

THE ROLE OF THE CRIMINAL JUSTICE COMMISSION IN CRIMINAL JUSTICE ADMINISTRATION (with an emphasis on Investigative Hearings)

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*Text of an address to AIAL seminar,
Brisbane, 13 June 1995.*

In Australia, the last decade has seen the emergence of permanent statutory agencies which, in effect, are standing Royal Commissions or Commissions of Inquiry. These bodies include the National Crime Authority, the Australian Securities Commission, the NSW Crime Commission, the Independent Commission Against Corruption (ICAC) and, in Queensland, the Criminal Justice Commission (CJC). In addition, Queensland established the Public Sector Management Commission and the now defunct Electoral and Administrative Review Commission (EARC) with significant coercive powers to inquire.

Functions of the CJC

The CJC has functions of inquiring and reporting. It derives its authority and coercive powers from the *Criminal Justice Act 1989* (Qld) (CJ Act).¹ The CJC is a unique organisation combining under the one umbrella activities as diverse as:

- investigation of complaints against police and public sector;
- complaint resolution;

- corruption and organised crime investigation;
- corruption prevention education;
- witness protection;
- law reform research; and
- intelligence gathering.

However, the public perception of its primary function is undoubtedly that of the investigation of corruption and organised crime through the conduct of associated investigative hearings.

In discharging these functions and responsibilities, the CJC is required to make administrative decisions on a daily basis which may be subject to judicial review under the *Judicial Review Act 1991* (Qld) (JR Act). In addition, there is a specific mechanism in the CJ Act for the review of the activities of the Official Misconduct Division (OMD).² The OMD is the investigative arm of the CJC.³ There are other specific provisions in the CJ Act which subject the exercise of the CJC's coercive powers to Supreme Court scrutiny. The *Freedom of Information Act 1992* (Qld) (FOI Act) also applies to the CJC. Therefore, the operation of the CJC provides a fertile field for the application of administrative law.

Natural justice

The CJ Act also has a specific requirement that the CJC must act in accordance with the rules of natural justice or procedural fairness in the

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discharge of each of its functions and responsibilities. Section 22 provides that:

The Commission must at all times act independently, impartially, fairly and in the public interest.

This obligation was originally imposed by paragraph 3.21(2)(a) in a Division of the Act entitled 'Procedures for Taking Evidence'. In *Ainsworth v Criminal Justice Commission*,⁴ the High Court of Australia decided that the application of this provision was not confined just to formal hearings but applied to any step, no matter how informal, taken in the course of, or in relation to, the functions and responsibilities of the CJC, including researching and generating proposals for law reform.

Subsequently the CJ Act was amended and the provision was transferred into a general Division of the Act which delineated the functions and responsibilities of the CJC.⁵ The CJ Act does not indicate what constitutes unfairness in a particular situation; therefore, it is necessary to turn to the general law to ascertain the content of the entitlements to procedural fairness in a particular case.

Another two provisions of the CJ Act emphasise the requirement that the CJC afford natural justice in the discharge of its functions and responsibilities. Paragraph 21(2)(b) requires CJC reports to present a fair view of all submissions and recommendations made to it in connection with the matter - whether they support or contradict the CJC's recommendations. Paragraph 93(1)(b) requires CJC reports to include an objective summary of all matters of which the CJC is aware that support, oppose or are otherwise relevant to its recommendations. The CJC may also comment on those matters.⁶

Judicial Review Act 1991 (Qld)

Any administrative decision made, or proposed, or required to be made under

the CJ Act may be reviewed under the JR Act.⁷ This includes conduct relating to⁸ a decision or even failure to make a decision.⁹

A review application can be made by any entitled person. The CJC is obliged upon request to provide a written statement of its reasons for a decision,¹⁰ unless the decision relates to:

- the investigation or prosecution of people for offences against the law of Queensland, the Commonwealth, another State, a Territory or a foreign country;
- the appointment of investigators for the purpose of such investigations;
- the issue of search warrants under Queensland law (including under section 72 of the CJ Act);
- a Queensland law requiring:
 - production of documents or things;
 - the giving of information; or
 - the summoning of witnesses;
- the investigation of people for misconduct (including official misconduct) under the CJ Act;
- the initiation of matters in the original jurisdiction of a Misconduct Tribunal;
- the performance of the functions of the Intelligence Division under section 58 of the CJ Act;
- the role and functions of the Witness Protection Division under section 62 of the CJ Act;
- the entry of premises by CJC officers under section 70 of the CJ Act;
- the attendance of prisoners or patients before the CJC under section 81 of the CJ Act;

- the use of listening devices under s 82 of the CJ Act;
- the exercise of powers of CJC officers under section 84 of the CJ Act.¹¹

Some of these exceptions apply expressly to CJC decisions; others apply by implication through the exercise of powers such as issuing notices. These usually require the production of documents or things, the giving of information,¹² and the summoning of witnesses¹³ - all of which are an integral part of the conduct of investigative hearings.

Four applications concerning CJC decisions have been made to Queensland courts under the JR Act. Two of these applications have been determined by the Court of Appeal.

In *Walker*¹⁴ and *Behrens*,¹⁵ the applications concerned decisions by the CJC Complaints Section not to recommend that disciplinary action be taken against police officers. In *Walker*, White J considered the authorities and decided that such a decision is reviewable under the JR Act. *Behrens* was decided by the Court of Appeal. In each case the applications were dismissed.

