Why Queensland Needs A Parliamentary Criminal Justice Commissioner

Address to Working Group of Parliamentary Committees
Overseeing Law Enforcement and Criminal Justice Bodies
Presented 26 February 1998

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Introduction

The Honourable Vince Lester M.L.A., Honourable Members of various Australian Parliaments, Parliamentary officers and staff, and distinguished guests:

Several months ago, I was invited to participate in a debate for the benefit of law students from various parts of Australia, and neighbouring countries in this part of the world, concerning the role of standing commissions on crime and corruption. One of the opposing speakers was Mr. Frank Clair, the chairman of the Queensland Criminal Justice Commission. In the context of such a debate, both Mr. Clair and I felt free to express our views more robustly than we might have been willing to do in a more public forum, with the media in attendance. I am particularly pleased to have this opportunity to address you in a similarly frank and robust manner, without the risk that my comments will be misreported, misrepresented, or taken out of context.

On the previous occasion which I have mentioned, I drew an analogy between the CJC and another great Queensland icon, the cane toad. You see, although the cane toad is often associated with Queensland - a sort of unofficial faunal emblem of this State - it is an introduced species. It was introduced to deal with a particular problem, the cane beetle which had infested the highly productive sugarcane centres of North Queensland. Unfortunately, the cane toad did not prove to be very successful in the job which it was introduced to perform, and ended up being a bigger problem than the scourge which it was supposed to eliminate.

The idea of having a permanent agency, free of democratic controls, with extraordinarily intrusive powers, is also quite un-Australian. Perhaps because of our convict origins, we have an ingrained abhorrence of over-powerful law enforcement bodies. Our nation's popular heroes are usually law-breakers, from the Rum Rebellion to the Eureka Stockade and Ned Kelly, and we have tended to vilify the forces of law and order, such as the much maligned (and, so far as the historical evidence shows, quite unfairly maligned) Captain William Bligh.

As a young nation, Australia has been able to learn the lessons of history which, in other parts of the world, have only been learnt at the cost of much pain, suffering and bloodshed. The first lesson that history teaches, about powerful non-democratic law enforcement agencies, is this: however well-meaning are those who create them; however well-intentioned are those who set them up; however benign and even beneficial they may appear to be in their first years of operation, they inevitably become instruments of oppression.

I have been criticized, in other places, for describing the CJC's premises at Toowong in Brisbane as "Gestapo headquarters". But in fact, this is one of the best historical examples of how an efficient and successful law enforcement agency can be converted, over time, into an instrument of oppression. The name "Gestapo" comes from *Gehemi Staatspolizei* - the name of the national police force established in 1933 by the duly elected government of Germany, to combat the wave of crime which that country experienced in the wake of the Great Depression. Only in later years did it become despised by all right-thinking people.

One does not, however, need such extreme examples as the Gestapo to illustrate this historical trend. One can go back to Roman times, when the law enforcement officers of the Roman Republic - the *praetors* and *quaestors* - became feared agents of a totalitarian dictatorship under the emperors Nero and Caligula. Our English word "proscribe" comes from the practice, in those days, of publishing lists of those condemned, without trial, as outlaws, with pin-pricks against their names indicating those to be executed rather than merely banished.

The same lesson repeats itself through the ages. We have the so-called "Spanish Inquisition" of Catholic Europe, originally a very popular body established to maintain the Christian faith when it came under threat from the forces of Islam, but which came to be a by-word for injustice and inhumanity. In England, the so-called "Star Chamber" was set up under the Tudors to combat high-level corruption and abuse of office; only in its later years did the Star Chamber evolve into the most feared institution in English legal history.

In Russia, too, the All-Russian Extraordinary Commission for Combating Counter-Revolution and Sabotage,

established by the Bolsheviks in 1917, was initially hailed as being, if not an intrinsically popular or desirable institution, at least a vast improvement over the former Tzar's secret police force. Only in later years was the Cheka, or the KGB as it later came to be known, responsible during the era of the "Red Terror" for some of the grossest atrocities committed in the history of humankind. Even in Western liberal-democratic countries, bodies like the American CIA and Senator Joe McCarthy's Congressional Committee on un-American Activities evolved into witch-hunts which overrode or simply ignored the rights and liberties of citizens.

