APPENDIX A:

Excerpts from:

The Contribution of "Corruption" to Miscarriage of Justice (MoJ) Cases

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Background:
After several several years as a pharmacist, Barbara Etter served 30 years in policing with the NSW, NT and WA forces, and was awarded the Australian Police Medal in 2008. She has been Director of the Australasian Centre for Policing Research (then in Adelaide, SA). From 2004-2010, she was Assistant Commissioner (and acting Deputy Commissioner) in WA across roles which included Strategy and Performance, Professional Development, and Corruption Prevention. In 2011 she was inaugural CEO of the Tasmanian Integrity Commission, before resigning to create her own consultancy. She holds Pharmacy, Law (Honours), Master of Laws, and MBA degrees, as well as Company Director qualifications. In 1995 she co-edited a book with former AFP Commissioner Mick Palmer (*'Police Leadership in Australasia'*, Federation Press).

DEFINING "CORRUPTION"

Before I proceed to discuss actual cases, I thought it would be important to provide a workable definition of "corruption" **for the purpose of this paper**.

The word "corruption" is a problematic one and has a host of definitions and interpretations. It is often frequently used to refer to a wide range of misconduct matters. (Interestingly, in Tasmania, when they chose to establish an Anti-Corruption Authority (ACA), they called it the "Integrity Commission". The legislation that underpins the agency does not even mention the word "corrupt" or "corruption" once, unlike the ACA's in the other States/Territories.)

There are a number of international definitions for corruption. For example, the definition used by Transparency International is:

> Corruption is the abuse of entrusted power for private gain.

An indication of the recognition of how difficult it is to define corruption is the fact that the United Nations Convention Against Corruption (UNCAC) (the first legally binding international anti-corruption instrument) does not provide a definition of "corruption" (see http://en.wikipedia.org/wiki/United_Nations_Convention_against_Corruption).

I have chosen to use a definition relevant to people holding public office, such as police officers and Crown prosecutors as they are generally key players in any MoJ matters (although it is acknowledged that other players, such as key witnesses or informants, may have deliberately lied to the courts).

In trying to develop a workable definition of "corruption", I have found the legislation of Australian ACA's, particularly the NSW ICAC, to be of relevance. In addition, I have also drawn

on the *Australian Standard on Fraud and Corruption Control (AS 8001 -2008)* and the Wood Royal Commission which examined the NSW Police Service (Wood 1996 & 1997).

"Corrupt conduct" is defined in the NSW *Independent Commission against Corruption Act 1988* as deliberate or intentional wrongdoing, not negligence or a mistake. The ICAC website states that corrupt conduct can take many forms, but occurs [in the public sector] when (http://www.icac.nsw.gov.au/about-corruption/what-is-corrupt-conduct):

- A public official improperly uses, or tries to improperly use, the knowledge, power or resources of their position for personal gain or the advantage of others
- A public official acts dishonestly or unfairly, or breaches public trust
- A member of the public influences or tries to influence, a public official to use his or her position in a way that is dishonest, biased or breaches public trust.

AS8001 Fraud and Corruption Control describes "corruption" as:

> A dishonest activity in which a director, executive, manager, employee or contractor of an entity acts contrary to the interests of the entity and abuses his/her position of trust in order to achieve some personal gain or advantage for him or herself or for another person or entity.

Justice Wood in the NSW Wood Royal Commission was charged with examining "the nature and extent of corruption within the Police Service, particularly of an entrenched or systemic kind" (1996, p.32). His definition of "corruption" in the 1996 Interim Report (1996, p.32) was as follows:

> 'Corruption' is notoriously difficult to define, and its reach may vary depending upon whether it is defined according to deviation from legal, public interest, or public opinion norms. Even within one of those possible sets of criteria it may change, from setting to setting, and from time to time, according to variations in community standards and expectations. Any attempt at a universal and precise definition is, in fact, likely to present more problems than it would resolve.

Justice Wood later defined "corruption" as including "the *mala fide* exercise of police powers". He went on to state (1997, p.20):

> Corruption has accordingly been taken to comprise deliberate unlawful conduct (whether by act or omission) on the part of a member of the Police Service, utilising his or her position, whether on or off duty, and the exercise of police powers in bad faith. It includes participation by a member of the Police Service in any arrangement or course of conduct, as an incident of which that member, or any other member:
>
> - Is expected or encouraged to neglect his or her duty, or to be improperly influenced in the exercise of his or her functions;
> - Fabricates or plants evidence; gives false evidence; or applies trickery, excessive force or threats or other improper tactics to procure a confession or conviction; or improperly interferes with or subverts the prosecution process;
> - Conceals any form of misconduct by another member of the Police Service, or assists that member to escape internal or criminal investigation; or

- Engages himself or herself as a principal or accessory in serious criminal behaviour.

In each case, the relevant conduct is considered to be corrupt, whether motivated by an expectation of financial or personal benefit or not, and whether successful or not.

I have also included in my definition and discussion of "corruption" the concept of **"process corruption"** or "**noble cause corruption**" (sometimes referred to as the "Dirty Harry Problem" (Klockars 1980)) which was also usefully defined and explained in the 1997 Wood Royal Commission Reports in NSW. Wood stated (1997, p.20):

> In addition to these activities which directly hinder the suppression and prosecution of crime, the good order of the Service and the creation of an environment of honesty, integrity and impartiality, the approach taken by the Commission embraces those forms of conduct sometimes referred to as 'noble corruption', but which are better categorised as 'process corruption'. This is the kind of corruption whereby unnecessary physical force is applied, police powers are abused, evidence is fabricated or tampered with, or confessions are obtained by improper means. It is often directed at those members of the community who are least likely or least able to complain, and is justified by police on the basis of procuring the conviction of persons suspected of criminal or anti-social conduct, or in order to exercise control over sections of the community.

