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"PUBLIC ACCOUNTABILITY OF THE CCC"

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I must begin by congratulating Justice Michael Barker, and all involved in devising and organising the "Vista" series of lectures, covering such an eclectic range of subjects. The three previous lectures have been most thought provoking and, I am sure, have stimulated those who have attended or read the lectures (obtainable on the SAT website) to give serious thought to issues which affect and will in the future shape the kind of society in which we live.

When Justice Barker invited me, in January this year, to speak on the topic of "*The efficacy of the Corruption and Crime Commission (the CCC) and the extent of its accountability to the public through the Parliament*", I doubt that he foresaw the spate of media comment and controversy relating to this subject which (coincidentally) followed in the next few months, with such headlines as:

> "*CCC does public servant major injustice*"
> "*Gloves off as CCC accuses McCusker of exceeding power*"
> "*Accept review or go, CCC Chief told*"
> "*McCusker right to query CCC: Premier*";
> "*CCC blundered, says McCusker*"; an editorial
> "*Public Interest demands CCC findings be open to review*"; and
> "*CCC hits back on war with McCusker*".

Media reports - or at least the headlines - would have, understandably, given the impression that there has been an irretrievable breakdown in the relationship between the Parliamentary Inspector (PI) and the CCC, and that the two are having, as one journalist put it, a "*public stoush*". Indeed, one of the most recent reports, in *The Australian*, bore the headline "*CCC claims win over McCusker*" - which, in fact, was quite untrue. The CCC has done no such thing, as it very promptly pointed out the same day.

What I wish to make very clear at the outset is that the PI's relationship with the CCC has been, and continues to be, one of co-operation. True, there have certainly been several important differences of opinion, in particular on the jurisdiction of the PI to review and criticise the reports of the CCC, and its assessments or opinions; but the CCC has, nevertheless, always been prompt to provide the PI with any information and access to material as requested, and to refer to the PI any matter which might possibly be thought to reflect adversely on the CCC or any of its officers, for the PI's consideration and investigation. That, of course, is as it should be, and as intended by the Parliament.

Nevertheless, as might be expected with new legislation dealing with sensitive issues, differences have emerged, and are yet to be fully resolved; and they are relevant to the important question of the accountability of the CCC to the Parliament and to the public, the topic on which I have been asked to speak.

ACCOUNTABILITY - WHAT IS IT?

The Parliament, in creating this new body, was very much aware of the need to ensure that it would be made "accountable". What, though, does that mean?

As observed by Gareth Griffith, in a paper "*Parliament & Accountability : the Role of Parliamentary Oversight Committees*", "*accountability*" like the term "*governance*", is one of the "*buzz-words of contemporary*

debate on public policy and administration", and as put in another paper (by Richard Mulgan), it is a term which

> "*crops up everywhere, performing all manner of analytical and rhetorical tasks, and carrying most of the burdens of demonstrative "governance" … another semantic interloper, as prevalent as it is impressive*".

Elusive as the concept is, it is generally understood to mean responsibility. But to whom, and for what? That requires a consideration of the particular body, its functions, powers, and purpose.

The Corruption and Crime Commission Act 2003 is titled:

> "*An Act to –*
>
> - *provide for the establishment and operation of a Corruption and Crime Commission;*
> - *provide for the establishment and operation of a Parliamentary Inspector of the Corruption and Crime Commission; and*

The Act's main purposes are:

> *(a) to combat and reduce the incidence of organised crime; and*
>
> *(b) to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.*

It also states, under the heading "*How Act's purposes are to be achieved*" (in section 7B(2)):

> "*The Commission is to be able to authorise the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of organised crime.*"

On 15 May 2003, in moving that the Corruption and Crime Commission Bill be read a second time , the Attorney General Mr Jim McGinty said that the Act would provide

> "*Western Australia with one of the most powerful crime and corruption fighting bodies in Australia. The Corruption and Crime Commission will be able to investigate Western Australian Judges, Ministers, Member of Parliament, Police officers and other public officers*".

The Attorney said that there were 10 principal ways in which the Commission was to be an improvement over the Anti-Corruption Commission, which it replaced, and which had been criticised by the Royal Commission as ineffective and secretive, and as having "*brought about a lack of public confidence in current processes for the investigation of corrupt and criminal conduct*".

The first of those 10 ways was, the Attorney said, a new structure for "*accountability*". There was to be a Parliamentary Inspector, plus continued monitoring by a joint parliamentary committee to which both the PI and the CCC were to be responsible. He said:

> "*A greater degree of accountability is achieved through the role of inspector, which is extremely powerful. The inspector has completely unfettered access to all CCC information, including operational matters and, for the purpose of his or her inquiries, all the powers, protections and immunities of a royal commission. In addition to having a reporting function, the parliamentary inspector will have responsibility for auditing the operations of the CCC and assessing the effectiveness and appropriateness of the CCC's procedures. In the overall context of the legislation, this office of the parliamentary inspector provides an important balance in relation to the CCC's extensive powers. Its presence will give Western Australians an additional reason to have confidence in the CCC by ensuring that the CCC's operations and exercise of powers conform to, and are conducted in accordance with, basic principles underlying the law. With the approval of either House of Parliament or a standing committee, the inspector's reports may be published.*

> *However, the inspector must ensure that his or her reports do not contain information that would identify a person who has been or is likely to be a witness before the CCC or reveal any particular investigation undertaken by the CCC or the Police Service.*"

During the debate, several members had expressed concern about the wide powers, both coercive and investigative, to be conferred on the CCC. It was to have the power to tap telephones, bug private homes or public places, compel persons to answer questions, hold public examinations of persons, (whether suspected of any wrongdoing or not) and publish opinions that "*misconduct*" or "*serious misconduct*" has been committed by named persons.

Mr John Hyde MLA (later to become the first chair of the parliamentary committee of the CCC) said:

> "*One of the important aspects of the Inspector is that she or he will have completely unfettered access to all CCC information. That is an important element in achieving public and parliamentary confidence in this new body. We are giving it a lot of powers. The trade off for giving it those powers is the establishment of the Parliamentary Inspector and the oversight committee*".

The members who debated the Bill clearly regarded the "accountability" of the CCC as being of high importance. In particular, they wanted to see that the PI would have sufficient powers to ensure that a real oversight role could be performed. Not only was this important in individual cases, but unless the CCC appreciated that its operations would be subject to both scrutiny and possible criticism, there was the danger that the CCC might be tempted to abuse the extraordinary powers conferred on it.

The question of what was to be the relationship between the PI and the CCC was carefully considered. In the course of the further debate in the Assembly (Consideration in detail of the Bill) the Attorney General Mr McGinty said:

> "*I am of the opinion that the Inspector is a more powerful person than the Commissioner although on a practical day to day basis the Commissioner will be in the limelight*".

