SUBMISSION
from
WHISTLEBLOWERS ACTION GROUP QLD [WAG]
to
PARLIAMENTARY CRIME AND MISCONDUCT COMMITTEE
upon
THE THREE YEARLY REVIEW OF THE CRIME AND MISCONDUCT COMMISSION

26 MARCH 2003

The CJC ... has had 'the integrity of a rugby league scrum'.
Presentation and discussion of paper, 'Regulatory Capture: Causes and Effects'
International Institute for Public Ethics Conference, Brisbane, 2002

OUTLINE

Summary. WAG submits that Queensland's efforts for an effective Public Service are being undermined by three factors

- The CJC (now renamed the CMC) is in need of major reform, including its culture, strategy, policies, procedures, management and leadership
- There is no authority charged with the sole responsibility of protecting whistleblowers, and authorities with the discretion to offer some protections can not be relied upon to exercise those discretions
- The protections available to whistleblowers for protecting themselves are ineffective and / or beyond the means of ordinary citizens to activate

This submission is relevant to all points of the review described in the 'Call for Public Submissions' released by the Chairman Mr Geoff Wilson, MP

BASIS FOR ANALYSIS

WAG has chosen the Fitzgerald Inquiry, its participants and processes, as the benchmark against which to evaluate the properties of Queensland's current criminal justice system

WAG has identified the following factors active in the Fitzgerald Inquiry that held for Queensland the possibility of a system that would be effective in the fight against misconduct and corruption in Queensland's Public Service

- **The Honest Politician.** A politician, Acting Premier Gunn, who chose an inquiry chair who was likely to investigate corruption in the police force in a thorough, fair and impartial process
- **The Investigator with Integrity.** A chair, Tony Fitzgerald, QC, who acted in this way without favour to any police officer, whatever their rank, connections or allegiances
- **The Witness with Courage.** A number of whistleblowers from the police force, notably Sergeant Col Dillon, who made disclosures and gave evidence of corruption within the police force

PROBLEMS WITH CURRENT SITUATION

'Capture' of the CJC. The CJC has shown itself to be selective rather than 'thorough, fair and impartial' in the way that it has carried out its responsibilities. Examples demonstrating this feature of the record of the CJC (now CMC) will follow shortly. This apparent selectivity and the associated inconsistencies have led to concerns that the CJC has been 'captured' by groups that come within the purview of the CJC. Certainly, it can be shown, the CJC has displayed the weaknesses of a 'captured regulator', as described in the paper quoted at the top of this position.

Those weaknesses are

- The CJC appears to lack independence, and to be driven by fears
- The CJC appears to lack integrity in their processes
- The CJC appears to be marked by a lack of internal complaint or whistleblowing
- The CJC appears to lack energy and effort in the meeting of the organisation's purpose

- The CJC appears to lack expertise in areas important to its role, and,
- The CJC appears to bully those that it does not fear

Reviews of police corruption prior to the Fitzgerald Inquiry also demonstrated the properties of 'capture'. The most memorable might be the publicity event by the then Minister Russel Hinze, who reported to the media his failure to find any illegal casinos in Brisbane after a car ride through the city – in which the Minister failed to get out of the car when he was driven past 'the Bath House'.

What helped Queensland escape this arrogance was the ability of one honest politician, Acting Premier Gunn, to refer relevant allegations to a reputable investigator willing to act without fear or favour.

Under current arrangements, any honest politician is obliged to refer suspected official misconduct to the CJC – not to an investigator of choice. With the Criminal Justice Act, it is the CJC (now CMC) to whom all suspected official misconduct must be referred. Bill Gunn's act of referring TORs for an Inquiry to an investigator of choice is no longer available

In this important respect, the situation is now more difficult and more perilous for an honest politician, or other public officer, who seeks to assist the system to free itself of systemic corruption. All initiatives must go to the CJC who, on allegations against powerful groups in Queensland, have also completed investigations 'without getting out of the car'

The Criminal Justice Act acts to channel public interest disclosures to just one watchdog authority. With that singular body apparently 'captured' by a group or groups within the government machinery of Queensland, the worst consequences from such channelling legislative provisions have eventuated.

The avenue to a thorough, fair and impartial inquiry, opened by Bill Gunn to triggered the escape by Queenslanders from police corruption, has been closed

If this choice-of-investigator option used by Acting Premier Gunn has closed, then the only chance for a 'thorough, fair and impartial' investigation of corruption and misconduct is if the CJC is thorough, fair and impartial. The CJC needs to be capable and willing to conduct its duties without the 'fear and favour' that the CJC appears to have shown in its treatment of past and current allegations, allegations that have a primary significance to the integrity of the Queensland criminal justice system

Where these alleged actions of favour remain uncorrected on the record of the CJC (now CMC), any confidence held in the CJC must be downgraded. The CJC is failing to maintain the independence of inquiry that was established by Gunn & Fitzgerald.

The Failure to Protect Whistleblowers. Clearly, the mini industry in criminal justice in Queensland that has attached itself to 'Post-Fitzgeraldism' has forgotten the primary role paid by whistleblower police officers.

