From: Julian Grill
To: Joint Standing Committee on the Corruption and Crime Commission
Subject: CCC-Power to prosecute
Date: Thursday, 25 August 2016 9:09:01 PM

The Hon. Nick Goiran
The Chairperson
JSCCCC
Level1, 11 Harvest Terrace
West Perth WA 6005

Re, Prosecution Powers, CCC
Dear Sir,
I make the following submission to the current inquiry:-
Star Chamber like institutions have a sad history of injustice. The problem is the centralisation and concentration of power, without the essential safeguards normally expected in a jurisdiction that expects procedural fairness. Invariably the powers are ultimately abused. It sound trite, but it is true, 'power corrupts and absolute power corrupts absolutely'.
That is the unfortunate short history of the current CCC. It has misused extensive powers, in significant instances, as your Committee has already impliedly found when it considered the CCC 'public hearings' performance.
People like me and I think you, who have witnessed corruption internationally and who have appreciated the devastating effect it can have on the economy and on the fabric of society are supporters of a powerful corruption fighting body. I personally, have always, both publicly and privately, strongly advocated a robust CCC type body.
However, problems arise at the interface of the absolute extent of the corruption fighter's legal capacity and its oversight mechanisms. That has been illustrated by the Supreme Court proceedings between the CCC and Malcolm McCusker QC. Also, later, with the dispute between Parliamentary Inspector Michael Murray and the CCC, where legal proceedings were threatened. Are there effective checks and balances? Where is the line prudentially drawn? I appreciate that the question of a 'prosecutorial' faculty in the hands of the CCC is part of this broader assessment and that is what you are probably always assessing in one form or another. My point is that, with the hind sight of history, it is an area where the legislature has to be extremely careful.
My submission is that the CCC should not have the power to initiate criminal prosecutions and that it is better for our society if it continues as a competent, high powered investigative body. Further, that the DPP should be the prosecutor, in cases of serious alleged crime. That is where penal penalty is possible.
As you would recognise, I have had experience with the CCC in respect to the Smiths Beach and Lobbyist inquiries, together with the ancillary investigation, which involved Parliament. They have relevance because they give an important window on the operations of the CCC, during this tumultuous period, when the CCC wrongly assumed and acted on the basis that it had prosecution powers. These two matters went on from late 2005 to the completion of the last case in 2014. Some nine years, with public expenditure of tens of millions of dollars. It created a national media circus, with incendiary press coverage for months and years. Surprisingly for some, it achieved very little, if anything, of positive value and paid a highly negative dividend. According to public statements by the Public Sector Commissioner Malcolm Wauchope, it

seriously demotivated the WA Public Service. Several of the State's best and brightest public servant were lost. It was later acknowledged, that, overwhelmingly, those public servants committed no impropriety. I concede that steps have since been taken, including amendment to the jurisdiction of the CCC, to guard against a repeat of this situation. However, for the most part, the flawed elements of the CCC legislation remains in place.

During this period, at a government level, CCC inquiries spelled the end of the Ministerial careers of the late John D'Orazio, John Bowler, Tony McRae and Norman Marlborough. In the case of Mr Marlborough, he was forced to give up his parliamentary career altogether, it put him into a psychiatric hospital and very close to suicide. Later forensic enquiry revealed that Messrs D'Orazio, Bowler and Marlborough committed no impropriety that the CCC had any jurisdiction over. In the case of Mr McRae there was a finding by the CCC of a (and in the opinion of some highly respected lawyers, highly marginal) case of impropriety. It is conceded by the CCC that this 'finding' was made on the lesser standard of proof, namely balance of probability, rather than proof beyond reasonable doubt. Even the CCC in its later report expressly ruled out any suggestion of prosecution or other censure.

No prosecutions, or disciplinary proceedings were brought against any of the local government officers arraigned before the CCC in the Smith Beach and Lobbyist hearings, for the simple reason that they had broken no laws.

A substantial index of private citizens were subject to criminal charges (30+charges), or had charges recommended. In that respect, except for one small exception, the CCC was singularly unsuccessful.

