to make proposals to go beyond 'Freedom of Information' to the 'Right to Know'. The current Premier is now talking of going further, asserting, as we have for nearly a decade that information collected by the government is the property of the people and a good reason needs to be given for keeping a people from their property.[8] The investigation, conviction and gaoling of two ministers in 2009 who had not taken the new governance arrangements seriously was, in part, an endorsement of the effectiveness of the integrity system but also a shock to the system that led Premier Bligh to establish an Accountability and Integrity Round Table[9] which proposed a number of measures.

None of these measures, however, involved a comprehensive and on-going reform process with a dedicated independent body such as EARC. As outlined earlier, the Fitzgerald report recommended an 'enduring body.' As Peter Forster[10] stated:

> 'although it was always envisaged that the list of priorities identified by the Fitzgerald Inquiry would be satisfactorily investigated and reported within the first few years, the Commission could have an ongoing mandate to monitor the impact of reform and address what it thought appropriate or were brought to its attention. The concept of a part time Chair with the capacity to call the Commission into action when and if required was the enduring model envisaged.'

Hopefully, this ongoing mandate would involve regular reviews of the integrity agencies established so that all integrity agencies should be reviewed by a body similar to EARC at least once every ten years. Such reviews should consider the functions the integrity agencies are intended to perform; how well they perform them; and, how well they assist other integrity agencies in performing their functions.

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[7] Indeed, the then Coalition Opposition wanted access to the Integrity Commissioner's advice, something not granted for another decade. I should also acknowledge the research project and the Key Centre itself had bi-partisan support. The project was initially supported by an earlier iteration of the Public Service Commission under Premier Goss and reaffirmed under Premier Borbidge. Funding for the Key Centre was initially committed by Premier Borbidge and confirmed by Premier Beattie.

[8] Address to the Open Government Forum, Red Room, Parliament House Brisbane, August 2013.

[9] Including Premier Bligh, Attorney Cameron Dick, Director General of Premier and Cabinet Ken Smith, Prof Alan Fels, Assoc. Prof Ann Tiernan, Dr David Solomon and myself.

[10] P. Foster, "Establishing EARC," in *Was EARC Worth It?*, ed. S. Prasser (Brisbane: RIPA (Qld), 1993).

An advantage of an enduring body is that it would develop expertise in the operation of the integrity system and its agencies – including strengths, weaknesses, gaps, overlaps and co-ordination problems. This process would help address systemic problems as well as look at the particular issues generated by individual agencies. Professor Colin Hughes pointed out that the PCEAR in its short life was able to develop sufficient understanding of the issues to assist in the integration of various reforms by pointing out inconsistencies in different reports.[11] Like the original EARC, it should include lawyers together with members from other disciplines with relevant knowledge of how public institutions work. Even if EARC was not resurrected, there are a number of ways in which its functions could be continued. Some advocates were very disappointed that our proposals for an 'EARC lite' costing so little that even a razor gang would smile were rejected by successive ALP governments that were otherwise very well disposed to our work and our proposals for reform.

The recent review of the CMC was conducted by two eminent lawyers (Hon Ian Callinan and Professor Aroney) and has generated much controversy. In my view, a major review of the CMC was long overdue. A body as powerful as the CMC should have been reviewed at least twice and probably three times. The fact that I believe that an enduring body such as EARC or an EARC-lite replacement might have been able to do a more comprehensive and less controversial review on a more regular basis is no criticism of the personal qualities of those the lawyers – one of whom (Hon Ian Callinan) is reported to have played a critical role in the establishment and protection of the Fitzgerald Inquiry. As we discovered in the course of that inquiry and subsequent reforms, institutions matter as well as individuals.

COMPOSITION OF GOVERNANCE REFORM COMMISSIONS (EARC or EARC 'lite')

There is much to be said for a lawyer to chair an EARC: however, a range of other skills are needed to consider the effectiveness of institutions and their interaction with others. A total of seven EARC commissioners were appointed. Three of them were lawyers (Sherman and Solomon, the two chairs and Colin Hughes) but all three were multi-disciplinary and had extensive experience outside the law (public sector management, journalism and election oversight).[12] Two had academic experience (Hughes and Virginia Hall), one local government (Brian Hunter), two were from industry (Marie Blake and Susan Davis) and one from the not-for-profit sector (Hall).

It is important that governance reform commissions are not merely law reform commissions. As I have argued elsewhere, governance reform involves a combination of ethical standard setting, legal regulation and institutional reform[13] and requires the inputs of ethicists, lawyers, political scientists and economists.[14] As one of the EARC reforms (on legislative standards and the parliamentary draftsman) reminded us: legislation should not be the first resort and alternatives should always be considered. In governance reform, legislation is generally a part of the answer but is rarely the whole of the answer.

'INTEGRITY'

Words like 'integrity' can be given a number of meanings and philosophers tend to say that there is no one 'right' meaning but more or less useful definitions. For me, integrity and corruption are conceptually linked terms – with one the obverse of the other. Transparency International defines corruption as the 'misuse of entrusted power for private benefit'. By contrast, integrity is 'the use of public power for officially endorsed and publicly justified purposes'. The latter definition is primary because you cannot know what an abuse is if you do not know what the correct 'use' is. The form of official endorsement will vary from system to system but, in a democracy, the officially endorsed uses of public power are those set by the elected government and legislature. Indeed, democratic competition is about differing views as to how public power should be used for the benefit of citizens.

Integrity is also linked to ethics. Personal ethics involves asking hard questions about your values, giving honest and public answers and then living by those answers. If you do, you have integrity, you are true to yourself. Institutional ethics involves an organisation asking hard questions about itself, giving honest and public answers and living by them. If it does it has integrity. Of course, the processes of asking, answering and living by those answers are more complex in an organisation – they are the stuff of governance.

In Appendix two, I include a glossary of governance terms that some find useful. I also include extracts from a recent keynote I was invited to deliver in Delhi which pulls together some of these themes – and deals with governance and integrity systems as a form of risk management.

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[11] Colin Hughes, "A Reform Program: Time and Methods," in *Was EARC Worth It?*, ed. S. Prasser (RIPA (Qld), 1993) 72-80.

[12] Colin Hughes had been an Australian Electoral Commissioner.

[13] C. Sampford and D. Wood, "The Future of Business Ethics? Legal Regulation, Ethical Standard Setting and Institutional Design," *Griffith Law Review* 1, no. 1 (1992).

[14] C. Sampford, "Adam Smith's Dinner," in *The Future of Financial Regulation*, ed. J. O'Brien I. Macneil (Oxford U.K.: Hart Publishing, 2010).

ISSUES RAISED BY THE BILL

Most of the major issues raised by the Bill reflect issues of importance to the Review and I will generally start from the Review in discussing them.

Number of integrity institutions and overlaps between them

The Review listed 15 integrity agencies, wondered if there were others and seemed to think that this was too many. The Key Centre for Ethics, Law, Justice and Governance undertook an integrity systems assessment of Queensland in 2001. In addition to those listed by the Review, we listed five levels of courts, the Department of Public Prosecution (DPP), and parliamentary committees. I am not wedded to any number though I recognise that there are clearly extremes: a very small number of integrity institutions may concentrate too much power and too many becomes unwieldy. However, there are bound to be a significant number for several reasons:

a. The whole point of an integrity system is to have a range of different agencies mutually supporting and checking each other.
b. If you look at the functions of the various integrity agencies, you will want them performed by some body.
c. A variety of agencies interacting with each other will be better able to keep watch on each other.

