BACKGROUND PAPER FOR

LECTURE TO ADMINISTRATIVE LAW STUDENTS

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No matter in what branch of the law you chose to practice, you are studying to become part of a profession that plays a critical role in today's community.

One aspect of administrative law which has great but still growing significance both in Australia and internationally, is that relating to integrity oversight bodies and particularly standing commissions of inquiry with jurisdiction in respect of public or private sector corruption, crime or other forms of misconduct.

The Corruption and Crime Commission of Western Australia ("CCC" or "the Commission") is one such body.

I started as Commissioner of the Corruption and Crime Commission in June 2007 taking over from the inaugural Commissioner Kevin Hammond, the former Chief Judge of the District Court.

The Corruption and Crime Commission started on 1 January 2004 as a result of recommendations contained in the Interim Report of the Royal Commission Into Whether There has Been Any Corrupt or Criminal Conduct by Any Western Australian Police Officers.

Sections 7A and 7B of the *Corruption and Crime Commission Act 2003*, ("CCC Act") describe the purposes of the Act and how those purposes are to be achieved.

> ***"7A Act's purposes***
>
> *The main purposes of this Act are –*
>
> *(a) to combat and reduce the incidence of organized crime; and*
> *(b) to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.*

7B How Act's purposes are to be achieved

(1) The Act's purposes are to be achieved primarily by establishing a permanent commission to be called the Corruption and Crime Commission.
(2) The Commission is to be able to authorize the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of organized crime.
(3) The Commission is to help 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."

Commission predecessors

The Commission did not start in a vacuum. It took over from the then Anti-Corruption Commission (A-CC) which for a number of reasons had lost the confidence of the government, public and media.

It is difficult to understand the legislation under which the CCC operates without some knowledge of the history of anti-corruption agencies in this State.

The first anti-corruption agency in Western Australia was the Official Corruption Commission (OCC) that was established in 1988 and acted simply as a post-box or clearing house for allegations of corruption by public officers.

The OCC consisted of three Commissioners and could refer allegations to a person or agency empowered to investigate the allegation. However, the OCC had no power to compel anyone to do anything.

In 1991 the *Official Corruption Commission Act 1988* was amended so that the OCC could report any finding of illegality to each House of Parliament. However, it could only present facts, not make findings nor express ethical or other judgments or opinions.

Further amendments to the Act followed in 1994 to allow the OCC to conduct preliminary inquiries so it could determine if there were reasonable grounds to refer a complaint onto an agency with the power to investigate it. The Commission was also granted the power to request information from any person or body and there was a $2,000 penalty for non-compliance.

In 1996, extensive amendments to the Act created the Anti-Corruption Commission (the title of the Act was also changed to the *Anti-Corruption Commission Act*). It was an independent body not subject to the directions of Government and was accountable to Parliament through a Joint Standing Committee.

It could undertake surveillance, utilize telecommunications interception and execute search warrants when authorized to do so by judicial warrant.

The A-CC only had an investigative and reporting function and could not determine the guilt of anyone. It also did not have the power to direct that disciplinary action be taken against a public officer or to initiate criminal prosecutions.

The A-CC's function was to receive allegations, carry out investigations or refer them to another agency to undertake investigations and to receive reports on those investigations.

The results of those investigations could be referred to the police, DPP or relevant department for disciplinary action.

Some of the difficulties that arose for the A-CC included:

- the secrecy under which the Commission operated. For example, media organisations couldn't even name the Commission and had to use phrases such as "an allegation has been referred to an organisation that cannot be named";
- the inability to hold public hearings, which weakened public confidence in its work;
- the non-disclosure provision under which the A-CC could decide what it did and did not reveal to its Parliamentary Joint Standing Committee, and
- the lack of an independent body to receive complaints about the A-CC.

The Parliamentary Joint Standing Committee made a number of recommendations to change the legislation including that:

- an Office of Parliamentary Inspector be established with extensive powers to audit the operations of the A-CC, investigate complaints against the Commission and evaluate its procedures, and
- the A-CC be allowed to initiate an investigation without an allegation having been made.

These recommendations did not, however, find their way into law.

General concerns were also expressed by the Joint Standing Committee about the secrecy of the A-CC, the level of protection offered to individuals being investigated by the A-CC and the extent to which the A-CC should and could make public the results of its investigations.

CCC Powers

In the meantime, under the *Royal Commissions Act 1968* and the *Royal Commission (Police) Act 2002*, the Government established a Police Royal Commission, the Interim Report of which, in December 2002, recommended the establishment of a Corruption and Crime Commission to replace the A-CC.

The Government accepted most of the Police Royal Commission's recommendations including giving extensive powers to the CCC. Each of the powers is constrained by appropriate checks and balances, including:

- The power to compel witnesses to attend an examination and give evidence. The evidence obtained in this way cannot be used to prosecute the witness. Evidence to do that has to come from other sources.

- The power to require the production of documents, other evidence and information and to enter and search public premises. The power can only be used for the purposes of dealing with allegations of misconduct.