In *Boe*,¹⁶ the applicant succeeded. This concerned a decision by the CJC not to hold a hearing as part of its statutory responsibility to monitor and report on the funding of criminal justice agencies, including the Legal Aid Office and the Director of Prosecutions. This is a responsibility which is discharged through the Research and Co-ordination Division. De Jersey J decided that the CJC had been influenced by an irrelevant consideration, or had failed to take account of a relevant consideration. It was also decided that the applicant, a solicitor practising mostly in the criminal jurisdiction with a majority of clients funded by Legal Aid, was 'a person aggrieved' within the meaning of subsection 7(1) of the JR Act. His Honour

held that, consistent with decisions in other jurisdictions, this phrase should not be read narrowly. The applicant did not have to establish that his interest was financial or primarily financial. His interest in the proper or improved representation of his clients was sufficient.

In *CJC and Public Trustee of Queensland v Queensland Advocacy Incorporated*,¹⁷ the Court of Appeal was concerned with a decision made during an investigative hearing. In conducting the Basil Stafford Centre Inquiry, the Hon DG Stewart refused leave for Queensland Advocacy Incorporated (QAI) to appear at the hearing either on behalf of the residents of the Centre or in its own right. The decision of the Supreme Court in favour of the QAI was set aside by the Court of Appeal (Macrossan CJ and Demack J; Davies JA dissenting). This is addressed in examining the conduct of investigative hearings.

Freedom of Information Act 1992 (Qld)

To ensure its accountability, the CJC has always said that it should be subject to Freedom of Information legislation. This was reflected in the CJC submission to the EARC on the proposed legislation. If an FOI application is made to the CJC, it may only withhold the material if the matter is exempt under Division 2 of the FOI Act. There is only one specific reference to the CJ Act in the FOI Act. This relates to a limited secrecy provision exemption¹⁸ which has recently been inserted. This prohibits disclosure of information obtained under a statutory provision listed in the Schedule¹⁹ unless disclosure is required by a compelling reason in the public interest. Section 83 of the CJ Act is included in the Schedule. This applies to the use of information obtained by a listening device which has been authorised by a Supreme Court judge under the CJ Act. Information obtained through the use of the listening device shall not be disclosed otherwise than to the CJC chairperson or a person

nominated by the chairperson for that purpose.²⁰ Furthermore, this information shall not be used for any purpose, including a CJC investigation, without the approval of the chairperson or further approval of a Supreme Court judge.

Supreme Court scrutiny

As has recently been observed by Demack J in the *Queensland Advocacy Incorporated* case²¹ the CJC has wide powers of search and interrogation. His Honour made reference to:

- section 69

notices to produce documents and things and discover information;
- section 70

entry to public premises;
- sections 71, 72 and 73

search warrants;
- section 74

summonses to witnesses;
- section 79

warrants for the apprehension of witnesses;
- section 82

authority to use listening devices;
- section 84

authorisation of surveillance which would otherwise constitute an offence;

authorisation to take possession of passports, other travel documents, instruments of title to property, certain securities, and financial documents;

authority to enter, during business hours, premises in which are to be found records of any bank or financial institution, insurance company, share or stockbroker, person engaged in the business of investing money on behalf of others, or person suspected of having a relevant association with a person to whom an investigation by the CJC relates, to inspect and make copies or extracts from such records so far as they relate to the affairs of the person to whom the investigation relates;

authority to require a person to furnish affidavits or statutory declarations relating to the property, financial transactions, or money or asset movements of a person holding an appointment in a unit of public administration or any person associated with that holder;

- section 94

a person's obligation to furnish information, to produce a record or thing or answer questions (subject to claims of privilege under section 77).

However, the exercise of these powers is strictly limited by criteria contained in each of the provisions; consequently the exercise of these powers depends on the CJ Act which grants the powers. When examining the use of a particular power, this is the first statute to consider.²²

In the case of the CJC, Supreme Court approval is required to use many of these powers, including the powers:

- to issue search warrants;
- to use listening devices;
- to issue a notice or summons where there is a duty of confidentiality;²³
- to obtain a warrant to apprehend a person who does not comply with a

summons to attend as a witness before the CJC; and

- to exercise any of the powers under section 84 other than the chairperson's authorisation to perform surveillance which would otherwise constitute an offence.

In relation to the CJC, the Supreme Court also determines claims of privilege. This includes legal professional privilege, Crown or other public interest privilege, or parliamentary privilege which may be claimed in relation to:

- a notice to discover information;
- a notice to produce records or things;
- a notice of summons;
- an authority to enter public premises;
- a search warrant.²⁴

When an authority to enter public premises or a search warrant is involved, the CJC Act includes a specific procedure to be followed on a claim of privilege. This includes placing the record for which privilege is claimed in a sealed container and making a written record of the container's contents. The container and the record is then delivered to the Registrar of the Supreme Court so the claim can be determined.²⁵

In addition, the CJC has adopted internal procedures to provide additional accountability. The coercive powers are exercised only by the chairperson, the Director of the OMD or General Counsel and are documented. The Director and General Counsel exercise these powers through delegation from the chairperson under subsection 140(1) of the CJ Act.

The CJC is directly accountable to the Parliament and the people of Queensland through the Parliamentary Criminal Justice Committee (the PCJC).²⁶ All the major

political parties in the Queensland Parliament are represented on the seven member committee. The PCJC is required to monitor and review the discharge of the functions of the CJC as a whole and of the OMD in particular, and to have tabled in the Parliament a report on the CJC near the expiry of each three years.²⁷

There have been two PCJCs to date. The second PCJC recommended in its three year review of the CJC²⁸ that the CJC's coercive powers be confined to the investigation of official misconduct, organised or major crime.

