



CORRUPTION AND CRIME COMMISSION

PUBLIC LECTURE BY COMMISSIONER LEN ROBERTS-SMITH QC

TO

THE MURDOCH UNIVERSITY COMMUNITY

“COURTING CURRENT CHALLENGES”

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(The Commissioner spoke off these speech notes)



CORRUPTION AND CRIME COMMISSION

Thank you for inviting me here today. It is important for the Commission to reach out to the community to explain what it does and to receive feedback.

As part of its corruption prevention function, the Commission since its inception in 2004 has visited communities around the State to inform people about the role of the Commission and to better understand the misconduct issues they face.

Understanding the role of the Corruption and Crime Commission is not easy. Our Act is complex and still being relatively new legislation, needs interpretation and at times testing in the courts.

The title of this address, *Courting Current Challenges*, is most apt.

The Commission has been in existence for almost six years now and the Government is considering changes to the legislation which could have a profound effect on its future.

For that debate to be effective, the media and the community need to understand the complex environment in which the Commission operates.

Unfortunately, while the Commission is well known, it is not well understood. The public perception of the Commission is from the high-profile cases that are reported in the media - there has been no shortage of them.

By its nature, an anti-corruption Commission will come up against powerful people in the State. That's inevitable not only here but in other jurisdictions. One of the first people to lose their position after ICAC was set up in New South Wales more than 20 years ago was the Premier who established the Commission, Nick Greiner.

In Western Australia the CCC has been no less controversial. Four Ministers in the previous Government have lost their portfolios as a result of revelations at Commission public hearings, one Ministerial Chief-of-Staff has been jailed and another is facing trial, five back benchers have been affected by Commission investigations, charges against a former Premier, Brian Burke and former Minister, Julian Grill, are currently before the courts, and the administrative head of the Parliament faced serious charges.

Clearly, the Commission has created problems for Government.

However, when the Commission comes across an allegation of misconduct what is it supposed to do? Investigate it or say we cannot investigate that because the person involved holds a powerful position. I think the answer is obvious.

The Commission is at a critical point. The *Corruption and Crime Commission Act 2003* states that three years after the establishment of the Commission, the Act has to be reviewed.

That was done by Perth Barrister, Gail Archer SC, who has since been appointed as an Acting Commissioner to the Commission. Her recommendations included granting the Commission the power to itself directly investigate serious and organised crime (more of that later), the appointment of Assistant Commissioners and amendments to the Act to overcome a series of anomalies.

The reforms are being considered by Government but I am concerned that the discussion in the media and broader community is being distorted by myths being spread about the Commission by those who oppose it.

This is perhaps a consequence of how effective the Commission has been.

One of its functions is to conduct investigations into allegations of misconduct by public officers, establish and expose the facts about what has been going on, express opinions about misconduct by public officers and make recommendations directed to the maintenance of integrity in the public sector.

So the first current challenge is the spreading of myths, and self-interested false assertions about the Commission and how it operates, generated most frequently but often quite indirectly and surreptitiously, by those whose conduct has been exposed by the Commission or who have an apprehension that it will be.

I say at once, clearly and unequivocally, that I am not talking here about genuine, informed criticism or concerns based on a real understanding of what is contained in the Commission's legislation – the *Corruption and Crime Commission Act 2003* – or a knowledge of how the Commission actually does operate in fact and the legal constraints and principles which apply to it.

The Commission exercises serious powers. It is well aware of that. It recognises the importance of being subject to external scrutiny in the exercise of those powers and welcomes that scrutiny.

Let me give you briefly some idea of the sort of myths and false assertions of which I speak, and which I will go on to talk about in more detail later.

Myth 1: Organised Crime

It is still being said that the Commission is “wasting” its time and resources dealing with public officer misconduct – particularly concerned with politicians – when it ought to be applying its substantial powers to the investigation of organised crime.

One Member of Parliament asked would the public prefer the Commission to be chasing members of the Sword Boys or Members of Parliament.

