The New South Wales Independent Commission Against Corruption
3rd ICAC Symposium - Hong Kong
8 to 11 May 2006
BACKGROUND PAPER

In 1988 the New South Wales Parliament passed the Independent Commission Against Corruption Act establishing the Commission. In the 80's there had been a number of corruption scandals involving Parliamentarians, the Judiciary and public officials. In the opinion of the Parliament, these scandals had diminished public confidence in the processes of democratic government and that corruption in public administration promoted economic inefficiency. The New South Wales legislation has since been adopted with certain variations by the Parliaments of Queensland and Western Australia. The Federal Government, now, is contemplating a like-Commission but directed only to the conduct of people employed in Federal law enforcement agencies.

The legislation is directed to, amongst other things, the exposure and prevention of corruption in the public sector. What amounts to "corruption" is defined by sections 8 and 9 of the legislation. Section 8 is an inclusive provision which specifies the kinds of acts that might constitute corrupt conduct. It defines "corrupt conduct" as, inter alia, the dishonest or impartial exercise of official functions or breach of public trust or misuse of information or material acquired in the exercise of official functions.

However section 9 is an exclusively exclusionary provision establishing the boundaries of corrupt conduct. An action referred to in section 8 will not constitute corrupt conduct unless it could (i.e. if proved beyond reasonable doubt in a court of law) amount either to;

(a) a criminal offence;

(b) a disciplinary offence; or

(c) reasonable grounds for dismissing or dispensing with the service or otherwise terminating the services of a public official; and

(d) in the case of a Minister of the Crown or a Member of a House of Parliament, a substantial breach of an applicable code of conduct and a similar provision with respect to local government councillors.

It has frequently been said that the type of conduct attracting the attention of the Commission goes far beyond what ordinary people would describe as "corruption" in the traditional sense. In theory this may be so. Before I became Commissioner I was retained by the Government to independently review the activities of the Commission and I invited a number of organisations including the Bar Council, the Law Society and the Council of Civil Liberties (to name but a few) who had expressed concern about the width of the definition to furnish me with instances of when the Commission made findings of corrupt conduct where ordinarily people would not describe the conduct as corrupt. I received no examples of it and therefore concluded, tentatively, that there was no need to change the definition. The relevant legislation was amended last year to make it clear that the Commission should direct its attention to serious and systemic corruption (which is what the Commission had always done in any event).

The legislation is directed to corruption in the public sector and to the behaviour of public officials. However the definition of "public official" includes people exercising functions on behalf, or at the behest, of a public authority. There is an increasing tendency for the

Government to "outsource" its many functions. People who are carrying out the outsourced work are deemed to be public officials and hence amenable to the Commission's jurisdiction. Thus, for example, the function of inspecting motor vehicles for registration is now outsourced to privately run service stations with the consequence that the people undertaking the inspections are relevantly "public officials" (in recent years the Commission exposed a serious criminal conspiracy to "rebirth" stolen motor vehicles and non-public servants who inspected these motor vehicles for registration were subject to the Commission's jurisdiction and were found to have engaged in corrupt conduct).

Also, it must be noted that section 8(2) of the legislation defines corrupt conduct as including the conduct of any person (public employee or otherwise) that affects or could adversely affect directly or indirectly the exercise of official functions by a public official. Thus jurisdiction of the Commission extends to the conduct of non-public officials attempting to corrupt public officials whether or not the conduct actually results in corruption by the public official.

The Commission has two principal functions. The first is to investigate and expose corruption. The second is to promote integrity and accountability in the public sector and to review methods of work or procedures which may be conducive to corrupt conduct.

The Commission also has a secondary function which is to assemble evidence that may be admissible in the prosecution of a person for a criminal offence and to furnish such evidence to the Director of Public Prosecutions. I shall return shortly to this aspect of the jurisdiction of the Commission because it has been the subject of some criticisms.

Although it took some time for some people to accept, it is now fully understood that the Commission is an inquisitorial body discharging an administrative function. It is not a court of law nor is it an administrative body intended to function like a court of law. Investigations, education and corruption prevention strategies are the means by which it discharges its primary functions. It is clear from the legislation that its primary functions are regarded by Parliament as more important than its secondary function of assembling evidence for criminal prosecutions. A consequence of this is that investigations are primarily concerned with the exposure and prevention of corruption and that function is regarded by the legislation as more important than obtaining criminal convictions of those involved in corrupt practices.

