

# DIRTY HANDS AND COMMISSIONS OF INQUIRY: AN EXAMINATION OF THE INDEPENDENT LOCAL GOVERNMENT REVIEW PANEL IN NSW, AUSTRALIA

*ABSTRACT:* We utilise the problem of dirty hands to consider the ethical dimensions of commissions of inquiry, particularly commissions of inquiry conducted for the purposes of public policy. The Independent Local Government Review Panel (ILGRP) in NSW is used as an example for the purposes of discussion. Four questions endemic to considerations of dirty hands are derived from Coady (2014). The framework affords various insights into the ethical terrain of this particular inquiry and those undertaken for the purposes of public policy more generally. We argue that commissions of this type and the ILGRP in particular cannot be labelled examples of dirty hands and that the concept of *determinatio* from the work of St Thomas Aquinas sheds light as to the nature of moral claims around commissions. We also argue that a fruitful analysis is afforded by Wallis' (2013) analytic framework of the 'logic of fateful choices faced by the leaders of commissions of inquiry'. Nevertheless, confusion surrounding the nature and types of inquiries is partially responsible for accusations of their ethical incoherence.

**KEYWORDS:** Appreciative Inquiry (AI); Commissions of inquiry; 'dirty hands';  
Independent Local Government Review Panel (ILGRP).

## COMMISSIONS AND INQUIRIES: DEFINITIONAL AMBIGUITIES AND ETHICAL DIMENSIONS

It would be difficult to overstate the salience of commissions and inquiries in Australian public life. For example, during the week 28 April to 2 May 2014 the work of the NSW Independent Commission Against Corruption (ICAC) led to the resignations of Marie Ficarra, Parliamentary Secretary to the Premier and Police Minister Mike Gallacher, following on from the resignation of Energy Minister Chris Harcher on the 4<sup>th</sup> of December of that year and the stunning resignation of the (then) NSW Premier, Barry O'Farrell on 16<sup>th</sup> April 2014 (Whitbourn et al., 2014). In the same week a National Commission of Audit (NCA) examining Commonwealth government expenditure, appointed by the Conservative Abbott Coalition Government and chaired by the former head of the Business Council of Australia Tony Shepherd, handed its 'Final Report' to Government. The 'Final Report' contained 64 recommendations inclusive of *inter alia* raising the pension age, introducing a compulsory co-payment for general practice medical consultation, increasing the contribution of tertiary students to their education and dismantling Commonwealth agencies for education and health care (NCA 2014a).

*Prima facie* there are important qualitative distinctions between the two types of inquiry that were salient in that particular week in 2014. Scott Prasser (2006, 28) distinguished between 'commissions to advise government on policy issues' on one hand and what he referred to as 'inquisitorial commissions' on the other hand. According to Prasser (2006, 28) inquisitorial inquiries such as royal commissions<sup>1</sup>, are defined by remits to 'investigate allegations of impropriety and maladministration'. Alternatively, inquiries commissioned for the purposes of informing public policy are convened to do precisely that.

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<sup>1</sup> Prasser (2006, 32) noted that: 'Contrary to conventional media reporting, royal commissions are not "judicial inquiries". This impression arises because they are often chaired by present or past judges or other senior legal professionals and adopt many of the outward trappings and adversarial processes of courts. Royal commissions are nevertheless, like all other public inquiries, creatures of executive government'.

It is the latter type that are of central concern here, principally because such inquiries fall squarely within the auspices of the authors' work; also because, *prima facie* at least, the ethical implications of public policy commissions are, arguably, less obvious to observers than those of the inquisitorial type<sup>2</sup>.

Our central concern is with a seeming contradiction: Despite consistent proclamations as to their independence, on many occasions commissions of inquiry deliver findings and recommendations remarkably amenable to their commissioning governments, and often despite evidence to the contrary. A comprehensive survey of commissions of inquiry in this regard is beyond the scope of this paper, yet instances of this phenomenon are readily found. For example, Prasser (2006, 34) noted that both the Hawke Government's 1984 *Royal Commission into British Nuclear Tests in Australia between 1952-1963* and the Howard Government's 2001 *Royal Commission into the Building and Construction Industry* were accused of precisely this type of bias. Similarly, Ross Giddens (2014) long-standing economics writer for the *Sydney Morning Herald* took issue with the aforementioned NCA's five-volume 'Final Report' in precisely this regard, decrying what he termed '*the blatancy of its commissioning*'. It comes from an "independent" inquiry effectively handed over to just one business lobby group, the one composed of the most highly paid chief executives in the country, the (big) Business Council' (emphasis added). Giddens argued that the timbre of the NCA's 64 recommendations was essentially predetermined, despite consistent annunciations that the Audit was 'an independent body' (NCA 2014b).

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<sup>2</sup> Despite the utility of the conceptually neat taxonomy introduced by Prasser (2006) we suggest that the distinction between these two types of inquiries can be considerably blurred. For example, the Royal Commission into Institutional Responses to Child Sexual Abuse initiated by the Gillard Government in January 2013 is due to deliver its Final Report and Recommendations 31 December 2015 (RCIRCSA 2014). On February 11<sup>th</sup> 2013 Prime Minister Tony Abbott announced a Royal Commission into Union Governance and Corruption, aimed at 'shining a light into the dark corners' of the movement (Bourke 2014). Yet the extent to which either one of these inquiries would have been initiated by a government of the opposite political persuasion is not an irrelevant point upon which to reflect.

