# REFLECTIONS BY A ROYAL COMMISSIONER

ADDRESS TO
***REFORM IN QUEENSLAND: THE POST-FITZGERALD ERA***
A NATIONAL CONFERENCE
PRESENTED BY
THE UNIVERSITY OF THE SUNSHINE COAST
IN ASSOCIATION WITH
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AND
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BY

ANTHONY J H MORRIS, LL.B. (HONS.), Q.C.
BARRISTER-AT-LAW
FORMERLY CHAIRMAN OF THE
BUNDABERG HOSPITAL COMMISSION OF INQUIRY

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As tomorrow is the 30th Anniversary of the most dramatic and celebrated sacking in Australia's history, I wonder if I might be forgiven for opening with this observation: For those who have an eye to posterity, it is quite extraordinary how the public's perception of an individual, whose performance in public office has otherwise been no better than mediocre, can be transformed into something far greater if the individual has the misfortune – or, perhaps, the good fortune – to be cut down in his or her prime.

It would be interesting to speculate whether King Alexander of Macedon would be remembered as "the Great" if he had not died at the age of 33, after conquering an empire which stretched from Macedonia to the Punjab, and had

actually been required to knuckle down and administer the government of his far-flung conquests. Would Julius Caesar hold the same significance in the history of the Western World if he had not been assassinated within twelve months after securing his appointment as Dictator for Life? Would Richard the Lionheart be immortalised in legend and song if he had spent as much time administering his realm of England, as he spent, hostage in a German dungeon, attracting the original "king's ransom"? Would assassinated US Presidents, from Abraham Lincoln to John F. Kennedy, have the same cachet if they had survived their terms of office, and been remembered only for what they did, rather than for what their untimely deaths prevented them from doing?

You will be pleased to hear, however, that I am not quite so immodest as to see myself as a modern Alexander, or Caesar, or Richard ***Coeur de Lion***, or even as a Australian Lincoln or Kennedy. Nor do I intend to emulate the Whitlam example, and spend the next thirty years complaining about the unfairness of my dismissal.

Especially in the context of this Conference, were I to draw any historical parallel, it would be difficult to go past that of Harold Holt. Holt took office with the supreme disadvantage that his immediate predecessor, Sir Robert Menzies, was the most outstanding Prime Minister in living memory. Had Holt survived his term of office, and perhaps even won re-election, he would still have been remembered principally as "the bloke who came after Menzies". Whether Holt drowned whilst swimming off Cheviot Beach near Portsea – or whether, as some believe, he was in fact abducted by a Chinese submarine – his untimely disappearance at least spared him from ignominious comparisons between the

achievements of his administration and those of the administration under Menzies.

Tony Fitzgerald – a person as unlike Sir Robert Menzies as it is possible to imagine – nonetheless had this much in common with Ming the Merciless: both were extraordinarily hard acts to follow. Fitzgerald effectively re-invented the public inquiry as a means of addressing the most egregious flaws in the administration of government, and created the model for similar inquiries throughout Australia.

Twenty years on, we tend to forget that it was not always thus. Pre-Fitzgerald, public inquiries were almost invariably chaired by serving members of the judiciary. To describe them as "hide bound" may be unfair, but it is undoubtedly the case that they operated in a context of court-like procedural rigidity which largely defeated any investigative effectiveness.

So that I am not misunderstood, let me make it perfectly clear that I have a great deal of faith in our Anglo-Australian judicial system, and the way in which our courts operate. Throughout the history of civilisation, human wisdom and ingenuity has failed to come up with a more effective system of tribunals for determining matters in dispute, either between citizen and citizen, or between citizen and government. Within those parameters, Australian courts – and their counterparts in the United Kingdom and other common law jurisdictions – are the fairest, most rigorous, and most impartial tribunals that have ever existed, or are ever likely to exist.

But the very word "tribunal" implies a particular kind of proceeding – a proceeding which involves three participants, two adversaries and one neutral decision-maker. Whether in a civil case, where the adversaries are plaintiff and defendant or applicant and respondent, or in a criminal case, where the adversaries are prosecution and defence, the role of the third participant is the same. The third participant may be a judge or a magistrate sitting alone, or may comprise a judge and jury, or a bench of three or more judges. Their sole function is to hear both sides of the case, as advanced by the adversarial parties, and reach an impartial decision on the evidence and submissions which are presented.

