

# *Crime Commissions and the Criminal Trial — The Criminal Justice Commission\**

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## *Introduction*

A frequent criticism of the Queensland Criminal Justice Commission and of other investigative agencies like it in Australia<sup>1</sup> is that their work is inimical to a fair trial.<sup>2</sup> In particular, it is the complaint of civil libertarians and of defence lawyers whose professional interest inevitably points in the same direction that the coercive powers of these agencies to gather evidence powers denied to the Police Services give them and ultimately the prosecution an unfair advantage.

## *The Commission's Jurisdiction and Powers*

At least, with respect to the Criminal Justice Commission, it is submitted that this complaint is generally unfounded. Certainly the Commission has extensive powers of investigation but equally extensive are the restraints, formal and informal, imposed upon their exercise. The resulting regime is one which achieves a balance between the interest of the accused person in securing a fair trial and the interest of the community in having relevant incriminatory evidence adduced at that trial.

In his Report Mr G E Fitzgerald QC, as he then was,<sup>3</sup> wrote as follows:

Whilst most individual offences against the person or property are easily detected, other crimes, such as corruption and organised crime, are extremely difficult to detect and it is often impossible to catch and convict the offenders. There is ordinarily no complainant and participants usually remain silent for fear of retribution, or because they believe that speaking out would achieve nothing.

Special powers and punishments may be needed to combat such crimes. The steps which are appropriate, to whom power should be given, and how the exercise of these powers

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\* Paper presented to the 5th International Criminal Law Congress, Sydney, 29 September 1994.

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1 Particularly the National Crime Authority, the New South Wales Crime Commission and the New South Wales Independent Commission Against Corruption.

2 For example see Editorial (1984) 8 *Crim LJ* 349, Roser, W G; "The Independent Commission Against Corruption: The New Star Chamber?" (1992) 16 *Crim LJ* 225; Richter, R, QC, "The Right to Silence: A Civil Libertarian Perspective" in Palmer, D and Dargan, B (eds), *Liberty Law Enforcement and Accountability*, Victorian Council of Civil Liberties, 1993 at 59; Corns, C, "The Big Four: Privileges and Indemnities" (1994) 27 *ANZ JC* at 133.

3 Now Fitzgerald P of the Queensland Court of Appeal.

should be controlled, undoubtedly involve very difficult issues which place very important public interests in conflict.<sup>4</sup>

Later in the Report he recommended the establishment of the Criminal Justice Commission with investigative responsibilities pertaining to the above categories of crime and with special powers to assist in making its investigations effective<sup>5</sup>. The Queensland Parliament unanimously endorsed these recommendations and gave effect to most of them in the *Criminal Justice Act 1989*. In the result the Commission has jurisdiction to investigate some specific categories of criminal activity but it clearly does not have the plenary jurisdiction of the Queensland Police Service to investigate all criminal conduct.

The first and widest category within the scope of the Commission's powers is official misconduct. This, according to the Act, means conduct by a public official that involves carrying out the duties or exercising the powers of office in a way that is dishonest or lacks impartiality or involves a breach of trust or breach of confidentiality. The conduct must also be such as to amount to a criminal offence or to a disciplinary breach which provides reasonable grounds for dismissal.<sup>6</sup> Obviously this definition comprehends many diverse forms of corruption and abuse of public office.

The second category is the "investigation of organised or major crime" in circumstances where, in the Commission's opinion, it is not appropriate for that function to be discharged by the Police Service or it cannot be effectively so discharged.<sup>7</sup> The Act contains no definitions of the terms "organised or major crime" but according to the Fitzgerald Report itself organised crime is a term which "embraces serious crime committed in a systematic way involving a number of people and substantial planning and organisation, sophisticated methods and techniques".<sup>8</sup> The Commission has found this satisfactory as a working definition. It readily applies to the systematic criminal activity which the Commission has investigated in the areas of money laundering, gambling, prostitution, public corruption and illicit drug cultivation and distribution. With respect to "major crime" the Commission has confined its work to what are indisputably very serious crimes such as murder and attempted murder committed in circumstances which suggest an organised crime connection and where the police investigation has proved abortive. A decision that a particular investigation of organised or major crime cannot be appropriately or effectively done by the Police Service is one for the Commission but is not beyond judicial scrutiny. The Queensland Court of Appeal has recently decided that any such decision is examinable on the usual administrative law grounds.<sup>9</sup>

Features of official misconduct and of organised criminal activities are that they are usually clandestine and they have the capacity to debase public life. Traditional investigative techniques offer little prospect of exposing these. Events in Queensland and elsewhere in Australia in the 1980s made that very plain. That is why the Fitzgerald Report recommended that the Commission, and especially its investigative unit, the Official Misconduct

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4 *Report of Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 3 July 1989, par 5.1.2.