Anyone who considers that an OMD investigation is being conducted unfairly or that the investigation is not warranted can seek a mandatory or restrictive injunction from the Supreme Court.²⁹ The Court may direct that the investigation cease or not proceed, or may require that it be conducted under certain guidelines.³⁰ When the application is on the basis that an investigation is not warranted, the applicant is not entitled to be provided with particulars of information or the complaint, or the source of the information or complaint³¹ by or on behalf of the CJC. This raises the question of whether or not the Court may order the CJC to provide this information, subject to issues of privilege, where the application is based on the alleged unfair conduct of the investigation. The CJC may apply for the revocation of the order if further factors have emerged which put the propriety of the injunction in question. The Supreme Court may revoke or vary the order as it sees fit.³²

The procedures for Supreme Court applications are contained in Part 5 of the CJ Act. The applications must be heard in chambers.³³ In *CJC v The Council of the Shire of Whitsunday*³⁴ the Court of Appeal unanimously decided that subsection 119(1) requires that an application for an injunction under the CJ Act be heard in chambers throughout its duration.

Certain applications and authorities must be heard *ex parte*. These include:

- application for revocation of an injunction;³⁵
- authority to issue a search warrant;³⁶
- authority to issue a notice or summons where confidentiality is involved;³⁷
- authority to use a listening device;³⁸ or
- authority under section 84.³⁹

These applications must be supported by evidence on oath or affirmation.⁴⁰ In practice, this requirement is fulfilled by an affidavit.

To date there have been two applications under section 34 which have proceeded to decision. These are *In the Application of Bryant*⁴¹ and *Kolovos v O'Regan*.⁴²

In the Application of Bryant concerned the investigation which was the subject of the public CJC Report on an Investigation into the Tow Truck and Smash Repair Industries.⁴³ The judgment of Ryan J is extensively referred to in that report. One issue was whether or not the court was entitled to examine or take into account material to support the position of the CJC without disclosing it to the applicant. The CJC asked the court to consider information obtained in the course of the CJC's investigation which was in a sealed envelope. The CJC objected to the disclosure of the information to the applicant on the basis that this would harm the integrity of the investigation and therefore would be injurious to the public interest. Ryan J ruled that it would be wrong for him to receive and act upon such an *ex parte* communication.⁴⁴

In Report No 26 the PCJC recommended that section 120 of the CJ Act be amended to provide that a judge hearing

an injunction application on the ground that an investigation is unwarranted may take or receive evidence in camera from the CJC as to the basis of the investigation. The applicant or his representatives would not be entitled to be present when the evidence is taken.

In *Kolovos v O'Regan*,⁴⁵ the Court of Appeal dismissed an appeal from the Supreme Court and upheld the chairperson's decision to direct the OMD to conduct an investigation, having formed the opinion that it involved 'major crime' which was not appropriate to be discharged or could not effectively be discharged by the Police Service or other Queensland agencies. The Court decided that this opinion formed under subparagraph 23(f)(iv) of the CJ Act was not beyond judicial scrutiny; but there was no evidence to show that any error affected his opinion in that case. The Court decided:

... there would be no foundation sufficient to sustain the investigation as a lawful exercise of the powers of the Commission were it made to appear, for example, that the chairman had not addressed matters which the legislation makes necessary to such an investigation, that he had taken into account some extraneous consideration or had ignored a material consideration, or that no grounds existed to support his conclusions.⁴⁶

Among the authorities referred to in support of this proposition was *In the Application of Bryant*.⁴⁷

Investigative hearings

The CJC is authorised to conduct a hearing in relation to any matter relevant to the discharge of its functions and responsibilities.⁴⁸ In theory, a hearing may be held for the purpose of any of the wide range of matters within the CJC's jurisdiction; however, in practice hearings relate to OMD investigations. Even when the principal basis for a hearing is an OMD function, the hearing may also assist

the CJC to discharge ancillary functions such as recommendations for law reform.⁴⁹

A hearing conducted for the purpose of discharging OMD functions may be constituted by:

- the chairperson alone;
- the chairperson and one or more of the part-time CJC commissioners;
- the Director of the OMD;
- the legally qualified part-time commissioner; or
- a legal practitioner authorised by the chairperson.⁵⁰

The presiding officer for the majority of hearings is a senior CJC lawyer. In general, these are relatively short private hearings held as part of CJC investigations. Although these investigations usually do not conclude in public reports under section 26 of the CJ Act, the *Report on an Investigation into the Tow Truck and Smash Repair Industries*⁵¹ is an example of *in camera* hearings conducted by a CJC lawyer in support of an investigation which was the subject of a public report.

Private hearings are generally to assist in determining whether to report in the form of a brief of evidence to the Director of Prosecutions or other prosecuting authority,⁵² or report for reference to a Misconduct Tribunal,⁵³ or to report to a principal officer of a unit of public administration with a view to disciplinary action.⁵⁴

The majority of section 26 reports result from public hearings at which the chairperson or an eminent lawyer independent of the CJC presides. To date these lawyers have been retired members of the judiciary.

Section 26 reports have resulted from investigations by:

- the Honourable RH Matthews QC - *Allegations of Laurelle Anne Saunders Concerning Circumstances Surrounding her being Charged with Criminal Offences in 1992 (April and December 1994) - Improper Disposal of Liquid Waste in South-East Queensland (June and October 1994)*;
- the Honourable WJ Carter QC - *Inquiry into the Selection of the Jury for the Trial of Johannes Bjeke-Petersen (August 1993)*;
- former District Court Judge, Mr PV Lowenthal - *Inquiry into Allegations by Terrance Michael MacKenroth MLA (March 1993)* (this concerned the conduct of former Queensland Police Commissioner Newnham).