- The power to obtain search warrants but only when a judicial officer is satisfied that there are reasonable grounds for doing so.

- The power to intercept telecommunications and use surveillance devices under the *Commonwealth Telecommunications (Interception) Act 1979* ("TI Act") and the *Western Australian Surveillance Devices Act 1998*, again on the basis and authorization of judicial warrants and subject to strict auditing.

- The power to authorize the acquisition and use of assumed identities in the course of the duties of officers of the Commission. Assumed identities must be used in accordance with the precise terms of the approval granted by the Commissioner. (The penalty if a Commission officer misuses an assumed identity is imprisonment for 3 years and a fine of $60,000).

- The power to authorize the conduct of integrity testing programmes to test the integrity of any particular public officer or class of public officer. Integrity testing programmes must be targeted and cannot be conducted randomly. Section 123(a) of the Act constrains the Commissioner from granting an authority in respect of a matter for which there is not an allegation of misconduct, unless each person to be tested is a police officer or a person of a prescribed class.

- The power to authorize the conduct of controlled operations. Controlled operations aim to obtain or facilitate the obtaining of evidence of misconduct and involve authorized persons engaging in controlled activities. A controlled activity is an activity for which a person would be criminally responsible but for Section 128 of the Act. Section 128 protects participants in authorized controlled operations from criminal charges.

  In granting an approval to conduct a controlled operation, the Commissioner must be satisfied that those taking part will not induce another person to engage in misconduct unless there is a suspicion that the person has previously engaged in such misconduct and that the operation is not likely to seriously endanger the health or safety of anyone, or result in serious loss or damage to property. Again, Section 122 (2) of the Act constrains the Commissioner from granting an authority in respect of a matter for which there is not an allegation of misconduct unless each person to be tested is a police officer or a person of a prescribed class.

The Commission is said to have the most complete set of powers of any anti-corruption agency in the nation. For example Queensland's Crime and Misconduct Commission does not presently have telecommunications interception powers.

Under the Queensland legislation, hearings are conducted in public unless there are reasons for them to be private. The reverse is the case in Western Australia where hearings are to be held in private but can be held in public if the benefits of public exposure and public awareness outweigh the potential for investigational prejudice or privacy infringements. This will often be a difficult decision, on which views may reasonably differ.

In New South Wales the Independent Commission Against Corruption (ICAC) and Police Integrity Commission (PIC) have coercive powers except for integrity testing.

Organised Crime

I now turn to the issue of the exceptional and fortification removal powers which are contained in Part 4 of the Act which deals with organised crime.

Division 1 of Part 4 provides the basis for and the control of the use of exceptional powers.

What this does is to enable the Commissioner of Police to make application to the Commission for the grant of the exceptional powers which mean those powers given under Divisions 2,3 4 and 5 of Part 4 of the Act.

Division 2 provides for the summonsing of witnesses to attend and produce and be examined before the Commission.

Division 3 relates to the entry and search provisions and the powers to stop, detain and search without warrant.

Division 4 relates to the assumed identity power, which is identical to the power which is granted to the CCC itself.

To use the organized crime powers, the Commissioner of Police has to apply to the Commissioner of the CCC for what the Act calls an "Exceptional Powers Finding", on the basis that if there are grounds for suspecting that a Section 5 offence (i.e. an organized crime offence) has been or is being committed.

The CCC can grant in writing permission for the police to use these powers if the CCC Commissioner is satisfied with the grounds for requesting those powers. The Commissioner can give directions limiting the exercise of the exceptional powers and revoke or vary directions and give further directions limiting the use of the powers.

In addition, there are strict requirements upon police officers using an exceptional power to give a written report within five days to the Commissioner of Police on each occasion upon which the power was exercised and, in turn, the Commissioner of Police must pass this report on to the CCC Commissioner as soon as is reasonably practicable.

In addition, the CCC Commissioner can also direct the Commissioner of Police at any time to give details of the use of an exceptional power.

I now turn to the Fortification Removal power.

Division 6 of the Act relates to the ability of the Commissioner of Police to make application to the Commission for the issue of a Fortification Warning Notice with respect to specified premises.

Under Section 68 (2), the Commission may issue a Fortification Warning Notice if satisfied on the balance of probabilities that there are reasonable grounds for suspecting that the premises to which it relates are –

"(a) heavily fortified; and
(b) habitually used as a place of resort by members of a class of people, a significant number of whom may reasonably be suspected to be involved in organized crime."

Organised crime is defined as meaning the "activities of two or more persons associated together solely or partly for purposes of the pursuit of which two or more Schedule 1 offences are committed, the commission of each of which involves substantial planning and organization".

If the Commissioner of Police can persuade the CCC to issue a Fortification Warning Notice then that notice can be given to the owners or occupiers of the premises.

Thereafter, the Commissioner of Police can continue Fortification Removal Action but the owners or occupiers of the Fortified premises may apply to the Supreme Court within seven days after the day upon which the notice is given to the owner of the premises.

