Chapter Three The Missing Constitutional Ingredient: An Upper House

Bruce Grundy

Much of the argument that follows flows from the experiences and observations of the author in reporting and investigating a serious offence and its associated cover-up.

That offence was committed by members of the Cabinet of one of the States of the Australian federation. What they did has gone unpunished. What a citizen of that State subsequently did (which involved the same point of law but was much less serious) attracted the full force of the law. The law had not been changed in the interval between the two events.

The State concerned, Queensland, is the only member of the Australian federation to operate a unicameral parliamentary system – the Upper House having been abolished over three-quarters of a century ago. For much of that time, the State has been notable for poor public administration, dubious regard for democratic values, and corruption.¹

This paper notes, on the basis of the evidence it contains, that political reform attempted a decade ago following a tumultuous Royal Commission has failed to produce the good government and strong democratic society hoped for at that time. It therefore contends that a new attempt should be made to bring that about – based on the reintroduction of a House of Review into the State Parliament.

Background

Following the efforts of two journalists, Phil Dickie of *The Courier-Mail*² and the Australian Broadcasting Corporation's Chris Masters, which revealed the existence of extensive corruption associated with police-franchised and protected brothels, illegal casinos and other strange things, a Royal Commission was established to look into the matters raised. The inquiry was conducted by a returned-to-the-Bar former judge, Mr GE (Tony) Fitzgerald, QC. As a result of his investigations, more than 200 people eventually faced the courts, including the Premier of the day (no verdict, a hung jury) and several Ministers (who went to jail).

In his report in July, 1989, Mr Fitzgerald made a variety of recommendations designed to provide better and more accountable government in his home State.

The State Premier who accepted his report, Mike Ahern, said, even before they were delivered, that Mr Fitzgerald's recommendations would be implemented "lock, stock and barrel". He did not, however, get the chance to implement them. In the first place, dwindling opinion poll results in the wake of the Fitzgerald Inquiry's revelations saw Mr Ahern replaced by his party colleague, Russell Cooper. In the second place, the Nationals were thrashed at the elections in December, 1989, and the government fell to Labor, led by an energetic young lawyer, Wayne Goss.

Goss was supported by the king-making industrial trade union, the Australian Workers Union, from which the Labor Party had sprung toward the

end of the previous century, and which dominated Labor politics in Queensland thereafter.

Within days of coming to power (Labor had been out of office for almost a generation), the Goss Government demonstrated that, despite the Fitzgerald process and its fallout, a government in unicameral Queensland could do what it liked, ignoring both good government and proper public administration.

It shut down an inquiry (the Heiner Inquiry, set up during the last days of the Cooper Government) into the running of the John Oxley Detention Centre, a Brisbane youth detention centre; and shortly after, with the knowledge that the material collected by that inquiry was being sought, properly and legally, by a firm of lawyers, it ordered the destruction of all the material involved.⁷

The author, via sustained coverage in the newspapers produced by University of Queensland's Journalism school, *The Weekend Independent* and *The Independent Monthly*, and some articles in *The Courier-Mail*, has reported on the matter for over a decade.

These efforts, and those of Mr Kevin Lindeberg detailed in Chapter One in this volume, have led us to the point where it is beyond question that:

- the shredding of the Heiner Inquiry documents was a criminal offence;
- the shredding covered up the serious abuse of children in the care of the State;
- the shredding allowed a climate to persist that permitted further serious such abuses of children (not to mention public administration!) to occur; and finally, and most seriously,
- two standards of law operate in the State of Queensland one for the ordinary citizen, against whom the full force of the law is applied, and one for the powerful, against whom the law is not applied at all.

Since the efforts of a decade cannot be compressed into the space available for this paper, in what follows the argument will be based principally on the last matter raised above, i.e., an all-powerful government in a unicameral Parliament, clearly with no satisfactory checks and balances in place, allows a system of "one law for us and one for them" to operate.

In approaching the matter, recall at the outset the expectations that arose in the community from the Fitzgerald process at the end of the 1980s and from the reforms he recommended. The following quotes provide a snapshot:

"I well remember the excitement with which so many of us greeted the election in 1989. There was dancing in the streets! A new age was dawning. The Parliament and the government were to become accountable. Civil liberties were to be assured and there would be broad community consultation about proposed reforms.

"No longer would the Parliament and the government be dominated by one conservative and omnipotent man. The days of the personality cult were over.

"Political appointments would disappear from the Public Service and citizens who openly disagreed with the government in power would not be disadvantaged.

"There would be effective Freedom of Information legislation which would render MLAs, Ministers and the Executive truly accountable". 8

The writer then went on to analyse what had happened in the intervening years. She concluded her appraisal thus:

"So, nothing much has changed. There are politicians of the ruling party behaving in much the same way as those who were previously in power. Lip service is given to parliamentary and criminal justice reforms, but in many ways we seem to be going backwards. This was not what the Fitzgerald process was meant to achieve".