The key questions are: What functions need to be performed? Who can perform them best? And, which functions should be combined and which kept separate (for example, giving advice and investigation of wrongdoing need to be kept separate)? These are just the kind of questions a revamped EARC could consider. It would be in an excellent position to do so.

Some groups of institutions have long standing relationships with each other or other bodies that allows their work to be ordered – such as parliamentary committees or courts. Some have clearly demarcated and complimentary roles (for example, investigators in police or CMC, DPP and courts).

This Bill does not involve a reduction in numbers of integrity institutions (though it may limit some of the integrity functions performed within the system). There does seem to be a concern to avoid overlaps in moving some functions to the Public Service Commission and heads of agencies. I would caution against being too concerned about the existence of apparent overlaps:

a. No system of coverage will be perfect. There will inevitably be either overlaps or gaps. If we err on the side of avoiding overlaps, we will leave gaps which will get wider as wrongdoers discover them and exploit them until gaps become gaping holes.
b. Most systems have some redundancy built in – especially in crucial areas.
c. A degree of overlap in function will mean that other integrity agencies will see a little of what other agencies do (though the main basis for this occurring is complementary functions).

This is not to say that we should ignore potential overlaps and duplications. Overlaps, potential duplication and, most importantly of all, the location and combination of functions within integrity agencies would be a primary and ongoing concern of any reconstituted EARC.

Publicity generated by the lodging of a complaint

The Review quoted my strong criticisms of the practice of publicly reporting that you are 'going to the CMC'. I called it an 'abomination'. Victims of such practices are justifiably furious.

If a complainant really believes that another may be doing something wrong, the last thing they should contemplate is alerting the alleged wrongdoer and thereby giving the latter an opportunity to destroy evidence, coerce potential witnesses, or concoct and share stories among potential witnesses. Such publicity reduces the chance of the alleged wrongdoer being caught.

If a complainant makes the complaint public and thereby reduces the likelihood of wrongdoers being prosecuted, it would suggest an ulterior motive – generally political or economic advantage.

I generally supported the Review's requirement of confidentiality. The exceptions should be carefully considered. They should not rule out making complaints to other bodies (for example, some corrupt behaviour might also breach other laws such as insider trading). Nor should they rule out complaining to oversight bodies if they are concerned that the complaint is not being properly investigated. Indeed, after a reasonable interval (best defined by statute), the complainant should be free to complain to the media that the CMC/CJC has not done its job investigating their complaint. By that time, the CMC/CCC would have had time to consider the matter and be able to respond so that baseless claims will be seen as such, and subject to defamation proceedings. It is one thing for someone to raise publicly a claim of corruption against another person and say they are taking it to the CMC before the CMC has had an opportunity to consider it and is therefore unable to comment. It is quite another for them to say: here is my

complaint, the CMC has not dealt with it effectively and for the public to immediately hear that the CMC has already investigated it and found it baseless. Of course, if there are legitimate grounds for criticising the CMC/CCC who are charged with investigating complaints then the press have a second, and even more important, story.

I support strong sanctions for anyone who publicly reports that they are making a complaint for the simple reason that they are putting at risk the investigation they claim to be necessary. However, the confidential reporting of an honest belief in the facts alleged should be protected.

Under new section 88L, those making complaints 'honestly and reasonably' are immune from all civil, criminal and administrative process and can claim 'absolute privilege' in cases of defamation.[15] I generally support this provision – though I would suggest that honesty is sufficient as I am not sure what the test of 'reasonableness' would involve in these circumstances. I would suggest that this privilege should be lost if the complainant discloses that the complaint has been made. Indeed, I would go further, supporting the availability of exemplary damages and criminal sanctions to match those for officials under 88M (below). However, the inability to make the complaint public beforehand and the fact that unsubstantiated complaints will not see the light of day means that there is not much point in making such complaints – dealing with the primary mischief to be addressed.

I entirely support the requirements of confidentiality placed on the CCC under new 88M of the amended act. We should be very suspicious of leaks by the CMC/CCC for the same reason as we are cautious about leaks by the police. Police leaks have been done for money, to prejudice a jury or for political motivation. All three are totally unacceptable for police as they should be for the CMC/CCC. Of course, there are reasons when the police will want to make a public call and Royal Commissions may have good reason to hold some hearings in public. Such hearings should be permitted for CCC as they are for other such commissions (and ad hoc Commissions of Enquiry). While these procedures could be abused, there are a number of safeguards (including transparency, legal representation and judicial review). There is room for more safeguards to be built in to public hearings.

I am not, at this stage, advocating criminal penalties for media who report information about complaints leaked by officials under 88M or by complainants. The issues here are the same as for reporting of other criminal investigations. They can provide a great service in some cases to encourage further information on crimes the police are publicly investigating. On the other hand, they can prejudice investigations that need to be carried out in secret – including under-cover and 'sting' operations and investigations into terrorism, spying, insider trading, collusive tendering and various forms of organised crime – including corruption. However, reporting restrictions on sensitive investigations should be considered collectively rather than for corruption by itself.

Where the media undoubtedly have a key role is in raising a hue and cry against failures to investigate – either because there is no body to carry out these investigations (as was the case when *Moonlight State* was broadcast) or because they argue that the designated body is not doing its job. .

Change and Hierarchy of purposes

The current act gives the CMC two functions: to combat and reduce the incidence of major crime and to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector. This Bill would give the first priority and limit the second to combating corruption.

First, I do not see this distinction as particularly helpful and it does not send a good signal. Corruption will often fit into the definition of major crime in that it is generally 'organised crime'. Fitzgerald exposed a high degree of organisation by corrupt officials in the 1980s. I am sure that the drafters of this Bill would not suggest that this was not a major crime. But even when it does not fit that definition, it is a serious and highly insidious form of crime. Democratic polities entrust their power to elected and appointed officials. The abuse of that trust and the use of that power for the officials or groups to which they belong risks that trust on which democracy is founded. While the dints in that trust by acts of 'petty corruption' may be limited, they may encourage others to follow, excusing themselves that it is only minor, a 'perk of the job' and something that everybody does. The last excuse can become a self-fulfilling prophesy. Thus low levels of corruption have a tendency to increase and 'petty' corruption breeds 'grand corruption'. Even low levels of corruption can fuel a belief that civil servants and politicians are just in it for themselves, reducing trust in government.

[15] Though the conditions on honesty and reasonableness give this the flavour of 'qualified privilege'.

Secondly, there is one key feature of the integrity/misconduct function that is most worthy of preservation. The second function is not just one of combating corruption but of promoting integrity. This function is directly linked to the two greatest contributions that Queensland made to the global anti-corruption movement:

1. That the promotion of integrity is the primary goal and that corruption is merely one of the ways to limit public integrity.
2. The promotion of integrity and combating corruption require a combination of ethical standard setting, legal regulation and well-designed institutions that form an 'integrity system'.

This function puts the CMC at the heart of the integrity system and gives it a system-wide role in promoting integrity. Now the logic of integrity systems does not require that the anti-corruption body should be given this role. To some extent that role is shared among a number of integrity institutions and the leading role could be given to another integrity institution with similar independence to the current CMC. On first principles, I would have thought that the education and ethics functions might be placed within another integrity institution (e.g. the public ethics office proposed by EARC or the Integrity Commission). The promotion of integrity could be given to another body along with the ethics and education functions. But, it is not clear what other body could be given the responsibility of combating corruption/misconduct. Any such shift should follow a detailed study of the integrity system (preferably by an EARC style body). And, any such shift should ensure that these functions are not only done but done better than the CMC (to justify the transaction costs of moving that function).