When the legislation commenced in 1989 there was a general presumption that investigations of corrupt conduct should be wholly conducted in public. As time went by Parliament took the view that the "public interest" should prevail over the general presumption of public hearings. The legislation requires the Commission to take into account in determining whether or not it is in the public interest to conduct a public inquiry such matters as the benefit of exposing to the public the corrupt conduct, the risk of undue prejudice to a person's reputation and whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of persons concerned.

Recently the legislation was amended to reflect the administrative nature of the jurisdiction of the Commission. Previously hearings were held in private or in public. Now the private hearings are referred to as "compulsory examinations" and the public hearings are referred to as "public inquiries". When a person is called before the Commission to attend for a

compulsory examination or at a public inquiry the person called must be told beforehand of the "nature of the allegation or complaint being investigated". Although Parliament has decreed that the failure to give the advice referred to above will not invalidate or otherwise effect the conduct of the compulsory examination or public inquiry the Commission, of course, takes the view that these are Parliamentary directions which much be observed no matter how awkward that may be in a given case.

In order to allow the Commission to discharge its function as intended the Parliament has given it extensive coercive and intrusive powers. It can compel the giving of evidence and the production of documents and other material. It is a serious criminal offence for a person to give false or misleading evidence at a compulsory examination or public inquiry. It authorises the use of listening devices and the interception of telephone conversations and may engage in "controlled operations".

Legislation provides for serious penalties for people who engage in conduct with the intent of frustrating the Commission in the discharge of its duties. It is an offence to give false or misleading evidence to the Commission, or to attempt to bribe persons giving evidence, or for failure to attend when summoned. Disobedience to a summons can result in fines and jail sentences.

Previously, and when the Commission was established, it was provided that a person could be held guilty of contempt of the Commission if he engaged in conduct which, if the Commission had been a court of law, would have amounted to contempt of court. What was referred to was the form of contempt that lawyers refer to as "scandalising contempt".

Conduct can amount to scandalising contempt of court where it is said to have the tendency to weaken public confidence in the integrity of the court. I do not propose to express any opinion as to whether scandalising contempt of court should remain punishable beyond observing that there is a respectable body of legal opinion that it should not.

When I was undertaking the Inquiry referred to above I was firmly of the view that (putting to one side laws of defamation and the like) the right of free speech should ordinarily prevail over criticisms of government agencies albeit ill-informed criticism. After all free speech is not about encouraging people to say what the government or its agencies want them to say. It is about the government tolerating them saying things it does not want them to say. I was therefore pleased that the recommendation I had tentatively made was adopted by the Parliament and it has now accepted that "scandalising contempt" is now no longer an offence. I should also add, however, that my view on the undesirability of applying legal doctrines of contempt of court to administrative functions of government or government agencies is not original. It is a view that has been advanced by the Australian Law Reform Commission many years ago.

The legislation authorises the Commission to make findings of corrupt conduct and to express opinions and recommendations associated with its investigation. However it is not permitted in its reports to express an opinion that a specified person is guilty of, or has committed a criminal or disciplinary offence and it may not make a recommendation that a specific person be or an opinion that a specific person should be prosecuted for a criminal or disciplinary offence.

It may include in its report with respect to what are described as "affected" persons, a statement to the effect that the advice of the Department of Public Prosecutions should be sought with respect to the prosecution of a person for a specified criminal offence or disciplinary action. An "affected" person is a person against whom in the opinion of the Commission substantial allegations have been made in the course of, or in connection with the investigation.

There have been suggestions from civil liberty groups that the Commission should simply find facts and should not make findings of corrupt conduct bearing in mind the significant damage done to reputations by such findings. The matter has been repeatedly debated since the early 90's but to date the Parliament has not seen fit to change the law.

I do not think anyone will deny that a finding of corrupt conduct, although having no legal consequences, is likely to significantly affect the reputation. Even allegations of corrupt conduct often adversely affect reputations. This is why these matters must be taken into account before the Commission determines to conduct a public inquiry.