Reputation were ruined, families broken up, careers destroyed and the taxpayer put to huge, unnecessary expense.

Additionally the recommendation from the two CCC reports were overwhelmingly ignored.

WA was given a national and International, unearned reputation as a focus of corrupt activity. Why did this come about and how did it happen? I have just about completed a book on this subject. It has taken some time, but it is a complex issue and given all of the misleading publicity on the subject, it has been essential that my research was beyond question. I won't try to regurgitate my book here, but I venture some comments. Also I shall try to keep away from the vexed question of motivation.

There is evidence to believe that the CCC dramatically over reached itself and misused it powers, in these inquiries. In the case of Smith's Beach I suggest that if competently handled, the inquiries should not have extended beyond the secret hearings in March 2006. Numbers of innocent reputations would have been spared. In the case of the Lobbyist inquiry, it should never have commenced, as there was never evidence of corruption or criminality in the hands of the CCC. For a long heady time the CCC was the toast of the town, (and the nation) and the darling of the media. It could do no wrong. It was unrealistically perceived as being Australia's foremost corruption fighter. It seems to have believed its own media.

There is no doubt that the CCC had awesome powers and state of the art electronic surveillance technology. But that technology was misused to terrify people like my wife. When Lesley wrote to the CCC begging for the devices to be removed from our home and from our front gate area, they refused. The CCC simply rejected the recommendation of PI, Chris Steytler on this issue.

The failure of the two enquiries to establish either corruption or crime, was, I would argue, due to basic factors. Firstly the structure and jurisdiction was suspect. It seems that they were really not enquiries into 'Public Officers'. After the initial, very early, Smith Beach investigations, the probes, in reality became inquiries into Burke and Grill, with public officers being like props in a movie. There were no search and surveillance warrants issued against public officers. The only consistent thread, throughout the long process, was the business dealings of Burke and Grill. I

contend that if the CCC had discovered illegal activity by Burke and Grill it should have taken it to the police, who clearly had jurisdiction. You do not need to be reminded that the high profile case of Margaret Cunneen and ICAC in NSW made it abundantly apparent that CCC type bodies are set up to have jurisdiction in respect to public officers in carrying out their public duties, not in relation to private citizens.

The Smith's Beach matter was run and presented to the media and public on the premise that Canal Rocks made improper payments to Busselton Shire Councillors so as to induce them to support the Smith Beach Development Plan. A version of events condemnatory of Canal Rocks was presented. There was another exculpatory narrative that could have placed a different light on events. It was never allowed and there was no other forum to present it. I shall not examine the entrails of the CCC's improper payments' argument, but suffice to say that the CCC completely abandoned this thesis, when it brought down its report, many months after the hearings. You shall know from my evidence before your committee's inquiry into CCC 'public hearings' that the CCC made other irresponsible inferences of bribery and wrongdoing on other related matters, that created electrifying headlines, but where of no substance. In all of these cases the assertions were ever so quietly dropped, without any correction being made. In other words the false impression never abated and still lingers today, in some circles.

As indicated above, the truth about this, is that the CCC should have desisted in its Smith's Beach enquiry, once it became aware that the wheels had fallen off its 'improper payments' argument. I contend that this awareness happened, or should have happened, in the twelve months leading up to the public hearing in later October 2006, at the latest. That is especially the case because there were extensive private hearings in March 2006 when all of the salient facts were available. Instead, once it had reached this inflexion point, the CCC merely amended the nature of the inquiry into one where it embarked upon a search for discrepancies in witnesses' testimony took place. That laid the groundwork for later allegations that witnesses were misleading in their testimony. It was almost as though it had already decided who were the guilty parties and wanted a Stalin type show trial. I would add that although it brought many (30+) such charges, it was no more successful in this endeavour than is was in proving corruption. But it destroyed people's lives and ran up considerable legal costs. I come back to this shortly, as it is close the core of my submission.