That piece was written almost exactly ten years ago and only five years after the Goss Government came to power. Imagine what the writer, Dr Janet Irwin (former Director of Health Services at the University of Queensland, and one-time part-time Criminal Justice Commissioner), would say today. I suspect she would be absolutely lost for words.

And just in case readers should think Dr Irwin bitter and twisted, one of those who organised an all-too-short series of seminars on post-Fitzgerald reform in the early $1990s^9$ wrote this:

"The ... government has initiated many changes proposed by Fitzgerald, but as is evidenced by the continued lack of genuine parliamentary reform, lack of resources to the Opposition, the hypersensitivity to criticism, the subtle politicisation of the public service, one must really question whether the spirit of real, open, democratic government has really come to Queensland". ¹⁰

That too was written ten years ago. It is a pity that its author, Dr Scott Prasser, hadn't continued to run his conferences. But people probably wouldn't come. What would be the point? After all, it has all got much worse since those pieces were written.

The unicameral Parliament - a brief history

March 23 is a fateful date in the history of Queensland. That was the day in 1990 when the government of the day broke the law, and set in train the events that have brought the law in this State, and our respect for it, and our respect for our institutions of government from the Governor down, into disrepute. Strange that this presentation should also be predicated on the actions of another Labor government on March 23, which also profoundly affected the kind of government we get in Queensland ... not to mention our respect for it.

March 23 was the date on which legislation was proclaimed that abolished the State's Legislative Council in 1922. It is conceded at the outset that the composition of the Legislative Council at the time had but a passing acquaintance with any notion of democracy at work. The members of the Council were all appointed by the government, through the Governor, for life. Little wonder a frustrated government facing a non-elected "slaughterhouse", as the then Upper House has been called, would want it gone. And it was eventually done, against the express wish of the people, a referendum only four years before (in 1917) to abolish the Legislative Council having been soundly defeated.

Later the *Constitution Amendment Bill* of 1934 was passed. It established that an Upper House in Queensland may only be introduced by a referendum of the people. It was not abolished by a referendum of the people, but can only be re-created by such a vote – a vote the Labor Party has made clear it would oppose, regardless of the proposed composition and role of a resurrected Upper House.

The case for an Upper House

During the days that eventually saw the return of a Coalition government in

Queensland in the mid-'90s, both the Nationals and Liberals agreed that there should be such a referendum. During the 1995 election campaign, Opposition leader Borbidge was reported as saying:

"At present the Parliament is a joke. It is not working properly. The committee system is not working properly and accountability is a charade. It might not be this way if there was a House of Review". 13

He pledged that if elected there would be a referendum. Money was set aside in the budget for it.

The Greens and the Democrats were in favour. But the idea was stillborn. It was clear the Labor Opposition would not support such a move, and without bipartisan support, a referendum was unlikely to succeed. The proposal did not even get to the stage of the Borbidge Government setting out a model, although some suggestions were considered. These included:

- Reduce the numbers in the Assembly to accommodate the number of Legislative Councillors that would be elected (to counter the suggestion that no one would buy an Upper House that would mean more politicians);
- · Some form of proportional representation to elect them; and
- Perhaps the creation of three provinces or districts, Northern, Central and Southern, to provide for representation across the state. 14

But there was never any serious work done on the proposal, and the Coalition proceeded to implode. That was the end of that.

The Labor view

In a TJ Ryan Memorial Lecture (honouring the man who held the failed 1917 referendum) at the University of Queensland in 1996, Opposition Leader Peter Beattie said \$6 million had been set aside in the State budget for "reestablishing this 19th Century relic". ¹⁵ He opposed the move on two grounds. First, the Criminal Justice Commission (a creature of the Fitzgerald reform recommendations) would do a better job of ensuring accountability of government; and secondly, the number of politicians that would be needed. In reply, Premier Borbidge said Mr Beattie did not "even know that the roles of an Upper House and the CJC are as different as chalk and cheese". ¹⁶

Nevertheless, Mr Beattie has continued to present such an argument. On 26 October, 2003 he was interviewed by Helen Dalley of the *Sunday* program on Channel 9, who reported thus:

"Premier Beattie argues the accountability mechanisms set up after the Fitzgerald corruption inquiry, such as the Crime and Misconduct Commission [the successor to the Criminal Justice Commission], have now taken over the review function of an Upper House".

Helen Dalley: "So do you reckon you benefit as much as Joh did, from no Upper House?"

Beattie: "No, because Fitzgerald changed all that. The Fitzgerald Inquiry has given us accountability mechanisms that don't exist anywhere else in Australia. The Joh days are gone, they're dead, finished, over, buried".

The suggestion that the Criminal Justice Commission, or Crime and Misconduct Commission, was or could be an alternative to an Upper House is one that will be examined in more detail later in this paper.