It is at this point that comparisons with what Tony Coady (2014) described as ‘the problem of dirty hands’ invite themselves. Coady (2014, 1) posited the following formulation of the ‘dirty hands’ scenario: ‘Should political leaders violate the deepest constraints of morality in order to achieve great goods or avoid disasters for their communities?’, adding: ‘the importance and challenge of the dirty hands scenario is *not* that hands get dirty from time to time but that it is *right* that they do so’ (Coady, 2014, 6; emphasis added). Coady (2014, 1) discussed what he termed ‘five issues’ in this regard: First, is the dirty hands scenario ‘simply confused with the merest contradiction [between moral and non-moral imperatives]?’; second, in cases where moral restraints are overridden, should this action be viewed as taking place ‘within normal morality or somehow beyond it?’; third, is the charge of dirty hands relevant only to a specifically political realm or is the idea more broadly applicable – and to what extent are citizens implicated in dirty hands?’; fourth: ‘how are the circumstances that call for dirty hands best described?’; fifth, ‘the dirty hands problem has affinities with the problem raised by moral dilemmas, but the question is: should those similarities be allowed to obscure the differences?’

In this context, the first four of Coady’s (2014) five issues can be made directly relevant to commissions of inquiry. First, is it contradictory that commissions of inquiry deliver ‘independent’ reports that nevertheless conform to what is required by government? Second, as atypical servants of state, do commissioners *justifiably* operate *outside* the constraints of everyday morality? Third, to what extent (if at all) are citizens complicit in the problem? Fourth, the issues surrounding commissions of inquiry for the purposes of public policy are such that the question of how best to describe them is a good one to ask.

To discuss these questions we examine the Independent Local Government Review Panel (ILGRP) run from 2011-2014 in NSW. While this particular example may feel quite obscure compared to other inquiries that have taken place on the Australian national stage, as

we will see, the ILGRP comprised a wide-ranging, substantive and controversial process aimed at fundamental reform to local government in NSW.

The paper is divided into four main parts. A brief overview of commission scholarship is provided, distinguishing between a political/sociological approach exemplified by the work of Prasser (1985; 2006) on the one hand and the ‘Appreciative Inquiry’ tradition initiated by Sir Geoffrey Vickers (1965) on the other hand. We assert that these two strands of inquiry scholarship (one descriptive and analytical, the other prescriptive) have in essence talked past one another despite being concerned with the same or similar phenomena. The case study is then described. Two *prima facie* objections to the applicability of dirty hands to commissions of inquiry are countered before we examine commissions generally and the ILGRP in particular using the four-part framework provided by Coady (2014). On this basis, we suggest that commissions of this type generally, and the ILGRP in particular, can be disqualified from being labelled dirty hands situations and that Aquinas’ concept of *determinatio* provides an account of the shape of moral argument around commissions of inquiry. Further, we suggest that the ethical dimensions of inquiries for public policy are more fruitfully explored using Wallis’ (2013) ‘logic of fateful choices facing the leaders of commissions of inquiry’. The gap between the sociological approach to commissions and that of Appreciative Inquiry is emphasised.

## TWO TYPES OF COMMISSION SCHOLARSHIP

Before moving to the case study under examination here and commissions of inquiry for the purposes of advising public policy more generally, it is useful to draw a distinction between two different types of commission scholarship. The first we will describe as the *political sociology of commissions of inquiry*, as exemplified by the work of Scott Prasser (1985; 2006). As (arguably) the leading exponent of commission scholarship in the Australian context, Prasser’s work provides information about inquiries commissioned for the purposes

of advising on public policy, as well as offering observations as to the role of commissions in the structure of Australia's polity and discussing the efficacy of this role. For example, Prasser (1985, 8-9) described a series of research questions for examining inquiries. In more recent work Prasser (2006, 29) documented the incidence of royal commissions of inquiry undertaken by various Commonwealth administrations in the period 1949-2005.

The second identifiable type of commission scholarship, Appreciative Inquiry (AI), can be located in the broad field of public administration and in the particular area of policy studies. It has its genesis in Sir Geoffrey Vickers' (1965) *The Art of Judgement: A Study of Policy Making*. For Vickers (1965, 13) policy-making is properly conceived as *judgement*, defined *inter alia* as 'an ultimate category which can only be approved or condemned by a further exercise of the same authority'. Further, for Vickers (1965, 40) judgement ought to be understood initially as a 'mental skill' involving the constant renegotiation between 'value judgements' and 'reality judgements'. Moreover: 'The relationship between judgements of fact and judgements of value is close and mutual; for facts are relevant only in relation to some judgement of value and judgements of value are only operative in relation to some configuration of fact' (Vickers 1965, 40). On this account, institutions ought to be viewed as 'dynamic system[s] of precarious stability (Vickers 1965, 30).