There has only been one case in which the chairperson has conducted an investigative hearing with one or more of the part-time commissioners. On 15 March 1991, the then chairperson, Sir Max Bingham QC, sat with the four commissioners at a public hearing to respond to allegations made against the CJC by Channel 7 and Mr RD Butler about its investigations associated with former Superintendent JW Huey of the Queensland Police Service.⁵⁵ In 1993/94, the Yock Investigation was conducted by the legal part-time commissioner, Mr LF Wyvill QC.

A person who constitutes the CJC to conduct a hearing has the same protection and immunity as a Supreme Court judge.⁵⁶ A person before the CJC has the same protection and immunity as a witness in the Supreme Court.⁵⁷

Procedures for taking evidence at CJC hearings are detailed in Division 2 of Part 3 of the CJ Act which is concerned with investigations. In *Ainsworth*,⁵⁸ the High

Court considered that Division 2 was not limited to formal hearings held under what is now section 25. However, the Division will mostly apply and be considered by the courts in relation to hearings in support of OMD investigations.

Under subsection 90(1) of the Act hearings are generally open to the public. However, the hearing may be closed at any time on the order of the person presiding if it is considered that an open hearing would be unfair or contrary to the public interest, having regard to:

- (a) the subject matter of the hearing; or
- (b) the nature of evidence expected to be given.⁵⁹

In *ICAC v Chaffey*,⁶⁰ the majority of the NSW Court of Appeal decided that procedural fairness did not require a private hearing but that this was a matter for the discretion of the presiding commissioner.⁶¹

Generally, CJC hearings are relatively short and have a senior CJC lawyer presiding. These hearings are held to supplement other investigative techniques. These techniques include the usual methods and powers available to all police officers and may or may not be combined with other special CJC powers.

Staff of the CJC include Queensland police officers who retain their authority as such.⁶² Therefore, a CJC investigation can proceed in the traditional manner by interviewing witnesses and using search warrants issued under provisions such as section 679 of the Criminal Code (Qld). In certain circumstances, listening devices may be used under the *Invasion of Privacy Act 1973* (Qld) or the *Drugs Misuse Act 1986* (Qld).

However it may become apparent in the conduct of an OMD investigation that the use of these more traditional powers will not be effective to get to the truth. This

could include investigations into alleged misconduct (including official misconduct) by members of the Queensland Police Service or alleged official misconduct by other persons holding appointments in units of public administration, or organised or major crime under subparagraph 23(f)(iv) of the CJ Act. For example, in some cases there may be value in assessing the account of the complainant or some other witness on oath; or, it may be considered that a full investigation requires the testing of the account of the person against whom the allegations are made, by cross examination in the witness box. It may be that a potential witness, including the person the subject of the allegation has exercised the right not to answer questions in an interview; however, there is no right for any person not to attend, give evidence, or answer questions at a hearing.⁶³

In such cases, it will generally not be difficult for the presiding officer to decide that an open hearing would be:

- unfair to a person because of the prejudicial effect of the publicity associated with the allegations or with the mere requirement that the person attend as a witness; and/or
- contrary to the public interest, by prematurely disclosing the investigation or the extent of information known to the CJC.

Matters generally considered by the CJC in determining whether or not a hearing should be closed are listed at page 153 of a submission on *Monitoring of the Functions of the Criminal Justice Commission*.⁶⁴

The CJC may also make a suppression or non-publication order under section 88 to supplement the closed hearing. This may extend not only to the evidence given or to what is produced to or seized by the CJC, but also to the fact that someone has given or may give evidence before it

(including information that may help to identify this person). Suppression orders may also be used to protect the identities of witnesses or people who are the subject of allegations in a public hearing. It is contempt of the CJC to breach a suppression order.⁶⁵

In general, the CJC will hold public hearings if it considers that the subject matter of the investigation is of such public importance that a public report should be made under section 26. Even in such cases, parts of the evidence may be taken *in camera*. Such hearings are the most public manifestation of the work of the CJC. The practice is to make a formal resolution to conduct the investigation. These resolutions also refer to the appointment of the presiding officer and the terms of reference of the inquiry. The resolutions are published in the final report.

The CJC has published its procedures for public hearings to supplement the express terms of the CJ Act. They are designed to ensure procedural fairness to persons affected by the hearings. For example there is provision for a Notice of Allegation be given to a person who may be the subject of adverse evidence in the hearing and giving the person an opportunity to appear in person or by legal representative. Where possible a person against whom an allegation is made is given an opportunity to make a brief response on the same day. The procedures are published in the *Submission on Monitoring the Functions of the Criminal Justice Commission*.⁶⁶

The PCJC in Report No 26 recommended that the power of the CJC to hold hearings be subject to, and on terms approved by a District or Supreme Court Judge. It also recommended that a person affected by the operation of an investigative hearing, either as a witness or as the subject of the hearing, be able to apply to the approving court for a variation of the terms of that hearing.

The PCJC also recommended that hearings be conducted in private unless the CJC is able to establish to the approving court that the hearing is of an administrative nature and/or would not be unfair to any person and/or that to hold the hearing in private would be contrary to the public interest.

Criticisms and legal challenges have mostly been directed to the procedures which are adopted at closed CJC hearings. These difficulties arise because these are inquisitorial hearings which may obtain evidence to be used in an adversarial system. Additionally, the hearings have many of the trappings of an adversarial system.