What I call the Lobbyist inquiry of late February 2007 was really an extended fishing trip into the lobbying activity of Burke and Grill. A number of our client were dragged in, a number of our assignments were examined in detail. Public officers were involved, but as I say, essentially as props or bit actors. This set of enquiries, once the CCC reports dribbled out over two years produced nothing that amounted to impropriety. The nearest thing to it was the questionable and legally untested 'finding' against Mr McRae. However, the criminal innuendo, public condemnation of witnesses, media commentary and political outcomes were spectacular.

From my perspective the matter spiralled out of control and the issues assumed ridiculous proportions near the end of the Lobbyist hearings. There are many instances but it is best illustrated by the unethical dismissal, as Federal Minister, of an innocent and decent Senator Ian Campbell, for meeting with a group from the Turf Club that included Mr Burke. There was an artificial form of strict liability developed, so that Mr Burke was considered so 'toxic' that the slightest engagement with him rendered a person unfit for public office. It was insanity.

This grotesque situation was developed out of the CCC hearing because of a set of circumstances under the control of the CCC. Those circumstances included:-

1. All of the normal common law procedural fairness processes were confiscated from witnesses when the CCC adopted the equivalent of the Cole Royal Commission procedural rules. Witnesses could not question witnesses, give evidence in our own right, call exculpatory witnesses, publicly comment on the evidence, or appeal findings. Hearsay evidence and unfair speculation were the order of the day. This allowed a one

sided narrative to be presented by the CCC without any fear of contradiction, qualification or explanation. Procedural fairness was completely denied.

2. The CCC kept witnesses in the dark as to the nature of the matters being investigated and the underlying accusations. This was an active process. By deliberately taking witnesses by surprise it made it impossible to prepare to give testimony and it deprived witnesses of the ability to give accurate evidence. A good example of the lengths that the CCC went to in this respect can be seen in the evidence of Chief CCC Investigator RM Ingham, at pages 34 to 48 in the Magistrates Court case of CCC v Brian Burke, before Magistrate Bayly on the 3rd of March 2010.
3. The CCC never withdrew highly damaging direct and implied accusations, even when it must have realised that those accusation could not be proved. The CCC reports ultimately did not mention the initial hair raising matters canvassed at the hearings. There was only one apology that I am aware of.
4. Because the CCC reports came out up to two years after the hearings, the public and apparently the media, appeared not to remember the initial reputation destroying accusation. The public was not in a position to compare the respective white hot allegations made at the hearings, as against the report findings. But by the later date, the unenlightened public was thoroughly prejudiced, by an accumulation of damaging imputations against the witness. On several occasions, prior to hearings, the CCC improperly fed selected and highly prejudicial information to the media, in the way of 'exclusives'. All of the information provided later proved to be incorrect. However it was ruinous to the witnesses standing. These unethical actions alone, makes suspicion of the CCC's ambitions and methods highly relevant.
5. When the CCC raided Mr Burke's home and home office on the 8th of November 2006, the media were on hand to take highly detrimental photographs. There could only be one source for the tip off. It was not the action of an impartial legal body.
6. It was admitted by the CCC Chief Investigator, in the case referred to above, that the CCC eavesdropped on at least one telephone call between Mr Burke and his counsel Grant Donaldson. It later used that information in its interrogation. Legal professional privilege was subverted.

The Lobbyist inquiry had all of the hallmarks of an afterthought. The 'associated' Smiths Beach inquiry had been underway for about a year when the CCC raids on Mr Burke and my home was undertaken on the 8th of November 2006. It was about then, that Stephen Hall, Counsel Assisting announced the 'extension of the Smiths Beach matter' to investigate possible improper activity by public officers in relation to their dealings with Burke and Grill. If you look at the press from that time you shall see conflicting statements reported from the CCC as to nature and timing of that 'extension'.

There are two points to be made about that situation. The first is that the hearings were convened in haste and were ultimately disastrous, partly because insufficient time was given to preparation. The second is that the 6th of November 2006 was about the time that it became publicly apparent that the CCC's core allegation in the Smith's Beach matter would just not fly. Apart from everything else, expectations in the media and the public, for the exposure of substantial criminality and corruption, had been raised very high. As we now know, such exposure did not eventuated. The CCC was never able to make a finding of corruption and it failed dismally in the courts. The reality was, that despite all of the exaggerated hype, there was never ever any hard evidence of corruption or serious criminality.