Those who argue this often point to section 7A(a) of the CCC Act which says that one of the main purposes of the Act is:

“To combat and reduce the incidence of organised crime”.

However, they go on to explain that section 7B of the CCC Act says how those two purposes are to be achieved. That section says the Act’s (and therefore the Commission’s) purpose with respect to organised crime is to be achieved by being able to:

“... authorise the use of investigative powers not ordinarily available to the police service to effectively investigate cases of organised crime.”

In short, all the Commission can do is authorise the WA Police to use the exceptional powers in Part 4 of the CCC Act in police organised crime investigations. These powers include the holding of private hearings where witnesses can be compelled to answer questions, enhanced search powers and powers to stop, detain and search people.

The Commission itself has no power to itself investigate organised crime. Commission investigators are not permitted to take part in those investigations.

Myth 2

It is said that persons appearing before the Commission are denied legal representation. That is false. Section 142 of the CCC Act says that when appearing at an examination a witness may be legally represented and no witness before the Commission has been denied the right to legal representation.

Myth 3

That the Commission has a high failure rate in criminal prosecutions.

That too, is simply false. Of the 53 people charged by the Commission with criminal offences since January 2004 and whose cases have been concluded, 44 have been convicted. That is a conviction rate of 83%!

There is another and more fundamental problem with that criticism. It assumes that successful criminal prosecutions are the appropriate measure of the Commission’s success or effectiveness. That is a fallacy. The Commission is not about investigating and prosecuting criminal offences. As I mentioned, although one purpose of the Commission is *“To combat and reduce the incidence of organised crime”*, the Commission’s role there is very limited.

The other function is *“To improve continuously the integrity of, and reduce the incidence of misconduct, in the public sector.”*

So when the Commission conducts an investigation, it is a “misconduct” investigation, not a criminal investigation.

That fallacy underlay recent media criticism of the Commission that it is too costly and each conviction cost \$1.84 million.

This completely misses the main purpose of the Commission as started in its Act which is as I said “*To improve continuously the integrity of, and reduce the incidence of misconduct, in the public sector.*”

(s.7B(3)) It is to achieve that purpose by helping public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct.

The Commission has two functions in relation to misconduct.

(s.17) The first is that of helping to prevent misconduct by public officers. This is its prevention and education function.

(s.17(2)) That may be performed in a range of ways, including analysing intelligence or information which it gathers from its investigations or otherwise; reviewing systems used within public authorities to prevent misconduct; providing information to, consulting with and making recommendations to public authorities; providing educational information to the general community; generally increasing the capacity of public authorities to prevent misconduct by providing advice and training to those authorities; and reporting on ways to prevent misconduct.

(s.17(2)(ca)) The Act specifically requires the Commission to ensure that in performing all its functions, it has regard to its prevention and education function.

(s.18) The Commission’s second function in relation to misconduct, is to ensure that an allegation about, or a matter involving, misconduct is dealt with in an appropriate way. The Act calls this the misconduct function.

What the Commission may do in exercising that function includes:

- receiving or itself initiating allegations of misconduct;
- considering whether action is needed in relation to allegations and matters related to misconduct;
- investigating or taking other action itself if it is appropriate to do so, or referring the matter to other agencies or authorities so that they can take action themselves or in co-operation with the Commission;
- monitoring the way in which the other agencies or authorities do that;
- make recommendations and present reports on the outcome of investigations;
- consulting, co-operating and exchanging information with other agencies (such as the state or federal police, and other anti-corruption or crime commissions); and

- assembling and passing on to other agencies, evidence which may be admissible in a criminal prosecution or which may otherwise be relevant to the functions of that agency.

It is necessarily against that background of what the Corruption and Crime Commission Act says the Commission is to do, that I return to the claim that it is a “failure” because it has not produced enough criminal convictions or persons found guilty of disciplinary offences. The argument is alternatively put that the Commission often “gets it wrong” because of the number of criminal or disciplinary offences which it initiates or recommends, subsequently fail.