As with the ICAC, the appearance of CJC hearings is not very different from those of a court. There is a bench and bar table, witnesses give evidence after the administration of an oath or affirmation,⁶⁷ evidence is given from the witness box, witnesses are allowed legal representation and are examined by lawyers, and there is a presiding officer.⁶⁸ The presiding officer ensures that the proceedings are conducted in accordance with the CJ Act and rules on whether a witness is required to answer a question. Because the presiding officer will be a legal practitioner authorised by the chairperson for the purpose of the particular investigation there should be an internal document evidencing the authorisation and the investigation to which the authorisation is limited.

Despite these similarities to an adversarial trial, the CJC, in conducting a hearing, is not bound by the rules or practice of any court or tribunal about matters of procedure and may conduct its proceedings as it considers proper; nor is it bound by the rules of evidence, and may inform itself on any matter as it considers appropriate.⁶⁹

The Commission may also receive written evidence, which in general will be on

statutory declaration.⁷⁰ It may refer any matter on which it seeks expert evidence to a person of relevant competence, and may admit that person's report as evidence before it and act upon the report.⁷¹

The mechanism to have persons appear to give evidence before a hearing is a summons issued under section 74 of the CJ Act. A person served with a summons is obliged to comply with it in all respects unless the person has a lawful excuse or is not a 'subject person'.⁷² It is not a lawful excuse that the person is subject to an obligation of confidentiality concerning the information, record or thing to which the summons relates, or service is outside Queensland.⁷³ A failure to comply with a summons is contempt of the CJC⁷⁴ and an offence under section 135 of the CJ Act.⁷⁵ The chairperson may apply to a judge of the Supreme Court for a warrant to apprehend a witness who fails to comply with a summons.⁷⁶

A witness before the CJC is first examined and cross-examined by a counsel assisting as is the case in a Royal Commission or Commission of Inquiry. Any legal practitioner may perform the role of counsel assisting. The CJC may appoint a legal practitioner employed by it or engage a lawyer in private practice to assist.⁷⁷ In general CJC lawyers assist the relatively short private hearings. Senior private practitioners are engaged to assist hearings which will involve a public report. The private practitioners will generally be assisted by a junior who will often be a CJC lawyer.

Counsel assisting will be supported by multi-disciplinary investigative teams of lawyers, investigators (including members of the Police Service), accountants and other professionals whose particular expertise is required. Under s95(2) counsel assisting may examine and cross-examine any witness on any matter relevant (in the CJC's opinion) to the subject matter of the proceedings. This is

always subject to the direction of the presiding officer.

A 'person concerned' in the proceedings may appear in person or represented by counsel or solicitor, or by an agent approved by the CJC under section 95(1) of the CJ Act. Subsection 95(2), after referring to the authority of counsel assisting, goes on to provide:

... any Counsel, Solicitor or other agent authorised by the Commission to appear in any proceedings of the Commission may examine and cross-examine any witness on any matter relevant (in the Commission's opinion) to the subject matter of the Commission's proceedings, subject always to the direction of the person conducting the proceedings.

Section 95 has been considered by the Queensland Supreme Court in four cases, the first of which was *Re Whiting*⁷⁸ where each member of the Court of Appeal commented on the unsatisfactory drafting of section 95 (which was then section 3.23) and related provisions. The appeal had proceeded on the basis that a mere witness to an investigative hearing was a 'person concerned'. However, Macrossan CJ observed that the ambit of the category might have to be considered in greater detail on another occasion.⁷⁹

The issue of who is a 'person concerned' was considered by the Court of Appeal in *Queensland Advocacy Incorporated*⁸⁰ case. As mentioned above, the issue in that case was whether the QAI was entitled to appear on behalf of the residents of the Basil Stafford Centre or in its own right before a CJC investigative hearing. The majority (Macrossan CJ and Demack J) decided in the negative. The members of the Court considered the meaning of 'person concerned' with reference to either the concept of 'person aggrieved' or a person who has standing in an action to enforce a public right. Neither party contended that the residents of the centre were not 'persons concerned'. However at no stage of the proceedings had anyone appeared on

behalf of the residents claiming to have been appointed in any formal way. It was understood that the residents lacked the capacity to take that step on their own behalf. It was in these circumstances that the QAI sought to appear before the inquiry.

Macrossan CJ while accepting that it would not always be a simple task to decide whether a particular person is a 'person concerned' considered the category should be taken as conveying some personal and relatively direct involvement in the outcome being investigated or to adopt a phrase used in another context, more than 'a mere intellectual or emotional concern'.⁸¹ This phrase was adopted from *Australian Conservation Foundation v The Commonwealth*.⁸² The Chief Justice considered that the relevant comparison is more with a party than a witness.⁸³ His Honour also drew some support from the additional opportunities for appearance and participation, which appear to be envisaged by subsection 95(2) under the reference to 'any person authorised by the Commission to appear in any proceedings of the Commission'.⁸⁴ Therefore it was within the discretion of the presiding officer to determine the extent of the participation that he or she would accord QAI in the proceedings and it could not be said that it was inappropriate or an error to order that QAI only receive the transcript and have an opportunity to make written submissions.⁸⁵

Demack J also considered the question of whether QAI was a 'person concerned' by reference to the *Australian Conservation Foundation*⁸⁶ case. He considered that QAI could not show, any more than the Foundation, that it had the necessary standing, and added;

The general principle that the majority of the High Court applied may be expressed succinctly in the words of Lord Wilberforce in *Gouriet v. Union of Post Office Workers* (1970) A.C. 435, at p.477: "in general, no private person has the right of representing the public in the

assertion of public rights". A group of citizens who adopt a corporate identity cannot, by doing that, give themselves a right they did not have as individuals; (c.f. Stephen J. 146 C.L.R. at 539).⁸⁷

Davies JA (dissenting) considered that the QAI was, by reason of its objects and functions, a 'person concerned' in the proceeding to the extent that it may involve recommendations relevant to the treatment of residents of the Centre or the reporting of such treatment or related matters.