Queensland vis-a-vis the other States

The federal Parliament and every other State in Australia each has an Upper House. Despite complaints from governments, and despite changes in representation in some of those Houses from non-aligned individuals to party adherents (in most cases), none of those Chambers has yet been abolished – although some States, including Tasmania, with a population less than that of Brisbane, have thought about it.

It is said by opponents of the idea that the Northern Territory and the Australian Capital Territory do not have Upper Houses, which is true. And that means that Queensland places itself in the company of the Territories rather than the States. And even the Territories have a House of Review. It is called the federal Parliament. No better example exists than Dr Nitschke's attempts to have legislation legalising euthanasia introduced in the Northern Territory. It was introduced, but it was overridden by the federal Parliament.

And remember too, it is expected that the State without an Upper House will be the second most populous State in the Commonwealth in another decade or so.

The "Yes" and "No" cases

The arguments for and against reintroducing an Upper House in Queensland are well known, and are only summarised here, as it is the *performance* of the unicameral Queensland system on which I wish to concentrate.

The usual arguments against an Upper House (together with brief rejoinders to them) are:

- No one wants more politicians. (The size of the Legislative Assembly could be reduced to accommodate the number in the Upper House. The overall numbers would not need to change much.)
- But that would mean a reduction in each citizen's access to his/her local Lower House member. (But he/she could have two avenues of representation depending on the role chosen for the Upper House.)
- The cost (last estimated at \$25 million) is too high. (It's a small price to pay to get better, or even half-decent, government.)
- The Upper House would just be an "echo chamber" of, or alternatively an obstruction to the will of, the Assembly. (A House of Review does not necessarily mean either of those things. It can just as easily be a valuable steadying hand on the operations of the Lower House, and a significant contributor in determining the content of legislation.)
- A referendum to get the people's view would be too expensive. (Getting the people's view on how they might be better governed, once in 88 years, does not seem a great burden.)
- Independents or minority groups could hold the Lower House to ransom or frustrate it. (True. It does happen. Compromise is not always an evil.)
- Party politics makes such a Chamber redundant Councillors would vote along party lines as happens in the Lower House. (That would likely depend on the voting system used. And we are all aware that Senators in the federal Parliament take themselves and their role very seriously.)
- A committee system operating within the Lower House makes an Upper House redundant. (Not so. The government has a majority on the committees, and the performance of such committees mirrors the

actions and views of the government on the floor of the unicameral Parliament. More on the committees later.)

In favour of the proposal, an Upper House could offer additional advantages, apart from providing the obvious – an opportunity for more debate, consultation, consideration, analysis, and so on:

- An Upper House could only be a vast improvement on the current Lower House committee system. Upper Houses are bound to have more influence than committees.
- Overall, the past 80 years have consistently shown that there are great dangers and shortcomings in unfettered government (of whatever complexion) in a unicameral environment.
- Councillors are normally elected for longer terms, providing an overlap with the terms of MLAs in the Lower House. This can assist the consideration and consultation processes of the Lower House.

The Courier-Mail in its editorial of 6 December, 1994 said:

"... provided an upper house is representative, popularly elected, strictly limited in what it can do to obstruct a government, but equipped with extensive powers to review procedures and monitor executive performance, the people are likely to be better served than in a system where *Cabinet rule effectively has overcome opposition*". (emphasis added)

The unicameral Parliament - a performance review

I acknowledge that the chance of an Upper House being reintroduced in Queensland is probably somewhere between nil and negligible.

Nevertheless, in 1992 the Electoral and Administrative Review Commission (the establishment of which was recommended by Commissioner Fitzgerald), in carrying out a review of parliamentary committees, said that the absence of an Upper House in Queensland had had:

"....a profound effect on the ability of the Queensland Parliament to carry out its functions under the Constitution and conventions which require it to act responsibly and review the activities of the executive arm of government". 17 (emphasis added)

It is trite, but necessary, to point out that a modern democracy is not defined by the mere existence of a Parliament (be it one House or two) and elections for such a Parliament every so often (three years or four or whatever). A modern democracy is much more than that, including, not in priority order:

- an understanding by *all* of, and an adherence by *all* (particularly the government) to, the notion of the rule of law;
- an independent and arms-length bureaucracy;
- independent, arms-length, watchdog agencies;
- vigilant, forthright professional bodies;
- · vigilant, forthright academics and commentators;
- a vibrant fourth estate;
- a Parliament, including parliamentarians and a parliamentary committee system, that work/s.

In Queensland much/most of the above is found to be wanting.

And the single most significant reason for Queensland's poor performance against the check list above, the one that creates and then pervades the rest, is the brute force, the power, the authority, the control, of a government operating in a single Chamber environment.

So I admit that, while there is no guarantee that an appropriately elected Upper House in this State would make the rivers run with milk and honey and pave the streets with gold, it would be a welcome addition to what we have at present.