This and subsequent excerpts excised from the tabled submission as falling into one or more of the following categories:

1. *irrelevant to the Committee's review pursuant to section 292 of the Crime and Misconduct Act 2001 which requires the Committee:*

   (f) to review the activities of the commission at a time near to the end of 3 years from the appointment of the committee's members and to table in the Legislative Assembly a report about any further action that should be taken in relation to this Act or the functions, powers and operations of the commission;

2. *confidential and/or not suitable for public tabling; or*
3. *more appropriately dealt with as a complaint to the Committee; or*
4. *has previously been processed as a complaint by the Committee and been finalised.*

Excerpt Excised

Whatever the written law, the police, public service and CJC authorities appear able within themselves to ignore the law. There is no whistleblower protection authority that empowers whistleblowers to require these authorities to obey the law. Further examples will follow shortly.

The CJC has been seen to come to an unofficial but publicly stated position that it is impossible to protect whistleblowers. Without the support of a leadership motivated to protect whistleblowers, the availability of evidence about corruption in the Public Service (evidence such as that which served Mr Fitzgerald in his Inquiry) cannot be assured.

The CJC has become part of the corruption problem in the Public Service, WAG will herein show. The CJC has done this by refusing to 'get out of the car' in its investigations of disclosures made by whistleblowers about wrongdoing in particular parts of the Public Service. In most significant instances, the CJC has become the protector of the wrongdoer rather than the protector of the wronged.

Whistleblowers will not be maintained in their employment within the Public Service unless

- They have the support of a properly funded and capable Whistleblower Protection Authority
- They have the right to a thorough, fair and impartial investigation if they can establish a prima facie case of maladministration or reprisal affecting their employment
- The investigation is undertaken in good time after any complaint is received, statements are taken and documents retrieved and stored safe from loss and destruction or disposal
- Witnesses in any investigation are given the same protection

The cases cited below demonstrate the capacity of the CJC (now CMC) to deny whistleblowers a thorough, fair and impartial investigation, by methods that include

- Wilfully misstating the law
- Wilfully misstating the evidence
- Failing to achieve thoroughness, fairness and impartiality in the conduct of investigations
- Failing to advance and complete investigations in good time

MAJOR FAILURES BY THE CJC

The two cases that continue to give information tending to show the complete lack of integrity of which the CJC can be capable, in their treatment of whistleblower disclosures and the rights of whistleblowers, are

- The disclosures concerning the direction by the Queensland Cabinet to destroy the Heiner documents, requested for an intended civil court case by the lawyers of public officer Peter Coyne – **the Lindeberg disclosures**
- The disclosures concerning the refusal by the Qld Department of Mines to enforce the licence conditions of major mines regarding environmental management, with disclosures that Mines Inspector Jim Leggate was subjected to a punitive transfer to the Department of Primary Industries because he continued to report to the Mines Department the breaches by mines of the environmental conditions of their licences – the Leggate disclosures

Both sets of disclosures have been brought to the attention of the public by recent events and disclosures. These recent public interest disclosures point to future complications for our criminal justice system because of the improper precedents created by the CJC when appearing to avoid the implications of the Leggate and Lindeberg disclosures.

THE LINDEBERG DISCLOSURES

The CJC, in its processing of the Lindeberg disclosures, excused the Queensland Cabinet from the allegation of criminal wrongdoing. The CJC did this by claiming that it was not against the law to dispose of evidence relevant to a court case if the disposal is effected before the legal writ is lodged and /or served, that is, before the legal action is afoot.

Excerpt Excised

The CJC maintained this position in face of multiple legal opinion, based at that time on the decision of the High Court in *the Rogerson case,* that the CJC legal opinion was wrong at law.

Last year, the issue of destroying evidence prior to serving of a writ or laying of a charge was addressed before the Victorian Court of Appeal in *the McCabe case*. The decision reaffirmed the law in Rogerson, emphasising the error in the CJC's misinterpretation of the law on this point.

Excerpt Excised

The CJC is avoiding taking action by maintaining a position regarding the law that is without any foundation, and by sticking to a legal position that has been consistently contradicted by every court in Australia.

Excerpt Excised

The integrity of the criminal justice system in Queensland has been degraded by this inconsistent treatment, and by the continuing refusal by relevant authorities to admit to and apply the correct interpretation of the law regarding the destruction of evidence for legal proceedings. At the origin of that degradation has been the CJC (now CMC) and its continuing adherence, as an apparent matter of will not law, to assert as lawful an act that is a blatant breach of the law.

The CJC is simply misstating the law, and this misstatement is protecting a privileged group of public officers from inspection of their actions according to the law

THE LEGGATE DISCLOSURES

The Non-enforcement Policy

A similar affect was caused by the CJC in its processes concerning the disclosures made by Jim Leggate.

Regarding the failure by the Department of Mines to enforce the environmental laws of the state, the CJC excused the authorities of suspected official misconduct. The CJC did this by claiming that the non-enforcement did not constitute official misconduct because everyone knew that the Qld Government had a policy of non-enforcement.