And Mrs C L Edwardes said:

> "*If the Parliamentary Inspector is seen to occupy a lesser role (than the Commissioner) even though we do not believe it to be a lesser role, that perception will be there. It means there will be conflict to begin with. There will be either very strong head-on conflict or the Parliamentary Inspector will have a subservient role. We do not want a Parliamentary Inspector who is subservient to the Commission*".

She went on to say that the expectation was that the Parliamentary Inspector should have

> "*a very strong oversight role of the Commission*".

A report (number 21) produced by the Standing Committee on Legislation in 2003 dealt with the relationship between the CCC, the PI and a Joint Standing Committee (JSC) which was to be established under the Act.

The report referred to the fact that there had been disputes between the counterparts of the CCC and PI in Queensland (the Criminal Justice Commission and the Parliamentary Commissioner of the Criminal Justice Commission) which had resulted in Court proceedings, and to the need for a dispute resolution mechanism to resolve any such disputes. It recommended that the PI be made an agent of a Parliamentary Joint Standing Committee, as that was thought likely to assist "*in resolving any disputes that may arise*". The model which it recommended was said to be one which would "*ensure that the CCC and the PI are publicly accountable through the JSC to the Parliament and ultimately the public*".

The Committee considered that the model which it proposed, whereby the CCC would be accountable to the JSC, and to the PI as an agent of the JSC, would be one which "*serves to distance the PI from matters of public controversy relating to the work of the CCC which are raised in the public forum*".

The CCC has the potential to seriously damage, even ruin, the reputation and career of people in the community. It can summons a person to be "*publicly examined*", and level damaging accusations at him or her, with very limited opportunity to refute them. The mere fact of being summonsed to a public examination is, of itself, likely to create prejudice. That, and any prejudicial accusations are aired publicly in the press, television and on the internet.

Much worse may follow. The CCC may table a report in the Parliament stating its opinion that a person is guilty of "*serious misconduct*", or "*misconduct*", or even (as the CCC maintains it can opine) "*inappropriate conduct*". Such an "opinion" by the CCC is, to most members of the public, conclusive, even though expressed as an "*opinion*". It is reported, often as a "*finding*", by the media, and great damage may be done to the person concerned.

The CCC is an investigative body, not a court, but its "*findings*" or "*opinions*" are often (incorrectly) treated as akin to a Court's decision. The police force is an investigative body also. If it, or the DPP, lays charges, that, too, may be very damaging; but at least the public understands that there is no "*finding*" of guilt, only an allegation, which must be proved beyond reasonable doubt by the accuser in a Court, where the accused knows before the trial what the allegation is, what the evidence is, has the opportunity to rebut it; and there are safeguards to ensure that the trial is fair.

No-one with a sense of justice would support a system in which the police could compel a citizen to be questioned in public, publicly accuse him or her of an offence, "*find*" that person guilty of the offence (or express that opinion) and table that finding in the Parliament to be published. That sounds like a "police state". So safeguards are essential.

PUBLIC HEARINGS

When the CCC Bill was before the Parliament, apprehensions were voiced about the powers to be given to the CCC to hold public hearings. Several members warned of the danger of "*trial by media*". Mr Matt Birney MLA, was one of those. He said

> *" … one of the greatest issues of human rights is the ability of a media outlet to print somebody's name in a newspaper or air somebody's name on an electronic media outlet, when that person has not been found guilty. It is an absolute tragedy for somebody to wake up one morning and find his name in print associated with all manner of accusations, such as … corruption as in this case … . We proceed in this country on the basis that one is innocent until found guilty. Unfortunately, public hearings do not recognise the court of public opinion. Like it or not, if somebody's name appears in the media in association with a particular crime, human nature dictates that people automatically assume, rightly or wrongly, that he is guilty. The initial allegations against someone can be printed on the front page of a newspaper, but the conclusion of the court hearing in which that person may be found innocent can be printed on page 185. That is a tragedy for human rights. I greatly fear that public hearings will be misused to sully the name of a person who might subsequently be found to be innocent. I have a very strong reservation about the need for public hearings. We need to strike a balance. There is a need to ensure that CCC investigators are not overzealous and that they do not follow frivolous or vexatious complaints against public officials. It is human nature to assume, rightly or wrongly, that somebody who is being investigated by the CCC has a degree of guilt. Is the presumption of innocence not the basic foundation stone upon which western democracy is built? This Bill removes that presumption of innocence. I believe that we will see a media circus at some stage in the future*".

In recognition of these concerns, section 14 of the Act provides that a public examination (save in the case of an organised crime investigation) should only be held if the Commission, having "*weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements,*

considers it is in the public interest to do so". That, of course, begs the question, what is "*the public interest?*", the problem is that views on what is "*in the public interest*" are subjective, to a considerable degree, and may differ widely. It must not be forgotten that the infringement of citizens' privacy rights, and the infliction of prejudice, without a fair (or any) trial is itself contrary to the public interest in maintaining a "just society".

In its published reports, the CCC has acknowledged the statutory direction in Section 140, and has stated that it only holds public examinations after carefully "*weighing*" the competing considerations. However, it has never actually explained, in its reports, the reasons which have led to a conclusion, in specific cases, that "*public interest*" has dictated that a person be publicly examined, despite the prejudice to him or her.

Justice Barker, in a paper "*Integrity in Practice in the Public Sector*" delivered in October 20007 observed:

> "*Now the new CCC is sometimes criticised as having too much power, a 'law unto itself'. However I think it is fair to say the CCC is exactly the sort of body the Royal Commission had in mind. As recent inquiries concerning the conduct of members of the public sector show, the conduct by the CCC of public hearings into matters of concern has the advantage of bringing to public attention matters of in the practice of government. Without entering into any detailed discussion of one recent report concerning the conduct of local government in relation to a private sector coastal development proposal, the influence of lobbyists may have in the decision-making of local governments and public sector officials was brought to the attention of the Premier, the Parliament and the public. One Minister lost his position during the hearing as a result of disclosures made in the course of the hearing. Three local government councillors are currently under pressure to leave their posts. Disciplinary proceedings against certain public sector employees are about to be commenced under the Public Sector Management Act.*"

Justice Barker's paper was delivered shortly after the CCC published its "Smiths Beach Report". The public hearings to which he referred were 12 months earlier.

One person examined in the "public hearings" complained to me that he was "*pilloried in public*". In a submission made in October 1992 in a review of NSW legislation Athol Moffit QC described public examination as "*akin to the ancient practice of sentencing a person found to have done a public wrong to the public pillory*"). By comparison, in a police investigation (the police who unlike the CCC, have no power to compel a person to answer questions) conduct all of their interviews of witnesses and suspects in private, whatever the nature of the crime.