For the moment, I shall use the term “prosecution” to cover charges of both criminal offences and breaches of discipline.

It is apparent from what the Act requires the Commission to do, that the initiation or recommendation of prosecutions is only one tool – and one small part – of what the Commission does, to improve the integrity of, and reduce the incidence of misconduct in, the public sector.

“Misconduct” has a particular meaning in the Corruption and Crime Commission Act. The quite long description of “misconduct” in section 4 of the CCC Act includes corruption or other criminal offences committed by public officers in their official capacity, but it also includes a range of conduct which may not involve the commission of criminal offences.

For example, it covers conduct by a public officer which is not honest or impartial, or involves a breach of public trust, or the misuse of information or material obtained in connection with their public office, and which conduct is sufficiently serious that it could give reasonable grounds to terminate a public officer’s office or employment.

I emphasize that the Corruption and Crime Commission does not conduct criminal investigations. When it conducts investigations, they are investigations into allegations of misconduct as defined in the CCC Act – which may or may not involve the commission of criminal offences.

The Commission focuses its attention on the investigation of alleged misconduct in two ways.

First, it conducts investigations to form an opinion whether individuals have engaged in misconduct and to make recommendations whether disciplinary or criminal charges should be laid.

In some instances, the Corruption and Crime Commission will lay charges itself where appropriate.

Second and perhaps more importantly, the Commission seeks to identify and recommend improvements to systems, processes, policies and procedures in order to assist and prevent future misconduct in the public sector.

In this way the Commission is not merely focused on criminal conduct or breaches of discipline by public officers. Rather, it is required to consider how to improve the integrity of the public sector as a whole.

That may require inquiring into the systems and processes of public sector departments and agencies or other matters which would be quite outside the conduct of a merely disciplinary or criminal investigation.

A joint report by Griffith University and Transparency International,¹ referring to the NSW Independent Commission Against Corruption (ICAC), observed that:²

“Consistently with some elements of NSW political culture, integrity agencies such as the ICAC have been criticised for “not taking enough scalps” and emphasising education and prevention. However, the study confirmed that, while important, investigations and prosecutions should not be the sole measures of successful integrity agency activity, the crucial element being whether these investigations bring about wide change.”

The Report identified that a key challenge for integrity agencies is to direct their resources into investigations that promote organisational reform and cultural change.

This view was supported by the former NSW Premier, Nick Greiner, who I mentioned earlier.

The point is, that some prosecutions may well arise out of or be consequential on Commission misconduct investigations, but the ultimate objective of any such investigation must be to improve the integrity of, and reduce the incidence of misconduct in, the public sector.

In this context, that is primarily done by investigating and revealing the facts about the particular misconduct matter. The prevention and education function is served by the Commission exposing the relevant conduct to “the disinfectant of sunlight”.³

(s.7B(1)) In its investigations, the Commission is acting in the same way as a Royal Commission or other Commission of Inquiry – in fact the CCC Act actually establishes it as a permanent Commission of Inquiry.

In regard to investigations or inquiries into allegations of misconduct, the essential function of the CCC, as with any Commission of Inquiry is to ascertain the facts, report upon them and make appropriate recommendations. Prosecutions may or may not follow; and if they do, they may or may not be successful – but that is not the point of the work of a Commission of Inquiry, which is to find out the facts, reveal them and make recommendations.

Where the investigation or inquiry concerns an allegation of misconduct by a public officer, the Commission is to assess the evidence and express an opinion whether or not there has been misconduct. There are two things to note about that.

First, the Commission is not a court. It does not exercise judicial power and so it does not make legal determinations about guilt or innocence of criminal offences or breaches of discipline. In fact the Commission not only does not even express any opinion about those matters, it is specifically prohibited from doing so.

(s.23) Secondly, the concept of “misconduct” under the Act is not the same as a criminal offence or breach of discipline.

