JOINT STANDING COMMITTEE ON THE ANTI-CORRUPTION COMMISSION

NATIONAL CONFERENCE OF PARLIAMENTARY OVERSIGHT COMMITTEES OF ANTI-CORRUPTION/CRIME BODIES 2003

Report No. 7

36th Parliament

2003

Published by the Legislative Council and Legislative Assembly, Parliament of Western Australia, Perth, December 2003.

Printed by the Government Printer, State Law Publisher, Western Australia.

Joint Standing Committee on the Anti-Corruption Commission

National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies 2003.

ISBN: 1 920830 19 7

(Series: Western Australia. Parliament. Legislative Assembly. Committees.
Joint Standing Committee on the Anti-Corruption Commission. Report 7)

328.365

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PERTH WA 6000

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Report No. 7

Presented by:
Hon Derrick Tomlinson, MLC
Mr John Hyde, MLA
Laid on the Table of the Legislative Council and Legislative Assembly
on 4 December 2003

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COMMITTEE'S FUNCTIONS AND POWERS

On 28 June 2001 the Legislative Assembly and the Legislative Council agreed to establish the Joint Standing Committee on the Anti-Corruption Commission. The Joint Standing Committee's functions and powers are set out in the Legislative Assembly Standing Orders 289, 290 and 264.

290 (1) It is the function of the Committee:

(a) to monitor and review the performance of the functions of the Anti-Corruption Commission established under the *Anti-Corruption Commission Act 1988*;

(b) to consider and report to Parliament on issues affecting the prevention and detection of "corrupt conduct", "criminal conduct", "criminal involvement" and "serious improper conduct" as defined in section 3 of the *Anti-Corruption Commission Act 1988*. Conduct of any of these kinds is referred to in this Standing Order as "official corruption";

(c) to monitor the effectiveness or otherwise of official corruption prevention programs;

(d) to examine such annual and other reports as the Joint Standing Committee thinks fit of the Anti-Corruption Commission and all public sector offices, agencies and authorities for any matter which appears in, or arises out of, any such report and is relevant to the other functions of the Joint Standing Committee;

(e) in connection with the activities of the Anti-Corruption Commission and the official corruption prevention programs of all public sector offices, agencies and authorities, to consider and report to Parliament on means by which duplication of effort may be avoided and mutually beneficial co-operation between the Anti-Corruption Commission and those agencies and authorities may be encouraged;

(f) to assess the framework for public sector accountability from time to time in order to make recommendations to Parliament for the improvement of that framework for the purpose of reducing the likelihood of official corruption; and

(g) to report to Parliament as to whether any changes should be made to relevant legislation.

(2) The Joint Standing Committee will not:

(a) investigate a matter relating to particular information received by the Anti-Corruption Commission or particular conduct or involvement considered by the Anti-Corruption Commission;

(b) reconsider a decision made or action taken by the Anti-Corruption Commission in the performance of its functions in relation to particular information received or particular conduct or involvement considered by the Anti-Corruption Commission; or

(c) have access to detailed operational information or become involved in operational matters.

The Legislative Council has agreed to a resolution which has the same functions and powers as set out in the above Standing Orders of the Legislative Assembly.

The Standing Orders of the Assembly relating to standing and select committees are also followed as far as they can be applied.

CHAIRMAN'S FOREWORD

The Joint Standing Committee on the Anti-Corruption Commission hosted a *National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies* at Parliament House, Western Australia, on 30 September and 1 October 2003. The Conference constituted the fourth working group meeting of oversight committees of this type, currently operating in Australia. These include:

- The Committee on the Office of the Ombudsman and the Police Integrity Commission, New South Wales;
- The Committee on the Independent Commission Against Corruption, New South Wales;
- The Parliamentary Crime and Misconduct Committee, Queensland;
- The Joint Standing Committee on the Anti-Corruption Commission, Western Australia; and
- The Parliamentary Joint Committee on the Australian Crime Commission, Commonwealth.

Members of the Commonwealth Committee oversighting the Australian Crime Commission were unavailable to attend.

In brief, the primary function of these Committees is to monitor and review the performance of the functions of the agencies they oversee and to report to Parliament on matters pertaining to those agencies.

The aim of these conferences or working groups is to foster informed debate amongst Parliamentary Committees oversighting anti-corruption and law enforcement bodies, in order to promote the ongoing development of best practice in the performance of the Committee's role.

This Conference focussed on three distinct areas: *Improving Public Confidence*, *Governance* and *Ethics Education*. These issues were identified in consultation with interstate committees and a range of relevant practitioners. Presenters principally comprised of committee chairpersons or their member representative, practitioners from the various levels of the anti-corruption framework and relevant academics. The Conference format aimed to stimulate thought and the frank exchange of ideas by providing a balance between the delivery of information and facilitated debate or workshop sessions.

Following deliberations with interstate counterparts, the Joint Standing Committee on the Anti-Corruption Commission resolved to extend an invitation to other anti-corruption and law enforcement bodies and relevant regulatory agencies. This decision

was based on the premise that there exists a certain degree of interdependence between the various levels of the anti-corruption framework, despite them generally operating as distinct entities in terms of their role and functions. This seems fairly self-evident given that these anti-corruption bodies work to the same outcome: to minimise corruption within the Public Sector. However, on a procedural level, effective oversight is dependent on a clear understanding of the operations of the agency politic being oversighted and of the environment in which that body operates. Further, certain principles of operation can be applied to all levels of the framework. Drawing on several examples from this Conference, this would include principles of governance, media management and the building of ethical cultures.

To date, I have referred only to the lineal exchange of information. One should not underestimate the importance of formal and informal exchange between equivalent anti-corruption bodies. From a macro perspective the anti-corruption frameworks in the relevant states are at different stages in their development, principally as a consequence of social and political influences and their experiences within the courts. Justice Kennedy, AO QC, Commissioner, Police Royal Commission in Western Australia, refers to this concept when making reference to the impact of the Wood and Fitzgerald Royal Commissions in Queensland and New South Wales:

> *"What has occurred in both Queensland and New South Wales can be seen in a developmental model as an evolution of the agencies tasked with corruption and crime prevention."* [1]

Importantly, he talks about the changes in each state's initial model as a result of the experiences gained from that model. Although acknowledging that those models reflect the needs of each jurisdiction, the various states have and do continue to draw from those experiences.

From a Western Australian perspective, the Conference fell at a critical time, given the impending changes to the current anti-corruption structure as a result of the findings of the Police Royal Commission[2]. As reflected in Justice Kennedy's report, the proposed new framework draws on aspects of the Queensland and New South Wales' models.

To date these "anti-corruption" conferences have been extended to the New Zealand Parliament and to Australian Parliaments in those States or Territories where laws have not been passed establishing specialist criminal justice agencies, supervised by Parliamentary oversight Committees. Other than shared experience, this provides opportunity for challenge to the way in which we conduct our business, from those jurisdictions operating external to this system. The oversight Committees on this occasion welcomed participation from the Victorian Drugs and Crime Prevention Committee and Dr Andrew Jack, Senior Legal Advisor to the New Zealand Police.

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[1] *Royal Commission Into Whether There Has Been Any Corrupt Or Criminal Conduct By Western Australian Police Officers, Interim Repor*t, December 2002, p.9, 2.12.

[2] *Royal Commission Into Whether There Has Been Any Corrupt Or Criminal Conduct By Western Australian Police Officers.*

The reader will note that a strong focus on corruption rather than crime was evident at the conference, despite the conference title. This can be attributed to the fact that, of those in attendance, only the Parliamentary Crime and Misconduct Committee (PCMC) in Queensland oversights a Commission with responsibility for corruption and organised crime (including paedophilia). Although there are intended changes in Western Australia that will incorporate both functions, at present, the Commissions in New South Wales and this state are limited by legislation to the investigation of corruption within the Public Sector.

The success of any conference hinges on the calibre of its speakers. The Joint Standing Committee on the Anti-Corruption Commission was fortunate to obtain commitment from a number of very senior practitioners who provided sound information from a theoretical and operational perspective, the Committee thanks them for their commitment. Professional profiles have been provided at Appendix Two.

I mentioned earlier that the anti-corruption bodies face similar issues despite different jurisdictional influences. This was clearly reflected in the papers presented at the conference. Also notable was the degree of consensus amongst speakers regarding proposed solutions to current challenges.

Briefly, some of the common themes of the conference included:

- The concept of public confidence in the various sectors of the anti-corruption framework, including:
  - A system of good governance based on sound empirical research that reinforces that public funds are being expended effectively and efficiently.
  - The important role of the Inspector of the Commission, from a governance perspective.
  - The complexities and difficulties associated with measuring the performance of anti-corruption commissions versus the need for external reporting.
  - A clear indication of the independence of the Commission from political or other improper interference through an appropriate level of transparency of process.
  - The conflict between the competing interests of public exposure of corruption and the potential harm of false allegations to an individual being investigated and the need to establish a system that provides a balance, from both a Commission and media perspective.
- The need to develop ethical cultures, based on a self regulated approach, within units of public administration and the broader corruption framework, to ensure

the development and maintenance of robust governance systems tailored to the needs of the particular body.

- Changes to the police accountability system.

- The complexities associated with using police to investigate police corruption either within an independent corruption agency or in one where crime and corruption functions are amalgamated.

- The importance of Crime Commissions developing and maintaining effective partnerships with Police and complementing the work of the latter given additional powers, technical resources and research capacity.

As this is principally a conference of committees, I just want to comment on the paper by Mr John Price, MP, Chair, Legislative Assembly Standing Ethics Committee, New South Wales, on ethical standard setting and the development of ethical cultures within the New South Wales Parliament. Several other Australian Parliaments, including Victoria, Tasmania and the Northern Territory are adopting a similar stance. This marks an acceptance by Parliament of the need to continually optimise their functioning to better serve the public, a public that has entrusted it with a certain level of privilege and power. However, it is also a milestone in the acceptance of corruption prevention practices at all levels of Government.

The formal and informal exchange of information at the Conference has been remarked on as invaluable and confirms the need for ongoing resource commitment to these working groups. On behalf of the Joint Standing Committee on the Anti-Corruption Commission, I would like to extend my sincerest thanks to all those who participated in this event. The Parliamentary oversight committees of anti-corruption/crime bodies have resolved, dependent on funding, to hold a further conference in 2005.

HON DERRICK TOMLINSON, MLC
CHAIRMAN

ABBREVIATIONS AND ACRONYMS

"ACC [Cth]"	Australian Crime Commission (Commonwealth)
"ACC"	Anti-Corruption Commission
"ADB"	Asian Development Bank
"AFP"	Australian Federal Police
"ANAO"	Australian National Audit Office
"APRA"	Australian Prudential Regulatory Authority
"ASIC"	Australian Securities and Investments Commission
"ASX"	Australian Stock Exchange
"BBC"	British Broadcasting Commission
"CC"	Crime Commission
"CCC"	Corruption and Crime Commission
"CEO"	Chief Executive Officer
"CICIC"	Commissioner for the Investigation of Corrupt and Improper Conduct
"CJC"	Criminal Justice Commission
"CMC"	Crime and Misconduct Commission
"CPA"	Certified Practising Accountant
"DPP"	Department of Public Prosecutions
"EARU"	External Agencies Response Unit
"FSA"	Financial Services Agency
"HIH"	HIH Insurance Limited
"ICAC"	Independent Commission Against Corruption
"IFAC"	International Federation of Accountants
"IPF"	Investigations Performance Framework
"IT"	Information Technology
"JSCACC"	Joint Standing Committee on the Anti-Corruption Commission

"KPMG"	KPMG Professional Advisory Firm
"LA"	Legislative Assembly
"MEAA"	Media Entertainment and Arts Alliance
"MLA"	Member of the Legislative Assembly
"MLC"	Member of the Legislative Council
"MORI"	Market and Opinion Research International
"MP"	Member of Parliament
"NASA"	National Aeronautics and Space Administration
"NCA"	National Crime Authority
"NSW"	New South Wales
"NSWCC"	New South Wales Crime Commission
"OAG"	Operations Advisory Group
"OCC"	Official Corruption Commission
"OECD"	Organisation for Economic Co-operation and Development
"OHS"	Occupational Health and Safety
"OPR"	Office of Professional Responsibility
"PCJC"	Parliamentary Criminal Justice Commissioner
"PCMC"	Parliamentary Crime and Misconduct Committee
"PIC"	Police Integrity Commission
"PR"	Public Relations
"QC"	Queen's Counsel
"QCC"	Queensland Crime Commission
"QCMC"	Queensland's Crime and Misconduct Commission
"QLD"	Queensland
"QPS"	Queensland Police Service
"QSARP"	Qualitative and Strategic Audit of the Reform Process
"SC"	Senior Counsel

"SCIA"	Special Crime and Internal Affairs
"SWOS"	Special Weapons Operations Squad (otherwise known as Tactical Response Group)
"UK"	United Kingdom
"UPA"	Units of Public Administration
"WA"	Western Australia
"WAPRC"	Western Australian Police Royal Commission

APPENDIX ONE

TABLE OF SPEAKERS

Name	Position/Organisation	Topic	Appendix Number
Day One - 30 September 2003			
Mr Peter Breen MP	Member, Committee on the Office of the Ombudsman and the Police Integrity Commission, NSW	Overview of corruption model - indication of perceived strengths and weaknesses, with particular reference to the Committee	Three
Hon. Kim Yeadon MP	Chair, Committee on the Independent Commission Against Corruption, NSW	Overview of corruption model - indication of perceived strengths and weaknesses, with particular reference to the Committee	Four
Mr John Price MP	Chair, Legislative Assembly Standing Ethics Committee, NSW	An update on the work of the Committee	Five
Mr Geoff Wilson MP	Chair, Parliamentary Crime and Misconduct Committee, QLD	Overview of corruption model - indication of perceived strengths and weaknesses, with particular reference to the Committee	Six
Hon. Derrick Tomlinson, MLC	Chairman, Joint Standing Committee on the Anti-Corruption Commission, WA	Overview of corruption model - indication of perceived strengths and weaknesses, with particular reference to the Committee	Seven
Dr Stephen Tanner	Senior Lecturer, School of Media, Communication and Culture, Murdoch University, WA	Corruption bodies and the media - understanding the relationship	Eight
Mr Torrance Mendez	Reporter, West Australian Newspaper	Competing interests? Privacy, transparency and the role of the media	Nine
Professor Peter Little	Acting Dean, Faculty of Business, Queensland University of Technology	The relevance of good governance principles to anti-corruption bodies	Ten
Mr Brendan Butler SC	Chairman, Crime and Misconduct Commission, QLD	The pros and cons of amalgamation of crime and corruption functions	Eleven

Name	Position/Organisation	Topic	Appendix Number
Mr Phillip Bradley	Chairman, New South Wales Crime Commission	The pros and cons of amalgamation of crime and corruption functions	Twelve
Mr Robert Needham	Parliamentary Crime and Misconduct Commissioner, QLD	The Commissioner model, a practical approach	Thirteen
Day Two - 1 October 2003			
Mr Peter Hastings QC	Senior Counsel Assisting, Police Royal Commission, WA	Lessons learned in governance from the Royal Commission	Fourteen
Ms Deirdre O'Donnell	Parliamentary Commissioner for Administrative Investigations, WA	Can self regulation deliver public confidence?	Fifteen
Dr Narayanan Srinivasan	Head of School, Murdoch Business School, Murdoch University, WA	An international perspective of corruption prevention	Sixteen
Ms Moira Rayner	Commissioner, Anti-Corruption Commission, WA	What kind of a role should a committee have in ethical standard setting?	Seventeen

APPENDIX TWO

PROFESSIONAL PROFILES OF CONFERENCE PRESENTERS

The Hon. Derrick Tomlinson, MLC

The Hon. Derrick Tomlinson, MLC was appointed Chairman of the Joint Standing Committee on the Anti-Corruption Commission in October 1996, having previously chaired the Select Committee on the Western Australian Police Service. Mr Tomlinson is also Shadow Minister for Indigenous Affairs, Upper House member for the East Metropolitan Region and a member of the Legislation Committee currently considering the *Corruption and Crime Commission Amendment Bill 2003*.

The Hon. Peter Breen, MLC

The Hon. Peter Breen, MLC has been a member of the Committee on the Office of the Ombudsman and Police Integrity Commission since 1999. He is also a current member of the Legislation Review Committee, with former membership of the Joint Select Committee upon Victims Compensation and Standing Committee on Law and Justice. He has a keen interest in human rights issues, law reform and access to justice.

The Hon. Kim Yeadon, MP

The Hon. Kim Yeadon, MP is Chair of the Committee on the Independent Commission Against Corruption and member for Granville, one of Sydney's outer western suburbs. He has been a member of the New South Wales Legislative Assembly since 1991 and Minister for a number of portfolios including Western Sydney, Energy, Ports, Information Technology, Forestry, Land and Water Conservation.

Mr John Price, MP

Mr John Price, MP is currently Chair of the Standing Ethics Committee, a member of the Committee on the Independent Commission Against Corruption, and the Member for Maitland, New South Wales. Mr Price was elected to the Legislative Assembly in 1984 and is currently Deputy Speaker. He has participated on other committees including the Standing Committee on Public Works, the Standing Orders and Procedures Committee and as Chairman of Committees. He has been Shadow Minister for Public Works and for State Development.

Mr Geoffrey (Geoff) Wilson, MP

Mr Geoff Wilson, MP has been Chair of the Parliamentary Crime and Misconduct Committee since January 2002 with membership and Chairmanship of the former Parliamentary Criminal Justice Committee. He is member for Ferny Grove in

Queensland. Prior to his election to Parliament, Mr Geoff Wilson was a union official, barrister and public servant.

Dr Stephen Tanner

Dr Tanner is a Senior Lecturer in journalism at Murdoch University, Western Australia where he coordinates the investigative journalism, journalism ethics and political journalism courses. Dr Tanner has a strong interest in media treatment of corruption, completing a doctorate on this topic in 1999. He has presented numerous conference papers both nationally and internationally on this subject and is a recently published author of an academic journalism text.

Mr Torrance Mendez

Torrance Mendez migrated to Western Australia from the United Kingdom in 1990 and has worked for the State's daily paper, the *West Australian*, since that time. In 2000, he led calls for a police royal commission in Western Australia after exposing the circumstances of the death of a protected witness, Andrew Petrelis, late in 1999. He has written on the performance of the Anti-Corruption Commission, Western Australia.

Professor Peter Little

Professor Little is Professor of Business Law and Acting Dean of the Faculty of Business at Queensland University of Technology. He has published extensively in the area of corporate law and is a member of the Law Council of Australia's Corporations Law Committee and the Queensland Law Society's Companies Committee. His current professional interests include corporate governance, compliance law and the law of company takeovers. He was a member of the working party which produced the new Corporate Governance Standards released in July 2003 by Standards Australia and has been undertaking reviews of corporate governance systems for a number of public companies and not for profit organisations.

Mr Brendan Butler SC

Mr Butler SC was appointed Chairperson of the Crime and Misconduct Commission, Queensland in December 2001, following a period of approximately three years as Chairperson of its predecessor, the Criminal Justice Commission (CJC). Mr Butler SC's career has spanned periods as both a Crown Prosecutor and Barrister in private practice. From 1989 to 1996 he held the position of Deputy Director of Public Prosecutions. From June 1987 to September 1989, he was Council Assisting the Fitzgerald Commission of Inquiry, the forerunner to the CJC. In 1990, he was the principal Counsel Assisting the Ward 10B Commission of Inquiry in Townsville.

Mr Phillip Bradley

Mr Phillip Bradley has been Commissioner of the New South Wales Crime Commission since 1990. He has previous experience in litigation, prosecutions, Royal Commissions and with the National Crime Authority (NCA). Mr Bradley recently spent six months with the Commonwealth Government winding up the NCA as the last Chairperson and commencing the Australian Crime Commission as the first Chief Executive Officer.

Mr Robert Needham

Mr Robert Needham was appointed to the part-time position of Parliamentary Crime and Misconduct Commissioner, Queensland in 2001. He is a Barrister of the Supreme Court of Queensland and of the High Court of Australia. He has extensive experience in criminal practice at all levels at trial and appellate work, in defence and prosecution. From 1987-1989 he was one of the counsel assisting the Fitzgerald Inquiry and from 1990-1991 he was involved in collating briefs and prosecuting in political corruption trials for the Special Prosecutor's Office.

Mr Peter Hastings QC

Mr Hastings QC is a Sydney Barrister practising principally in criminal law. He was appointed a Queens Counsel in 1992. He is currently Senior Counsel to the Police Royal Commission[1] in Western Australia, although has had extensive experience in corruption inquiries. These inquiries include the Moffit Royal Commission in the 1970's; the Royal Commission into the Aged Tapes, the Wood Royal Commission and the Police Integrity Commission's Operation Florida. He has also worked for the former National Crime Authority and the Independent Commission Against Corruption.

Ms Deirdre O'Donnell

Ms Deirdre O'Donnell was appointed as Parliamentary Commissioner for Administrative Investigations (Ombudsman) for Western Australia on 25 February 2002. She previously held the position of Deputy Ombudsman for the Telecommunications Industry Ombudsman Scheme, a national scheme based in Victoria. Besides an extensive employment history in telecommunications, Ms O'Donnell has experience in languages and education, with a current interest in Commercial Law, particularly dispute resolution.

Professor Narayanan Srinivasan

Professor Narayanan Srinivasan is Dean of the Business School, Murdoch University and Adjunct Professor, School of Justice and Business Law, Edith Cowan University.

[1] Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct By Western Australian Police Officers.

His principal focus for last decade has been strengthening the capacity of Western Australian and South East Asian business communities to overcome fraud and corruption by building alliances and developing appropriate educational programs to improve regulatory standards. Two areas of focus have been corporate governance and aviation security and he is chair of several related boards and committees. Professor Srinivasan has also published numerous papers in the field of corporate governance and spoken at a variety of forums including the OECD, ADB and at national forums organised by ministries of finance, state securities commissions, regulatory bodies and major financial institutions.

Ms Moira Rayner

Ms Moira Rayner is currently Commissioner of the Anti-Corruption Commission and formerly Acting Commissioner for Equal Opportunity in Western Australia. She has a strong background in law and social policy development. In 2000, Ms Rayner was involved in the establishment of the Office of Children's Rights Commissioner for London, from 1990-1994 she held the position of Commissioner for Equal Opportunity in Victoria and from 1986-1990 Commissioner/Chairman of the Western Australian Law Reform Commission. She holds a number of contemporaneous part-time appointments including Chair, Council of the Financial Services Complaints Resolution Scheme; Commissioner, Human Rights and Equal Opportunity Commission; and a columnist for the Age. She has been appointed an Adjunct Professor at a number of Australian Law Schools and is a Senior Fellow in the Law School of Melbourne and University of Western Australia. She has held a range of positions in community organisations and has authored a number of successful books.

APPENDIX THREE

Paper delivered by the Hon. Peter Breen MLC, Member, New South Wales Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, New South Wales

Striking a balance: essentials for police accountability and Parliamentary oversight

INTRODUCTION

Conceptual Framework

In discussing the role of 'watchdog' authorities, such as the Ombudsman, the Inspector and the Police Integrity Commission (PIC), it may help to look at the conceptual framework within which they operate. As independent statutory bodies, these authorities are all accountable to the Parliament, through the mechanism of a parliamentary committee, and they report to Parliament on the exercise of their respective functions. It is these features that make the "watchdogs" independent of the Executive and the agencies they scrutinise.

In the case of the Ombudsman, regard may be had to the concept that the Ombudsman serves as an "officer of the Parliament". In some jurisdictions, for example New Zealand and Britain, the connection between the Ombudsman and Parliament is recognised formally within the relevant statutes. The Parliamentary and Health Services Ombudsman in the United Kingdom is established under the *Parliamentary Commissioner Administration Act 1967* as an officer of the House of Commons and the work of the Parliamentary Commissioner is examined by the Public Administration Committee.[1] A complaint made by an individual must be referred to the Parliamentary Ombudsman through a Member of the UK Parliament.[2] Similarly, the New Zealand Ombudsman is an Officer of the Parliament.[3] The Officers of Parliament Committee fixes the appropriation for the New Zealand Ombudsmen's

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1 The House of Common's Public Administration Committee is appointed by the House of Commons to examine the reports of the Parliamentary Commissioner for Administration, of the Health Service Commissioners for England, Scotland and Wales and of the Parliamentary Ombudsman for Northern Ireland, and related matters. It also considers matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service.

http://www.parliament.uk/parliamentary_committees/public_administration_select_committee.cfm

2 This complaints mechanism is termed the "MP filter" and the Public Administration Committee has recommended its removal as part of a package of proposed reforms to the public sector ombudsmen.
http://www.publications.parliament.uk/pa/cm200203/cmselect/cmpubadm/448/44802.htm

3 Other Officers of the Parliament include the Auditor General and the Parliamentary Commissioner for the Environment.

Office and recommends the appointment of the Ombudsmen.[4] In New Zealand, the criteria used for defining an officer of Parliament is that:

- their primary function is to act "as a check on the Executive, as part of Parliament's constitutional role of ensuring accountability of the Executive";
- and they must discharge quasi-Parliamentary functions which the House might appropriately undertake.[5]

In jurisdictions such as New South Wales, there is no such formal categorisation of the Ombudsman as an officer of the Parliament. However, the Ombudsman's role of taking up complaints on behalf of individuals can be viewed as comparable to the role of Members of Parliament, who make representations and pursue grievances on behalf of their constituents.[6] It also could be said that the Ombudsman, Inspector and PIC perform oversight functions analogous to another role of the Parliament, namely oversight of the Executive.

Nevertheless, in the absence of a statutory basis for classifying the 'watchdog' authorities as formally tied to the legislature, they must still be seen as forming part of the Executive arm of government. In the case of the PIC, the Inspector has recently provided a useful description of the status of the PIC as part of the 'investigative' arm of the executive government.[7] This description while recognising that the 'watchdog' authorities are not formally part of the legislature acknowledges that they perform a separate and distinct role from most executive departments and agencies of government. This investigative role complements and assists the legislature in its role of holding the executive arm of government accountable. The interface between the 'watchdog' authorities and the legislature is provided by the parliamentary committees that oversee them.

This framework may assist in providing a better understanding of the relationship between 'watchdogs' and their parliamentary oversight committees.

BACKGROUND

Historical Overview

The findings of entrenched corruption that were made by the Royal Commission into the New South Wales Police Service (the Wood Royal Commission) are well known.

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4 Reports and other matters relating to the Officers of Parliament may be referred to parliamentary committees that are most relevant to the subject matter involved

5 Finance and Expenditure Committee 1989, *Report on the Inquiry into Officers of Parliament*, New Zealand House of Representatives, p.5-7.

6 NSW Ombudsman, *The Independence and Accountability of the Ombudsman*, 19 July 1990, pp.4-12.

7 Evidence, Fifth General Meeting with the Inspector of the Police Integrity Commission, 25 June 2003, p.4.

However, the changes to the police accountability system resulting from the Royal Commission are not so well known, or so easily understood. Recent reviews of the PIC have highlighted some of the misconceptions and confusion surrounding its jurisdiction, functions and proceedings.

In order to understand the PIC, and its relationship with the Committee, it is important to put the PIC's development into context.

Prelude to the Royal Commission

The police accountability system in the period preceding the Wood Royal Commission comprised:

- *Internal investigation by police with external oversight by the Ombudsman* – i.e. investigation of police misconduct by police officers, with monitoring and review of the investigations by an external, independent civilian body[8];

- *Investigation of police corruption by the Independent Commission Against Corruption (ICAC)* – ie investigation of corruption by an independent statutory authority with responsibility for corruption investigation across the public sector.

Under this system the Office of Professional Responsibility (OPR)[9] within the NSW Police Service investigated complaints and police corruption. Central Internal Affairs allocated the investigation of complaints either centrally, through Regional Internal Affairs or Local Area Commands. All police complaints were notified to the Ombudsman but responsibility for investigating corruption matters, arising by way of complaint, resided with the Professional Integrity Branch of OPR. The Royal Commission assessed the Police Services' investigations as largely reactive.[10]

The Ombudsman was intended to act as a safeguard within the police complaints system and was empowered to:

- conduct a direct investigation into a police complaint;

- direct the Police Commissioner to investigate a complaint;

- monitor the progress of an investigation;

- assess the adequacy of an investigation;

- direct a further investigation of a complaint;

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8 Royal Commission into the New South Wales Police Service, *Interim Report*, February 1996, p.76

9 OPR comprised the Professional Integrity Branch (PIB) and the Office of Internal Affairs (Central IA).

10 Royal Commission, *Interim Report*, op.cit, pp.6-8.

- conciliate a complaint;
- review the action proposed by the Police Commissioner on a sustained complaint.[11]

ICAC investigated matters of police corruption, as part of its role in exposing and minimising corruption throughout the public sector. It did not have a specific division for investigating police corruption. ICAC's powers included powers to obtain information and documents, enter premises, obtain listening device warrants, and issue and exercise search warrants. The ICAC also held public or private hearings to take evidence from witnesses. In addition ICAC performed a corruption prevention and education role, and prior to the Wood Royal Commission had conducted corruption prevention projects on secondary employment of police officers and the management of criminal investigations.[12]

Although one of the functions of the New South Wales Crime Commission was to review a police inquiry into criminal activity, it rarely did so, and did not exercise its coercive powers on such reviews. The Crime Commission employed police task forces to conduct investigations and these police remained under the control and direction of the Commissioner of Police. Police corruption was investigated only where it arose incidentally in the course of a criminal investigation. An obvious conflict existed for the Crime Commission in undertaking corruption investigation functions involving the police when police were necessarily involved in any investigations it undertook. However, the Crime Commission had worked on joint projects with Internal Affairs and ICAC to produce evidence of corruption arising from criminal investigations, and on occasions it provided additional investigation and technical resources to the joint projects.[13]

Royal Commission into the NSW Police Service

In considering the relative merits of creating a standing commission such as the PIC, the apparent deficiencies with the pre-Royal Commission system are instructive.

While Justice Wood's Interim Report referred to general support for the past performance of the Ombudsman in dealing with police complaints, the Ombudsman's heavy reliance on information received from the Police Service was noted. The Office depended on the use of investigators seconded from the Police Service, and although initial fears about the independence of seconded police were not realised, it proved difficult to attract police because of the negative effect secondment to the Office had on their career paths. This problem was partly overcome through the use of civilian officers with former policing experience. Furthermore, the Ombudsman did not possess coercive powers "to undertake proactive investigations". The number of direct

11 ibid, p.9.

12 ibid, pp.10-13.

13 ibid, pp.14-15.

investigations and reinvestigations conducted by the Office was limited and the Office did not have the capacity to investigate corruption effectively, or to monitor protracted and complex corruption investigations. In addition, the oversight role performed by the Ombudsman did not accommodate any direct participation in criminal investigations and prosecutions.[14]

With regard to the role of the ICAC in investigating police corruption, the Interim Report observed that:

- the ICAC's responsibility for corruption investigation, prevention and education, across the public sector may have affected the level of attention given to the identification and elimination of serious police corruption;
- the corruption prevention work carried out by the ICAC in relation to the Police Service appeared to have had limited impact;
- ICAC's intervention in this area, by direct operations or formal inquiries, had been occasional rather than regular;
- the membership of the Police Commissioner on the ICAC's Operations Review Committee risked a perception of partiality;
- the dangers for a corruption investigation body of using NSW police outweigh the advantages, and their use in the past may have affected the quality of ICAC's investigative work in this area;
- although the ICAC has greater powers than the Royal Commission eg telephone interception powers, the result of ICAC investigations into police corruption had been limited. Particular reference was made to the Milloo investigation, which is described as "an opportunity lost", resulting in limited convictions and the enforced departure of few corrupt officers;
- ICAC had not used aggressive proactive investigative techniques, such as those employed by the Royal Commission, and police corruption of a significant kind and extent had continued.[15]

Limitations noted in the Interim Report in relation to NSW Crime Commission (NSWCC) investigations of police corruption included that:

- the NSWCC's power to review Police Service inquires had been sparsely exercised.

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14 ibid, pp.64-66.

15 ibid, pp.66-68.

- the impartiality or independence of any NSWCC review was called into question because the Task Forces used came under the control and direction of the Police Commissioner;

- the appearance of impartiality was not fostered by the presence of the Police Commissioner on the NSWCC's Management Committee.