In what circumstances, then, <u>should</u> the CCC conduct an examination in public? And is it accountable for its decision to do so?

I have, as part of the PI's audit function, taken the view that the CCC <u>is</u> accountable for such a decision, given the direction in section 140 that hearings generally shall be in private.

That is not a proposition which the CCC appears to view with great enthusiasm. When asked to explain the reasons for a decision to hold an examination in public, it has always replied that it has done so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. But that simply repeats what the Act says, and does not explain the reasons for the decision, in individual cases.

This topic was discussed in an address delivered by Mr Len Roberts-Smith QC, the present Commissioner in October 2007: "*Misconduct - Is That All There Is!*" Public hearings, he acknowledged, "*have been controversial, particularly in terms of the damage done to the reputation of some witnesses*". He pointed out, correctly, that not everyone who is called to a public hearing will necessarily have his or her reputation damaged, and quoted from a statement made by the first Commissioner, Mr Kevin Hammond:

> "*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."*

With the greatest of respect, those observations disregard the reality, that many persons summonsed to attend public hearings, even though innocent of wrongdoing, may well feel intimidated and embarrassed. They often have only a general idea of what they are going to be questioned about, and are not ready for the kind of accusatorial approach sometimes taken by counsel assisting the Commission.

One complainant has alleged that he had tried to persuade the CCC investigators not to compel him to be publicly examined, as he believed that his reputation would be damaged, merely by being questioned in public. He had nothing to hide, gave the investigators all of his relevant files, and was quite happy to give evidence on oath in a private hearing. There was no allegation that he was guilty of any wrongdoing. The response (he claims) was that he could avoid a public examination if he gave some evidence to the CCC which would help to inculpate another person who <u>was</u> a target of the CCC investigation. He could give no such evidence. He was publicly examined, and although there was not the slightest evidence of impropriety by him, his photograph appeared in the press the next day, alongside that of others who <u>were</u> said to be guilty of impropriety. And that was enough to cause some of his acquaintances to look askance at him and ask what he had been up to. "*Mud sticks*", and "*guilt by association*", are phrases based on human experience.

The point is that "the public interest" is an elusive and subjective concept. It all depends on your point of view. Journalists, for example, may take the view that anything likely to sell newspapers is in the "public interest". But that is clearly <u>not</u> the test

I have discussed this issue with the present Commissioner, who has established a procedure to ensure that a careful assessment is made and full reasons produced, before deciding to conduct a public examination. Indeed, during his term so far there has not been one public hearing held by the CCC. I have made it clear that I consider that it is within my "audit" function to examine the reasons for the decision to do so, to ensure compliance with the requirements of section 140.

FUNCTIONS OF THE CCC

The three main "functions" of the CCC are (as stated in the Act):

(a) Prevention and education function;

(b) Misconduct function; and

(c) Organised crime function.

The organised crime function confers what are called "*exceptional powers*" on the CCC, but the operation of that function can only occur on the application of the Commissioner of Police, and in support of police organised crime investigations. The CCC cannot initiate their use, and as a result this function has so far been exercised only on two occasions. I understand that is likely to change, by a legislative amendment recommended by Gail Archer SC in her recent review of the operation of the Act

PREVENTION AND EDUCATION

The prevention and education function is a very important one, although it gets little coverage in the media. In performance of that function, the Commission delivers seminars and produces reports, all with the objective of heightening the public sector's understanding of its responsibilities. In its report for the year ended 30 June 2007 the Commission stated that it had during that year delivered 155 corruption prevention and education seminars to over 5,600 persons including around 1,000 persons in regional Western Australia, and tabled 6 reports in the Parliament including reviews of the misconduct management mechanisms of particular agencies and a report on the WA Police Force's progress in its reform program. The aim, of course, is to ensure that all persons in the public sector have a full understanding of their responsibilities in relation to the Public Sector Code of Ethics, and what is or may constitute misconduct, and thereby substantially reduce the incidence of misconduct.

MISCONDUCT

However, despite its great importance, the prevention and education function is overshadowed, in the public eye, by the "*misconduct function*".

Section 18 of the Act spells out, in considerable detail, how this function is to be performed. The Commission must ensure that an allegation involving misconduct is dealt with in an appropriate way. It may do so by receiving or initiating allegations of misconduct, make assessments, and form opinions as to whether misconduct has or may have occurred, is or may be occurring, is or may be about to occur or is <u>likely</u> to occur (section 22).

The definition of misconduct is in section 4. It refers only to conduct by a "*public officer*", which has the very wide meaning given by section 1 of the WA Criminal Code, and includes Parliamentarians.

The first two paragraphs of the definition of misconduct deal with corrupt actions by a public officer, essentially in the course of that public officer's employment. The third, with the commission of a criminal offence punishable by 2 or more years imprisonment by a public officer whilst acting or purporting to act in his or her official capacity. They are all defined as "serious misconduct". In summary:

"Serious Misconduct" is when a public officer

- *corruptly acts or corruptly fails to act in the performance of his/her functions, or*
- *corruptly takes advantage of his/her employment to obtain a benefit for him/her or for another person or to cause detriment to another, or*
- *while acting in his/her official capacity, commits an offence punishable by two or more years' imprisonment*

Other misconduct (which is not described as "serious") is conduct by a public officer which adversely affects or could adversely affect the honest or partial performance of the functions of a public officer or public authority (whether or not the public officer was acting in that capacity at the time of engaging in the conduct) constitutes or involves performance of his or her functions in a manner that is not honest or impartial, or a breach of trust or misuse of information obtained as a public officer, <u>and</u> in any of such cases constitutes or could constitute "*a disciplinary offence providing reasonable grounds for termination of a person's office or employment as a public service officer under the Public Sector Management Act, whether or not the public officer to whom the allegation relates is a public service officer or a person whose office or employment could be terminated on the grounds of such conduct*".

Again, in summary:

"Other Misconduct" by a public officer

- *Acting in a way that adversely or could adversely affect the honest or impartial performance of his/her functions*
- *Performing those functions in a manner that is not honest or impartial*
- *Breach of trust*
- *Misusing information or material acquired in connection with those function*

if such conduct could constitute a disciplinary offence providing reasonable grounds for dismissal if the public officer were employed under the Public Sector Management Act.

For the financial year ended 30 June 2007 the Commission reported that it received 2,150 complaints and notifications of "misconduct", of which approximately 25% were substantiated. It charged 14 people including 6 public officers with 156 criminal offences and 10 persons including 4 public officers were convicted as a result of investigations conducted by the Commission.

