



**CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

“MISCONDUCT – IS THAT ALL THERE IS!”

Address by

Commissioner the Hon Len Roberts-Smith RFD, QC

at

Edith Cowan University

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Professor Kerry Cox, Vice Chancellor of Edith Cowan University,

Professor Robert Harvey,

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Ladies and Gentlemen

Thank you for inviting me to speak to you today.

The two main purposes of the *Corruption and Crime Commission Act 2003 (WA)* (and so of the Commission itself) are first to combat and reduce the incidence of organized crime and secondly, to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector. Today I will confine myself to the second of those.

In my short time as the Commissioner of the Corruption and Crime Commission since June this year, it has become apparent to me that there is not necessarily a very good understanding in the media and the wider community of what the role of the Commission actually is, and how it works. So I thought today would be a very good opportunity to say something about both.

The nature of the Commission's work means much of our contact with the public is done through public hearings, the tabling of reports in Parliament or by the education sessions we conduct with public officers around the state. Unfortunately, it's not always possible to address some important, complex issues with those means of communication.

This became apparent following the tabling of the Commission's report on Smiths Beach this month. The report prompted a public debate which is still continuing and I dare say will continue for some time.

That debate extended to a war of words between two media outlets with one claiming our report on Smiths Beach 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.

“Misconduct” here is an important word. To understand its significance it’s necessary to consider how anti-corruption agencies came about. Interestingly, in Australia they have been set up in New South Wales, Queensland and Western Australia – all states that have had Royal Commissions into police corruption (though the Independent Commission against Corruption (“ICAC”) in NSW was set up prior to the Wood Royal Commission in that State).

Anti-corruption agencies 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.

Another reason for anti-corruption agencies is 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 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.

Investigating this type of activity can require sophisticated and powerful techniques. That is one reason anti-corruption agencies in Australia have been given the powers of a standing Royal Commission.

This is part of what could be called a social contract that exists 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 powers granted to anti-corruption agencies are also necessary as unfortunately long experience has shown that some witnesses are prepared to swear an oath or take an affirmation to tell the truth but nonetheless lie to conceal corruption or misconduct. It's a disturbing phenomenon that strikes at the heart of our system of law and government. One of the most effective ways of countering this practice is through the use of objective forms of other evidence such as that from telephone intercepts or surveillance devices.

The debate generated by the tabling of the Commission's Smiths Beach report is why today I particularly wanted speak on the topic *Misconduct is that all there is!*

The word 'Misconduct' here is used in a particular sense.

The word 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*.

The word "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 "serious misconduct", which occurs if a public officer:

- Corruptly acts or corruptly fails to act in the performance of their functions, or
- 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".

Misconduct which the Act describes as "not serious misconduct" includes public officers/doing any one of the following four things:

- 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
- Breaching the trust placed in them
- Misusing information or material acquired in connection with their function

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 you may expect this is only a small percentage of cases – about 1% of all cases.

The majority of allegations (71%) 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 2,100 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 with its considerable powers.

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 15% 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 recent 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 I have said, 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 Department of Premier and Cabinet, 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 can also express an opinion on conduct that falls short of misconduct.

This may involve explaining that while the conduct is undesirable, inappropriate, unwise, imprudent, dangerous or whatever, it does not fall within the definition of misconduct under the CCC Act.

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.

The type of behaviour the Commission mentioned adversely in the recent Smiths Beach report included:

- Agreeing to appoint a departmental officer preferred by a lobbyist to write a report on the development in preference to other officers
- A departmental head having a surreptitious, private lunch with the lobbyist for a developer while his department was considering an application from the developer
- Recommending the deferral of a proposal after being approached by the lobbyist for the developer without declaring the contact

- Agreeing to appoint a lobbyist's candidate to a government board when the merit of the candidate was unknown
- A councillor failing to declare a personal relationship with a lobbyist for the development before voting on motions affecting the development
- A councillor failing to declare gifts received from the developer before voting on motions affecting the development

Outside a legal framework, the Commission believes the public finds this type of behaviour unacceptable and a threat to good government. Interestingly, some of those adversely mentioned in the report strongly contended that they had done nothing wrong.

This could mean that the practices have been going on for years and are considered the norm despite the various legislation and codes of conduct, or there is a genuine lack of recognition that these behaviours are seen as a problem.

The fact is that community standards are changing and the public today expects a high degree of integrity in its public sector. Those who don't meet those standards risk paying a heavy price particularly as the media today is more pervasive and aggressive in reporting allegations against public officers.

The story so far covers public officers. However, if non public officers are involved in the allegations of misconduct, under the Act the Commission has only two choices – recommend they be charged with a criminal offence or do nothing at all. As a substantial level of proof is required for a criminal charge, non public officers may escape mention as the Commission cannot form opinions of behaviour even if it considered that to be highly undesirable, unless what they have done has caused, or been likely to cause, misconduct by public officers.