In *Re Whiting*⁸⁸ the Court of Appeal had to consider whether having regard to, *inter alia*, section 95, the appellant was permitted to appear at a closed hearing of the CJC by the counsel or solicitor of his choice. This arose from an investigative hearing of a complaint against a police officer. Counsel instructed by a firm of solicitors acting for the appellant who was witness in the proceeding, two other police witnesses, and the police officer against whom the complaint was made, sought to represent the appellant. The presiding officer at the hearing ruled that the same legal representatives would not be authorised to represent both the potential witnesses and the officer against whom the complaint was made.

In dismissing the appeal, Macrossan CJ and Moynihan J (Pincus JA dissenting) considered that the dominant provision for the entitlement to legal representation was the provision which is now subsection 95(1), which conferred upon persons concerned in CJC proceedings a full right of legal representation and a qualified right of non-legal representation. The reference to approval in that provision did not relate to legal representatives. Their Honours also decided (Pincus JA not deciding) that the ruling was a proper exercise of the implied power of the CJC to control its own proceedings so as to prevent its proceedings being prejudiced. In particular, Macrossan CJ decided that the ruling was justified because it had been concluded in good faith that to allow

the particular representation sought by the appellant would, or would be likely to prejudice the investigation or the effective discharge of the CJC's functions.

Pincus JA also decided that the CJC could refuse to allow particular representatives to appear where to do so would prejudice proceedings or impede its functions. However this was because the appellant's entitlement to representation depended on the CJC's approval or authorisation.

This decision was applied *In the Application of Bryant*⁸⁹ in deciding that the presiding officer did not err in directing that a witness was not entitled to be represented at a closed investigative hearing concerning the tow truck industry by the same counsel and solicitors representing another witness. In that case a non-publication order had been made under the equivalent to the present section 88 of the CJ Act.

In *Re an application under the Criminal Justice Act 1989*⁹⁰ the issue was not whether the applicant police officer was entitled to be legally represented but whether the applicant was entitled to be present at all, either personally or through some representative. The police officer was the person under investigation. The presiding officer denied the applicant and his legal representatives permission to be present at the interrogation of other witnesses before a closed hearing. Derrington J answered the question in the negative on the authority of the High Court in *National Companies and Securities Commission v News Corporation Ltd.*⁹¹ He observed:

The purpose behind this closed session is to exclude other persons, including a person concerned so that the Commission may properly perform its function of investigation.⁹²

However, he considered that once the reason for the exclusion ceased to exist, the applicant's rights to natural justice should be restored to permit the

opportunity of knowing, meeting and testing any evidence received during the exclusion. Therefore subject to any interference involved with the performance of the CJC contrary to the purpose of the CJ Act, the applicant was to be fully informed of any proposed adverse report which the CJC may consider making, and the details of it to such an extent that he would know the evidence that had been received; and he would have the right to test all such evidence that may be relevant to the conclusion that would lead to the making of such an adverse report.

In practice, for public hearings and closed hearings with a view to a report under section 26, the CJC seeks to ensure that procedural fairness is provided as required by this decision by serving a Notice of Possible Adverse Findings on persons in jeopardy of such a finding in the final report. This provides an opportunity to the person to make a submission in response. This submission is to be taken into account in completing the report. In the inquiry into the tow truck industry,⁹³ all of the submissions are set out in full in the report.⁹⁴

In closed hearings supporting an OMD investigation which may result in the referral of a report to the Director of Prosecutions or other prosecuting authority, the Misconduct Tribunal, or the appropriate principal officer in a unit of public administration with a view to disciplinary action, the general approach is to give any person the subject of an allegation or who may be adversely named in the report an opportunity to respond either through a formal interview or a Notice of Allegation or of Provisional Adverse Finding.⁹⁵ On some occasions this will involve the person responding to the allegations on oath or affirmation in an investigative hearing. In all such cases the CJC report does not involve an ultimate finding of fact. If prosecution or disciplinary proceedings are instituted as a result, the person charged will have the

normal opportunity to challenge and respond to the allegations through the court or disciplinary processes as the case may be.

Privilege against self incrimination

Although a witness at a hearing may not refuse to answer a question or produce any record or thing that in the opinion of the CJC (through the Presiding Officer) is relevant to its investigation and is required by the CJC, on the ground that the disclosure may incriminate the witness,⁹⁶ such disclosure will not be admissible in any proceedings against the person giving it, provided an objection was made to the disclosure.⁹⁷ This extends to statements of information provided under section 69 of the CJ Act.⁹⁸ The protection does not apply to proceedings for contempt of the CJC or perjury.⁹⁹ A witness who, without lawful excuse, fails to answer a question when required to do so by the CJC, is guilty of contempt.¹⁰⁰