ACCOUNTABILITY MECHANISMS

The Commission is a very large agency. There are now more than 150 Commission Officers. It has an annual budget of more than $25 million. This adds another element o the need for accountability.

There are three mechanisms by which the Commission is to be made accountable. The Parliamentary Inspector and the Joint Standing Committee are the two specified in the Act. In addition, there is the Parliamentary Estimates Committee. Although that Committee's primary focus is on financial matters, and it is not referred to in the CCC Act as having a supervisory role, when the Commission appears before that Committee, its questions are usually quite wide-ranging and searching.

FUNCTIONS OF THE JOINT STANDING COMMITTEE -

The Joint Standing Committee (JSC) consists of four members, two from the Assembly and two from the Council. Standing Order 288 requires its membership to be appointed at the commencement of every Parliament, by resolution of the Assembly, and forwarded to the Council for its concurrence. Although not stipulated by the CCC Act, its membership is bi-partisan.

The functions of the JSC, by section 216A of the Act, are to be "*as determined by agreement between the Houses*". The functions which have been conferred on it by such agreement are, by Standing Order 289, 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 and Crime Commission Act 2003."

The Committee plays a very important role, therefore, in ensuring that not only the CCC but also the PI are accountable. It holds regular meetings with the CCC and the PI, to discuss issues relating to the CCC's operations. It occasionally receives, directly, complaints which it takes up with the CCC or the PI,

as appropriate. Both the CCC and the PI are answerable to it, and it, in turn, is answerable to the Parliament.

FUNCTIONS AND POWERS OF THE PARLIAMENTARY INSPECTOR

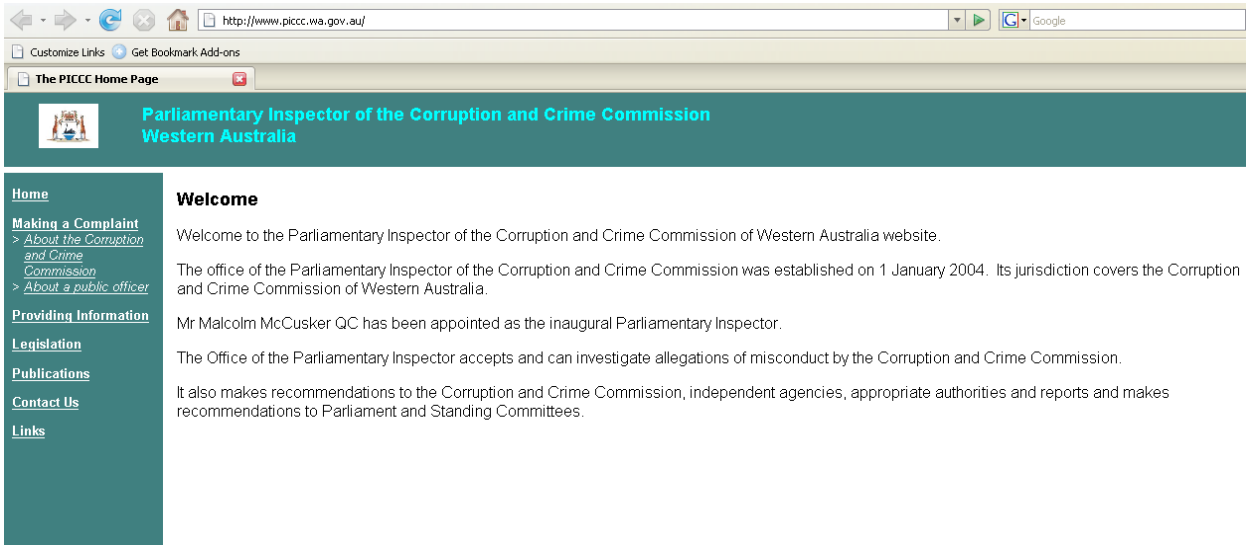
Undoubtedly, the Parliamentary Inspector is seen as a very important element of the accountability regime for the CCC. Section 195 spells out the Parliamentary Inspector's functions:

> "***195. Functions***
>
> *(1) The Parliamentary Inspector has the following functions —*
>
> *(aa) to audit the operation of the Act;*
>
> *(a) to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State;*
>
> *(b) to deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector;*
>
> *(cc) to audit any operation carried out pursuant to the powers conferred or made available by this Act;*
>
> *(c) to assess the effectiveness and appropriateness of the Commission's procedures;*
>
> *(d) to make recommendations to the Commission, independent agencies and appropriate authorities;*
>
> *(e) to report and make recommendations to either House of Parliament and the Standing Committee;*
>
> *(f) to perform any other function given to the Parliamentary Inspector under this or another Act.* "

It will be noted that the term "audit" appears in 3 different places. It is not defined by the Act. Exactly what that term is intended to cover has been the subject of some debate. Indeed, at one point the CCC wrote to me, quoting a dictionary definition of "audit" which would have had <u>that</u> function confined to checking the accounts of the CCC! I hasten to say that I do not believe this is (if it ever was) the Commission's real view. A much wider definition, which I quoted in reply, is "*a systematic and critical review*", which I believe is what is intended.

Initially, my performance of these functions has been mainly "reactive". That is, to deal with matters of complaint, either referred to my by the CCC or made to me directly by persons with a real or imagined cause of complaint, usually (though not always) about the CCC's refusal to investigate their complaint.

The Parliamentary Inspector has a website, to facilitate access by members of the public.



Complaints may be made directly to the PI, preferably by letter, but a person who has not yet made his or her complaint to the CCC will often be asked to go first to the CCC, (unless the complaint is of misconduct by the CCC or one of its officers). Occasionally, complaints are made by telephone, and sometimes may be dealt with on the spot as, for example, where the complaint is not against a "*public officer*", and the CCC has dealt correctly with the matter by pointing out that it is therefore outside the CCC's jurisdiction.

Considering the large number of complaints which the CCC receives each year, the PI receives a very small number of complaints about the CCC's handling of them, and an even smaller number result in a referral back to the CCC for review or reconsideration after being investigated by the PI.

It is, of course, important to ensure that each complaint is properly and sympathetically considered. That can sometimes be a very wearing task. Occasionally a complainant gets to the point where the complaint, and all that it entails, has become an obsession, and the centre of his or her life. Indeed, one complainant, when asked what he would do if the complaint were completely resolved in his favour, appeared quite nonplussed, and frankly confessed that he wouldn't know quite what to do with his life!

Putting aside a few highly publicised issues, which I will discuss later, I think it fair to say that in general, the Commission deals appropriately with complaints made to it, and is performing its misconduct function well.