The change from 'official misconduct' to 'corruption' raises a number of issues. Behaviour that amounts to 'official misconduct' would fall within TI's and other definitions of corruption. Under section 14 of the CMC Act, it includes abuses of entrusted power by making decisions that are not honest or impartial, a breach of trust and misuse of information for personal benefit or the benefit of others. (It also includes inducing others to so act.) The Bill would call such acts new act and would call them corruption rather than official misconduct. However, there is benefit in having a less charged term than corruption. Some might feel that corruption is much more serious and quite different from what they are doing. Complainants and juries might think of corruption as essentially much bigger than the offences covered under official misconduct/corruption. The use of the less charged term 'official misconduct' might be seen as analogous to the creation of offences covering negligent driving causing death after Australian juries proved reluctant to convict drivers of homicide.

What is of more concern is that the CCC would only be able to investigate more serious corrupt conduct cases. There is a practical difficulty with this in that the seriousness of the corruption may not become evident until investigation has been completed. It may also give an apparent (and presumably false) signal that lower levels of corruption are not really a problem and of minor concern to the State of Queensland.

High thresholds for making complaints

The Review suggested raising the bar for complaints and the Bill certainly does so. The Bill amends section 36 of the Act to require a complaint about corruption to be made to the commission by statutory declaration.[16] Complainants might be deterred by the change of wording to 'corruption', thinking only of classic bribery rather than the various abuses of public trust contained in the definitions of both official misconduct and corruption. Such thoughts might be supported by the list of examples given in section 15(2). Of more concern, potential complainants might be discouraged from reporting corruption, which is not 'serious' enough for the CCC. This would particularly be the case where the potential complainant had only caught a small glimpse of a much larger corrupt network. If a corrupt network has managed to conceal 99 per cent of their corruption, the small glimpse may be all that any individual can get. But different individuals could gain different glimpses which the CCC could start to put together – but only if they are reported.

I understand the concern that there may be large numbers of complaints and the opportunity to make vexatious complaints. I believe that enforcing the confidentiality of complaints will deal a huge blow to the latter and that this should be tried before further barriers are made to the receipt of information from the public.

Effective crime control is heavily reliant on information from the public. This is particularly the case where the victims are not present during the commission of the crime (as is classically the case with corruption). Individual members of the public may have fragments of information – but fragments that may be particularly useful in alerting investigators

[16] The amendment does not stipulate the requirements of the statutory declaration as suggested by the Callinan/Aroney Recommendation 3B. Some of these would have been particularly onerous, especially on lay people. For example, the Review recommended that the statutory declaration should state that complainants know the meaning of official misconduct, that complaints must allege matters that the complainant reasonably suspect would be (cf. 'could be') a criminal offence, official misconduct or grounds for termination of employment and that complaints must be made with reference to the definition of corruption.

to potential criminal behaviour, especially when added to other information they may have. Whether these fragments add up to the elements of a crime, official misconduct or matters that might lead to dismissal will be something that is considered after some collating of information and checking – often as late as when the police/CMC are preparing a report to the DPP recommending prosecution. Getting to that point requires legal knowledge (about the elements of the crime), considerable investigation and the collection of facts, which members of the public are unable to do. ART argue that NSW ICAC would never have caught up with Mr Obeid had this threshold applied. Even if you disagree that ART is correct in the Obeid case, it is easy to see that it could be in others. A lowly health official with an expensive lifestyle or a procurement official living in a very expensive house might be worth a quick initial check by the CMC. Or to take the most relevant example from Queensland, the fact that police officers are regularly seen walking past a known brothel would be insufficient to ground a complaint under the new system.

We encourage information from the public in other areas of crime control. Neighbourhood Watch and other mechanisms typically try to make it easy for the public to provide information. We should be very careful of putting barriers in the way of investigating corruption that we would never dream of for Neighbourhood Watch or Crime Stoppers. Most of the crimes reported by the latter are relatively straightforward and most citizens would have a good idea of whether they are witnessing a likely burglary or assault. It is much harder to know whether you are witnessing corruption – but what you do witness may be a part of a wider picture that only a body like the CMC/CCC can draw.

Criminalising complaints

Under s216, it is currently an offence to make a complaint twice if the complainant was told by the CMC that the first was vexatious or frivolous. This provision is retained with respect to frivolous complaints about corruption. But for vexatious and a range of other 'improper' complaints a new 'one strike' rule applies. Complaints to the Commission that are made (i) vexatiously; (ii) not in good faith; (iii) primarily for a mischievous purpose; (iv) recklessly or maliciously attract up to a year's gaol. This would have a chilling effect on anyone considering making a complaint, especially given the high threshold that applies to complaints. While few of us would condone complaints that fall within most of those categories, lay people may be uncertain what is meant by these terms. Potential complainants could fear that they might be accused and pursued through the courts with the attendant cost in time, emotion and maybe even gaol. Potential complainants concerned about what they believe to be corruption within a future government might be particularly concerned if the entire Commission was appointed by that government.

Objection might be taken to some of the categories of improper complaints. What if someone reported another 'primarily for a mischievous purpose' but secondarily because he knew that the person was corrupt. Someone might make a reckless assertion of corruption but might be correct. Someone might know another official was corrupt but only report them because they felt genuine malice towards them. Indeed, given the chilling effect these provisions might have on those involved in making complaints, the only people who are prepared to make complaints might be those who really hate those they are accusing.[17]

These problems are exacerbated by the high threshold placed on complaints. Members of the public do not appear to be able to merely point out suspicious facts that might be worthwhile investigating. They must effectively make an accusation of criminal conduct.

As indicated, the requirements of confidentiality and the loss of privilege for complaints that are disclosed should be sufficient to deter the most egregious of improper complaints. I would suggest that these measures are trialled before the more drastic measures suggested here.

There may be a role for an offence that is the equivalent of 'wasting police time' but applied at least as circumspectly as police do – given their desire to secure information from the public. Similar to restrictions on reporting, such measures can be considered in the light of publicly funded investigators rather than confined to complaints about corruption.

From CMC investigation to Media prosecution

Given the high threshold for making a complaint and the chilling effect of criminalisation, the obvious alternative complaint mechanism is to drop a quiet word to the media. While the media can play a critical role, especially when the normal channels fail to investigate properly, I do not see this as the best way of investigating most complaints of corruption. The ABC and the *Courier Mail* did sterling service in helping to air strong suspicions of corruption and the associated investigative journalism they performed. But Queensland did not rely on the media in the 1980s and certainly did not resolve to rely on them in the future. That was why the CMC was created – with significant powers to get to the bottom of what looked suspicious.

[17] Joseph Heller, author of 'Catch 22' would be impressed!

Information provided other than by a complaint.
The above has been driven by a concern that complaints may be discouraged by high barriers and potential criminal penalties. Section 36(1) also contemplates individuals giving information or matter involving misconduct/corruption to the Commission. If so, individuals could merely relay their suspicions to the Commission in the same way as neighbourhood watch. Provided citizens were aware of this option and the Commission was willing to act on suspicions that would, individually or in conjunction with other suspicions reported, there might be little difference – except that there would be very few complaints at all. However, given that the corruption function is framed in terms of handling complaints ('to ensure a complaint about, or information or matter involving, corruption is dealt with in an appropriate way, having regard to the principles set out in section 34'), I doubt if that is intended. Indeed, s34 and new 35A and 35B all concentrate on handling complaints.