Of course, Mr. Clair was not particularly happy to have the CJC compared with the Gestapo, the KGB, or even the Star Chamber; nor, unsurprisingly, did he regard the comparison between the CJC and the cane toad as a flattering or appropriate one. His response was that the only similarity between the CJC and cane toads is that they are both spreading southwards, with other States establishing permanent crime-fighting and anti-corruption bodies modelled on the CJC. This may be so, although it does not necessarily follow that the Southward migration of either phenomenon will be happily received. Frank Clair's remarks did, however, give me the opportunity to point out, in reply, that there is one other similarity between the CJC and cane toads: no matter how hard you kick them, they always get up on their hind legs and spit venom at you.

Today, we are not concerned with the theoretical question whether having standing commissions on crime and corruption is a good or desirable thing. They are a fact of life. They exist; and, as Frank Clair pointed out, they are spreading like cane toads. The issue for this Working Group is to consider how they should be supervised and controlled, so that they can successfully and efficiently perform the functions for which they have been established, without any risk that their extraordinary powers will be misused or abused.

The Role of Oversight Committees

Despite the somewhat cynical remarks which I have already made, I am the first to acknowledge that our community does need bodies like the National Crime Authority, ICAC and the Crime Commission in New South Wales, and even the Queensland CJC - as well as the new Crime Commission which is in the course of being established in this State - to lead the fight against corruption in public office, and organized crime. The real challenge is to devise a scheme which enables such bodies to be effective in combating corruption and organized crime, but at the same time accountable through democratic institutions to the public which they are supposed to be serving.

Unless this challenge is successfully met, such bodies pose two risks to the community. The first risk, the short-term one, is that such bodies, whilst costing the taxpayers huge amounts of money, will mistake the focus of their responsibilities, making them an inconvenience, and even a substantial threat, to ordinary law-abiding citizens, whilst the "big fish" go free.

(I might mention, incidentally, that I drafted the last sentence on the 10th of this month. When I referred to bodies like the CJC being "an inconvenience, and even a substantial threat, to ordinary law-abiding citizens", I could not have imagined that an instance would be reported in the following morning's *Courier-Mail* [1], which serves as a perfect illustration of this risk. I refer to the report which, if it is accurate, suggests that a well-known television personality was, without his knowledge, subjected to two weeks of intense surveillance by the CJC, involving "round the clock" surveillance teams photographing his home, monitoring his mail and running checks on vehicles visiting his property - all apparently because the CJC did not bother to find out that the real target of the CJC's investigation had sold the house ten months earlier, and the television personality was the innocent and entirely unrelated purchaser of the property. Even if the report in the *Courier-Mail* is not entirely accurate, it illustrates precisely what I mean when I talk about the CJC posing a risk of inconvenience, and even a substantial threat, to ordinary law-abiding citizens.)

The other risk, the long-term one, is that such bodies can become so powerful as to challenge the institutions of parliamentary democracy under our Westminster system.

I will speak mainly about the situation in Queensland, which is the situation best known to me. I have had some professional dealings with the NCA, which lead me to believe that many of my perceptions about the CJC apply equally to the NCA. I am not in a position to comment on the situation in other States, save to say that, even if the situation elsewhere is presently very different, there is a need for constant vigilance to ensure that the same problems do not arise.

