

SUBMISSION TO THE JOINT STANDING COMMITTEE ON THE CCC

INQUIRY INTO THE CCC BEING ABLE TO PROSECUTE ITS OWN CHARGES

TERMS OF REFERENCE

The Committee will enquire into:

a) the operation of the State's prosecution system in relation to Corruption and Crime Commission matters subsequent to the Court of Appeal decision in the case of A v Maughan [2016] WASCA;

b) arrangements for the prosecution of offences associated with corrupt conduct and misconduct in other jurisdictions; and

c) any amendments required to the Corruption, Crime and Misconduct Act 2003 following the Court of Appeal decision in the case of A v Maughan [2016] WASCA.

I n t r o d u c t i o n

I write this submission having had adverse findings against me by the CCC in its 2007 report on the Smiths Beach investigation, and subsequently two criminal charges that were laid by the CCC. I hasten to add that I had no case to answer on the adverse findings, and was found not guilty on both the criminal charges.

Therefore my submission is not from a dispassionate bystander; rather it is from someone who has had experience with this organisation and has informed opinions about its operations.

I n t e n t i o n o f P a r l i a m e n t

It is clear from many sections in the (now) Corruption Crime and Misconduct Act that it was never Parliament's intention to give the CCC the power to prosecute. In fact the Act says one of the functions was to assemble information that could be used by others in any subsequent prosecutions.

It also says in Clause 43 that:

(1) The Commission may —

(a) make recommendations as to whether consideration should or should not be given to —

(i) the prosecution of particular persons; and

(ii) the taking of disciplinary action against particular persons; and

(b) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject matter of its assessments or opinions or the results of its investigations.

The CCC's role (in cases of misconduct allegations) should remain one of investigating, reporting and making recommendations to others as to whether any subsequent action (including prosecution) is necessary.

S h o u l d t h e C C C h a v e t h e a b i l i t y t o p r o s e c u t e i t s o w n c h a r g e s ?

The short answer is no. I say that because of my own experience with the CCC, which demonstrates a litany of incompetence and laziness on their part. For this reason checks and balances are imperative.

Separating the investigative function from the prosecution role is required.

Don't take my word for the incompetence of the CCC – read the Report of the Parliamentary Inspector about me, dated March 2008. I have included some extracts later in this submission.

The CCC required me to attend public hearings and answer questions without being told I was under suspicion of any wrongdoing. I did not have legal representation because I had no reason to suppose I was an accused person. This is the nature of CCC investigations and it is inimical to any notion of justice if that process concludes in a criminal charge.

That is the first problem. You are required to attend and required to answer questions, unlike in normal criminal proceedings where you have the right to remain silent.

You are not told if you are suspected of having committed an offence and therefore are answering questions in a vacuum. This is made worse by the fact that there is no cross-examination allowed so only one side of the story is ever told. I understand that this process contrasts with a police inquiry where you are advised of the nature of the inquiry, whether or not you are under suspicion and if a criminal charge is a possibility. You also have the right to remain silent.

The Smiths Beach report was published in October 2007 containing an adverse finding against me which read : *in agreeing to appoint the departmental officer preferred by Mr Burke to write the Department for Planning and Infrastructure (DPI) report on Smiths Beach in preference to other officers, involved a performance of duties that was not impartial* (the underlining is mine).

Unbeknown to me at the time, the CCC had interviewed 'the departmental officer preferred by Mr Burke' in May 2007. The officer denied absolutely what the CCC accused me of doing. The fact was there was no report and was never going to be a report of any kind.

This is a clear demonstration of the incompetence and bias of the CCC. The Parliamentary Inspector's report of March 2008 had this to say in the Executive Summary. It confirms the alarming incompetence in the CCC:

1. The CCC made a finding of "misconduct" against Mr Allen because (as it concluded in its Report of 5 October 2007) he had "complied" with the wishes of Mr Burke in August 2006, by agreeing to appoint "a DPI officer" (Ms Pedersen) to write a "DPI report" on Smiths Beach, in preference to "other DPI officers" (Ms Clegg).

