



**CORRUPTION AND CRIME COMMISSION  
OF WESTERN AUSTRALIA**

**THE CORRUPTION AND CRIME COMMISSION**

**“WHERE IS IT AT” ?**

FRIDAY 26 MARCH 2004

**BY COMMISSIONER KEVIN HAMMOND**

EDITED ADDRESS ON  
THE CORRUPTION AND CRIME COMMISSION – WHERE IS IT AT  
BY COMMISSIONER KEVIN HAMMOND

AT A SYMPOSIUM ON  
HUMAN RIGHTS AND THE PROTECTION OF INNOCENCE  
ORGANISED BY THE INSTITUTE FOR ADVANCED STUDIES  
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Place: Parmelia Hilton Hotel  
Mill St  
Perth

The Corruption and Crime Commission was established by the Corruption Crime Commission Act 2003 which was passed by the Parliament of Western Australia in the last sitting days of December 2003 and proclaimed to come into effect on the 1st of January 2004.

Sections 7A and 7B of the 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.

*(Section 7A inserted by No. 78 of 2003 s.7(2).)*

### **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.

*(Section 7B inserted by No. 78 of 2003 s.7(2).)*

For ease of reference, I will use the already common shorthand for the Commission namely "The Triple-C". I hope I am able to provide the information you may want to know about the Triple-C given that the organization only started on the first of January 2004 with three people.

We are progressively advertising for permanent staff that will be gradually coming on board until we reach our anticipated full complement of about 150.

It is appropriate that the Triple-C is discussed at this forum entitled *Human Rights and the Protection of Innocence* as the Triple-C has arguably the most extensive powers of any external oversight body in the nation.

The Triple-C has virtually inherited the powers given to the Police Royal Commission so in effect, will be able to operate as a standing Royal Commission and there are obviously human rights implications. But more of that later.

These powers need to be seen in a context so at this point I think it would be useful to look at the evolution of these powers over the last 16 years.

The Official Corruption Commission was established in 1988 and acted as a postbox or clearing house for allegations of corruption by public officers.

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

In 1991 the Official Corruption Commission Act was amended so that the O-C-C could report any finding of illegality to each House of Parliament. However, it could only present facts, not express ethical or other judgments.

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

In 1996, extensive amendments to the Act created the Anti Corruption Commission. It was an independent body not subject to the directions of Government and 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-C-C 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. In contrast, the Triple-C can make recommendations on prosecution, disciplinary action or for further action but note Section 43 (6) of the Act which provides:

**43 (6)** A recommendation made by the Commission under this section is not a finding, and is not to be taken as a finding, that a person has committed or is guilty of a criminal offence or has engaged in conduct that constitutes or provides grounds on which that person's tenure of office, contract of employment, or agreement for the provision of services, is, or may be, terminated.

*(Section 43 inserted by No. 78 of 2003 s.17.)*

The A-C-C'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 difficulties that arose from the A-C-C included:

- The inability to hold public hearings,
- The non-disclosure provision under which the A-C-C 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-C-C.

Since 1998 the Joint Standing Committee has made a number of recommendations including that:

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

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

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

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-C-C.

The Government accepted most of the Police Royal Commission's recommendations including giving extensive powers to the Triple-C. I observe here that each of the powers is constrained by appropriate checks and balances which I will now illustrate:

- 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 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 only 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 me. I might add the penalty if a Commission officer misuses an assumed identity is imprisonment for 3 years **and** a fine of \$60,000.

As with most penalties applying to the Triple-C Act, the punishments are substantial.

- 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 me 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, I 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 me 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.

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.

I deal firstly with Division 1 of Part 4 which 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 summoning 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. Division 4 relates to the assumed identity power which powers are identical to the powers which are granted to the Triple-C.

To use the organized crime powers, the Commissioner of Police has to apply to me if there are grounds for suspecting that a Section 5 offence i.e. an organized crime offence has or is being committed.