In his original work, Vickers' (1965, 30-66) examined three commissions of inquiry, demonstrating in each case that the commissioners were obliged to cast about for values within which to frame their facts and *vice versa*. This process he termed *appreciation*. Further, Vickers (1965) argued that this is how executive action *ought* proceed: 'Nothing is more inimical to the process of solving executive problems than to change the specification of the problem or even to suggest that it might have changed' (Vickers 1965, 39).

While this tweaking the nose of epistemic dualism may appear old hat contemporaneously, the ramifications for our view of commissions of inquiry undertaken to

advise on public policy are profound. On this account, problems are decidedly not ‘solved’. On the contrary, in the language of two contemporary advocates of AI: ‘[A] steadfast commitment to a problem-solving view of the world acts as a primary constraint on ... imagination and contribution to knowledge’; further: ‘through our assumptions and choice of method we largely create the world we later discover’ (Cooperrider and Srivastva 1987, 129).

Of course it may be objected that this account of AI gives short shrift to this type of commission scholarship<sup>3</sup>. In particular, AI and the work of Vickers (1965) are discernible in the public policy literature (see, for example, Majone 1989). However, our task here initially is to demonstrate the fundamental distinction between the two types of commission scholarship. It is also to demonstrate how profoundly dissimilar commission scholarship of the AI prescriptive type is from the inquisitorial type identified in the introduction to our discussion. We now proceed to the case study.

#### NSW INDEPENDENT LOCAL GOVERNMENT REVIEW PANEL (ILGRP)

Notwithstanding its prosaic nature, local government has been a hotbed of the types of inquiries with which we are concerned. NSW local government was the subject of six major processes of inquiry to inform public policy in the period 2011-14 with the ILGRP comprising the centrepiece of these processes (Gooding 2013). It was established by the (then) Minister of Local Government ‘to draw on *independent* expertise to help tackle issues and identify how councils can best govern and be structured to support the future wellbeing and prosperity of NSW communities’ (Page, 2012, 4; emphasis added). The three-person panel comprised Graham Sansom, Professor at the Australian Centre of Excellence for Local Government (ACELG) at the University of Technology, Sydney, alongside Jude Munro, former CEO of Brisbane City Council and Greg Inglis, a former local government CEO and

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<sup>3</sup> Like other works of its type (the authors are thinking here of Mark Moore’s (1995) *Creating Public Value*) AI has found a home in other social scientific disciplines, in particular in program evaluation (see, for example, Elliot 1999; Whitney and Trosten-Brown 2003; Preskill and Catsambas 2006) One such text (Elliot 1999, v) observes that: ‘To date most applications of appreciative inquiry have taken place in the corporate world’. This is profoundly ironic as the genesis of AI resides in public policy scholarship and policy-making in particular.

‘specialist strategic local government advisor’ (ILGRP 2014a). In this regard the Panel members conform to Vickers (1965, 55) description of heads of commissions of inquiry as ‘experienced men [sic] of affairs’.

The Panel’s work was embedded in a narrative of economic development, namely ‘the broader objectives of the State as outlined in “NSW 2021: A Plan to Make NSW Number One”’ (ILGRP 2014b). The Terms of Reference (ToRs) directed it to seven ‘Key Actions’ including *inter alia* developing models for structural reform (i.e.: council amalgamation), options for increasing council own-source revenue, alternative governance arrangements and more clearly delineating state and local government responsibilities (ILGRP 2014b; the details of these mooted reforms are of marginal interest in this context). It was also directed to be cognisant of several other considerations, the most salient of which was ‘to take into account the Liberal-National’s [i.e.: the incumbent government’s] 2011 election policy of ‘no forced amalgamations’ of councils (ILGRP 2013).

In the context of our discussion of dirty hands, the latter directive was particularly significant: Historically, across Australian state and territory governments have consistently implemented programs of forced amalgamations with the rationale that these processes result in scale and scope economies, despite the protestations of the communities – in particular, their elected and appointed officials – and contrary to a weight of evidence suggesting that said efficiencies are largely illusory (see, for example, Dollery, Grant and Kortt 2013). In essence, many suspected that the ILGRP was a stalking horse for a program of forced amalgamations (see Dollery 2013).

Events that subsequently transpired have borne this suspicion out: The Panel produced a series of reports – many of them commissioned – in its 14 months of operation, alongside conducting extensive community consultation (see, for example, ILGRP 2013). The ‘Final Report’, ‘Revitalising Local Government’ (ILGRP 2013) advanced no fewer than 65

recommendations. Despite the raft of reforms contained therein, media attention – and public policy – subsequently focused upon the process of radical consolidation recommended by the Panel. Under this plan 32 councils in the greater Sydney region would be reduced to approximately seven and a range of structural reforms would be introduced across most of the remainder of the state (ILGRP 2013). In essence, the Panel dispensed with the 2011 commissioning government's stated policy and conferred with its widely suspected secret agenda, arguing that: 'Sooner or later amalgamations will have to be part of the package: the number of councils in NSW has halved during the past century and that trend will surely continue' (ILGRP 2013, 7).

The ensuing response by the Government – despite its 2011 pre-election pledge – was to wholeheartedly embrace the recommendations of the Panel with respect to council amalgamation and offer a range of financial incentives for those local governments to merge (see OLG 2014). At the same time it did not discount forced amalgamation (see, for example, Kenny 2014).

