

THE INDEPENDENT COMMISSION AGAINST CORRUPTION: THE ROLE OF THE COMMISSION IN LAW ENFORCEMENT AND THE NEED FOR SPECIAL POWERS

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INTRODUCTION

In recent years we have seen in this State a spate of Inquiries nearly all of which have directly or generally dealt with issues of corruption in public office. The Government has seen it as necessary for the truth of these matters to be sought out by means other than the ordinary investigative processes. Hence, the establishment of the Independent Commission Against Corruption.

Each and every one of us, in some way or another, is affected by the public sector, for there are few, if any, aspects of community life which are not touched, shaped or controlled by public institutions.

As noted by the Premier, Mr Greiner, in the second reading speech of the Independent Commission Against Corruption Bill:

Nothing is more destructive of democracy than a situation where the people lack confidence in those administrators and institutions which stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded, and the community confidence and the integrity of public administration is preserved and justified.

Corruption in the public sector produces frustration and inequality, wastes resources and public money, and leads to inefficiency and despair. It is unfair to all honest citizens.

TACKLING CORRUPT CONDUCT

As our society becomes more complex and sophisticated, so does criminal activity. Changes are occurring at a rapid rate. So much so that law enforcement organisations and the legal system have been generally unable to effectively deal with new and sophisticated forms of criminal conduct.

Official corruption has only recently been recognised as a serious problem but one which, because of its nature, cannot be restrained simply by using traditional methods. Consequently, new methods and techniques need to be employed to fight official corruption.

The function of a criminal investigation is to gather information in relation to a criminal offence. There is a body of decisional law and legislative and other rules

governing important aspects of the process of criminal investigation. These decisions and rules invariably seek to strike a reasonable balance between two competing public requirements - the need to bring to conviction those who commit criminal offences and the protection of the individual from unlawful and unfair treatment. They have evolved because a criminal investigation may result in charges being laid against a person who will be put to trial. The object of a criminal investigation is to bring to conviction those who commit criminal offences.

On the other hand the object of the Commission is different. It is to minimise the incidence of official corruption in this State by disclosure of the facts and discovery of the truth.

I have grave doubts about the effectiveness of the criminal justice system in combating insidious crime such as corruption in the public sector. The criminal justice system is mainly geared towards dealing with offenders of the more traditional crimes involving violence and property. There is a need to reform the substantive criminal law to cover the range of criminal conduct found in corruption. In addition, the rules of evidence need reform so as to overcome the myriad of evidentiary problems associated with documentary and complex commercial cases.

In the United Kingdom the Fraud Trials Committee chaired by Lord Roskill was established due to public concern at the effectiveness of the methods of combating serious commercial fraud. The Roskill Committee made this telling observation:

The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious fraud expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right. In relation to such crimes, and to skilful and determinable criminals who commit them, the present legal system is archaic, cumbersome and unreliable.

At every stage, during investigation, preparation, committal, pre-trial review and trial, the present arrangements offer an open invitation to blatant delay and abuse. While petty frauds, clumsily committed, are likely to be detected and punished, it is all too likely that the largest and most cleverly executed crimes have escaped unpunished.

The findings of the Roskill Committee resulted in the establishment of a Serious Fraud Office with coercive powers and a range of legislative amendments in an attempt to effectively combat this type of criminal activity.

From time to time the public interest demands that inquiries be initiated with coercive powers so as to conduct thorough and searching investigations. So long as such inquiries are conducted in the public interest, and for the overall well-being of society, then the public interest should prevail and they should be permitted. The task of inquiries is to collect information, assess it and to make recommendations.

MECHANISMS TO FIGHT CORRUPTION

Inquiries are unique institutions that have frequently been established in relation to matters of vital public importance which need investigating. It is common for governments to establish permanent statutory bodies, clothed with various powers, including coercive powers.

The prime function of an inquiry is to inform governments. There are wide differences in the kind of information such bodies are empowered to gather. In some cases, inquiries are directed to the gathering of information which is to be the basis of the formulation of policy, whereas in others, inquiries are directed to ascertain the facts of a particular issue. The method adopted by an inquiry would usually vary according to the nature of the information required to be sought.

Inquiries armed with coercive powers must be confined to matters of vital public importance because clearly the power to compel the answers to questions and to compel the production of documents is a responsibility that should not be given lightly. It is this power that makes an inquiry unique and special.

Inquiries have powers normally only associated with the judicial branch of government. They do not make decisions or affect the legal status of people as do courts, but in the conduct of some inquiries they act in a manner similar to that of courts. They are not part of the normal process of criminal justice although they are sometimes used to investigate whether crimes have been committed.