Some judges expressed concern that there might be a case (as there undoubtedly would be) where a person is found to have engaged in corrupt conduct yet is acquitted after a prosecution for an offence the gravamen of which relates to that corrupt conduct. It must be remembered however that if this is a problem it is not a problem unique to the functioning of the Commission. Tribunals in New South Wales are established to determine for example, fitness of professionals to practice and they may make findings which may appear inconsistence with subsequent acquittals. Yet I have not heard it suggested that for that reason those tribunals should not function as they do. Moreover I should also mention that if an appropriate case were presented to the Commission for a re-appraisal of its earlier published finding it has the jurisdiction to entertain the application and to make the appropriate order. But it would have to be satisfied that applying the appropriate standard and applying the appropriate law, something has occurred which persuades it that it should not have made, or at least should no longer maintain, the finding of corrupt conduct.

People who are called to compulsory examinations of public inquiries must answer all questions asked of them and produce all documents required to be produced. People are not entitled to refuse to answer questions or produce documents on the ground that they may be incriminated or on any other ground of privilege such as the right of silence, duty of secrecy and the like. In Australia there is no constitutional provision similar to the American 5th Amendment. New South Wales has not legislated for a Bill of Rights. It is part of the common law of Australia that there is a presumption that Parliament does not intend to remove traditional liberties and privileges but it unquestionably has the power to do so. The only common law privilege remaining is a limited form of legal professional privilege which is confined to advice people receive with respect to their obligations under the legislation.

Thus a person may object to answering questions but whether they object or not the questions must be answered. However the legislation has provided that, if people do object, the questions and answers may not be used against them in subsequent civil or criminal proceedings (except in proceedings for an offence under the ICAC legislation or in proceedings for contempt).

The Commission is independent. Of course it relies on government for funding to pursue its functions and it relies on government agencies to enforce its orders. But it is not otherwise accountable to government. The term "public official" extends to members of parliament, members of the judiciary and local government councillors.

There are three accountability mechanisms. The Commission is answerable to the Parliamentary Joint Committee comprising members of the Legislative Assembly (Lower House) and the Legislative Council (Upper House). It has the function to monitor and review the exercise by the Commission of its functions and to report to both Houses of Parliament. However the legislation, in terms, prohibits the Parliamentary Joint Committee from investigating "a matter relating to particular conduct" and it may not reconsider a decision of the Commission to investigate or not investigate or discontinue investigations of a particular complaint nor can it require the Commission to reconsider findings, recommendations, determinations and other decisions of the Commission in relation to a particular investigation or complaint.

The legislation also established an Operations Review Committee which consists of the Commissioner, Deputy Commissioner, a nominee of the Governor on the recommendation of the Attorney-General, the Commissioner of Police and four members of the public. The function of the Operations Review Committee is to advise the Commission whether it should investigate a complaint or discontinue an investigation of a complaint. It also has the function of advising the Commissioner on such matters as the Commissioner may from time to time refer to the Committee.

Recently the legislation was amended to establish the Office of Inspector of the Commission who has all, and more, of the powers of the Operations Review Committee and the Parliamentary Joint Committee. He has the function of auditing the operations of the Commission and, in particular, auditing the exercise of the Commission's covert and coercive functions which is not the function of the Operations Review Committee or Parliamentary Joint Committee. He also has the function of investigating complaints made against the Commission.

The Inspector is answerable to the Parliamentary Joint Committee. However as with its review function of the Commission, the Parliamentary Joint Committee may not, when reviewing the Inspector's function, investigate a matter relating to particular conduct or other matters referred to in the legislation. It might be said if that is so then to whom is the Inspector accountable when the Inspector investigates a complaint concerning a matter relating to particular conduct - i.e. who guards the guardian. I think the short answer must be, at the end of the day somebody has to be trusted and provided care is taken in the selection of an Inspector the performance of his duty in this regard must be left to him.

Section 122 of the legislation provides that nothing in the Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech and debates and proceedings in Parliament. The doctrine of parliamentary privilege dates back to Article 9 of the Bill of Rights 1689 (which is part of the law of New South Wales) which provides "that freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament".