My strong suspicion is that the CCC realised this, likely well before the Smiths Beach public hearings commenced. I can't prove that, but I can say on the advice of some of the best lawyers in the State, that the CCC, if competently advised, should have reached that conclusion well before it proceeded with court action. That is, at the very least, the CCC was reckless.

My fear is that, for whatever motivation, (that is something that I do not want to discuss now), the CCC made targets of selected witnesses. As I have mentioned, once the initial central allegations against those targets in the Smiths Beach matter was found to be unprovable, the CCC looked to bring charges alleging that the targets gave misleading evidence. It also opened a

new front with the Lobbying inquiry. The danger is that it took this action, not because it had evidence, or even some third party allegations of wrong doing, but in the hope that in the mountain of material it had seized from our homes and with the voluminous emails and tapes of telephone conversations it already had on hand, it could fashion findings and charges.
This view is supported by the bizarre departure of Commissioner Hammond. That is, after he had heard all of the testimony in both matters, but before he had brought down the reports and before he had a replacement. I have concrete evidence that he had completed the Smith's beach Report, circulated is to witnesses for final comment and received that comment back. There is public evidence that he intended to table both reports before he retired. There is also indisputable evidence that his draft final report on Smiths Beach was substantially different to that tabled by the CCC many months later. The CCC, in its final report, made adverse findings, some at least, of which findings, Commissioner Hammond (who heard the Testimony) was not prepared to make and did not make. There are many unanswered questions from that set of circumstances, which I shall not canvass here.
What is clear however, is that the CCC is an immensely powerful body that operates largely in secret, sets its own terms of reference and makes its own procedural rules. It is very different from the police and from a Royal Commission. It is largely only accountable to itself and is not subject to the normal checks and balances that apply to courts of law. My experience with the CCC in the two inquiries mentioned above is that it has the propensity to cause immense injustice. Because of is largely secret operational methods it is extremely hard to oversee. Its (of necessity) secrecy and associated factors allow the potential for rogue elements within the agency. Michael Murray and the West Australia have already identified that. Most importantly, as we have experienced, it has the ability to target blameless witnesses as it did in these two aforementioned inquiries and destroy them. People may argue that, if strictly managed, this would not happen. But the fact that it has happened, necessarily implies that it can go down that road again. You no doubt have seen such excesses before with similar tribunals the world over. All that is required is the right set of circumstances for gross injustice to be brought about.
The faculty to bring criminal charges is a daunting capacity that has to be exercised with great discretion. Most people's reputations and sometimes their whole life's course can be demolished by one unfortunate charge, even if it is not successful. It should never be available in circumstances where it can be unfairly or vindictively used against selected targets. Intrinsically, because of its structure and role, the CCC is not suited to exercise the caution required in making decisions to bring penal charges. Past experience demonstrates that fact. In WA we have a system of prosecution, which although not perfect, offers some protection to the public. The CCC already has very substantial powers that other investigative bodies do not have. Granting it the added power to criminally prosecute would be to concentrate a dangerous excess of power in what is first and foremost an investigative body.
I have data that strongly suggests that the DPP were of the view that the CCC did not competently assess and frame some of its prosecutions coming out of the two inquiries and ancillary matters that I have referred to. The DPP had to massively amend and then finally abandon the most serious charges presented by the CCC. I make the point that if the CCC is handed a prosecution power, it would have to greatly upgrade its legal expertise in that specialist area. I would also suggest, that by necessity, such a power could only, responsibly, be conferred, given the secret nature of most of the CCC's operations, if there were greater transparency. Such further transparency may impede the CCC in its important work, where confidentiality is indeed important.
Lastly, I would venture the opinion that too much has been loaded on to the CCC. Given WA's history, if the CCC could just keep the police force honest, it would be doing a great service for

WA.
I am prepared to provide hard evidence for the factual assertions that I have made above.
Yours faithfully,
Julian Grill.

Julian Grill
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