The Commission must apply the particular statutory definition set out in section 4 of the Act. I have already explained that.

In the course of its misconduct investigations, the Commission may come across evidence that public officers or others may have committed criminal offences.

The Commission has a number of options about how to deal with that, depending on the circumstances, including whether or not the possible offender is a public officer and the nature and extent of the apparent criminal activity.

The Commission may:

- refer the matter to another agency (eg WAPOL) for investigation;
- recommend consideration of prosecution; or
- itself lay criminal charges and prosecute them in the Magistrates’ Court.

In exercising that last option, the Commission may act on the advice of its own lawyers or seek the advice of the Director of Public Prosecutions before charging. In that respect, it operates in the same way as the Western Australia in relation to the circumstances in which it will seek the advice or engagement of the DPP. Like criminal charges laid by the police, if they have to be tried in the District or Supreme Court, the prosecution must be conducted by the DPP.

It is that context, since its inception in 2004 the Commission has charged 64 people with a total of 577 offences. Of those 64 people, 53 have had their cases resolved. Of those 53, 44 have been convicted of at least one criminal offence (a conviction rate of 83% - a high conviction rate by any standard). In total 296 charges have been dealt with, resulting in 240 convictions (a conviction rate of 81% by charge). The remaining charges are still before the courts.

Myth 4

A commentator and radio presenter as recently as last week, criticised the Commission for “going after public servants who were given toasters”, as the presenter described it.

They were talking about public hearings conducted by the Commission between 26 and 28 of last month as part of its investigation of possible misconduct by public officers concerned in the purchase of business consumables – in this instance photocopy or printer toners.

A “snapshot” of about 20 government agencies which had dealings with one particular corporate supplier, revealed that over a three-year period those agencies had purchased toner from that corporate supplier at a cost of some \$473,000. Had they purchased toner from a supplier listed under the government’s Common User Arrangement it would have cost \$157,000. Those purchases therefore cost the WA public purse \$316,000 more than they should have. Many of the purchasing officers were given gifts, which increased in value with the size of the order they placed.

Contrary to the impression sought to be created in the media discussion mentioned, the gifts were not insignificant. This was not just about a few toasters. The gifts ranged from \$50 or \$100 gift vouchers (sometimes \$1,000 worth at a time) to Ipods, digital cameras, coffee machines, and television sets. But it is not necessarily the value of the gift which is important; it is rather the amount of public money which is spent by the public officers who received the gifts. In one instance, a prison officer spent over \$111,000 on non-genuine toner cartridges. Had he bought toner cartridges under the Common User Arrangement (which he should have done) they would have cost only \$28,000 – a difference of \$80,000.

One witness who received gifts worth approximately \$5,000 was ultimately being offered airfares and holidays to Sydney.

Asked why he eventually stopped placing orders with the company, he said:

“ ... I started refusing the gifts because they were becoming, as I said before, outlandishly large. What stopped it all in the end was one afternoon I came back into the office after lunch and found a pamphlet with – from the CCC which covered exactly what I was doing basically. I read the pamphlet and realised, “What I’m doing here is wrong.”. I went straight to my manager and advised him of everything that had been happening, at which point the Port Authority started an internal

investigation. I ended up with disciplinary action and they told Premium Office to cancel all orders and not bother calling us again".⁴

So what does the Commission actually do?

Since it's inception on 1 January 2009 the Commission has:

- (a) tabled 32 reports in Parliament;
- (b) handled more than 12,000 allegations of misconduct of which it conducted more than 1,000 investigations and preliminary investigations itself;
- (c) to date has held 92 days of public hearings and 111 days of private hearings;
- (d) monitored more than 8,000 investigations into misconduct by agencies;
- (e) reviewed 9,390 investigations into misconduct by agencies;
- (f) given more than 400 corruption prevention seminars to the public sector attended by some 15,000 people;
- (g) oversighted allegations of misconduct against police, and has dealt with almost 7,000 allegations against police over the last five years (more than 1,200 in the last financial year);
- (h) has conducted Regional Outreach Programs in Broome, Kununurra, Kalgoorlie and Albany; and
- (i) the Commission's police review team last year visited every police district in Western Australia and conducted a spot check of all their complaint files.