- the nature of the NSWCC's work as a law enforcement agency makes the NSWCC heavily dependent upon the police with whom it works, thus limiting its capacity to take any significant part in fighting police corruption.[16]

Proposal for a new system

The Royal Commission Interim Report concluded that:

> *The experience of this Royal Commission is that a focussed, sophisticated and aggressive approach is necessary to uncover and combat serious police misconduct and corruption. This has been lacking and a new approach is now needed.*[17]

A purpose built agency[18], which would operate in a system combining internal and external investigation, features prominently in the Royal Commission proposal for a new system for corruption detection, investigation and prevention. The new agency would focus on the investigation of serious police misconduct and corruption, and would be free of the problems associated with the system that had preceded the Royal Commission. The Police Service would retain a meaningful role in certain police misconduct matters subject to oversight.[19]

In particular, the proposed new system was seen as addressing the following factors:

- there is a pattern of corruption within the NSW Police Service that needs to be addressed urgently in order to restore public confidence;

- complaint handling and corruption investigation require different approaches;

- complaints alone are an inadequate indicator of the extent of police corruption;

- the nature of corruption means that it is difficult to detect and requires the application of sophisticated and determined investigative techniques;

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16 ibid, p.69.

17 ibid.

18 Originally the proposed title for the agency was the Police Corruption Commission. This was changed during the passage of the legislation through Parliament to the Police Integrity Commission.

19 Royal Commission, *Interim Report*, op.cit, pp.91, 93-4.

- NSW Police Service must accept ownership of and responsibility for its problems.[20]

Significantly, the Interim Report specifies that the new body "should not be of the genus of a standing Royal Commission". The distinction was made that a Royal Commission's *primary* function is to establish the facts of a matter through the use of inquisitorial powers and, as a secondary aim, secure convictions. In contrast assembling admissible evidence to furnish to the DPP would be a key function of the proposed new body.[21]

The Interim Report stated that:

> *There is always a risk that an agency which is heavily committed to covert investigations, reliant on informants, and possesses powers which are both coercive and of a kind which might involve substantial infringements of rights of privacy, may overstep the mark. For this reason it is important that there be a 'watchdog' which is able to respond quickly and effectively to complaints of misconduct and abuse of power, without risking secrecy of operations, or confidentiality of informants and witnesses.*[22]

Consequently, it was recommended that the new body would be accountable by way of its annual report and an Inspector. The Inspector would be able to audit operations, and respond quickly and effectively to complaints of misconduct and abuse of powers by the new body, without compromising the integrity of its investigations. For the purpose of carrying out these functions, it was recommended that the Inspector should be able to:

- Access records of the new body;
- Require employees of the new body to supply information;
- Assess complaints or incidents of misconduct, either alone or with the Commissioner of the new body;
- Recommend internal disciplinary action or criminal prosecution; and
- Refer misconduct in the case of seconded investigators to parent agencies.[23]

The Interim Report specifically recommended against the establishment of a parliamentary joint committee, in view of the narrow focus of the new body and the oversighting role to be performed by the Inspector. However, the Parliament strengthened the accountability system for the PIC by making provision for a

[20] ibid, p.88.

[21] ibid, p.94.

[22] ibid, p.95.

[23] ibid.

parliamentary oversight committee. The role of the committee is dealt with in Section 3.

Establishment of the Police Integrity Commission

In response to the findings and recommendations contained in the Interim Report, the Government introduced legislation into the Parliament in 1996. The *Police Integrity Commission Act 1996* (PIC Act) provided for the creation of an independent statutory body to detect, investigate and prevent police corruption and serious misconduct. The *PIC Act* also provided for the appointment of the PIC Inspector and the Parliamentary Joint Committee. As a complementary measure, the existing police complaints system was reformed by the *Police Legislation Amendment Act 1996*, which amended the *Police Service Act 1990*.

The new legislation removed the role of ICAC in investigating police corruption while retaining the Ombudsman's jurisdiction in relation to oversight of individual police investigations of complaints and misconduct. Statutory provision was made for police complaint categories to be defined through a number of "class or kind" agreements between the PIC, the Ombudsman and the Police Commissioner. The NSW Police would continue to investigate the majority of complaints and misconduct matters. However, investigating a special category of serious misconduct and corruption would be the focus of the Police Integrity Commission. Matters not taken up by the PIC, would be investigated either by the Ombudsman, or by the NSW Police subject to oversight.

CURRENT ACCOUNTABILITY STRUCTURE FOR THE PIC

The Inspector of the PIC

Under s.89 the Inspector has the following Principal functions:

- to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and

- to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and

- to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

The Inspector may exercise his or her functions on their own initiative, at the request of the Minister, in response to a complaint, or in response to a reference by the Ombudsman, the ICAC, the New South Wales Crime Commission, the Joint Committee or any other agency. The Act clearly states that the Inspector is not subject to the Commission in any respect.

The powers provided to the Inspector under s.90 are that he or she:

- may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
- is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and
- may investigate and assess complaints about the Commission or officers of the Commission, and
- may refer matters relating to the Commission or officers of the Commission to other agencies for consideration or action, and
- may recommend disciplinary action or criminal prosecution against officers of the Commission.

The Inspector may make or hold inquiries (s.91) and has the powers of a Royal Commissioner for this purpose. Additional staff or consultants may be engaged by the Inspector to assist in the performance of his or her functions.

The Inspector is independent of both the Committee and the PIC and his position serves as an intermediate level of accountability between the Committee and the PIC. However, the jurisdiction of the Inspector differs significantly to that of the Committee. The Inspector's oversight role relates primarily to the legality and propriety of PIC activities and the conduct of the PIC and its officers. In contrast, the Committee focuses on systemic issues.

Parliamentary Oversight

Unlike the accountability system proposed by Justice Wood, the Parliament made specific provision for a parliamentary joint committee to oversight both PIC and the Inspector, consistent with arrangements for other investigative bodies in New South Wales. In his second reading speech on the draft exposure Police Corruption Commission Bill 1996, the then Minister for Police, the Hon. P. Whelan MP, stated that:

> *Although this was not a recommendation of the Royal Commission there is a view that such a powerful body should be the subject of more direct*

> *accountability to the Parliament. This is consistent with existing oversight arrangements for other investigative bodies in New South Wales, such as the Ombudsman and the ICAC, and in other jurisdictions.*[24]

Following a period of consultation a revised bill, entitled the Police Integrity Commission Bill, was introduced and passed.

Amendments made to the proposed legislation prior to its reintroduction as the Police Integrity Commission Bill gave the parliamentary oversight role to the Committee on the Office of the Ombudsman rather than the Committee on the ICAC, as originally proposed. This Committee performs a general monitoring and review role in relation to the Ombudsman, PIC and the Inspector.

Amendments moved by the Opposition during the Committee stage of the Police Integrity Commission Bill in the Legislative Assembly led to the provision of a statutory veto role for the parliamentary oversight committee in relation to the appointment of both the Commissioner of the PIC and the Inspector.[25]

Committee's functions

The Parliamentary Committee on the Ombudsman is constituted under the *Ombudsman Act 1974* and its functions relating to the PIC are given in Part 7 of the *PIC Act.* The Committee's statutory functions are modelled on those of the Committee on the ICAC, which in turn was modelled on the federal legislation that provided for the Committee on the National Crime Authority.

Section 95(1) of the PIC Act specifies the following functions:

- to monitor and review the exercise by the Commission and the Inspector of their functions,
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of their functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing, or arising out of, any such report,
- to examine trends and changes in police corruption, and practices and methods relating to police corruption, and report to both Houses of Parliament any

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[24] NSW Legislative Assembly, Hansard, 24 April 1996, p.446

[25] The Committee already possessed a statutory veto power over the appointment of the Ombudsman and the Director of Public Prosecutions.

changes which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,

- to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

Statutory prohibitions

Statutory limitations prohibit the Committee from examining *particular* or individual conduct, or recommendations, findings and decisions made in relation to particular investigations. In other words, the Parliamentary Committee cannot become involved in undertaking the work performed by the PIC and the Inspector.

The types of matters outside the Committee's jurisdiction also basically mirror those contained in the *Ombudsman Act 1974*. Section 95(2) of the PIC Act provides:

Nothing in this Part authorises the Joint Committee:

- to investigate a matter relating to particular conduct, or

- to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct, or

- to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or a particular complaint.

Particular matters - There can be a tension between the function to monitor and review the PIC and the provisions that prohibit the Committee from examining particular matters, particular conduct, and the recommendations, findings and decisions of the PIC in relation to particular investigations.

Operational matters - The sensitivity of operational material was raised by the Commissioner of the PIC during his first General Meeting with the Committee. He commented that the internal workings of the PIC had to be kept confidential and that it was necessary "to preserve the integrity of current, pending and potential operations, the details of which must remain confined to Commission officers." To date the Committee has adopted a practice of dealing with certain operationally sensitive issues and other confidential matters in camera. Subjects that may be covered by this practice are: the strategic directions and current operational focus of the PIC, and certain investigative methods.

Current program

The Committee's current inquiry program includes:

- *General Meetings* – Conducted as public hearings, the General Meetings are an opportunity for the Committee to examine the Commissioner of the PIC and senior officers on a wide range of matters relating to the operation of the PIC. In preparation for the public hearing, the Committee forwards Questions on Notice to the PIC concerning jurisdictional issues, the impact of recently enacted [or proposed] legislation, management and resource issues, and performance management. The PIC provides written answers prior to the public hearing, which are tabled during proceedings, and the Commissioner and senior officers answer supplementary questions and questions without notice during their appearance before the Committee. Subsequently, the material obtained through this process is collated and tabled in a report to Parliament.

  The General Meetings are held annually or biannually, as the need arises. In recent years they have been held to coincide with the release of the PIC's annual report. On some occasions, significant issues have been raised during the General Meetings, which could not be fully explored during the public hearing. Where this occurs, such issues are then examined in more detail after the General Meeting, and may be the subject of a separate report to Parliament.

- *Reviews of annual and other reports* – To date the Committee has elected to examine both the PIC and the Inspector of the PIC on their annual and other reports as part of the proceedings for General Meetings, rather than as separate inquiries. However, should the Committee consider there to be a need then a separate inquiry can be conducted.

- *Trends and changes in police corruption* – In December 2002, the Committee tabled its first report in relation to its function to examine trends and changes in police corruption, and reported to Parliament on any changes desirable to the functions, structures and procedures of the PIC and the Inspector. The report is dealt with in more detail in the section on issues raised with the Committee.

The Committee also deals with unsolicited complaints concerning the PIC and its officers. It is consistent with the functions and powers of the PIC Inspector, for the Committee to refer any procedural issue raised in relation to a particular matter or investigation to the Inspector for a full report. This option has been taken on a number of occasions.

STATUTORY AND OTHER REVIEWS OF THE PIC

Recent reviews of the Police Integrity Commission

Statutory review of the Police Integrity Commission Act 1996

Section 146 of the PIC Act provides for a Ministerial review of the Act "to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives". The review must be undertaken

within five years of the commencement of the Act, and tabled within a year of the end of the five year period ie by 21 June 2002. The review was conducted by the Police Ministry, on behalf of the Minister for Police.

During the review process, the Police Ministry gave the Committee a briefing on significant issues arising from the submissions received. Some of these issues were discussed in the Committee's General Meetings with the Ombudsman and PIC that occurred during the course of the review. They are dealt with in greater detail in the next section of the paper.

On 17 December 2002 a Discussion Paper of the Review of the *Police Integrity Commission Act* was provided to the Clerks of both Houses.[26] The Discussion Paper proposed further consideration of a number of issues central to the operations of the PIC, for example:

- Whether NSW Police should be able to raise legal professional privilege in response to a requirement by the PIC to produce documents;
- Oversight of police complaints;
- Whether the PIC's jurisdiction should be extended, to cover misconduct by civilian employees of NSW Police.

Inspector's report on Practices and Procedure

In June 2003 the Inspector furnished a report to the Presiding Officers, entitled *Report on the Practices and Procedures of the Police Integrity Commission*, to be tabled in the Parliament. The Report was made in response to a Ministerial reference from the previous Minister for Police, the Hon Michael Costa MLC. The reference stemmed from a recommendation, contained in the Discussion Paper prepared by the Ministry for Police on the *Review of the Police Integrity Commission Act 1996*, which proposed that the Inspector examine the appropriateness of the practices and procedures of the Commission, with particular reference to Operation Malta.[27] Operation Malta was commenced by the PIC in March 2001 and concerned the investigation of allegations by four members of the NSW Police Crime Management Support Unit that senior members of NSW Police had deliberately obstructed the reform process over a three-year period.[28] The majority of the discussion during the Committee's most recent General Meeting with the Inspector focused on this report.

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[26] The Discussion paper had a limited circulation and its status is somewhat unclear.

[27] Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, June 2003, pp.i-v, 84.

[28] ibid, pp.84-5, 98.

ISSUES RAISED WITH THE COMMITTEE THUS FAR

The nature of the debate relating to oversight of PIC has changed significantly since its establishment. Initially, debate revolved around implementation issues but has progressively turned to issues that are basic to PIC's ability to function as an effective, independent commission of inquiry.

PIC as an independent investigative commission

The Inspector has recently emphasised that the PIC is a commission of inquiry, not a court. He stated that: "This distinction has ramifications for practically every aspect of the way in which proceedings are conducted, including the outcome and reporting of such proceedings".[29] Section 20 of the PIC Act requires PIC to conduct its proceedings in a non-adversarial manner, with as little technicality or formality as possible. However, the Inspector observed that the submissions to his inquiry "demonstrate that this is easier to legislate than to put in practice".[30] Operation Malta was unusual and the problems associated with it included the loss of control of the hearing process, failure by parties to meet deadlines, and delays in the production of documents. The Inspector's recommendations support the retention and exercise of certain discretions by the PIC, dependent upon improved procedures and practices, and accountability.

The Committee also examined recent proposals for PIC's Operations Advisory Group (OAG) to include external membership, as is the case for other investigative bodies, such as ICAC and the NSW Crime Commission. The proposal had been rejected previously by the Police Ministry on the basis that "it would simply create an unnecessary and costly additional level of 'oversight'". In the Inspector's opinion external membership would increase the risk of disclosure and such "risk is sufficient to outweigh any perceived benefit from altering the composition of the OAG." The Committee has stated that it considers little purpose has been served in reiterating the proposal to have external membership on OAG, and is awaiting the outcome of a meeting convened by the Police Minister to resolve the issue.[31]

PIC's Powers

The importance of coercive and covert powers to proactive, intelligence-based investigation of police corruption was noted by the Royal Commission. For instance, the Royal Commission considered electronic surveillance as "the single most important factor in achieving a breakthrough in its investigations". It provided "a compelling, incontrovertible and contemporaneous record of criminal activity" and "[removed] the incentive to engage in process corruption".[32]

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29 ibid, p.iii.

30 ibid, p.i.

31 These issues are discussed in the report of the Committee on the Office of the Ombudsman, *Fifth General Meeting with the Inspector of the Police Integrity Commission*, September 2003.

32 Royal Commission, *Final Report*, vol II, May 1997, p.448.

An extensive range of coercive and covert powers are available to PIC. Covert powers utilised by PIC include telecommunication interception, listening devices, controlled operations and assumed identities. Some of the PIC's powers include:

- to conduct an investigation on its own initiative on a police complaint (s.23);
- require a public authority or official to produce a statement or information, for the purposes of an investigation (s.25);
- require the production of documents or other things, for the purpose of an investigation (s.26);
- authorise PIC officers to enter and inspect premises occupied by a public authority or official in that capacity, and to inspect and take copies of any document or thing on the premises. (s.29);
- apply to the Supreme Court for an injunction restraining a person's conduct where the conduct is subject to investigation by PIC (s.30);
- hold hearings in public or in private (ss.32 and 33);
- summons persons to appear at hearings to give evidence or produce documents (s.38);
- require witnesses at hearings to answer questions or produce documents (s.40); and
- issue or apply for search warrants (s.45).[33]

In the early stages of parliamentary oversight of the PIC and the Inspector parliamentary oversight committees spent some time clarifying the nature of the PIC's powers, and supporting necessary legislative amendments. For instance, the previous parliamentary committee drew attention to the need for further amendment to the Commonwealth *Telecommunications Interception Act 1979*:

- to enable the PIC to communicate lawfully obtained telephone intercept material to the Inspector, in order that he can fulfil his statutory functions; and
- to allow lawfully obtained telephone intercept material to be used in proceedings alleging contempt of the PIC.[34]

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33 Police Integrity Commission, *Annual Report 1996-7*, pp.15-16.

34 Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on Matters arising from: 7th General Meeting with the Ombudsman; 3rd General meeting with the Commissioner of the PIC; 2nd General Meeting with the PIC Inspector; Talks with Heads of Agencies*, August 1998, pp.33-35.

These recommendations had been made previously by the then Inspector to the relevant State and Federal Ministers.

Previous parliamentary committees also took regular evidence from the PIC on the extent of the use of its powers, and the associated outcomes. More recently, the current Parliamentary Committee has examined controversial instances of PIC's use of its powers, for example, the publication of surveillance material to the media prior to its introduction into evidence by the PIC, and the granting of a listening devices warrant that named a large number of individuals (whose conversations were allegedly likely to be recorded incidentally). The Inspector's inquiries into these matters resulted in recommendations for better processes and the introduction of practice guidelines.[35]

Strengthening the Inspector's oversight role

The current Committee has reviewed the history of the two Operation Florida incidents regarding the listening devices warrant and the release of surveillance material and, in doing so, has noted the relevant conduct of law enforcement agencies involved with PIC in Operation Florida. The lack of external accountability with respect to the conduct of officers from the Crime Commission and other agencies, engaged in joint operations with PIC, has significant implications for oversight of PIC's activities. The Inspector has expressed concern about possible diminution of public confidence in PIC should he be unable to fully investigate the conduct of non-PIC officers working with PIC. Consequently, the Committee has recommended that the Inspector's jurisdiction be expanded, on a limited basis, to enable him to investigate alleged misconduct by non-PIC officers.[36]

Legal professional privilege

The legislation that establishes investigative commissions often limits or restricts legal professional privilege and other forms of privilege, which would otherwise be available to refuse to provide information or documents. These limitations exist because of the public interest in such bodies being able to obtain relevant information. In turn, limitations are often placed on the use that can be made of such material in any subsequent court proceedings. This situation applies under the *PIC Act.*

Following two decisions handed down by PIC in 2001 about the production of documents, NSW Police proposed that the PIC Act be amended specifically to allow legal professional privilege, or its statutory equivalent. The Committee examined both the Inspector and PIC on the matter but was not persuaded to support the Police proposal. The Committee considers that the principles on which the current legislation is based seem sound and that the proposed changes "may act to place new constraints

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35 See Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2002* pp.14-25.

36 See Commentary section of the report of the Committee on the Office of the Ombudsman and the Police Integrity Commission, *Fifth General Meeting with the Inspector of the Police Integrity Commission*, September 2003.

on PIC's ability to gather information." Where personal liability or jeopardy may be involved, an individual can claim privilege, including legal professional privilege, but PIC's capacity to investigate official conduct should not be reduced by allowing privilege to be claimed by public officials acting in that capacity.[37] Likewise, the Inspector has recommended that there should not be any change made to the current procedures in place at PIC to determine privilege over documents.[38]

Rationalisation of the system for police oversight

The Committee also has clearly supported the "class or kind" categorisation of police misconduct, and further streamlining and rationalisation of the legislative framework for the police complaints system, provided the functions and powers of the PIC and the Ombudsman are preserved and not compromised.

In its report on matters arising from General Meetings (August 1998), the previous Committee stated that:

> *It fully supports the retention of "class or kind" agreements as the most appropriate mechanism for determining the classification of complaints within the police complaints process. The agreements not only make the agencies directly affected by the categorisation equally responsible for its formulation but also allow sufficient flexibility for revision and adjustment when it becomes apparent that certain types of complaints should be either included or excluded from the agreements. The consensus required to maintain the agreements also prevents arbitrary decision making about complaint classification.*[39]

The previous Committee also noted that the "class or kind" system of agreements, when combined with an audit power for the Ombudsman, provide a powerful incentive for police to deal with matters properly. In 1992 the then Committee perceived the class or kind agreement on matters for conciliation as an incentive for the range of matters captured by the agreement to be broadened or narrowed, depending upon the performance of police in dealing with this category of matters. However, previous Committee's have been reluctant to support changes to the complaint categories in areas where Police were experiencing problems eg in relation to the conciliation of police complaints. Faced with evidence from the Ombudsman about ongoing failures in relation to conciliated police complaints, the previous Committee, recommended that changes to the "class or kind" agreements should not

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37 Committee on the Office of the Ombudsman and the Police Integrity Commission, Sixth General Meeting with the Commissioner for the Police Integrity Commission, June 2002, p.xxvi-xxviii.

38 Inspector of the Police Integrity Commission, *Report on the Practices and Procedures of the Police Integrity Commission*, op.cit, p.ii.

39 Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on Matters arising from: 7th General Meeting with the Ombudsman; 3rd General meeting with the Commissioner of the PIC; 2nd General Meeting with the PIC Inspector; Talks with Heads of Agencies*, August 1998, p.20.

be considered in advance of a thorough assessment by the Ombudsman of police performance in this area.[40]

Successive Committees on the Office of the Ombudsman and the Police Integrity Commission have also recognised the importance of police ownership of police complaints process, and the investigation of corruption and serious misconduct. The Royal Commission summed up the balance between police ownership and oversight thus:

> *Retention of a role within the Service to respond to corruption was seen as essential, otherwise there was a risk that it might abandon all responsibility and interest in maintaining high standards of integrity. On the other hand, external oversight was seen as advantageous in enhancing police accountability, guaranteeing independent and aggressive pursuit of serious corruption, and increasing public confidence in the Service.*[41]

This Committee and its predecessors have clearly supported the "class or kind" categorisation of police misconduct, and further streamlining and rationalisation of the legislative framework for the police oversight, provided that the functions and powers of PIC and the Ombudsman are preserved. Further rationalisation has become possible because of advances in complaint data and notification systems.

Prohibition on police employment by the PIC

Section 10(5) of the PIC Act prohibits PIC from employing, seconding, or engaging serving and former NSW police officers. According to Justice Wood, the difficulties in employing NSW police to investigate NSW police were substantial.

Despite a number of arguments being put forward recently, the Committee is not convinced that it is desirable to remove the prohibition. In the past, other organisations using seconded NSW Police as investigators have had problems with security leaks. Another argument against lifting the employment prohibition is that PIC investigations already benefit from NSW police who know the corrupt practices of other NSW police. For example, NSW police participating as members of joint task forces and "police roll-overs". Also, NSW Police already investigate NSW Police: this is a role performed by Special Crime and Internal Affairs (SCIA). These methods enable access to knowledge about police methods and procedures without creating unnecessary risks that have the potential to compromise the PIC's independence and result in internal security risks.

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40 ibid, pp.20-23.

41 Royal Commission, *Final Report*, vol II, May 1997, p.254.

The Committee is of the view that in only the most exceptional circumstances should consideration be given to lifting the employment prohibition contained in s.10, and it has not been persuaded that these circumstances have arisen.[42]

Organisational performance

Methods for measuring the organisational performance of an investigative commission like PIC are complex and difficult. Essentially, the question to be asked is whether PIC, in the performance of its mandate, has overcome those deficiencies in the pre-Royal Commission system, which it was specifically created to address. PIC is in the process of implementing an Investigations Performance Framework (IPF), which will form part of its Corporate Planning process, and the Committee intends to monitor the operation of the Framework in future General Meetings.[43] The Committee also holds the view that the extent to which PIC's recommendations are accepted and implemented is another vital performance indicator. Significant improvements have occurred in Police implementation of PIC's recommendations following the creation of the External Agencies Response Unit (EARU) within NSW Police. The Committee uses General Meetings on an ongoing basis to obtain information from the PIC on the implementation of the recommendations that PIC has made.[44]

Auditing the reform process

The Royal Commission recommended that the reform of the Police Service should be measured through an audit framework conducted over a 3 year period, termed the Qualitative and Strategic Audit of the Reform Process (QSARP). The findings and recommendations of the final QSARP report had not been released at the time of the last General Meeting with the PIC, although there were signs from the previous two QSARP reports that the reform process in NSW Police is incomplete. The Committee will examine the PIC on the outcome of the final audit year at the next General Meeting scheduled for November 2003. At that stage, consideration will need to be given on the need to maintain a similar mechanism to measure the police reform process.[45]

Trends and changes in police corruption

In 2002 the Committee conducted its first examination of trends in police corruption, and reported on changes it considered desirable to the functions, structures and procedures of the PIC. This examination has been one of the more innovative, research-orientated tasks undertaken by the Committee and it benefited from the cooperation of all key stakeholders. The Committee's report offers a theoretical

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42 Committee on the Office of the Ombudsman and the Police Integrity Commission, *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, op.cit, pp.xii-xv.

43 ibid, p.xxix.

44 ibid, p.xxv.

45 ibid, pp.xv-xvi.

framework in which to consider police corruption, and looks at: individual and environmental causal factors, process corruption, apparent cycles of scandal and reform, and ethical and administrative approaches to remedying police misconduct and corruption. The theoretical framework is supplemented by a brief and selective history of policing and law and order in New South Wales, which attempts to set current police corruption issues in context, as integral to the cultural and historical construction of policing, rather than as an aberration. Particular reference is made to new techniques such as drug and alcohol testing, integrity testing and joint operations.

The relative success of these initiatives allows for some generalisations to be made about trends in police corruption. However, the difficulties in researching such trends are clearly acknowledged in the report. Police corruption tends to start with a series of small acts that commonly escalate. These acts form recognised, critical indicators that identify officers at risk of corruption, and can serve as a means for police to introduce early warning systems. On the basis of its examination, the Committee recommended that PIC consider conducting research into officers who are removed from NSW Police or who resign when removal proceedings are initiated. The Committee further recommended that PIC and the Ombudsman consider assisting NSW Police in establishing the indicators for an Early Warning System to identify and assist vulnerable police officers. In doing so, the Committee recognised the valuable work already done in this area by the Ombudsman, PIC and Special Crime and Internal Affairs Command, NSW Police. There has been a positive inter-agency response to the Committee's recommendations.[46]

ELEMENTS CRITICAL TO POLICE ACCOUNTABILITY

The viability of the police oversight system in New South Wales, therefore, relies on the following critical elements:

- police ownership of the system for investigating complaints and misconduct, and police acceptance of responsibility for dealing with misconduct;
- strategic external oversight;
- targeted corruption investigation;
- coercive powers for corruption investigation, balanced by appropriate oversight and safeguards to prevent the abuse of such powers;
- reform and incentives for cultural change by members of the NSW Police Service.

It is a dynamic system that continues to evolve on a number of levels. Increasing levels of police responsibility for dealing with their own misconduct is balanced by the

[46] See Committee on the Office of the Ombudsman and Police Integrity Commission, *Research Report on Tends in Police Corruption*, December 2002.

safeguard mechanism of external oversight. Within the police oversight system it is important to appreciate that the investigation of complaints, targeted corruption investigation, and oversight are very different functions.

ESSENTIALS FOR EFFECTIVE OVERSIGHT OF THE PIC

The Inspector and the Parliamentary Committee provide two very different yet complementary forms of oversight in relation to the PIC, the essential features of which can be summarised as follows:

Independence versus accountability

Both the Inspector and the Parliamentary Committee balance the PIC's independence with the requirement that it be accountable for the exercise of its functions and powers. Achieving such a balance is not easy and can involve inherent tensions. To some extent, oversight may function as a discipline, in that the PIC will undertake its activities in the knowledge that its operations are open to close scrutiny.

The credibility of the oversight role performed by the Inspector and the Parliamentary Committee also relies upon their independence from the PIC and each other. In the case of the Parliamentary Committee, this means that PIC and the Inspector can undertake the performance of their functions free of any allegations of political interference, either real or perceived. For the Inspector, independence from the PIC means that he is able to investigate matters without relying on, or being influenced by, the PIC.

Transparency and public accountability

Parliamentary oversight committees in New South Wales generally conduct their proceedings in public and report to Parliament on their activities. Where necessary, this Committee has conducted proceedings in camera but such occurrences are few. Without the activities of this Committee, public scrutiny of the activities of the Ombudsman, Inspector and PIC would be limited. There is a strong public interest in having each "watchdog" account for the use of their respective powers: they all possess significant investigative powers, although the PIC's powers obviously are greater and more extensive by comparison. The Committee has been critical of instances where it felt discussion of proposed changes to the police accountability system, and to the role and functions of the Ombudsman and the PIC, have not been full and open. For example, it made a number of criticisms about the consultation process undertaken during the review of the PIC Act. [47]

[47] See the Committee's report on the *Sixth General Meeting with the Commissioner for the Police Integrity Commission*, op.cit, pp.x-xii.

Bipartisanship

The establishment of the PIC and the Inspector was a bipartisan step in reforming the police accountability system in New South Wales. It is desirable that this parliamentary committee should adopt a bipartisan approach. That is not to say that issues considered by the Committee have not been, or will not be, without political implications or sensitivity. To date, the reports of this Committee have been consensus reports and this should strengthen the credibility and authority of the recommendations made by the Committee.

Specialised and appropriate levels of oversight

Parliamentary committees offer a particular form of oversight, that is, a general monitoring and review role, and are able to apply the powers of the Parliament to this "big picture" role. They bring a level of public accountability to the work of such bodies that would not otherwise occur. The Committee considers the statutory limitations on its jurisdiction to be appropriate, and has rejected a proposal that the restrictions on its jurisdiction should be removed.

It is important to understand that all three bodies oversighted by the Committee possess recommendatory powers only, and although the contents of PIC reports may reflect adversely on the reputation of individuals or agencies, the PIC does not make findings of guilt. Rather it establishes facts and makes recommendations to the DPP to consider prosecution in certain cases. The Inspector offers an appropriate specialised form of oversight, concentrated on the legality and propriety of PIC investigations, and the specific conduct of PIC and its officers.

CONCLUSION

Similarities can be seen in the essential elements of the police oversight system and general parliamentary oversight of "watchdog" authorities. For instance, there are common themes of:

- transparency and public accountability;
- targeted and strategic oversight;
- varying levels of oversight appropriate to the functions and powers under review.

In the case of PIC, several oversight mechanisms exist, which all serve different functions and together comprise a comprehensive external accountability framework. Parliamentary Committees have a particular role to play, which is assisted by the powers and privileges that derive from the Parliament. As is the case with the rights and privileges enjoyed by any parliamentary body, these powers need to be exercised in the public interest and, preferably, in a bipartisan manner. The statutory direction set for the Committee to look at systemic rather than individual matters defines the

appropriate role the Committee should exercise in the oversight framework. The Committee has yet to experience any difficulties in relation to secrecy provisions and parliamentary privilege.

It should be recognised that there are similarities and differences across jurisdictions in terms of the analogous systems created for the oversight of police and "watchdog" authorities. The NSW model reflects the particular circumstances and experience of this State. Consideration of the development of oversight mechanisms in other jurisdictions assists in assessing the NSW system.

APPENDIX FOUR

Paper delivered by Mr. Kim Yeadon, MP, Chair, Committee on the Independent Commission Against Corruption, New South Wales

Thank you, Chairman.

Good morning everybody. I was recently appointed Chairman of the New South Wales Parliamentary Committee on the Independent Commission Against Corruption, or in short, the ICAC Committee. This conference will be an excellent opportunity to meet you all and learn about the work of your Committees.

The Independent Commission Against Corruption

The task of the New South Wales Independent Commission Against Corruption is to investigate allegations of corruption that could adversely affect the impartial exercise by public officials of their duty. It also investigates matters referred to it by Parliament.

The Independent Commission Against Corruption has the additional role of instructing public authorities on ways to eliminate corruption and to instruct the public on the need for integrity in administration.

The Independent Commission Against Corruption Act applies to public authorities and public officials. The Independent Commission Against Corruption was created in response to community and parliamentary concerns about corruption, which had been revealed in various parts of the New South Wales public sector.

It is not part of the Independent Commission Against Corruption's function to prosecute persons for offences. However, the Commission may express an opinion on whether consideration should be given to the prosecution of any person.

The Independent Commission Against Corruption's investigations, including hearings, are not criminal in nature. The standard of proof is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as in criminal matters. The civil standard is the standard, which has been consistently applied in the Commission.

Resources do not permit the Independent Commission Against Corruption to investigate every matter it receives. It focuses on allegations of serious and substantial corruption, or matters that involve system issues capable of assisting a number of public sector agencies.

The ICAC Committee

The Committee on the Independent Commission Against Corruption (the ICAC Committee) is a joint committee and consists of 11 members, 3 from the Legislative Council and 8 from the Legislative Assembly. Each House appoints its own members. At a meeting 6 members constitute a quorum, and there must be at least one Member from each House present.

The functions of the ICAC Committee

The functions of the ICAC Committee are defined in the Independent Commission Against Corruption Act, and require the ICAC Committee:

- To monitor, review and report to Parliament on the exercise by the Independent Commission Against Corruption of its functions;
- To examine reports of the Independent Commission Against Corruption and report to Parliament upon them;
- To examine and report on corruption trends; and
- To inquire into any matter referred to it by Parliament.