Although an inquiry does not have a judicial function it acts judicially. Any body which has the power to affect the rights of a person will, in general, be required to act judicially, but that does not mean such bodies exercise a judicial function. The function of a Judge is to determine issues between parties in a binding way, but the function of an inquiry is to find out the facts and report them, with or without recommendations. No one is bound by the findings and it is up to the government whether the findings are to be acted upon.

Obviously, the functions of an inquiry and the functions of a court of law are completely different. Consequently, the conclusions reached by an inquiry might differ from those of a court of law, even though the same issues have been investigated. This is so for a number of reasons, the most important being that an inquiry adopts the civil standard of proof in reaching its findings, whereas a court of law must be satisfied beyond reasonable doubt. Also, they function differently in that a court of law is based on an adversary system with stringent rules of evidence whereas an inquiry is inquisitorial with less formal application of the rules of evidence.

The rules of evidence have developed in the context of an adversary system of law which appropriately serve the object of our courts. However, they may not be appropriate when considered in the context of an enquiry with an inquisitorial function, simply because the object of an inquiry is different to a court. The function

to inquire may not be assisted by rules which can at times limit a search for the truth. Some inquiries, in their search for the truth, admit hearsay evidence which is sometimes the only means of securing further and admissible evidence. An inquiry may also compel a person to answer questions and produce documents, where in a court of law the rules of evidence may not allow this to happen because of an objection as to privilege.

One of the main values of inquiries is that they gather information for the government to consider and act upon. It is information which the government requires when it establishes an inquiry. Therefore, information may be useful to government even if its correctness has not been established beyond reasonable doubt. It is also important here to stress that the activities of an inquiry can greatly affect people's lives.

It is also important to ensure that when inquiries, which might cause injustice, become necessary they will be conducted in such a way that there is little or no likelihood of injustice occurring. However, by conducting inquiries in accordance with the principles of natural justice, there would be very little if any opportunity for injustice to result.

The ICAC is different from a police force and a court. The functions of the Commission probably more closely resemble those of an inquiry than anything else. There are, however, significant differences between the Commission and an inquiry. They are in essence:

- The Commission sets its own agenda, in that the Commission decides what matters it will investigate, and when any investigation will be concluded. However, a reference from Parliament must be investigated.
- The Commission determines its own "terms of reference". This is achieved by associating with each investigation a "general scope and purpose". The Commission has the power, as and when occasions demand, to vary the general scope and purpose of an investigation or of a hearing.
- The Commission can ensure something is done about official corruption in requesting public bodies to take certain action, including a change of procedures, restructure, and so on.

However, there are also a number of limitations that carefully and appropriately control the conduct of the Commission but at the same time provide the framework to effectively fight official corruption. The Commission is a unique and innovative arm of law enforcement tailor-made to combat official corruption.

THE PURPOSES OF THE COMMISSION

The prevailing attitude to corruption seems to be that important though it is that those who commit crimes be brought to justice, this is an area in which disclosure of the facts and discovery of the truth can be more important than punishment of the individual. By giving the Commission coercive powers, Parliament

has placed greater emphasis upon the Commission getting to the truth than upon securing convictions.

Accordingly, the ICAC is designed for specific purposes, and has special powers, to meet the special needs of a community determined to fight official corruption.

The Commission is required by s.12 of the *Act* to regard the protection of the public interest, and the prevention of breaches of public trust, as its paramount concerns. The principal functions of the Commission are:

- To investigate possible corrupt conduct, with a view to prosecution, and/or reporting to the Parliament. It is important to stress that the Commission is only concerned with the State public sector - not functions and agencies of the Commonwealth, and not the private sector;
- To advise public authorities on ways in which to prevent corrupt conduct;
- To educate public authorities in the community regarding the detrimental effects of corrupt conduct and the importance of maintaining the integrity of public administration.

It would be wrong to consider the Commission purely as an investigatory body. For not only is it required to investigate possible corrupt conduct but its range of principal functions include communicating the results of investigations to appropriate authorities, advising on laws and procedures that may assist in the battle against corruption, co-operating with public authorities in appropriate reviews of practices and procedures, educating and advising on strategies to combat corrupt conduct, and communicating with the public at large with a view to fostering public support for the fight against corruption, all for the purpose of carrying out the special task of minimising corruption in the public sector of this State.