Quite literally, this argument is nonsense. There is no provision at law that excuses or allows criminal activity on the basis that 'everyone' knows that the law-breaking was being allowed by policy

Excerpt Excised

For this reason, within the CJC, the nonsense argument has come to dominate the legal sense argument. This nonsense paradigm is a simple reflection of the culture of the CJC rather than the legality of logic and behaviour displayed elsewhere.

In the same way that the mistreatment of children, at John Oxley and Neerkohl for example, get to the courts many years after the alleged wrongdoing is committed, so it will be with the wrongdoing that

was and is the subject of the Leggate disclosures. Decades now of acid waters and other pollutants have been poured into the river systems of Queensland, and decades of pollutants are to come. There is now, in the results of tests of water and plant and soil, results held by the Government, the '*factual matter*' that Carmody held would be necessary '*to exist before the criminal offence could be constituted*'.

Two cases exist where mines, identified in the Leggate disclosures as offending mines (with the environmental impacts that each mine would cause – see attachment C, head flags C1 and C2), have made out-of-court settlements for the harm caused to '*a particular adjoining land holder or somebody else*'. These cases are now available, and others will inevitably become available. For the CJC, however, to find this information, information tending to show criminal acts by Mr Leggate's superiors, the CJC will have to be forced 'out of the car' to do a thorough, fair and impartial investigation.

The CJC's investment in nonsense principles is adversely affecting the public interest in overcoming the environmental harm being caused by mines.

Excerpt Excised

– does the failure of the CJC to act on the Leggate Disclosures cause all authority that comes into contact with the issue to be contaminated by their own failure to act in the face of this $2billion problem.

The Punitive Transfer

The CJC's misstatement of the law on the issue is contained in their most recent refusal to investigate the 1991 transfer of Mr Leggate from the Department of Mines to the Department of Primary Industries.

Excerpt Excised

Excerpt Excised

there is a precedent faced by all whistleblowers, whereby tacit approval has been given to CEOs and Commissioners to forcibly transfer whistleblowers to lower level positions, where the CJC undertakes to define 'choice' to include 'offers that officers cant refuse', and where the CJC has indicated that it will not interfere.

Excerpt Excised

THE TEST OF CAPTURE

It would be a simple matter for the CJC to disprove the allegation of capture – demonstrate from case law or legislation authoritative sources for the three CJC laws for whistleblowers, namely that

- **The First CJC Law for Whistleblowers.** It is a defence to the crime of obstructing the course of justice (by destroying documentation desired for an impending legal action) to show that the destruction occurred before the legal action was on foot.
- **The Second CJC Law for Whistleblowers.** It is a defence against the misdemeanour of misfeasance (an arbitrary act not to enforce laws, to the prejudice of the rights of another) to show that everybody knew that the authority was not enforcing the law.
- **The Third CJC Law for Whistleblowers.** No offence arises when a CEO of a Queensland Public Service Department or a Commissioner transfers a whistleblowers to a position of lower classification level than that substantively held by the public officer, including a transfer to a Gulag, because a CEO has the power to direct such transfers.

WAG Qld holds that these three 'CJC laws' are in truth anomalies that define the integrity of the CJC. The three 'CJC (now CMC) laws' have been used to justify refusals by the CJC to investigate wrongdoing by some of the most powerful business and political and bureaucratic interests in this State.

The CJC (and the CMC) have cursed themselves. The organisation will not be able to free itself of this curse, WAG judges, other than by admission of its wrongdoing, because the disclosures of Jim Leggate and of Kevin Lindeberg concern matters whose impacts on individuals will continue to come before the community and the courts. This will occur as the inmates from John Oxley grow older, and the pollutants from offending mines accumulate in the natural resources of Queensland's waterways and aquifers.

These same matters are now bringing shame to Queensland before national and international symposiums, on matters from regulatory capture to bullying to destruction of evidence. Queensland is being portrayed by overseas authorities as providing the leading examples of the worst behaviour of these types by any democratic jurisdiction in the world.

CONCLUSION

The CJC has for the last ten years been part of the problem with criminal justice in this State, not part of the Fitzgerald solution. It is in need of substantial reform. It must establish its independence from powers and authorities external to the organisation, and it must establish legal expertise and integrity within itself for the thorough, fair and impartial completion of its investigations.

The CJC, to this end, needs to renounce the 'three laws for whistleblowers' that it has invented, and return its core from rogue opinions to mainstream Australian law.

The Fitzgerald solution needs whistleblowers. Whistleblowers need the protection of a well resourced Whistleblower Protection Authority and balanced Whistleblower Protection Legislation. Only 'the Shield' of these two mechanisms will ensure that whistleblowers will not be subjected to reprisals for the disclosures that they make in the public interest.

The cases of Messrs Lindeberg and Leggate, including the disadvantages that they suffered in their careers because of the disclosures that they made for the benefit of the public interest in Queensland, should be the focus of an inquiry into the treatment of whistleblowers in this State.

This submission has been made on the unanimous vote of the members of the Whistleblowers Action Group assembled at the Annual General Meeting

G MCMAHON
Secretary