Limitations on functions of the ICAC Committee

There are some particular limitations on the capacity of the ICAC Committee:

- The ICAC Committee is not entitled to investigate matters relating to "particular conduct." The Crown Solicitor in New South Wales interprets this as a reference to corrupt conduct.
- It cannot reconsider a decision by the Independent Commission Against Corruption not to investigate.
- It cannot reconsider findings or recommendations of the Independent Commission Against Corruption in relation to a particular complaint or investigation. The Crown Solicitor has said the Committee's job is not to act as if it were the Commission.

In order to fulfil its functions, the ICAC Committee has the enforceable power to send for persons, papers and records.

Previous work of the ICAC Committee

Over the past decade or more, the ICAC Committee's work has involved holding public hearings with the Commissioner, dealing with a limited number of complaints against the Independent Commission Against Corruption, and undertaking inquiries about the functions of the Commission.

In the normal course of events, these public hearings with the Commissioner – termed 'general meetings' – have examined such issues as:

- Staffing and resources;
- Numbers and kinds of complaints received;
- Numbers of investigations undertaken;
- Number of public and private hearings held;
- Prosecutions arising from Commission investigations;
- Corruption prevention programmes;
- Education work;
- Outcomes arising from Commission reports;
- Evaluation of operations;
- Electronic detection and surveillance; and
- Protected disclosures.

The evidence from these meetings is tabled together with a report to Parliament. The general meetings have raised issues for further inquiry such as the rights of witnesses, the televising of hearings, damage to reputations, and procedures of the Independent Commission Against Corruption.

Among the principal work of the previous ICAC Committee during the 52nd Parliament (1999-2003) was a three-stage review of the Independent Commission Against Corruption that produced three reports to Parliament. These were:

- Accounting for the extraordinary powers exercisable by the Independent Commission Against Corruption;
- Jurisdictional issues, with particular reference to what is defined as corrupt conduct; and
- The conduct of hearings by the Independent Commission Against Corruption.

Accounting for extraordinary powers

This report examined whether there was an appropriate level of accountability for the powers held by the Independent Commission Against Corruption.

Internally, the Commission has an Operations Review Committee. Current external oversight is provided by the ICAC Committee, and judicial review is available for any administrative actions in excess of power or which breach the rules of procedural fairness.

Nevertheless, the ICAC Committee concluded that a significant gap existed in relation to the consideration of complaints against the Independent Commission Against Corruption and its officers. The ICAC Committee recommended the appointment of an Inspector of the Independent Commission Against Corruption to hold inquiries and investigate any aspect of the Commission's operations. The current position in respect of this matter is that the Independent Commission Against Corruption wrote to the Premier supporting implementation of the ICAC Committee's recommendation but that the Premier rejected it on the basis that sufficient oversight was already available. Time will tell who was right.

Jurisdictional issues

This report contains several recommendations to clarify and strengthen the role of the Independent Commission Against Corruption. A principal one is that the definition of corrupt conduct should be recast to exclude conduct not ordinarily thought of as corrupt.

The conduct of hearings

In this report the ICAC Committee concluded that the Independent Commission Against Corruption's use of public hearings required reform. The ICAC Committee's recommendations seek to establish a model for future hearings, which strike a balance between the competing issues of public exposure of corruption and the potential harm that arises from false allegations placed on the public record.

The ICAC Committee recommended that wherever possible initial investigations, including hearings, should be in private and that the Independent Commission Against Corruption should only go public where it has gathered sufficient evidence to justify the making of an adverse finding. This recommendation is, on the evidence given by the Commissioner, consistent with the practice of the Independent Commission Against Corruption.

Current and future activities

The new ICAC Committee, formed after the general State election in March 2003, has adopted some processes that differ from past Committees. In particular, the new ICAC Committee will explicitly link its examinations of the activities of the Independent Commission Against Corruption to reports issued by the Commission, including annual reports and what are termed "other reports" of the Commission. The ICAC Committee cannot, as indicated previously, examine investigation reports.

Examination of annual reports

The ICAC Committee is required by section 64(1)(c) of the Independent Commission Against Corruption Act to examine each annual report and to report to Parliament on any matter in or arising out of the report. The initial task of my Committee has been to examine the last available annual report of the Independent Commission Against Corruption, which is for the 2001-2002 financial year. A public hearing was held several weeks ago, and supplementary and further questions have been submitted to the Commissioner for her reply. I anticipate that a report of the examination will be tabled in Parliament before the end of 2003.

The next review will deal with the 2002-2003 annual report of the Independent Commission Against Corruption, which is to be tabled by the end of October 2003.

Examination of trends and changes in corrupt conduct

It is a function of the ICAC Committee under section 64(1)(d) of the Independent Commission Against Corruption Act to report on trends and changes in corrupt conduct. The Committee has not previously examined or reported on this subject.

In January 2003 the Independent Commission Against Corruption tabled a research report profiling the New South Wales public sector in terms of risk and corruption strategies facing public sector organisations. The ICAC Committee is required by section 64(1)(c) of the Independent Commission Against Corruption Act to examine each "other report" and to report to Parliament on any matter in or arising out of such report.

The ICAC Committee has scheduled a public hearing later this year to examine the findings and recommendations arising from the research report profiling the New South Wales public sector in terms of risk and corruption strategies facing public sector organisations.

I note that the Independent Commission Against Corruption has also previously prepared reports, in 1993 and 1999, which described public sector perceptions of workplace behaviour and reporting of corruption.

The many investigations conducted by the Independent Commission Against Corruption have provided a bank of material on corruption trends which will be a useful source of information to the ICAC Committee for the purposes of an inquiry into this subject.

Assessment of impact and effectiveness of work of the Independent Commission Against Corruption

The ICAC Committee, in its report on the Independent Commission Against Corruption headed "Accounting for extraordinary powers", discussed the extreme difficulty of assessing the real impact of the activities of the Commission.

The ICAC Committee recommended that the Independent Commission Against Corruption be the subject of a performance audit by the New South Wales Audit Office under section 38 of the Public Finance and Audit Act. The Audit Office for various reasons declined to do this task. The ICAC Committee then considered engaging a consultant for the work but before this could take place it was overtaken by two reviews commissioned by the Commission itself in late 2000. These reviews and their implementation have a material bearing on the issue of measuring the effectiveness of the work of the Commission.

However, in addition to examining the current situation in relation to the implementation of the reviews it may also be instructive to examine the practical outcome of a sample of reports and investigations by the Independent Commission Against Corruption. This would involve taking evidence from the relevant public authorities. The approach taken so far by the ICAC Committee has been to limit itself to questions at meetings with the Commissioner or to comment on the performance management summaries in the Commission's reports.

Follow up on the outcome of internal reviews conducted by the Independent Commission Against Corruption

As noted, in November 2000 the Independent Commission Against Corruption commissioned a functional review and an investigative capacity review to assess its capacity to meet new challenges in dealing with corruption.

The key recommendation of the functional review was that the Independent Commission Against Corruption should be more selective and strategic in its choice of work. It recommended the acquisition of new investigative techniques and skills and more flexible structures, resourcing, staffing, and technology systems.

The investigative capacity review focused on the Independent Commission Against Corruption's ability to take on more sophisticated corruption and concealment. It said improvements needed to be made to the Commission's information management systems and intelligence capacity. Enhanced training was necessary for investigators.

We will be following up these internal reviews to examine and report on progress in their implementation.

Concluding comment

My Committee has fairly harmonious relations with the Independent Commission Against Corruption. From time to time there have been some relatively polite disputes over the question of whether the ICAC Committee has jurisdiction to examine certain issues. These questions have been settled through advice from the New South Wales Crown Solicitor. So far I have not gathered any perception that the ICAC Committee feels unduly restricted by its terms of reference.

At the end of this conference perhaps I will have a clearer appreciation of the relative merits of our model in contrast to others. However, the most conclusive test, as always, is whether Parliament acts on our recommendations.

APPENDIX FIVE

Paper delivered by Mr John Price MP,
Chairman, Legislative Assembly Standing Ethics Committee
and Deputy Speaker, New South Wales

One of the interesting factors about the Joint Committee on the Independent Commission Against Corruption, is that the Legislative Assembly members of the Committee also make up the Legislative Assembly Standing Ethics Committee.

The Standing Ethics Committee also currently includes 3 community members, who are appointed following advertisement in the press, but this may soon change.

The Committee was established by a 1994 amendment to the ICAC Act, which came about due to the decision of the NSW Court of Appeal in *Greiner v ICAC (1992)* which resulted in some uncertainty about the ICAC's jurisdiction over Ministers of the Crown.

The LA Ethics Committee, along with the Legislative Council Standing Committee on Parliamentary Privilege and Ethics, was created to draft a code for consideration by each respective House. In 1998 each House adopted the first Code of Conduct.

Both of our Committees undertook the first review of the Code last year and found that the Code is still relevant. My committee recommended a few minor changes, which are still being considered by the Government. The Committee also recommended that the community members only be appointed for the review period, which should occur only once in every Parliament (i.e. once every 4 years, rather than every 2 years). These changes would require amendment of the Act, which is currently before Cabinet.

The Code of Conduct, which is adopted by the House at the beginning of each Parliament, ties in with the ICAC as a substantial breach of the Code could give the ICAC jurisdiction to investigate a Member's activities, provided those activities fell within the fairly extensive definition of "corrupt conduct" under the ICAC Act. The report of the ICAC just tabled on Secondary Employment of Members of Parliament was interesting in that it confirmed that the ICAC has no power to investigate conduct that is protected by parliamentary privilege. This means that although the House requested the ICAC to look into issues concerning employment of the Leader of the Opposition, Mr John Brogden, as a public affairs consultant, the ICAC could not as it did not have statutory authority.

One of the recommendations in the ICAC report was that the Legislative Assembly set down a procedure for dealing with a breach of the Code of Conduct or the pecuniary interests register, in those cases where parliamentary privilege protects the conduct

from investigation by the ICAC. Options suggested by the ICAC include allowing the House to waive privilege for specific matters, or for the House to appoint an independent officer on a case by case basis, possibly along the lines of the British House of Commons model, which includes an investigatory panel.

These are all matters for future inquiry by our committee, but indicate the range of serious issues which can arise for the "ethics" oversight committee.

It should be stressed that the Standing Ethics Committee currently has no power to examine matters in relation to actual or alleged conduct of any particular person.

In addition to reviewing the Code, the Committee has the function of carrying out educative work relating to ethical standards applying to members of the Legislative Assembly. To date this has taken the form of ensuring that there is information available for members on the web and printed form on the Code and its relationship with the guidelines in the Member's Handbook. I addressed new members following the election earlier this year, and members also received information about our Parliamentary Ethics Adviser. The Committee also recognises the important role that staff play in supporting and assisting members in their day to day activities, and the Clerk has also introduced a session on ethics, the Code of Conduct and the Member's Handbook in staff training sessions.

Finally, the Committee has a statutory function of giving advice in relation to ethical standards in response to requests for advice by the Legislative Assembly, but it is expected that the Secondary Employment Report might be the first such reference.

APPENDIX SIX

Paper delivered by Mr Geoff Wilson MP, Chairman, Parliamentary Crime and Misconduct Committee, Queensland

Overview of the Queensland system of Parliamentary oversight of the Crime and Misconduct Commission

Introduction

- On 1 January 2002 the Queensland Crime Commission ('the QCC') and the Criminal Justice Commission ('the CJC') were merged under the *Crime and Misconduct Act 2001* ('the Act') to establish the Crime and Misconduct Commission ('the CMC').

- The Act also establishes the Parliamentary Crime and Misconduct Committee ('the PCMC') which is principally responsible for monitoring and reviewing the CMC.

- The Committee is assisted in this role by the Parliamentary Crime and Misconduct Commissioner.

The CMC

- The CMC is led by the 'Commission' which is comprised of a fulltime chairperson, Mr Brendan Butler SC (who is also the CEO) and four part-time commissioners. One of the part-time commissioners must be a lawyer with a background in civil liberties and the others must have qualifications or expertise in public sector management, criminology, sociology or community service experience.

- The key responsibilities of the CMC are:

  – to combat and reduce the incidence of major crime (ie organised crime, criminal paedophilia and other serious crime); and

  – to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.

- The CMC's multiple roles in respect of major crime, and police and public sector misconduct distinguishes it from its NSW counterparts – ICAC, PIC, NSW Crime Commission and the NSW Ombudsman.

- The CMC's role in respect of major crime is to supplement the ability of the Queensland Police Service to deal with major crime, particularly where the usual investigative powers available to police prove ineffective.

- Major crime matters are referred to the CMC by the Crime Reference Committee which is comprised of the CMC chairperson, the Commissioner of Police, the Chair of the Australian Crime Commission, the Commissioner for Children and Young People and two community representatives.

- The CMC has responsibility for:

  – ensuring that complaints or information involving misconduct in the public sector are dealt with in an appropriate way; and

  – building the capacity of public sector departments and agencies (referred to as units of public administration – UPAs) to prevent and deal with misconduct.

- A key principle underpinning the Act is the devolution to UPAs of responsibility for preventing and dealing with misconduct.

- The CMC undertakes the initial assessment of complaints to determine how they should be dealt with – more complex matters that raise a reasonable suspicion of official misconduct are dealt with by the CMC, while the remaining matters are referred to the relevant UPA to be dealt with. The investigation of matters referred to UPAs may be subject to monitoring and or review by the CMC.

- In the case of complaints against police, the Police Commissioner has primary responsibility for dealing with police misconduct (i.e. lower level misconduct by police officers) and responsibility for dealing with matters involving official misconduct referred by the CMC. Again the investigation of such complaints may be subject to monitoring or review by the CMC.

- The CMC also undertakes a number of 'supporting functions' in the areas of research and prevention, intelligence, witness protection, and the civil confiscation of proceeds of crime.

The Committee

- The Committee, established under section 291 of the Act, has the following functions:

  – to monitor and review the performance of the CMC's functions;

  – to report to the Legislative Assembly where appropriate;

- to examine the reports of the CMC;
- to participate in the appointment of the chairperson and commissioners of the CMC;
- to conduct a review of the activities of the CMC at the end of the Committee's three year term; and
- to issue guidelines and give directions to the CMC where appropriate.

- How does the Committee on a practical level monitor and review the CMC?
  - holding regular Committee meetings at least each week Parliament sits [2001 – 42 meetings; 2002 – 30 meetings; 2003 – 27 meetings to 30 September];
  - considering comprehensive confidential bi-monthly reports from the CMC in relation to its activities;
  - considering confidential minutes of meetings of the Commission and its Executive;
  - holding bi-monthly in camera meetings with the Chairperson, Commissioners, and Assistant Commissioners of the CMC;
  - receiving and considering complaints against the CMC and its officers;
  - reviewing CMC reports;
  - requesting responses from the CMC on issues which arise (via complaints, the media or other means);
  - where necessary referring matters of concern to the Parliamentary Commissioner (or to the QPS or DPP) for investigation and report;
  - conducting inquiries into specific or general matters relating to the CMC;
  - conducting (either itself or through the Parliamentary Crime and Misconduct Commissioner) audits of various registers and files kept by the CMC concerning the use of its powers;
  - seeking independent legal advice to assist the Committee where a particular skill or expertise is necessary; and
  - examining the CMC's performance against its performance measures.

The Parliamentary Crime and Misconduct Commissioner

- the position of Parliamentary Commissioner commenced in April 1998 (then known as Parliamentary Criminal Justice Commissioner) as a result of a recommendation of the third PCJC in Report 38 tabled in Parliament in May 1997.

- The principle role of the Parliamentary Commissioner is to assist the Committee in enhancing the accountability of the CJC/CMC.

- the Parliamentary Commissioner may only act at the direction of the Committee – in broad terms the Parliamentary Commissioner is the 'agent' of the Committee.

- the Committee may require the Parliamentary Commissioner to:

  – audit records and operational files of the CMC;

  – investigate complaints against the CMC and its officers;

  – investigate allegations of a possible unauthorised disclosure of confidential information;

  – verify the CMC's reasons for withholding information from the PCMC;

  – verify the accuracy and completeness of CMC reports to the PCMC; and

  – perform other functions that the Committee considers necessary or desirable.

- any direction to the Parliamentary Commissioner requires the bipartisan support of the Committee (this means a majority of the members which does not consist wholly of Government members)

- the Parliamentary Commissioner has power to access all CMC documents records and files and to hold hearings.

- While the Parliamentary Commissioner may also hold hearings, a significant change under the Act is that the Committee must give prior authorisation before the Parliamentary Commissioner can hold a hearing.

- The Parliamentary Commissioner is also obliged under the Act to conduct an annual review of the intelligence holdings of the CMC and QPS. No direction is required from the Committee in this regard. The report of such review is provided to the CMC chair, the Commissioner of Police, and the PCMC.

Strengths and weaknesses of the system from an accountability perspective

Strengths

- Internal accountability in the CMC's decision-making processes through the involvement of part-time commissioners who bring a range of experience and expertise.
- The Committee is a statutory Committee that continues in its role until the reappointment of a new Committee after an election (thus the Committee will continue its role during the period after any dissolution of Parliament). This ensures continuity of oversight.
- The Committee's role in the appointment of the CMC chairperson and commissioners and of the parliamentary commissioner – bipartisan support of the Committee is required.
- An ability to direct the CMC to investigate a matter with a corresponding obligation on the CMC to investigate and report the results to the Committee (though this power has never been exercised).
- The power to issue mandatory guidelines to the Commission (again this power has never been exercised).
- A statutory obligation on the chairperson of the CMC to inform the Committee of any suspected improper conduct of a CMC officer.
- An ability to direct the CMC or QPS to investigate and/or report on any matter of concern regarding the activities of the CMC or its officers.
- The ability to direct the Parliamentary Commissioner as 'agent' of the Committee to report and investigate into a particular matter.
- The Committee's ability to receive and consider complaints against the CMC and CMC officers.
- Arguably the strengths in the 'system' are also attributable to how the Committee in practical terms performs it oversight role – there is no statutory prescription in this regard.

Possible Weaknesses

- It might be argued that a 'Commission' which includes a number of part-time commissioners (rather than a single commissioner) could be inefficient – decisions must await a meeting of the Commission, time and resources are absorbed in this process. (This concern is raised in the WA Kennedy Royal Commission interim report).

It has not proved to be a problem in the case of the CMC, which meets every two weeks. Urgent matters are dealt with at specially convened meetings which can take place via teleconference. There is however an advantage in having a number of commissioners – availability of part-time commissioners to act as chairperson or undertake the role of the chairperson in matters of potential conflict) or where there are a number of major inquiries under way.

- It might be argued that a perceived weakness is the fact that the Parliamentary Commissioner can only act upon direction from the Committee (contrast the NSW Parliamentary Inspector for the Police Integrity Commission and the proposed WA Inspector who can act on their own motion or upon complaints received). In Queensland it is the Committee that undertakes primary responsibility for the handling of complaints against the CMC. The Committee can determine to ask the Parliamentary Commissioner to investigate and report to the Committee. As the Parliamentary Commissioner observed in the Committee's recent three year review hearings – if matters of concern come to his attention he can write to the Committee recommending action including a possible referral back to the Parliamentary Commissioner for investigation.

- The nature of the oversight arrangement - whereby the Committee considers complaints, is responsible for directing the Parliamentary Commissioner in the performance of his functions, and is involved in the appointment of commissioners of the CMC and the Parliamentary Commissioner - means that the Committee is more actively aware of the operations of the CMC. The disadvantage may be an increased workload of the Committee, but an advantage is a better feel for and understanding of the day to day operations of the CMC.

- On a broader level an issue which the Committee is presently grappling with is the possible dilution of its oversight role as a result of the devolution process. As more matters are referred back to UPAs and the QPS (over which bodies the Committee has no jurisdiction) there is a lessening of the Committee's ability to oversee the handling of misconduct matters generally. In instances where a matter is referred back to a UPA and the CMC has no further involvement in the matter, the Committee appears to be limited to a consideration of the CMC's action in referring the matter back to the UPA and perhaps the appropriateness of the CMC's decision to not monitor or review the UPA's consideration of the matter. The handling of matters by UPAs will not generally be subject to direct scrutiny by the Committee or the Parliamentary Commissioner.

APPENDIX SEVEN

Paper delivered by the Hon. Derrick Tomlinson MLC, Chairman, Joint Standing Committee on the Anti-Corruption Commission, Western Australia

The Joint Standing Committee on the Anti-Corruption Commission (JSCACC) was established shortly after the passage of the Anti-Corruption Act in 1996. Unlike similar bodies in Queensland and New South Wales, it was established by Standing Orders of the Legislative Assembly rather than by statute. Like the committees for the Crime and Misconduct Commission (CMC), the Police Integrity Commission (PIC) and the Independent Commission Against Corruption (ICAC), the JSCACC is bipartisan, but unlike the Standing Committee on the CMC in Queensland, is bicameral.

The Standing Orders provide for a committee of eight members, four from each House, nominated and elected separately by the members of the two Houses. Four members, two from each House, are elected from the government benches and four from opposition members. While there is not a proscription against the Committee making majority decisions, the balance of numbers means that the Committee can work only if its decisions are arrived at by consensus. From the beginning, the Committee functioned in a bi-partisan manner.

The terms of reference for the JSCACC contained within Standing Orders mirror those of the Standing Committees on PIC at section 95 of the *Police Integrity Commission Act 1996.* An important difference is that the NSW legislation provides for an Inspector of the Commission and a requirement for the Standing Committee to consider the Inspector's report. At this stage, Western Australia's legislation does not provide for an Inspector of the ACC. That, along with other significant matters, is being changed.

An Interim Report of the *Royal Commission into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers* ("The Kennedy Royal Commission") has recommended a replacement of the Anti-Corruption Commission (ACC) with a Corruption and Crime Commission (CCC). The Bill to implement that recommendation was agreed to by the Legislative Assembly in July. With the agreement of the Government, the Bill was split in the Legislative Council. Those parts enabling the creation and appointment of the new commission formed a new Bill, which was passed and returned to the Legislative Assembly. The remainder of the Bill was referred to the Council's Standing Committee on Legislation. At the time of writing this paper, the Committee has not reported.

In brief, the Bill provides for the CCC to be a standing commission with a single Commissioner. In addition to investigative powers now exercised by the ACC, the CCC will be authorised to conduct controlled operations, integrity testing, conduct hearings, and its investigators to use assumed identities. The organised crime function

will be confined to the Commissioner conducting closed hearings and authorising the Commissioner of Police to use exceptional powers in the investigation of scheduled offences. A Parliamentary Inspector with powers to audit and review the misconduct operations of the Commission is provided for, as is a standing committee.

The form and functions of the standing committee have yet to be decided. The Bill allows the Commissioner to report to a Minister, directly to Parliament, or to a standing committee. It is silent on the nature of that committee, other than to describe it in the definition clause (Clause 3) as a standing committee appointed for purposes of monitoring and reviewing the functions of the Commission and the Parliamentary Inspector. When the ACC is abolished, the current joint standing committee will cease, and a new committee appointed under Standing Orders. Clause 3 allows for a committee of either House or a joint committee of both Houses.

The JSCACC 1996-2003

Three issues formed the focus of the Committee's work in its first term: privacy and confidentiality; investigative powers; and operational accountability of the ACC.

Secrecy and Confidentiality

When the ACC Act was framed, the government of the day was mindful of the need for confidentiality of the Commission's operations. Strict requirements of secrecy were mandated. For example, persons called to give evidence to ACC investigators were obliged under strict penalty not to divulge what had been discussed: individuals or bodies who reported matters to the ACC were prohibited from publishing the fact; officers of the Commission were bound by secrecy provisions that prevented them from disclosing any information acquired by them as employees of the Commission; the Commissioners could disclose information to the JSCACC, but the Committee was bound by the same obligations as employees of the ACC and could not report that information without authorisation of the Commissioners.

There are reasonable justifications of confidentiality. Protecting the integrity of ACC investigations is of paramount importance. Unfortunately, the secrecy imposed upon the ACC caused it to be labelled in the media as a "star chamber". Well-founded principles of confidentiality became objects of public ridicule and strained public confidence in the ACC. Because of its legislative obligations of confidentiality, the ACC was constrained in defending itself against public criticism.

The Committee tabled three reports on confidentiality and secrecy within the ACC.[1] When the CCC Bill was framed, government accepted the inevitability of relaxing some of the strictures of confidentiality.

[1] Joint Standing Committee on the Anti-Corruption Commission: *Confidentiality and Accountability: Parliamentary Supervision of Anti-Corruption and/or Law Enforcement Agencies in Australia.* First Report in the Thirty-Fifth Parliament, October 1997

Secrecy under the Anti-Corruption Commission. Discussion Paper. April 1998

Investigative Powers

The genesis of the ACC Act was a recommendation of the Royal Commission into the Commercial Activities of Government and Other Matters, more commonly known as the "WA Inc Royal Commission".[2] It proposed that government should replace the then existing Official Corruption Commission (OCC) a Commissioner for the Investigation of Corrupt and Improper Conduct (CICIC) to investigate allegations, including 'own motion' allegations, of corruption or improper conduct by public officers.

In presenting that recommendation, the Royal Commission emphasised that CICIC was not "another police force". It was envisaged as having a limited inquisitorial function; "to find facts in relation to possible corrupt and improper conduct, and to report those facts to the relevant authorities"[3]. The Commissioner was not to make findings. That responsibility was to rest with the relevant authorities.

When the Bill was introduced to amend the *Official Corruption Commission Act 1986* and restructure it as the Anti-Corruption Commission (ACC), the functions proposed by the Royal Commission were extended to include criminal involvement. Further amendments carried in debate in the Legislative Council also emphasised the role of the ACC in investigating corrupt, criminal or improper conduct by police officers. Commensurate changes were not made to the investigative powers available to the ACC, however.

As it has turned out, the powers available to the ACC have proven inadequate. Allegations against police officers form a major part of its work.[4] Matters subject to investigation have tended to be breaches of criminal rather than administrative law and the extent of the ACC's authority in criminal matters is unclear. Consequently, the ACC has referred matters to the Commissioner of Police for investigation.

The Committee considered submissions from the ACC for amendment of the Act to eliminate anomalous provisions, to make clear the ACC's authority to call for persons or bodies to attend and provide information, and to enable the Chairman to conduct private hearings without having to appoint a Special Investigator. Eventually, the Committee recommended changes[5], government agreed in principle, but legislation was not introduced before a general election was held, and government changed.

Report on the Operational Accountability of the Anti-Corruption Commission and the Protection of Rights Under the Anti-Corruption Commission Act 1988. October 1998.

2 Hon Geoffrey Kennedy (Commissioner) *Report of the Royal Commission into the Commercial Activities of Government and Other Matters*, 1992, Parts I and II, 7 volumes, etc

3 Ibid , Part II, Appendix 2, pp 2.3.

4 In 2002-03, the Commission reported that 54% of their work involved police officers, the remainder involving officers of state and local government authorities. As at May 2002, the Western Australian public service comprised 147,800 persons, compared with 4,921 sworn police officers.

5 Joint Standing Committee on the Anti-Corruption Commission: *The Investigative Power s and Operational Accountability of the Anti-Corruption Commission.* Report No 11, August 2000.

The Gallop Government's electoral platform committed it to a Royal Commission into the Western Australia Police Service. Consequently, action to amend the ACC Act was deferred until the Royal Commission reported. The Interim report in proposal for a Corruption and Crime Commission included recommendations for additional investigative powers. Legislation already approved by the Legislative Assembly and currently being considered by the Standing Committee on Legislation in the Legislative Council provides for CCC investigators to carry out controlled operations and, for the purposes of investigation, to assume identities, and authorises the Commissioner to undertake open or closed hearings as part of the CCC's misconduct functions.

Operational Accountability

Like parliamentary oversight committees in Queensland and New South Wales, the JSCACC cannot become involved in operational matters. Standing Orders preclude the Committee from investigating matters received or considered by the ACC; reconsidering decisions made or actions taken by the ACC in the performance of its functions; or having access to detailed operational information.

This has been a continuing source of concern for the Committee. Persons who have complaints against actions of the ACC or any of its officers have no avenue for redress of grievances other than through court action or by complaint to the Commission Chairman. From time to time, the Committee has received complaints, but had no power to do anything other than request the Chairman to have the matter reviewed and report back to the Committee. That commonly is referred to as 'Caesar judging Caesar'.

The difficulty the JSCACC confronts in these situations is compounded by requirements of confidentiality. Under the Act, only the Commissioners may provide to the Committee, or other persons, information about the functions of the ACC. The Committee, in turn, is bound by statutory obligations of confidentiality. Hence, it is unable to respond to or report upon information given other than with the formal consent of the Commissioners.

The Committee sought clarification from the Crown Solicitor of its powers after receiving complaints from ACC investigating officers about management issues within the Commission. Did they constitute operational matters or were they issues relevant to the performance and functions of the ACC that came within the purview of the Committee? The advice received was that it was beyond the Committee's authority to receive information on the functioning of the ACC from other than the three Commissioners. That raised the more serious consideration of whether the officers had breached confidentiality in raising the issues with the ACC? Furthermore, with whom might ACC officers raise such matters, other than with the Commissioners. Because of their employment conditions, they were not caught by the Public Sector Management Act, and it was doubtful whether the Commissioner for Public Sector Standards could respond to or investigate complaints from ACC officers.

These matters may be resolved in the Bill to create the Corruption and Crime Commission. Part 13 of the Bill provides for a Parliamentary Commissioner of the Corruption and Crime Commission. The Commissioner will be authorised to audit the operations of the CCC and may investigate particular matters relevant to the Commission's operations, on complaint, on referral by the Standing Committee or the Minister, or on the Inspector's own motion. Commission officers aggrieved by actions of the Commission will have their grievances investigated by the Inspector.

Conclusion

It is anticipated that when the CCC Bill is enacted and the ACC abolished, the JSCACC will cease. The Bill makes provision for a Standing Committee of either House or a Joint Standing Committee, but its establishment will be by Standing Orders at the decision of the Parliament. It is reasonable to say, therefore, that the Committee is in a state of flux. It is awaiting decisions about a future committee, its membership and the Standing Orders under which it will operate.

Government has indicated support for a standing committee on the CCC. The Premier's Ministerial Statement on tabling the Interim Report undertook that the Parliamentary Inspector "will report to Parliament through the Joint Standing Committee"[6] However, until the legislation passes through the Parliament and Standing Orders are approved, the future is uncertain.

[6] Brief Ministerial Statement, Hon Br Geoff Gallop, MLA, Premier: "*Royal Commission into whether there has been by corrupt or criminal conduct by Western Australian police officers.* Tuesday, 25 February 2003.

APPENDIX EIGHT

Paper delivered by Dr Stephen Tanner, Senior Lecturer in Journalism, Murdoch University, Western Australia

Introduction:

Thank you and good morning. I've been asked to cover two topics this morning. The first is the relationship between journalists and corruption fighters and the second is the relationship between corruption fighters and parliamentary oversight committees. Both are important because they can influence public perceptions of the role and effectiveness of permanent and ad hoc corruption and crime bodies.

Corruption fighters and the media

This relationship can be likened to a puzzle. In an ideal world, there is only one way in which the puzzle will fit so that the relationship makes sense. But different people will try all sorts of ways of putting the puzzle together, some which from a distance appear to work. However when you take a closer look, it becomes obvious that the fit is not a perfect one.

What we do know, however, is that Australian corruption watchdogs believe the media can and should play a role in the fight against corruption. This has been highlighted since the 1980s. Whenever a corruption watchdog has been set up – either as a permanent body like the NSW ICAC, or an ad hoc body like the former WA Inc Royal Commission – one of the first things they do is put in place a media strategy. These strategies have one primary goal – to ensure that the media are catered for. This approach is built on the adage that a happy media is a supportive media.

To illustrate, when ICAC was established, one of the first things the inaugural Commissioner, Ian Temby QC, did was to hold a meeting with senior media representatives to discuss their needs. Following on from those discussions, areas were set aside in the ICAC building to house journalists covering hearings. These facilities included desks, chairs and cubicles for the preparation of radio pieces. The room was also wired so that journalists could hear what was being said in the hearing room.

Perhaps more importantly, the Commissioner agreed that journalists would have their own area in the main hearing room, access to the exhibits and access to the person chairing the inquiry. Significantly, the ICAC also appointed a media relations manager.

All up it was a smart tactic. It was saying to the journalists 'welcome, you are an important part of the team'. And it worked. From day 1, the journalists covered the ICAC --- not just its hearings, but everything it did or said. Now as history has reported, media coverage of ICAC has not always been positive – or supportive – it

has, nonetheless helped the Commission gain a high public profile in NSW. As the ICAC's own research reveals, people are aware of the ICAC and the important work it does. They may not necessarily admire it, but they know it is out there (ICAC, 1999).