Until quite recently, the Parliamentary Inspector has been a part time, "*one man band*". That severely limited the extent to which an audit, in the wider sense, could be conducted. However, with the appointment of Mr Murray Alder, a qualified legal practitioner with considerable relevant experience, as the Principal Legal Officer to the Parliamentary Inspector, the Inspectorate is now in a position where it is able to conduct, on a more regular and systematic basis, audits of the operations of the Commission, pro-actively, and will be doing so.

TELEPHONE TAPPING AND "BUGS"

An important and sensitive part of the Commission's operations is the use by it of surveillance devices or "bugs" and telephone intercepts. Properly used, they can be helpful investigative tools. However, there is always the potential for abuse.

A full audit has now been completed by the Inspectorate, of the use by the Commission of surveillance devices.

However, a difficulty has arisen with the PI's proposed audit of the use of telephone intercepts, which the Commission is authorised to use under the *Telecommunication (Interception and Access) Act 1979*. The point has been made by the CCC that the PI's functions, set out in section 195, give the PI the function "*to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State*". The TI Act is a law of the Commonwealth, not of the State. Accordingly, the CCC says, the CCC Act does not authorise the PI to audit the Commission's compliance with the TI Act. So, despite the fact that the PI's eligible authority status under the TI Act permits the CCC to provide TI information to the PI in the exercise of his "misconduct function" (or any of the PI's other "functions") and to make use of that information for that purpose, the PI is unable to carry out a "general audit" of the CCC's use of TI's, to ensure that the CCC is complying with the requirements of the TI Act.

There is, however, a provision in the Commonwealth Act authorising the PI (as an "*eligible authority*" to have access to TI warrants and information for the purpose of an "inquiry", which the PI may conduct into possible misconduct by the CCC or its officers pursuant to section 197 of the CCC Act. For the purposes of such an inquiry, the PI has "*the powers, protections and immunities of a Royal Commission*", and may have access to TI material.

The purpose of seeking to audit this TI material was to ensure that the CCC is not misusing its powers of telephonic interception for some purpose not intended or authorised by the TI Act, which essentially prohibits the tapping of telephones, save for a number of authorised bodies which include the CCC. However, any such body, if it wishes to tap someone's telephone, must first obtain a warrant authorising it to do so. The application for that warrant must be made to a Commonwealth judicial officer, supported by an affidavit, sworn by an officer of the CCC, to the effect that there are reasonable grounds for suspecting that the person whose telephone is to be tapped has committed or may commit an offence punishable by not less than 7 years imprisonment. However, section 67 of the TI Act permits the use by an authorised agency of the TI material, once obtained, for a "permitted purpose", which in the case of the CCC is the investigation of possible misconduct by a public officer.

Concerns have been expressed by some, about the possibility of the CCC applying for a warrant based on the ground of a suspected offence carrying a 7 year term of imprisonment, but then using the telephone intercept for other purposes. It is undoubtedly the case that the CCC has made great use of recorded telephone conversations, which have resulted in the CCC publishing reports of its opinions that "misconduct" has occurred. Misconduct as such, although it may be a disciplinary offence providing reasonable grounds for termination of employment under the Public Sector Management Act is not, of itself, an offence punishable by 7 years or more imprisonment. Not even "serious misconduct" will necessarily fall into that category. So an apprehension that TI information may be obtained by the CCC for a purpose not authorised by the TI Act is perhaps, understandable, but to date there is no evidence that this has happened.

However, as I have mentioned earlier, it is open to the PI , should there be reasonable grounds for suspecting that TI information is being improperly obtained or misused, to conduct an inquiry, as that would constitute "misconduct" by the CCC or its officers. I should emphasise that I am not to be taken as suggesting that the CCC (or any of its officers) is abusing the TI Act. But an audit to ensure that it is not, as part of the CCC's accountability, is in my view desirable.

ASSESSMENTS AND OPINIONS OF "MISCONDUCT" BY THE CCC

This, as I have mentioned, is the function which has had media prominence, and given rise to debate and controversy.

As the CCC has itself endeavoured to make clear, a report by the CCC that in its opinion "misconduct" has occurred does not amount to a finding of guilt. Section 23 of the Act provides that the CCC must not publish or report a finding, or opinion, that someone has committed either a criminal offence or a

disciplinary offence, and that an "opinion" that "misconduct" has occurred is not to be taken as a finding or opinion that a person has committed either a criminal offence or disciplinary offence.

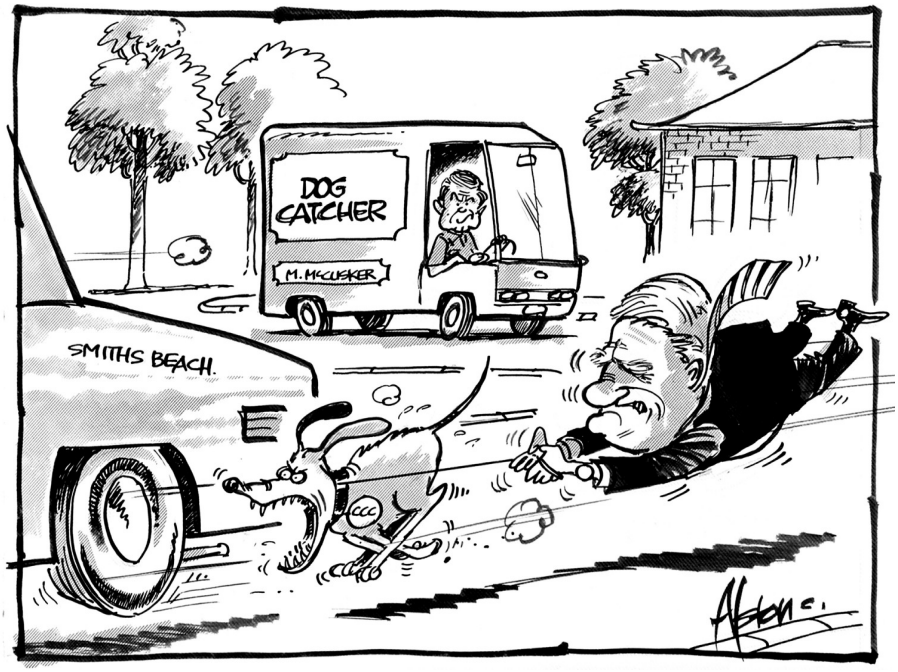
The reality is, however, that when the Commission does report that in its opinion someone has been guilty of either serious misconduct or misconduct, and makes recommendations in that report either that the DPP consider prosecuting that person for a criminal offence (in the case of "*serious misconduct*") or that the Director General consider disciplinary action against that person, which might lead to his or her dismissal, it is understandable that in the public mind it amounts to a "finding" of guilt by the CCC, and the publication of such a report of the Commission's "opinion" is therefore a very serious matter for the person concerned.