Number of complaints
The Review seemed to be very concerned about the numbers of complaints, a concern that appears to be shared by the drafters of this Bill. I would respond in two ways.

First, we need some detailed analysis of the costs involved and put it in perspective of the potential costs of corruption. I have long argued that we should see integrity measures as a form of insurance against the risk of corruption (see Appendix One). We should look at the total revenue and assets of the state and ask what is a reasonable proportion of revenue that should be spent on protecting the rest. We should ask how much insurance it is reasonable to take out. Our integrity system includes the parliament, its committees, the courts and a range of watchdog bodies such as the Auditor General, the CMC, the Integrity Commissioner, DPP, some aspects of the Public Service Commission etc. We count the total number of institutions in the low 20s (see numbers above). The total cost of these institutions is considerable. In integrity systems, as in property management, we can over insure and under insure. To know whether we are under or over-insuring, we need a lot of facts and estimates of the kind indicated by ART. Concerns about the number of staff in the CMC handling complaints needs to be placed in that larger context. A reconstituted EARC would be in a good position to do that.

Any integrity system will be at risk of receiving too many complaints or too few. There are no 'Goldilocks' solutions. Although measures can be undertaken to reduce baseless complaints and encourage genuine complaints, our choice is on the side on which we err. Even 25 years after Fitzgerald, it is natural for Queenslanders to err on the side of spending a few hundred thousand too much on triaging citizens' complaints than risk another episode like the 1980s. It is often argued that you should always take out 'catastrophe' insurance – insurance against the catastrophes against which you cannot afford to self-insure. The question we might ask (rhetorically or otherwise) is whether the corruption of the type that Queenslanders long suspected but only discovered in the late 1980s is just such a catastrophe.

Research, prevention, education and ethics
There are queries about whether the CMC should perform these functions and whether they should be performed at all. I do not know whether or not they are done well and I am not sure that they are best done by the CMC even though they are done well by similar agencies in other jurisdictions (for example, Hong Kong ICAC). These functions need to be performed: and, if they are done well by a particular institution in a particular integrity system, it is generally wise to leave that function with them. If it is not done well, then consideration needs to be given as to whether the agency performing that function should be required to do it better or whether it should be given to another agency. Such consideration would, again, be a task that a new EARC could do very well and better than other agencies would.

Preventing and combating corruption obviously requires well-drafted laws but this is only the starting point. It also needs:

a. Tip offs and suspicions from within the public service and general public.
b. Whistleblower protection for the above – and in some cases witness protection.
c. Research into corruption and corruption networks as well as the identification of corruption risks and vulnerabilities.
d. Experience from earlier investigation and prosecutions.
e. Input from other integrity agencies (for example, identification by the Ombudsman of areas where maladministration may generate opportunities for corruption and other forms of official misconduct).
f. Use of the above to develop corruption prevention strategies within particular agencies (reflecting the particular corruption risks) and across agencies.
g. Education.
h. Ethics – identifying the highest standards to be sought and the temptations and dilemmas facing public servants in any particular agency.

It is sensible for a number of these functions to be co-ordinated and located in the CMC. I would suggest items 'a-f' but not necessarily 'g and h'. I do not think that the Public Service Commission is equipped to do items 'a-d' and 'f' at all and is not well equipped to do 'e'.

I hardly need emphasise the importance of prevention. Prevention is generally agreed to be better than cure and it is central to the police who perform similar roles to the CMC over most other areas of the criminal law. Those bodies who are receiving (a) and engaging in (c) and (d) would seem the natural body to engage in developing prevention strategies. Accordingly, I would recommend against the adoption of Sections 23 and 24 of the Bill, which remove the prevention of corruption (misconduct now read as corruption) function.

Research (c above) goes well with (a), (d), (e) and (f). However, this research should be applied and honed in the light of what is unearthed by these other functions and as part of the overall strategy of the CMC/CCC. The provision of three-year research plans approved by the Attorney General is the appropriate model for a Law Reform Commission but not for CMC/CCC. As indicated, CMC/CC should tailor its research into the strategies above – some of which is informed by matters that would not always be known to the Attorney (e.g. a, b, d) Accordingly, I would recommend against the adoption of section 52 of the Bill.

It is not entirely clear where the **ethics and education** functions of the CMC are intended to be performed. These functions would seem to be a part of the integrity/misconduct function that is to be abolished. I would argue that these functions are very important but I am not sure that the CMC is the appropriate body to perform this task. First, ethics is first and foremost about what we should do rather than what we should not do. The two are closely related. If power should be used for publicly justified and officially endorsed reasons (i.e. with integrity), this clearly excludes the use of that power for private gain (i.e. corruptly). The CMC rightly concentrates on preventing wrongdoing. But this means that the CMC will tend to emphasise the negative aspects of ethics and will not be the best body for promoting the predominantly positive message of ethics.

However, I am not at all sure that this function should be pursued by the Public Service Commission. It did not do a good job in the late 1990s (when it reduced the ethics function to half a staff member) and it has tended to opt for a generalist approach, abandoning one of the most globally admired elements of the 1990s Queensland reforms. In 1994, the *Public Sector Ethics Act* set out values and general principles for the conduct of appointed officials in a wide range of agencies and institutions (including universities). However, it did not mandate a general enforceable code of conduct. It required the CEOs of agencies to organise the drafting of an agency specific code of conduct which applied those values and principles to the work of the agency. This allowed a contextualisation of what were very general principles. It encouraged agencies to think how those values and principles applied to them – asking not 'what is a good public servant' but 'what is a good fireman, teacher etc.'. Most importantly, it allowed agencies to consider the temptations and dilemmas that might present themselves and to think through what their responses might be. Our research indicated that there was much variability in the performance of this function. One of the reasons was that Directors-General and other heads of agencies (DGs) were given a large number of responsibilities (from fiscal prudence to whistleblower protection) with little guidance on how to do them, let alone how to integrate them into the operations of the agency. The second was that they received little external help in performing the ethics function – least of all from the Public Service Commission. During the late 1990s, there was officially a half-time position in the Public Service Commission allocated for this function.

DGs could have been greatly assisted in each if the government had adopted the EARC recommendation for an ethics office, building and improving on US, Canadian and Western Australian models. These functions could be taken on by an expanded Integrity Commission. Instead the ethics function was performed, in part, by CMC and, in part, by the Public Service Commission. In 2009, the latter pressed for a system wide code of ethics, casting aside one of the signal EARC reforms.

Employment conditions for managers

I have no problem with the recommendation of the Review included in s219A that it is a condition of employment for managers that they take reasonable steps to prevent official misconduct and corruption. However, as the 1990s experience demonstrates, just giving a busy senior officer another responsibility is not, by itself, an answer. If they have a significant responsibility, they will delegate most of the relevant work to an individual or a unit within his or her agency with time and expertise (such as an internal audit group or an ethical standards unit). If all managers have such a responsibility, it is even more important to provide support. Where the responsibility is given to all DGs, it is particularly helpful to have a system wide unit to assist them in this task and in integrating that task with the rest of their duties. As indicated above, this support was what was missing in the 1990s.

The existence of an internal and an external ethics unit is not duplication any more than the presence of internal and external auditors. Each performs complementary functions and makes it easier for the other to fulfil their functions. I would argue that the ethics function be carefully reviewed to ensure it operates effectively within the integrity system.