In taking this approach ICAC was not alone. WA Inc also provided similar facilities, as did the recently concluded WA Police Royal Commission (WAPRC). In fact the Police Royal Commission also provided journalists with an information package. This was available both in hard copy and on the web (See WAPRC, 2002).

Queensland's Crime and Misconduct Commission (QCMC) also caters for journalists. It has a media manager, posts its media releases on-line and has other online information media organisations can use, including photographs of key people (QCMC 2003). It is smart PR and acknowledges the important role media can play in promoting the organisation and its work.

The relationship at work

Journalists, media organisations, and crime or corruption commissions are all recognised as watchdogs. The role of the crime and anti corruption commissions is written into their enabling legislation. While the role of Australian journalists and media organisations is not legislatively defined, it is one they have taken ownership of over the years through reporting on public affairs and business. This is the so-called 'fourth estate' function. It is an accountability role.

Some cynics might say that the watchdog analogy I've used in this slide is inappropriate – that it suggests too many teeth to be representative of the majority of Australia's anti-corruption agencies, or for that matter the media. I'm not going to buy into that argument, other than to say I believe that both have the potential to be effective watchdogs. However I would like to issue one warning. Like watchdogs of the canine variety, regulatory watchdogs – and journalists or media organisations – have the capacity to turn nasty if not properly controlled. This is where media organisations have an important role. They can not only help to uncover corruption – a topic I want to discuss later in my paper, but equally, they can keep an eye on the regulators themselves.

To conclude on this point, I believe the role of a watchdog is an important one. And I'm a great advocate of the media and the crime or corruption commissions working together. It's just that in some instances there needs to be considerable work in defining the parameters of the relationship. More on that later.

Defining the relationship

The relationship is a difficult one to define. As indicated earlier, there is recognition on the part of corruption fighters that the media can help them in the fight against corruption. But the relationship has not always been built on trust. In part this may be due to the different perceptions they have of their own and each other's role. Having

said that, though, there is an obvious overlap between the two, which links back to the dual responsibilities many anti-corruption bodies have.

While organisations such as the ICAC, the Crime and Misconduct Commission, and the soon to be Crime and Corruption Commission here in WA are set up primarily as investigative bodies, they have another very important function: it is an educational function. And this links in directly to one of the media's main responsibilities – its informational (or educational) role.

This is where tensions in the relationship often emerge. Generally speaking, corruption bodies have a policy of not discussing operational matters with the media. This is understandable as they do not want to jeopardise their investigations by tipping off people whose activities they may be investigating. Equally understandable is their reluctance to provide journalists with the names of people they may be calling as witnesses (as they don't want the journalists approaching the witness before they've had a chance to subpoena them). Consequently, they often adopt a 'neither confirm nor deny' approach when asked by journalists if they are investigating 'X' or 'Y'. This can often put them at odds with the journalist or media organisation, particularly if the latter are conducting their own inquiries into a story which they believe they are covering exclusively.

Thus while crime or corruption commissions would often like to defer publicity (unless they need media assistance to draw potential witnesses out of the woodwork), media organisations like to get in at the ground floor and cover inquiries from the outset. This involves an incremental – or building block approach – to coverage, much like the approach adopted by commission investigators. The difference is, however, that such publicity can bring with it a swag of negatives. For example, news consumers, even the most voracious of them, do not necessarily read or listen to the news every day. Consequently they may have heard damning allegations against a person, but missed the rebuttal when it was heard by the Commission days or weeks later. Consequently, their view of the inquiry, the allegations being made, or even of a particular individual, may be tainted by those first impressions. This can have serious consequences for individual reputations, an issue I'll pick up on later in the paper.

To understand how the media responds to crime or corruption investigations, it is important to understand how journalists operate. Few are lone wolves. Most operate in packs, the size and nature of which are determined by the round within which they work. While journalists love to have a scoop – a story that their colleagues have missed out on – equally they do not like to be beaten to a story. Often this means that instead of working alone, journalists tend to hunt together, like packs of dogs or sharks. This can often result in feeding frenzies (Sabato, 1991), where stories are often beaten up and given greater prominence than their real news value – or even public interest - would suggest they deserve. Frequently the journalists focus on issues that are of peripheral interest to the inquiry.

Personalities over substance

In the ICAC's first annual report, Ian Temby made the following observation:

> *The Commission recognises and acknowledges the vital role the media plays in keeping the public informed. The Commission's general approach is that it is working for the public of NSW and the public should know what it is doing. This is limited by the need to maintain confidentiality in relation to current investigations. When investigations are pending or have not yet reached the public hearing stage, a responsible media can assist the public cause by exercising restraint (ICAC, 1989; p. 53).*

This statement is important. On the one hand, it acknowledges the role the media can play. On the other, it is calling for restraint. It is easy to understand Temby's concerns, and his wishes, but realistically, there will always be individual journalists or outlets prepared to push the boundaries if it means scooping their competitors. It is the nature of the business!

Temby was not alone in having mixed views on the role of the media. Tony Fitzgerald QC, who headed the Qld inquiry that bears his name, also realised that the media could both help and hinder his work. He made the following comment:

> *There was for the most part a determined effort to be fair in reporting the proceedings, although there were some lapses in standards which caused concern. Scoops were reported which unintentionally but unnecessarily hindered the Commission's work. Sometimes admissible evidence with a hearsay component was reported on as though the hearsay was probative. The names of prominent persons mesmerized some journalists and their employers (Fitzgerald Report, 1989, p. A210 and p. 21).*

Fitzgerald's comment highlights another problem that I want to touch on, namely the competence of journalists covering such inquiries. Some journalists do not understand, or do not care, that some evidence can be reported, but other evidence is off limits. Equally, they do not consider, or again do not care, about the potentially detrimental impact their reporting can have on the reputations of witnesses, and others who are drawn into inquiries through their association with people being investigated.

Fitzgerald's relationship with the media was interesting. He would often deliver what journalists called his 'homilies' from the bench. The above quote made up part of one of those homilies. Fitzgerald's comments are important, because they point to one of the potential sources of misunderstanding between journalists and corruption fighters.

I've argued elsewhere that there seems to be an expectation that journalists and corruption fighters should be 'as one' in the fight against corruption (Tanner, 1999a; 1999b). And some journalists may be genuinely committed to the fight. That is, they may be crusaders in the fight to stamp out corruption in its various guises. The sad reality is, however, that many do not consider corruption in the way that many of us here today view corruption. They don't consider it as something which is unethical, perhaps illegal or even anti democratic and thus should be condemned outright. Instead, they see it as 'a great story', something that might win them professional plaudits from their peers and their editors or employers because it leads page one or the evening bulletin.

These people cover corruption because it is 'just another story' albeit one that probably has a number of sexy dimensions, including:

- the possible involvement of high ranking public figures (perhaps even high ranking business figures as well);
- it might involve the misuse of government money;
- or it involves the misuse of political power (power that has been vested in a person by virtue of the position they hold, and as such is theirs only temporarily).

They don't consider the consequences of the corrupt act – certainly not in the sense that this audience would. They wouldn't ponder what impact such a story potentially could have on public confidence in our politicians, the public service or even the political system. Perhaps they should indulge in a little self examination every once in a while. Journalists staunchly defend their right to be considered watchdogs and yet they regularly fare much worse than the politicians and other public figures they seek to hold to account in public polls of honesty and ethics. For example, the most recent Morgan poll showed that print journalists scored just 9%, above only estate agents and car salesmen, and down from 13% in the previous poll. Television reporters scored 18%. By comparison, State MPs scored 17% and their federal counterparts 16%. Talkback radio announcers – the scourge of 'real' reporters - rated 17% (Morgan Poll, 3851, 2002).

Temby's attempted solution: off-the-record briefings

The concerns Fitzgerald raises were also reflected in comments made by Temby, who probably worked the media harder than either of his successors or, for that matter, the heads of other anti corruption agencies. Temby would frequently bemoan the tendency of journalists to focus on personalities, rather than the issues, as this quote indicates:

> *'[t]he trouble is that always the media's emphasis is upon personalities, not issues and we are always trying to get to the issues, not the personalities.'* (Parliamentary Committee on ICAC, 1993, p. 58).

Temby's strategy to deal with this problem was straight-forward. He would conduct off-the-record briefings for selected journalists (those he believed were committed to the work the ICAC was doing). Not surprisingly, this provoked an outcry --- from the journalists who felt they were being isolated or disadvantaged; and from the ICAC Committee, which very quickly brought him to task.

Temby was forced to stop this practice. He tried to justify the briefings, arguing, that they enabled a two-way flow of information which helped ensure the media was properly informed and the stories published were accurate. He also made another interesting comment which is perhaps worth reflecting on. He said that if the ICAC were forced to have 'absolutely transparent dealings with the media' it would be the

only organisation within the state to do so (Parliamentary Committee on ICAC, 1993, p. 59).

Some of you can perhaps understand Temby's frustrations – or for that matter, those expressed by Fitzgerald. In part they are understandable, but also, I think they reflect an ignorance of how the media operates and the pressures under which journalists are sometimes required to produce stories.

Not a proud record

Recent history suggests that media organisations have not been particularly successful in uncovering corruption. Of the corruption inquiries of the late 1980s and early 1990s, only the Fitzgerald inquiry was the direct result of journalistic endeavour. The others were all uncovered by regulators, whistleblowers and political opponents. I don't know enough about the pre-history of the recently concluded Royal Commission into police corruption to comment on the media's role in that (I wasn't living here in the lead-up to the inquiry).

Alan Doig is equally critical of the situation in the UK, where he says few of the reported cases of corruption in the 20th century were uncovered by journalists (Doig, 1983).

Journalists in the US have a better record, dating back to the muckraking era of the period 1890 – 1920, moving through the Watergate era and beyond. Much of this is due to the greater access US journalists have to government information --- and perhaps even the protections they enjoy under the US Constitution.

In an Australian context, Margaret Simons has questioned why her profession (she is a journalist) "so rarely succeeds in detecting wrongdoing, and uncovering the corruption and cronyism that undoubtedly proliferates" (Simons, 1991). According to Simons, while the Australian media has undoubtedly played a part in exposing corruption in Australia, it had also "helped contribute to a climate in which corruption, mateship and venal public policy have flourished." It is a powerful criticism.

But in defence of the media organisations, there are a number of reasons why Australian media organisations have not had a major role in exposing corruption. They include: the cost, time, likelihood of a publishable or broadcastable outcome, risk etc (Tanner, 1999a). Some journalists, like Phil Dickie and Chris Masters, who both won Australian journalism's Walkley award for their work that led to the Fitzgerald inquiry, feel that all of these are worthwhile. Although Dickie did much of his preliminary work after hours because the newspaper he worked for appeared reluctant to offend the then government of Sir Joh Bjelke Petersen. Both Dickie and Masters were subjected to risks. In Dickie's case, his then girlfriend had a bullet fired through her flat window. Masters had a camera smashed and was threatened with a smear campaign. Despite this, both men continued to investigate their stories, with significant results.

The difficulties confronting journalists

One of the keys to understanding media interest in, and coverage of, crime or corruption has to do with the fact that journalists tend to be generalists rather than specialists. For example, very few journalists are trained as accountants or lawyers. As such, they do not have the forensic skills required to determine whether a particular act is corrupt or illegal. Corruption is by its very nature a complex issue. Not only does it involve layers of secrecy and considerable efforts on the part of those involved to conceal their actions from scrutiny, but invariably when conduct is exposed there can be considerable debate over the labelling of that action. At a time when experts can disagree over the appropriateness or otherwise of the 'corrupt' label, it is not surprising that journalists may struggle to come to grips with the use of the term (Tanner, 1999a).

It is interesting that when the ICAC was established, a number of NSW media organisations appointed their own specialist ICAC roundsman. This is significant, because it highlights the media's attitude towards the 'newsworthiness' of corruption stories, if not their absolute importance. I don't know if they still maintain those positions, or if the ICAC roundsman is required to combine that responsibility with other duties. I do, however, know that this lack of skills often frustrates corruption fighters because they have expectations of journalists that often are not met. I think it is fair to argue that many journalists do not understand how the corruption bodies operate (and if they are only covering one story or two stories tend not to try and find out). They will try and wing it. Unfortunately, this can lead to shallow reporting --- the type that both Temby and Fitzgerald bemoan. It can also serve to undermine relations between the commission or inquiry and journalists. This can have negative consequences for the commission (in terms of public perceptions of its work). It can also undermine the role of journalists and media organisations in the fight against crime and corruption and thus explains in part at least, the profession's poor showing in the honesty and ethics polls cited above.

There are a number of other potential explanations for the media's poor coverage of corruption – particularly at the point when allegations are being tested at the inquiry stage. For example, television and radio news formats are hardly suited to the coverage of complex issues. Corruption inquiries frequently involve the testing of allegations and counter allegations. One day of hearings can run to hundreds of pages of transcripts. It is well nigh impossible to distil this down to two or three minutes of television air time, let alone 30 seconds for a radio news grab. Not surprisingly, therefore, the media is often accused of superficiality, and of resorting to the strategy that Temby, Fitzgerald and others are critical of, namely focusing on the personalities rather than the complexities, or even the potential consequences, of the case.

While newspapers are better suited to covering such hearings by virtue of the fact that they can devote more space to the detail, and may even have room for some analysis or infusion of expert opinion, they can also struggle to do the story justice. Deadlines, which are invariably the bane of radio and television reporters, are less problematic for newspapers that also tend to have more staff resources that they can divert into

coverage of an inquiry. Nonetheless, they are occasionally stymied by the lack of an appropriate skills base within the newspaper, particularly among journalists who are 'roped in' to cover a big hearing.

Having said that though, the corruption fighters need to make some concessions to these inadequacies (perhaps by making themselves more accessible to the media --- or at least letting the media know they are accessible). And this includes acknowledging that journalists have standards that most will not compromise (including protecting the identity of sources). This particular standard is covered by the Media Entertainment and Arts Alliance and other in-house codes of conduct (MEAA, 2003).

Maintaining the standards

This was the cause of the stoush between Temby and Deborah Cornwall. Towards the end of his term as Commissioner, Temby's relationship with journalists and media organisations appeared to deteriorate. He was criticised over the so-called Cornwall affair; he was criticised over a number of other issues. In fact the criticism that he attracted highlights how difficult the Commissioner's job can be.

Cornwall was working for the *Sydney Morning Herald*. She wrote a number of stories in which she said that an unnamed police officer had told her that Neddy Smith had been a police informer. At the time ICAC was investigating police corruption. Temby asked her to name her informers. She refused, citing the MEAA code of conduct, clause 3, and Temby cited her for contempt. Justice Abadee in the Supreme Court refused the Clause 3 argument and also the argument that the Constitution contained an implied freedom of political communication. Cornwall was found guilty, sentenced to two months jail (suspended sentence) and 90 hours community service at the local legal centre. This decision caused a great deal of media angst – with other organisations rallying behind Cornwall. And highlights how the media can work as one if they are under siege.

A balancing act

Towards the end of his term as ICAC Commissioner, Temby's relationship with the media had soured markedly. Despite his best attempts at maintaining good media relations and trying to do what he considered best for the ICAC, Temby had developed a reputation as being something of a media junkie. In many respects the media (as watchdog) had turned on the corruption watchdog (in this case ICAC and Temby). It had begun to question the future of the ICAC, particularly in light of its decision in the so-called Metherell affair, which saw ICAC architect and Premier Nick Greiner labelled corrupt by his own watchdog. This decision was subsequently overturned 2:1 by the NSW Court of Criminal Appeal, but not before Greiner had been forced to resign as Premier. Not only did the media question Temby, but it also provided a forum for the political critics of the ICAC. Only now, nearly a decade later, can it be said that the ICAC has managed to reclaim the reputation it lost in the immediate aftermath of the Metherell inquiry. In part that is due to the strategy employed by current Commissioner Irene Moss of maintaining a more distant relationship with

journalists. She has managed to walk the tightrope, whereas her two predecessors slipped and over-balanced towards the end of their respective terms.

How to avoid being eaten

From the perspective of the corruption commissioner, or crime fighter, you need to earn the respect of journalists. If you pander to them, they'll eventually eat you alive. Equally, if you are too tough on them, that is you don't provide them with information, or make their lives difficult, they'll also turn on you.

In many respects the needs of journalists are simple – they need information. Give them information and they'll produce accurate stories. Starve them of information and chances are that some will construct stories. If you take a particular decision, explain it to them. This can be by way of press conference, briefing or even an announcement from the bench. It is better to advise than to let the journalists make their own conclusions. Even the smart ones can get it wrong if they are starved of information, particularly information that doesn't jeopardise the inquiry and may help the community at large to understand the work you are doing.

Relations between commissions and oversight committees

I've also been asked to touch on one other topic --- and that is the relationship between the commissions and the committees that oversee them. This is a difficult topic and probably warrants a whole session in the conference. But I'll just make a couple of points.

At the end of the day, both parties need to think carefully about their responsibilities and those of the other party before taking public aim at each other. Clearly personalities will always influence the relationship between a Commissioner and his or her parliamentary committee. There were occasions when Commissioner Temby and his successor Commissioner O'Keefe's relationship with the NSW ICAC Committee (or individuals on the Committee) were tense (See, for example, Parliament of NSW, Committee on the ICAC, Collation of Evidence, Oct. 15, 1993).

I think in part these tensions were inspired by personality issues. But also I think that they were influenced by the political agendas individual committee members were pursuing. I believe that individual MPs need to be careful about criticising the Commission or its head in a public forum, given that such attacks have the potential to undermine community attitudes towards a particular watchdog body.

As members of oversight committees, they are in a stronger position to attack corruption commissions or commissioners than the latter have to hit back. Having said that, I do think the system put in place by the NSW Parliament whereby the Commissioner and senior employees of the ICAC meet with the Committee for question/answer sessions is a very good idea. I like the fact that these sessions (or parts thereof) are held in public and that the media are invited to attend. Such meetings do lend a sense of transparency to the oversight process.

However this is where my reservations should be inserted. The media will take advantage of these sessions to promote tensions between the Commissioner and the Committee. Individual MPs know that. They know that conflict is a media staple, and they will seek to feed that need. But at the end of the day, they need to think about the consequences of potentially ill-thought or ill-advised attacks on the Commission or commissioner. Public trust in an institution is often hard won, but easily eroded, and committee members need to think about this. As do journalists who will willingly seize on the sniff of a disagreement and seek to turn it into a major story.

Conclusion

As indicated in my opening comments, the relationship between corruption fighters and the media, or for that matter crime commissions and the media, can be a precarious one. Often, however, the relationship is determined by personality issues and by a misunderstanding of how the two types of watchdogs can work together.

Australian media organisations have not been particularly successful over the past 20 years in uncovering corruption, however they have devoted considerable resources to the coverage of corruption inquiries that have resulted from the endeavours of other people. While my paper is essentially critical of the media, I do believe there is scope for the two groups of watchdogs to work together. To achieve that, however, I feel that corruption and crime commissions need to invest more time and resources in understanding how media organisations work – and employing media managers who have a background as journalists is one positive that has taken place. The provision of facilities for journalists at inquiries is another.

From the perspective of media organisations, however, I feel that more can be done. Australian media organisations should be devoting more resources to the establishment and maintenance of investigative teams. Such teams tend to be a thing of the past, or are established on an ad hoc basis. The establishment of such teams would also help address one of my other criticisms, namely the lack of specialist skills – in law, accountancy and even policing – that exists within newsrooms. The development of such skills and the willingness of editors and chiefs of staff to devote staff resources to the investigation of story leads that might lead to a big corruption or crime story would be a worthwhile investment in the future of corruption reporting.

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APPENDIX NINE

Paper delivered by Mr Torrance Mendez, Reporter, West Australian Newspaper

CORRUPTION does not belong to anti-corruption commissions.

The very nature of corruption is that it is an offence against a community. And the community has a vested interest in its outcome. A public outcome is essential. It alerts the community to the existence of corruption, the seriousness with which it is viewed, the harm that it causes, the penalties it incurs and how its wrongs are corrected.

Without a public outcome, no-one knows that authorities are interested in this form of wrong-doing. It is as much of an educational process for a community to be guided in understanding how this particular type of offending is checked.

Corruption tends to be revealed in three ways. Either a whistleblower discreetly gives information to an authority; or there is an investigation by an anti-corruption agency into a certain type of offending; or there is a scandalous act or activity exposed in the media.

Now, be sure of this. The media has an interest in all three types of corruption. In the case of the whistleblower, there is often a need to reassure a whistleblower that the complaint will be fully investigated.

Complaints do not reach fruition for three reasons - (1) lack of resources; (2) in-house office politics; or (3) sensitivity to perceived reaction from elected officials.

Lack of resources speaks for itself. A complaint dies if there is neither money nor staff to pursue inquiries. Full stop.

In-house politics can stymie an inquiry when investigators get the unwritten message that pursuit of certain lines of inquiry will be a career-ending move.

Similarly, powerful elected officials can “heavy” a timid bureaucracy into paying lip service to certain inquiries.

Now let us look at our everyday hero, the whistleblower.

A whistleblower sometimes gives information to an anti-corruption agency and then seeks to keep the media informed of progress of the complaint. A whistleblower can do this for two reasons - either they feel the complaint is a matter of genuine public interest and the public has a right to be kept informed; or they feel that it will not be properly investigated because of its sensitivity.

Here in Western Australia, it was hard for a whistleblower to keep media informed of the progress of a complaint because of secrecy provisions in the Anti-Corruption Commission Act.

By way of potted history, Western Australia had an Official Corruption Commission which was little more than a repository for allegations of official wrongdoing. It offered some comfort to people who had a serious complaint to make - allowed them to get it off their chest - but little more. Active investigations were few and far between.

It was eventually replaced by the Anti-Corruption Commission in 1996 which had much stronger powers including the power to investigate, demand or seize documents, hold hearings, and compel witnesses to answer questions.

Hearings of the Anti-Corruption Commission were to be conducted in secret and the media was expressly forbidden from saying (a) that a complaint had been made and (b) the nature of the complaint.

It was virtually an impenetrable embargo for a whistleblower who wanted to keep media informed of a complaint. And it became a harrowing experience for the whistleblower when allied to the Anti-Corruption Commission's inability to hold public hearings.

The restriction on reporting that a complaint was made to the Anti-Corruption Commission was circumvented to some degree by the media reporting that a complaint had been made to an independent investigative agency. That phrase became a euphemism for the Anti-Corruption Commission. The ACC, as it happens, is about to be disbanded and will be replaced by the Corruption and Crime Commission.

Looking back on it, I think the ACC accepted that a greater measure of public accountability and openness would have helped its work. For a start, it would not have attracted the great expectations followed by the fear and loathing that it drew from a largely ignorant public.

Now, you should be aware that in 1996 an Upper House committee of State Parliament reported on police corruption after a three-year inquiry. In essence, the report said sections of police were riddled with endemic corruption. Also, it found: police took bribes from organised crime; tampered with evidence; got paid-off to protect prostitutes and drug traffickers; sold drugs confiscated from raids; pocketed money from drug raids; colluded to conceal evidence; senior officers interfered in criminal investigations; police selectively leaked confidential information to the press; and “friendly officers” warned people under investigation for gambling.

Clearly, Western Australia had a problem with police crime-fighters. And you might think the Anti-Corruption Commission had a big job to do - identify the corruption and do so in a way that would satisfy public concern.

In fact, the ACC found the going tough. In hindsight, it needed an outlet or connection with the public to perform its work properly. Without that outlet, there was rumour, innuendo and suspicion about the work of the ACC, the degree of police corruption and whether the ACC was up to the task.

The secrecy provisions given to the ACC were meant to ensure that people could complain in confidence.

But the provisions helped destroy the very institution they were meant to protect. Notably, the police union ran a successful campaign of complaint saying that officers should be allowed to face their accusers.

Further allegations about police corruption followed in 1999 and 2000, principally involving the death of a protected witness in an organised crime case. By then the Labor Opposition (now Government, of course) had had enough. They called for a police royal commission. And that is what we got, which is about to report on November 30.

The royal commission has gone about its business in an equally secretive manner. The files of the Anti-Corruption Commission were given to the royal commission. But the relationship with the media has been no different. A new kind of complaint arose. Police complained about officers being named without the ability to quiz their accusers, some of whom had codenames protecting their identity. Scores of suppression orders, preventing publication of an officer's name, were issued in public hearings. Regrettably, one officer committed suicide apparently in fear of an adverse finding. In fact, the commission says no such adverse finding will be made against that officer.

Reporting on the police royal commission has not been facilitated in any quantifiable way. The media has not been notified about which witnesses will be called and when. There was little or no prior knowledge about the topic to be addressed. These things help in the organisation of photographers and help alert the newsroom about the need for space in the paper.

Similarly, there was no attempt at gaining the confidence of journalists to brief them about aspects of the inquiry, namely why certain topics were being addressed. This meant it was impossible for working journalists to fathom the thinking behind the operational direction of the inquiry. We were merely presented with a series of unrelated segments of inquiry. Occasionally, there would be a statement that this segment carries on from matters revealed in such-and-such a segment. But those moments were rare.

There was one instance in particular when the royal commission could have assisted in defusing public anxiety over an infamous case called the Perth Mint Swindle. Brothers Ray and Peter Mickelberg had vehemently protested their innocence and claimed to have been framed in 1982. A detective sergeant involved in the original inquiry of that year and subsequent appeals was now saying under immunity from prosecution that

the brothers had, in fact, been framed and were essentially jailed on tainted evidence. There were obvious grounds for appeal. The whole matter struck at the heart of the criminal justice system in that the brothers had complained of being framed for more than two decades. And each time, successive Courts of Criminal Appeal had rejected their case. Ultimately, questions would have to be asked on how or why the Appeal Courts were duped into accepting fabricated evidence. The Attorney-General dealt with this case by sending it to the police royal commission, despite the fact that the original crime - theft of gold bullion from Perth Mint - fell outside the royal commission's 15-year embargo on hearings.

The case had a touch of the bizarre - the royal commission wanted to investigate the allegations but the detective and author Avon Lovell who had first publicised inconsistencies in the Mint Swindle investigation, flew to Thailand fearing for their safety.

The detective eventually returned to Perth on the understanding he would not be prosecuted. He admitted his wrongdoing to the WA Supreme Court and got a further immunity from prosecution. But he had spoken to reporters outside court and was charged with perjury for that action when he had no formal immunity from prosecution. It was clearly a farcical situation.

By way of postscript, the author was eventually convicted of contempt of court and fined $30,000 for his initial refusal to cooperate with the royal commission. Finally, the perjury charges against the detective were thrown out by a District Court judge.

It sounds like a funny story. But it was not. The detective's testimony was major evidence of the type of cultural corruption that the legislative committee had spoken about in 1996. Yet any casual observer must have got the impression that the whistleblower was being relentlessly pursued for, dare I say it, telling the truth. This was completely the wrong message that was sent to the community. I have to say that as I speak the Mickelberg brothers are due to have their appeal against conviction heard in December.

The effect of this episode threatened to undermine confidence in the police royal commission. Who now would dare come forward with evidence against colleagues or former colleagues given the experience of this detective?

Yet the fact of the matter was that the inconsistencies in what was happening in this case presented an opportunity for the royal commission to play a part in giving some measure of sanity to these seemingly bizarre antics. To the contrary, the royal commission made no public statement about its opinion and in fact initiated prosecution of the author who had contemptuously stormed out of the commission. It could be argued that the $30,000 fine imposed on him was severe but that, of course, was not the commission's doing. That was a matter for the WA Supreme Court.

Back to the whistleblower: any whistleblower needs to be assured that their complaint is being adequately investigated. Be mindful that conspiracy theorists abound. And it is oh so easy - tempting even - to write these people off as cranks or nutters.

Every so often, a complaint arises that alleges that several government servants or agents have colluded together to someone's personal detriment. In Western Australia we had the case of failed election candidate Terry Maller who claimed his criminal record was leaked from police records to harm his chances of winning a seat on City of Perth local authority. The police royal commission did not investigate the complaint in public but has said that the case will be mentioned in its final report due on November 30.

The issue here is this: where there is a need for openness - such as when a complainant talks of collusion between government agencies … it is essential for such allegations to be investigated in public. There is a need to show that the complaint is being taken seriously and is being addressed openly. Failure to do that can only confirm in the complainant's mind that his suspicions are real and possibly worse than he imagined. That is not a helpful state of affairs.

The point is that some complaints can only be investigated in public. To examine them behind closed doors is a waste of resources and, if anything, does more harm than good.

What is needed is clear recognition about categories of corruption - where an anti-corruption agency can see that certain types of complaint can only be adequately tested by open hearing.

The next step is to recognise that corruption is not the province of the investigator. That the media has a vested interest in the outcome of corruption, especially when the media has been instrumental in exposing a scandal. Yes it is true that media stories that expose scandal are often full of falsehoods yet they do create an atmosphere that warrants a ‘please explain’.

This is the refreshing aspect of the BBC story that claimed the Blair Govt had “sexed up” a confidential report about Saddam Hussein's potency to deploy weapons of mass destruction. We have a public inquiry … in fact a very public inquiry … where the presiding judge Lord Hutton has understood that an inquiry of that nature can only have meaning if it is held in public. And that must be because the public interest in that scenario is over-riding.

So too is it with many types of corruption. And it really is for investigating agencies to understand that the media can be an ally, sometimes a hindrance but essentially a friend.

It is worth remembering that the success or otherwise of a public organisation is largely influenced by the degree of faith placed in it by the public. To hide away inquiries, to reveal little substance of a complaint, to prolong investigations needlessly

with no avenue for public account, to dismiss complaints summarily, and to be comforted by that quality of work does not build public confidence.

It should also be borne in mind, that the public relies upon the independence of corruption fighters. And if there is interference in the work of a commission, public accountability is a good method of curtailing it. Rather than suffer in silence, an agency can operate in a freer, more effective climate if there is transparency in its work.

I came across an interesting document about the proposal to set up an Independent Anti-Corruption Commission in Bangladesh. This was brought about by failure of the old Bureau of Anti-Corruption where investigations simply were not reaching fruition. Here is what was proposed for the new commission:

> *The Commission shall regularly publish up to date data regarding its activities (e.g. the number of cases filed with the Commission, their sources, inquiries, filing of cases, submission of charge-sheets, penalties, acquittals, quantum of financial involvement, amounts recovered etc.). These data will be published in the media, as well as on web sites, to increase public awareness.*

Interestingly, a corruption prevention department was seen as part of the work of the Independent Anti-Corruption Commission, in which media would be involved in raising public awareness about corruption through regular bulletins and the like.

Of course, such requirements seem unimaginable in Australia. And hopefully matters will never get so bad that they are warranted.

But vigilance is required. And it is time for anti-corruption commissions to develop operations and strategies that involve keeping the media informed of developments. Not only for the public good but also to guarantee the independence and effectiveness of an anti-corruption agency.

APPENDIX TEN

Paper delivered by Professor Peter Little, Acting Dean, Faculty of Business, Queensland University of Technology

Special Counsel, McCullough Robertson, Lawyers, Brisbane*

Applying Good Governance Principles To Anti-Corruption Organisations

BACKGROUND TO DEMANDS FOR GOOD GOVERNANCE

In the last decade, both in Australia and internationally, we have witnessed an increasingly vigorous demand for greater corporate governance and organisational accountability. This demand has been fuelled by major corporate failures as well as significant lapses in public sector management. The pressures for better governance apply equally, but with important distinctions that highlight different organisational circumstances, to the key sectors of the economy – the private, not-for-profit, and public sectors.

The response has been the development of a somewhat overwhelming maze of information and guidance on achieving better governance. In the private sector, significant contributions to the governance debate include: ASX Corporate Governance Council's *Principles of good corporate governance and best practice recommendations*, Standards Australia's suite of governance Standards, *Sarbanes-Oxley Act*, the Australian Shareholders Association's *Statement of Corporate Governance Principles*, OECD's *Principles of Corporate Governance*, the Cadbury/ Greenbury/Smith Reports, the Higgs Review, the Combined Code on Corporate Governance (UK) as well as guidance from Chartered Secretaries Australia, CPA Australia and the Investment and Financial Services Association.

Approaches to public sector governance have also been discussed widely including: International Federation of Accountants' *Governance in the Public Sector: A Governing Body Perspective*, Audit Office of NSW's *On Board – Guide to better practice for public sector governing and advisory boards*, Australian National Audit Office's *Principles and Better Practices: Corporate Governance in Commonwealth Authorities and Companies*, Western Australia Audit Office's *Public Sector Boards: Board Governing Statutory Authorities in Western Australia*, as well as contributions from other State and Territorial audit offices and anti-corruption bodies.

This paper argues, notwithstanding the key differences between public sector organisations and private companies, emerging standards of corporate governance offer useful guidance for organisations in all sectors.