A public inquiry – whether described as a Royal Commission, or a Commission of Inquiry, or any other title – is fundamentally different. It is not adversarial in nature. A commissioner does not have the luxury of deciding between two opposing contentions. His or her function is to ascertain the truth. The truth may possibly emerge from the evidence and submissions put forward by interested parties. But, more often, commissioners discover the truth as a result of enquiries or investigations conducted, and witnesses called, of their own volition.

The inadequacy of the traditional judicial method in such a context is highlighted when it is recalled that, in the quarter-century preceding the Fitzgerald Inquiry, two other public inquiries were conducted in this State, both of which were broadly concerned with matters of police misconduct. Each was chaired by a judge of the greatest eminence: in one instance, Justice Gibbs of the Supreme Court of Queensland, who subsequently became a Justice of the High Court of Australia, and ultimately Australia's Chief Justice; in the other instance, Justice Lucas of the Supreme Court of Queensland, who is deservedly remembered as one of that Court's most distinguished members.

The Gibbs Inquiry was focussed on prostitution which was allegedly occurring, with police protection, at the National Hotel in Brisbane. The Inquiry was an abject failure. At the time, Sir Harry Gibbs was unkindly referred to as the only man in Queensland who could not find a tart at the National Hotel.

Gough Whitlam – who has his own reasons for not being a great fan of the late Justice Gibbs – has observed that an extraordinary phenomenon occurred in Queensland in a little over twenty years. The results of the Gibbs Inquiry suggested that police corruption was entirely absent from this State; yet, in just twenty years, the situation had deteriorated to the point that the Fitzgerald Inquiry was able to identify police corruption throughout the State, from the highest ranks of the Police Force down. In another speech, Whitlam was less subtle, saying: "… police corruption continued to have immunity as a result of the incompetence of Sir Harry Gibbs".

The Lucas Inquiry, in the late 1970s, was only marginally more successful. Justice Lucas was assisted by Mr. Des Sturgess QC, one of the State's most respected criminal barristers, and also by a retired Superintendent of Police. They were able to identify some instances of abuse of police powers, and concluded that there must be "more effective control over police activity than there has been up to the present moment". They recognised that it would be a "task of considerably great difficulty … to lay down how this control should be exercised". But that is where it ended, until the Fitzgerald Inquiry.

With the greatest respect to Gough Whitlam, I feel that he is a little harsh in his comments about Sir Harry Gibbs. The failure of the Gibbs inquiry, and the limited success of the Lucas Inquiry, were no reflection on the intelligence,

integrity or ability of the respective Chairmen. It was the methodology that was flawed. The judicial method is perfectly attuned to ascertaining the truth as between two opposing cases: it was never designed to ascertain the truth at large.

The Fitzgerald Inquiry coincided with a trend amongst Australian judges – a trend which has since become almost universal – of declining to participate in public inquiries. The reasons for this are entirely commendable: inquiries generally deal with matters of intense public controversy, and for a serving judge to participate in such an inquiry has the real potential to bring the courts and judiciary into partisan political debate, and to undermine the fundamental separation between the legislative and executive branches and the judicial branch of government.

But, whilst that is the reason for the trend, it has another advantage. Nobody doubts that serving judges (or at least most of them) have the intellectual attainments necessary to conduct a public inquiry. But, in order to do so successfully, a very different mind-set is required from that which is appropriate for ordinary judicial work.

A commissioner is something less than a judge: generally speaking, he or she has no power to make decisions which are legally binding, and any recommendations fall to be implemented at the discretion of the government of the day. But, whilst commissioners are something less than judges, their functions are much broader: they oversee the investigations and enquiries which precede the calling of evidence in a public forum; they determine the evidence that is received, the order in which it is received, and the manner in which it is received; and they liaise with interested parties – which may include the

government, the opposition, and other interest groups – using both their statutory powers and their influence to ensure that the truth emerges. Such a role would be unthinkable in the case of a judge in our Anglo-Australian judicial tradition; it is closer to the role of an "Investigating Magistrate" in the legal systems of some European countries.