As was said in the Smiths Beach report, in order to avoid further delaying the tabling of the report, comment on non-public officers, particularly Messrs Burke and Grill, was limited to reporting the facts concerning their actions as revealed in the Commission's investigations. This was due to the considerable debate about the power of the Commission to make comments on allegations of misconduct by non-public officers.

However, as the Commission deals with these issues over time the way in which the legislation sets out how these matters should be dealt with will become clearer.

This contrasts with ICAC in New South Wales where the jurisdiction extends to corrupt conduct by any person – whether or not they are a public official. Similarly, in Queensland, the Crime and Misconduct Commission ("CMC") is not constrained in its ability to make adverse comments in relation to persons other than public officers.

I would like to elaborate on three aspects of the recent hearings that have caused confusion. They are the impact of Parliamentary Privilege when investigating Members of Parliament, the necessity to notify witnesses at public hearings of adverse mentions in reports before they are tabled, and the process of public hearings.

Parliamentary Privilege

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 can then present it to the Parliament.

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

If the allegation is serious misconduct, that is involving corruption or criminal conduct, the CCC Act does not state what should happen. However, if the Commission did receive an allegation of serious misconduct, it would deal with it as any other allegation, not referring it to the presiding officer.

If in dealing with 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.

Informing witnesses of matters adverse

Under the Act, 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 report to them.

There is a legal requirement that information sent to affected parties has to 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 in which submission or communication to the Commission may be made.

Reasonable opportunity is an objective test. However, it should be noted 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.

And it is certainly not the role of the Commission to answer lengthy correspondence requesting particulars and claiming or demanding compliance with that section of the Act by provision of detailed evidence, reasoning and provision of the full text of a draft report.

It will never be in the public interest that the tabling of a report be delayed for long periods by extensive correspondence or by complying with demands made in extensive and protracted correspondence from witnesses or their legal advisers.

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. 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 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.

A current example is the experience of Wanneroo Mayor Mr Jon Kelly, recently re-elected for the third time, despite early media publicity about him being called as a witness in a public hearing before the Commission. On 22 October 2007 the “West Australian” reported his re-election under the headline “CCC Spotlight – No trouble as Wanneroo Mayor Lands Treble”. The paper quoted Mr Kelly as saying – “I don’t think I was actually accused of anything at the CCC, so it hasn’t had any impact on my election at all.”

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, evidence cannot be used against them in any criminal prosecution. However, obviously any evidence gathered by the Commission from sources outside the hearing room is admissible in 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.

This 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, 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 – and no more than that.

While 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.

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.

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.

Benefits of Hearings

As Commissioner Hammond has previously pointed out, generally speaking, there are three main benefits that result from the conduct of public hearings.

First, 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.

Second, 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.

And third, the educational benefit of these public examinations of alleged serious misconduct for other public officers cannot be overestimated.

Additionally, a specific benefit of public hearings is that the exposure of some of the matters raised may hopefully enable public sector agencies within the State to take immediate remedial action to ensure 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.

In terms of the importance of openness it is worth remembering our predecessor – the Anti-Corruption Commission – 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) 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.

The Commission public hearings in February and March this year dealt with allegations of public officers in relation to the actions of certain lobbyists, specifically Mr Burke and Mr Grill.

The Commission's investigation of these matters is continuing. The Commission intends to publish a series of reports on the outcomes of these investigations.

An important issue currently for the Commission is the review of the legislation being undertaken by the Attorney General as required under the Act three years after its commencement. That will hopefully address a number of difficulties that I have identified.

The Joint Standing Committee on the Corruption and Crime Commission – which oversees our work on behalf of the Parliament – is also considering our powers in terms of the organised crime function. I understand that will also be considered in terms of the Attorney General's review.

An interesting statistic – as part of an independent survey of public officers, we added a question 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. I would be very surprised if that did not reflect the general community view.

Commissioner Hammond described the intention of the Commission's February/March public hearings as being "to address the public interest in identifying the matters raised during these hearings that go to the heart of good and effective governance in this State".

The evidence already obtained in public hearings raises a number of questions for the people of Western Australia. One of the most important of those is to what degree is it appropriate for a select few to have privileged access to confidential information and for special consideration to be given to the interests of a lobbyist's client provided secretly and in such a manner that the public officers seek to deny any involvement when confronted with the facts of their involvement.

The vast majority of public officers in Western Australia are dedicated and committed servants of the public and are doing a great job.

It is not the intention of the Commission to slow down or inhibit the processes of government. It is rather to foster and sustain a culture across the public sector, and at all levels of it, that ensures decisions are made in the public interest and not as the

result of secret influences, or pressure, in the private interests of individuals or corporations.

There should be no mistake. What we are concerned with here is nothing less than the integrity of our democratic institutions and the proper governance of the State. Corruption and other forms of misconduct in public office strike directly at those fundamental aspects of our society. The success of an integrity agency such as the Commission is not to be measured by the number of persons convicted of criminal offences, but by the extent to which it can uncover and publicly expose to the community, corruption or misconduct in public office, wherever and whenever it occurs, and the extent to which it can help establish within the community and the public sector, an expectation that all decisions made by public officers will be made in the public interest.