Tailoring governance to organisational circumstances

A number of common principles are consistently reinforced across sectors such as honesty, avoidance of conflicts of interest, board effectiveness and independence, disclosure of information to stakeholders, promotion of organisational and ethical values, transparency and accountability. However, it is acknowledged without exception that there is no 'one size fits all' approach to corporate governance, specific organisational differences and requirements must be considered and incorporated to ensure the proper implementation of a governance system.

Embedding a culture of good governance

Standards Australia has recently developed five corporate governance Standards (the Standards) that serve as a useful tool for organisations seeking to operationalise a realistic and effective governance system. The Standards are intended to assist public sector organisations to an equal extent as private and not-for-profit organisations. They adopt a holistic approach to developing systems that assist in conforming with governance requirements arising under multiple pieces of legislation as well as codes and aspirational standards. Realistically, most large or complex organisations will take some years to successfully implement an integrated, well co-ordinated governance system which addresses all key issues of governance.

This paper will highlight the important principles and unique challenges of public sector governance, together with a discussion of how the five new Standards produced by Standards Australia can assist an organisation to successfully implement a governance system.

PARTICULAR EXAMPLES OF THE PUBLIC SECTOR UNDER SCRUNTINY

The recent ICAC inquiry into the collapse of the NSW Grains Board provides a good example of the importance of good governance in the public sector. ICAC recommended that three senior executives be criminally prosecuted as it is alleged that the board's directors were misled as to the financial position of the organisation and that financial records were falsified, actions which ultimately led to the collapse of the Board costing the State more than $150 million in bad debts.[1]

In the aftermath of the Pan Pharmaceutical's debacle, the industry regulator – the Therapeutic Goods Administration – has been subjected to significant criticism, with the Australian National Audit Office indicating that it would carry out a major audit of the operations of the regulator.[2] Similarly, the Australian Prudential Regulatory Authority (APRA) has also been under intense scrutiny in the wake of the HIH collapse.

[1] Lisa Allen and Cathy Bolt, 'ICAC Wants Three Charged', *Australian Financial Review*, 29 August 2003, p5

[2] Jennifer Secton, 'Drug watchdog faces major audit', *The Australian*, 6 August 2003, p5.

The Crime and Misconduct Commission (Qld) was recently criticised for its management of a sexual harassment inquiry. The Parliamentary Crime and Misconduct Commissioner tabled a report in parliament finding that a 'serious error' had occurred when the CMC failed to assess for three months information it had received from the State Government relating to the case.[3]

In the US, the Columbia Accident Investigation Board in its recently released report heavily criticised NASA's governance system, concluding that one of the principal causes of the space shuttle disaster were failures in NASA's safety and organisational culture. The report states:

> *'In the aftermath of the Challenger accident…contradictory forces prompted a resistance to externally imposed changes and an attempt to maintain the internal belief that NASA was still a "perfect place", alone in its ability to execute a program of human space flight. Within NASA centers, as Human Space Flight Program managers strove to maintain their view of the organisation, they lost their ability to accept criticism, leading them to reject the recommendations of many boards and blue-ribbon panels…External criticism and doubt, rather than spurring NASA to change for the better, instead reinforced the will to "impose the party line vision on the environment, not to reconsider it"...This in turn lead to "flawed decision making, self deception, introversion and a diminished curiosity about the world outside the perfect place"…the board views this cultural resistance as a fundamental impediment to NASA's effective organisational performance'*.[4]

In Japan, the pressure on the Financial Services Agency (FSA) is continuing with doubts remaining over whether there has been any improvement in its regulation of Japan's banking sector. The prosecution of two former presidents and a manager of Ishikawa Bank, following its collapse in December 2001, has raised questions over whether more could have been done by the FSA to prevent the collapse.[5]

Organisations in the public sector, including regulators, crime and corruption commissions and watchdog or supervisory bodies, are facing increasing governance expectations like organisations in the private and not for profit sectors. In this environment, developing and maintaining an effective governance system is essential for improving performance and maintaining the confidence of stakeholders and the public. However, the better a governance system, the better an organisation placed to win the confidence of the public.

PUBLIC AND PRIVATE SECTOR ORGANISATIONS COMPARED

In private sector organisations, the core objective – maximising profit and shareholder value, and the instruments for achieving that core objective are relatively clear. The

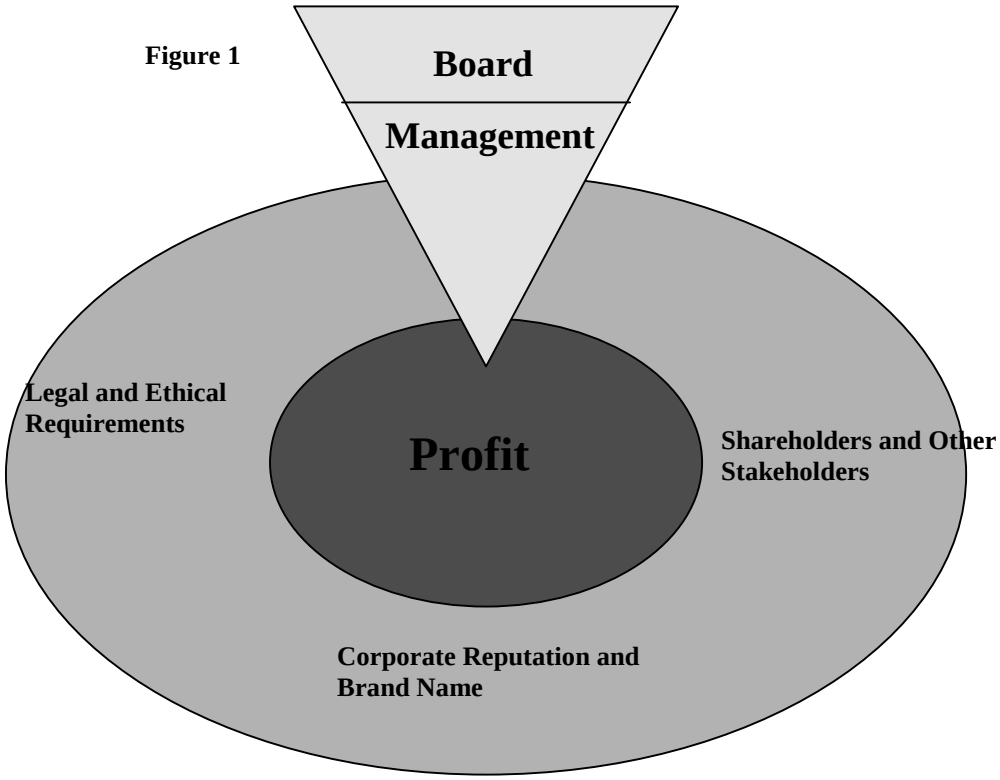
[3] Sean Parnell, 'Watchdog censured', *The Courier Mail*, 20 August 2003, p4.

[4] Columbia Accident Investigation Board Report Volume 1, August 2003 [102].

[5] 'Sleepy watchdogs', *The Economist*, 30 August 2003, 55.

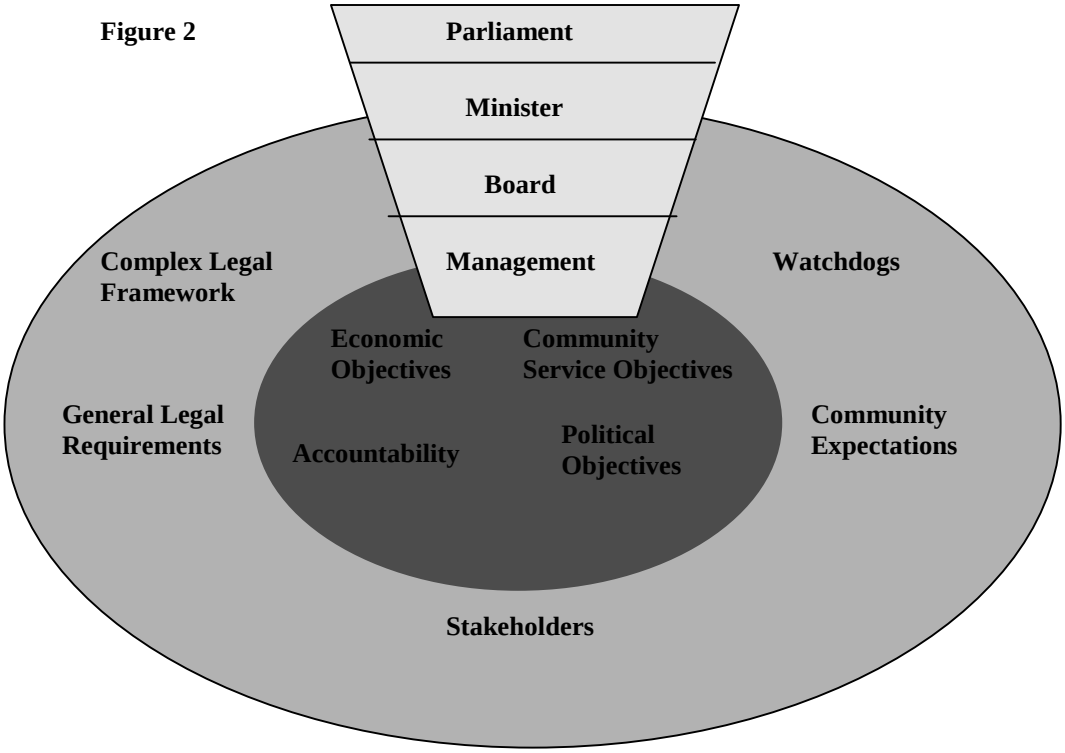
board of directors has ultimate responsibility for the strategic direction of the organisation, and management is charged with responsibility for ensuring the decisions of the board are carried out in the day-to-day operations of the business. The actions of the board and management are restricted by obligations to the company's shareholders, other stakeholders such as creditors and customers, as well as conforming to legal and ethical requirements and preserving the company's corporate reputation and brand name. This structure is described in the Figure 1.

Figure 1



The nature of a public sector organisation is significantly more complex. The core objective is more expansive involving economic, political and community service objectives, as well as the concept of public accountability. The instruments to achieve these objectives are also more complicated, including parliament, the responsible minister, the board, and management – the relationships and relative responsibilities of these players are often unclear and ill defined. Contextual constraints in the public sector include a more diverse and demanding group of stakeholders, the governing legal framework, general law requirements, public sector watchdogs and community expectations. This structure is described in Figure 2.

Figure 2



While recognising the existence of significant differences between public and private sector organisations, discussed below, there are, nevertheless, many ways in which good governance principles apply equally to both sectors. For example, organisations involved in each sector must; undertake sound strategic planning; promote ethical and responsible decision making; effectively manage risk; and seek to measure and improve performance.

FUNDAMENTAL DIFFERENCES IN PUBLIC SECTOR GOVERNANCE

Whereas profits are the main focus of private sector organisations, public sector bodies (other than those principally engaged in trading) are normally charged with implementing legislation and governmental policy in a cost effective manner for a range of beneficiaries and for diverse purposes. These differences have significant implications for the design and implementation of public sector governance systems, especially for anti-corruption bodies and their parliamentary oversight committees. Nevertheless, private sector best practice can contribute substantially to implementing many aspects of public sector governance. It has been said that "it is the extent to which corporate governance mechanisms borrowed from the private sector can contribute to accountability that justifies their adoption in the public sector".[6]

Key features of public sector governance include:

[6] Brendan Butler, *Corporate Governance in the Public Sector*, Address to the Public Sector Symposium, June 1999.

- Shareholders are, essentially, the public or segments of the public: thus, the organisation and its board's relationship with its stakeholders is different in nature and extent from the private sector creating a heightened obligation of transparency and accountability;[7]

- Public service ethics rely more heavily on impartiality and objectivity, requiring officers to act in the best interests of the whole community;[8]

- The additional level of power and responsibility (eg. the involvement in the governance chain of a Minister) may create difficulties defining roles appropriately;

- Oversight is exercised by a range of watchdogs including the relevant audit office, anti-corruption bodies, the ombudsman, central agencies and parliament. In combination, these may have different outlooks, culture and experience from those working in the private sector;[9]

- Freedom of information and judicial review processes create additional obligations;[10]

- Government/Ministerial demands have a considerable effect on the power of public sector boards – these demands are different and more numerous than those made by institutional investors;[11]

- The complex legal framework under which the public sector operates (in addition to general legal requirements) provides an additional burden and responsibility on the public sector;[12] and

- Difficulties arise when economic objectives conflict with political, public interest and community service objectives.[13]

While these features and distinguishing characteristics apply generally to the public sector, crime and anti-corruption bodies face the additional burden of operating under strict secrecy and confidentiality conditions, often in politically charged circumstances. Constraints on external reporting limit the effect of one of the most natural mechanisms of good governance. Further, they are almost constantly subject to intense media interest in their activities and performance.

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[7] The Audit Office of NSW, *Corporate Governance in the Public Sector* (Conference Paper), June 2002, p3.

[8] Butler, above n 6.

[9] The Audit Office of NSW, above n 7.

[10] Butler, above n 6.

[11] The Audit Office of NSW, above n 7.

[12] Ibid.

[13] Butler, above n 6.

PRACTICAL BENEFITS OF A WELL IMPLEMENTED GOVERNANCE SYSTEM

For organisations that are essentially trading organisations, regardless of sector, there are many practical benefits which are expected to flow as a result of developing a system, and ultimately, a culture of good governance. Anti-corruption bodies would not necessarily obtain all of these, but there are significant benefits available to such bodies that should be considered. Certainly anti-corruption bodies will always face strong elements within the community seeking to undermine the perception of the quality and value of their work. Good governance will serve to reduce the effects of and, possibly, the likelihood and severity of such attacks.

Building and maintaining reputation

It is said that 'good reputations may take years to develop, but can be destroyed in a single day'.[14] It has almost become clichéd to cite HIH, One.tel, NSW Grains Board and Arthur Andersen – those all too familiar examples of the ultimate price paid for compliance failure. The importance of a good governance system, including a holistic approach to compliance, can not be overemphasised: in an increasingly responsive stakeholder environment managing regulatory risk and being committed to the principles of good governance are vital to overall strategic management. Non-compliant organisations face a range of regulatory risks including loss of reputation, suspension or cancellation of licence (eg. Cancellation of Pan Pharmaceutical Ltd's manufacturing licence by the Therapeutic Goods Administration in April 2003 causing the largest medical products recall in Australia's history; and ASIC's recent crackdown on the financial services industry)[15], financial cost and business disruption in defending legal action and in extreme cases, termination of operations.

In the public sector maintaining trust among stakeholders, such as government, the media and the community generally, is also fundamentally important. Damage to the reputation of a public sector organisation may have a significant impact on funding levels, even to the extent of cessation of activities.

Organisational benefits

Use of good governance systems and an accompanying commitment to ethical behaviour should produce an improvement in an organisation's internal governance and compliance culture, thereby enhancing trust with the organisation's stakeholders.

Further, an organisation may obtain a number of significant legal benefits from developing a culture of compliance and good governance, as well as other valuable business and organisational advantages that should not be overlooked. These include attracting and retaining quality staff and the related issues of employee wellness and

[14] Charles Ilako, 'Reputations at risk' (2002) 157 *Global Investor* 64.

[15] Kate Askew and Anne Lampe, 'ASIC puts squeeze on dodgy dealings', *The Age*, 12 July 2003, 3.

job satisfaction.[16] Many situations exist where, in the absence of a culture of good governance and compliance, employees are exposed to the threat of regulatory or government intervention, workplace, safety or service failures, and in extreme cases, calamities.

Improving Performance

Public sector enterprises, generally, are subject to requirements to apply scarce public resources efficiently. There has been a plethora of research over the last decade testing the link between various elements of a good governance system and firm performance in the private sector, with varying results. A 2003 Harvard study found that strong governance structures were positively correlated with higher profits and higher sales growth.[17] A 1998 study found that firms with weaker governance structures have greater agency problems and perform worse than companies with strong governance structures.[18] However, a number of studies have cast doubt over the link between best practice governance recommendations and better firm performance.[19] Other studies have provided strong empirical support for such practices as board independence and independent nominating committees.[20]

What is missing from the current body of research is watertight empirical evidence demonstrating that organisations with a well managed compliance system embedded in a culture of good governance are able to perform better. This is no doubt a reflection of the absence of sufficiently powerful tests or an indication of the difficulty of defining or measuring exactly what constitutes a culture of good governance. As better measures of governance performance emerge, the causal link between good systems, culture and improved organisational performance will become clearer. With the effort presently being invested in implementation and measurement of corporate governance systems around the world, it is likely that better indicators of causality will soon emerge. In the meantime, best practice guidelines and benchmarking are available in relation to many aspects of good organisational governance.

Considering the wide ranging benefits that may flow to an organisation as a result of a good governance system, the positive correlation between performance and good governance would seem to be a logical progression. At the very least the confidence of leadership in an organisation's governance system should promote better decision making. A superior knowledge of the risks faced by an organisation, and the measures

[16] Rick Julien and Larry Rieger, 'The missing link in corporate governance' (2003) 50(4) *Risk Management* 32.

[17] Paul Gompers, Joy Ishii and Andrew Metrick, 'Corporate Governance and Equity Prices' (2003) *Quarterly Journal of Economics*, 107.

[18] John Core, Robert Holthausen and David Larcker, 'Corporate governance, chief executive officer compensation, and firm performance' (1998) 51(3) *Journal of Financial Economics*, 371.

[19] See Benjamin Hermalin and Michael Weisbach, 'Boards of directors as an endogenously determined institution: a survey of the economic literature' (2003) 9(1) *FRBNY Economic Policy Review*, 7.

[20] Salomon Smith Barney, *Best practice in corporate governance: what two decades of research reveals* (2002) [15].

in place to guard against them, provides an advantage to organisations by assisting leaders to become more successful risk takers.[21]

Managing critical incidents

Recent private sector research into crisis management highlights the practical benefits of a good governance system for organisational continuity. Results showed that, on average, organisations that have governance systems which are adequately prepared for a crisis suffered 21 emergencies between 1998 and 2001, while less prepared organisations suffered 33 emergencies.[22] This indicates that preparing an organisation for crises reduces their incidence.

Further, crisis-prepared organisations perform better financially – the return on assets being double the average of that of crisis prone organisations. The authors of the study point out that they 'don't attribute the superior performance only to better crisis management, but there's no doubt that proactive companies incur lower crisis-related costs…and a crisis-prepared company is likely to be a better steward of its assets in other areas as well, like financial risk management'.[23]

The study also found a significant link between crisis preparedness and organisational reputation – crisis prepared companies scoring significantly higher on *Fortune's* ranking of the most admired companies in America.[24]

The ANAO report discussed above[25] found that a number of public sector organisations studied had inadequate approaches to risk management which impaired their ability to limit the likelihood and consequences of risks, including the reoccurrence of significant risks, also limiting their ability to take advantage of such experience and opportunities'.

Meeting demands for accountability

Like all organisations whether public or private, anti-corruption bodies operate within a legislative framework that requires them to meet certain legal obligations as well as be accountable for performance and use of resources. The employment of a good governance system internally, including appropriate compliance programs, will enable organisations to manage responsibility on an ongoing basis and be able to demonstrate that they are doing so. An organisation that regularly reviews and evaluates its governance system is able to benchmark the performance of the system overtime and

[21] Neil Gerrard, 'Rethinking regulatory risk: A strategy for the UK and global corporate governance' (2003) 11(1) *Balance Sheet*, 37.

[22] Ian Mitroff and Murat Alpaslan, 'Preparing for evil' (2003) April *Harvard Business Review* 109.

[23] Ibid.

[24] Ibid.

[25] Australian National Audit Office, 'Management of risk and insurance: The Auditor General Audit Report No.3 2003–04', 2003.

against other comparable organisations. This provides practical and tangible evidence of good governance that can be utilised to persuasively meet stakeholder demands.

Management of risk and insurance

An organisation's ability to obtain adequate insurance at an affordable cost is vital. Since the demise of HIH the insurance market has 'hardened' with insurance 'costing more and covering less…capacity [has] sharply reduced, insurers are far choosier'.[26] Insurance companies are seeking further information from organisations beyond simply the balance sheet: organisational culture and the quality of management systems have become relevant considerations.[27]

A recent report by the Australian National Audit Office[28] reinforces the important link between management of risk and insurance. A good governance system, incorporating holistic risk management practices provides an organisation with the ability to demonstrate its knowledge of, and control over operational risks. This will minimise the cost and ensure the availability of insurance coverage. The report notes that in the public sector there has been a push to improve the links between risk management and insurance because of 'increasing insurance costs and reductions in available cover'.[29] However, audit results revealed that most organisations were only beginning to understand the link. The audit found that a significant 'inhibitor to integration is…the absence of a basis for properly assessing the performance of general insurance activities…exacerbated by a lack of generally accepted performance indicators for risk management that link it to insurance".[30]

The report also found that 'another major impediment to the effective management of insurance…[is that] risk management, OHS and workers' compensation were often represented as "silos" within an organisation, and managed as separate, rather than related, functions'.[31]

GOOD GOVERNANCE PRINCIPLES IN THE PUBLIC SECTOR

The International Federation of Accountants (IFAC) in its publication *Governance in the Public Sector: A Governing Body Perspective* provides a comprehensive guide on how governance can be "implemented in practice".[32] The report describes four dimensions to public sector corporate governance: standards of behaviour, organisational structures and processes, control and external reporting.

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[26] Mark Lawson, 'The key task of attracting an underwriter', *Australian Financial Review*, 14 August 2003, 10.

[27] Ibid.

[28] Australian National Audit Office, above n 25.

[29] Ibid, p6.

[30] Ibid, p9.

[31] Ibid, p10.

[32] International Federation of Accountants (IFAC), *Governance in the public sector: A governing body perspective*, 2001.

Standards of behaviour

Organisational leadership must act in accordance with high standards of behaviour. In practice, leadership and commitment are probably the key elements in the success of a governance system. AS8000 reinforces the widely agreed notion that a written code of conduct is essential, as are management and board commitment to upholding it. It is helpful to include practical examples – scenarios and guidance on ethical dilemmas – to improve the usefulness of an organisational code of conduct.[33]

In pursuit of such concepts as objectivity, integrity and honesty, mechanisms should be created that minimise the influence of prejudice, bias or conflicts of interest.[34] The NSW Audit Office advises that a register of related party transactions and a register of pecuniary interests be maintained. Further, conflict of interest disclosures should be recorded in the minutes, conflicted members should refrain from voting, and conflicted members should not be present for discussion related to the issue.[35]

Organisational structures and processes

Of paramount importance is the implementation of systems to ensure compliance with an entity's statutory framework, general law requirements and other relevant codes and statements of best practice. Arrangements must also be developed to ensure public funds are used effectively and properly safeguarded.[36]

The heightened responsibility to stakeholders in the public sector requires a definite commitment to openness and transparency. Effective communication channels with key stakeholders should be developed, and particular emphasis should be placed on ensuring information on governing body appointment processes is reported publicly.[37] The inherent tension between commercial and community service objectives can be addressed by clearly documenting expectations and having them approved by the responsible Minister.[38] Stakeholder consultation is an important tool in managing such tension.

Confusion about the various roles and responsibilities of the Minister, the board and the CEO can significantly impact upon the effectiveness of a governance system. It is necessary that the role of the board be clearly articulated in legislation or set down in a memorandum of understanding with the Minister – allowing the board 'full and

[33] Queensland Audit Office, *Auditor General Report No.1 – A review of corporate governance*, 2001/2002; Queensland Audit Office, *Auditor General Report No.2 – incorporating a governance risk management review of government owned corporations*, 2002/2003.

[34] International Federation of Accountants (IFAC), above n 32.

[35] The Audit Office of NSW, *On Board – Guide to better practice for public sector governing and advisory boards*, p18.

[36] International Federation of Accountants (IFAC), above n 32.

[37] Ibid

[38] Australian National Audit Office, above n 25.

effective control' of the organisation.[39] Allowing the board sufficient power to set strategic direction and exercise control over the allocation of resources clarifies the board's liability for the decisions made.[40] Directives from the Minister should be in writing, publicly reported, and subject to clear limitations.[41] The board should have full and free access to all relevant information and be able to seek independent professional advice as required.[42] A greater focus on non-financial information is an area that could improve the overall quality of information provided to the board for decision-making.[43]

The consensus in public sector corporate governance best practice guidelines is that the board should be responsible for appointing the CEO, have a detailed performance agreement with them, and the CEO should report directly to the board. Ministerial CEO appointments result in the board being less accountable and less responsible for the actions of the CEO, and correspondingly the organisation as a whole.

The performance of the board, and individual board members, should be reviewed regularly against a performance agreement formed between the board and the government. Results of board reviews should be publicly available.[44] The NSW Audit Office recommends that candidates should be required to declare any significant political activity pursued in the previous five years.[45]

The process by which individuals are appointed to the board needs to be formal, transparent and based on merit and specific criteria that have been developed in accordance with the required skills and knowledge of the board.[46] It is suggested that an appropriate mix of board skills and knowledge includes operational/technical, financial, legal and government/regulatory.[47]

Best practice dictates that a majority of board members be independent of both the management and commercial dealings of the organisation.[48] The chairperson should also be independent of management and issue the instructions for the drafting of the board agenda. It should be reinforced to all board members that they are required to

[39] The Audit Office of NSW, *Corporate Governance in The Public Sector*, 2002, p5.

[40] The Audit Office of NSW, *Corporate Governance in Principle*, 2002, p5.

[41] The Audit Office of NSW**,** above n 39.

[42] Australian National Audit Office, above n 25.

[43] Queensland Audit Office, *Auditor General Report No.1 – A review of corporate governance*, 2001/2002.

[44] The Audit Office of NSW**,** above n 39.

[45] The Audit Office of NSW**,** above n 39.

[46] International Federation of Accountants (IFAC), above n 32.

[47] Australian National Audit Office, above n 25.

[48] Australian Standard AS8000, p15; Australian National Audit Office, above n 25.

bring to bear independent judgment on matters before the board, and not simply act as a mouthpiece for sectional interests.[49]

The continued quality of contributions and independence of board members can be maintained by holding regular renominations of board positions (every 3 years).[50]

Control

A primary responsibility of the board is to ensure that a comprehensive system of risk management forms part of the organisation's governance system.[51] An effective audit committee plays an important role in such a system.

According to AS8000, an appropriately constituted audit committee requires:

- a written charter laying down its responsibilities and core rights;
- a committee comprised entirely of non-executive directors a majority of whom are independent;
- members to be financially literate;
- unlimited access to the necessary information, management and independent advice;
- the committee to approve and monitor policies for reporting, risk management and internal audit;
- the committee to resolve differences of opinion between internal auditors and management;
- the committee to ensure recommendations from internal audit are implemented; and
- accurate minutes of meetings to be recorded.

It is argued that the relevant public audit office should be invited to attend audit committee meetings of public sector organisations.[52] A survey of NSW public sector audit committees in 2002, revealed that many organisations do not conduct a periodic review of their audit committee's effectiveness.[53] The survey report argued that a periodic review is an important element of best practice.

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[49] International Federation of Accountants (IFAC), above n 32.

[50] Australian National Audit Office, above n 25.

[51] International Federation of Accountants (IFAC), above n 32.

[52] The Queensland Audit Office, *Corporate Governance: Beyond Compliance – A review of certain government departments*, 1998/99.

[53] The Audit Office of NSW, *Compliance Review of Operations of Audit Committees*, 2002.

Public sector boards must also ensure that effective and efficient budgeting systems are in place. To be successful the system must be integrated with the accounting and cash management functions, and performance must be regularly monitored against budgeted figures.[54]

External Reporting

The board should ensure that the annual report contains sufficient information to allow stakeholders to make an assessment as to whether accountability for the expenditure of public funds has been maintained, and whether the organisation has operated in an efficient and effective manner.[55] This involves the use of accurate performance measures and discussion of those results in the context of both economic and community service obligations. An organisation's ability to demonstrate the achievement of its objectives is an important element of satisfying societal demand for increased accountability in the public sector.[56]

In a recent report to the New South Wales Parliament[57], the Audit Office of New South Wales made some interesting observations about the value of reporting. It said:

> *Taxpayers have the right to expect governments to spend their tax dollars efficiently and effectively. They have the right to expect governments to be accountable.*
>
> *Good performance reporting allows readers to judge achievements and value for money. When performance reporting is poor, accountability, transparency and openness are diminished. By reading an agency's annual report, ordinary citizens should gain some appreciation of whether their tax dollars are being spent efficiently and effectively.*

The report then went on to observe that few agencies in New South Wales use performance targets, declare or discuss set-backs, link costs to results or provide benchmark comparisons. It then set out the following guides for performance reporting by public sector organisations which are worthy of consideration:

- publishing a comprehensive suite of performance measures in the annual report consistent with those in their corporate plans and which meet the needs of external stakeholders
- integrating financial and non-financial information to show how resources and strategies influence results

[54] International Federation of Accountants (IFAC), above n 32.

[55] Australian Standard AS8000, p19.

[56] CPA Australia, *Issues Paper – Inquiry in corporate governance in the Victorian public sector*, 2002.

[57] Judging Performance From Annual Reports: Review of Eight Agencies' Annual Reports, Tabled 1 October 2003 at http://www.audit.nsw.gov.au

- providing benchmark comparisons
- setting targets
- declaring and discussing setbacks or failures
- publishing trend data for key indicators covering the last three to five years and discussing results.

It is notable that Clause 91 of the Western Australian Corruption and Crime Commission Amendment Bill 2003 sets out at least seventeen matters to be included in an annual report to Parliament by the proposed Corruption and Crime Commission. While this does not address all of the criteria recommended by the New South Wales Audit Office, it is a more comprehensive list than is required to be supplied by similar types of organisations in some other states. Having regard to secrecy and confidentiality requirements that necessarily attend the operations of a corruption and crime commission, there will be constraints upon the ability of such an organisation to meet the full range of performance criteria that other public sector organisations may come to regard as best practice. Nevertheless, good governance and public confidence are likely to be enhanced as corruption and crime commissions around the country develop appropriate reporting criteria and benchmarking.

Corporate governance practices should be disclosed in the annual report. Where the organisation has failed to implement best practice procedures, an explanation should be given.[58]

A SYSTEMATIC APPROACH TO GOVERNANCE – BUILDING A CULTURE OF GOOD GOVERNANCE

The five new governance standards released in July 2003 by Standards Australia are based on Australian Standard AS3806: *Compliance Programs*, and offer a good governance model because they take a holistic approach requiring a program to include, structural, operational and maintenance elements. The Australian National Audit Office argues that 'the real challenge for management is not simply to put various elements of corporate governance in place, but to ensure that those elements are implemented effectively, well understood, applied properly, and fully integrated as a vital element of the "culture" of each entity'.[59] The five Standards are discussed in detail below, with the exception of AS8003: *Corporate Social Responsibility* which is beyond the scope of this paper.

[58] International Federation of Accountants (IFAC), above n 32.

[59] Australian National Audit Office, *Control Structures as part of the audit of financial statements of major Commonwealth entities for the year ended 30 June 2003*, 2003.

AS8000: Good Governance Principles

The lead Standard is aimed at enhancing organisational performance; promoting an understanding of and ability to manage risk effectively; strengthening stakeholder and community confidence in an organisation; enhancing public reputation through improved transparency and accountability; providing an ability to demonstrate how an organisation is discharging its legal obligations; providing a mechanism for benchmarking accountability; and assisting in the prevention and detection of fraudulent, dishonest and unethical behaviour. AS8000 encourages the development of an ethical culture through a committed, self-regulatory approach, the ultimate aim being the creation and maintenance of a robust governance system that fits the particular circumstances of the entity.

The key elements of an effective governance system include structural, operational and maintenance elements as outlined below.

Structural elements include:

- A commitment to effective governance from people at all levels of the organisation;
- Clearly stated governance policy for board and senior management emphasising a commitment to effective governance (eg. board charter and protocol, codes of conduct, statement of matters reserved for the board and board delegations of authority);
- Board acceptance of responsibility for good governance;
- A solid understanding and active promotion of governance issues by the board: and
- A philosophy and strategy of continuous improvement in governance performance.

Operational elements include:

- Policies and procedures ensuring the identification of governance issues;
- Integration of regulatory requirements into daily operations;
- A system for detecting, recording and resolving governance failures; and
- Internal reporting procedures that are integrated with strategic and operational objectives, risk management strategies and the overall governance system.

Maintenance elements include:

- Practical education and training of the board (eg. induction program, ongoing training regarding regulatory changes, due diligence obligations, government policies and organisational risk);
- Governance training for other staff on code of conduct responsibilities and managing conflicts of interest;
- High visibility and promotion of governance system, leading to wide understanding;
- Ongoing monitoring and performance evaluation of the governance system;
- Regular review in accordance with stakeholder requirements; and
- Appropriate liaison with relevant bodies to ensure awareness of current best practice.