New South Wales appears to be the only Australian State in which the laws of parliamentary privilege continue to be based on the common law. But the other States have introduced legislation to the same end. Although the Commission has had jurisdiction over members of parliament since 1989 there has been only one occasion when an issue of parliamentary privilege has arisen. That was when the Commission sought to exercise its search warrant powers over a member of parliament in the House. This led the Privileges Committee of the Parliament to conclude that there had been a breach of immunity of the House under Article 9 of the Bill of Rights and its recommendation to that effect was adopted by the Parliament.

Leading to the finding that the Commission was in breach of parliamentary privilege were a number of assertions and counter assertions concerning the meaning and scope of Article 9 and what procedures ought to be followed in the event of a similar occurrence in the future. I do not propose on this occasion to advance views held by the Commission, some of which were in conflict with views represented by lawyers advising the Parliament. It is my instinctive feeling that questions of parliamentary privilege should be determined by the Parliament unless the issue arises where that it would not be convenient to do so as for example, if the issue arises in the course of defamation proceedings, or in the case of the Commission, if it arises during the Commission's conduct of a compulsory examination or a public inquiry. It seemed to me that the preferable course from the Commission's point of view would be to reach some understanding with the Parliament as to what should be recognised as parliamentary privilege and how it should be dealt with if parliamentary privilege were claimed bearing in mind that parliamentary privilege is a privilege of the House and not of a particular Member and that Parliament would recognise that it has granted the Commission the jurisdiction to investigate allegations of corrupt conduct by members of parliament. I think I am justified in stating at the present time that the Commission and the Parliament have resolved the procedural matters.

Not infrequently an argument is advanced (mostly by members of parliament) that the Commission should not have the power to investigate allegations of corrupt conduct against members of parliament on the ground that, unless the conduct complained of is a criminal offence, it ought be left to the Parliament to determine its own standards and to discipline its own members. I make no comment on this argument beyond noting that if that is what the majority of members of parliament want then Parliament plainly has the power to legislate to the affect. To date it has not done so.

Not all findings of corrupt conduct result in convictions for offences, the gravamen of which relate to the corrupt conduct. This had led to a criticism, (mostly by the Parliamentary Joint Committee) that there should be more convictions. This criticism is, in my opinion, misplaced and is the result of a superficial understanding of the legislation. Because the Commission cannot make a finding of corrupt conduct unless the conduct complained of could constitute or involve a criminal offence it appears to be assumed by some that lack of convictions is the result of the Commission failing to discharge its duties properly. It is said that few convictions mean that the Commission has made findings of corrupt conduct when it should not have or has failed to assemble evidence to secure a conviction.

Leaving to one side that it is the Director of Public Prosecutions and not the Commission, which has the carriage of the prosecutions there are other circumstances capable of explaining what is thought to be a discrepancy. The Commission is an administrative body - it is not a

judicial body. The Commission is not bound by the rules of evidence and it makes its findings on the application of the civil, not the criminal, standard of proof. Moreover it must be understood that people may not refuse to answer questions to the Commission but if an objection is taken the questions and answers may not be used in subsequent criminal proceedings. Not infrequently the Commission gets sufficient information from admissions made to make findings of corrupt conduct and to make recommendations concerning the system that was conducive to that corruption but the evidence is not sufficient to found a criminal prosecution because all or most of the justification for the Commission's findings derives from the evidence given to the Commission which cannot be used in criminal proceedings.

Like all bodies discharging statutory duties the Commission is constrained by its budget and the demands of its functions. The legislation makes it clear that the assembling of evidence for subsequent criminal prosecutions is a secondary, not a primary, function of the Commission. That function must necessarily stand behind the Commission's primary functions. If the Commission is able to establish corruption from evidence received under compulsion a question arises whether the resources of the Commission should be used to unearth evidence that would lead to the same conclusion as the admissions made but which would be inadmissible in criminal proceedings. As I have said the Commission is not a law enforcement agency unlike a number of law enforcement agencies and, I think, unlike the Hong Kong ICAC. Whether its functions should extend to law enforcement in the sense referred to above is a matter for Parliament. But if Parliament decides to make the assembling of evidence which may be admissible in a criminal prosecution a primary function it will need to ensure that the budget of the Commission is significantly increased.

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