Bipartisan Support/consultation on appointments to the CMC/CCC.
Removing the requirement for bi-partisan support of appointment to the Commission abandons a very important innovation in Queensland's integrity system of which we should be proud.

I am naturally aware that appointments to other highly responsible positions are made by the government of the day – particularly judicial office. This could be an argument for the improvement of other appointment procedures rather than changing those for the CMC. But in any case, I would distinguish judicial appointments in that:

- Judges do not have as much discretion.
- With few exceptions they play their role in open court.
- They have to give reasons for their decision.
- They are subject to appeal.
- They are generally appointed one at a time and enter a very strong culture.
- They have much longer tenure.

I am very aware that many great appointments have been made by governments without securing the support of oppositions – including quite a few Royal Commissioners, many judges and, as I understand it, the first appointees to EARC.[18]

I am also aware that bipartisan appointment was agreed by the major parties after Fitzgerald reported. This decision merely indicates how good ideas can come out of bi-partisan discussion and that such bi-partisan discussion can lead to improvements on Fitzgerald's recommendations. We should celebrate those party leaders in 1989 who came up with this very important innovation.

Anti-corruption commissions are very powerful bodies. There is a temptation to appoint commissioners who will go much harder on the opposition than the government. In other jurisdictions, governments have succumbed to this temptation and anti-corruption commissions have been used as a way to entrench power. This temptation creates a serious governance risk that has materialised. Recognising that risk and 'insuring' against it by requiring bi-partisan support for commissioners is an excellent risk management strategy. One does not have to suspect, let alone accuse, a government of harbouring such intentions. One does not even have to suspect that a particular government is likely to give in to that temptation. The question is whether it is wise to create a temptation where none has been present for a quarter of a century.

The simple question is whether MLAs from both sides of politics would trust a future government led by their political opponents to put this temptation behind them. If they do not so trust their opponents, then they should opt to retain the current requirement of bi-partisan support. If they do trust them – then why not share that power of appointment with such trustworthy adversaries? It will certainly increase the trust of the public in this critical institution that lies at the centre of our integrity system.

To put it less rhetorically: if key integrity institutions become partisan, the integrity system is at great risk. Risks will not always materialize but that is no reason for ignoring such risk. The best way to avoid that risk and secure non-partisan integrity institutions is through bi-partisan appointment processes bolstered by consultation with non-partisan.

[18] As I understand it, these were appointed before the first PCEAR sat.

APPENDIX ONE: EXTRACTS FROM RECENT INDIAN KEYNOTE

Meeting the Challenge of Globalising Corruption: Building a Global Integrity System

Annual Asia African Legal Cooperation Organisation (AALCO) Conference, New Delhi, September 10, 2013
Professor Charles Sampford

'Corruption' and 'Integrity'

Integrity and corruption are conceptually linked terms – with one the obverse of the other. Transparency International (TI) defines corruption as the 'misuse of entrusted power for private benefit or personal gain'[19]. By contrast, integrity is 'the use of public power for officially endorsed and publicly justified purposes'.[20] The latter definition is primary because you cannot know what an abuse is if you do not know what the correct 'use' is. The form of official endorsement will vary from system to system but, in a democracy, the officially endorsed uses of public power are those set by the elected government and legislature. Indeed, democratic competition is about differing views as to how public power should be used for the benefit of citizens.[21]

This is about power

Both definitions centre on power – specifically its uses and abuses. This is not to restate Lord Acton's famous dictum (that power corrupts and absolute power corrupts absolutely). The relationship between power and corruption is contingent rather than a necessary one. However, wherever there is power there is the risk of its abuse. That risk must be recognised and minimised by appropriate governance and integrity measures (see below). We must recognise that the corrupt are attracted to ungoverned power – power that is not channelled by governance integrity measures towards the purposes for which the power is justified. For them, the point of gaining power is to use it in their own interest.

While there are many ways that power can be abused for personal gain (the ingenuity of the corrupt is considerable), I wish to distinguish two different forms of abuse. One is when the power holder uses the power directly for their own benefit – using property with which you have been entrusted for your own use, stealing entrusted money, using entrusted power to force others to do what you want. The other form of abuse is when the exercise of public power is for the benefit of another who rewards the power holder for the abuse – a corrupt exchange that we recognise as bribery. We could distinguish these two forms of abuse as unipolar and bipolar corruption. The power that is relevant to unipolar corruption is that which has been entrusted and which there is a risk of abuse. In bipolar corruption, the power held by the corruptor is as relevant as the power held by the corrupted. The risk lies in the power held by each and risk management needs to be applied to both.

Evolution of Corruption

As power evolves and grows, so too do the opportunities for corruption. Human imagination, innovation and drive give us scientific and engineering advances. They also give us new forms of social organisation, from the hunting party to the sovereign state, to the global corporation that bring together people, power and resources capable of achieving much more than unco-ordinated individual behaviour. But that same imagination, innovation and drive also generate new ways of abusing institutional power. The potential for corruption is built into all institutions because of the dynamics of collective action and agency. The reason why we create and support governments, joint stock companies – and international NGOs – is because so often more can be achieved collectively than individually with the pooling of people power and resources for shared goals. However, that opens the possibility that institutional leaders may turn that entrusted power to their own benefit or use against their citizens/stockholders/bondholders.

Accordingly, the history of institutional innovation is also the history of corruption. I will not attempt a full history of either but provide a few snapshots. In late Republican Rome, provincial governorships were seen as a license to amass personal fortunes through corruption. Cicero's prosecution of the Sicilian governor Verres in 70BC was remarkable for its oratory, audacity and rarity. The Roman generals enjoying 'Imperium', the power of command, started using that power against the Republic they were supposed to defend. In Medieval Europe, the

[19] 'Personal' gain is very widely construed. It extends beyond personal enrichment and includes benefits to the power holder's family, associates, political party – indeed, anyone other than those who are the publicly intended beneficiaries of that power.

[20] I will not go into detailed argument here, but I would distinguish between originally intended purposes and publicly justified purposes on the basis that the purposes for which institutional power is used may change over time. However, any new uses of entrusted power must be publicly justified and officially endorsed.

[21] Note that this approach treats integrity as a process value rather than a substantive value. It is a question of living by the publicly stated values relevant to your role.

Church claimed the power to provide salvation and eternal life – and extracted a very good income from the sale of 'indulgences' and the provision of special masses.[22] The great lords or 'tenants-in-chief' received land and serfs so that they could provide men at arms to fight the king's wars and defend his territory. However, these men at arms were often turned against the king to wrest extra privileges and sometimes the crown itself. The sovereign states that emerged in seventeenth century Europe were designed to eliminate reliance on these 'over-mighty' subjects by creating a national bureaucracy, collecting taxes and paying for a standing army. However, this created new opportunities for corruption by the bureaucrats and generals reminiscent of Ancient Rome. Nicholas Fouquet was Louis XIV's minister of finance – having bought two public offices and being given a third as a favour by the corrupt Cardinal Mazarin which made him the leader of the 'tax farmers' who took a cut from the taxes they collected. He built Vaux le Vicomte, the most magnificent chateau in France and entertained the king in August 1661 in such a lavish manner that the King had him arrested.[23] The following century, Napoleon used the army command given him to defend the French Republic to take it over – setting the example to be followed by hundreds of later generals, colonels, a flight lieutenant[24] and even a master sergeant.[25] Thus financial corruption and *coups d'etat* became diseases of the modern state as the great power of the modern state attracted those who wanted to engage in unipolar corruption. As corporations grew in number and strength, some found a variety of ways to secure what they wanted from government through multiple forms of bipolar corruption.[26]

More recent multi-ethnic empires provided further examples of financial corruption. Christopher Columbus wanted to become Viceroy of the territory he conquered and 10% of all taxation. Robert Clive was not as demanding but made much more money in Bengal. Neither left a good example to the local inhabitants who finally regained control of their territory.