AS8000 also provides guidance on specific governance issues including: the role, powers and responsibilities of the board, board independence, board skills, composition and operation of audit and other board committees, board reviews, disclosure and transparency obligations, rights and responsibilities of shareholders, and the role of stakeholders in corporate governance.

AS8002 Organisational codes of conduct

The objective of this Standard is to provide a practical management guide for organisations to develop, promote and implement proper standards of behaviour and, ultimately, an ethical culture. It is recognised that an effective code of conduct may contribute not only to more effective compliance with laws and more effective management but will also minimise corrupt and illegal practices.[60] Further, a well designed and implemented code of conduct helps to maintain the integrity and reputation of an entity while offering guidance to staff/volunteers on appropriate standards of behaviour and the resolution of ethical dilemmas in the workplace.

An effective code of conduct should include the following –

Structural elements such as:

- A commitment to and in depth knowledge of the code by all people in the organisation, with the board and senior management leading by example;
- An ethics committee that oversees development and promotion of the code, and adjudicates on breaches;

[60] See ACCC Media Release MR 168/03 (11/08/03) regarding the legal, compliance and self regulatory benefits of high standard voluntary codes of conduct

- Allocation of adequate resources for updating, monitoring and training as necessary; and
- A philosophy of continuous improvement.

Operational elements such as:

- Drafting the code in consultation with employees and gearing it toward actual ethical problems rather than merely stating broad general principles (the Standard provides a list of issues which should be addressed in a code of conduct);
- Providing a copy of the code to all employees, volunteers, contractors and suppliers;
- A comprehensive implementation plan listing managerial and staff responsibility for specific implementation should be created;
- An ethics committee which keeps records of code failures and responses;
- Internal reporting systems that ensure concerns are reported to the appropriate level of management;
- A visible and accessible feedback system (eg. a 'help line') to provide guidance on complying with the code, and to report compliance failures;
- Decisive action being taken once non-compliance is reported (eg. counselling, retraining, dismissal, referral to authorities);
- A system of monitoring compliance; and
- Appointment of a designated code of conduct manager.

Maintenance elements such as:

- Ongoing training and education reinforcing relevance to daily activities;
- High internal and external visibility;
- Regular review of the content of the code;
- External reporting of outcomes, measured against pre-designated performance indicators; and
- The development and updating of benchmarks over time.

AS8001 Fraud and Corruption Control

Fraud and corruption control is a fundamental element of a good governance system. Results of the recent ICAC inquiry into the collapse of NSW Grains Board, discussed above, demonstrate the dramatic effect that insufficient fraud prevention controls may have on an organisation. The KPMG Fraud Survey 2002 found that fraud continues to be a major problem for organisations, but noted that many organisations 'including many that have suffered serious fraud loss, are yet to implement even the most fundamental fraud prevention measures'.[61] AS8001 points out that increasingly 'major fraud and endemic corruption within an entity will be viewed as reflective of a failure of the entity's controllers to discharge their governance obligations'.

A comprehensive organisation-wide approach to fraud and corruption control should include the following –

Structural elements such as:

- A sound ethical culture including a detailed code of conduct, ethical benchmarking across time, specific allocation of responsibility for ethical initiatives, establishment of an ethics committee, a method of reporting complaints and adequate communication and training regarding ethical expectations;
- Senior management commitment to controlling the risks of fraud and corruption;
- Periodic and comprehensive assessment of fraud and corruption risk, leading to the creation of a 'risk register';
- Management and staff awareness of ethical expectations, fraud risks, and avenues of reporting suspected fraud;
- A commitment to the implementation of fraud and corruption control planning; and
- A commitment to continuous improvement.

Operational elements such as:

- A fraud and corruption detection program using strategies such as targeted post transactional reviews, strategic use of computer systems for data mining and real time transaction assessment, analysis of management accounts to identify trends and ongoing assessment of internal risk factors;
- A variety of alternative pathways to report suspected fraud;

[61] KPMG, *Fraud Survey 2002* (2002) [ii].

- Procedures for dealing with suspected fraud including independent investigation, disciplinary proceedings, prosecution, recovery action and review of internal controls after discovery;

- Sufficient allocation of resources to the system including allocation of overall responsibility to a senior person, and sufficient oversight by the board; and

- Thorough pre-employment screening.

Maintenance elements such as:

- Ongoing monitoring and review of the fraud and corruption control plan, the strategies in place and the entity's ethical culture.

AS8004 Whistleblower Protection Programs for Entities

Whistleblower protection is an important element of corruption prevention and corporate governance as a whole. The KPMG Fraud Survey 2002 highlighted this importance, finding that the majority of fraud incidents are detected by employee notification, rather than the organisation's internal controls.[62] An organisation may be required by law to provide procedures for whistleblowers and their protection, and other organisations may voluntarily adopt such measures. This Standard will assist an organisation in not only complying with such legislative requirements but also to successfully integrate an effective whistleblower protection program into the overall governance system of the organisation.

Structural elements of a whistleblower protection program include:

- A strong organisational commitment to effective reporting of corrupt or illegal practices;

- A clearly stated whistleblower protection policy that provides confidential avenues to report suspected fraud and corruption, and guarantees protection from dismissal, demotion, harassment or discrimination; and

- The provision of adequate resources including protection and inspection personnel, reporting lines, training and an appeal process.

Operational elements include:

- Appointment of a whistleblower protection officer and a separate whistleblower inspections officer both with access to the necessary resources;

- A highly visible and trusted system of confidential internal reporting;

[62] KPMG, *Fraud Survey 2002* (2002) [12].

- A requirement that the whistleblower be kept informed of the progress and outcomes of the investigation;
- A thorough investigation of all reported corrupt practices having due regard for the principles of natural justice; and
- Encouragement of a reporting culture.

Maintenance elements include:

- Thorough education and training of all employees;
- Ensuring the organisation's policy remains highly visible; and
- Regular review of the system's effectiveness.

Conclusion

It is now widely accepted that the most indispensable requirements for effective governance in an organisation are commitment and leadership. Notwithstanding the critical differences that exist in the structure, operations and aspirations of corruption and crime commissions and their supervising bodies, when compared with others in the public sector and organisations in other sectors, the necessity for commitment to good governance and leadership of the governance effort in a corruption and crime commission is equally indispensable.

Further, good strategic planning including comprehensive risk management is essential. These must be accompanied by the use of effective policies and procedures which work in a coordinated way to achieve the organisation's operational goals while also delivering good governance. Embedding governance practices into the day-to-day operations of an organisation is likely to be the most efficient way of implementing good governance. It is also the best strategy for promoting a culture of good governance within an organisation.

Informed and active participation by board members in governance issues including ongoing monitoring and review, ensuring the visibility of the commitment to good governance and adopting strategies, including external reporting that will assist with continuous improvement, are also key features of developing and maintaining a system of effective compliance and good governance.

For an organisation such as a corruption and crime commission to be successful in its operations, its governance, its accountability and to achieve the trust of its stakeholders, it is also essential that the respective internal and external monitoring forces actually converge. Where some of these forces are discordant, which is not uncommon with such commissions, good governance and operational success can become unattainable.

***Participant in the Standards Australia working parties which prepared the five Corporate Governance Standards. The author wishes to acknowledge the assistance of Fergus Smith in researching and preparing this article.**

APPENDIX ELEVEN

Paper delivered by Mr Brendan Butler SC, Chairman, Crime and Misconduct Commission, Queensland

The Pros and Cons of Amalgamation of Crime and Corruption Functions

The Queensland Crime and Misconduct Commission came into being on 1 January 2002. In doing so it absorbed the roles of the former Criminal Justice Commission (CJC) and the Queensland Crime Commission (QCC).

As you are no doubt aware, the CJC was a direct descendant of the Fitzgerald Commission of Inquiry. It was created in 1990 to give effect to the blueprint for reform proposed by the Honourable Tony Fitzgerald QC.

The original CJC did have a statutory jurisdiction to investigate organised and major crime. However, that was limited to matters which, "in the Commission's opinion, are not appropriate to be discharged, or cannot effectively be discharged, by the Police Service or other agencies of the State". From December 1992 the CJC participated with the Queensland Police Service (QPS) in investigating organised crime by means of a Joint Organised Crime Task Force (JOCTF). Although the QPS contributed investigators to the JOCTF it was housed on CJC premises and the form and direction it took was largely dominated by CJC management. It should be acknowledged that the JOCTF had a number of successes particularly in the area of the investigation of organised drug dealing.

In 1997 the government of the day created the QCC with a structure largely modelled upon New South Wales legislation. The JOCTF was disbanded and the CJC's organised and major crime resources and records were taken over by the new Crime Commission.

The QCC operated on a very different model than the CJC before it. Its core function was to investigate major crime including organised crime and criminal paedophilia. It operated on a referral basis from its nine member management committee whose members included the Police Commissioner, the Children's Commissioner and the Chairman of the National Crime Authority (NCA). The Commission combined the use of strategic intelligence with targeted research and a risk assessment methodology to monitor and evaluate the criminal environment and to determine investigative priorities and trends in criminal activity. By commencing from a strategic assessment of crime trends in Queensland and identifying the areas of greatest risk, it was possible for the Commission to take a proactive role in targeting high risk criminal activity. This allowed the Commission to value add to the more reactive police response to crime and to provide leadership to the QPS in relation to the adoption of new investigative strategies.

With the creation of the Crime and Misconduct Commission on 1 January 2002 the anti-corruption and crime commission functions were once again amalgamated in the one organisation. However, the experience that had been gained through the existence of the QCC meant that the way in which organised crime, paedophilia and serious crime are dealt with within the new Crime and Misconduct Commission is quite different to the arrangements that applied in the CJC in the early 1990's.

Section 4 of the *Crime and Misconduct Act 2001* states:

> *The purposes of this Act are*
>
> - *to combat and reduce the incidence of major crime; and*
> - *to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.*

In addition to these two major functions the Commission has another significant function bestowed under another Act. That is the provision of witness protection in Queensland to those persons in danger because of assistance they have provided to the police or other law enforcement agencies.

Major crime as defined in the Act refers to criminal paedophilia, organised crime, or criminal activity involving an offence attracting not less than 14 years imprisonment.

The Commission maintains permanent investigative teams continuously pursuing operations in both the areas of child sexual offending and organised crime. In addition unsolved serious crimes, particularly murders and other high profile violent crimes, are frequently referred at the instigation of the Police Commissioner, for investigation by the Commission utilising its coercive hearing powers.

The *Crime and Misconduct Act* maintained within the structure of the broader Commission the model which had proved successful for the QCC. Under the new Act a Crime Reference Committee, which includes among its members the Police Commissioner, continues to refer matters for investigation. As with similar bodies these include a number of ongoing umbrella references in the core areas of activity such as the investigation of paedophilia and organised crime. Under these umbrella references the CMC is able to utilise its intelligence processes to identify targets, formulate proposed operations and advance those operations without the need to seek specific references. The Crime Reference Committee is regularly briefed on these activities.

The Pros and Cons of Merger

Whether there are advantages or disadvantages in the merger of an anti-corruption commission and a crime commission depends very much on the type of crime commission one wants.

I consider it important that a crime commission works in close cooperation with the local police service to the point where it is viewed by police as being an essential aid to the effective investigation of organised and major crime in the State.

Secondly, I consider that the commission should have the capability and flexibility to provide leadership in the use of innovative investigative techniques. As a small flexible highly skilled organisation the commission should be able to take some risks in trialing new methodologies which a larger police organisation may not be prepared to undertake.

The crime commission should also lead in identifying priorities for the allocation of scarce investigative resources. A commission with ready access to skilled intelligence and research capabilities is well positioned to be able to provide such leadership.

A crime commission with the ability to choose its own investigative priorities, even though its investigative capability is modest, can nevertheless perform an important role in identifying and attacking criminal conduct which may fail to be pursued under the priorities prevailing within the police service. For example, there is often a temptation in a busy police service to close an operation once sufficient evidence has been obtained against a number of individuals rather than expending the additional time and resources to attempt to pursue evidence of higher level criminals in the network. A crime commission which persists with targets not easily susceptible to investigation may achieve results which have more impact in dismantling criminal networks.

Finally, there is no doubt that there is often a link between serious corruption and organised crime. For this reason a crime commission must be willing and able to play its part in the investigation of organised criminal networks found to be utilising corrupt officers to pursue their aims.

If a crime commission is to do all these things it is necessary that it be given the powers and resources to allow it to do so. In addition, if it is merged with an anti-corruption commission, it is necessary that the relationship supports and does not impede the desirable role for a crime commission.

Risk to Effectiveness of a Crime Commission

To be effective a crime commission needs to operate as a full partner with other law enforcement agencies. It can only do this if it has their respect. It can only maintain that respect if it is seen to be value adding to the process and providing skills and input that might otherwise have not been available within the police service or broader law enforcement community.

Where the crime commission has access to statutory powers which are not available to the police service, this will increase its attractiveness to police investigators and enhance its ability to value add to investigations. In Queensland the CMC has the ability to hold coercive hearings and in a number of cases this has proved to be an

effective adjunct to traditional investigative techniques. In addition, the Commission has intelligence, financial investigation, computer investigation and forensic computing skills and capabilities which are less readily available within the police service.

The New South Wales Crime Commission is able to offer law enforcement investigators access to significant telecommunications interception capability, however, in Queensland the Parliament has to date declined to enact complementary telecommunications interception legislation.

One foreseeable risk in merging a crime commission with an anti-corruption commission is that police officers might prefer not to work with the crime function because of an adverse perception arising from the broader commission having a police oversight role.

A number of steps were taken within the CMC following its creation to ensure that such negative perceptions would not arise and impede the operation of the crime function.

Within the structure of the CMC the performance of the crime function retained a significant practical independence from the misconduct function. The flow of information between the two functional areas is strictly controlled. The investigative areas are separately located on different floors and have different permanent personnel. Each operates independently from the other and information systems and operational management practices create chinese walls within the organisation. Information is disseminated between crime and misconduct through a Strategic Intelligence Unit where intelligence officers determine if any information received by one function should be disseminated to the other. This has resulted in a careful control of information and the operation of a need to know principal within the different areas of the Commission.

Both the legislative structure and the administrative and management processes within the CMC have maintained the operational independence of the crime and misconduct functions. This approach continues in the relationship the Commission has with the QPS. The legislation provides for two Assistant Commissioners, one Misconduct and the other Crime who head the respective functions. They each have regular liaison meetings with their counterparts in the QPS, but those meetings are separate and different.

For the crime function the Assistant Commissioner, Crime meets with his QPS counterpart on a regular basis and shares information on all the relevant operations being conducted by both organisations. There are other committees at an officer level which also regularly share information with their QPS counterparts. This ensures that all Commission crime activity is conducted in cooperation with the QPS and does not duplicate QPS operations. Importantly, it is apparent to QPS officers, from the highest level down, that the crime function of the CMC operates independently of the misconduct function and has a philosophy which is directed to fostering a partnership

with the Police Service. After 20 months of operations within the merged Commission there is no indication that the merger has adversely affected the working relationship with the QPS.

To some extent this might reflect the experience that the QPS has had in its relationship with its oversight body since 1990. The CJC and now the CMC has always employed a large number of serving Queensland police officers as investigators and in other roles. The current police complement at the CMC is about 80 with police officers of the rank of Assistant Commissioner down. In the period that the Commission has been operating, hundreds of police officers have moved through positions within it and returned to the Police Service. Numbers of current Assistant Commissioners and other senior officers have served at one time or another within the CMC or the CJC. This and a high level of commitment over a long period of time by senior police management to maintaining the relationship has resulted in a high level of understanding within the QPS about the oversight role of the Commission.

Benefits of Amalgamation

When the CMC was formed, concerns were expressed from some quarters that the combating of major crime, including organised crime and paedophilia, would receive a lower profile in the merged organisation.

To the contrary the CMC has worked to enhance the crime function beyond its status in the former dedicated organisation. The crime function now has available to it significant resources and facilities not previously available within the QCC.

Crime Commissions are necessarily modest organisations in comparison to police services. The role of a crime commission must be to value add rather than compete with the police service. Even recognising this, there is little doubt that the QCC was under resourced to perform its role effectively. In 2001-02, the budget for the QCC was $4.5m. In 2003-04 the estimated budget for the CMC crime function is $9.8m. This increase in resources available to the crime function within the amalgamated commission has been made possible without any significant increase in funding for the Commission overall. It has been made possible by achieving synergies and efficiencies made available through the merger of the two organisations.

The QCC had no surveillance and technical resources of its own. Both its intelligence and investigative capabilities suffered as a result. The CMC Surveillance and Technical Unit now provides many thousands of hours of assistance to the crime function each year. This has resulted in an enhanced capacity to implement productive target identification development strategies. It has also allowed the crime function in the past year to progress several highly complex organised crime investigations involving the manufacture and trafficking of amphetamines, organised theft of heavy transport and machinery and associated money laundering activities.

The QCC had no in-house forensic computing expertise. The CMC's Forensic Computing Services now provide expert assistance to the crime function especially in

the investigation of criminal paedophilia. Forensic computing analysis is a very scarce resource which the QPS strains to provide to its investigators. This in-house capability within the CMC has allowed the development of new investigative methodologies within the paedophile area. As these methodologies generate large amounts of computer forensic workloads they would not have been possible without this capability.

Following the merger of the CJC and the QCC the strategic intelligence capability of each organisation was merged into a central unit. This unit services both crime and misconduct needs but is predominantly committed to crime projects. Nineteen projects or probes directly linked to organised crime or criminal paedophilia were progressed in 2002-03. For example, one such project identified an alleged networked child sex offending group in Queensland. This project resulted in a joint Commission/Police task force being formed to investigate the alleged network. The outcome of the investigation was that three people were arrested and charged with various child sex offences. Other paedophile operations have been identified and referred either to the Commission's child sexual offences investigation team or to the QPS.

The crime function has also benefited through access to the broader administrative and IT resources of the larger commission.

The Commission's considerable research capability has been re-structured to incorporate a new focus on crime research and crime prevention within Queensland. Significant current projects include one which has surveyed 690 amphetamine users in Queensland in order to examine key aspects of amphetamine use across the State. Another project has investigated the prevalence of illicit drug use among individuals entering hospital emergency rooms, while another has collected baseline indicators of illicit drug use patterns and attitudes across Queensland. Other research has examined recidivism among young offenders.

These crime research activities are being complemented by strategic intelligence publications, including a recent publication on amphetamines which assessed that amphetamine remains the primary illicit drug of concern to the Queensland community. The CMC continues to utilise the methodology originally adopted by the QCC in targeting crime on the basis of a risk analysis of crime trends within the State.

As from 1 January 2003 new legislation was enacted in Queensland to allow the seizure of criminal proceeds through a civil based confiscation scheme. As a result of the efficiencies achieved through the merger the CMC was able to set up a new Criminal Proceeds Confiscation Unit without any additional funding from government.

Conclusion

The amalgamation of the QCC and the CJC has been achieved without any apparent adverse consequences and with significant benefits flowing to the crime function.

This is not to say that if significant additional recurrent funding was provided to a stand alone crime commission, the same could not have been achieved. Indeed, the funding of the crime commission is modest compared to the cost of law enforcement overall. In the current financial year the budget of the Queensland Police Service has exceeded $1b. In contrast the commitment to the crime function within the CMC is a mere $10m. Nevertheless, at a time of competition for scarce government resources, there is a certain attractiveness in amalgamating various functions within the one commission. This more cost effective alternative is likely to be more attractive within the less populous States.

The CMC in Queensland performs roles that in New South Wales are carried out by the New South Wales Crime Commission, the Independent Commission Against Corruption, the Police Integrity Commission, the Police Complaints Section of the New South Wales Ombudsman's Office and the New South Wales Police Witness Protection Unit. In addition the CMC has a more significant active independent research unit than any of those bodies.

Whether crime and anti-corruption commissions can be effectively amalgamated within the same body will depend very much on needs within the particular State involved. Commissions are very often a product of local history. This is certainly true of Queensland. Ultimately, the circumstances applying in a particular State will dictate what is most appropriate for that State.

APPENDIX TWELVE

Paper delivered by Mr Phillip Bradley, Chairman, New South Wales Crime Commission

Crime Commissions: organised crime investigations and police corruption investigations

Introduction

The most contentious issue surrounding Crime Commissions, Royal Commissions and other co-ercive bodies is the conduct of public hearings.

This paper is specifically concerned with structural issues about the choice between two models:

- one in which organised crime investigation is combined with corruption investigation, and
- one in which the functions are separated, as is the case in NSW.

Even this is affected by the public hearing issue. Most corruption inquiries are concerned with revelations through public hearings, whereas Crime Commissions tend to use coercive *in camera* hearings to advance investigations towards criminal prosecution.

Why have coercive bodies?

Police have in the past, and continue to, carry out successful organised crime investigations without the assistance of coercive powers. They are not always seen as successful, especially against the perception of a growing organised crime problem. That has been the reason for the establishment of a number of Royal Commissions over the past decades and the permanent bodies which followed them.

Coercive bodies cannot succeed without the assistance of experienced detectives. They can do some things against organised crime, but they need police to sustain effective work. There have been very few successful attacks on organised crime which have not involved police.

Police depend on information and intelligence for all criminal investigations. Much of the information and intelligence comes from members of the public. This flow is dependent upon trust and confidence.

In the area of organised crime, particularly the pro-active work, the information comes from police sources to a large extent. Coercive bodies working in the area of organised crime depend on police sources for information, and that in turn is dependent on the confidence of the police.

In the area of corruption investigation, particularly police corruption:

- There is a cultural factor, which inclines some police not to become involved in reporting corrupt conduct by colleagues – that is probably why reporting is compulsory in many jurisdictions.

- There is a lack of confidence in corruption bodies. Some police tend to focus on their failures and are reluctant to recognise success. They resent being singled out for special treatment by such bodies using special powers, and they are offended by the effects on their colleagues, their general morale and their capacity to catch criminals. Most of the offence is caused by damaging public hearings.

There is quite a lot of compulsory reporting to Internal Affairs branches of police which can pass on matters to coercive bodies where they exist (the Police Integrity Commission in NSW).

Reluctance of police to pass on information to coercive bodies can affect the organised crime function where the two functions are combined in one agency.

The reporting of an organised crime may lead to the investigation of corruption. Police (the main source of information), understandably, do not like to be reporting to people who may be working on them or their colleagues. In the area of organised crime/corruption investigations, there is sometimes someone within the police who could be targeted by the investigation.

Because of the importance of 'police sources' of information and police expertise, Crime Commissions should never take the view that they can replace police, or go it alone. They need to embrace partnerships or other models to ensure that the best and most efficient result is obtained. This does not mean that they give up their sovereignty or hand the agenda to police. There should be a willingness to compromise in the interests of getting the job done.

The best relationship is based on a good understanding of the rules of each partner and a degree of trust. These conditions will not exist if the police included in the relationship believe or suspect that their partner may be investigating them. In NSW the PIC is prohibited from employing NSW Police.

A Crime Commission working with police must give priority to organised crime and must also be serious about corruption, but corruption should not be the primary focus. It helps if there is a body to which instances of corruption can be referred.

These propositions are put forward in the context of a WA bill which combines a corruption investigation function with a limited organised crime function. The propositions are based on experience of the NSW environment which has tended towards a 'de-merged' model, while Queensland has gone the other way.

The merger/de-merger debate has gone on in the private sector for some time. 'MAs', as they are called, usually involve combining companies with similar businesses for the purpose of achieving economy of scale, market share or client base, or for taking on disparate businesses for the purpose of diversification or risk spreading. Most companies seek growth, and merger and acquisitions are the quickest way to achieve it.

De-mergers are usually for the purpose of setting adrift parts of the company which are incompatible with the core business or are loss making. There can also be reasons of workforce management.

Some of these concepts have relevance to the debate on whether the functions of organised crime investigations should be merged with corruption investigations.

In the public sector, the only advantages which we should seek from structures are public benefit through efficiency and effectiveness. Growth is not always good. In amalgamated structures, economies of scale can be achieved by more efficiently deploying investigative and administrative resources across a wider range or larger volume of work.

Resource savings can be made in areas, such as:

- accommodation, including specialised hearing rooms;
- electronic surveillance;
- physical surveillance;
- IT systems;
- payroll and personnel;
- CEOs and executive support;
- Annual reports; and
- Oversight bodies.

In New South Wales, we are the most fragmented of all States. Not only do we have the largest numbers of federal agency personnel, such as the AFP and the ACC, but we also have:

- the State Police;
- the ICAC;
- the Police Integrity Commission;

- the Crime Commission; and
- the Ombudsman.

Among these there are overlapping responsibilities. We have four or five confiscation systems operating, four agencies with coercive powers, and even more if a Royal Commission is current.

There are also disadvantages of fragmentation:

- the sharing of intelligence, methodology and resources between law enforcement agencies is still less than optimal. Fragmentation accentuates this problem;
- there is also replication of infrastructure such as that referred to above;
- the cost:

ICAC	$16 mil
PIC	$17 mil
CC	$11 mil
Ombudsman	$12 mil
	$56 mil

Everyone of the above agencies has some responsibility for corruption matters. The ICAC is the main corruption agency. It deals with all public sector corruption. This used to include police corruption but, following the Wood Royal Commission, this was *de-merged* to the Police Integrity Commission. The Ombudsman also has responsibility for some levels of police and general public sector misconduct. The Crime Commission has a statutory function to review police investigations which are referred to it, and may investigate criminal conduct by police pursuant to a *Reference*. The police forces also have a corruption investigation function and can compel answers to questions through administrative action.

The Wood Royal Commission[1] did not favour maintaining a police corruption function within the ICAC for a number of reasons:

- the public perception that the ICAC had failed in the area of police corruption;
- structural difficulties in keeping the functions separate;
- competing functions – including education;
- 'two heads' would lead to internal tension;
- competition for resources and divided loyalties;

[1] Royal Commission into the New South Wales Police Service – Interim Report Feb 1996

- resentment of hiving off resources to a single function;
- security;
- political controversy which attends ICAC work;
- less willingness of other agencies to co-operate;
- the need for a fresh approach;
- purpose built; and
- freedom from institutional baggage associated with perceived failure.

Organised Crime Models

The NSW Crime Commission is a very small agency. It has only 100 staff and works almost entirely in joint operations with others – mainly police. It has no field operatives (except investigative accountants), no police – seconded or otherwise, and no capacity to arrest, except for non-compliance with a summons. It focuses on what it does best, and leaves the rest to its partners. These core functions include:

- coercive powers - hearings
  production;
- financial investigations;
- confiscation litigation;
- intelligence analysis;
- telecommunications interception; and
- co-ordination.

The Crime Commission is very careful not to be cast in the role of competitor with any of its partners. For this reason it employs no police, it eschews publicity, it claims no arrests and does not seek to grow or assume new functions. We don't even keep the money we confiscate.

There are a number of reasons why we have nurtured this profile. Foremost among them is the desire to maintain workable relationships with our partners, without whom we could not do much that is useful.

This approach may not be appropriate to all jurisdictions.

The ACC [Cth], for example, has its own investigators – many of them seconded from State and Federal Police. It can arrest people, conduct most forms of surveillance, and install its own bugs. It only goes outside the agency for the highly specialised

functions such as forensics, SWOS and air support. It does many things jointly and is now specifically mandated to do mostly collaborative work as a consequence of perceived deficiencies in its predecessor.

Some police have, in the past, resented the invasion of the law enforcement pitch by agencies such as the NCA, the Crime Commission and others. These days they are more accepting.

In the past we have had the unseemly spectacle of agencies competing for news headlines following an arrest. The benefits of sharing the kudos are now being recognised, in some cases grudgingly. The spoils are still fought over between jurisdictions, even though the amounts are minuscule in the scheme of things.

A low key profile does not immunise a Crime Commission from criticism and tension with its partners. In NSW the relationship with the police – our biggest partner – has been workable. But it has not been helped by our work on police corruption. We have been accused of stepping out of our crease.

Arising out of a recent corruption investigation, there is current action by police officers who were not investigated or charged to challenge some of our warrants, and general disquiet as to our methodology – which would not have raised an eyebrow if applied to criminals. Internally, some of our own staff say we should never have ventured so far down the pitch, and are concerned that the relationship has been irreparably harmed. This is a high price to pay. And it is the public who will pay it.

Why has this happened? Did we act illegally, improperly or corruptly? No. It would be an oversimplification to attribute the decline in relationships to 'culture'. It is more complicated than that.

A case study

In the mid 90's we had a perception that there was serious organised crime going on, and that no one was pro-actively working on it. There were a number of possible reasons:

- reactive work (smoking guns) was receiving priority attention;
- pro-active work was seen as consuming resources disproportionate to results, and was too hard; and
- there was plenty of drug work to keep things going.

We all have our local 'colourful identities'. In WA some have been grown locally and some have been exported from NSW. You read about their latest exploits in the tabloids on Sunday. They are an embarrassment. People ask us why is not someone working on them? They have heard of the pro-active approach, which led to the apprehension of Al Capone (for tax offences), and the Australian examples of this.

There was a lingering concern that people with such reputations were continuing to get away with it in NSW, and that the police may have been turning a blind eye or worse. So we sat down with a number of senior law enforcement agency representatives (including police) and, on an intuitive, unscientific basis, decided who they were and what needed to be done. A key component of that decision was that any evidence of corruption would be pursued, because if these people were getting a *green light*, it was the single biggest obstacle to success. We were alive to this because we had been in a number of operations in Kings Cross which had turned up such a problem, and had 'rolled' a number of witnesses who later made their public debut at the Police Royal Commission.

We, and our police partners, learned quite a bit about police corruption and its importance to organised criminals. Some police were prosecuted and convicted.

The more formal manifestation of this approach became a Crime Commission Reference, known as *Gymea*, which ultimately included the Special Crime Unit of NSW Police and the AFP. It continued to produce results against organised crime and, after the Royal Commission, more police got into trouble.

As the temperature went up, some people started to consider their positions. A police officer, who became known as 'Sea', decided to unburden himself about his crimes and misconduct. This included quite a bit of information about his colleagues. He only wanted the Crime Commission to handle the matter, even though the paint was not yet dry on the PIC. So we did with him what we would do with other informers who were looking to earn some points. We sent him back to his colleagues with some concealed equipment. Two years later we were still doing it with our partners which by then included the PIC.

The debriefing of a career policeman with corrupt associations spanning 20 years took a long time. Ultimately, many of Sea's colleagues also 'rolled' and had to be debriefed. Their allegations ranged from minor misconduct to major crime. Very little seemed to be left out. Some police were prosecuted and received substantial sentences. Some were counselled and, in the middle, a large number of careers and families were damaged. Those that were not ruined had their careers suspended for years while inquiries rolled on, far too slowly. Detectives became aware of what was happening; mainly through public hearings which were conducted by the PIC. They became wary of their colleagues; they did not know whether any particular set of circumstances was real or a contrived *integrity test*. There were nervous breakdowns among police – both the investigators and investigated. There was a suicide, attempted suicides, and many unfortunate other events. Respected police were accused, some of them unjustifiably. Inevitably the work suffered. The public paid a price as drug dealers and others received less attention from police.

The reactions to our involvement in this were not good. Some criticism may have been due and some things done in our name may have been wrong. But not much of it. Essentially we did to crooked police what we would do to other crooks, albeit on a large scale.

Culture

Internal Affairs investigations have traditionally not been well regarded by police. Not dobbing a mate is part of an ethos carried forward from the school playground. *Sea* was not popular for breaking the rules. He is still not, having traded his corrupt colleagues for a place on the *Witsec* program.

The reactions are understandable, if a little extreme at times. Most police do not subscribe to the no-dobbing rule, but it is difficult to break rank. Many applaud their members who carried out the work, but are conscious of the price paid by others.

It is important to note that most of the damage (as well as much of the impact) was caused by the public hearing process.

Public Hearings

The *disinfectant effect of sunlight*, which is said to beam from public corruption hearings, has been generally beneficial, but the collateral damage has been substantial.

Its damage takes many forms:

- the unfairness of public allegations, not subjected to the rigorous processes of the criminal justice system, can destroy reputations. Where those allegations are effectively rebutted in public evidence, they do not receive the same coverage and the damage is not repaired;

- the distraction to mainstream policing and the diversion of resources to meet the demands of such large scale investigations; and

- the loss of public confidence which is so important to the flow of information referred to above.

From the point of view of an organisation which seeks to do all of its work through collaboration with others, the damage to the relationship with its biggest partner is a substantial cost.

Police who suffer the daily frustrations of a criminal justice system which is designed to be fair to criminals, have difficulty with a system which does not accord them the same rights.

Revelation or Criminal Justice

The tension between Royal Commissions and the protectors of civil liberty has arisen over the power to compel answers to questions and the publication of those answers.