The blueprint for the Queensland CJC is to be found in the Fitzgerald Report, which embodies the recommendations of Mr. G.E. Fitzgerald Q.C. - now Justice Fitzgerald, president of the Queensland Court of Appeal [2] - arising out of the Fitzgerald Inquiry. Fitzgerald himself did not regard his recommendations as "set in concrete"; he suggested certain reforms, including the establishment of the CJC, to be adopted on an experimental basis, subject to review after a sufficient period of time to assess their strengths and weaknesses. The Fitzgerald Inquiry was such a cathartic experience in Queensland politics that those holding office at the

time, and the then opposition, felt a political imperative to commit themselves fully to the terms of the Fitzgerald Report - "lock, stock and barrel". Even today, almost ten years later, it is politically very difficult to suggest any changes to the CJC, or to what has come to be known as the "Fitzgerald process of reform". In may ways, this may be viewed as a good thing. But it has had the undesirable side-effect that there are substantial political obstacles even to genuine improvements upon the Fitzgerald model.

Tony Fitzgerald recognized the risk that such a powerful body as the CJC could ultimately become a threat to the Parliamentary democratic institutions in this State. As a safeguard against this threat, he proposed the establishment of the Parliamentary Criminal Justice Committee to oversee and monitor the CJC's activities. This was, no doubt, a very commendable idea so far as it went. Our Westminster tradition is based on the idea, or the ideal, of accountability to Parliament. People who ignorantly talk about the so-called doctrine of the "Separation of Powers" fail to understand that this is an American doctrine, referable to the American system under which the executive government (that is to say, the President and his Cabinet) are separated from the legislative branch of government (the Houses of Congress). This is a very different tradition from the Westminster tradition, under which the executive branch of government is accountable to the legislature - the system known as "responsible government". Thus, for example, the police force is accountable to the Parliament, and through the Parliament to the community, because the minister of the crown who administers the police force - the Police Minister - is a member of the Parliament, and can be called upon by the Parliament to explain and justify the actions of the department which he administers.

However, there are some obvious problems with the Fitzgerald model, and I think that it might be useful to spend a few moments discussing these problems, and looking at possible solutions to them.

Divided Loyalties

To become a member of a Parliamentary oversight committee, like the PCJC, one first has to be a Member of Parliament. And to be a member of Parliament, one ordinarily has to be elected as the endorsed candidate of a political party.

Some political theorists will tell you that the party system has destroyed democracy - that is has compelled parliamentarians to adhere to their parties' platforms, rather than voting in accordance with the dictates of their own consciences. As W.S. Gilbert wrote in his script for the Gilbert & Sullivan opera, Iolanthe:

> "When in that House, MPs divide
> "If they've a brain and cerebellum too,
> "They've got to leave that brain outside
> "And vote, just as their leaders tell 'em to."

The contrary view, and the one which I hold most strongly, is that party politics is essential to Parliamentary democracy. Anyone who doubts that this is the case should take a moment to reflect on the highly unsatisfactory way in which the recent convention in Canberra was conducted [3], due to the absence of party discipline.

The great virtue of the party system is that, when voters are voting for a candidate, they know exactly what the candidate is standing for. A prominent and well-known independent candidate can sometimes win, because the voters know enough about that person's policies to support him or her, or because voters know enough about that person's character to take him or her on trust. But I am sure that I do not need to point out to this audience that it would be extraordinarily difficult for most parliamentary candidates to achieve a sufficient level of recognition within a local community, that a majority of voters would be willing to support the candidate without the assurance of knowing that the candidate has made a commitment to pursue the platform of one or other of the major political parties.

To some extent, political candidates still have to be taken on trust, as there is always the risk that, one elected, a candidate will abandon the party by which he or she was endorsed. I make no criticism of politicians like Sir Winston Churchill and Mrs. Cheryl Kernot who, having become disenchanted with the party by whom they were originally elected to Parliament, resigned from that party, and also resigned from the Parliament at the same time. But there can be no greater breach of trust than that of a person who is elected to Parliament as the endorsed candidate of a particular party, and then remains in Parliament after resigning from that party - as in the case of Senator Colston in the Federal sphere and, here in Queensland, Mr. Brian Austin and the late Mr. Don Lane.