Governance and Risk

All institutions concentrate power, people and resources to achieve certain publicly stated goals which are, or are seen to be, of benefit to the relevant community. However, that concentration of power, people and resources could be used for other purposes that might harm that same community. Police forces and the armed services are supposed to protect citizens but can use their coercive force to secure bribes, to terrorise inhabitants or even to seize state power. Banks and other financial institutions concentrate the resources of their shareholders, depositors and others who entrust them with their money. These resources are supposed to ensure liquidity for those who engage in the provisions of goods and services to others. Yet those resources can be used in transactions that generate very high fees for the financial intermediaries at the same time as they create great risk for those who have entrusted their money to them.

For anarchists, the dangers are just too great, but most of us are sufficiently keen to reap the intended benefits of states and corporations that we are prepared to take a risk. The American revolutionaries considered the former issue very carefully. For them, governments are instituted to support the 'inalienable rights to life, liberty and the pursuit of happiness', but they could turn against the people they were supposed to benefit, justifying revolution and the establishment of governments that could perform the relevant function (or in my terms, justify themselves). But they did not decide to abandon the idea of government because government power had been abused by the British. However, they wanted to reduce the risk of future abuse by creating a system of 'checks and balances' that developed into a form of 'risk management' that we now recognise as 'governance'.

Governance is about the allocation and direction of power within individual institutions and within polities as a whole. While the term is relatively recent, the idea is not and a number of 'governance disciplines' have been developed. All of them recognise and theorise corruption and other governance problems within institutions but do so in different ways. When lawyers look at institutions they see sets of formal norms. Ethicists see informal norms and the values the institution claims to further. Economists see incentives and disincentives. Political and social scientists see power relations and complex webs of interpersonal and group relationships. Accordingly, institutional problems are seen in the deficiency of laws, ethical standards, incentives etc. and the solutions are seen as lying in remedying the deficiencies their disciplines identify. All these partial insights into institutions and their problems are important. Any solution that ignores them is likely to fail. However, solutions limited to the

[22] Those corrupt enough to think they could buy salvation from a supposedly omnipresent and omniscient God were likely to be in need of it.

[23] The arrest was by a captain of musketeers named d'Artagnan – leading Dumas to craft a series of books about him and three other musketeers culminating in the story of the 'man with the iron mask'.

[24] Jerry Rawlings of Ghana.

[25] Samuel Doe of Liberia.

[26] From outright bribes to funding party elections.

insights of a single discipline are also likely to fail. Solutions to governance problems such as corruption should recognise and integrate the insights of law, ethics, politics and economics.

In doing so, most of these governance disciplines explicitly acknowledge the importance of power and its abuse. Law seeks to set out what powers officials have; how they must be exercise; for whose benefit it is to be exercised; and, penalties for using it for other purposes. Ethics is always particularly concerned about how those who hold power should exercise that power – asking hard questions about their values, giving honest and public answers and then living by those answers.[27] Political science is, first and foremost, a study of how power is exercised. Economics is one governance discipline that avoids discussion of power because it seeks to describe a world in which all exchanges are voluntary and Pareto efficient.

The Evolution of anti-corruption responses

The long history of institutional power and its abuse by the corrupt has led to a wide range of responses.

The first instinct is a strong 'legal' response in which the corrupt are executed by the King or Party Strong responses. Not infrequently, the head of state who felt cheated did not take a chance on the accused being acquitted (Louis XIV was not the last to do so – though he only insisted on life imprisonment). The rule of law ruled out such certainties of outcome. But in any case, its limitations must be recognised.

Prosecutions still have a cathartic effect and may help to mobilise reform. Criminal laws can support other reforms. But they are not the key part of the answer. First, prosecutions take a long time and are frequently inconclusive. Even if successful the process will not bring back the destroyed shareholder wealth, the stolen money, the uncollected revenue or even a significant proportion of it. Even for the few who are brought to justice, most of the wealth that has been destroyed or stolen will be irrecoverable. This is not just because it cannot be traced but often because it no longer exists. Second, as we all know, laws whose purposes are not internalised are rarely effective. This is where ethics comes in. Third, they do not address the key institutional questions of why the corrupt 'bad apples' got to such positions of power and were tempted to abuse that power for their own ends. If there are a lot more crooked CEOs or senior public servants, it is not because there are more bad people in a particular country; it is because its corporate, bureaucratic and/or political institutions generate a lot of temptations and opportunities for corruption and tend to promote those who will give in to those temptations.

The point is that many of the problems that lead to corruption are essentially institutional rather than individual and you cannot fix institutional problems merely by punishing individuals.

Much of this is appreciated. In fact, there are almost as many zealous proponents of ethics and institutional reform as single solutions to governance problems. After law reform has failed – as it always does if tried in isolation – the other solutions are preached from a range of soapboxes.

Those pressing for essentially ethical solutions emphasise that law is ineffective if not backed up by the values of those they are supposed to govern. This leads to attempts to create codes of conduct and to persuade relevant players to abide by them. Some enthusiasts (not including myself) push for a form of 'bare ethics' as a singular solution involving voluntary codes and 'all regulation short of law'. Yet ethics without the sanction of law to back it up is a 'knaves charter' – a guide for the good and a dead letter for the bad.

Those pressing for institutional solutions are attuned to the institutional nature of many of these problems. They recognise that much of the problem lies in the opportunities and temptations for corrupt and unethical behaviour and the difficulty in detecting it. The solution becomes the creation of new agencies and the reform of existing ones – ticking every box on the list of institutions that have worked in other countries.

Institutional solutions have taken a variety of forms – removing temptations to act corruptly, making it more difficult to act corruptly (from the separation of powers to administrative law) and making it easier to detect corruption (from regular audits and assets checks to financial tracking). By the late 1980s, a common response was the creation of a single, very powerful, anti-corruption agency along the lines of the Hong Kong Independent Commission Against Corruption (ICAC) enforcing very strong anti-corruption law.

However, this model caused concern for placing too much reliance on a dangerously powerful single institution. In the 1990s, the approach to reform taken in Queensland and Western Australia (two Australian states plagued by

[27] N. Preston, C. Sampford and C. Connors (2002). *Encouraging Ethics and Challenging Corruption: Public Sector Ethics in theory and practice,* Federation Press.

corruption) reflected a new approach. The answer to corruption does not lie in a single institution, let alone a single law, but rather in the institutionalisation of integrity through a number of agencies, laws, practices and ethical codes. Instead of a single agency, a *combination* of state institutions and agencies (courts, parliament, police, prosecutors, DPP), state watchdog agencies (ombudsman, auditor general, parliamentary committees), non-governmental organisations (NGOs) and the norms (including values and laws) and incentive mechanisms by which relevant groups live is needed.