An example

Early in 2003, after a Baptist minister was committed to stand trial under s. 129 of the Criminal Code (destroying evidence) or alternatively s. 140 (attempting to pervert the course of justice), a group of students with whom I was working under the umbrella of The Justice Project¹⁸ (whose activities are reported on the internet), sent a letter to each of the State's 89 MLAs.

The letter pointed out that a former Director of Public Prosecutions and the Criminal Justice Commission had said (many times in the case of the CJC) that a charge under s. 129 could only be sustained if a court action had been under way at the time of the alleged offence; and that no such action was under way in the case of the Baptist minister. We included quotes from High Court Chief Justice Murray Gleeson and New South Wales Chief Justice James Spigelman that the rule of law required the "governors as well as the governed" to be treated equally before the law, and asked four questions. Summarised, they were:

- Do you have any comment on the situation in which a court action does not have to have been under way in one case (the Baptist minister), but does have to have been in another (the shredding of the Heiner documents)?;
- Do you support the view that the law should be applied equally to all?;
- Do you support the view that the law should be applied consistently and not arbitrarily?;
- What, if anything, do you intend to do about the matter?

In many cases the fax, email and postal services between St Lucia and the far end of George Street collapsed. The Members never got our letters. We sent more. Some never got them. In all only 30-odd responded. Only one answered all the questions.

Some said they were not legally qualified and could not offer any comment on our questions; some said such matters were the responsibility of the Attorney; some said they could not give legal advice. Most chose not to say anything – not to commit themselves on whether they believed in the rule of law!

The Attorney's response said, in essence, that the DPP was an independent statutory authority and the government did not interfere with its decisions. He went on to say:

"The Heiner Inquiry was instituted with inadequate powers to take protected evidence, and the Labor government which inherited the flawed arrangements acted in good faith and on legal advice". 19

Any reading of the documents Kevin Lindeberg has uncovered from that time reveals an absence of good faith. For example, the government had been advised not to shred the documents. It shredded them. People were told their access to those documents was still being considered, when the documents had in fact already been destroyed! And acting on bad legal advice may be convenient, but it does not absolve a person who acts on it from any responsibility in the eyes of the law.

That latter is not a new concept. If it were otherwise there would be no need for courts. We would all seek bad advice and that would be the end of the matter. A West Australian crayfisherman took the advice he was given by a government department. It was wrong. The High Court said it might be a shame, but he broke the law. ²⁰ End of story.

The response from the Opposition was extraordinary. They said there was no credible evidence to support the laying of charges in the Heiner matter _ despite the fact that the offence had been admitted for over a decade! And Cabinet records reveal that those involved knew the documents were required by a firm of lawyers for potential legal action. In addition, the Morris and Howard report²¹ into the shredding said there was *prima facie* evidence of numerous breaches of the criminal law!

We had occasion to write to the Premier separately on the matter a little while later. His Chief of Staff, Rob Whiddon, replied. The response included the following:

"... problems arising as a result of the way the Heiner Inquiry was initially established by the National Party government of the day, were subject of Crown Law advice and canvassed in the Morris/Howard report to which you refer. The information is not new and has been well documented". 22

The writer neglected to say that Morris and Howard absolutely rejected the basis of the Crown Law advice involved (and what the advice was is of no consequence anyway). He also failed to mention that Morris and Howard said there was *prima facie* evidence that the shredding matter involved numerous breaches of the criminal law.²³

The Premier's Chief of Staff also pointed out the independent nature of the operation of the Office of DPP, and then concluded thus:

"Finally, I must object to the suggestion in your letter that there is some sort of cover up of child abuse in relation to the Heiner documents. This matter has been the subject of review and report on numerous occasions. The Morris/Howard report, to which you refer, was provided to the Coalition government of the day, who decided to take no further action. This Government has made every effort to be open about this matter, to the extent that in July, 1998, the Premier took the unprecedented step of tabling all relevant documents and other correspondence in Parliament. This is consistent with the Government's action in tabling the Anglican Church's report". 24

The government has not, however, tabled the DPP's advice that resulted in the Coalition taking no further action on the Morris/Howard report, despite a recommendation that it do so by the House of Representatives Committee of Inquiry into *Crime in the Community* report into the shredding matter last year. ²⁵

We know, however, what that advice said, at least according to Kevin Lindeberg who has seen it, and what it said was a rehash of the discredited view that a court action had to be under way before the offence of destroying evidence could be sustained. ²⁶ That issue is covered at length on the front page of the April, 2005 edition of the newspaper I now edit, *The Independent Monthly*. The current DPP (in the context of the case against the Baptist minister) completely rejected her predecessor's (and the CJC's) view.