Section 84 of the Act provides that the Commission may prepare a report on any matter the subject of an investigation of misconduct, which may include its opinions and recommendations and reasons for them; and it may cause such a report to be laid before each House of Parliament. You will note that the Act does not oblige the CCC to table such a report in the Parliament, only that it "may" do so.

Suppose that the CCC does table a report that in its opinion a person is guilty of misconduct, but that, on close analysis, the reasons do not support the CCC's conclusion, or that in reaching that conclusion it has failed to take into account evidence which it either had obtained, or should have obtained, by a full investigation, and which does not support the CCC's opinion of "misconduct". Is the CCC "accountable", and if so by what means?

As has been widely reported, this is an issue on which the views of the CCC and the PI differ. I have taken the view that the "audit" functions of the PI extend to reviewing the CCC's reports on its investigations, and the conclusions expressed in those reports, and that the PI's power, under section 199, to prepare a report on "*any matters affecting the Commission, including the operational effectiveness of the Commission*", entitles the PI to review reports of the CCC and the investigation which has led to those reports. If that were not so, then for all practical purposes the CCC would not be accountable with respect to one of its most important functions, the forming and publication of misconduct opinions.

If the CCC is the "watchdog" to guard against corruption, who watches the watchdog, to see that it only "bites" the right persons? This issue came to a head with the publication by the CCC, in October 2007, of the "Smiths Beach Report".



The CCC's report expressed the opinion that two senior and respected civil servants, Michael Allen and Paul Frewer, both officers of the Department of Planning and Infrastructure (DPI) were guilty of "misconduct". In each case, that opinion was coupled with a recommendation that the Director General consider taking disciplinary action against them, it being the opinion of the CCC that their conduct "may constitute grounds for dismissal", under the *Public Sector Management Act* (a necessary element, as I have said, of "misconduct", as defined).

The Director General very promptly requested the Department of the Attorney General to appoint an independent investigator. An independent and senior public officer (not from the DPI) conducted an investigation, in accordance with the requirements of the Public Sector Management Act.

I later obtained a report of that investigation. It was very thorough. It concluded that neither officer had any "*case to answer*".

Both officers had lodged complaints with me, both before and after the publication of the CCC's October 2007 report, that the CCC had, in reaching its conclusion, failed to take into account relevant evidence, and that there were no reasonable grounds for its opinion.

The misconduct opinion as stated in the CCC's tabled report against Mr Allen was based on the CCC's finding that he had complied with the wishes of Mr Burke, in August 2006, by agreeing to appoint a senior DPI officer, Ms Pedersen, to write a "*DPI report*" on Smiths Beach, in preference to another (more junior) DPI officer, Ms Clegg. This was "misconduct", in the CCC's opinion, because Mr Burke's client, the developer, believed (rightly or wrongly) that Ms Pedersen was more favourably disposed towards the Smiths Beach development than Ms Clegg was.

There was no evidence, nor any suggestion, that Mr Allen was offered or given any benefit, financial or otherwise, for what the CCC said was his compliance with the wishes of Mr Burke. Nor was it suggested that Ms Pedersen was not the most suitable person to write such a report, had she in fact been asked to do so.

When I read this section of the Smiths Beach Report (I read all reports of the CCC) it immediately struck me that the CCC's opinion of misconduct was essentially based on an inference which it had drawn from telephone intercepts of conversations between Mr Burke and Mr Allen, and of a conversation between Mr Burke and Mr Grill (although it is dangerous, as the law recognises, to rely upon hearsay, particularly when one of the parties may have a real motive to "*pump up his own tyres*").

But nowhere in the report was there any explanation of what "*the DPI report*" (which Mr Allen was said to have agreed that Ms Pedersen should write) actually was. Nor was there any mention of whether either Ms Pedersen or Ms Clegg had been interviewed, to see whether Ms Pedersen had in fact been appointed to write such a report "in preference to Ms Clegg".

Ultimately, I ascertained that there was no "*DPI report*" on Smiths Beach then being prepared or written or to be written. At the relevant time, all that the DPI was doing, in relation to Smiths Beach, was assisting the developer's consultant, who was preparing a landscape study, to ensure that his methodology met the requirements of the Busselton Shire TPS. One of the DPI officers giving that assistance to the consultant was Ms Clegg. Ms Pedersen played no part in it. She had been interviewed by a CCC investigator, before the Smiths Beach report was published, and told him that Mr Allen had never asked her to write a "DPI report on Smiths Beach". That evidence was not mentioned in the report. The reason for that is to be the subject of an inquiry, as I foreshadowed in my report.

I also found that Ms Clegg was never interviewed at all by the CCC, to see whether a "*DPI report*" was being written, and if so whether she had been "sidelined", and preference given to Ms Pedersen. It was not so.

I raised all these matters with the CCC, and suggested that its "misconduct" opinion was therefore unsoundly based. The CCC responded that to review its reports and opinions in a critical manner was beyond the jurisdiction of the PI. I did not, and do not, agree. It also maintained its opinion that Mr Allen had been guilty of "misconduct". It accepted that it was incorrect to say that Mr Allen had "*agreed to appoint the DPI officer preferred by Mr Burke to write the DPI report on Smiths Beach*", and substituted (although it did not table the substitution) an opinion that his "*conduct in agreeing to arrange for Ms Pedersen's involvement in the DPI's assessment of the proposed development at Smiths Beach in preference to another officer, involved a performance of duties that was not impartial*".

In its written response to me, when I wrote advising the Commission of my proposed report, the CCC said that the "lack of impartiality" and therefore the "misconduct" lay not in actually arranging for Ms Pedersen to be involved in the assessment, in preference to Ms Clegg (which did not in fact happen) but in agreeing to do so!

I tabled my report on this matter on 10 March 2008, critical of both the inadequate investigation and the reasoning which had led to both the CCC's original opinion, and the "substituted" one.

The Smiths Beach report also expressed an opinion of "misconduct" by another senior officer of the DPI, Mr Paul Frewer.

He was a member of the South West Regional Planning Committee. At a meeting of that Committee on the morning of 19 May 2006 an item on the agenda was a proposed amendment (92) to the Busselton Shire TPI. The evening before that meeting Mr Burke had rung Mr Frewer. He mentioned Amendment 92 and said "*I would like to send you an email with a point of view about dealing with that amendment now*". Mr Burke did send the email, but by mistake he sent it to the wrong address, and Mr Frewer never received it.

Several years earlier that Committee had resolved that its members would report any "lobbying". This was a voluntary arrangement. If a person is "lobbied", that does not mean that he or she has a "conflict of interest", which always must be declared. For example, Parliamentarians are continually being lobbied by or on behalf of constituents, about matters that may come before Parliament. That does not mean that those who are "lobbied" have a conflict of interest; nor is there any requirement to disclose that they have been "lobbied". If there were, the business of Parliament would be considerably extended, one might expect, beyond the present normal sitting times.