CORRUPT CONDUCT

Corrupt conduct is defined widely in the *Act*. Corruption is the dishonest abuse of power or position by a public official, or a dishonest attempt by another to have a public official abuse his or her power or position. Section 7 defines the term by reference to ss. 8 & 9. Section 8 delineates a range of activities which may constitute corrupt conduct, but only if they have a propensity to adversely affect the exercise of official functions by any public official. Section 9 limits the definition of corrupt conduct by requiring that it constitute or involves a criminal offence, a disciplinary offence, or reasonable grounds for dismissing a public official.

THE CONDUCT OF INVESTIGATIONS

The Commission may conduct an investigation as a result of a complaint from a member of the public, a report from a public authority, a reference from the

Parliament or on its own initiative. Complaint is not defined in the *Act*. However, under s.10:

- any person may make a complaint;
- it must be made to the Commission; and
- it must be about a matter that concerns, or may concern, corrupt conduct.

Section 11 imposes a duty on a principal officer of a public authority to report, in certain circumstances, possible corrupt conduct to the Commission. Part 5 establishes a scheme whereby the Commission can refer matters to other agencies for investigation and report.

Section 73 provides that both Houses of Parliament may, by resolution of each House, refer a matter to the Commission.

The obligations of the Commission differ according to the means by which a matter has come to the Commission.

- In the case of matters embarked upon on its own initiative or in consequence of a s.11 report, the Commission is free to determine whether there will be an investigation, and whether any investigation embarked upon will be discontinued.
- In the case of matters referred to the Commission by both Houses of Parliament under s.73, the Commission is under an obligation to investigate them.
- In the case of complaints, the Commission may determine whether or not to embark upon an investigation, and also whether to discontinue an investigation that has already commenced. However, before deciding either not to commence, or to discontinue, the investigation of a complaint, the Commission must consult the Operations Review Committee.

In considering whether or not to conduct, continue or discontinue an investigation, the Commission may have regard to such matters as it thinks fit, including triviality, remoteness in time and, in the case of a complaint, lack of good faith.

SPECIAL POWERS

Once the Commission has commenced an investigation, its coercive powers and search warrant provisions in Part 4, Divisions 2, 3 & 4 are available. The coercive powers are exercised "for the purposes of an investigation".

Under s.21 the Commission may require a public authority or public official to produce what is called a statement of information.

Under s.22 the Commission may require a person to produce a document or some other thing. Whereas a requirement to produce a statement of information

under s.21 may only be made of a public authority or public official, a requirement to produce a document or other thing under s.22 may be made of any person.

Under s.23 the Commission may enter and inspect public premises and inspect and take copies of documents which are found there.

I should add that the focus of these special powers is very much on public institutions and officials. They do, in some instances, extend to citizens who have been involved in the corrupt conduct under investigation. However, they are not powers that will normally affect the general public.

There are provisions for claims of privilege to be made in respect of any of the matters subject to a s.21 or s.22 notice, or an entry under s.23. There is also provision protecting a person from the use against him of anything which tends to incriminate him and has been produced over objection under s.21 or s.22.

Section 40 confers on the Commissioner the power to issue search warrants if satisfied that there are reasonable grounds. That power has not yet been exercised, the Commissioner preferring to apply to a justice for search warrants, as is also provided in the section. A search warrant is issued on the basis that there are reasonable grounds for believing that there is in or upon any premises a document or other thing connected with any matter that is being investigated under the *Act*. However, it should be stressed that Part 3 of the *Search Warrants Act* 1985, with its various requirements and procedures, applies to a search warrant issued under the *Act*.

HEARINGS

Section 30 provides that for the purposes of an investigation the Commission may hold hearings. A hearing can only be held for the purpose of an investigation. Any such hearing should be regarded as a step taken in the process of investigation.

As a general rule hearings will be conducted in public. The *Act* provides that the Commission may direct that a hearing, or part of a hearing, be held in private, but stipulates that such direction may only be given if the Commission is satisfied "that it is desirable to do so in the public interest for reasons connected with the subject matter of the investigation or the nature of the evidence to be given."

A public hearing should not to be regarded as a trial or court case towards which the Commission has been working.

The *Act* requires the Commission to exercise its functions with as little formality and technicality as possible, to accept written submissions as far as possible and to conduct hearings with as little emphasis on an adversarial approach as is possible. It is Commission policy to be astute to ensure that relaxation of the rules of

evidence, particularly those relating to hearsay, will not allow the hearings to degenerate into a means for the dissemination of rumour.