The effectiveness of this approach is best demonstrated by the success of the Fitzgerald Inquiry – especially as compared with other similar public inquiries – in what it achieved:

- Its success was unprecedented as a means of identifying and exposing shortcomings in the administration of a particular branch of government – in this instance, the Police Force.

- It was unique in its effectiveness in extracting the truth from reluctant witnesses – witnesses who were able to provide relevant evidence, but who also had powerful reasons for wishing to withhold their testimony.

- It produced cogent documentary and testimonial proof of systemic deficiencies which had allowed wrong-doing to continue, for decades, both unchecked and unpunished.

- It established a solid evidentiary foundation for subsequent criminal charges against many of the most serious offenders, ultimately resulting in some 300 convictions.

- Perhaps more significantly than anything else, it produced a reform package intended to prevent a recurrence of the same or similar problems – a reform package which, twenty years on, we may regard as, if not entirely successful in achieving that aim, at least a vast improvement on the ***status quo ante***.

Of course, these achievements were, first and foremost, a reflection of the man in charge, Tony Fitzgerald. None of them would have been possible – or even conceivable – without the rare mixture of talents which he brought to the task: his intellectual gifts; his wisdom and sagacity; his tactical skills; his nous; his flare.

However, it does not derogate from the primacy of Fitzgerald's own role, to observe that he operated in an environment which was unprecedentedly conducive to his efforts:

- First, the media, and indeed the general public, enthusiastically embraced the work of the Fitzgerald Inquiry. I am sure that most of us can recall, night after night on Quentin Dempster's ABC current affairs programme, seeing detailed reports of each day's evidence, and even re-enactments by professional actors of the testimony of the principal witnesses.

- Secondly, the Fitzgerald Inquiry received multilateral political support, at least to the extent that all major political parties felt compelled to give lip-service to their endorsement of the Fitzgerald process. Again, who can forget the promise to adopt Fitzgerald's recommendations, "lock, stock and barrel"?

- Thirdly, and perhaps as a result of the first two factors which I have mentioned, Fitzgerald was provided with an unprecedented level of resources – a virtually unlimited budget, a staff of hundreds, and no rigid time-table to finalise the investigations, evidence or report.

Apart from those circumstances, which undoubtedly contributed to the success of the Fitzgerald Inquiry, there is one further circumstance which – at least from my (not entirely impartial) perspective – made a significant contribution to a context in which Fitzgerald's own skills and talents could be exercised with maximum effectiveness. It is a happy coincidence of history that the Fitzgerald Inquiry occurred at a particular point in the development of the law regarding public inquiries.

As I have observed, the Fitzgerald Inquiry occurred at a time when serving members of the judiciary were increasingly reluctant to participate in public inquiries. The Fitzgerald Inquiry – and other public inquiries of the same era, such as the federal Costigan Inquiry – undoubtedly benefited from the opportunity to escape the court-like procedural rigidity which had characterised public inquiries at an earlier time in history, and took full advantage of the new-found ability of such inquiries to conduct their own "behind the scenes" investigative operations.

On the other hand, the Fitzgerald Inquiry preceded legal developments which have tended to diminish the investigative flexibility of such inquiries, and to impose on them a straight-jacket of judicial review which gives greater emphasis to the personal interests of individual participants, over the public interest in

discovering the truth. As it seems to me, this recent trend of judicial decisions has tended to handicap public inquiries, in at least four areas.

First and foremost, the success of a public inquiry depends on attracting and maintaining the support and goodwill of the public. In a nutshell, the public need to know that the inquiry is "fair dinkum". Unless the public is convinced that the inquiry is "fair dinkum", the inquiry will inevitably face a series of impediments.