This combination has been given various names. Following work with the Electoral and Administrative Reform Commission and the Parliamentary Committee to which it reported, I called it an 'ethics regime'.[28] The idea was adopted by the UK Nolan Committee on Standards in Public Life[29] and the OECD which renamed it an 'ethics infrastructure'.[30] Under the different names, this approach has become the preferred model for governance reform within national and sub-national jurisdictions.[31] However, the term with the widest currency is Pope's 'national integrity system'[32] which was widely promoted by TI and is the term used in the subsequent joint work with TI, which I had the privilege to lead while working closely with Pope. Our team developed the conceptual analysis, methodology and a sophisticated tool for mapping and assessing 'integrity systems'.

In an effective integrity system, the relationships between the various elements of the system will be rich and varied. Relationships will be those based on powers and responsibilities set out in the constitution and other laws, on mutual involvement in each other's knowledge gathering or policy formation, and on support for each other's operational effectiveness. Some relationships will be supportive, some procedural and some will involve checks and balances. However, these should not be seen as limiting and negative but as part of the way that the integrity system keeps its elements to their mission and prevents them from abusing their power for other purposes.

While the term was used to describe the relatively well integrated and developed governance systems found in some western jurisdictions and advocated for others, every jurisdiction has an integrity system of some description in place, whatever its challenges. A NIS can vary in completeness and effectiveness, but there is almost always some base on which it can be built. Even if it is not effective in promoting and supporting public integrity, it will almost always contain some institutions or entities that could become vital elements in an effective integrity system. Institutions that play no part in the integrity system in one context may play a prominent role in others (e.g. religious institutions do not appear in most descriptions of western integrity systems but the Catholic Church played a critical role in the emergence of the Polish integrity system and liberal Islamic faith based NGOs may be an important part of an emerging Indonesian system).

Since 2000, two methodologies have been developed by TI research partners to map and describe national integrity systems – an early, static 'tick box' model developed by Jeremy Pope and Alan Doig that seeks to take a quick snapshot of the individual elements of the integrity system and a more recent and more ambitious and dynamic model and methodology developed by Jeremy Pope and I that seeks to see the way that a particular integrity system is actually operating.

Integrity Systems as a form of risk management that provide insurance against corruption

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[28] C. Sampford (1990) *Law, Institutions and the Public Private Divide (Keynote address)*, Australasian Law Teachers Association Conference, Canberra – later published in the Federal Law Review.

[29] The Right Hon Lord Nolan (1995) *Standards in Public Life: First Report of the Committee on Standards in Public Life*, HMSO.

[30] OECD (1996) *Ethics in the Public Sector: Current Issues and Practices*; OECD (1997) *PUMA Draft Checklist*, Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries; OECD (1997) *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.*

[31] For example, Acar, M., & Emek, U. (2008). Building a clean government in Turkey *Crime Law and Social Change, 49*(3), 185–203; Anechiarico, F. (2010). Protecting integrity at the local level. *Crime, Law and Social Change, 53*(1), 79; Behnke, N., & Maesschalck, J. (2006). Integrity Systems at Work: Theoretical & Empirical Foundations. *Pub Admin Q, 30*, 263; Huberts, L. W., Maesschalck, J., & Jurkiewicz, C. (2008). *Ethics and integrity of governance*:, Edward Elgar.

[32] Langseth, P., Stapenhurst, R., & Pope, J. (1997). Role of National Integrity Systems in Fighting Corruption *Comm L Bull, 23*, 499 and J Pope (2000) *Confronting Corruption: The elements of a National Integrity System (The TI Source Book)*, Transparency International. 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. One cannot know what an abuse is without knowing what the legitimate uses of those powers are. Integrity (the use of entrusted power for publicly justified ends) is primary. We want effective institutions that deliver a sufficient proportion of their promises. If all we just wanted to avoid government corruption that goal could be achieved in theory by not having government and in practice from anti-corruption practices that prevented the government doing anything.

Integrity systems can be seen as a form of risk management. One of the most important drivers of integrity system reform should be the identification of integrity risks. It is not necessary to prove that the risk has materialised (though this will provide conclusive evidence of the existence of the risk) for us to take action.

Like all insurance, there will be costs. Integrity measures utilise money and talent. While almost always ensuring better decisions and avoiding corrupt decisions, they may make decisions slow or timid or even stall decision making completely in ways that prevent public agencies providing the benefits they claim to deliver as surely as if they were acting corruptly.

Some important insights flow from this:

1. The purpose of integrity measures is to ensure that government agencies do what they claim to do.
2. Like all risk management, you should look at the probability of the risk and the seriousness of the risk as well as the costs of insurance.
3. Like insurance the cost of integrity measures is real but is generally a small proportion of the total. I am not sure what the cost of parliament, courts and the various integrity agencies is but let us assume that it is 5%.
4. The purpose of the 5% investment is to ensure that we get the other 95%.
5. But if extra integrity measures eat into the 95% without significantly reducing risk, they are either not worth it or the integrity measures have been poorly designed.
6. Similarly, if the extra integrity measures mean that we start getting a lot less for that 95%, they are either not worth it or the integrity measures have been poorly designed.
7. Even if the risk has materialised, it does not necessarily require action if the risk is proven to be very rare or that it has been dealt with effectively.
8. However, confidence in integrity measures is important so that sometimes we may engage in integrity measures to ensure confidence. This is related to another point – that risk can never be fully quantified and, in human systems, a risk that is not addressed may encourage behaviour to exploit that risk. For these reasons, it is rational to err on the side of over insurance rather than under-insurance.

We can distinguish three ways of reducing the risk that power will be abused as a function of temptation and opportunity.

1. Reduce temptation: there is a temptation where governments have the power to make decisions that particularly favour individuals by increasing the value of their property in the broadest sense. The classic case is building approvals and rezoning. If there is a betterment tax or a charge for service provision there is less temptation.
2. Reduce opportunity – ensure that those who benefit cannot be involved in the decision. Those who are interested:
    a. Do not decide – conflict of interest rules.
    b. Do not have input – lobbying rules.
3. Increase likelihood of being discovered:
    a. Transparency – we know what is done and who benefits and who has spoken to whom about what.
    b. Right to know/FOI/public own information.
    c. Requirement to give reasons and defend them under administrative law.

Corruption Systems

While National Integrity Systems were seen to be the answer to corruption, TI's early comparative studies generated some surprising 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 it 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 in determining the level of corruption.[33] It is quite possible that the more significant variable is the strength of the 'national corruption

[33] See A. Doig and S. McIvor (2003) 'The National Integrity System: Assessing corruption and reform' 23 *Public Administration and Development* 317. This article built 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.

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 co-ordinate their activities.[34] While a NIS may be seen as the best way to promote integrity, the corrupt are often far more organised and in some states NCSs 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 to map and understand the corruption system then plan how to disrupt and destroy it.

Organised crime (whether gangsters or corrupt cliques) will always attempt to suborn or intimidate police, judges and any one 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 and have existed across a range of historical periods, 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 subsystems 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. We can also recognise some of the means of breaking corruption systems from the Queensland experience (sequential investigation with immunity for those who come forward when their information is still useful) and approaches to tackling other systemic abuses (general amnesties for those who tell all and a version of truth and reconciliation commission).

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

[35] See R. Neilsen (2003) 'Corruption networks and Implications for Ethical Corruption Reform' 42 *Journal of Business Ethics* 125. Neilsen 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 such activities 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 etc.