The owner may seek a review of whether the Commissioner of Police could reasonably have had the belief required when issuing the notice. Therefore that decision of the CCC to issue a Fortification Warning Notice is reviewable by the Supreme Court if an application for that is made within seven days.

Those are the main powers of the CCC. Almost all the powers of the CCC, including the conduct of examinations, requiring production of material or other things, assumed identities, controlled operations, integrity testing and organized crime, are vested in the Commissioner of the CCC personally and are amongst a number of powers or duties that cannot be delegated. (Section 185 (2)).

Interestingly, the Government did not accept a Police Royal Commission recommendation to give the CCC itself powers to investigate serious crime as well as organized crime, however, this reform was recommended in a report that reviewed the CCC Act last year.

Both the previous and present State Governments have committed to bring in legislation to allow the Commission to directly investigate organised crime. The Commission and Police have made a joint proposal to the Government and the Joint Standing Committee on the CCC for the Commission to be permitted to actively investigate serious crime and organised crime and proposed a model for how that could be done.

Under the proposal, the CCC would be able to conduct investigations independently or in conjunction with WA Police, and State and Commonwealth law enforcement agencies. Investigations would only commence after referral from a Reference Group consisting of the Commissioner of Police and the CCC Commissioner.

Some of the Commission's most controversial aspects are telecommunications interceptions, the use of surveillance devices, the conducting of public hearings and oversight of the Commission.

Telecommunications Intercepts

Telecommunications interceptions are intrusive and before the Commission can undertake them it must establish the necessity for the process before an especially appointed Commonwealth judicial officer. That is because telecommunications are controlled by the Commonwealth Government under the Commonwealth Constitution. This means an application has to be made before the Commonwealth judicial officer to obtain the appropriate warrant to intercept telecommunications or communications devices.

Information has to be provided on affidavit to convince a judicial officer that the proposed interception is justified in the light of a number of criteria, including:

(a) the seriousness of the alleged offences being investigated, which must involve the investigation of a criminal offence punishable by imprisonment for at least seven years;
(b) the importance or significance of the evidence likely to be obtained; and
(c) information as to whether the evidence sought to be obtained could be obtained by any other means.

There has been some public observation that the CCC has some extraordinarily powerful powers in this connection but in fact, the powers are possessed by all Police Services in Australia and a number of other agencies declared by the Commonwealth under the Commonwealth legislation. The CCC is one such agency.

Those interception warrants when obtained must go through a registration process and their auditing and reporting upon by the State Ombudsman who acts as the agent for the Commonwealth Ombudsman is a complex and rigorous procedure - as indeed it should be.

A copy of each interception warrant must be lodged with the Attorney General of the State as soon as practicable after it is obtained, and in turn the State Attorney General must inform the Commonwealth Attorney General.

Additionally, however, there are significant checks and balances on dealing with intercepted information. These are imposed by the TI Act. In short, apart from the internal Commission constraints around the integrity, security and record keeping of such information, the Commission can only deal with it for permitted purposes – which are defined in the TI Act – and can only communicate such information to other persons and agencies where this is expressly authorised by the TI Act.

Surveillance Devices

Information from a Commission surveillance device placed in the home of a witness was used in the public hearings on Smiths Beach. The use of such a device is highly intrusive and an infringement of personal privacy, Nonetheless, at times this procedure may be the only way to obtain evidence critical to the investigation of serious allegations. The Parliament has recognised this by making the power available but subject to strict controls.

The Commission is one of the few bodies in the State permitted, under the *Surveillance Devices Act 1998 of Western Australia* (SDA), to use surveillance devices, such as listening devices and optical surveillance devices. The use of these powers is tightly constrained by that Act.

Under the SDA, the Commission can only use these devices under a warrant issued by a judge of the Supreme Court of Western Australia, except in a few special situations provided for in the SDA.

A Commission officer can obtain a warrant (as part of a specific investigation) if he or she satisfies the judge, on affidavit, that (amongst other things) there are reasonable grounds for suspecting a specified offence may have been or is likely to be committed and the use of a specified type of device is likely to yield evidence that will assist the Commission's investigation.

As with the TI Act, there are significant constraints on the Commission's use of surveillance devices. The Commission does **not** have a general power to use devices as and when it or any Commission officer feels they may be useful, or may provide interesting information.

The officer applying for the warrant must in the application address a number of criteria, such as the public interest generally but also, specifically, the nature and seriousness of the offence, the effect of using the specified device on the privacy of others and the value or weight of the information expected to be collected through the use of the device.

Warrants can be used for up to 90 days. If there is an operational need to continue the use of the surveillance device, another application has to be made to a Supreme Court Judge and a warrant obtained.

The SDA also controls how the Commission deals with information collected through the use of devices. For example, information collected must be stored in a secure area with appropriately limited access. Further, the Commission is constrained by the SDA as well as its own legislation in determining whether it can give information collected through a surveillance device to another person and in what circumstances.