With the details of this case study in mind, our discussion is framed by a degree of scepticism surrounding the efficacy of processes of inquiry for the purposes of public policy generally, in particular a suspicion that there might be some type of 'dirty hands' activity associated with commissioned bodies consistently proclaiming their 'independence' while at the same time delivering recommendations commensurate with what governments wish to see. In the next section of the paper, we examine the issue of 'dirty hands' in relation to the ILGRP utilising Coady's (2014) 'four issues' outlined in our introduction. However, initially we address the issue of the applicability of dirty hands to commissions of inquiry more generally.

## DIRTY HANDS AND COMMISSIONS OF INQUIRY: TWO QUESTIONS OF ELIGIBILITY

The first objection to the eligibility of dirty hands to commissions of inquiry is that according to some interpretations of dirty hands the type of scenario described above does not entail the moral gravity that forms a necessary requirement to qualify. For example, Coady (2014, 1) initially describes dirty hands as situations where ‘political leaders violate *the deepest constraints of morality* in order to achieve great goods or avoid disasters for their communities’ (emphasis added). However, this reason for exclusion can be countered on the basis of what Coady (2014, 3-5) labelled the ‘shifting interpretations’ of dirty hands. For example, Coady (2014 3) notes that in ‘Political Action: The Problem of Dirty Hands’ (Walzer 1973, 162) the phenomenon is far more mundane, defined as: ‘[A] central feature of political life, that ... arises not merely as an occasional crisis in the career of this or that unlucky politician but systematically or frequently’. This understanding conforms to Bernard Williams’ (1978, 55) use of the term, namely: ‘It is in cases where the politician does something morally *disagreeable*, that I am concerned with’ (emphasis added)<sup>4</sup>. Understood in this sense, commissions and their governments performing what Giddens (2014) labelled a ‘blatancy of commissioning’ are not excluded from dirty hands on the mere basis that the cases are not sufficiently serious from a moral standpoint. In the example of our case study, it is encapsulated by the accusation that, despite all of its work, the ILGRP was merely a stalking horse for a program of radical amalgamation. Our point here is not to dismiss the importance of the issue of the moral gravity of an act; rather, it is to observe that the issue of gravity is at least equivocal.

A second *prima facie* reason for excluding commissions of inquiry from consideration might be more damning, namely that dirty hands ought to apply only to the actions of

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<sup>4</sup> While Williams (1978, 71) moved to distinguish between the morally disagreeable or distasteful and the morally criminal based upon the category of ‘violence’, the majority of his discussion is taken up with non-exceptional political events that are of the morally disagreeable type.

politicians. On this account, agency is the crucial issue and as we have seen, for both ideal-types of inquiries (i.e.: inquisitorial and public policy) commissioners decidedly *do not* have a prescribed role in decision-making. Further, in the case of commissions of inquiry for the purposes of public policy this objection of non-agency seems particularly cutting because they are defined by their advisory, rather than decision-making role.

This objection can also be countered. First, action by politicians is in fact a necessary element of any commission of inquiry: They have to commission the process and decide whether and how to act upon recommendations. Second, there is an intuitive case for classifying politicians and commissioners as belonging to the same club: In our example of the ILGRP, clearly the three panel members were persons of eminence, and *by virtue of appointment*, potentially influential. Bernard Williams (1978, 58) makes precisely this point, arguing that it is important to consider whether an individual is ‘the originator of action, or at least a joint originator of action, rather than one who [merely] participates in a party or a government, or *acquiesces*, with respect to decisions he does not help to make’ (emphasis added). We think that this aptly describes particular types of behaviour by commissioners and return to the issue of acquiescence or otherwise in due course. We now utilise the four elements of dirty hands discussed by Coady (2014) in order to structure our discussion of commissions of inquiry generally and the ILGRP in particular<sup>5</sup>.

## DIRTY HANDS, COMMISSIONS OF INQUIRY AND THE ILGRP

### *Outside morality? Political realism and determinatio*

Coady’s (2014, 5) first line of inquiry is that dirty hands ‘seem ... to involve a contradiction or paradox’. This description appears to fit many commissions of inquiry and their

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<sup>5</sup> The other way that commissioners are implicated is by choosing the content of their advice. Thus, even if the executive (i.e.: political) decision is made by others the decision to provide a certain type of advice is a matter of private morality for the commissioners themselves. The authors would like the editors of this special edition for pointing this out.

governments: The independence of commissions is proclaimed, yet they consistently produce recommendations that governments wish to see. Although Coady (2014, 5) is referring more specifically to the rightness of an action and the moral guilt of the person who performs it, commissions also appear to conform to the type initially discussed by Bernard Williams (1978). Williams (1978, 63) was interested in the situation where a morally disagreeable political act has been done and from which there may well be what he refers to as a ‘moral remainder, [an] uncanceled moral disagreeableness’ and for which there are victims who are aware that they have been wronged by a *political* act.