It is, I am sure, no secret to say that much of the evidence which emerged at the Bundaberg Hospital Commission of Inquiry would not have come to our attention, unless people were convinced that we were "fair dinkum". Why would a clinician – let alone a bureaucrat – risk his or her career to blow the whistle, unless they were convinced that some good would come of it? Why would people trust us with intelligence, such as where to find the smoking gun in relation to hospital waiting lists, unless we had already won their trust? Why would senior bureaucrats within Queensland Health break ranks with the then Director-General and Deputy Director-General, unless it was in the clear expectation that we would make appropriate use of the evidence which they provided? Of course, what little my Inquiry was able to achieve, by convincing potential witnesses that we were "fair dinkum", is nothing as compared with what Fitzgerald was able to achieve, largely by the same strategy.

Encouraging witnesses to come forward with relevant information is just one of the benefits which flow from gaining the public's confidence. Another, and equally important consequence is simply a matter of practical politics.

Public inquiries depend, almost entirely, on the continued support of the government of the day. The government appoints the inquiry, nominates its members, and sets its terms of reference. The government decides how long the inquiry has to receive evidence and prepare its report, and what funding is available. If the inquiry needs more time or more money – or if it becomes necessary to expand or fine-tune the terms of reference – the inquiry must go, cap in hand, to seek the government's indulgence.

The difficulty, of course, is that public inquiries often wander down paths which are uncomfortable for the government of the day. This may not be what the government originally intended. Governments, of all political persuasions, are well known for following Sir Humphrey Appleby's maxim that one should "Never hold an Inquiry unless you know the outcome before you call it". But mistakes sometimes happen. What started out, for example, as an examination of clinical issues at one hospital, may somehow evolve into an exposé regarding contentious issues like hospital waiting lists. One never can tell.

Unless there is deep public and media support, it would be an easy matter for a government to restrict, or even terminate, any public inquiry – to turn off the funding tap, and to refuse requests, however reasonable, for extensions of time or changes to the terms of reference. Public confidence is the one protection which public inquiries have against interference from the government of the day.

And public confidence is equally important, not only in ensuring that an inquiry has the necessary time and resources properly to explore all of the issues within its remit, but also to ensure that its ultimate recommendations are acted upon. Referring again to the famous commitment to implement the Fitzgerald Inquiry

recommendations, “lock, stock and barrel”: would there have been such a commitment – let alone the political will to make that commitment a reality – unless the Fitzgerald Inquiry had already achieved widespread community confidence ?

So that is the first reason why the members of a public inquiry – any public inquiry – must be free to behave in a way which, in the context of judicial proceedings, may be regarded as demonstrating an appearance of bias. They must be free to act in a way calculated to attract and maintain public trust; to demonstrate that they are “fair dinkum”.

The second reason is equally important. A judge, hearing a case in a court of law, has no part in formulating or implementing the tactics and strategies which will ensure that the truth emerges. After all, judges are not concerned with absolute truth, merely with relative truth. A judge’s function is <u>not</u> to discover what actually happened – it is merely to decide which of two versions of history, presented by the opposing parties, represents the closer approximation to the truth. If neither party is able to secure relevant evidence, or if neither chooses to call a particular witness who might be able to assist the judge in discovering the truth, then the judge has to do the best that he or she can without the benefit of such evidence.

Public inquiries are not like that – nor should they be. The Fitzgerald Inquiry would have been finished in a matter of weeks – and would have achieved no more than the Gibbs Inquiry or the Lucas Inquiry – if it were not for the evidence of one, Jack Reginald Herbert. Fitzgerald’s counsel assisting travelled to London to interview Herbert, and did a deal with him which involved his receiving

immunity from prosecution in return for lifting the lid on the Pandora's Box of police corruption in this State. No judge, sitting in any court of law, could have done that. Yet the course of Queensland history would have been very different if it had not happened.

The Herbert example is, of course, an extreme one. He was a vile creature, who confessed to his own perjury and corruption in order to bring down his partners in crime. Yet Fitzgerald was able to do a deal with him which acknowledged that, for the greater public good, the judicial system could turn a blind eye to Herbert's own criminality, in return for evidence which exposed more wide-ranging problems.

I would hesitate in even mentioning, in the same context as a grub like Herbert, people as decent and honourable as the Bundaberg Hospital "whistleblowers", Toni Hoffman and Peter Miach. Yet I have been criticised for treating some witnesses differently from others. To the extent that I did so, it was a calculated and deliberate attempt, on my part, to encourage potential witnesses to come forward with the truth. If I broke the current rules by merely shaking hands with an honest witness, how much worse was Fitzgerald's offence, in doing a secret deal with a self-confessed crooked cop?