As an aside, before any person can commence work at the CCC, at any level, he or she must be cleared to at least "Highly Protected" security status by an authorised delegate of the Commonwealth Attorney General and this is a lengthy and intrusive process.

There is an added protection in that all CCC staff at every level are required to take an oath or affirmation of secrecy before the Commissioner.

Officers of the CCC are subject to heavy penalties for revealing information without authority.

The Commission is particularly conscious of its considerable responsibility in using material it has gathered, only for authorised purposes.

In preparing for the conduct of examinations (that is, hearings), specific attention is paid to ensuring that only that material that is directly relevant to the hearing's scope and purpose is used. In doing this the Commission applies what it describes as a proportionality test.

Through this test the Commission assesses whether the revelation of the information is relevant to the matter being investigated, whether it is in the public interest and the potential for unfair damage to the reputation of individuals and/or organisations.

The Commission's position is that there can be no benefit to the public interest or indeed its own reputation in disclosing material that is not relevant, especially if it is only gossip or matters outside the scope of the investigation or it results in unfair damage to the reputation of the individuals and organisations concerned.

However, for all that, the significant revelations which have come out of public hearings of the Commission would have been impossible without telephone interception and surveillance devices powers.

Public Hearings

Public hearings – particularly those dealing with Smiths Beach and the general lobbying issues – have been controversial, particularly in terms of the damage claimed to have been done to the reputation of some witnesses.

It is important to appreciate that in fact most hearings are held in private.

The CCC Act states that hearings must be conducted in private unless the Commission considers it is in the public interest to hold the hearing in public (sections 139 and 140). That is, the Commission may open an examination – that is a hearing – to the public if having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.

Contrary to what is sometimes asserted, appearing before a public hearing by no means necessarily damages reputations of public figures. A good example is the former Minister for Agriculture and Food; Forestry; the Mid West and Wheatbelt, the Hon Kim Chance, whose integrity was impugned by Mr Burke. The Commission indicated to Mr Chance on completion of his evidence in a public hearing that it had no evidence to contradict what he had said.

The issues around public hearings were well explained by my predecessor, Commissioner Kevin Hammond. He said:

> "*many persons appearing as witnesses do so to assist the Commission. They are not the objects of its investigations and will not be adversely affected by the Commission's activities. Consequently, contrary to the views of some, a summons to appear before the Commission does not automatically signal a threat to their reputation or suggest any criticism of their actions in regard to any matter. In regard to the effect on the reputation of individuals it has been said that often any damage to a person's reputation resulted from the public revelation of his or her conduct. In that circumstance it was really the person's conduct rather than the Commission's revelation of it that damaged their reputation. That being said, the degree to which the reputations of individuals might be inadvertently adversely effected is a matter of careful consideration by the Commission."*

When witnesses are compelled to give evidence at a hearing, that evidence cannot be used against them in any criminal prosecution. However, obviously any admissible evidence gathered by the Commission from sources outside the hearing room may be used in a court.

Some lawyers have complained that their clients don't get a fair go because "the defence" (as they describe it) is not presented with all the available evidence beforehand.

This shows a fundamental lack of understanding of the process followed by Royal Commissions and Commissions of inquiry.

The Commission is an investigative body. A hearing before the Commission is not a trial. In a criminal trial, the defendant or accused person has been charged with a particular criminal offence. The prosecution is obliged to disclose all the evidence against the accused before the trial, so that they know what is the case against them. The prosecutor is required to prove that person's guilt beyond reasonable doubt. The defence does not have to prove the accused's innocence. The rules of evidence apply. The trial is conducted before a judicial officer (and perhaps a jury). The outcome (subject only to a legal appeal) will be a legally conclusive decision that the accused is either guilty or not guilty of the offence.

None of this applies to a Royal Commission or to hearings before any other investigative agency or commission of inquiry, such as the CCC. Those hearings are but part of an investigation to find out what the facts are. The Commissioner is an investigator. Any opinions expressed by the Commission in a report are just that – they do not determine any legal rights or obligations. They are in no way an exercise of judicial power.

Witnesses appearing before the Commission may be represented by lawyers. This does not necessarily mean they have a right to cross-examine the client witness or any other witnesses as the evidence is presented.

The hearings form part of a continuing investigation and in the absence of the knowledge of all of the evidence available to the Commission it is usually not in the witness's interests to be further examined by their counsel at that time.

Rather, lawyers representing affected parties will usually be given the opportunity to recall witnesses for cross-examination after all the evidence has been presented. This actually provides a higher degree of procedural fairness, because by then they know what other evidence has been given.

Lawyers for some people who are the subject of Commission investigations have sometimes complained that they did not have an opportunity to cross-examine witnesses to “test” their evidence. Again this reflects a misconception of the nature of the process. It is the responsibility of the Commission (primarily through Counsel Assisting) to test the evidence. The hearing procedures reflect that reality.