The unicameral Parliament's procedures

Questions: On two occasions in recent months quite serious matters going to the very heart of responsible and accountable government were the subject of Questions on Notice in the Queensland Parliament. One concerned some questions *The Independent Monthly* had been asking the government regularly for six months, and which it simply would not answer. The questions had to do with the accuracy of a statement made by a former Minister to *The Courier-Mail* newspaper in 1989, about the identity of a girl pack-raped on an excursion from the John Oxley Youth Detention Centre a year before the infamous shredding took place.

The second related to a matter of the Governor seeking a response from the government about a citizen being charged with a serious offence while politicians and bureaucrats were not.

The Members who asked those questions had to wait 28 days for answers, the contents of which could have been provided within a matter of hours in the latter case and perhaps a day in the former case.

(For the record, the answer to the first question revealed, finally, that what a Minister of the Crown had told the public of Queensland through the pages of *The Courier-Mail* in 1989 was untrue. The victim of a pack rape was not 17 years of age, as the Minister had claimed, but 14, and her identity meant that what else the Minister had said about her in the newspaper was also not true.

The answer to the second question revealed that, despite the passage of 18 months, the State government had not yet responded to a request for information on this issue from the Governor.)

In relation to the issue of accountability, prior to 1995 Questions on Notice had to be answered within 24 hours. That period was extended by the then Labor government to 28 days – in the interests of good government, the Speaker of the day told the paper I edited at the time. 27

If there were another Chamber where such important questions could be raised, it wouldn't matter quite so much.

Sitting days: Between 1970 and 1981 (in the dark days of Premier Johannes Bjelke-Petersen, when all manner of commentators and academics complained of a lack of government accountability and a lack of democracy in Queensland), the Parliament sat for 50 days or more each year – some years more than 60, some more than 70. ²⁸ This year it will sit for 44. (In days long gone it sat for many more. During the years of the seventh Parliament, the Assembly managed a total of 339 days and the Council, 198). ²⁹

The committee system: The parliamentary committee system, which Fitzgerald said had to be invigorated, is often touted as a Lower House substitute for an Upper House. It is not.

Former Nationals leader Rob Borbidge said in 1995:

"The committee system is a farce and accountability is a myth \dots a House of Review would be a good check on Parliament". ³⁰

Now let me move forward ten years to January 1, 2005. Stephen Wardill, writing about the parliamentary committees in *The Courier-Mail*, said in part:

"... despite their supposed status as pillars of the Queensland democracy, since this State has no upper house, what did they achieve? Did any make

sweeping reform recommendations that eventually will make Queensland a better place? Or did at least one group have a controversial proposal adopted because it convinced the Government it was the right thing to do? Of course not ...".

Wardill concluded:

"Until the committee system is reformed and given more teeth, the 'open and accountable' mantra this Government likes to tout can only be met with derision".

The "alternative Upper House"

Mr Beattie has claimed Queensland has no need of an Upper House because it has the Criminal Justice Commission or, now, the Crime and Misconduct Commission.

At the outset one can but point out the obvious, namely that such a body is not a substitute for an Upper House. It does not provide an opportunity for debate; it does not provide a conduit for community reaction to issues of the day; it has no say in what a government decides or does not decide to do; it does not ask questions, initiate Matters of Public Importance or Grievance Debates; and it does not do a host of other things.

But since the Premier thinks the CJC (and presumably the CMC) provides such an alternative, let us look at how well we have been served by those bodies.

When we wrote to our State MLAs about the rule of law, and a citizen being charged with a criminal offence while others who did much worse were excused, we subsequently sought the views of the then Chair of the CMC on these matters. We also sought the views of the Police Commissioner. We faxed our letters to both. Two years later the Police Commissioner has yet to respond. But then, when you think about it, what could he possibly say? So he says nothing.

Mr Butler, the Chairman of the CMC, however, did respond. He said:

"I refer to your letter in which you request a response ... in regard to the interpretation of section 129 of the Criminal Code.

"I wish to advise that the CMC is not prepared to proffer an opinion on the interpretation of section 129 of the Criminal Code in a vacuum. Whether a particular complaint requires the CMC to consider the interpretation of a statute, the CMC will do so insofar as it is necessary for it to fulfil its statutory requirements with respect to the facts of the complaint.

"In the past, in order to satisfy its statutory obligations, the CJC may have had an opinion as to the interpretation of section 129 of the Criminal Code. However, I would expect that any such opinion would have been provided in the context of a particular fact situation. It may well be that in the future a different fact situation arises and the CMC will be required to consider the application of section 129 in respect of those new facts.

"I hope this helps you understand the CMC's position in relation to this matter". 31

Well, it didn't. The law is the law. If the facts fit, you have an offence.

What else did we get from the "alternative Upper House"? We got, consistently from the CJC, in the face of *R v Rogerson*,³² that a court action had to be under way before s. 129 of the Criminal Code could be triggered – a view which Kevin Lindeberg and I and others, including Ian (now Mr Justice) Callinan, QC, Bob Greenwood, QC and Alastair MacAdam, Senior Lecturer in Law at Queensland University of Technology, have said all along was simply not so.