Two decades down the track, I am sure that there are plenty of people who are pleased to discover, even at this late stage, that Fitzgerald erred in treating some witnesses differently from others – people like ex-Police Commissioner Terry Lewis, like former Ministers of the Crown Don Lane, Brian Austin, Geoff Muntz, and Leisha Harvey, and many of the other 200 plus individuals who faced criminal charges in the aftermath to the Fitzgerald Inquiry.

In the final analysis, it is the Commissioner's function to discover the truth. Part of the professional skill-set of a barrister is to know how to use a range of forensic approaches in the interests of eliciting the truth. At one extreme, this may involve the "softly softly" approach – asking easy and apparently sympathetic questions in order to have the witness let down his or her guard. At the other extreme, it may involve asking questions which are apparently aggressive or even extravagant, with the object of inducing the witness to argue that a less extreme view should be taken – in effect, giving the witness the opportunity, in denying a more serious allegation, to admit to a less serious one.

Regardless of whether such tactics are successful or not, they form part of any competent barrister's armoury of techniques which – as experience has shown over many centuries – comprise the most effective system ever devised by human ingenuity, short of physical torture, for drawing out the truth from a recalcitrant witness.

Yet the Supreme Court has found that my questions, directed to certain Bundaberg Hospital bureaucrats, went beyond "exploratory or tentative statement of issues with a view to testing their correctness or to give the witnesses an opportunity to respond to a provisional view". It is and remains, in my respectful view, a singular inhibition on a public inquiry to say that a commissioner is confined to an "exploratory or tentative statement of issues" – and is prohibited from expressing those issues otherwise than in a way which is limited to "testing their correctness or giv[ing] the witnesses an opportunity to respond to a provisional view" – if the commissioner believes that a different forensic approach is more likely to bring out the truth.

The third reason why it is necessary to apply to public inquiries standards different from those applicable to courts of law is that public inquiries must be informed by what Justice James Thomas has called "a sense of social, political, moral or economic direction". For a judge in a court of law, there is a roadmap – it may sometimes be imperfect, sometimes ambiguous, sometimes incomplete – but a roadmap nonetheless. That roadmap is the law, comprising Acts of Parliament, regulations and other subordinate legislation, and previous judicial decisions. If the judge strays off the road, there are appeal courts to set him or her back on the right track. But public inquiries do not have any such roadmap: they must navigate by dead reckoning, informed by what Justice Thomas calls their "sense of social, political, moral or economic direction" – what I would call, more succinctly, their "moral compass".

Frankly, it is not clear to me whether, in the case of the Bundaberg Hospital Commission of Inquiry, my mistake was to have a moral compass at all; or whether the Supreme Court accepted that I was entitled to have a moral compass, but thought that my moral compass was misdirected. Thus, I was criticised for the view that, in the hospital context, practising clinicians – that is to say, doctors and nurses who actually participate in treating and caring for patients – fulfil a more useful function than bean-counters, pen-pushers, and other bureaucrats.

That I held such a view – that I still hold such a view – is beyond doubt. I have never made any attempt to conceal it. Others are perfectly entitled to take a different view. Some people may believe, for instance, that balancing the budget is a more socially desirable outcome than healing the sick. But I do not understand that it was the Supreme Court's function to substitute its views for

mine. If (contrary to the opinion of Justice Thomas) a commissioner is not entitled to have a moral compass – a "sense of social, political, moral or economic direction" – it would seem to me that there is little point in having public inquiries at all.

As I have noted, one of the many features which distinguish a public inquiry from a court of law is the fact that the inquiry's report – its findings and recommendations – are not binding on anyone. If, for instance, the inquiry concludes that a specific person has a case to answer for criminal or official misconduct, those issues are decided by the appropriate court or tribunal. Implementation of the inquiry's recommendations is a matter for the government of the day, and whilst the inquiry's conclusions may carry some political weight, the government is free to decide which recommendations to adopt, and when and how to do so.