The justification for the abrogation of the right to silence is usually found in a perception that the problem is so bad, the police methods so ineffective, or the need for the public to know the truth is so great, that special powers of interrogation are required. It is said that the public has a right to know the truth, even if the allegations

made publicly cannot be proven to the criminal standard. Sometimes they cannot be proven at all.

Yet the more permanent Crime Commissions have been a fact of life in Australia since 1985, and are increasing in number as more jurisdictions address the problem of organised crime and corruption.

While the two forms of conduct are often inextricably linked, even interdependent, the methods of dealing with them are different. In the revelatory processes of Royal Commissions and corruption inquiries, publicity is not only an end, but can be a means. Publicity not only informs the public, but it shames the accused and may operate to generate more information for the inquirer. Victims of corruption, in particular, come forward when they see that there is a *fair-dinkum* inquiry underway. Those who might be inclined to resist interrogation, more readily see the futility of doing so.

These are not investigations towards criminal prosecutions. Indeed, Royal Commissions have been notoriously bad at securing convictions based on the 'evidence' they have collected. Apart from false evidence and contempt cases, most of the convictions, which have been achieved in the corruption area, are based on evidence collected covertly using organised crime methods. There is less distinction between the methodologies these days. Witnesses are now commonly required to listen to public broadcasts of recordings of their own conversations.

It is difficult in agencies where both functions – revelation and criminal investigation – are juxtaposed, to separate the goal of revelation from arrest and prosecution. Both processes may attract public interest, but the processes by which the public is informed are quite different. In one case, there is an internal decision of an 'investigator' (because that is what the Commissioner is) subject to no settled rules and, in the other, there are well developed standards applying to charge, prosecution and trial, mostly involving independent agencies subject to long established rules.

It should not be forgotten that in most agencies there is a corporate ego, and 'success' might be measured by the amount of air time and column space devoted to a particular investigation. While there have been deliberate attempts to attract publicity to the various levels of the criminal justice process, the rules are more settled and there are sanctions for breaking them.

Criminal investigators should have a single set of rules not unduly influenced by the prospects of public response. Corruption exposers should have another set; currently they have few, but they are developing them as they go along.[2]

It is not acceptable for investigators who have failed to obtain sufficient evidence to sustain a prosecution, to fall back on the public hearing process to accuse and destroy the reputation of their target.

[2] Report of Inspector of the PIC 2003

We often hear from journalists that organisations like the Crime Commission are overly secretive and that they should conduct their hearings in public. This approach, motivated by the experience of free scoops often pre-packaged by the inquirer, fails to recognise the different nature of a criminal investigation. It is equivalent to asserting that police should have a journalist *embedded* in task forces as they interview witnesses and suspects in a homicide inquiry.

Despite some public perceptions, Crime Commissions, in reality, spend very little time grilling Mr Bigs in the witness box. They spend most of their time gathering evidence and marshalling witnesses – often unwilling witnesses. The ultimate product is a prosecutable brief of evidence. This distinction must be made clear. However attractive it may be to some to have public accusations without fear of litigation, revolving rollover doors and titillating listening device product, the rules in the criminal justice process are quite different and for good reason. Prejudicial publicity may be a legitimate tool of those charged with exposing corruption, but not of those who prosecute criminal charges towards depriving people of their liberty.

When the two roles are combined, the distinction becomes blurred. When police are required to apply one set to criminals and have the other set applied to them, they are understandably resentful.

This is an argument for keeping them separate. No-one who has been caught up in the revelation process used in corruption inquiries – even as a collateral casualty – thinks well of them. Even the informed spectator cringes occasionally. If a Crime Commission brings this process to bear on its partners, it will soon be looking for new partners. It cannot do organised crime work without police partners.

It is hoped that the model adopted in WA will be structured in a way which recognises the conflict between the corruption and organised crime functions.

APPENDIX THIRTEEN

Paper delivered by Mr Robert Needham, Parliamentary Crime and Misconduct Commissioner, Queensland

The Commissioner Model – A Practical Approach

Background

In the Queensland scene, the accountability mechanism for the State's anti-corruption body operates with what those formulating the topics for this conference have called "the commissioner model". This is not the model that was put in place in late 1989 when the then Criminal Justice Commission was set up under the *Criminal Justice Act*.

Initially, based on the recommendations in the Fitzgerald Report, the CJC was accountable to a Parliamentary Committee, however that Committee was not assisted in its role by a Parliamentary Commissioner or any similar investigative body.

In that accountability model, succeeding Parliamentary Committees found difficulties in fully carrying out their monitoring and review function.

In short, they found difficulties with:

- dealing with complaints the Parliamentary Committee received about the then CJC, including allegations of the leaking of confidential information, these difficulties arising from a lack of an investigative mechanism and from the Committee's inability to look at current operational matters within the CJC;

- the way in which complaints received by the CJC itself against CJC officers were dealt with; and

- the conducting of audits of the use by the CJC of its coercive powers, again mainly because the Committee could not look at current operational matters within the CJC.

Successive Parliamentary Committees recommended the establishment of the position of a Parliamentary Commissioner with that office being given the necessary powers to overcome the difficulties the Committees had found. This was done in 1997.

The way this was done in Queensland was to make the Parliamentary Commissioner, in effect, the agent of the Parliamentary Committee; to have the Commissioner carry out for the Committee those activities that the Committee was limited in its ability to perform for itself.

I have now been the Queensland Parliamentary Commissioner for a little under two years and can, hopefully, offer some useful comments on this commissioner model from my practical perspective.

Investigation Function

Under the Queensland model, the Parliamentary Committee can request the Parliamentary Commissioner to investigate complaints made against the Crime and Misconduct Commission, or concerns raised in Parliament or in the media about the CMC or, indeed, concerns that the Committee itself has about the CMC. Such concerns can include the possible release of confidential information from the CMC.

Any such request must be made with the bi-partisan support of the Committee, ie. either unanimously or with the support of a majority other than a majority consisting wholly of members of the governing party.

The Parliamentary Commissioner's role is to investigate the complaint or concern and to report to the Committee. If the Committee considers it appropriate, the Commissioner's report can be tabled in Parliament.

I see a number of advantages with this model and one possible disadvantage.

The Parliamentary Commissioner's Accountability

The Fitzgerald model of accountability as incorporated into the Act setting up the CJC was clear; the CJC was to be accountable to the Parliamentary Committee, the Committee to the Parliament and the Parliament to the people.

This form of accountability, with slight variations, appears to be common to most anti-corruption bodies in Australia.

The Commissioner model supports this system of accountability.

Within this system the Parliamentary Commissioner is accountable to the Parliamentary Committee. This is, in my opinion, appropriate.

As the Parliamentary Commissioner investigates on behalf of and reports to the Parliamentary Committee, those investigations and reports are subject to Parliamentary Privilege and cannot be challenged through the courts.

However the Committee does not have to accept a report, or all parts of it, from the Parliamentary Commissioner. If the CMC, or a citizen affected by the report, is unhappy with its conclusions or with the methodology of the investigation behind it, their concerns can be raised with the Committee. The Committee, in turn, may request the Commissioner to reconsider his/her report in light of the concerns expressed. In the last resort, the Committee could refuse to act on the Commissioner's report and decline to table it in Parliament.

Reporting to the Parliamentary Committee or directly to the Parliament

It appears to me that this issue of the accountability of the Parliamentary Commissioner would be complicated if the Commissioner did not report to the Parliamentary Committee but instead reported directly to Parliament. Parliament would obviously not be well placed to receive and, more importantly, deal with any criticisms of the contents of a Parliamentary Commissioner's report or the methodology of the investigation behind it.

Further, matters can be reported to a Parliamentary Committee which would not be suitable for open publication by a report to Parliament.

In Queensland, the Parliamentary Committee members have an obligation of secrecy under the *Crime and Misconduct Act* with respect to information about the Commission which comes to them in their role as a Committee member. This does allow the Parliamentary Commissioner to report in a more comprehensive and meaningful way to the Parliamentary Committee on the results of an investigation in a confidential report, an edited version of which may later be tabled in Parliament.

Political / Media Aspect

An important aspect of the accountability process with respect to anti-corruption bodies is dealing with concerns about the body raised in the minds of the public. These can be issues raised directly by the media or by media reporting of concerns raised politically, in or outside Parliament.

In Queensland the process that occurs when these public concerns are raised is normally that the Parliamentary Committee requests me to investigate and report on the matter and at the same time issues a media statement advising of this request. When this occurs the hubbub in the media about the issue invariably dies away.

At the conclusion of my investigation, my report is normally tabled in Parliament with the Parliamentary Committee again issuing a media statement.

This process has the advantage of relieving me of the necessity of making public statements inserting myself into the controversy. This enables me to remain aloof from the media, which can be particularly important at a time when the media is in a "feeding frenzy" over the particular issue. This in turn aids in my acceptance by the media and the public as an independent and impartial investigator on behalf of the Parliamentary Committee.

Lack of "own initiative" power

Apart from an annual review of the intelligence holdings of the CMC and the Queensland Police Service, all the functions of the Queensland Parliamentary

Commissioner are subject to the caveat of being "as required by the Parliamentary Committee".[1]

In practice, I have found no difficulty with this; in fact there is a practical advantage in it for me. All complaints about the CMC go through the Parliamentary Committee. Only those with some substance or public concern are referred by the Committee to me. The Committee deals with those complainants who really have no cause for complaint.

Again, in practice, if I were to become aware of a matter of concern about the CMC that I considered required investigation and report to the Parliamentary Committee, I would bring it to the attention of the Parliamentary Committee and suggest that the matter be referred to me for investigation and report. From my knowledge of the Queensland Committee, I would be surprised if such a request were not forthcoming.

However any discussion of the system of accountability should look beyond the way the system is working at present to the potential problems that could, hopefully only in theory, arise.

As a majority vote in the Parliamentary Committee is controlled by members of the governing party, it would be possible for those members to refuse to allow the Committee to request the Parliamentary Commissioner to investigate a matter, for example, information suggesting the CMC was refusing to investigate a complaint against a member of the governing party.

If that was done, the Parliamentary Commissioner would not be able to investigate that matter.

If the issue was already in the public arena, the opposition members of the Committee would be able to raise the issue in Parliament and through the media.

In this circumstance there would be brought into play the second limb of the accountability model, namely the Parliamentary Committee is accountable to Parliament and through Parliament to the people.

However, if the issue had solely come to the attention of the opposition members of the Parliamentary Committee through their membership of that Committee, they would be precluded by the confidentiality provisions of the *Crime and Misconduct Act* from raising the issue outside the Committee. In these circumstances, as the legislation presently stands in Queensland, the government majority in the Parliamentary Committee could successfully prevent the investigation of an issue, and that majority could not be held accountable for their actions.

I find it difficult to conceive of such a scenario arising, where the issue was not sufficiently known outside the Committee so as to allow its public ventilation.

[1] Section 314(2) of the *Crime and Misconduct Act 2001*

However, if it was thought that this scenario needed to be specifically allowed for in the powers of the Parliamentary Commissioner, it would be possible to legislate to empower, in that scenario, the minority members of the Committee to refer the matter for the consideration of the Parliamentary Commissioner, and to empower the Commissioner, where the Commissioner considered it necessary, to exercise his/her own discretion as to whether the matter required investigation.

Audit function

An audit function appears to be common to both the Commissioner model and the independent investigator model. It is a most important function.

The investigation role is basically a reactive function; it involves investigating complaints or concerns raised about the anti-corruption body and, if problems are found, recommending methods to avoid a recurrence of those problems.

The audit function gives the opportunity for a pro-active role, where an attempt can be made to identify problems or potential problems before they have become issues of complaint or public concern.

The Parliamentary Commissioner's audit role includes examining the use by the CMC of its coercive powers, to ensure that they have been used in an appropriate way and in accordance with the statutory requirements for the exercise of those powers and with the CMC's own internal procedural guidelines for their exercise.

The Commissioner's audit role goes beyond this however, to include looking at issues such as timeliness, fairness to both complainants and officers the subject of complaints, etc.

In the past in Queensland, it has been the practice for the Parliamentary Committee to request the Parliamentary Commissioner to carry out an audit of the CMC on an annual basis. Ideally, time permitting, I would like to see this changed to an ongoing audit role for the Commissioner, where, instead of doing a large audit once a year, smaller audits are done every four to six months.

I would see several advantages in this approach. For example. if a problem were to occur with the methodology adopted for obtaining approvals for the use of coercive power, it is better for this problem to be identified as soon as possible, rather than continuing for up to twelve months before its identification. Further, on the procedural side within the CMC, more regular, but smaller, audits, could allow for a more concentrated examination of a particular issue within that particular audit.

Hearings

The power of the Parliamentary Commissioner in Queensland to conduct hearings as part of an investigation has altered over time. When the Parliamentary

Commissioner's role was first established, the Commissioner was given an unfettered discretion as to whether to conduct hearings as part of investigations.

In the *Crime and Misconduct Act 2001* the power of the Parliamentary Commissioner to conduct hearings was circumscribed, such that the Parliamentary Commissioner can now only conduct a hearing as part of an investigation if the Commissioner has used all reasonable means to obtain information about the matter without success and if the Parliamentary Committee authorises the holding of the hearing to obtain the necessary information. Such authorisation must receive the bipartisan support of the Parliamentary Committee.[2]

The powers of the Parliamentary Commissioner with respect to requiring witnesses to attend before a hearing were also circumscribed by the new legislation. Previously the Commissioner had full power to require any person to attend at a hearing. Now the Parliamentary Commissioner can only require a present or former Commission officer or a present or former officer of a unit of public administration to attend and give evidence at a hearing.

I see no problems with the general thrust of these amendments, though I envisage some problems could arise in the detail.

Generally, I agree with a comment made by the then Inspector of the NSW Police Integrity Commission in his annual report for the year ending 2001 wherein he stated:

> *"I consider that the use of costly, time taking, formal inquiry hearings should generally be restricted to complaints which necessarily involve a formal hearing in order to resolve some factual conflict critical to the complaint."*

There are enough demands on the resources and budget of the CMC that, if at all possible, the least formal means of resolution of complaints and issues should be adopted.

In the various investigations I have carried out to date in my role as Parliamentary Commissioner, I have not even come close to considering making a request of the Parliamentary Committee for approval to conduct a hearing. I have found that access to all the Commission holdings on the relevant matter and interviews with the relevant parties have been sufficient.

The minor concerns I have with the present hearings power relates to two issues. The first is the inability to summons as witnesses people outside the CMC or units of public administration. This speaks for itself.

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[2] Section 318(1) of the *Crime and Misconduct Act 2001*.

Secondly the granting of approval to conduct a hearing is predicated on the Parliamentary Commissioner having used all reasonable means to obtain information about a matter without success.

This in many ways means that if the officer the Commissioner desires information from agrees to be interviewed, then a formal hearing could never be sought.

I referred to these concerns as minor because, in practice, I consider that these restrictions on the hearing power would have little practical effect. In short, I would consider the need to conduct a hearing would arise very infrequently, if ever.

Any serious factual conflict involving a question of whether or not a criminal or disciplinary offence has been committed by a Commission officer would not be resolved by the Parliamentary Commissioner. In such a case the Commissioner would merely make a recommendation as to whether the evidence was such that it warranted consideration being given to the proffering of criminal or disciplinary charges against the officer involved. A resolution of that conflict would then be a matter for the appropriate tribunal before whom the charge would be heard.

Types of matters that the Parliamentary Commissioner is asked to investigate

The position of Parliamentary Commissioner has now been established in Queensland for approximately five and a half years. In that time the matters that the Commissioner has been asked to investigate have fallen into the following categories:

- just over one quarter have involved investigations of possible leaks of confidential information;
- just over one quarter have involved complaints by private persons;
- just over one quarter have involved issues raised by politicians and in the media; and
- just under one quarter were from officers the subject of investigations by the CJC/CMC.

The types of complaints received has varied over time. For example in the last twenty-one months that I have been the Parliamentary Commissioner in excess of two-thirds of the matters that I have been asked to investigate have related to issues raised by politicians and in the media.

In addition to the above investigations, the Parliamentary Commissioner is requested, when needed, to supervise the investigation by the CJC/CMC of internal disciplinary matters within the Commission.

Personal factors concerning the position of Parliamentary Commissioner

Seniority of Parliamentary Commissioner vis a vis the Chair of the Anti-Corruption Body

I understand that, at times, the suggestion has been made that the Parliamentary Commissioner should be of equivalent or greater seniority than the head of the anti-corruption body.

In this regard, it is inevitable that the Parliamentary Commissioner will at times have to express criticisms of the anti-corruption body and officers within it and make recommendations concerning changes to be made to processes within that body.

Ideally these criticisms and recommendations should be viewed in a constructive light, as part of the necessary accountability mechanism. Human nature being what it is, this is more likely to occur if the Parliamentary Commissioner is equal to or of greater seniority than the head of the anti-corruption body.

However, mere adherence to the notion of seniority will not guarantee such acceptance of the Parliamentary Commissioner's criticisms. It is more important, to my mind, that the person appointed as Parliamentary Commissioner be someone whose professional ability and integrity is respected by the chairperson and senior officers of the anti-corruption body.

Preferably there should be mutual professional respect between the Parliamentary Commissioner and the head of the anti-corruption body. When this exists, there will then be the best chance of securing the proper co-operation of the anti-corruption body with the Parliamentary Commissioner's exercise of his or her functions, leading in turn to a more effective carrying out of the Parliamentary Commissioner's role.

Full time or part time

I would see no reason to appoint the Parliamentary Commissioner/Investigator on a full time basis if the work commitment did not justify it.

I can also see no reason why the appointment could not be on a part time basis.

It has been suggested that a part time appointment would not be appropriate where the appointee continues to practice as a barrister in private practice.

It is pointed out that potential conflicts of interest can arise where a part time Parliamentary Commissioner continues in practice as a private barrister. Certainly the potential for such conflicts can arise, but barristers confront and deal with potential conflicts of interest on a not irregular basis.

If a Parliamentary Commissioner continued with a criminal practice, it would be inappropriate for the Commissioner to defend or, I would consider, even prosecute, a

case where the charge arose from an investigation by the anti-corruption body. Any barrister accepting appointment as a Parliamentary Commissioner would understand and accept this. I would not see it as precluding the appointment of a Parliamentary Commissioner on a part time basis.

Summary

In summary, I have found the Commissioner model, as it applies in Queensland, to work well in practice:

- it supports what I consider to be an appropriate form of accountability, where the CMC is accountable to the Parliamentary Committee, the Parliamentary Committee to the Parliament and the Parliament to the people;
- it makes the position of Parliamentary Commissioner itself properly accountable;
- it enables the reporting to the Parliamentary Committee of details which could not be reported to the Parliament; and
- by relieving the Parliamentary Commissioner from the need to make media statements, it aids in the acceptance of the role of Parliamentary Commissioner as being independent and impartial.

The lack of an *"own initiative"* power does mean that it would be possible for the majority bloc within the Parliamentary Committee, being comprised of members of the governing party of the day, to prevent an issue of concern about the CMC being investigated.

APPENDIX FOURTEEN

Paper delivered by Mr Peter Hastings QC, Senior Counsel Assisting, Royal Commission Into Whether There Has Been Corrupt Or Criminal Conduct By Western Australian Police Officers

Lessons Learned from the Royal Commission

Functions of Royal Commission

It is important to bear in mind that Royal Commissions, such as the Police Royal Commission, have entirely different functions to permanent oversight agencies and Crime Commissions. Royal Commissions are created whenever the machinery of government is incapable of handling the issues which become the subject of the Royal Commission. Accordingly, the primary function of a Royal Commission is an investigation of those issues for the purposes of the formulation of recommendations for improvement to the processes of government to enable similar issues to be handled in the future. This is reflected in the most recent Royal Commissions such as the HIH Royal Commission and the Building Industry Royal Commission as well as this Commission.

It is not the function of a Royal Commission to gather evidence for the purposes of the institution of prosecutions or disciplinary proceedings. Such a process may be undertaken if it is coincidental with the primary purpose of the inquiry, which is to establish facts only to the degree necessary to confirm that problems exist which existing agencies of government have been unable to control.

This has been the focus of the Police Royal Commission. The Commission embarked upon an examination of allegations of possible police corruption firstly to confirm the substance of the allegations, and secondly to identify that the existing agencies, the Internal Affairs Unit of the Western Australia Police Service and the Anti-Corruption Commission, were incapable of resolving the issues to the satisfaction of the community. This in turn led to the presentation of the Interim Report to government in order to initiate the process of reform through the establishment of the Corruption and Crime Commission with the capacity to resolve the community concerns.

The continuing work of the Commission has also been primarily directed towards the identification of deficiencies within the Western Australian Police Service which have contributed to the failure to prevent or expose or deal with corrupt or criminal conduct by police officers, again with the primary objective of the formulation of proposals for improvement and reform which will enhance the capability of the police service to achieve those objectives. This is consistent with the view of the Commission that its fundamental aim is to bring about permanent change to the system for controlling corruption, rather than the collection of admissible evidence to prove corrupt conduct. Whether the evidence gathered is sufficient for the purposes of a prosecution or

disciplinary action will be determined by the Commissioner of Police or the Director of Public Prosecutions in the light of any such further evidence which the Royal Commission Investigation Team gathers.

The role of the Commission is clearly different to that of standing Commissions which have the objective of investigating and establishing cases of corrupt conduct or serious crime. Whilst those agencies have a significant role in the formulation of improvements and reforms within the police services, that is usually subservient to the primary function of gathering evidence of corruption.

Trends in Corruption

The trends in corruption investigated by the Royal Commission were predictable:

- Cash generated by drug dealing continues to constitute an irresistible lure for police inclined to corruption;
- The introduction of statutory requirements for electronic recording of interviews and internal requirements for videos of searches have made significant changes to culture and to opportunities for corruption;
- Unauthorised access to and disclosure of confidential information is a major issue:
  - The Wood Royal Commission in 1997 recognised the significance of the issue;
  - The CJC published a detailed report in 2000;
  - The UK Home Office in its study "Police Corruption in England and Wales: an Assessment of Current Evidence (11/03)" identified information compromise as the single most common type of corrupt activity;
  - The Royal Commission evidence has supported those concerns;
  - Western Australian Police Service submissions that, because complaints concerning unauthorised disclosure of information only constitute 5% of current complaints, the matter is not a major issue, should not be accepted;
  - Information technology is a major issue to police. It is essential for proper intelligence based policing, but at the same time provides police with unique privileges and powers, which require strict regulation; and
- Inappropriate associations between police and criminals have been a feature and should be regulated by requirement for compulsory disclosure.

Trends in Corruption Prevention

Parallel to the public hearing conducted by the Royal Commission, considerable resources have been dedicated to the identification of benchmarks initiatives for improving corruption resistance. The reviews and surveys conducted have shown an identifiable pathway of progress in increasing corruption prevention within police services:

- The Fitzgerald Report in 1989 marked the first acknowledgment of the extent of problems with police corruption, and the beginning of the identification of causes of corruption and possible solutions through improved management and changes to culture;

- In the early 1990's some reforms commenced to improve police structures and management. In WA in 1993 the McCarrey Report into Government Financial Services identified problems with the Western Australia Police Service which led to the formulation of the Delta Reform Program in 1994. The process of improving police management commenced;

- The release of the Wood Royal Commission Report in 1997 took the Fitzgerald theories a large step further and provided a textbook of principles of corruption prevention;

- The Report stimulated an awakening of academic interests, partly because of the involvement of tertiary education institutions in teaching police studies, and also because of the recognition of the implications of police corruption on society following the factual findings of the Wood Royal Commission. This led to a surge of literature and research. As time has passed, the quality of academic commentaries has improved significantly;

- The mid 1990's also marked a recognition by police services themselves that the delivery of policing to the community needed to be improved. This generally led to the identification of intelligence based policing as an appropriate model. This in turn involved recognition of the need for greater attention to community crime trends and the need for appropriate strategic response;

- The period since about 2000 has been marked by a further burst of reform and have been highlighted by the emergence of the role of external oversight agencies as significant players in the process of improving the management and culture of police services; and

- There is now a realisation that the progress of the reform of the management and culture of police services is somewhat illusory. The QSARP reports have increasingly drawn attention to the fact that the New South Wales Police reforms since Wood have been more directed at performance indicators than changing culture as Wood had intended. Similarly, in WA Messrs Bogan and

> Hicks reported last year that the Western Australian Police Service lacks corporacy – that is a sense of unified strategic direction – and traction – the capacity to ensure that strategies are in fact implemented and effective. The current challenge is the identification of processes of change management which ensure that new programs become effective. In this regard external oversight agencies will have an increasingly important role to play.

Lessons Learned from the Royal Commission

It should be acknowledged that Royal Commissions are often in a privileged position financially. For political reasons, governments usually ensure that Royal Commissions are well resourced in order to avoid criticism that the inquiry has been established but undermined by lack of adequate financial support. The level of resources available to Royal Commissions usually exceeds that available to permanent government agencies. Adequate resources are the key to the performance of a Royal Commission and provide a model to which permanent agencies should aspire.

Royal Commissions are also in a position of advantage with staff morale and motivation. As temporary bodies established for a limited purpose and a limited time, and with the capacity to recruit well, staff are usually enthusiastic and dedicated. The limited time involved also avoids morale issues which can arise from over familiarity and jealousy found in permanent agencies. The high level of enthusiasm and energy makes leadership and supervision less challenging than in a permanent body. Flexible recruiting procedures, assisted by an exemption from some of the usual Public Sector Standards requirements, is an invaluable aid in attracting highly qualified officers.

The lesson of broader application from the motivation and enthusiasm of newly recruited staff is the use of secondments and short term contracts for a percentage of the total staff to ensure that there is a continual process of introducing new staff to maintain the level of enthusiasm necessary to tackle the difficult task of investigating corruption.

Multi-disciplined Teams

With the ultimate goal of producing evidence in a hearing, the structure of the Royal Commission into multi-disciplined teams headed by counsel was inevitable. The use of counsel in a permanent body is usually financially unattainable, but the use of lawyers in teams working with analysts and investigators has been highly successful in the Royal Commission and is a desirable permanent structure. The capacity of external oversight agencies to conduct public hearings invariably means that lawyers should have a significant role in the planning of operations and the collection of evidence to be led at the hearing. The Commission's investigators seem to have enjoyed working in a team environment and have welcomed the support of the lawyers and analysts. Analysts have had a significant role in target identification and intelligence gathering. This has released the investigators for more field work and all involved seem to have enjoyed these combinations of efforts in the team structure.

Technology

The key to successful investigation of police corruption is technology. It is clear from the investigations of the Royal Commission that police were well prepared for the now familiar tactics of police corruption inquiries of endeavouring to recruit the services of a corrupt officer in order to infiltrate the corrupt ranks of the service. Not only were the officers resistant to suggestions that they should cooperate, but other police were highly sensitive to any possibility that an officer had been approached by the Commission and may have agreed to cooperate.

The successful exposures of the Royal Commission were due almost entirely to sound target identification and technical expertise in obtaining electronic evidence of corruption. The success in that area was largely due to the expertise of the Special Services Officers and the sophisticated equipment acquired, upon which the Royal Commission had invested significant funds. The view was taken that efforts would be made to equip the Royal Commission with high level equipment, and the investment was rewarded. It is hoped that technical proficiency will be a legacy to the new Corruption and Crime Commission.

The Commission did not have the capacity to carry out telephone intercepts but was assisted by the Anti-Corruption Commission pursuant to joint operations. This only confirmed the obvious fact that telephone intercepts are an essential part of the equipment of an effective oversight agency.

Research and Policy Unit

Because the view was taken that reform was a primary objective of the Royal Commission, the Commission ensured that it was adequately resourced with research staff to guarantee that it was familiar with best practices in corruption prevention throughout the world. A permanent external oversight agency has an even greater role in research and education and the provision of sufficient staff to discharge that function is absolutely essential.

External Oversight of the Royal Commission

As a short-term agency, external supervision of a Royal Commission is not feasible. Accountability comes from the threat of judicial review and from the fact that sooner or later the operations of the Commission become revealed publicly, either in the process of the hearings, or in later prosecution proceedings. That prospect plays a large part in ensuring that operations are conducted with appropriate integrity.

Public reputation for honesty and integrity is essential if the recommendations of the Commission are to have persuasive effect.

There is no doubt that in a permanent agency, the role of the Inspector would be essential in monitoring investigative practices. Whilst a judicial or ex-judicial officer as Commissioner is an important safeguard, the presence of an Inspector is not only a

comfort to the community, but also a reassurance to the Commission that it may proceed with operations with the confidence that comes from the fact that its standards are at a level that meets with the approval of the Inspector. The involvement of the Inspector also removes the need for a Commission of several members, which is intrinsically inefficient and unsuitable for the dynamic role of corruption investigation, and which only seems to be justified on the basis of that extra members improve the quality of decision making, and reduce the risk of an aberrant Commission creating havoc.

The Parliamentary Committees seem to have a continued role as a specialised group within Parliament with the capacity to absorb and react to the reports of the Inspector. Providing the Committee remains disassociated with operations, it has an effective part to play.

APPENDIX FIFTEEN

Paper delivered by Ms Deirdre O'Donnell, Parliamentary Commissioner for Administrative Investigations

Can self-regulation deliver public confidence?

Overview

Corporate governance systems in the 21st century are increasingly influenced by a risk management approach which attempts to balance the requirements of a range of stakeholders – government, shareholders, the community and the employees and management of the corporation itself. Ultimately the aim of good corporate governance is improved confidence. In the private sector, this equates to shareholder confidence; for government agencies, it is public confidence.

Against this background, this paper presents one contemporary governance model, that of the 'open corporation', developed by Christine Parker from the Law Faculty at the University of Melbourne in her book '*The Open Corporation*'.[1] The benefits of a principled approach to governance can be seen in Ms Parker's empirical research. Her framework provides a valuable context against which to consider the focus of regulatory agencies or oversight bodies on appropriate organisational processes and systems. Importantly, the 'open corporation' model also defines the critical factors in organisations achieving a truly democratic governance model.

Is effective self-regulation possible?

Corporate governance is about managing what people actually do. Behaviour needs both internal and external controls. In an environment of increasingly complex regulation, an approach which is informed by simple guiding principles appears to be an ever more attractive option.

Under the open corporation model, organisations are coming to recognise that they have more than just shareholders but also a range of stakeholders. In the WA public sector these include agencies such as the Ombudsman, the Commissioner for Public Sector Standards, the Auditor-General, unions and community groups, among others. Such stakeholders to a greater or lesser degree have influence over the organisation, and need to be acknowledged and managed appropriately. Complainants also fall into this category.

Traditional regulation of corporate conduct is via a 'command and control' model. Under this model, certain regulatory requirements are imposed on companies via legislative action and administrative enforcement by regulatory agencies. However,

[1] Christine Parker, *The Open Corporation – Effective Self-regulation and Democracy* (2002).

Ms Parker has identified the weaknesses of command-and-control regulation as including:

- a tendency towards unnecessarily complex rules that are too difficult or costly for business to access, understand and comply with;
- over-regulation, legalism, inflexibility and unreasonableness in design and implementation that tend to break down the natural willingness to comply with reasonable, substantive objectives;
- evasion and 'creative' compliance by taking advantage of technical and detailed rules, rather than compliance with the substance and goals of regulation;
- capture of regulatory agencies by regulated entities; and
- dependence on strong monitoring and enforcement where sufficient resources, expertise and strategy are not necessarily available. [2]

In order to ensure true 'openness', organisations face the challenge of ensuring that legal and social values permeate the internal workings of the corporation, rather than bouncing off the corporate veil (in the private sector), or being deflected by a defensive, inward-focused culture which can sometimes be found in public sector agencies.[3]

To achieve this type of permeability is inherently difficult. In many private sector organisations, Parker has noted, there is a fundamental disconnection between corporate life and individual integrity and external values.[4] However, it seems to me that in the public sector there is potentially a greater chance of congruence of these spheres if the managerial will is there. The challenge for public sector managers lies in the harmonising of principled frameworks such as codes of ethics and codes of conduct with the business objectives of their organisations.

There is another dimension to this move towards encouraging internal corporate self-regulation systems, as Parker describes it. From a public policy perspective, this not only recognises the need for democratic responsibility of corporate action, but also recognises that companies have the capacity to govern themselves and their relationships with others. From the corporate perspective, a compliance program is a system for managing the risk of irresponsible, unethical or illegal action.[5]

[2] Ibid 8.

[3] Ibid 28.

[4] Ibid 31.

[5] Ibid 37.