APPENDIX TWO: GLOSSARY OF GOVERNANCE TERMS

Governance disciplines
The importance of good institutional governance is recognised by many disciplines which might make a contribution to institutional governance and reform. The problem is not that it is ignored: the problem is that each discipline has a strongly theorised but limited conception of institutions, which colours and structures their view of the nature of institutional problems and the best means for addressing them. For example, lawyers look at institutions and see sets of formal norms, ethicists see informal norms and the values the institution claims to further, economists see incentives and disincentives, political scientists see power relations, social psychologists see complex webs of interpersonal and group relationships, and management theorists see structures and systems. Accordingly, the problems are seen in the deficiency of laws, ethical standards, incentives etc. and the solutions are seen as lying in remedying those deficiencies. All these partial insights into institutions and their problems are important and any solution that ignores them is likely to fail. However, as proffered solutions tend to be developed from only one disciplinary perspective, they are necessarily limited, perhaps over-emphasising legislative solutions or the impact of economic incentives.

Governance
There are many different definitions of governance. However, at their base, they refer to the way that decisions are made within an organisation – whether a particular corporation, NGO, or government agency OR within government as a whole.

Good Governance
A narrow definition might see good governance in terms of institutional integrity (see below). However, I would prefer to see it as governance subject to 'good governance values'. Such values include integrity and accountability but are not confined to these values. For governments such values would include: democracy; respect for human rights and liberties; adherence to the rule of law; citizenship; respect for the environment. For corporations, good governance values would include: adherence to the rule of law; adherence to the corporations own constitution; respect for customers, consumers and members of the communities in which it operates.

The above values are stated in English and in western terms. In saying that, I seek to avoid cultural relativism and claims to universal values. Values are universal only when stated in their most general terms. Good governance values (and bad governance values) can be found in all cultures and traditions. Governance reforms should be based on the local versions of good governance because good governance will take a firmer root if based on local versions of good governance and the good governance values will be more easily recognisable by the relevant population.

National Integrity Systems
While it is now fashionable to see national integrity systems as the answer to corruption, this is a relatively recent development. When corruption scandals strike, one of three responses results – tougher laws, ethical standard setting or institutional reform. Each response has its weaknesses and strengths but is unlikely to be effective by itself. If a new law, ethical code or new institution is successful, it is because it supports or is supported by other measures already in place. Nevertheless, the apparent success of a particular measure in one jurisdiction may lead some to see a panacea or 'silver bullet'. During the 1980s, the most common response to corruption was the creation of a single, very powerful, anti-corruption agency along the lines of the Hong Kong Independent Commission Against Corruption (ICAC). However, this model was criticised for placing too much reliance on a dangerously powerful, single institution. The NIS does not see the answer to corruption in a single institution, let alone a single law, but rather in the institutionalisation of integrity through a number of agencies, laws, practices and ethical codes.

This approach has been given various names including an 'ethics regime' (Sampford 1991), an 'integrity system' (TI 1996) and an 'ethics infrastructure' (OECD 1997), but the term with the widest currency is TI's 'national integrity system'. Based on this, a 'National Integrity System' is a term that encapsulates the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life. Given that integrity is the opposite of corruption, one may wonder whether it matters whether it is called an integrity system or an anti-corruption system. However, the distinction is an important one. Integrity systems are not built around the negative goal of limiting corruption but the positive goal of maximising integrity. The negative goal is necessarily implied by the positive one – if power is to be used in officially sanctioned ways, it should not be abused by being diverted to other ends. It is not enough to avoid government corruption (if that were our only goal, it would be achieved by abolishing government!). Institutions need to achieve the goals set for them by the people's representatives.

In placing power in the hands of individuals or groups, human communities are taking a risk — that the benefits to be gained from use for the justified purposes of the institution outweigh the risks of its abuse. Integrity systems are designed to increase the likelihood of the benefit of the intended use of power and reduce the risk of the abuse.

Integrity and Corruption
It is interesting that the OECD's preferred term is not 'anti-corruption infrastructure' and TI, despite its central and fundamental focus, does not call it an 'anti-corruption system'. This raises the question of what is meant by 'integrity' (or for the OECD, what is meant by 'ethics'). Integrity and corruption are conceptually linked terms – with one the obverse of the other. TI defines corruption as the 'misuse of entrusted power for private benefit'. By contrast, integrity is 'the use of public power for officially endorsed and publicly justified purposes'. The latter definition is primary because you cannot know what is an abuse if you do not know what the correct 'use' is. The form of official endorsement will vary from system to system but, in a democracy, the officially endorsed uses of public power are those set by the elected government and legislature. Indeed, democratic competition is about differing views as to how public power should be used for the benefit of citizens.

Accountability
Officials are accountable if they are required to demonstrate that they have used their power in officially approved ways. In National Integrity Systems, it is common for agencies to be 'mutually accountable' rather than hierarchically accountable.

Institutional Integrity
Where organisations use their power for publicly stated and officially authorised purposes they exhibit 'institutional integrity'. This is analogous to individual integrity. An individual has integrity if they are true to their principles and do what they say they will. Institutions have integrity if they operate to further the goals that are publicly set by democratically elected governments.

Individual and Institutional Ethics
This is consistent with, and is underpinned by, our approach to ethics. We see ethics acting as the coordinating force because it asks fundamental values questions. For many ethicists, the fundamental ethical question that individuals face is 'how should I lead my life?' For me, ethics is about asking hard questions about your values, giving honest and public answers and living by them. If we do, we have 'integrity'. This is as true of institutions as it is of individuals.
As I see it, individuals and institutions face similar questions. How should we lead our lives together? What is the institution FOR? On what basis can we justify the power and authority that we are given despite the fact that there is, as in all concentrations of power, a risk of abuse? What values does it further and should we further it in order to justify the power and authority given to us and/or tolerated by the community we claim to serve?

Transparency
Transparency is a key process value in the practice of ethics and the achievement of integrity (and hence countering corruption), good governance, integrity systems and is necessary for accountability. Transparency involves publicly stating the values we claim to further in both general and specific terms, the means we are taking to achieve them and the extent to which they have been achieved. This is critical to personal ethics and allows us to be 'true to ourselves'. It is particularly important in institutional ethics to ensure that organisations think about where they are going, how they are going to get there and what progress they are making. Transparency is an essential part of the operation of integrity systems – both of the agencies and institutions monitored and the agencies and institutions undertaking the monitoring.

This might appear to be an imperialistic statement about one governance value. However, similar stories can, and often are, told about other values. At times 'liberty', 'human rights', 'the rule of law', 'democracy' and, nowadays, 'sustainability'. What the statement above actually sets out is the interconnectedness of governance values in theory as well as in the practice of national integrity systems.

Transparency does not mean that all information is provided to everybody about everything. The revelation of some information would totally compromise institutional integrity and the ability of institutions to do their jobs as well as compromising important human rights. Public revelation of those suspected of corruption would both tarnish the innocent and protect the guilty. Revelation of whistleblowers can put lives at risk as well. The details of what information particular kinds of institutions provide to their members and to those they affect may need to be carefully worked out, balancing and respecting a range of important values. However, the above schema provides a clear guide. The focus of transparency demands and the information that is scrutinised should concentrate on claims about values an institution seeks to further, its means for achieving them, the risks of non-achievement especially through the abuse of power and the extent to which those values are being achieved.

However, there is a broader argument for transparency. Where institutions are established to serve a particular community (governments to serve citizens and joint stock companies to their ultimate owners), the presumption must be that the information belongs to the citizens and stock holders and that the information should be readily available to any one of those who want it. It is up to the government or corporation to justify to its citizens/owners that it is in their interests that such information is not available. Such arguments can be made based on national security or competitive advantage. However, that case has to be made and accepted by the citizens and ultimate owners respectively.