2. Before making and publishing such a grave finding a careful and thorough investigation should have been carried out. At the very least, it would be expected that the CCC would have:

2.1 interviewed Ms Pedersen, to ascertain whether she had been "appointed" by Mr Allen to "write a DPI report on Smiths Beach"; and

2.2 interviewed Mr Singleton, Director of the Environment and Sustainability Directorate, who was the supervisor of both Ms Pedersen and Ms Clegg, to ascertain whether there was a "DPI report on Smiths Beach" written, or to be written, in August 2006, and if so, whether Mr Allen had any power to appoint Ms Pedersen to write such a report; and whether he had appointed, or sought the appointment of Ms Pedersen, "in preference to Ms Clegg"; and

2.3 interviewed Ms Clegg, to ascertain whether Ms Pedersen had been "appointed" to write "a DPI report on Smiths Beach" "in preference" to her.

3. However, of those persons, all of whom were obviously relevant witnesses, only Ms Pedersen was interviewed.

4. Ms Pedersen was interviewed by the CCC's senior investigator Mr Mark Ingham in May 2007. Her evidence did not support the finding of "misconduct" against Mr Allen, but negated it. She said that she did not believe she had ever been given any instruction by anyone to write a "DPI report on Smiths Beach"; that she had no memory of any such report; that she would have remembered if she had "had a conversation that (she) had been allocated to do a job"; and that she had "absolutely no memory" of Mr Allen ever telling her that she had been "allocated" the job of writing a report.

5. The evidence given by Ms Pedersen is not mentioned in the CCC's Report. I have not yet ascertained whether that evidence was ever brought to the notice of the Report's author. Mr Ingham was unable to tell me whether it was or not, when I interviewed him on 29 February 2008. It seems unlikely that it was, as that evidence contradicts the Report's finding.

6. The misconduct finding in the Report was not made on the recommendation of Mr Ingham, who was the senior investigator heading the investigation, in his Final Report of April 2007. Although he read the CCC's Report before it was tabled, it did not occur to him that Ms Pedersen's evidence was inconsistent with that finding.

7. Had the CCC interviewed the other obvious witnesses, Ms Clegg, Ms Cherrie and Mr Singleton (as did Ms Petrice Judge, the independent investigator later appointed by the Director General of DPI) further evidence, also inconsistent with the CCC's finding of misconduct, would have been revealed.

8. In August 2006 the DPI was not writing, or about to write, a "report on Smiths Beach". The only work on Smiths Beach then in progress was an assessment of whether the methodology used in a Landscape Study prepared by the developer's Consultants was consistent with the methodology required by the Busselton Shire TPS (the "methodology assessment"). Advice had been given to the consultant from time to time on that matter by the DPI's officers, Ms Clegg and Ms Cherrie. It did not involve, or result in, any "opinion" or "report" by the DPI on the merits of the proposed Smiths Beach development Ms Pedersen played no part in the methodology assessment. It was not within her area of expertise. Ms Cherrie took the "lead role", with the assistance of Ms Clegg, who was never excluded from it. No suggestion was made by Mr Allen that she should be excluded. When Ms Clegg and Ms Cherrie were satisfied that the consultant's methodology conformed with the TPS methodology, Mr Singleton signed a letter to confirm that.

9. No satisfactory explanation has been given by the CCC for the omission from the Report of the evidence of Ms Pedersen, nor for the failure to interview Ms Clegg, Mr Singleton and Ms Cherrie, all of whom would have given additional evidence inconsistent with the CCC's finding of misconduct.

10. The "finding" or "opinion" of misconduct expressed in the Report was made
(a) without referring to the evidence of Ms Pedersen, which contradicted the finding;
(b) without interviewing important and obviously relevant witnesses, whose evidence also would have contradicted the CCC's finding;
(c) by "inferring" from a TI conversation on 4 August 2006 between Mr Burke and Mr Allen, that Mr Allen "agreed to appoint Ms Pedersen to write a DPI report on Smiths Beach in preference to Ms Clegg", although Mr Allen did not, in fact, say that; and
(d) relying on claims made by Mr Burke to Mr McKenzie and to Mr Grill in monitored conversations, to support that inference.