For Coady (2014, 5) this charge of dirty hands can be overcome using two familiar lines of moral theorising: For consequentialists the paradox can be resolved by assuming that the course of action that ought to be taken results in the greatest happiness for the greatest number and accepting the residual consequences as (perhaps) unfortunate but justifiable. Alternatively, from a deontological perspective, any wrongs are proscribed in the first place, so the problem does not arise.

Either of these solutions might be possible courses of action for a particular type of dirty hands situation, namely the ‘supreme emergency’ (see, for example, Walzer 2004). A particular politician (or, dare we suggest, a corporate form of leadership – a cabinet, for example) could adopt a consequentialist stance with respect to (in Walzer’s (2004) scenario) the slaughter of civilians in order that a worse event is avoided. Alternatively, a morally absolutist argument would form a line in the sand from which no action could proceed<sup>6</sup>.

However, public inquiries of the type we are concerned with here are decidedly different situations, conforming to the more mundane understanding of dirty hands. In these circumstances the hard and fast theoretical solutions that Coady (2014) finds applicable to supreme emergencies appear not to apply, not for reasons of a lack of moral gravity discussed

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<sup>6</sup> These two approaches effectively *dissolve* the dirty hands problem by revealing that it isn’t a moral problem at all. However, as suggested in the ensuing discussion, we in no way mean to imply that these are the only two ways of addressing the problem philosophically.

earlier but because there are a series of trade-offs around a series of issues. Further, the idea that ‘non-moral oughts’ can trump moral ones (Coady 2014, 6) is particularly unsatisfactory in the public policy realm: The claim to realism is properly a descriptive rather than normative claim<sup>7</sup>. Deployed otherwise, it is widely recognised as self-serving ideology (see, for example, Heywood 2011, 53).

Another way of understanding the vexation around the ILGRP is by a consideration of St Thomas Aquinas’ concept of *determinatio*. Jeremy Waldron (2010, 1-2) defines *determinatio* as the process of translating natural law into positive law and the variability implied in this process<sup>8</sup>. Thus (for example): ‘Natural law principles might indicate that a house should be sturdy and weather-proof ... But still, in designing a particular house, the architect has choices to make – choices of detail – which are not governed precisely by the natural law principles to which he (sic) is responding’.

In accord with general accounts of Aquinas’ work (see, for example, Velasquez and Brady 1997) Waldron (2010) notes the work that is *determinatio* (i.e.: from natural to positive law) will change over time and that ‘the integration of even an uncontroversial requirement of practical reasonableness into law will not be a simple matter’ (Finnis, cited in Waldron 2010, 3). Further: ‘the lawmaker has to do all this and his work may look quite unfamiliar to the layman’ (Waldron 2010, 4). Moreover, Waldron (2010, 4-5) points out that the legal process

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<sup>7</sup> The authors would like to thank an anonymous reviewer for pointing this out.

<sup>8</sup> The definition of both natural law and positive law is discussed by Robert P. George (2008). For George (2008, 144) natural law ‘consists of three sets of principles’: First, ‘those directing human choice and action toward intelligible purposes, i.e.: basic human goods, which ... as intrinsic aspects of human well-being ... constitute reasons for action whose intelligibility as reasons does not depend on any more fundamental reasons; Second: ‘a set of “intermediate” moral principles which specify which specify the most basic principle of morality’ through action motivated to achieve human fulfilment; Third: ‘specific moral norms which require or forbid (sometimes with, sometimes without exceptions) certain specific possible choices’.

For George (2008, 148) ‘natural law itself requires that someone (or some group of persons or some institution) exercise authority in political communities ... by translating certain principles of natural law into positive law and reinforcing and backing up these principles with the threat of punishment for law-breaking’. Further, Aquinas, following Aristotle, observed that the translation from natural to positive law occurs in two ways. The first is ‘more or less direct’ and ‘designed to inhibit grave injustices’. However, the second requires the legislator exercising ‘a kind of creativity, not deduction, to construct a system of laws by the activity of the ‘practical intellect’ that Aquinas termed *determinatio* (discussed above).

is complex, involving a range of actors – judges, yes, but also legislators (and commissioners) – who at times will work in accord with one another and sometimes not.

Waldron (2010) makes two additional points of particular relevance in this context. First, we can evaluate the outcomes as better or worse (‘It can be a botched job; it can be dangerously incomplete, or it can be ... an enterprise carried too far (Waldron 2010, 11)). Second (and most importantly in this context):

Since our natural law reasoning is not infallible, sometimes we will be applying *determinatio* to a conviction or judgement which is not (as we think it is) a true apprehension of natural law. *Perhaps we will disagree about this: some people will say that natural law requires one thing in a given area and others will say it requires something different.* They will compete to occupy the position of human law-maker, and when one side gets it, it will be to their convictions about natural law (in that area) that they try to give the form of human law (Waldron 2010, 4; emphasis added).

This rings true of our case study: Throughout the course of the ILGRP’s activity what we might term relatively mundane instrumental reasons (efficiency; capacity) were offered up for the Panel’s recommendations in total and in particular its proposed amalgamation program. These reasons were frequently countered (see, for example, Dollery 2013).