What is important, to my mind, is this: to the extent that the inquiry's report reflects the moral compass of its members, that should be apparent for all to see. In selecting the person or persons to constitute a public inquiry, the government will presumably choose people in whom it has confidence – even if their moral compass is somewhat different from the government's own political agenda. When the Beattie Government appointed me, along with Sir Llew Edwards and Margaret Vider – well knowing that two out of the three commissioners had past associations with the conservative side of politics – I assumed it was because the Beattie Government wanted our honest and sincere views regarding the issues comprised in our Terms of Reference. What I did not anticipate – and do not accept, even now – is the proposition that we should have discarded our moral compasses because a Supreme Court Judge may not agree with them; or, worse

still, that we should have concealed our views, lest they be challenged as creating an “apprehension of bias”.

The fourth and final reason why public inquiries ought not be subject to the same constraints as a court of law is, however, the most important. As the word “inquiry” implies, the process is an investigative one. It is, frankly, bizarre that the most formal type of investigative process known in our system of constitutional government should be hamstrung by constraints which do not apply to less formal inquiries, such as those conducted by the police and other law enforcement agencies.

Consider the case of a police homicide detective, investigating a series of suspicious deaths. If the principal suspect were found to have fled, it is absurd to imagine that the police should be restrained in asking hard questions of the person who arranged payment of the principal suspect’s airfares. Yet that, in substance, seems to be something which I – as a commissioner – was not permitted to do.

Every investigative process – whether it be criminal, civil, scientific, or of any other nature – consists of essentially the same series of steps. One begins by looking at the evidence which is most readily available. One then forms an hypothesis as to what might have happened, drawing inferences – and maybe forming suspicions – based on the available evidence. As the evidence accumulates, you test your hypothesis, your inferences, your suspicions. Of course, you keep an open mind. As more evidence emerges, your suspicions may be answered; inferences may be negatived; initial hypotheses may be contra-indicated. You may have to modify the existing hypothesis; or you may reject it

entirely, and attempt to formulate a new one. Once all of the evidence is complete, you reach your conclusions. If you are lucky (or prescient), your conclusions may bear some resemblance to your initial hypothesis; more often, you will have considered and rejected a series of hypotheses during the course of the investigation.

The idea that one can conduct any kind of investigation, with a mind that is a blank canvass, is simply farcical. One might as well say that Howard Florey's investigation of the clinical uses of penicillin was misconceived, because Florey began with an hypothesis (or a suspicion, if you like) that penicillin could be adapted as a chemotherapeutic agent. This may be contrasted with Alexander Fleming's initial discovery of the antibiotic properties of penicillin, which occurred entirely by chance. Are future public inquiries to be entitled, like Florey, to develop and explore hypotheses – or are they obliged, like Fleming, to leave everything to chance ?

It seems to follow from the Supreme Court's decision, dismissing me as Commissioner, that I was not entitled to find things suspicious, even disturbing – that I was not entitled to call upon the individuals directly concerned to explain themselves or their conduct – that I was not permitted to express my surprise, my concern, indeed my alarm, so as to let such people know, very clearly, why I considered that an explanation was called for, and what they needed to explain.

Why should this be so? Why, as commissioner, should I have been the only person in Queensland who did not find it suspicious that the man who had authorised payment for Jayant Patel's return flight to the United States claimed, just 8 weeks later, to be unable to recall doing so? Why, as commissioner, should

I, alone amongst the citizens of this State, not be permitted the luxury of expecting the same bureaucrat to explain the effusive letter to Patel which issued from his office 4 days later, congratulating Patel for his outstanding contributions to the health of the citizens of Bundaberg? Why should I, as commissioner, be expected to have thought processes so very different from every other Queenslander, that I was not entitled to feel anxiety at the circumstances in which – even after complaints about Patel's clinical incompetence had surfaced, and an investigation was pending – he was offered the opportunity to renew his contract until March of the year 2009?

If the person chairing a public inquiry is prohibited by law from forming and voicing suspicions, drawing inferences, and developing hypotheses, then we might as well give up. There is simply no point in having Commissions of Inquiry, or Royal Commissions, whilst the law in Queensland remains as most recently stated by the Supreme Court.