At the outset of the meeting, Mr Frewer said "*Someone rang me about the Smiths Beach thing, and they said they'd send me all this stuff but they didn't. Anyhow, nothing arrived and I didn't receive anything so if that's called lobbying that's fine*".

The minutes of that meeting (as is often the case) did not record everything that was said, and did not refer to what Mr Frewer said. When he was publicly examined, he was shown only the minutes. He did not recall that he had in fact made a statement about having been approached on "the Smiths Beach thing", and he was cross-examined on the basis that he had said nothing.

The email which Mr Burke had sent, obtained from Mr Burke's premises, was shown to him, and he was also cross-examined on the basis that he had received it, and therefore had been "lobbied' before the meeting. The email contained arguments as to why Amendment 92 should not be considered at the meeting, but none of those arguments was put to Mr Frewer by Mr Burke.

After he was publicly examined, Mr Frewer was able to point out, and the Commission accepted, that in fact he had never received the email. But the Commission maintained its opinion, which it put in its report, that he was guilty of misconduct, and that he had failed to "*act with integrity*", in not disclosing to the meeting that he had been "lobbied" by Mr Burke.

After the publication of the Smiths Beach report, Mr Frewer obtained a tape recording of the meeting. It showed that he had, at the outset of the meeting, made the statement to which I have referred. He had been questioned, at the public hearing, on the false premise that he had said nothing at all about having been approached about the Smiths Beach matter.

The tape recording of the meeting had been obtained before Mr Frewer's public examination, by CCC investigators, but they had not given a transcript of it either to counsel assisting the CCC before he cross-examined Mr Frewer in public, nor did the Assistant Commissioner who later wrote the report receive it.

When I read the full transcript it was clear that, contrary to the CCC's report, Mr Frewer had not gone to the meeting "recommending" deferral of Amendment 92. That was a matter first raised at the meeting by the reporting officer, because of suggested legal problems with the amendment. It was therefore unanimously resolved by the Committee members to defer consideration of the amendment, pending clarification of this legal problem. Although Mr Frewer took part in the decision, and no doubt was aware that it was a decision which would please the Smiths Beach developers (as the other Committee members would also have known) he did not initiate the discussion about deferral, or "recommend it".

Before delivering a report on this matter, I had raised these issues with the CCC. Its response was that, although it accepted (as it had to) that Mr Frewer had never received Mr Burke's email, and that Mr Frewer had told the meeting, at the outset, that he had been approached "*about the Smiths Beach thing*", he had not actually stated that it was Mr Burke who had approached him, and that therefore he had failed to act "impartially and with integrity"!

Again, the investigators relied heavily on the content of telephone intercepts. But they had not interviewed the members of the Committee, who had unanimously agreed to defer consideration of the amendment. They were later interviewed, by an investigator appointed by the Director General. They said that they considered that, in the circumstances, Mr Frewer had complied with the spirit and intent of their voluntary decision to disclose "lobbying".

As in Mr Allen's case, the independent investigator, after a much fuller investigation, concluded that Mr Frewer had "*no case to answer*" with respect to alleged "misconduct".

In both of my reports (and also before they were tabled), I recommended that the CCC withdraw its "misconduct" opinions. It refused to do so. The PI has no power to substitute his or her opinion for an opinion expressed by the CCC, nor to direct it to withdraw its opinion, but only to report and "recommend". Neither the PI (nor the JSC) can compel the CCC to comply with a recommendation. So there is that limitation on the CCC's "accountability" for the contents of its reports.

The purpose of my explaining (perhaps in rather too much detail) these two matters is that they have given rise to an issue of importance, concerning the power of the PI to critically review reports of the CCC. I was very surprised when the CCC first contended that the PI did not have that power. If that were correct, then as I saw it, the "oversight" role of the PI would be considerably diminished, as would the scope of "accountability" by the CCC for its actions. For all practical purposes, it would be accountable to no-one, for opinions expressed in its reports.

The issue arose again the following month, when I delivered a report on the CCC's opinion of "inappropriate conduct" by Mr John D'Orazio. Mr D'Orazio, when Minister for Police, was found to be driving without a licence. As it happened, that was because a notice had not been sent to his changed address. Ultimately, his suspension was set aside in the Supreme Court. In the meantime there was (understandably) a lot of publicity given to the matter. One of his constituents, Mr Minniti, knew that he was trying to obtain (quite legitimately) a copy of the facsimile Mr D'Orazio had sent to the DPI, notifying his change of address.

Minniti was a somewhat eccentric character. He delighted in dressing up and posing as a police inspector. Mr D'Orazio, and others who knew him, knew that he often made boastful claims of having contacts in "high places". When Mr D'Orazio had already set in motion a search within the DPI office for the facsimile (which was ultimately found) Minniti approached him and said that he could help to find the letter faster by, as he put it, through "the back door", and contacts which he claimed to have.

In an intercepted telephone discussion, during which Mr Minniti said "*Okay John I'm sorry I'm just trying to help*". D'Orazio said "*I know you are but don't say anything to anyone because I don't need any more at this stage*". Minniti replied "*I'll run things past you before I do anything okay*?". And Mr D'Orazio said "*Yep, don't do anything*".

In a report of 21 December 2007 the CCC concluded that although Mr D'Orazio was not, in its opinion, guilty of misconduct, he was nevertheless, guilty of "inappropriate conduct", because he did not "actively discourage and unequivocally reject Mr Minniti 's offers of assistance", and that might have provided Mr Minniti with a basis upon which he could represent to third parties that he had a close relationship with Mr D'Orazio. The CCC described this as Mr D'Orazio permitting himself to be "groomed".

Following complaints by Mr D'Orazio about the CCC's report (which did him considerable political damage) and an exchange of correspondence with the CCC, I tabled a report in which I repeated points previously made in correspondence with the CCC (which did not agree with them):

- The CCC does not have the "function" of expressing an opinion, in a report, on what is "*inappropriate conduct*". There is a clear definition of "misconduct", but no definition of or reference to "inappropriate conduct". Although the "opinion" of inappropriate conduct is said to be the opinion of "*the Commission*", the reality is, of course, that it is an opinion of some person or persons within the Commission. And opinions as to what may or may not be "*inappropriate conduct*" are often subjective and may well differ. There are no objective criteria.

- Mr Minniti was not proposing to do anything unlawful, when he offered to help Mr D'Orazio, and if Mr D'Orazio did not "*unequivocally reject*" that offer (as the CCC put it) he certainly did not accept it. But even if he had done so, by what measure would that be "inappropriate"?