This nonsense view has been provided, supported, or never repudiated by no less than three Chairs of the CJC/CMC, by its one-time Senior Complaints Officer, now State Coroner, and by a former consultant, now a serving magistrate. It was never questioned, as far as we know, by its parliamentary committee, one chair of which described the efforts of those exposing the shredding matter as "a looney tune conspiracy". 33

The "alternative Upper House" also got the facts of the shredding case wrong and misled its parliamentary committee.³⁴

A tape in the safekeeping of the "alternative Upper House" mysteriously erased itself – a 2500 to 1 eventuality according to one expert. 35 I have heard the tape and can say, after long years working in radio, that it was erased by human hands.

The "alternative Upper House" rewrote the wording of the law (Regulation 65 of the *Public Service Management and Employment Act*) and were then able to interpret that regulation to get it to say what it did not say. ³⁶

The "alternative Upper House" said the shredding matter had been investigated to "the nth degree", 37 when it had never been investigated at all.

The "alternative Upper House" objected strenuously that the setting up of an investigation into the paper trail involved in the shredding matter (the Morris/Howard Inquiry) was a "waste of resources". 38 Given that the two barristers involved found what the "alternative Upper House" could not find, i.e., *prima facie* evidence of serious breaches of the criminal law, it is, perhaps, little wonder that the "alternative Upper House" should object so vociferously to the establishment of that inquiry.

Much more could be said about the suggestion that a CJC/CMC is a substitute for an Upper House, but that may be enough for present purposes.

The "independent" bureaucracy

Throughout the last fifteen years the entire relevant bureaucracy, in all manner of manifestations, has participated in the covering-up of the circumstances of the shredding of the Heiner Inquiry papers, including blatantly lying to Kevin Lindeberg and to me. That is demonstrable. We have the documents.

The lies and cover-up do not just involve public servants in the department at the centre of this scandal. They extend even into the administration of our courts. In simply seeking access to court records I have been lied to and misled by court officials. I have the correspondence. When I complained to the Director-General of the Department of Justice at the time, he said he didn't think any good purpose would be served by pursuing the matter. I happen to disagree.

Access to records has been improperly (read illegally) denied to us (and at least one other person) by Freedom of Information officers. As well, material that should not have been blanked out on pages has been blanked out, in clear contravention of the rules. Note that the improper blanking-out assisted in covering-up the circumstances surrounding the pack-rape of a girl in the custody of the State!

Every public servant in the Queensland bureaucracy knows where their bread is buttered when it comes to anything that might remotely touch the Heiner matter. It's the culture, the same one Fitzgerald spoke about in relation to the police brotherhood ³⁹ when he conducted his inquiry. You protect, or you had better protect, anyone involved in this matter. The brotherhood and sisterhood are alive in Queensland today.

The Fitzgerald process did not change the bureaucracy. Its capacity to indulge in blatant dishonesty and deceit, not to mention the disingenuous, has not been, and is not today, diminished by any of the Fitzgerald "reforms" (despite the existence of the CJC/CMC and, in earlier days, the Electoral and Administrative Review Commission). For details see the Morris and Howard report, 40 and The Justice Project. 41

Freedom of Information

Fitzgerald specifically recommended the introduction of Freedom of Information legislation. It was introduced and since that time has been whittled away, to the point where it is now derided and scorned as a joke by all.

Former FOI Commissioner Fred Albeitz said in one of his annual reports to Parliament:

"My primary concern is that the *FOI Act* is in danger of dying the death of a thousand cuts unless the recent trend towards more and more exclusions of particular bodies, or particular functions or classes of documents in respect of particular bodies, is not arrested and, preferably, reversed". 42

That was written ten years ago, just three years after the legislation was introduced; and it has all been downhill since then. Have you seen anything in the news media lately about a successor to the position Mr Albeitz held?

It has now reached the stage where everyone quite openly describes FOI in Queensland as a joke. For example, Malcolm Cole, reporting for *The Courier-Mail* earlier this year, said in part:

"So as they sat around the Cabinet table, the men and women who occupy offices of great privilege in this state, laughed about their secrecy, their lack of accountability. Because they know the murky and confusing world of freedom of information will not change votes they can afford to laugh.

"Because the power of this government is virtually unlimited, and because it has no fear of losing office any time soon, the people in charge can make jokes about their contempt for basic democratic principles.

"In a previous era the same sentiment would have been expressed as: 'Accountability? Don't you worry about that!' ".43

At the same time I have to acknowledge that, while FOI has been slow and sometimes improperly handled by those responsible (to the point where material that legally should have been released was withheld), we did get access to some documents that have advanced the battle against the Heiner affair cover-up.