A lawyer representing a witness may, so far as the Commission thinks proper, examine that witness on any matter that the Commission considers relevant (s.143(2)).

In a civil or criminal trial before a court, the proceedings are adversarial. That means the judicial officer presides over the conduct of the proceedings but (to a very limited extent) is not involved in testing the evidence – that is done by the contesting parties.

However it is in the nature of an inquisitional inquiry that it is the Commission itself which is testing the evidence.

The CCC Act reflects that when it says (in s.142(5)) that the Commission may allow another person to be legally represented at an examination while a witness is being examined, if the Commission considers there are special circumstances. In other words, under the CCC Act, a lawyer representing a person is not allowed to be present while another witness is giving evidence, unless the Commission considers there are special circumstances.

As with Royal Commissions, the rules of procedural fairness do not impose any obligation on the Commission to notify any person that evidence may be given that is adverse to their interests before that evidence is given. This approach is well supported by legal precedent, for example *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.

The reason is that because in some cases advance notice might adversely affect the investigation and in others the Commission may not necessarily know that a particular name is going to be mentioned. The Commission is keenly aware that it is essential to conduct investigations of this nature with scrupulous care to avoid any prejudice to the investigation itself and to avoid unfair damage to the reputations of those affected.

The requirements of procedural fairness can also be met in other ways such as by giving the person an opportunity to reply to the allegations under oath or to make written submissions, before an adverse opinion is expressed in a Commission report.

Section 86 of the CCC Act states that before reporting any matters adverse to a person or body in a report, the Commission has an obligation to give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.

This means informing the person subject to an adverse mention in a report of what the Commission is considering saying about them. It does not necessarily involve forwarding the whole draft report (nor even extracts from it) to them.

Information sent to affected parties must be treated confidentially as the report is only a draft and it could be harmful to publish opinions that may well not be the final view of the Commission.

Factors that influence what is a reasonable opportunity include the seriousness of the adverse matter and whether the person has had a previous opportunity to consider or comment on adverse matters either in the course of the public hearing or in the period following the hearing during which submission or communication to the Commission may be made.

"Reasonable opportunity" is ultimately an objective test. It does not depend on the subjective view of one person concerned – nor indeed, the subjective view of the Commission. It follows, therefore, that it is not for the Commission to satisfy the person possibly affected that the opportunity to comment on a potentially adverse matter has been reasonable.

It will never be in the public interest that the tabling of a report be delayed for long periods by extensive argumentative correspondence nor merely by demands made in extensive and protracted correspondence from witnesses or their legal advisers, for particular or additional information which does not clearly and relevantly bear upon the possible adverse matters.

Benefits of Public Hearings

Generally speaking, the main benefits that result from the conduct of public hearings include:

1. The exposure of some of the matters raised may hopefully enable public sector agencies within the State to take immediate remedial action to ensure particular practices involving misconduct (including corruption) of which go to good governance, is not compromised. Some of the conduct being exposed may be seen to have such a malign effect that action to curb it cannot await the tabling of a Commission report in what might be some months in the future.

2. Public hearings enhance the public's confidence in the Commission's work. The public can see for itself and so judge for itself the conduct of the public officials and others which is being exposed, and the worth of the Commission's work.

3. It allows the public to become more aware of the range of matters that concerns the Commission and promotes awareness of public sector misconduct more broadly. Experience has shown the complaints of suspected misconduct brought to the Commission's attention increase during high profile public hearings. In some cases, people come forward with important additional information which advances the investigation which is the subject of the public hearing.

4. The educational benefit of public examinations of alleged serious misconduct for other public officers can be particularly significant for misconduct and corruption prevention.

In terms of the importance of openness, it is worth remembering the predecessor of the CCC – the A-CC – and how its Act forced the agency to operate in great secrecy. That quickly eroded the public's confidence in that organisation and its efforts to combat corruption in the State.

With regard to the potential prejudice to, or privacy infringements of individuals, the Commission acknowledges that public hearings may sometimes (but hopefully rarely) potentially come at considerable cost to some witnesses and their families. While it is not the Commission's intention to cause undue stress and discomfort to individuals, the overwhelming need must be to address the public interest in identifying the matters which it is expected will be raised during these hearings, which go to the heart of good and effective governance in this State.

An interesting statistic – as part of an independent survey of public officers, the question was asked whether the Commission should continue holding public hearings. 91.6% of those who responded believed the Commission should continue to conduct public hearings. The reasons included transparency, openness and sending a message to the community. There is good reason to think that reflects the general community view.

Accountability of the Commission

Rightly, the Commission itself is subject to very considerable oversight.

First and foremost the CCC is accountable to the Parliament. This occurs in four ways, namely through:

- the Joint Standing Committee on the CCC;
- the Parliamentary Inspector;
- annual auditing of its financial statements by the Auditor General; and
- the CCC's responsiveness to the annual Parliamentary Estimates process.

The last two need no further comment, I will however address the first two.