However, more interestingly the Panel also consistently appealed to a sense of *historical inevitability* as an element of its justification: ‘Sooner or later amalgamations will have to be part of the package’ (ILGRP 2013, 7). The Government fell in line with this justification: ‘It’s clear that our system of local government - with boundaries dating back to the 19th century - will not be able to meet the needs of growing and changing communities’ (Baird in OLG 2014b).

Equally (and we will assert, rather than argue this point in this context) claims made against programs of consolidation generally are more vexatious and more profoundly felt than other examples of disagreement over public policy options. We are by no means suggesting that they are singular in this regard: For example, arguments about the inviolability of public transport provision can have a similar tone. Yet the point in this context is that the concept of *determinatio* as discussed by Waldron (2010) provides an account of the nature of disagreement in our case study and (perhaps) the charge against other commissions of inquiry. As such, they are not accurately labelled ‘dirty hands’ situations of the more mundane type. Namely, it is not a problem of doing what is morally prohibited due to other overriding moral reasons, but a case of differing opinions about what is the right thing to do, practically speaking, in a particular situation.

#### *Inside morality: Virtue ethics*

Coady’s (2014, 8) second line of inquiry (or ‘route out of the paradox’) is to concede that ‘morality is not entirely coherent or self-consistent’. On this account, the way out of the paradox is anchored far more firmly in the ethical character of the individual rather than the nature of the act itself or indeed in what might be termed any structural justification of such an act or acts. Indeed, this is Williams’ (1968 56) point of departure: ‘What sort of persons do we want and need to be politicians?’ and it is with this terrain Williams (1978) is largely concerned. Here, the political scientist is on very familiar ground in that the morality of leaders is set against that of us ordinary folk. Michael Walzer (2004, cited in Coady 2014, 8) embraces this, arguing that this is “‘what political leaders are for’”.

Tony Coady (2014 9) takes issue with the flexibility with which Walzer (2004) plays this card, arguing (for example) that the extinction of all members of a community is entirely different to talking about ‘continuity of a “way of life”’. We have argued with respect to our

example of the ILGRP, the latter argument, grounded in the language of an economic imperative (also a degree of historicism), is a familiar enough refrain from both governments and commissions. This serves to underline the importance of criticism of these types of justifications if they are espoused for pursuing particular courses of public policy.

But what of the question of commissions of inquiry conforming to a *bona fide* definition of dirty hands? Again, Coady's (2014, 10) discussion of the work of Michael Walzer generally is instructive here, with him arguing that the conceptual distinction between an excuse for a particular action – amounting to an admission of fault – and a justification for an action – amounting to “an assertion of innocence” (Walzer's phrase) does not hold in the case of dirty hands. Coady (2014, 10) is insistent on this point, arguing that dirty hands involves both, and as such collapses an important distinction: ‘[W]hat is justified needs no excuse and the unjustifiable is sometimes excusable’. In the case of commissions of inquiry generally, and our example in particular, the idea of advancing a prescribed course of public policy based upon an excuse is counterintuitive: For Coady (2014, 10) and we would suggest, Williams (1978) dirty hands has to involve an admission of fault from which one is asked to be excused. Certainly the ILGRP did not evince any behaviour of this type: Justifications (we have argued) exhibiting particular characteristics (instrumental, yes, but of other types as well) were its *modus operandi*. As such, again, our Independent Panel is excluded from being engaged in a dirty hands scenario insofar as what they did not believe that what they were doing was morally wrong.

### *The complicity of citizens*

With respect to whether or not (if at all) citizens are complicit in dirty hands, Coady (2014, 13) explored the idea that a moral division of labour is legitimate alongside an instrumental one and that accordingly politicians have dirtier hands. Yet he is insistent that this does not

authorise leaders to do whatever they like in the pursuit of particular ends. This conforms to Williams' discussion (1978) generally: The character of the leaders is pivotal. Further, both emphasise that there is no unanimity of consent in democratic politics, particularly concerning everyday morally disagreeable decisions. In this respect, Williams (1978, 63) discusses the problem of victims, while Coady (2014, 14) puts the shoe on the other foot, arguing that: '[A]t least those of us who agree that [a particular decision] is right are involved in what they do and have some responsibility for it. Indeed, we are more than tainted, we are complicit'.

With respect to commissions of inquiry generally and the ILGRP in particular, for some individuals the dissolution of their political communities into larger entities might be a profound injustice. It may be that the political rhetoric of the local government sector – that local government is 'closer to the people' and that democratic voice and democratic choice' for local communities – are heart-felt and the objections to amalgamation, not merely on (contestable) instrumental grounds but on grounds involving identity and difference, are profound enough to conform to William's (1978) discussion of moral disagreeability. However, the idea of citizens' being morally complicit is dealt with far more readily using the idea of *determinatio*, suggesting that the situation is not one of dirty hands; i.e.: the amalgamation of local governments is not itself an absolute violation of justice; rather, the justice or injustice of the amalgamation would be contingent on the efficacy of the policy.