Other matters

There are other ingredients in a vibrant democracy that have been missing in action throughout the course of this matter. The deliberations of an Upper House, if we had had one, might, just might, have given some of those concerned some courage.

The professional bodies and the academy: With some exceptions, the performance of the professional bodies, the legal community and those involved in relevant disciplines in our institutions, in the face of this blatant abuse of power, has been disgraceful. I particularly *exclude* Alastair MacAdam of QUT and David Field of Bond University.

And I would suggest, if the boot were on the other foot, if it were Johannes Bjelke-Petersen who had been in charge during the travesties of the last 15 years,

the people referred to above would have been howling in the streets. But we get silence, thunderous silence.

Last year *The Independent Monthly* canvassed the views of some of the professional bodies and academics involved in relation to the unfortunate citizen who had to face the music that others had escaped. What we were told is a very sad tale. The story said in part:

"The Queensland legal fraternity has declined to comment on the double standards involved in a case to come before the District Court in March. Last month an international authority on archives practice, Professor Terry Cook told *The Independent Monthly* the case exposed 'the two-faced hypocrisy' of Queensland authorities. This was because a citizen was facing trial for destroying records that could reasonably have been expected to be used as evidence in court proceedings, but politicians and senior public servants who did the same thing (in connection with the destruction of the Heiner Inquiry documents) were officially excused. When *TIM* invited numerous legal and civil liberties bodies to respond to the situation facing the citizen, all declined to comment". 44

The watchdog media: Despite the revelations of numerous rapes, death threats, lies, cheating and deceit, and even connections to shotgun deaths in the streets, a House of Representatives Inquiry into the matter, the Morris and Howard report, the Governor being required to wait 18 months for a reply from the government, the DPP rejecting the stance of her predecessor and the CJC, the story has either never, or almost never, been covered by ABC News, the 7.30 Report, Stateline, AM, PM or The World Today. It did make Australian Story, and the Conversation Hour on ABC Radio (but note that you cannot access a transcript of that interview, unlike others conducted for that program).

The Courier-Mail (which has twice criticised my coverage of this story in its feature pages in recent years) covered the Baptist pastor's trial and its outcome, but has never made any connection between what happened to him and what happened (more precisely, did not happen) to those who destroyed the Heiner documents. The failure of the media generally to apply normal standards in relation to this case is a matter of serious concern. It is the exact same circumstance that existed in the days when Bjelke-Petersen "fed the chooks".

The Courier-Mail can do its own thing. That is the reality with a private commercial enterprise. But the problem with the ABC is serious. The ABC is not funded by the Queensland taxpayer; it is funded by the Australian taxpayer, and its failure in this matter ought to be investigated.

Conclusion

Queensland today is as feeble a democracy as it ever was. The extent to which an Upper House would fix it, would depend on how it was elected, the quality of those elected, and the role it was given or allowed. It could not make things any worse. It would almost certainly make things better. But will it be allowed to happen?

In the meantime, we go on lapping up our Fourex and our sunshine and not giving a damn. Good old Queensland.

Endnotes:

- 1. See, for instance: Whitton, Evan (1993), *The Hillbilly Dictator: Australia's Police State*, Sydney, ABC Books; Dickie, Phil (1989), *The Road to Fitzgerald and Beyond*, St Lucia, Queensland University Press; Dempster, Quentin (1986), *The Sunshine System*, Brisbane, Australian Broadcasting Corporation (video).
- 2. A Year After Sturgess, Sex- for- Sale Business Thrives Unchallenged, in The Courier-Mail, 12 January, 1987; Organised Crime Group Revolutionises the Sex-for-Sale Industry, in The Courier-Mail, 18 April, 1987.
- 3. The Moonlight State (1987), ABC, Four Corners.
- 4. Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (The Fitzgerald Inquiry). See report: Fitzgerald, Gerald Edward (1989), Brisbane, Queensland Government Printer.
- 5. Whitton, E, The Hillbilly Dictator, op. cit., p. 180.
- 6. Reynolds, Paul (2002), *Lock, Stock and Barrel,* St Lucia, University of Queensland Press, p. 183.
- 7. For more detail, see Chapter One in this volume by Mr Kevin Lindeberg. See also Report of the House of Representatives Legal and Constitutional Affairs Committee of Inquiry into *Crime in the Community*, Volume II, 2004, and *An Investigation into Allegations by Mr Kevin Lindeberg*, Tony Morris, QC and Edward Howard (1996), Brisbane, Queensland Government Printer.
- 8. Irwin, Janet (1995), *Promise of a New Deal Not Delivered*, in *The Weekend Independent*, Brisbane, The University of Queensland, 30 June, 1995: 4.
- 9. The seminar co-organisers were John Nethercote and Rae Wear; see *Corruption and Reform: the Fitzgerald Vision* (1990), St Lucia, University of Queensland Press; and Andrew Hede and Mark Neylan, *Keeping Them Honest: Democratic Reform in Queensland* (1992), St Lucia, University of Queensland Press.
- 10. Prasser, Scott (1995), Goss Adopts a Moderate Line, in The Weekend Independent, Brisbane, The University of Queensland, 30 June, 1995: 4.
- 11. Fact Sheet 39, *Abolition of the Upper House*, Parliamentary Education Services, Queensland Parliament, 2001.
- 12. For details of the events surrounding the abolition, see: Murphy DJ and RB Joyce (1978), *Queensland Political Portraits 1859-1952*, St Lucia, Queensland University Press; and Fitzgerald, Ross (1994), *Red Ted: The Life of EG Theodore*, St Lucia, Queensland University Press.
- 13. Borbidge, Rob, as quoted in *The Courier-Mail*, 6 July, 1995: 13.
- 14. From conversation between the author and former Attorney-General, Denver Beanland, March, 2005.
- 15. Beattie, Peter, reported in *The Weekend Independent*, November, 1996:11.
- 16. Borbidge, Rob, reported in The Weekend Independent, November, 1996:11.
- 17. Fact Sheet 39, op. cit..
- 18. See www.justiceproject.net.
- 19. Welford, Rod, in correspondence with the author and The Justice Project,