11. Pursuant to the CCC's recommendation in its Report, that the Director General of the DPI "give consideration to the taking of disciplinary action against Michael Allen", the Director General appointed Ms Petrice Judge, a senior and experienced public officer from another department (Premier & Cabinet) to conduct an investigation, pursuant to Section 81(2) of the Public Sector Management Act. Ms Judge conducted an admirably thorough, objective and professional investigation into the allegation of misconduct, in contrast with the CCC, which had not taken into account the evidence of an important witness (Ms Pedersen), failed to interview witnesses whose evidence was obviously (and admittedly) relevant, and relied heavily on hearsay.

12. By letter of 13 February 2008, the CCC "withdrew" its opinion as stated in its Report, and "substituted" another "opinion", that Mr Allen had "agreed to arrange for Ms Pedersen's involvement in the DPI's assessment of the proposed development at Smiths Beach, in preference to other officers". This was only after I had pressed the CCC, several times, to identify evidence establishing that there was a "DPI report" which, as "found" by the CCC in its Report, Mr Allen had agreed to appoint Ms Pedersen to write, and following the CCC's receipt of Ms Judge's report, which established that there was no such "DPI report", and that Ms Pedersen had never been asked by Mr Allen to write "a report".

13. An obvious problem with the vaguely expressed "substituted opinion" (eg what does "Ms Pedersen's involvement" mean?) is that, as with the original opinion in the Report, the CCC has not identified any evidence to support it, and the evidence of Ms Pedersen, both in the CCC interview of May 2006 and when interviewed by Ms Judge, as well as the other witnesses interviewed by her, refutes it.

14. The CCC failed in its obligation to state, in the Report, its reasons for the "misconduct opinion". In particular, it did not identify
(a) the evidence said to support each element of its assertion that Mr Allen agreed to arrange for Ms Pedersen to write a DPI report in preference to Ms Clegg; or
(b) the evidence said to establish that Mr Allen did not perform his functions in an "impartial manner" (an element of the statutory definition of misconduct); or
(c) the objective criteria for "dismissal" (a further element of the statutory definition) or the evidence establishing that the case fell within those objective criteria.

15. The CCC commented on my previous report, concerning its finding of misconduct by Mr Frewer, to the effect that there was merely a "difference of opinion" between the Parliamentary Inspector and the Commissioner, as to the interpretation of the evidence. That is not so. In Mr Frewer's case, and now in Mr Allen's, the CCC's investigation was demonstrated to be inadequate. Its "opinion" of misconduct was unsupported by the evidence, and was contrary to the evidence which the CCC had, as well as other evidence that a full investigation would have

obtained. It is not merely a "difference of opinion" as to the interpretation of the same evidence.

16. The CCC failed to comply with its statutory obligation under section 86 of the Corruption and Crime Commission Act. The notice which it gave to Mr Allen, of proposed "adverse comment", in reply to which he made representations to the CCC, was substantially different from the basis for the opinion stated in the Report, of which no notice was given to him.

17. The CCC contention, that the Parliamentary Inspector (who is an "officer of the Parliament") cannot review and report on an adverse finding made in a CCC Report which it has tabled in the Parliament "including any factual errors, or inadequacy of the evidence relied on by the CCC to support the finding", is incorrect. That would mean that the power of the CCC to make and table findings of "misconduct" by any public officer, (with the serious consequences that follow) would be absolute and unchecked, and not subject to review and criticism by the Parliamentary Inspector. That is contrary to the intention of the Parliament, manifest both in sections 195 and 196 of the Act, and the Parliamentary debates on the CCC Bill.

18. The CCC has failed satisfactorily to explain in the Report why it decided to publicly examine Mr Allen, with (foreseeable) consequential damage to his reputation and career.

19. The delay between Mr Allen's examination, in November and December 2006, (when he was, to use his term, "pilloried in public") and the publication of the CCC's Report in October 2007, was unacceptable and unfair to him. It was not until then that the Director General, acting on the CCC's Recommendation in the Report, commissioned an objective and more thorough investigation, which found that he had "no case to answer".