If the success of the Commission is not to be measured by the number of criminal convictions coming out of its misconduct investigations, how can it be measured?

I suggest that should be:

- the extent to which departments and agencies have introduced or strengthened their systems and processes for preventing, identifying and dealing with misconduct (including corruption) as a result of the Commission's work;
- the extent to which attitudes of public officers to misconduct and their obligation to act always in the public interest have changed in a positive way; and
- the extent to which there is an increased awareness by public officers and members of the community, of the risks of misconduct in public office and the role of the Commission in relation to misconduct and corruption prevention.

It is undeniable that the Commission has had a significant impact across the public sector:

- (a) as a result of the Commission's Parliamentary report on the investigation of allegations of sexual contact between students and staff in the Department of Education, the Department now has a Professional Standards Unit to deal with integrity issues and allegations of misconduct;
- (b) the Department of Child Protection has gone down a similar path as a result of a Commission Parliamentary report;

- (c) the Department of Local Government and local governments around the State have demonstrated a greater awareness of proper governance such as correctly dealing with conflicts of interest; and
- (d) Western Australia Police have established a new storage facility and completely upgraded their system for storing court exhibits and other property.

Conclusion

Ultimately, the role of the Commission will be determined by the Parliament.

As I come to my conclusion, I want to return to the challenge of overcoming disinformation about the Commission and its role.

The particular proposition, or myth, is that the Commission is “wasting its time” dealing with misconduct by public officers because unless it is actually criminal corruption, misconduct is merely “trivial”.

The first point of course is that misconduct may actually or potentially be corruption.

The second point is that even where that is not so, the behaviours with which the Commission is concerned are nonetheless serious and strike at the heart of public confidence in the institutions of government.

The third point is that corruption or other serious misconduct often grows from relatively minor misconduct which goes unchecked.

What sort of conduct by public officers are we talking about?

We are talking about:

- Corruption, certainly, but also –
- Sexual or other assaults by teachers on children.
- Assaults by police or prison officers or railway transit officers.
- The stealing of drugs of addiction from hospitals.
- Fraud, or stealing public money or property.
- Drug dealing in the workplace.
- Unauthorised access to official (confidential) information.
- Unauthorised disclosure of official (confidential) information to benefit individuals.
- Acceptance of gifts or bribes for making decisions or giving favours.
- Vehicle licensing inspectors certifying vehicles as roadworthy without examining them.
- Secretly advancing the commercial or other interests of people with whom the public officer has a particular personal, commercial or political relationship (for example, government ministers approving development plans, council decisions on rezonings or council contracts, to the substantial financial benefit of councillors or staff).
- Making decisions for personal or other reasons which are not impartial, not honest, or not in the public interest.

- Breaching the trust placed in them as public officers to advance other interests.

The Commission believes the Western Australian community expects public officers to act with fairness, honesty and integrity and always in the public interest. Are we as a community prepared to accept public officers, however senior or junior they may be, acting with a lack of fairness, honesty or integrity, or to their own personal advantage or secretly advancing the private interests of other individuals?

Public officers who do act in that way subvert the institutions and very process of government.

There is nothing “trivial” about this. On the contrary, it is fundamental to community confidence in government, without which ultimately no government can function.

¹ “National Integrity Systems Assessment (NISA) Final Report” December 2005)

² Ibid, p.30.

³ US Supreme Court Justice Louis Brandeis, Harper’s Weekly article, December 20, 1913: “Sunlight is said to be the best of disinfectants”

⁴ Evidence of A D Trigg, Corruption and Crime Commission public hearing, 27 October 2009, p93.