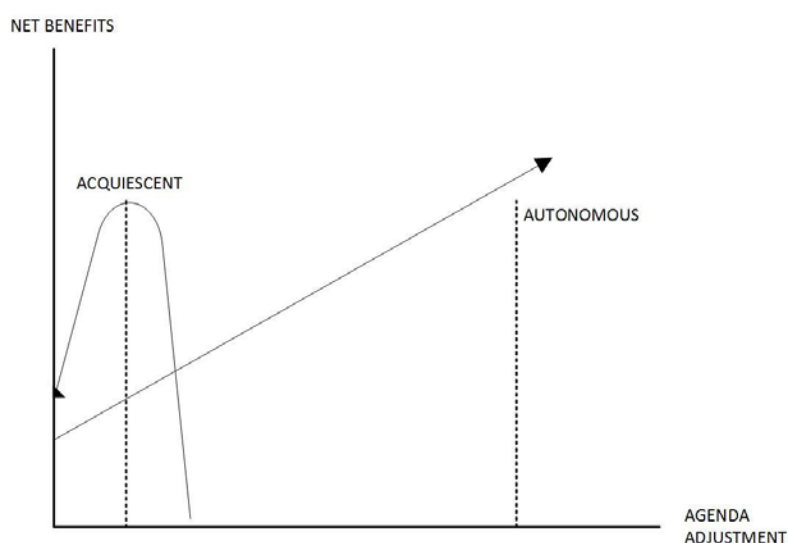
*Describing the circumstances that call for dirty hands: Wallis (2013)*

Coady (2014, 14-16) then turns his attention to how the circumstances of dirty hands are best described. Initially he is concerned with distinguishing between moral absolutism and dirty hands, arguing that if we align dirty hands with either Thomas Nagel's 'threshold ontology' or Coady's (2004, 778-9) own 'balanced exceptionalism', then the problem of dirty hands is

significantly militated against. In this context we will defer to an account of the actions of commissioners of inquiry that begins within the domain of the descriptive, but from which we can reflect upon the moral considerations therein. This account is based on the recent work of Joe Wallis (2013).

On this account, Wallis (2013, p. 11) asks us to accept that commissioners of inquiry have a strong motivation to undertake their work with earnestness and verve. Wallis (2013) argued that a lot is at stake *for the individual* when they are appointed to these roles: Appointment is based on their expertise, indeed eminence. However, they are also aware that in many instances the work of inquiries is simply left on the shelf: discarded for reasons of political expediency. Wallis (2013, 10) also asks us to accept (reasonably, we think) that any head of any inquiry will face a “fateful day” of existential choice ... on the day when the incumbent government makes public the degree to which it is prepared to endorse his [sic] policy proposals’. Further: ‘On that day, the commissioner will have to “come out of the closet” and “reveal his or her true colours” as either an *acquiescent* or an *autonomous* commissioner’. The choice is represented in Figure 1.

*Figure 1: Existential logic of commissioner behaviour*



Source: Adapted from Wallis (2013, 32).

Examining Figure 1, according to Wallis' (2013) 'analytic framework' all commissioners will initially be motivated to be judged as autonomous: As such, they will work to 'enhance the receptivity of the government to [their] proposals' (Wallis, 2013, 10). This is represented by the ideal-type curve in Figure 1 stretching diagonally across the graph, where the agenda of government coincides, over time, with the agenda of the commissioner. However, during the course of the inquiry *and* while waiting for the government's response commissioners realise that this might not eventuate. At that point (and despite their verve, indeed *authority* during the inquiry) they will realise that this glory might not be theirs. Yet the option for roundly and publically dismissing the government's response to their work is not realistically open: Their work is finished; they are *not* politicians. While they might privately dismiss the response of government they are hardly in a position to openly reject it. So the choice is *either* one of autonomy (represented by the diagonal curve across Figure 1) or acquiescence (represented in the curve at left that U-turns back and where the 'net benefits' on the Y axis are both diminished and short-lived). The benefits derived from acting in an *autonomous* manner and successfully shaping the agenda of a process of inquiry extend beyond the graph in that they mark a significant watershed in public policy formulation and implementation, benefitting the commissioner.

Either way, despite the stated, *necessary* requirement for separation during an inquiry, commissioners have a strong motivation for more or less continually assessing what the government is thinking. At the same time, governments will seek advance knowledge of the commission's thinking to plan policy to address the findings of any inquiry; additionally, they will want to guard against being caught off-balance by the findings and recommendations of an inquiry they themselves have commissioned.

In the example of the ILGRP, there are good reasons for arguing that Wallis' (2013) 'analytic framework' (although perhaps it is more accurately described as a theory) is an

accurate, general depiction of events. The consistent proclamation of independence is reiterated throughout the report and government documents. There is also evidence to suggest that the inquiry was undertaken in an appreciative (as opposed to acquiescent) mode: The production of a series of reports and extensive consultation suggests a revisiting of ‘reality judgements’ (in Vickers’ (1965) parlance) and the rhetoric of the Independent Panel is indeed appreciative – the ‘Final Report’ is titled ‘*Revitalising* Local Government’ (ILGRP 2013b; emphasis added). Did the Panel grasp the nettle of amalgamation with a view to the future (and their own posterity?) or did it acquiesce to the tacit wishes of government? We will possibly never know, but the point is that Wallis’ (2013) ‘analytic framework’ captures what was going on.