The Triple-C can grant in writing permission for the police to use these powers if the Triple-C Commissioner is satisfied with the grounds for requesting those powers. The Commissioner can give directions limiting the exercise of exceptional power 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 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 Triple-C Commissioner as soon as is reasonably practicable.

In addition, the Triple-C 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 which 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 Triple-C 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 within seven days after the day upon which the notices given to the owner of the premises apply to the Supreme Court.

He may seek a review of whether the Commissioner could reasonably have had the belief required when issuing the notice. Therefore that decision of the Triple C to issue a Fortification Warning Notice appears in terms to be reviewable within seven days thereafter.

Those are the main powers of the Triple-C. I observe here that almost all of the powers of the Triple-C, including the conduct of examinations, requiring production, assumed identities, controlled operations, integrity testing and organized crime, are vested in me as Commissioner and are amongst a number of duties that cannot be delegated. (Section 185 (2)).

Interestingly, the Government did not accept a Police Royal Commission recommendation to give the Triple-C itself powers to investigate serious crime as well as organized crime.

The legislation to establish the Triple-C was introduced into Parliament in early 2003.

It was referred to the A-C-C Parliamentary Standing Committee that made 68 amendments – with the main changes concerning the role and the powers of a Parliamentary Inspector with the power to oversee the new agency and investigate any complaints.

The committee was particularly and rightly concerned that there was a proper balance between the power and accountability of the new body.

The Act eventually came into operation on January first this year and I feel that the balance between the power vested and the accountability required has created an agency that will serve the State well.

As you may know, a senior barrister, Malcolm McCusker Q-C, has taken on the role of Parliamentary Inspector. He has complete access to all Triple-C documents, can require Triple-C officers to supply information or produce documents, order Triple-C officers to appear before an inquiry and investigate complaints against the agency with the powers of a Royal Commissioner.

The Triple-C has to notify the Parliamentary Inspector whenever it receives allegations against officers of the Commission and the Inspector has the power to take over that investigation.

However, the Parliamentary Inspector doesn't have to wait for a complaint but can initiate his own inquiries, act on the request of a Minister or in response to a request by either House of Parliament or the Standing Committee.

The Standing Committee for the Triple-C has not yet been established so its powers and jurisdiction will need to be defined by the Parliament. However, the Standing Committee cannot access operational details – that can only be done by the Parliamentary Inspector.

The Parliamentary Inspector and Standing Committee are perhaps the most important of the checks and balances on the Triple-C's use of its powers. But another is the use of public hearings.

The legislation provides that an examination shall be in private (Section 139 (1)) but "The Commission may open an examination to the public, if having weighted the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements that it is in the public interest to do so".

*(Section 140 (2)).*

The issue of public hearings versus private hearings is one that has received judicial review in other jurisdictions see ICAC V Chaffey (1992) 30 NSWLR 21 – "The scrutiny of impugned conduct in public has a disinfectant effect: reference has often been made to "the disinfectant effect of sunlight". Per Mahoney J

Public hearings are one of the best ways of showing that justice has been done, that the right questions have been asked and that a matter has been taken as far as it can be. It's arguable that the A-C-C suffered from the fact that it could not conduct public hearings. The downside of public hearings is that innocent people may have their reputations tarnished and as Commissioner, it is my job to limit that as much as possible and to be mindful of the issues prescribed in Section 140 (2) as to the overall public interest.

One reason for conducting private hearings is to test the validity of allegations to protect the reputation of those subject to unfounded allegations. I might add that the penalty for making false allegations to the Triple-C is heavy – 3 years imprisonment and a fine of \$60,000.

This is, for example, to prevent candidates making malicious allegations to the Triple-C to damage the reputation of an opponent before an election.

The Triple-C needs its powers if misconduct and corruption is to be effectively reduced. It is particularly difficult to investigate serious allegations against police as they are themselves trained investigators. They know what evidence is needed for a conviction, the methods used by investigators and how to get around them. In fact, with the technology available to those acting corruptly, it is becoming more and more difficult to gain evidence, even outside the police area - so the Triple-C's powers are critical if it is to perform its misconduct function.