Joint Standing Committee on the CCC ("JSC")

The Committee comprises four Members, drawn equally from both Houses of Parliament and from the government and opposition parties. The Committee's functions are to:

(a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary inspector of the Corruption and Crime Commission;

(b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and

(c) carry out any other functions conferred on the Committee under the *Corruption & Crime Commission Act 2003*.

The JSC holds public hearings several times a year as well as private hearings in which the Commission can be questioned about its activities (although this does not include operational activities).

Parliamentary Inspector

The Parliamentary Inspector is an officer of the Parliament and is responsible for assisting the JSC in the performance of its functions (section 188(4)).

The current Parliamentary Inspector is the former President of the Court of Appeal, Mr Christopher Steytler QC. He has total access to the premises of the Commission, its staff and records at all times and can investigate allegations against the CCC and its officers, with the powers of a Royal Commissioner.

The Parliamentary Inspector may access all case and operational details and can interview any Commission officer on any matter at any time (section 196(3)).

In addition to being accountable to Parliament, the Commission is responsible to the Premier solely for budgetary purposes.

It is also relevant to its accountability, that the Commission is reliant on its reputation. The maintenance of that confidence is dependent on the broadly held perception that the Commission is effectively and appropriately performing its role. This means using its considerable powers in the public interest, but not in such a manner that it could be perceived as acting in trivial matters or somehow as not in the public interest.

In its approach to its own accountability the Commission recognises that it lives in its own "glass house" and so it seeks to meet its responsibilities for accountability stringently. It would do little for public confidence and reputation if the Commission was to breach those public sector standards to which it holds others to account.

Parliamentary Privilege

One of the most complex areas of law with which the Commission has to deal concerns Parliamentary Privilege.

The privileges, immunities and powers of each House of the Western Australian Parliament are derived from the *Parliamentary Privileges Act 1891*, which was enacted in reliance on s 36 of the *Constitution Act 1889*.

Parliamentary Privilege relevantly derives from Article 9 of the *Bill of Rights 1689 (UK),* which states that:

> *"The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."*

Section 27A of the CCC Act says that the Commission must refer an allegation of misconduct made against a Member of Parliament, not being serious misconduct, to the presiding officer i.e., to the Speaker of the Legislative Assembly or the President of the Legislative Council.

Section 27B of the CCC Act then requires the presiding officer to pass the referred allegation to the Privileges Committee. If the Privileges Committee decides to conduct an inquiry, it must do so by directing the CCC to act on its behalf. A report about the inquiry – either interim or final – can be made to the presiding officer and the Privileges Committee which must then present it to the Parliament.

That is for allegations the Act describes as "not serious misconduct".

Where an allegation of serious misconduct, (that is involving corruption or criminal conduct), is made against a member of Parliament, the Commission must deal with it in exactly the same way as an allegation of misconduct against anyone else.

If in dealing with such an allegation, the Commission were to be prevented from further investigation because of Parliamentary Privilege – that is Parliamentary Privilege prevented the Commission from having access to Parliamentary papers or interviewing Members of Parliament - the Commission would set out the results of its investigation to that point in a report which it would then present for tabling in Parliament. It would be for the Parliament to decide what to do after that.

Misconduct

The statutory jurisdiction of the Commission is to investigate or take over action in relation to public sector misconduct (as defined in s.4 of the Act). That includes corruption and other criminal offences, but also other conduct which might not be criminal. This point is important and requires further consideration.

This created an interesting situation following the tabling of the Commission's report on Smiths Beach in 2007 which generated a war of words between two media outlets. One claimed the report had "cleared" Messrs Burke and Grill while the other said that the lobbyists had *influenced or attempted to influence a string of senior public servants to engage in misconduct*.

These different responses suggest a need for better understanding of the Commission's statutory jurisdiction.

The Commission expresses opinions of whether misconduct may have occurred and makes recommendations.

"Misconduct" here is an important word. Agencies such as the CCC are an acknowledgement by Government that there is a need for agencies with special powers to not only expose criminal conduct beyond the reach of ordinary law enforcement powers, but also behaviour by public officers that while not criminal, strikes fundamentally at good governance and the public interest and is unacceptable to the broader community.

While the police deal with criminal behaviour, they are not set up to deal with misconduct in public office, the investigation of which can be very resource intensive, take a long time, does not necessarily result in criminal charges and often is only effectively countered in conjunction with education campaigns to help increase the awareness of the issues in government and the general public.

Examples of this type of behaviour can include improperly handling conflicts of interest, abuse of a position (commonly to benefit personal or private interests to the detriment of the public interest), the unauthorised access to and disclosure of confidential information, biased or preferential employment practices, allegations around contracts and tendering and the misappropriation of public funds or public property.

There is also the fact that public officers are expected to be held to a higher level of behaviour than the general community because of the power and influence they hold. They are entrusted with considerable discretion to carry out their everyday duties on behalf of the public honestly, with impartiality and in the public interest.