The question remains whether, in the current legal environment, the Fitzgerald Inquiry could have been so successful; indeed, whether it could have succeeded at all.

I, for one, do not doubt that Tony Fitzgerald's own legal acumen would have enabled him to navigate any legal obstacles placed in his path. But, for the reasons which I have outlined, I seriously doubt that the exercise could have been nearly so effective, had Fitzgerald been operating within the current legal framework. In any event, it would have to be a very different exercise from that which occurred twenty years ago.

And that leads to my ultimate point: if the current legal environment would not be conducive to another Fitzgerald Inquiry, one must seriously question whether legislative action is needed to ensure that a future Fitzgerald Inquiry will have just as much chance of success.

As I have mentioned, serving members of the judiciary have withdrawn from participating in public inquiries, for the very reason that such inquiries are properly viewed as part of the political process – part of the legislative/executive branch of government – rather than an exercise of judicial power. By the same process of reasoning, public inquiries – as part of the democratic processes connected with the legislative and executive branches of government – should not be subject to interference by unelected judges.

Needless to say, there will always be situation where judicial oversight of public inquiries is essential – for instance, if a commissioner were to do something completely outside his or her powers, such as attempting to gaol a recalcitrant witness, or operating a telephone tap without the appropriate warrant, or investigating issues which are totally removed from the terms of reference. But, when it comes to operational judgments regarding the day-to-day conduct of an inquiry, commissioners need the freedom to decide how best to ensure that the truth emerges. If there are genuine reasons for doubting the commissioner's impartiality, that is best judged when the process is at an end, and it is possible for everyone to see whether or not the commissioner's findings and recommendations are justified by the evidence on the public record.

We are all familiar with the radio or television sports broadcaster, who is well removed from the field of play, but is happy to find fault with the (often difficult)

decisions which an umpire or referee has to make in the course of a match – sometimes in the heat of a rapidly changing situation, and without the luxury of being able to examine and re-examine the incident from different camera angles and slow-motion replays. However, sportscasters do not have the power to sack an umpire or referee, even if they disagree with a split-second judgment, on a tough line call.

There is no question in my mind that, had the evidence at the Fitzgerald Inquiry been recorded on video, and if a judge were to be shown selected excerpts from the video, it is quite possible that – at least after three or four weeks of consideration – the judge, applying the legal standards which are now in vogue, could find much to criticise.

What such a process would ignore, however, is the fact that Fitzgerald – for everything that he achieved – had no real powers. He could not send anyone to gaol; he could not make binding judicial orders; he could not even direct administrative changes in the way that the Police Force operated. His function, like that of other Royal Commissions and Commissions of Inquiry, was merely to make recommendations.

If anyone were to face criminal or disciplinary charges, they were to be heard and determined by an independent tribunal, applying traditional judicial methodologies. At that stage, the individual's right to receive a fair hearing takes precedence over all else; but it does not follow that the public interest, in discovering the truth, needs to be subordinated to the individual interest at every step along the way.

Even Fitzgerald's reform recommendations, despite the "lock, stock and barrel" political commitment, always remained subject to the ultimate decision of the government of the day. In fact, subsequent governments, of both political persuasions, have fallen short of implementing the Fitzgerald Inquiry recommendations to the letter.

As I have observed, there will be some people who are pleased to know that, according to current legal standards, the Fitzgerald Inquiry miscarried. But I am emboldened to suggest that most people – and especially those who had nothing to hide – would be devastated by the idea that the Fitzgerald Inquiry might have been closed prematurely, by a judge applying the same legal standards which led to the closure of the Bundaberg Hospital Commission of Inquiry.

No doubt, the future holds many more public inquiries, on matters of critical interest and importance to the people of this State. It is time, now, to change the law – so that, before the next one comes along, the public can be confident that the appointed commissioner is able to do his or her job, in the way that he or she considers most effective for ascertaining the truth, without fear that every step along the way will be subjected to minute judicial scrutiny, and that the entire process may be derailed – possibly weeks or even months after the event – due to an error of judgment, or even a "perceived", "apprehended" or "ostensible" error of judgment.