- The University of Queensland, 22 May, 2003. See link to letter at: http://www.justice.project.net/content/Welford2.asp.
- 20. Ostrowski v. Palmer [2004] HCA 30.
- 21. An Investigation into Allegations by Mr Kevin Lindeberg, op. cit., 203-04.
- 22. Whiddon, Rob, in correspondence with The Justice Project (Jennifer Linchy), The University of Queensland, 7 October, 2003.
- 23. Tony Morris, QC and Edward Howard, op. cit., 87-98, 203-04.
- 24. Whiddon, Rob, loc. cit..
- 25. House of Representatives Standing Committee on Legal and Constitutional Affairs (2004), *Crime in the Community: Victims, Offenders and Fear of Crime*, Vol II, Canberra, 44.
- 26. Ibid., 43.
- 27. Fouras, Jim, quoted in The Weekend Independent, 24 March, 1995: 14.
- 28. Number of Sitting Days of the Legislative Assembly during calendar years (1970-1995), Parliament of Queensland, 26 April, 1995, reported in *The Weekend Independent*, 14 July, 1995.
- 29. Number of Sitting Days, During Parliaments of the Legislative Assembly of Queensland (1860-2005), Bills and Papers Office, Parliament of Queensland, March, 2005.
- 30. Borbidge, Rob, reported in The Courier-Mail, 6 July, 1995:13.
- 31. Butler, Brendan, in correspondence with The Justice Project (Susann Kovacs), 5 June, 2003. See http://www.justiceproject.net/content/Butler2.asp.
- 32. R v. Rogerson and Ors (1992) 66 ALJR.
- 33. Lucas, Paul, former Parliamentary Criminal Justice Committee Chairman, State *Hansard*, 25 August, 1998, p. 1879.
- 34. See letter dated 14 April, 1992 from CJC Chairman Sir Max Bingham, QC to Parliamentary Criminal Justice Committee; also letter dated 20 January, 1993 from CJC Chief Complaints Officer Mr Michael Barnes to complainant Mr Lindeberg; also February, 1995 CJC Submission to Senate Select Committee on *Unresolved Whistleblower Cases*, pp. 52-55.
- 35. Report compiled by Queensland University of Technology Professor Miles Moody, 27 March, 1995, provided in evidence to the Senate Select Committee on *Unresolved Whistleblower Cases*.
- 36. See letter dated 20 January, 1993 from CJC Chief Complaints Officer Mr Michael Barnes to complainant Mr Lindeberg; also February, 1995 CJC Submission to Senate Select Committee on *Unresolved Whistleblower Cases*, pp. 52-55.
- 37. See Senate *Hansard*, 23 February, 1995, p. 6. Evidence provided by CJC Chairman Mr Robin S O'Regan, QC to Senate Select Committee on *Unresolved Whistleblower Cases* in Brisbane.
- 38. Quoted in Tony Morris, QC and Edward Howard (1996), op. cit., 214.
- 39. Fitzgerald, G E (1989), op. cit., 79.
- 40. For example, Tony Morris, QC and Edward Howard (1996), op. cit., at The

- Smoking Gun: 74, and 203:5.3 and 204:8.1.
- 41. See: http://www.justiceproject.net/content/AccessToTruth_Denied.asp.
- 42. Albeitz, Fred, reported in The Weekend Independent, 1 December, 1995.
- 43. Cole, Malcolm, *Hypocrites Make No Secret of Hilarity*, in *The Courier-Mail*, 19 February, 2005.
- 44. The Independent Monthly, March, 2005: 3