Of course, the activities described might well result in criminal charges but there is more often a level of behaviour beneath that level of culpability that is unacceptable in terms of laws such as the *Public Sector Management Act, the Local Government Act* as well as Codes of Conduct and so on.

There is what could be called a social contract between governments at various levels, be they federal, state or local, and the people. The basis of this social contract is that in return for the payment of taxes, government not only provides goods and services, but also protection from the arbitrary or malicious exercise of power by government itself or by public officers.

This protection incorporates policing and the administration of law, as well as protection from misconduct by corrupt public officers whose place of privilege and trust might enable them to exploit their position to gain a benefit for themselves or someone else or cause a detriment to others.

The word “misconduct” conjures up an image of school kids misbehaving in class but in fact can involve behaviour that strikes at the very integrity of the public sector and carries serious repercussions under the *Corruption and Crime Commission Act*.

“Misconduct” has a very specific meaning under our Act. A simple working definition is that misconduct occurs when a public officer abuses their authority for personal gain or to cause detriment to another person, or acts contrary to the public interest.

However, the Act is very specific in its lengthy definition of misconduct. First, there is what the Act calls “<u>serious misconduct</u>”, which occurs if a public officer:

- corruptly acts or corruptly fails to act in the performance of their functions;
- corruptly takes advantage of their employment to obtain a benefit for themselves or for another person or cause detriment to another person; or
- in acting in their official capacity commits an offence punishable by two or more years’ imprisonment.

The Act says that is “serious misconduct”.

Other misconduct prescribed by the Act (falling short of “serious misconduct”) includes public officers:

- acting in a way that adversely or could adversely affect the honest or impartial performance of their functions;
- performing their functions in a manner that is not honest or impartial; or
- misusing information or material acquired in connection with their function;

and where that conduct does or could constitute an offence against any written law, or would constitute reasonable grounds for dismissal if the public officer were employed under the *Public Sector Management Act 1994.*

The Act states that the Commission must make an assessment and form an opinion in regard to misconduct. This does not mean that the Commission acts as some roving moral guardian with its own idiosyncratic view of what’s in the public interest. The standards which the Commission must bring to bear in this area are governed by statute, or are to be found in relevant rules, regulations, codes of conduct or ethics and ultimately in community expectations of proper conduct in public office.

Generally allegations can come from the public or be reported by public agencies as required under the Act.

The Commission assesses the allegation and if it is in jurisdiction, determines how it is best handled, conducts or causes an investigation to be conducted into it, forms an opinion as to whether misconduct has occurred and makes recommendations as to prosecution, disciplinary action or on any other matter arising from the investigation.

The more serious allegations, or those requiring the powers granted to the Commission to undertake the investigation, are handled by the Commission itself. However, as may be expected, this is only a small percentage of cases – about 1% of all cases.

The majority of allegations (55%) are referred to the home agency for investigation with the Commission monitoring the progress of the investigation and then reviewing the outcome. In this way the Commission holds agencies to account. There are good reasons for handling allegations in this way.

One is the sheer volume of allegations received – more than 3,000 in the last financial year. Obviously, the Commission can investigate only a very limited number of those allegations itself.

Critically, the Chief Executive Office (CEO) of each public sector organisation has responsibility for and is required to address integrity and misconduct issues within their agencies. If they are unable or unwilling to address serious misconduct issues, then the Commission can step in.

The Commission can also conduct investigations in conjunction with another agency, refer them to the police for investigation, refer them to other independent authorities such as the Auditor General, or can decide to take no further action - which

happened in 13% of the reports of allegations of misconduct received last financial year.

So what happens after the Commission investigates allegations of misconduct?

The Commission may make assessments and form opinions as to whether misconduct has occurred. It may also make recommendations as to whether there should be a prosecution, or disciplinary action taken against a public officer or officers.

The Act stipulates that an opinion that misconduct has occurred is not to be taken as a finding or opinion that a person has committed a criminal offence or a disciplinary offence. That is because the Commission does not exercise judicial power and so cannot make legal determinations of guilt or innocence.

After the Smiths Beach report was tabled, one of the people adversely mentioned downplayed their mention by saying it was only an opinion of the Commission. That is, the Commission hadn't ruled on the guilt of the individual and that the matter was relatively trivial. That response, of course, missed the point.

As already explained, legally the Commission cannot rule on guilt and can only express opinions on whether misconduct has or may have occurred. That's as far as it goes. It's then up to other agencies – be it the courts, the Public Sector Commissioner, the Department of Local Government and Regional Development, or even individual local councils - to decide on the appropriate action according to their jurisdiction.

That is not to say that a Commission opinion that misconduct has occurred is a minor matter.

Forming and publishing these opinions in a report may affect individuals personally and professionally. It may affect relations between those adversely mentioned and their families, friends and acquaintances. Recommendations may lead to the laying of criminal or disciplinary charges. For these reasons the Commission takes great care in forming opinions as to the occurrence of misconduct.