The obligations and the rights of a person giving evidence before the Commission are different from those giving evidence in a court. Both in a court and in a Commission hearing there is a general obligation to answer questions and, of course, to answer them truthfully. However, in Commission hearings claims of privilege do not operate to excuse a witness from answering questions, subject only to a couple of exceptions relating to legal practitioners and clergymen. However, the *Act* provides that if in a hearing before the Commission a person objects to a particular question and answers it only because he is compelled by law to do so, then that answer cannot be used in evidence against him in any civil or criminal proceedings or indeed in any disciplinary proceedings other than proceedings for an offence or for contempt under the *ICAC Act*.

The *Act* provides that at each hearing the general scope and purpose of the hearing must be announced. It also provides that the Commission may permit a person to appear at a hearing if it can be shown that the person is "substantially and directly interested" in a subject-matter of the hearing. The right to legal representation and to examine and cross-examine witnesses is also provided.

The Commission has issued procedures for the conduct of hearings. Some useful observations were recently made by the Commission of Inquiry into the conduct of Mr Justice Vasta. The Commission of Inquiry had this to say about the form of proceedings and the standard of proof appropriate for the evaluation of evidence before it:

In Australia, it is well settled that, subject to statute, the standard of proof beyond reasonable doubt is applicable only in criminal proceedings.¹ The Commission of Inquiry is not a criminal proceeding. The Commissioners are not required to determine the criminality of any of the behaviour in question.

The Commissioners considered that the civil standard of proof on the balance of probabilities was the proper standard to apply. When the standard is used as the measure of proof, it is sufficient if a fact is proved to the reasonable satisfaction of the tribunal evaluating the evidence. However, since the High Court decision in *Briginshaw v Briginshaw*,² it has been recognised that the degree of persuasion necessary to establish facts on the balance of probabilities may vary according to the seriousness of the issues involved. In that case, Dixon J expressed this proposition in the following words:³

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the

1 *Helton v Allen* (1940) 63 C.L.R. 691; affirmed in *Rejtek v McElroy* (1965) 112 C.L.R. 517 & 520

2 (1938) 60 C.L.R. 336

3 at 362

question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect references.

Subsequent High Court decisions approved His Honour's statement. In *Rejcek v McElroy*⁴ the Court stated unequivocally that "the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved."

The Commissioners were of the opinion that, in conformity with the High Court's approach to the degree of proof, due regard to the seriousness of the issues must be had in applying the civil standard to the evidence adduced.

THE OUTCOME OF AN INVESTIGATION

The Commission is not a prosecuting authority, and accordingly investigations do not result in any person being charged by the ICAC with any offence. Where there has been an investigation, the Commission may report on that investigation to both Houses of Parliament. It must report where there has been a public hearing. The Commission is also under an obligation to report in relation to matters referred to it by both Houses of Parliament.

Commission reports can be important as much for the recommendations they may contain about preventing corruption, as for making findings relating to past conduct by identified individuals. Either during or at the conclusion of an investigation the Commission can assemble evidence admissible in the prosecution of a person for a criminal offence, in connection with corrupt conduct, and furnish it to the Director of Public Prosecutions.

The Commission may also furnish information or a report on information to the Minister responsible for a public authority, with recommendations as to the exercise of functions by that authority. There is also the power to refer a matter for investigation or other action to "any person or body considered by the Commission to be appropriate in the circumstances" and require the person or body to report back.

WHO WATCHES THE COMMISSION?

The Operations Review Committee is one of three major mechanisms the Legislature has created to hold the Commission accountable. Other mechanisms are the Parliamentary Joint Committee and reporting by the Commission to Parliament.

The Operations Review Committee is an advisory body to the Commissioner and consists of the Commissioner, Assistant Commissioner, the Commissioner of

4 *Supra* at 521

Police, a person representing the Attorney General and four people representing community views. The Operations Review Committee advises the Commissioner whether particular complaints should be investigated, or investigations of complaints should be continued. The Operations Review Committee is also charged with responsibility to advise the Commissioner on such other matters as he may, from time to time, refer to it.

The Parliamentary Joint Committee has no power with relation to particular operational matters, but is empowered to monitor and review the exercise of the Commission's functions, to examine Commission reports, to report to Parliament and to examine trends and changes in corrupt conduct generally.

The Commission must make annual reports to Parliament and can report on individual investigations to Parliament. All public hearings must be reported to Parliament as must the outcome of the investigations of Parliamentary references.

CONCLUSION

A specialist body like the ICAC brings together a range of skills and special powers necessary to fight official corruption. However, with such a body comes great responsibility and above all accountability.