While not engaged in explicitly in ethical theorising, elements of Wallis’ (2013) analytic framework do touch on points of our discussion of ethics in our consideration of dirty hands. For example, it might be tempting to argue that the choice between the two ‘fateful choices’ offered by the framework is too stark. However, this either/or scenario does reflect Williams’ (1978, 58) account of ‘the politician as the originator of action’ or alternatively one who acquiesces ‘with respect to decisions which he does not help to make’. Further, it places what might be termed a roughly equivalent emphasis on the role of leadership as derived from both Coady (2014) and Williams (1978). This is not simply because it is concerned with those working within a concentrated realm of decision-making and responsibility that we (along with Williams (1978) and Vickers (1965)) identify as the political realm. Rather, it is because it focuses upon the ethical dimension of behaviour: In Wallis’ (2013) analytic framework the commissioner is depicted in a dialogue with herself about what it is a good course of action.

We are also concerned here with what Williams (1978) suggests we ought to be, namely in the *type* of person that we want our politicians to be. With both scenarios that

Wallis (2013) offers it is reasonable to suggest that it is precisely this kind of ethical reasoning that commissioners engage in. One sort of ideal-type commissioner – and her group – might behave in a more-or-less openly transgressive manner, seeking the opinions of her commissioning politicians, or behave in an Iago-like fashion to achieve the same ends. Another sort of ideal-type commissioner and her group might choose to act according to the strictures of legal proceedings when it comes to eliciting what the government really wants. But the reality is likely somewhere between these two extremes of behaviour. Williams' (1978, 64) injunction that we ought to want 'those who are reluctant or disinclined to do the morally disagreeable when it is really necessary' such that they 'have much chance of not doing it when it is not necessary' is wise. This brings us back to the problem of dirty hands.

## CONCLUDING REMARKS

Our central concern has been to investigate the ethical nature of the phenomenon whereby commissions of inquiry are accused of conforming to the wishes of their commissioning governments despite repeated proclamations as to their independence. Specifically, we investigated whether or not this constitutes an example of dirty hands. In addressing these related questions, our first observation is that dirty hands is a 'movable feast', varying between a narrow interpretation (Walzer's (2004) 'supreme emergency') on the one hand and a broader idea concerned with morally disagreeable, but nevertheless right acts of politicians on the other hand. Despite this moveability, the core feature of dirty hands is a contradiction or paradox that aligns with the 'blatancy of commissioning' (Giddens 2014) as we initially labelled it here.

We argued that two *prima facie* objections to the relevance of dirty hands to commissions of inquiry, namely the issue of moral gravity and the question of agency, can both be negated. Nevertheless, the phenomenon of a 'blatancy of commissioning' on the part

of both commissioners and their governments ought not to be labelled as an example of dirty hands for several reasons. Misleading claims to political realism aside, our account of *determinatio* derived from Waldron (2010) gives us an explanation for the depth of disagreement against findings of commissions generally and that of our case study in particular: There is a claim to a ‘natural’ order (though not, we hasten to add, a necessarily religious one) which may be characteristic of lawmaking generally. Further, on the account of Williams (1978, 64) the contradiction is addressed by recourse to virtue ethics: In the face of hard decisions we must trust that leaders (in particular, but not exclusively) have ‘a habit of reluctance [as] an essential obstacle against the happy acceptance of the intolerable’. Moreover, citizens are implicated in the actions of their leaders but this will not be all citizens all of the time; only those that agree with a commission’s findings and a government’s actions will bear responsibility (although less so) for these. The complexity of a democratic polity also diffuses any paradox.

Yet it is important that we understand the reason for the mislabelling that we have investigated here and the nature of the relationship between commissioning governments, those they commission and, in democratic polities, their constituents and the public more broadly. We argue that this arises from the consistent proclamation of independence by both parties. This is the source of the contradictory and paradoxical nature of commissions, for clearly they are not independent. The utility of the ‘analytic framework’ offered by Wallis (2013) is that it provides a more nuanced account of the ethical deliberations of those commissioned for the sake of advising on public policy. Wallis’ (2013) directs us to the ethical nature of the situation/s that commissions face.

Finally, there exists a profound gap between the work of commission scholars who examine commissions of inquiry from the perspective of political sociology (Prasser 1985; 2006; for example) and those engaged in designing and practicing appreciative inquiry. The

evidence that we have offered to support this assertion has admittedly been slim. Nevertheless it is borne out in the fact that while Prasser (2006) draws the distinction between inquisitorial inquiries and those conducted for public policy, a discussion of appreciative inquiry is absent from his work. The misunderstanding of what public policy commissions of inquiry do may well in part be due to a blurring of this type of inquiry with those that are inquisitorial. However, we would assert that it is also due to the relative invisibility of appreciative inquiry with political sociology as a discipline as well. The utility of Wallis' (2013) theory is not only that it provides a framework for understanding the ethical dimension of the work of commissions, it is also that it moves some way toward knitting the two traditions of analysis – political-social and appreciative. This renders a more interesting account of the work of commissions than the casual (and incorrect) accusation of dirty hands. Perhaps then the work of commissioners such as the individuals comprising the Independent Panel in our case study will in turn be appreciated rather than derided.

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