Although a disclosure made pursuant to a section 69 notice requiring a statement of information or a section 74 summons may not be recycled into any later proceedings for use against the person making the disclosure, this does not prevent the use of evidence derived from the inadmissible material. There is no 'derivative use immunity'¹⁰¹ such as was previously found in subsection 68(3) of the *Australian Securities Commission Act 1989* (Cth).¹⁰² Disclosures made to the CJC in response to such compulsory processes may be used for the purposes of the investigation and the evidence obtained as a result, may be admitted in evidence against the person making the disclosure, despite the objection. However, the CJ Act has not gone as far as the *Independent Commission Against Corruption Act 1988* which has an express provision to this effect.¹⁰³

Sherman has recently discussed the use of coercive powers once legal proceedings have commenced. He

concludes that not every use of an investigative power in these circumstances will be invalid, but there must be an examination of how the use of the power relates to the proceedings and whether it interferes with the proceedings.¹⁰⁴ The PCJC has recommended an amendment to section 96 to provide an exemption to the abrogation of privilege against self incrimination where the person affected is awaiting the outcome of a charge for an offence in relation to which the information, evidence or records or thing sought may tend to be incriminating.¹⁰⁵

Subsection 94(5) provides that a person is not compellable to disclose a secret process of manufacture. This does not apply to section 69 notices. The PCJC has recommended that it be extended to apply to such notices.¹⁰⁶

Public interest immunity

The CJC will often be the subject of subpoena to produce information obtained in an investigation to a court hearing a matter to which the investigation relates. It is likely that the CJC will claim public interest immunity for some of this information. The approach to be taken to such a claim will be governed by the decision of the Queensland Court of Appeal in *Criminal Justice Commission v Collins*.¹⁰⁷

In that case, the CJC applied for an order to review a magistrate's decision that there was no public interest immunity in favour of it not producing, under a subpoena, its tape recorded interview with a police officer during an investigation. The respondent issued the subpoena in connection with charges preferred against him by the officer. The respondent had complained to the CJC about the officer's conduct concerning the incident from which the charges arose. After the taped interview, the CJC investigation was suspended pending the outcome of the court proceedings. The magistrate

rejected the CJC's objection and ordered the tape recorded interview be produced to him. The Court of Appeal (Macrossan CJ, and McPherson JA; Pincus JA dissenting) allowed the appeal and set aside the order overriding the CJC claim of public interest immunity. It ordered the magistrate to further hear the claim and undertake a balancing of the competing public interests as to whether the taped interview should be produced.

The majority observed that it may be accepted that statutory bodies with functions like those of the CJC must have some degree of immunity if they are to function as intended. It may also be accepted that provisions of the kind found in the CJ Act can be taken as establishing some *prima facie* claim to immunity from obligations of disclosure on public interest grounds. However, such provisions do not, without more, demonstrate how a court should deal with a claim for immunity when faced with a competing claim for access to information by somebody in the position of the respondent. In particular, there was no single broad class enjoying public interest immunity which would embrace all documents recording information collected in CJC investigations.

Therefore there can be no blanket claim of public interest immunity by the CJC. In each case the court must make a decision considering the relevant statute and public policy considerations. The decision will involve a balancing exercise once it has been decided that a public policy entitlement to protection exists. Therefore claims of public interest immunity by the CJC will be decided case by case.¹⁰⁸

The future

In addition to the two three year reports, the PCJC has issued numerous reports recommending changes in the operation of the CJC. Many of these which require amendment of the CJ Act remain under consideration. It is ultimately a matter for

the Government to determine whether and what changes will be introduced into Parliament.

If some of these recommendations are accepted there will be no significant changes in the CJC. Some of these recommendations have been referred to in this article. The most recent of these, in Report No 26, could lead to:

- coercive powers being confined to the investigation of official misconduct, organised or major crime;
- investigative hearings being held only on the approval of a District or Supreme Court judge;
- a person affected by a hearing, as a witness or the subject of the hearing, being able to apply to the approving court for a variation of its terms;
- hearings being closed to the public unless the CJC is able to establish to the approving court that the hearing is of an administrative nature and/or would not be unfair to any person and/or that to hold the hearing in private would be contrary to the public interest;
- the PCJC formulating policies and issuing general guidelines which must be adhered to by the CJC;
- the PCJC being able to direct the CJC to commence or continue a criminal investigation;
- the creation of a division to investigate organised and major crime, separate from the OMD which would be confined to the investigation of misconduct and official misconduct;
- the abolition of the Corruption Prevention Division;
- the transfer of the Misconduct Tribunals from the CJC;

- the abolition of the co-ordination function of the Research and Co-ordination Division; and
- the establishment of the Whistleblower Support Program as a separate organisational unit in the CJC reporting directly to the Chairperson.

The CJC will continue to exist for the foreseeable future. However, its form and functions are likely to change as part of the continuing process of review. As to what this form and future will be, only time will tell.