Whilst, therefore, party politics is a beneficial feature of our Parliamentary system, it is not a feature which

equips parliamentarians to assume the role of a neutral umpire in respect of issues which have party political implications. What this means is that members of Parliamentary committees are placed in an extremely difficult position when they have to deal with cases that have political overtones. Nobody doubts the ability of parliamentary oversight committees, like the PCJC, to deal fairly and impartially with "run of the mill" cases involving, for example, allegations of corruption by police officers, or public servants, or allegations of organized crime. Nobody doubts that members of such committees are people of the greatest integrity, who do their very best to ignore the potential political ramifications of issues coming before them for consideration. But as the French mathematician and philosopher, Blaise Pascal, remarked in 1670: "the most just man in the world may still not act as judge in his own case". Once a member of a Parliamentary oversight committee is placed in the situation of having to consider a matter which involves partisan political ramifications, that person is subject to a conflict of loyalties. On the one hand, the member has a loyalty to higher ideals - to truth, to justice, to fairness. On the other hand, the member has a loyalty to his or her own party - but not merely to the party as an institution; also to the voters who elected that member to Parliament on a solemn trust that he or she would support and defend the party's platform.

The most difficult position for anyone to be in is a position which involves divided loyalties. I think that most of us have found that the greatest problems in life can be addressed by asking one's self, "what is the right think to do ?". But when one is subject to divided loyalties, there is no single "right" thing to do. The best one can hope for is to do the thing which is less wrong.

Let me offer, by way of example, the case of a businessperson who sits on the boards of directors of two different companies. If the businessperson becomes aware of an opportunity to make a successful investment, he or she may feel duty-bound to bring it to the attention of both companies. But if there is only an opportunity for one or other of the companies to make the investment, and not for both, a conflict of duty arises. The director may bring it to the attention of one company, and thereby breach the duty which is owed to the other; or bring it to the attention of both, which will not be satisfactory for either one of them. In our legal system, and particularly in the law relating to the governance of public companies, there are special rules and procedures which exist to help company directors in resolving conflicts of this kind. But there is no simple answer for a member of a Parliamentary oversight committee, whose loyalty to that member's own party - his solemn undertaking to the electorate to protect and further the interests of that party - conflicts with his or her duties as a member of such a committee.

It is a testament to the ability and integrity of members of the Queensland PCJC that this problem has not yet become a major one for them, either under the Chairmanship of the present Leader of the Opposition, Mr. Beattie [4], or under the chairmanship of his successor, Mr. Ken Davies, or under the current chairman, the Hon. Vince Lester. But there have been plenty of occasions on which this could have become a real problem: with the so-called "travel rorts inquiry" conducted by the CJC concerning the alleged misuse of Parliamentary travelling entitlements; the circumstances which led up to the Hanson Inquiry, where PCJC members were furnished with copies of CJC material including allegations of sexual impropriety by a prominent Federal Politician; and, of course, the circumstances surrounding last year's Carruthers Inquiry. Any one of these matters might have created a major conflict with the party political interests of PCJC members, if they had not been handled with the greatest discretion.

It is inevitable that the PCJC, and other Parliamentary oversight committees, will continue to receive these political "hot potatoes". I do not suggest that there is any simple solution - indeed, any solution at all - to the problems for Committee members in resolving the conflict between their party loyalties, including their moral obligation to the voters who elected them as endorsed candidates of particular parties, and the duties of impartiality implicit in holding such a position. I do, however, submit that these problems can be minimized, if not totally extinguished, by separating Parliamentary oversight committees and their members from dealing directly with standing commissions on crime and corruption.

If another agency is interposed between the Parliamentary committee and the standing commission - such as a Parliamentary Commissioner - the job of parliamentarians becomes one step removed from the process of reviewing, examining and monitoring the activities of the standing commission. Whilst the Parliamentary committee may not always accept the reports and recommendations of the Parliamentary Commissioner, and may see fit to hold their own inquiries in appropriate cases, in most instances the business of the Parliamentary committee will be to review, and either accept or reject, the report of the Parliamentary Commissioner.