When do companies best institutionalise responsibility? The five most frequently identified factors cited by Parker are:

- Management commitment;
- External regulatory pressures;
- Internal compliance/self-regulation constituencies;
- Integration into operational procedures, appraisals; and
- Interest group involvement/community opinion.[6]

Parker's analysis suggests that purely voluntary compliance or self-regulation is rare, or perhaps non-existent. However, it is most interesting to note her conclusion that a simple deterrence model does not, of itself, explain corporate compliance behaviour. She has concluded that, in short, to view an organisation as an *amoral calculator moved by appropriate deterrence to 'do the right thing' must be supplemented and nuanced by the facts that:*

- organisations can sometimes be persuaded to do the right thing without a direct threat of sanctions if there is a threat for defaulters in the background;
- some influential actors within organisations will be highly motivated to be law-abiding or socially responsible for its own sake;
- the existence of deterrence threats will not necessarily be a feature of daily decision-making;
- many organisations will behave in ways that they feel maintain their legitimacy in the eyes of industry peers, customers or governments irrespective of the individual cost and efficiency calculations; and
- even when formal sanctions are applied, it is their informal ramifications (shame and negative publicity) that are more effective deterrents.[7]

Parker's research has led her to conclude that effective self-regulation is conceptually possible, but that purely voluntary effective self-regulation is simply not an empirical reality. In her book she seeks an explanation for motivations to implement self-regulation that reflect the real experience of those she interviewed, namely that compliance and deterrence-type motivations are fundamentally entangled, and not able to be viewed in isolation from one another.

[6] Ibid 50.

[7] Ibid 76.

Significantly, Parker identifies several reasons which may combine in any one case to motivate an organisation to move beyond the mere implementation of a compliance system to the pursuit of self-regulatory leadership, as follows:

- a general desire to actually be a good corporate citizen;
- the desire to take advantage of perceived first-mover competitive and efficiency advantages in compliance, including the ability to shape government/regulatory policy to suit the company early on rather than have a less suitable system forced upon it;
- the ability to advantage from regulatory barriers to entry; and
- a desire to be seen by prospective customers, staff, investors, regulators, government, local communities and/or other stakeholders with power to make decisions affecting the business as a good, legitimate corporate citizen.[8]

However, it is telling that she identifies the most common reason for organisations to adopt systematic and robust self-regulation systems as probably the experience of a regulatory or public relations disaster, or the imminent apprehension that one may occur. She concludes from her research that the best chance for getting most companies to implement a systematic self-regulation program seems to be when there is a crisis of legitimacy brought about through a *moral panic in a local community, a spectacular regulatory enforcement action, or a major accident. These events create a window of opportunity in which top management attention is momentarily focused on the risks of non-compliance and on the benefits of attempting to systematically ensure compliance*.[9]

The open corporation model reflects the inter-dependence of the various elements which bear on the governance of an organisation. From an internal perspective, corporate culture is the critical factor in building compliance from the ground up. As reinforcement, external pressures for accountability are crucial to keeping commitment to compliance strong. Translating this to the public sector context, the role of oversight bodies, Parliamentary Committees or accountability agencies fulfil this role. However, Parker emphasises that large organisations must also have management systems in place that *link the top to the bottom and provide something central for stakeholder concerns and employee integrity to hook into. This type of hierarchical and centralised system is necessary to affect how the whole organisation conducts itself*.[10]

At a deeper level, effective self-regulation also requires double-loop learning. The little quantitative data available on the implementation of corporate compliance and

[8] Ibid 88.

[9] Ibid 110.

[10] See p.233.

self-regulation programs shows that this is one of their weakest spots.[11] One example is the way some agencies are able to learn from the business intelligence provided via their complaint management systems to improve their processes and procedures and ultimately their service delivery. Those agencies that handle complaints well are able to benefit from the feedback provided by complainants as well as the subsequent analysis of the effectiveness of any improvements to their business systems. To ensure that regulators and policy makers themselves learn from the effect they have on agencies, such bodies too need to evaluate their role against the outcomes they have been created to deliver or safeguard, and use this analysis to adjust their own strategies and objectives.

[11] Ibid 239.

APPENDIX SIXTEEN

Paper delivered by Professor Narayanan Srinivasan, Head of School, Murdoch Business School, Murdoch University, Western Australia

International Aspects of Corruption Prevention

This presentation discusses issues in relation to corruption taking into account the three pillars of action formulated as part of the Action Plan for the Asia-Pacific region. The presentation covers international developments in corruption prevention and specific issues to our region.

Theoretical framework

Being an academic, I have set the theoretical framework and methodology used in the research for my presentation.

The theoretical framework for most forms of corruption and white-collar crims was set by Sutherland in 1939, when he introduced the term white-collar crime (Sutherland 1983). (For the purpose of this presentation I argue that the kinds of corruption we face in this region falls within the category of white-collar crimes.) Sutherland's theory put forward the notion that criminal behaviour is learned behaviour. In simple terms, Sutherland's theory of differential association classifies all forms of criminal behaviour as learned and copied. Public officials learn to be corrupt by observing their co-workers and justifying their acts as being normal behaviour in their particular environments.

Box, another prominent criminologist, adds the element of skills and opportunity as being the major motivating factors behind white-collar criminals (Box 1983). Skills are developed by observing co-workers, and when the opportunity presents itself, these skills are activated to commit a crime.

In order to prevent corruption, those charged with investigating and preventing it should understand these theories, which help identify both the causes of corruption and the personalities of people who engage in it.

Indonesian study of personnel involved in investigating corruption and bribery

The Indonesian study offered an opportunity to put into practice an innovative methodology to improve the investigation and prevention of corruption. It was based on sound methodology aimed at meeting a set of specific criteria.

Methodology

The study was based on a methodology of critical hermeneutics (Crofty 1998; Rundell 1991; Warnke 1987), which uses focus groups to ensure that individuals from different countries and/or institutions participate in the learning process leading to their own development. This methodology also provides the impetus for local participants to take ownership of issues and think through and identify their own situations as discussed and analysed during and after the focus group meetings (Bernstein 1983; Zemke 1998). Five focus group meetings were held during a period of 18 months. Each meeting consisted of four separate groups of participants, who were mid-level and senior officers from the various agencies (police, judiciary, regulators, private sector, and other) involved in investigating corruption and bribery in Indonesia. The first group meeting was attended by 41 people who were selected based on recommendations from various government and private sector agencies. The main criteria in selecting this group were that they were mid-level or senior officers and had at least seven years experience of investigating corruption-related activities. A decision was made to include people who had worked in the private sector after discussions with the local partners of this project, who felt that personnel employed by the private sector (mainly multinational companies) to investigate corrupt practices would contribute positively to these groups. Such people (and a small number of observers) attended subsequent group meetings. All groups had above 80 percent attendance.

Three weeks before the first meeting, all focus group participants were given material to read about issues relating to corruption (see the reference list and bibliography for an idea of the types of materials provided to the participants). All the participants were also asked to think about how they could help improve the framework for investigating corruption and what changes, if any, they would recommend for making their respective jobs easier and more effective. They were also given a brief outline of how the project would function and an introduction to critical hermeneutics and the logistics of the focus group meetings.

At the first focus group meeting, a series of questions was formulated by the four working groups, and their leaders generated a list of factors relevant to these questions from each group. Further focus group meetings were based on this list of factors. At the second meeting specific themes were identified and the groups were divided in four thematic clusters. Leaders from each of the clusters drew up a final list of factors that the participants had identified as ones that would help improve the investigation and prosecution of corruption-related offences. At all stages the participants were assured of absolute confidentiality.

Major Findings

The findings of this study are preliminary, as the final report has been disseminated to all the participants for their comments.

The first and second focus group meetings identified five themes as being of utmost importance for enabling the effective investigation of corruption, namely:

- Legislation;
- Training;
- Interagency cooperation;
- Public awareness; and
- Effective implementation.

Legislation

Focus Group one discussed the adequacy of current legislation, the judiciary, and the process of influencing government. This group raised the following main points:

- The current legislation relating to many aspects of investigating and prosecuting corruption-related activates is adequate, with two exceptions, that is, money laundering and political interference. The group felt strongly that international efforts should concentrate on strengthening these omissions as they were beyond their control;
- The group identified the independence of the judiciary as an issue separate from the adequacy of legislation. Most of the participants agreed that the existence of good legislation and the implementation of good legislation are quite separate issues. This group implied that in Indonesia, the legislation in relation to anti-corruption investigation and prosecution is good, but because of issues relating to the judiciary, the implementation of this legislation is the real problem. Judicial independence would also help reduce corruption (Ades and Tella 1996; Gurgur and Shah 2000); and
- The group also highlighted political interference in decision making about anti-corruption investigations. The participants felt that even though political interference did exist, it was not as rampant as reported in the international media. They identified political will as the issue that must be addressed and as being much more important than political interference. After much discussion, the group defined political will as the ability of the political mechanism (both governmental and private) to identify corrupt activities and be sincere about rooting out corruption at all levels.

Training

Focus group two discussed issues relating to training officials working in both private and governmental organisations investigating and prosecuting corruption. The issues this group identified are as follows:

- A concentrated and coordinated training effort by both the Indonesian government and international agencies is lacking. The participants felt that the many ad hoc training initiatives being undertaken by the various international agencies and coordinated by the government did not meet the needs of the people concerned. All the participants had attended training programs (most had attended at least two in the past 24 months) organised by international agencies and foreign governments in areas related to anti-corruption. While they noted that many of these programs were excellent in content and presentation, most of them did not address local needs and legislation;

- The participants also identified the lack of specific programs that would be helpful in an international context. As an example, the activities of the Financial Actions Task Force had been explained to one of the participants, the only one afforded this explanation in an entire organisation actively involved in investigating money laundering and asset tracing; and

- The participants also identified a need for specific skills training in areas related to legislation and investigation to improve the investigation of corruption. All the participants felt that this would improve their rate of success in investigating corruption, as currently Indonesia has only a handful of highly trained corruption investigators.

Interagency Cooperation

Focus group three, which concentrated on interagency cooperation, believed that despite the many initiatives – such as the Jakarta Initiative, the Corporate Governance Initiative, the Anti-Corruption Plan, and the Ombudsmen's Office – the question of interagency cooperation has not been addressed. The main recommendations this group made include the following:

- A special task force should be established to map the types of interagency cooperation that would be workable in the Indonesian environment. This task force should take into account the work the many local and provincial government agencies are undertaking. The task force should also look into the legislative changes that would be required to make inter-agency cooperation function easily;

- As concerned international agencies, non-government organisations (NGOs), and other agencies involved in investigating corruption, the group identified many international agencies and NGOs that seemed to be working in isolation, because the current environment in Indonesia does not encourage cooperative arrangements;

- Within the Indonesian criminal justice system, the various agencies working in the area of corruption investigation and prosecution are not required to work together. The group identified many informal links, but felt that a more formal

approach of mandated meetings between private and government officials would improve overall effectiveness.

Public Awareness

Focus group four discussed public awareness and identified the following major issues:

- A concentrated public awareness campaign is needed on the negative effects that corruption has on an economy. The group agreed that in most cases the participants had investigated, both the victims and the perpetrators had extensive knowledge about corruption and white-collar crime. In many instances the people they had investigated understood clearly that they had broken the law, but argued that their actions did not hurt anyone;

- The role that the public should play in preventing corruption should also be publicised. The group noted that in Indonesia many NGOs play an active role in corruption prevention. One major activity that these NGOs could undertake is spreading the word about the importance of informants and whistleblowers in corruption identification and prevention. The participants stressed that the role of the public is important not only in preventing corruption, but also in investigating it. They cited many examples of cases were the informants were unaware of their rights and where employers victimised whistleblowers. The participants identified some public awareness campaigns that had been carried out by organisations such as the International Committee against Corruption in Hong Kong, China, and felt that these campaigns should be adapted for Indonesia;

- The group believed that education on corruption and investigation of corrupt activities, including the roles of agencies involved in investigation, should be disseminated to the employees of all government and private organisations. Again, they identified Hong Kong, China, as a good example and the most appropriate for the Indonesian context; and

- The role of educating the young was another area where the participants believed that funds could be directed. They felt that it was not their role to define or identify ways that this could be done (as they were mostly senior members of investigative agencies), but stressed the importance of this activity.

Overall, all the participants agreed that the examples from Hong Kong, China, which had been provided as part of their preparation for this project (Fee-Man 1999), seemed to be the most appropriate for the Indonesian environment. If these could be expanded to the provinces and local governments, it would help in the investigation of corruption and white-collar crimes.

Implementation

All the participants agreed that the most pressing issue facing them, as either senior investigators or directors of investigative agencies, was to implement good investigative practices. As noted either, critical hermeneutics is a method that would create an understanding of the issues and bring about a questioning of "what is." The implementation issue raised by this group is just another step closer to an understanding of what needs to be done. The group did not offer any solutions, even after intensive discussions, except to note the need for significant resources to improve the working conditions and training provided by the government to these investigators and their staff.

What is new in this area?

The first and most important aspect is that public awareness is on the rise with regard to understanding and reporting corruption. Whistle blower protection is being taken seriously by all countries in the region and civil society has been mobilised to engage with government and business in raising awareness of corruption prevention. The use of new tools such as information and communication technology towards fighting corruption is being advanced in countries such as Korea, Malaysia and Singapore. The rise of terrorism in this region has resulted in all governments being extremely careful in enacting legislation dealing with money laundering and fund transfers. There is also funding available to fight corruption as these activities are linked in with funding of terrorist activities.

CONCLUSION and LESSONS for WA

Using the Action Plan's three pillars as a guide and critical hermeneutics as the methodology, we can conclude that international agencies need to help Indonesian investigative agencies (governmental, quasi-governmental, and private) implement good investigative approaches. The focus group studies provides a starting point that indicates what senior investigators and their managers working in the government and in private agencies in Indonesia have identified as their needs to increase the success rate of their investigations.

Western Australia should play a more prominent role as currently there are no West Australian players in the international anti corruption prevention committees. As the current aid related funds prioritise governance and especially anti corruption in this region, WA should be applying to gain funds from these agencies. The best way forward would be for the interested groups to form a committee that looks at anti corruption funding in the Asia Pacific region. WA should also benchmark against countries such as Singapore and Hong Kong that have very effective and high profile anti corruption agencies.

APPENDIX SEVENTEEN

Paper delivered by Ms Moira Rayner, Commissioner, Anti-Corruption Commission, Western Australia

Ethical Standard-Setting – Is There a Role for a Parliamentary Committee?

Call to country

First let me acknowledge, a bit late, that we have been meeting here on country traditionally owned by the Aboriginal people of this area, the Nyungar people; and acknowledge the elders who are still the traditional custodians of that land today.

Context

I am speaking right at the end of a two day conference in which many of the views and concerns I would have put forward at the beginning have now been expressed and aired. I had to write an entirely new paper last night: I hope you all enjoyed the dinner.

The views expressed in this paper are personal views and do not necessarily reflect the position of the Anti-Corruption Commission of Western Australia ("ACC"), to which I was the first woman and last appointee on 11th December 2002, an appointment made by the Governor on the recommendation of a committee in a process designed to distance the members of this powerful executive agency from the rest of the Executive: its members are the Chief Justice of the Supreme Court, the Chief Judge of the District Court and the Solicitor General.

That method was required by the Parliament, to demonstrate and assure the independence of the ACC after the excesses of the Burke/WA Inc years in the late 1980s and to address the distrust in our public institutions that they caused.

I note without further comment than this, that the bill before Parliament as I speak proposes the appointment of a new Corruption and Crime Commissioner by the more usual method of appointment by the Governor on the recommendation of the Minister, the Premier: the public memory is short.

Ethical education or setting ethical standards?

I was originally invited to present a paper on the possible role in ethical education for a Joint Standing Committee of the Parliament. I called back a short while before this Conference and advised that after thought and a review of the literature I thought there was no such role. Parliamentary committees represent the interests of the people and Members of Parliament are under a duty to listen to them and speak for the interests of their constituents; other members of the public outside their own electorate, and the integrity of the Parliament itself. Education – as opposed to sharing knowledge and

giving leadership - is the responsibility of parents to provide to their children and the executive to either provide or require or enable others to so to do.

But there may well be a point in a discussion about how a parliamentary committee may help to set and evaluate ethical standards and an ethical culture in executive bodies, including those new, powerful anti-corruption bodies that also have a public educational responsibility.

Corruption is the end result of a failure of ethical standards. Corruption is also a failure of the ordinary systems of government. Setting ethical standards is one way to create, change or sustain an ethical culture in public officers and institutions.

Anti-corruption bodies are a relatively new piece of machinery to ensure that none of the components of government – traditionally separated (at least in principle) into the legislature, the executive and the judiciary – or the people who work in it, misuses or converts to their own use the power trusted in them. It is natural for this to occur. Lord Atkins is remembered for stating that, "*Power corrupts, and absolute power corrupts absolutely*." It is less often remembered that he went on to say, '*Great men are almost always bad men . . . There is no worse heresy than that the office sanctifies the holder of it*."[1]

No one and no body is immune from the charms of power. As our society becomes more complex, effective barriers to power grabbing are also becoming more labyrinthine - "*Rather ten devils to check one another than one mandarin with absolute power*," according to the Tiananmen Declaration of 2nd June 1989 – but they have become a demon horde,[2] revealing the failure of our Westminster system of representative democracy.

The role of Parliament

Parliament, representing the power of the people and legitimacy of their government, is supposed to be able to scrutinise executive actions and punish misbehaviour or maladministration. The concept of ministerial responsibility and the expectation that misleading Parliament or resigning over major scandals created by their departments or shamed governments falling have virtually disappeared. The people have become cynical and accepting of this.

Parliament has found it difficult to tighten the leash at Question Time or in parliamentary debates, which have been overwhelmed by the majority side's

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1 Letter to Bishop Mandell Creighton 5 April 1887.

2 As I suggest in Watchdogs Put Down, in the journal Eureka Street Volume 13 Number 3, April 2003, P 26-27, there is really no reason to expect that any body vested with vast power should be able to protect the public interest very well for very long or to be immune from the deleterious effects of such power. 'Standing royal commissions' are inherently undesirable. Oversight bodies should themselves be regularly reviewed and reconstructed by enthusiastic and inquisitive outsiders.

procedural controls over its business, and the practice of two disciplined party blocs opposing one another in the chamber, scoring points for 'their side' rather than adding to the sum of human knowledge. Don Dunstan once said that most parliamentary speeches are '*useless elocutionary exercises*'[3] and no wonder most ordinary people don't bother to listen to them.

The other means of checking and balancing executive power, the courts, is not readily accessible. People don't trust judges as they once did: the mystique has gone, aided by Ministers' habits of attacking judges who make inconvenient decisions, and Attorneys-General failing to protect them from criticism.

A Parliamentary oversight committee has a real and important role in ensuring that our public service is independent, neutral, and ethical. The need is as great now as it has ever been. A public servant should be politically neutral but must not be ethically uninvolved. The indispensable ethical requirement is that they possess an understanding of the common good.

The great problem of our modern age is the supremacy of the executive over the other parts of government. Parliament should be the brain of the body politic; but the executive, in theory its organs and limbs, has a nervous energy of its own. Under the Westminster system, William De Maria has said:[4]

> *'[T]he people are supposed to be at the end of the line of accountability. But in actual fact the 'king' (prime ministers, premiers, ministers) is still in a position of ultimate power. The English Revolution of 1688 has turned full circle in the Realpolitik of everyday life.'*

Parliamentary mechanisms are an essential part of restoring public faith that their government is governing in their interests.

Corruption is a betrayal of that faith.

Developing systems and procedures to ensure public integrity

What action should we take to restore it? To state the bleeding obvious, doesn't it depend on what works? Anti-corruption bodies – hugely powerful, coercive executive agencies, I remind you – are a sharpened stick. Governments don't really like being poked in the eye with them, in the long term, and people are distrustful, always.

There are other ways to build trust in government institutions.

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3 Quoted by Bennett, Scott, in Affairs of State. Allen & Unwin 1992, P.73

4 De Maria, William. Quarantining Dissent: The Queensland Public Sector Ethics Movement. Australian Journal of Public Administration, Vol. 54 No.4, December 1995, P.444. Quoted in Rayner, Moira. Rooting Democracy: Growing the Society We Want, Allen & Unwin 1997. P101.

In a recent MORI poll conducted for the Audit Commission in the UK (focusing on police, hospitals and local authorities[5]) it was found that the key drivers for people's trust in public institutions were whether or not:

- People felt they *kept promises;*
- People felt they *learned from mistakes;*
- *What friends and family said* about those institutions;
- Whether or not staff treated people well;
- They felt that the staff were *interested in their views*; and
- The perceived quality of their leadership.

Interestingly points 3 and 6 – the importance to people's sense of 'trust' in public institutions of what others said about the institutions and their experiences of them, and the 'quality of leadership' were not directly expressed by the people surveyed, but came out strongly in the regression analysis. The MORI pollsters concluded this was because, on the one hand, people were reluctant to admit their views were based on second hand and indirect knowledge but nonetheless the views of others were significant because many people do not have direct or regular contact with government agencies. On the other hand, the regression analysis demonstrated how deeply people care about the way they perceive the agency communicates with them, and how responsive and approachable it is. The experience of being belittled or having one's concerns haughtily or impatiently dismissed sends a mighty lesson about powerlessness and resentment.

Another key factor came from the qualitative part of the research. The MORI researchers found that high profile (i.e. media reports of) mistakes by public sector organisations could also have a significant impact on trust: two out of three people said that these not only undermined their trust in the specific agency, but in public organisations more widely.

In other words, people rely on the opinions of others when they do not feel involved in their own government, and when they do not feel that they are participating in what might be described as a democratic conversation, or a reciprocal relationship with government and its agencies.

Corruption is not only a betrayal of people's trust but the end result of systems failure – a failure of the integrity which is a fundamental condition of democratic

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5 'Local authorities' – what in Australia approximates to 'local government' – are different from Australian councils in that, at least in England and Wales, they are centrally funded to devise and deliver many services that in Australia are delivered by state government agencies, such as education, health, housing, child care services and child protection systems.

government, which depends on a legitimate expectation that persons vested with public duties will set aside their private preferences in performing them.

Corruption prevention is the exercise of getting the systems right**.** Ethical standard setting is part of getting the systems right too. Both maintain, mend or build public trust in public institutions, generally.[6]

Creating an ethical culture

In the research literature about preventing workplace discrimination, harassment and bullying; and into effective reduction of child abuse, three risk factors are significant. One is the character, desires or preferences of individuals to act wrongfully: we can't do much about them (other than not employ them or give them power at all), but we can do something about their opportunity to do so, and the presence or absence of inhibiting and dis-inhibiting factors.

In the context of this conference's purpose, these are cultural factors. An ethical culture sets up an expectation that some activities will be approved of by people whose opinions matter to us, such as colleagues' or superiors. A culture that is clear about what standards of conduct are 'normal' and acceptable and will be supported is a culture that is capable of creating pride in doing the work, and shame for deviant behaviour. The property of shame is a more effective disincentive to taking advantage of opportunities to act corruptly, than fear of detection and punishment. Many of the corrupt – whether grand corruption by elite groups or petty corruption by inferior bureaucrats and covert criminals – imagine that they will get away with it, rather as adolescents believe they will live for ever, and never contract a sexually transmitted disease.

There are three ways of preventing corruption: control, guidance and good management.

Good management ensures effective scrutiny and accountability exists and is part of an anti-corruption 'control' mechanism. Detecting, proving and punishing serious improper conduct in public officials is a control mechanism within a regulatory, legal framework.

Ethical rules and standards should never be framed as rules and laws about right and wrong actions: these are control mechanisms. That is not what ethical rules and standards can do or ought to seek to do. The essence of ethical decision-making is the disciplined exploration of doubt.

Ethics is about confronting dilemmas, not solving problems. Often, the consequences determine whether an action is right or wrong. The merit of a particular choice may depend on the good it achieves in a given situation. It is rarely possible to make the

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6 Janus Bertok, Getting the Public Ethics Right, 7 July 2000. OECD Observer <www.oecdobserver.org>

"right" choice unless all facts are known. Most situations are problematic. Is it "right" to subject a public officer such as a policeman to a prolonged and public investigation because someone suggests he may have acted improperly? One of the factors we rarely take into account in such actions is the consequences that may flow to the officer concerned, his or her family and colleagues, the workplace culture, and public trust. Which would do the least harm: to create workplaces where good people can't bear to work because they feel distrusted, or where cautious, defensive decisions and positions are taken by honest officers because they unreasonably fear other, probably equally honest officers?; or to create an environment of 'legitimate expectation" that people will behave properly?

A government climate that eliminates or diminishes corruption is only achievable by creating an ethical culture, not a culture of mere or apparent compliance with rules: one in which the ethical principles under-pinning the rules are understood, discussed, approved and willingly implemented. Robert Putnam found in his review of regional government in Italy, Making Democracy Work,[7] that the most effective and efficient governments were to be found in regions where people voluntarily participated in public affairs and set up strong networks of community associations, with resilient connections, in which there was little patronage but an expectation of equality, and the people were, '*bound together by the horizontal relations of reciprocity and co-operation, not by the vertical relations of authority and dependency. Citizens act as equals, not as patrons and clients, nor governors and petitioners.*' Putnam also found that the population in such cultures was much more willing to obey the laws, and expected others to do so.

Creating an ethical culture is a long-term project. The culture cannot be forced, but it can be modelled and it can be encouraged to grow.

I have said that ethical standards should not be framed as laws or disciplinary rules, and that too often, the two are confused, to the detriment of both ethics and the law. Ethical principles are **guidelines to help detect, and find appropriate resolutions to dilemmas.** Ethical standards are the principles of thinking and the expectations of behaviour in a community ruled by law, but not the law itself. They are the processes that help us to detect dilemmas, analyse and explore possible solutions rather than providing a single, directive course of action. Ethical standards enable the best possible decision to be taken given knowledge of the facts, the ability to evaluate the likelihood of consequences of possible courses of action, and the skills and tools to develop strategies to deal with them.

The tools for ethical decision making include codes of conduct, but frankly I have generally found them perfectly useless. People need to apply them. "Motherhood statements" do harm if they are stuck on the wall but not put into daily practice. Ethical cultures grow in an environment in which discussion of dilemmas is

[7] Putnam, Robert D. Making Democracy Work: Civic Traditions in Modern Italy. Princeton University Press, New Jersey. 1993.

encouraged and supported; where people learn and get experience in applying them, and which discourages breaches through sanctions – but also gives incentives and rewards for good conduct. They depend on authoritative, not authoritarian leadership, and leadership by example, and transparent and accountable management. Ethical 'standards' should be familiar throughout the workplace, and be seen to apply universally: to the public services, any particular agency and, equally, to the anti corruption body and the parliamentary committee and the Parliament to which it reports. Ethical standards need to be audited.

Suggestions for the role of a Parliamentary Oversight Committee

I have some suggestions about the role of a parliamentary oversight committee in setting ethical standards.

I suggest that such a committee adopt terms of reference and ways of operating based on explicit ethical principles and statements such as the following:

- Its role is part of the anti-corruption body's function: to help to develop and sustain the people's trust in government;

- It cannot replicate the anti-corruption control function – investigation, arresting and enabling prosecutions or disciplinary intervention and punishment of serious improper conduct. That is why it does not need to possess operational information about particular allegations or ongoing investigations. But the Committee has the right to expect to be given useful and accessible information;

- This should include information the anti-corruption body has obtained and should have analysed about not only trends, prevalence and the effects of corruption on the public purse, but also the effects of corruption on others, from the corrupt officers and their colleagues to their families and other victims – such as the children sexually preyed upon by public officers - and also on public trust in government. Every act of corruption has a social context and consequences. The agency should also give information about what it has done to ensure that proper action is taken by the public sector itself to establish an ethical culture and other effective measures to identify and prevent opportunities for corruption being realised, through its own, internal control, guidance and good management;

- The Committee cannot manage the anti-corruption body, but it should also require solid information about how the body itself is performing its public function and managing itself.

  'Confidentiality' can be an excuse for withholding information unnecessarily, avoiding transparency and accountability: the inscrutability of those possessing

power should be defined and limited by their real function. As Justice Michael Kirby told the National Crimes Commission Conference in 1983[8]

> *'In an understandable endeavour to make the body independent, so that it can pursue its targets without the risk of interference by corrupt or unsympathetic politicians, there is a very real danger of creating an institution which is largely unaccountable to the democratic elements of our government; unable, because of the secrecy of its operations, always to justify its work and its position publicly; prone, by the nature of its mission, to take on an evangelistic, even messianic role; and able, by the sharing of selected secrets, to win over even initially sceptical or unsympathetic administrators or politicians admitted into its secret world and to its assessments and points of view.';*

- The Committee must have reason to assure the people through their elected representatives in the Parliament that public faith in government is justified *because it has evidence of its integrity*, and that it is more likely than not that public servants are ethically involved, acting in the public interest and for the common good, because their employer is well-managed and has the systems, checks and balances in place and constantly renewed to control and guide the culture of the workplace. The Committee should inform itself on the quality and development of ethical standards in government generally: an ethical culture is not the sole responsibility of the anti-corruption body, but the whole of government;

- There is no 'expertise' required to oversee a powerful government agency. It is the role of the members of a parliamentary oversight committee to ask and insist upon adequate answers, particularly to the 'dumb questions' that their constituents might want to ask; even if, or because experts and what John Ralston Saul[9] called 'heroes' patronise, avoid or seek to obfuscate in their replies;

- It is a legitimate function of the Committee to require to be satisfied that the executive 'watchdog' on government, itself operates in an ethical way.

We can predict performance problems and inefficiency and the likelihood of unlawful and improper culture in an organisation, by looking at how it is managed.

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8 Cited in the Report of the Joint Committee on the National Crime Authority's Third Evaluation of the NCA.

9 Saul, John Ralston. The Doubter's Companion: A Dictionary of Aggressive Common Sense. Penguin, 1995.

In Professor Lois Bryson's review of the circumstances that led to complaints of systemic sexual harassment and discrimination in the navy ten years ago,[10] she also reviewed the research and experience of anti-discrimination bodies. Summarising, she found that unlawful discrimination, harassment and victimisation was most likely in workplaces in which information (and power) was not shared, decisions taken or changed without explanation by often informally powerful supervisors; where personal relationships and preferences substituted for merit, 'leaders' were in a position to prevent complaints from being made, and hierarchies were self-perpetuating.

A Parliamentary oversight committee is entitled to be satisfied that the anti-corruption body is well-managed, that its culture does not encourage or condone unnecessary secrecy, cliques or circles, covert power or communication networks, discrimination or harassment: that it regularly audits its own culture to detect and eliminate these and other unethical practices and attitudes; that it has effective grievance and disciplinary processes; and that the body itself communicates internally as well as publicly in a way that encourages and develops trust and cooperation; and

- It may also be appropriate for the Committee itself to take the initiative to explain and if necessary enter into public debate to defend or give reply on behalf of or in support of the anti-corruption body when it is subjected to unreasonable and unfair attacks – as Attorney Generals used to do when Courts were unable to defend their decisions and their independence at the same time. The committee should establish a protocol for the circumstances and manner in which that might be appropriate.

The Committee itself must be sure that it, too, meets ethical standards by:

- Ensuring it liaises effectively with whatever Parliamentary mechanism exists to maintain proper ethical standards in its Parliament;

- The Committee being able to identify and manage its own ethical dilemmas, exploring doubts and debating solutions.

  There is, for example, a potential conflict of interest between the duties of Members of Parliament and their investment in their own political success within any political party to which they may belong. Members should be aware of and able to identify such dilemmas and take proper action to avoid or handle this.

  There may be another in oversighting the anti discrimination body with such 'messianic zeal' that this may interfere with its capacity to do its 'control' job;

[10] Bryson, Lois. Dealing with a Changing Work Environment: the Issue of Sexual Harassment in the ADF. A Report Prepared for the Assistant Chief of Defence Force Personnel, Headquarters, Australian Defence Force. Directorate of Publishing, Defence Centre, Canberra. 1994

and there is a third: the risk of becoming unconsciously coopted, as Kirby put it, through an excessively comfortable relationship with the body '*by the sharing of selected secrets . . . [and the privilege of being] admitted into its secret world'*. How will it watch this?; and

- The Committee – and any public sector agency or office – should seek and be willing to take the advice of independent experts to review its own culture; and to learn, if necessary change and regulate its own practices. It takes an outsider to notice that to which we have become unresponsive or with which we are over-familiar. It is easy to be satisfied about one's own ethical standards and good judgment while criticising another's.

Finally, it might be useful to remember the wisdom of the ancient philosopher, Chuang Tzu. It's on the foot of every email I send:

> *"People who make themselves useful for government service risk the dangers of intrigue and unjust punishment. Better to be useless to others, useful to oneself, and thus survive."*
>
> *Chuang Tzu 369-286 BC*

I suppose it turns on what 'useful' means to a Parliament, a government, or an Anti-Corruption Commissioner. I will leave that ethical dilemma with you.