Recommendations

20. The CCC should now conduct (as I have requested the Commissioner on 4 March 2008) an internal investigation to determine why no mention of the crucial evidence of Ms Pedersen was made in its Report tabled in the Parliament on 5 October 2007 (and whether that evidence was considered) and then report to the Parliamentary Inspector, for his consideration of whether to hold an inquiry, pursuant to Section 197, into whether any CCC officer has been guilty of "misconduct".

21. Investigative officers of the CCC should be instructed that there must be the same thorough and objective investigation as for the investigation of an allegation of a criminal offence, into an allegation of "misconduct", because of the serious consequences of a finding of misconduct. They should also be instructed on the danger of placing reliance on "hearsay".

22. A decision to publicly examine a person, and then to put to that person damaging allegations in public, ought not to be made before that person has been privately examined, the allegations put to him or her, and a full and thorough investigation carried out (including any matters raised by that person in response) to ensure that there is a sound evidentiary basis for the allegations.

23. When the CCC has found (or made an "assessment") that a public officer is guilty of misconduct, and has decided to recommend to the head of the relevant department that "consideration be given to disciplinary proceedings", as a general rule the CCC should not table a report with its finding of misconduct before the relevant department has, in accordance with the CCC's recommendation, commissioned an independent investigation, and its report on that investigation has been received and considered by the CCC.

24. The CCC should publicly acknowledge that it was in error in finding that Mr Allen was guilty of misconduct, and withdraw not only the "opinion" of misconduct by Mr Allen as expressed in its Report of 5 October 2007 (which it withdrew on 13 February 2008) but also its "substituted" opinion of 13 February 2008, as neither opinion is supported by evidence, and both are inconsistent with evidence which the CCC had, but did not refer to in its Report, as well as the evidence of other relevant witnesses not interviewed by the CCC.

It is worth noting in his recommendations, the Parliamentary Inspector wanted information to determine if any CCC officer was guilty of misconduct (for not disclosing the record of interview with Barbara Pedersen). This goes directly to the competence of the organisation.

The Parliamentary Inspector also recommended the same level of investigation be undertaken for misconduct cases as for criminal cases, clearly highlighting the shoddy and superficial investigation that had been done.

The CCC recommended I be investigated for possible disciplinary action. The investigation conducted by the Department of Premier and Cabinet and held between October 2007 and January 2008, interviewed a number of material witnesses the CCC failed to interview. It concluded I had no case to answer.

Why did the CCC not interview the various officers interviewed by the Department of Premier and Cabinet? They were implicitly named in the wording of the adverse finding (i.e. 'in preference to other officers'). Was it incompetence? Laziness? Both of those, but probably more relevantly it did not want to discover that the finding they made against me had no basis in fact. Their finding was all based on hearsay evidence, which would not be admissible in a court of law.

However, without waiting for that process to be completed, in November 2007 criminal charges related to false testimony were laid by the CCC's Senior

Investigator. This, of course, is where the Appeal Court judgement becomes relevant because the question is whether those charges were laid lawfully. That will be for others to determine. However, one thing is for certain – if those charges were laid unlawfully there should not be any retrospective legislation to make them lawful. That would be completely contrary to all notions of natural justice and fairness.

When the CCC investigates, it uses the test of 'on the balance of probabilities' to determine if a particular finding should be made. That is a lower standard than the criminal test which is 'beyond reasonable doubt'.

Therefore, if the CCC was to be given the powers to prosecute it will need to be far more thorough in its investigations, and be far more diligent in its application to the task at hand in order to make a criminal prosecution successful.

Its track record demonstrates it cannot attain those standards.

As a result of the Court of Appeal decision we are now faced with the reality that the CCC will be able to use information gathered during investigations, including during questioning at public hearings, to launch prosecutions. This is unfortunate because these are the questions you are forced to answer. The CCC is also not bound by the law of evidence, compounding the powers they can line up against an individual. This is completely unfair and contrary to all principles of natural justice.

What makes it worse is that my understanding of the CCC Act gives their officials immunity from any action being taken against them if they have done wrong. Added to that is the impossibility of 'discovering' any documents from them if you even contemplated any such action. Does the Police Service have the same level of immunity – I don't think so.