There is still the theoretical possibility that members of a Parliamentary committee may find that they have divided loyalties, in voting either to accept or reject the Parliamentary Commissioner's recommendations in a particular matter. But, at a practical level, this is unlikely to be quite so problematic. To illustrate why I say this, let me offer an example which, I emphasize, is entirely hypothetical.

Let us say that the CJC is conducting an investigation into allegations of corruption involving a prominent

member of the Parliament - say, a Minister of the Crown, or a front-bench Opposition figure. It is alleged that the CJC's investigation is politically-inspired, and the PCJC determines to examine the question whether the CJC had sufficient grounds to justify its investigation. If that matter has to be addressed directly by PCJC members, they will find themselves in a position of appalling conflict, where their loyalty to their own party (including prominent members of their own party) has the potential to conflict with the interests of justice. With the best will in the world, it is hard to imagine opposition members of the PCJC agreeing that the CJC 's grounds for investigating a prominent government member are unsubstantiated, or *vice versa*. It is even more difficult to imagine a member of any political party voting in favour of a determination that the CJC had substantial grounds for conducting an investigation into the conduct of another prominent member of the same party.

If, in these circumstances, the allegation is investigated by the Parliamentary Commissioner, and a report is made containing recommendations based on that investigation, the position of PCJC members will be somewhat clearer. If the Parliamentary Commissioner finds that the CJC 's investigation is justified, whilst PCJC members from the same party may not be particularly happy with this outcome, one may anticipate that they will usually be willing to accept it, and either support the Parliamentary Commissioner 's recommendation, or at least abstain from voting on the issue.

It would be worthwhile considering whether the legislation governing the PCJC, and other Parliamentary oversight committees, should be amended to stipulate that the report and recommendations of a Parliamentary Commissioner can only be over-turned by a majority vote of the Committee, including at least one opposition member. However, I do not feel that it is necessary to go this far. If, in the circumstances of the hypothetical case which I have mentioned, the government members of the PCJC were to vote as a *bloc* to overturn the report and recommendations of the Parliamentary Commissioner, then - unless they had extraordinarily good reasons for doing so - they would face a most resounding political backlash.

Resources and Funding

The second major flaw in the Fitzgerald model is that, whilst it casts very heavy responsibilities on the PCJC, it does not provide for the PCJC to have funding and resources sufficient to enable the PCJC properly to discharge those responsibilities. I am not aware of the present position of the PCJC; but in times past, when I have had professional dealings with the PCJC, its entire staff has consisted of a couple of research officers (who, I might say, have performed sterling service) and one secretarial assistant. This is to monitor and supervise the activities of a body which costs the taxpayers of Queensland in the order of $25 million per annum, with some three hundred staff, as well as seconded police officers, external consultants, and members of the private bar, who are retained for specific projects.

The result, in my experience, has been this. When the PCJC wants to find out what the CJC is doing - or, as the case may be, what the CJC is not doing - all that the PCJC can do is ask the CJC, and trust the answers which are given. On at least one occasion - there may be others, but I am not aware of them - the PCJC requested, and the Commissioner of the Police Service agreed, to have a particular matter investigated by officers of an interstate police force, so that the PCJC could obtain some independent verification of the CJC 's claims that it was acting in a manner that was "above board". But this is hardly a satisfactory way for the PCJC to monitor and oversee the activities
of the CJC.

In retrospect, it seems extremely naive to imagine that the PCJC could carry out its statutory functions under the Criminal Justice Act, by sitting in a committee room in George Street, and merely asking the CJC whether or not the CJC is doing its job properly. Surprising though it may seem, whenever the CJC is asked whether it is doing its job properly, the answer is "yes". This includes - for instance - an occasion when the CJC went to the Supreme Court to seek an injunction restraining a newspaper from publishing a "leaked" CJC report, casting none too subtle aspersions that the "leak" may have originated from the PCJC. What the CJC neglected to mention, either to the Supreme Court or to the PCJC, was the fact that, at the very time that these aspersions were being cast against the PCJC members, the CJC could not account for several of its own copies of the leaked report, whilst all PCJC copies had been accounted for and returned to the CJC.