Endnotes

- 1 See T Sherman, 'Administrative Law and Investigative Agencies', (1995) 4 *AIAL Forum*, p 2 ('Sherman').
- 2 CJ Act, s34.
- 3 CJ Act, s29(1).
- 4 (1992) 175 CLR 564.
- 5 *Criminal Justice Amendment Act 1993* (Qld) s9.
- 6 CJ Act, s93(2).
- 7 JR Act, ss 4 and 20.
- 8 JR Act, s21.
- 9 JR Act, s 22.
- 10 JR Act, Part 4.
- 11 JR Act, Schedule 2.
- 12 CJ Act, s69.
- 13 CJ Act, s74.
- 14 *Walker v Criminal Justice Commission* QLR, 4 September 1993.
- 15 *Behrens v Criminal Justice Commission* (1994) 2 QdR 578.
- 16 *Boe v Criminal Justice Commission* (1993) 1 QAR 167.
- 17 Queensland Court of Appeal, 8 March 1995, unreported decision.
- 18 Section 48 as inserted by the *Freedom of Information (Review of Secrecy Provision Exemption) Amendment Act 1994* (Qld), s5.
- 19 FOI Act, Schedule 1.
- 20 CJ Act, s83(1).
- 21 Above n 17.
- 22 Sherman, 9.
- 23 CJ Act, s75.
- 24 CJ Act, s77.
- 25 CJ Act, s78.
- 26 Since this paper was prepared, the PCJC has been replaced by the Legal, Constitutional and Administrative Review Committee. It has been reported that the new committee plans to institute regular and routine auditing of the CJC and to impose stricter guidelines on the CJC complying with requests from the committee for information: see *The Australian*, 9 November 1994, p 4.
- 27 CJ Act, para 118(1)(a) and (f).
- 28 Second Parliamentary Criminal Justice Committee, Report No 26 (1995), ('Report No 26').
- 29 CJ Act, s34.
- 30 CJ Act, s120(1).
- 31 CJ Act, s120(2).
- 32 CJ Act, s35.
- 33 CJ Act, s119(1).
- 34 Queensland Court of Appeal, 8 March 1995, unreported decision.
- 35 CJ Act, s119(2).
- 36 *Id.*
- 37 CJ Act, s121(1).
- 38 CJ Act, s123(1).
- 39 CJ Act, s124(1).
- 40 CJ Act, s119(5).

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- 41 OS Nos 758, 770 and 894 of 1992 (unreported) 6 January 1993.
- 42 Queensland Court of Appeal, 13 May 1994, unreported decision.
- 43 Queensland Criminal Justice Commission, *Report on an Investigation into the Tow Truck and Smash Repair Industries* (1994).
- 44 Ibid, 16.
- 45 Above n 42.
- 46 Ibid, 3.
- 47 Above n 41, 23-24.
- 48 CJ Act, s25(1).
- 49 See for example the resolution by the CJC to undertake an investigation and conduct public hearings in Appendix 1 to *A Report on an Investigation into the Arrest and Death of Daniel Alfred Yock* (March 1994).
- 50 CJ Act, s25(2).
- 51 Above n 43.
- 52 CJ Act, para 33(2)(a).
- 53 CJ Act, para 33(2)(b).
- 54 CJ Act, para 33(2)(g).
- 55 *In the Application of Bryant*, above n 41, 35.
- 56 CJ Act, para 100(1)(c).
- 57 CJ Act, s100(2).
- 58 Above, n 4.
- 59 CJ Act, s90(2).
- 60 (1993) 30 NSWLR 21.
- 61 See also PD McClelland QC, 'Administrative Law and the ICAC', (1995) 4 *AIAL Forum* 30.
- 62 CJ Act, s67(3).
- 63 CJ Act, s94.
- 64 Queensland Criminal Justice Commission, Report, 1991.
- 65 CJ Act, s106(i).
- 66 Above, n 64.
- 67 CJ Act, ss 25(1) and 89.
- 68 See also ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC Comparison* (November 1994) ('ICAC'), 31.
- 69 CJ Act, s92(1).
- 70 CJ Act, s25(1).
- 71 CJ Act, s92(2).
- 72 CJ Act, s76(1). This subsection also defines who is a 'subject person'.
- 73 CJ Act, s76(3).
- 74 CJC Act, paras 106(1) and (b).
- 75 Maximum penalty - 85 penalty units or imprisonment for one year.
- 76 CJ Act, s79(1).
- 77 CJ Act, s91.
- 78 (1994) 1 Qd R 561.
- 79 Ibid.
- 80 Above, n 17, 8.
- 81 Ibid, 8.
- 82 (1980) 146 CLR 493, 530, per Gibbs CJ.
- 83 Above, n 17.
- 84 Id.
- 85 Ibid, 9.
- 86 Above, n 82.
- 87 Above, n 17.
- 88 Above, n 78.
- 89 Above, n 41.
- 90 OS No 68 of 1993, 17 September 1993, (1994) QLR 2 July 1994.
- 91 (1985) 156 CLR 296, 323-324.
- 92 Above, n 90, 3.
- 93 Above, n 43.
- 94 See the section on 'Procedural Fairness', pp 28-29 and Appendices 1 and 2.
- 95 See *Submission on Monitoring of the Functions of the Criminal Justice Commission* (April 1991), 168-71.

- 96 CJ Act, s94(2); see also ICAC, 32.
- 97 CJ Act, s96(1); see also ICAC, 32.
- 98 *Id.*
- 99 CJ Act, s96(2).
- 100 CJ Act, para 106(c)(ii).
- 101 For the purpose of this paper, 'derivative use immunity' is the inadmissibility against a person in any later proceedings (other than for contempt of perjury), of any information, record or thing obtained as a direct or indirect consequence of the person giving evidence, providing a statement of information or producing records or things pursuant to a compulsory process.
- 102 Section 4 of the *Corporations Legislation (Evidence) Amendment Act 1992* amended subsection 68(3) by removing the 'derivative use immunity'.
- 103 ICAC Act, s26(3).
- 104 Sherman, 14-16.
- 105 PCJC Report No 20, Part B (September 1993), 48.
- 106 *Ibid*, 89.
- 107 (1994) 74 A Crim R 63.
- 108 *Sankey v Whitlam* (1978) 142 CLR 1; *Alister v The Queen* (1984) 154 CLR 404; *Commonwealth v Northern Land Council* (1993) 176 CLR 406, followed.