All of this points to the need to keep some restraints on the organisation. They are already generally recognised as judge, jury and executioner when it comes to the delivery of reports, especially those with adverse findings. It would not be appropriate nor in the interests of natural justice and fairness for them to be prosecutor as well. The legal system requires a robust series of checks and balances, which would not be served by providing the CCC with power to prosecute.

The CCC as it stands today appears to have a number of agendas. Is it trying to pursue the government of the day's law and order agenda? Is it too close to government? This certainly appears to have been a recent concern in Queensland with their Crime and Misconduct Commission where the acting Chair of that Commission was in discussion with the Premier's office about strategies to defend the government's law and order policies.

Is the CCC hell bent on prosecuting as many people as possible because that looks like a good KPI? Don't worry about how many may be successful.

During the Smiths Beach inquiry the CCC had a very close relationship with the media and actively sought as much media exposure as possible. The closeness of that relationship was demonstrated when the media were all present when Brian Burke's house was raided and his computers and records removed; clearly a tip-off from the CCC.

This was not in the interests of justice or any notion of fairness and led to many descriptions at the time of the whole thing degenerating into a media circus.

The rampant self-promotion of the CCC was all designed to demonstrate its success as an organisation based on the number of its victims that may be prosecuted. This motivation to prosecute should play no part in the role of the CCC because it would distort the way investigation are undertaken. Does the Police Service advertise when it lays charges against people (other than high profile cases)?

A further illustration of the cosy relationship between the CCC and the media came in early 2007 when the original CCC Commissioner Kevin Hammond was giving one of his valedictory addresses to an audience of public servants at a breakfast at the Hyatt Hotel. All sections of the media were present – TV, radio and print. When questions were invited my wife Beth asked Mr Hammond if any findings produced in the Smiths Beach report were to be supported by evidence. Mr Hammond was clearly shaken by this question and after hesitating answered 'Ask Sean'. This was a reference to Sean Cowan (then) from The West Australian who was in the room. Cowan had produced highly defamatory articles about me in The West where I was described as one of Burke's lieutenants seeking advancement. The West was forced to publish an apology for this egregious slur.

The point is, it illustrates an agenda being pushed by the CCC with the support of the media to bolster its public profile.

In a November 2014 Discussion Paper on Prosecutions arising from the (New South Wales) ICAC it was suggested by the Police Integrity Commission that a prosecutorial role for the ICAC would be inimical to its investigative function and would potentially impeded its investigations because it would have to consider whether the evidence it was gathering could be useful for (or used in) a criminal prosecution.

The risk is that if powers of prosecution were available then investigations undertaken by the CCC could start from the point of view of 'there must be convictions at the end of this'. This would necessarily skew the nature of the investigations.

The Discussion Paper also quoted the following argument from ICAC itself which, for me, is a definitive statement as to why powers to prosecute should not be with the CCC:

*The powers of the Commission (i.e. ICAC) to compel production of documents and the attendance of witnesses, the availability of covert forms of surveillance, the absence of any rules of evidence, and the abrogation of the right to silence and the right against self-incrimination for the purposes of an inquiry under the Act are all hallmarks of an investigative body with coercive powers. **There is a sharp divide which is recognised in theory and in practice between investigative proceedings and judicial proceedings** (my emphasis). The powers of the Commission derive firmly from the former, whereas the rules of evidence and procedures that are critical to a fair trial are definitive of the latter.*

Clearly if the CCC had powers to prosecute it would have an internal conflict of interest in the way investigations and prosecutions are carried out.

Conclusion

The CCC was set up to investigate, report and recommend. While its findings have often been greeted with an assumption of guilt when an adverse finding is made, this is not the case and should never be the case.

The CCC does not have the skill set to do the level of investigation needed to launch prosecutions. Its record of successful versus unsuccessful prosecutions is testament to this. Given the extraordinary powers the CCC already has to investigate, you would expect 100% success when any case ends up before the courts. The fact that the successful prosecutions falls well short of that figure confirms their incompetence, lack of ability and motivation by other agendas to gather the evidence necessary for prosecutions to be initiated by the CCC.

The power to prosecute should remain with others. The CCC should remain in the role of evidence supplier, not prosecutor.

Mike Allen

6 August 2016