Wood referred to "process corruption" as one of the most "obvious, pervasive and challenging forms of police corruption" (1997, p.28). He pointed out that process corruption:

- has its roots in community and political demands for law and order;
- is seen by many police to be in quite a different league from the forms of corruption which attract personal gain;
- is subject to the confusion which exists over the definition of 'good policing'; and
- is compounded by ambiguities within the legal and regulatory environment in which police work, and by senior police and members of the judiciary apparently condoning it.

In a speech that Wood delivered in 1999, post Royal Commission, he stated:

> [T]he reality is that as often as process corruption has been the result of "honourable" motives, it has also been engendered by black motives referable to opportunistic theft, the elimination of rivals at the behest of a protected criminal, self advancement in securing promotion, thrill seeking, and simple laziness or unwillingness to do the hard work required for an ethical investigation.

Wood also pointed out that process corruption may result from an exercise of **partiality** in criminal investigations or prosecutions (1997, p.29). He stated that partial investigations and prosecutions involve the abuse of police powers resulting from the ability of officers to exercise discretion.

The existence of a lack of impartiality among police is potentially attributable to many factors, which included (Wood 1997, p.30):

- Attitudes to particular crimes which police themselves may commit, or personally condone, for example, drug taking, domestic violence, or driving while drunk;

- Financial gain in return for protection given to drug dealers and others;
- **The desire to obtain convictions, or information, regardless of the legality of the means used, or their consequences;**
- The existence of personal attitudes based on race, gender, sexuality, religion, and/or socio-economic status;
- The desire to protect a fellow officer at the expense of a member of the public;
- The desire to protect friends or family suspected of an offence; and
- Undue respect for, or concern as to the consequences of charging people who are particularly well placed socially or politically. (emphasis added)

Wood discussed individual police deviance and clearly stated that the "rotten apple" theory of police deviance (by which corruption had previously been understood in terms of individual moral failure) had long been discounted (1997, p.21). (Indeed, some now prefer to talk about "bad barrels" or "bad orchards", meaning, not individual, but institutional failure). Wood also very usefully went on to distinguish between corruption of an "entrenched" or "systemic" kind, by applying a "purposive meaning" (1997 p.21):

> '[E]ntrenched' corruption should be equated to the presence of corruption of such a nature and to such an extent, that it is firmly established within the Police Service and capable of being defended by its adherents or of resisting efforts for its eradication;
>
> '[S]ystemic' corruption is taken to be the form of corruption which has become accepted as part of the way of life or ethos of the Police Service, and which a significant proportion of its membership either pursues or tolerates at some stage of their police careers.

Wood commented that such definitions tend to become "terms of art" (1996, p.33). He commented that they were, to a degree, interchangeable, or at least closely related, since in their operation one may provide the environment for the other "to spawn and develop" (1996, p.33). In his 1996 Interim Report Wood stated that the Commission had already unearthed "significant corruption of the kind which could answer the test adopted of 'entrenched or systemic corruption'" (1996, p.34).

In light of the above, particularly the definitions provided by Wood, I have attributed a fairly broad meaning to the term "corruption". I must admit that I also chose to use the word "corruption" in the title of my paper, given that this presentation was for the Corruption Prevention Network and I wanted the material to be as relevant as possible to the Forum's goals and objectives.

I have also used the general definition of the *male fide* exercise of powers by prosecutors to constitute "corruption" for the purposes of this paper when referring to possible prosecutorial misconduct.

In this regard, I have had to be very careful. There have been some high profile cases here in Australia in recent times where prosecutors have been severely criticised by the courts. However, as this behaviour may not have been judged to constitute "misconduct" by the appropriate body for the purposes of any disciplinary action, I have refrained from mentioning such cases at this time.

POLICE BEHAVIOUR THAT MIGHT CONSTITUTE "CORRUPTION"

From my experience and observations over many years, the type of inappropriate behaviour or misconduct police or prosecutors can be involved in, which might lead to a MoJ, include:

- Tunnel vision;
- Misrepresentations to the accused, for example, making knowingly false statements about other witness or forensic evidence;
- Deliberately not taking a statement from a critical witness who does not support the police case;
- Obtaining a confession under duress or through the inappropriate use of force;
- Failing to declare and deal appropriately with a conflict of interest situation;
- Creating incriminatory statements or misrepresenting or enhancing statements from the accused so that they become incriminatory or more favourable to the Crown case (the "verbal");
- Spreading malicious and untrue rumour and innuendo, which is particularly damaging in smaller communities;
- Failing to transpose important details on handwritten running sheets accurately to a more formal Investigation Log or running sheet;
- Requesting that forensic reports be edited to be more favourable to the Crown case;
- Leaking material to the media unfavourable and prejudicial to an accused;
- Being overly selective about what goes in statements from witnesses, inappropriately influencing them, or leading them on specific points to fill holes in the Crown case;
- Utilising witnesses or informants that are known to be highly unreliable;
- Planting evidence;
- Presenting evidence in a case which one knows to be false or untrue; and
- Failing to disclose relevant material to the Defence.

There may not be an obvious and major issue in a case but it needs to be realised that a consistent tweaking, fine tuning and the distortion of evidence can nevertheless have a devastating effect. As was stated by Kirby J in *Mallard* [2005] HCA 68 at para.56:

> [I]t is important to consider the cumulative effect of the non-disclosure or suppression of material evidence in the hands of the police and thus available to the prosecution. It is the cumulation, variety, number and importance of such evidence that is critical to my conclusion that a miscarriage of justice occurred in the appellant's trial.

It should also be noted that there is also scope for misconduct amongst Defence counsel and forensic personnel, although this appears far less common.

(ends excerpt)