- In expressing its opinion of "*inappropriate conduct*", the CCC in its report said that conduct of that nature "*must at least amount to conduct that is discreditable or dishonourable*". There would be many, I think, who would have difficulty in accepting that not to "*unequivocally reject*" Minniti's offers of assistance was "*discreditable or dishonourable*".

- As I also pointed out to the CCC and in my report, the CCC based its finding on the proposition that Mr D'Orazio, in speaking to Mr Minniti, was acting in his capacity of a Parliamentarian. However, although he was a Parliamentarian, he was then acting in his private capacity. To that, the CCC responded that his loss of licence could adversely affect his position as a Parliamentarian. That is true, but does not address the issue. A Parliamentarian (or other public officer) may well engage in all manner of conduct which will reflect adversely on him or her and his or her future career prosects. Even criminal conduct. But that does not mean that he or she is acting in the capacity of a "*public officer*", and unless that is so, the CCC has no jurisdiction to find "misconduct", much less "inappropriate" conduct.

Again, my recommendation to the CCC, to withdraw its opinion was rejected; and (as I have said) the PI has no "compulsive" power.

The CCC has said that public confidence in the CCC and the operation of the Act would be damaged if it were to concede that it was in error, and withdraw its misconduct opinions, as recommended by the PI. My own view is that public confidence is more likely to be eroded, if it were thought that the CCC could

conduct an inadequate investigation on which it based flawed opinions, and include them in a report tabled in the Parliament, with no possibility of a review and critical analysis by the PI, and therefore no real accountability.

If the public know that opinions expressed by the CCC in a report may be reviewed and criticised, it would be more likely to have confidence in the CCC and the operation of the Act; and the CCC, knowing that it will be held accountable to the PI (who under the Act is an "*officer of the Parliament*") is likely to take great care before expressing opinions of misconduct.

Mr McGinty, the Attorney General, said in the course of his second reading speech that the office of the Parliamentary Inspector "*will give Western Australians an additional reason to have confidence in the CCC, by ensuring that its operations and exercise of powers conform to and are conducted in accordance with basic principles underlying the law*". One of those basic principles underlying the law, is that a decision-maker must take into account relevant considerations, and must not take into account irrelevant considerations. If the CCC does not act in accordance with those requirements, it must be held accountable.

THE FUTURE

As I have said at the beginning of this address, it is the clear intention of Parliament that the CCC be truly "accountable" for its actions and its operations. It is the duty of the PI (and the JSC) to ensure that this continues to be the case. Otherwise, there would be real cause for concern, and ultimately a lack of confidence in the CCC.

On the other hand, it may well be a cause for a degree of public disquiet, if the PI and the CCC, even only on occasions, are in public dispute, contrary to the hopes expressed in the Committee report mentioned earlier.

Take the cases of Mr Allen and Mr Frewer. The CCC delivered a report, expressing an opinion (only that) of "misconduct" by each, and a recommendation that the DG consider disciplinary action. The DG in turn, had an independent investigation conducted, more thoroughly (it must be said) than the CCC's investigation. It concluded that there had been no "*disciplinary offence*". Independently of that, the PI reviews the CCC's opinions and report, and concludes that the CCC's investigation is inadequate and there are no reasonable grounds for the "misconduct" opinion. The CCC's opinions are not withdrawn.

Various suggestions for resolving such an "impasse" have been considered, including making the JSC a kind of "referee". But although the JSC has, under the Act, the functions and powers determined by agreement between the two Houses, it does not, at present, have a "referee's function". That could, in the future, be a function conferred on it, but I doubt that will happen. How, in practical terms could it be expected to perform that role? By getting <u>another</u> opinion? And if so, from whom?

Although it may not be a complete solution, one possibility would be for the CCC to provide the PI with a draft of any proposed report, and any submissions made by persons about whom it is proposed to make adverse comment, to give the PI the opportunity, at that stage, to review the report and possibly make recommendations to the CCC as to its assessments or opinions which the CCC could consider, and either adopt or reject. That might avoid the position which has arisen, of the CCC expressing an opinion which is difficult for it to withdraw, with the PI (and the DG) both concluding that there are no reasonable grounds for the opinion.

But the CCC is not obliged to take that course, and if the PI were to require the CCC to produce a draft of any proposed report, and relevant submissions from affected parties, before finalising and tabling the report, I suspect that the CCC would resist that request, and possibly argue that this would, contrary to section 198, of the Act, "*interfere with , obstruct, hinder or delay (a) lawful operation of the Commission*".

There is an alternative course which the CCC could take, and which is open to it under the Act. Instead of immediately tabling its opinion of "misconduct", with a recommendation that the DG consider "*disciplinary action*", it could complete its investigation, reach that opinion, in a report (but without tabling or publishing it at that stage) and send it to the "*appropriate authority*" to consider disciplinary action, together with all the relevant material in the CCC's possession.

The "*appropriate authority*" would then be obliged to carry out an investigation, and to report to the CCC. It could then review the way in which the authority has dealt with the matter. If the authority were to find there was no "disciplinary offence" (as in the cases of Mr Allen and Mr Frewer) the CCC could examine the reasons for that view, and either agree, or disagree. If the latter, it could then prepare and table a report to Parliament, dealing with the authority's report, as is provided by section 85 of the CCC Act, stating its reasons for disagreeing. But if, after considering the authority's report and its reasons for finding no disciplinary offence, it was persuaded that its initial opinion was wrong (perhaps because it had overlooked or misinterpreted some evidence) then it could simply close the file.

The adoption of that procedure, where the CCC has concluded that there has been misconduct, although not mandatory, is open to it under the Act, and could avoid or at least lessen the likelihood of public debate and embarrassment.

I was asked to conclude this lecture by looking forward to the year 2020. Unfortunately, I do not have a crystal ball. However, I am an optimist. My expectation is that the CCC's "*education and prevention*" function will continue to operate satisfactorily, perhaps even to the point where the CCC will come close to "*working itself out of a job*", by establishing a culture within the public service where there is a heightened awareness and consciousness of what is "misconduct", and of the high standards expected in public office.

And, still in that spirit of optimism, I expect that the CCC will come to accept that the opinions expressed by it in reports, which can be so damaging to individuals, may be critically reviewed by the PI, and that through the PI, who is an officer of the Parliament, it is accountable to the Parliament and in turn to the public, both in general, and to individual members of it who are directly affected. I do not believe that it will take the next 12 years for that to happen.

Since it has been announced that amendments are to be made to the Act, to enable the CCC to initiate use of its "organised crime" function, which is one of the main purposes of the legislation, it is probable that the CCC will expand its activities considerably, which will in turn put further emphasis on the need for full accountability.