Human nature being what it is, when the CJC is asked by the PCJC to explain and justify its conduct, what the PCJC hears is only what the CJC wants the PCJC to hear. Far be it from me to suggest that the CJC is the only institution in our community which adopts the "C.Y.A." policy - I'm not quite sure what "C.Y.A." stands for, but I believe it has something to do with covering your lower extremities - but it has certainly made an art-form of evading and equivocating about the propriety of its conduct.

It is my suggestion that the PCJC and other Parliamentary oversight committees simply cannot do their job, unless they are given the resources - the personnel and the funding - to investigate the investigators. And, as it

seems to me, the appropriate way to apply such resources is through an intermediate agency, such as a Parliamentary Commissioner, which may investigate allegations of impropriety by the CJC, either of its own motion or at the direction of the PCJC.

Of course, it does not follow that every allegation will be the subject of a full-scale independent investigation. No doubt, there will be many cases - probably a great majority of cases - in which the Parliamentary Commissioner, and ultimately the PCJC, are perfectly content to accept the CJC's explanation without further investigation. But it is, in my opinion, essential that a body like the PCJC has access to investigative resources which can be called upon to scrutinize the activities of a body like the CJC. The mere fact that an oversight committee like the PCJC has access to such resources should, in itself, be enough to ensure that most of the information conveyed by a body like the CJC to a body like the PCJC is accurate and comprehensive: people running bodies like the CJC are not going to be stupid enough to provide incomplete or inaccurate information to a body like the PCJC, when they know there is the possibility that the information which they provide will be independently scrutinized and verified.

I don't believe that parliamentarians have the time or expertise to run a team of investigators. So, in my view, there must be an independent authority which provides investigative resources to bodies like the PCJC. This, as I see it, is the role of the Parliamentary Commissioner. Whilst having an open mandate to launch investigations of his or her own volition, the Parliamentary Commissioner should have a responsibility to investigate matters referred to the Parliamentary Commissioner by the PCJC. And to do this, the Parliamentary Commissioner must have a team of people with appropriate skills. To my mind, four particular skills are vital. First, the team must include a person with detective skills, such as an experienced police officer who is either retired from, or seconded from, the police force. Secondly, for reasons which will be obvious, the team needs an accountant. Thirdly, for reasons which may not be so obvious, the team needs an expert in information technology. In my experience, when the CJC has been caught out for getting up to mischief, it has usually been as a result of scrutinizing the CJC's information technology records - such as telephone records, showing a particular telephone call placed, out of regular office hours, at a particular time on a particular date to a particular telephone number which, for example, happens to be the telephone number of a journalist who happens to be the writer of a "scoop" which is published in the following morning's edition of a major local newspaper. Fourthly, although I am not here to advocate more work for lawyers, I feel that the investigative team needs a person with legal training - and I think that the reasons for this will also be obvious.

The Parliamentary Commissioner should have a sufficient budget, regulated by the appropriate Parliamentary committee, to enable the Parliamentary Commissioner to access independent specialist expertise as and when required. I am reminded of a case, many years ago - before the advent of the CJC - where a tape-recording was used as critical evidence in the prosecution of a police officer for alleged corrupt conduct. A very smart young man, working in the Public Defender's officer, thought that he heard a radio jingle in the background. He inquired with the radio station, and learnt that this jingle had not been broadcast until many months after the date of the alleged telephone interception. Audio experts from one of the local Universities were then retained to analyse the tape recording, and proved conclusively that the tape had been pieced together using words spoken by the allegedly corrupt police officer on a variety of different occasions. As a result, the charges were thrown out. It is this kind of expertise that, perhaps in very rare cases, the Parliamentary Commissioner may need to access.

Notes

[1] *The Courier-Mail*, 11 February 1998

[2] Subsequently a Judge of the New South Wales Court of Appeal

[3] Constitutional Convention, Canberra, 2 to 13 February 1998

[4] Subsequently Premier of Queensland