The Commission's obligation to prevent future misconduct may necessitate expressing a critical view about that conduct because if unchecked or repeated in other circumstances, it may amount to, or lead to, misconduct.

PID Act

The *Public Interest Disclosure Act 2003* ('PID Act') provides protection to 'whistleblowers' who make disclosures of public interest information. In order for the information to be public interest information for the purposes of the PID Act, it must tend to show improper conduct within public bodies, such as the state public sector, local government or public universities.

Such improper conduct may include, for example, the substantial mismanagement of public resources or conduct involving a substantial and specific risk of injury to public health.

While the CCC Act and the PID Act establish two separate schemes, there are a few similarities between them.

The CCC Act and the PID Act both have similar aims – essentially both Acts seek to improve the integrity, accountability and transparency of the public sector.

In addition, both the CCC Act and the PID Act provide protection for the confidentiality of information disclosed under the relevant Act. For example, s.151 of the CCC Act prohibits the disclosure of information about witnesses who appear at Commission private hearings and any evidence they have given before the Commission except in limited circumstances. Similarly, s.16 of the PID Act prevents the disclosure of any information that might indentify a person who has made a public interest disclosure under the PID Act.

Part 3 of the PID Act provides protection against reprisals against, or victimisation of, people who make public interest disclosures. Similarly, under s.156 of the CCC Act, the Commission is able to make arrangements for the protection of persons who have assisted the Commission (for example, as a witness). This protection includes making arrangements to ensure the person's safety or to protect the person from intimidation or harassment.

There are also some differences between the CCC Act and the PID Act.

One major difference between the two Acts is that the CCC Act gives the Commission a number of powers to enable it to investigate allegations of misconduct. These include the power to obtain information or documents, the power to summons witnesses to attend a Commission hearing or produce things at a Commission hearing, and the power to search premises.

The PID Act on the other hand, does not confer any specific investigatory powers on a proper authority. In investigating a disclosure, the proper authority can only rely on investigatory powers it has under other pieces of legislation. Therefore, if a proper authority lacks sufficient power to investigate a public interest disclosure, it may need to refer the matter to another investigative body.

This leads to the main overlap between the CCC Act and the PID Act.

If the public interest disclosure relates to a possible offence under State law or improper conduct by a police officer, the disclosure may be made to the Commission as the proper authority. Where this occurs the Commission is not obliged to undertake an investigation under the PID but instead can deal with the allegation in accordance with the CCC Act.

The reason for this is that the Commission is exempted under subsection 12(1) of the PID Act from dealing with matters under the PID Act that relate to the Commission's functions under the CCC Act.

The benefit of this approach is that it avoids duplication and enables the Commission to use its investigatory powers to investigate the allegations. While this is occurring, the whistleblower is still protected from having his or her identity disclosed and is protected from reprisal.

Conclusion

Since its inception the Commission has done much to help the State take a strong stand against corruption and misconduct. Over the past five years the Commission has tabled 28 reports in the Parliament and held 92 days of public hearings involving 157 witnesses and 111 private hearings over 167 days. It has conducted 19 integrity testing programs and received and assessed more than 12 000 complaints and notifications of misconduct. That is almost 50 a week. Twenty-three per cent of the allegations investigated were substantiated. The Commission has monitored 7 300 investigations by agencies and departments into allegations of misconduct. It has reviewed the outcome of 8 500 completed investigations into alleged misconduct by agencies and departments. It has charged 58 people, including 34 public officers, with 458 criminal offences and, of those charges, had a conviction rate of more than 88 per cent. It has delivered more than 380 corruption, prevention and education sessions and 450 consultations involving 13 500 people for a range of Western Australian public authorities in metropolitan and regional areas. It has recently launched the misconduct resistance framework, an Australian first, which assists agencies to assess their particular misconduct risks and appropriately deal with them.

It has been working closely with the State's other oversight agencies as part of the integrity coordinating group to improve and streamline oversight, and has been an integral member of the Australian Public Sector Anti-corruption Conference along with the New South Wales Independent Commission against Corruption and Queensland's Crime and Misconduct Commission. These conferences help increase the knowledge around corruption issues and improve cooperation between agencies. This shows the extent to which the Commission has been fulfilling one of its main purposes under the Act, which is to improve continuously the integrity of, and reduce the incidence of misconduct in, the public sector.

Since the Commission started five years ago, the list of charges and convictions include corruption, bribery, stealing and receiving, disclosing official information, drug offences and unlawful use of computers. They are serious offences that need to be acted on. But below the level of criminality is a layer of behaviour that corrodes the integrity of the public sector and with which only an anti-corruption agency can effectively deal and help implement the appropriate changes to policies and procedures. Most of our work never hits the front page. It is quietly working with agencies and public officers to improve processes to lessen the risk of misconduct and their capacity to deal with misconduct when it does occur.

The CCC has achieved a great deal in its first five years of operation – but if the experience of the CMC in Queensland and of ICAC and the Police Integrity Commission in New South Wales are any indication, there is much to do along the road ahead.