So how do the Triple-C's powers compare to other agencies? The ACC did not have integrity testing, controlled operations or assumed identities and as there was no Parliamentary Inspector.

Queensland's Crime and Misconduct Commission does not have telecommunications interception powers and has a Public Interest Monitor, a Parliamentary Inspector and a Parliamentary Standing Committee. Under the Queensland legislation, hearings are conducted in public unless there are reasons for them to be private.

As I have said the reverse is the case in Western Australia where hearings 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 call.

In New South Wales the Independent Commission Against Corruption or ICAC and Police Integrity Commission have coercive powers except for integrity testing. Both agencies have a Parliamentary Inspector and Standing Committee but no Public Interest Monitor.

In three years' time the Act under which the Triple-C operates will be reviewed as to its operation and effectiveness by the Minister. Additional areas to be considered in the review include:

- A multi person Commission. At the moment I am the sole Commissioner though there is a provision to appoint Acting Commissioners;
- The appointment of up to two Assistant Commissioners;
- Extension of Jurisdiction to cover private companies undertaking public functions. At the moment the Triple-C only looks at misconduct issues from more than 130-thousand public officers in some 600 Government agencies;
- The Triple-C having an investigative crime function;
- The need for a public interest monitor;
- The Commission performing a witness protection function; and
- The Commission taking over the confiscation of proceeds of crime from the DPP.

Information handed over to the Triple-C is subject to strict duties of non-disclosure.

The Act places firm limitations on the disclosure of that information which is limited to the purposes of the Act, conducting an investigation or for prosecution or disciplinary action. All Triple-C staff at every level are required to take an oath or affirmation of secrecy administered by me.

Officers of the Triple-C are subject to heavy penalties for revealing information without authority and I'm pleased to say that the track record in this area in the Police Royal Commission and the A-C-C has been very good.

Which leads to the protection of those who make complaints to the Triple-C. Complementary with the Government's recently passed Public Interest Disclosure or "Whistleblowers" Act, there are significant protections under the Triple-C Act which include heavy penalties for victimising, dismissing or causing injury or detriment to a person who has appeared before, or given evidence to, or helped the Triple-C. From my side, every protection available will be given to whistleblowers as they are such an important source of information for oversight agencies.

I may have dwelt too long on powers and checks and balances as I feel the real benefit from the Triple-C will come from the work of our Education and Prevention Directorate and I return to our statutory function of helping to prevent misconduct.

The Triple-C will provide capacity building assistance to agencies and local government throughout the State to implement risk management, training and education programs to combat misconduct and make recommendations on necessary changes to procedures from the intelligence gathered in the course of its investigations.

The experience of the ICAC in New South Wales – which has been in operation for 16 years and which is well documented in the public arena, is towards a greater emphasis on education and prevention and I certainly see that as being where the Triple-C will be really effective.

While the rights of those who appear before external oversight agencies are important, these agencies have a broader human rights agenda – to protect the public's rights when dealing with the public sector. Ultimately, external oversight agencies don't serve agencies, don't serve a Minister and don't serve Government. They serve the people.

Finally, I'd like to quote from a speech given by Shirley Heafey, Chair of the Commission for Public Complaints against the Royal Canadian Mounted Police given to the University of Ottawa Faculty of Law last October.

Appropriately, the paper was titled *The Need for Effective Civilian Oversight of National Security Agencies in the Interest of Human Rights*.

Ms Heafey listed five key elements when determining if a civilian oversight agency is effective. They are:

1. Independence – is the agency beholden to the police or security force? Is it beholden to the Minister or Government?

2. Powers – Is the process complaint driven or can the agency audit such activities as it sees fit?
3. Information – does the agency have ready access to all relevant information or does the police or security force control what it sees?
4. Resources – are there enough?
5. Reporting – does the reporting mechanism put the issues in the public domain.

I think the Triple-C measures up fairly well against each of these criteria.

Thank you for inviting me here today and for your attention.