5 *Ibid* at par 10.2.

6 *Criminal Justice Act 1989 (Qld)*, s32.

7 Section 23(f)(iv).

8 Above n4, par 4.3.1.

9 *Kolovos v O'Regan*, Appeal No 198 of 1993, 13 May 1994.

Division, be armed with various coercive powers and for the most part these very powers were conferred by the *Criminal Justice Act*. They are as follows:

- (i) Power to serve notices requiring information and records and things;<sup>10</sup>
- (ii) Power to enter premises occupied by a unit of public administration, inspect, seize and remove records and things;<sup>11</sup>
- (iii) Power under the authority of a warrant issued by the Supreme Court of Queensland to enter and search other premises and if necessary search persons found there and also seize records and things;<sup>12</sup>
- (iv) Power to summon any person to give evidence or produce records or things at an investigative hearing;<sup>13</sup>
- (v) Power to use listening devices in certain circumstances if so authorised by the Supreme Court;<sup>14</sup>
- (vi) Power to conduct surveillance (if otherwise unlawful);<sup>15</sup>
- (vii) Power in certain circumstances if so authorised by the Supreme Court:
  - (a) to take possession of passports, other travel documents, instruments of title, securities and financial documents;<sup>16</sup>
  - (b) to enter premises during business hours and inspect and copy financial records;<sup>17</sup>
  - (c) to require any person to furnish affidavits or statutory declarations relating to property of, financial transactions or movements of money or other assets by a person holding an appointment in a unit of public administration or by others associated with that person;<sup>18</sup>

### *Restrictions and Safeguards*

These are formidable powers and their efficacy in obtaining incriminatory evidence is manifest. Nevertheless the cost of more effective investigation is some loss of civil liberties. This must be acknowledged but it is important also to note that the Act and other legislation impose many safeguards in an attempt to ensure that the sacrifice involved is no more than the gravity of the matter justifies. In the first place any person who claims that an investigation is not warranted or that it is being conducted unfairly may apply summarily to the Supreme Court for an injunction.<sup>19</sup> Second any decision of the Commission is amenable to review by the Supreme Court under the *Judicial Review Act* 1992. Third many of the powers are exercisable only after judicial authorisation. This is the case with

10 *Criminal Justice Act* 1989 (Qld) s69.

11 *Ibid* s70.

12 *Id* s71.

13 *Id* ss74, 76.

14 *Id* ss82, 123.

15 *Id* 2284(1),124.

16 *Id* ss84(2)(a),124.

17 *Id* ss84(2)(b), 124.

18 *Id* ss84(2)(c), 124.

19 *Id* s34.

respect to notices seeking information, records or evidence subject to an obligation of confidentiality,<sup>20</sup> the warrant to enter and search private premises,<sup>21</sup> the power to use listening devices,<sup>22</sup> or to take possession of passports and other specified categories of documents,<sup>23</sup> to enter premises and inspect financial records<sup>24</sup> or to require affidavits or statutory declarations relating to financial records.<sup>25</sup> Fourth a person required to provide information or records or to give evidence to the Commission may claim legal professional privilege, public interest immunity or Parliamentary privilege and refuse to comply if that claim is found to be valid by the Supreme Court.<sup>26</sup> Fifth the Commission enjoys no special exemptions from disclosure of information under the *Freedom of Information Act* 1992.

Perhaps the most controversial of the Commission's powers are the power to compel a person to furnish information or produce a record or thing<sup>27</sup> and the power to summon a person to give evidence.<sup>28</sup> The *Criminal Justice Act* specifically abrogates the privilege against self-incrimination.<sup>29</sup> However, if objection has been taken in reliance on a claim of self-incrimination the information furnished or disclosure made under compulsion is not admissible against that witness in subsequent civil or criminal proceedings in a court or in disciplinary proceedings except in relation to charges of contempt of the Commission or of perjury.<sup>30</sup> If no claim of privilege is made the evidence is admissible against the person in any subsequent proceedings. This, however, rarely happens because witnesses are often legally represented<sup>31</sup> and because it is the Commission's invariable practice to advise any witness at the outset of the right to make a claim and of its effect. At most a claim of privilege triggers a use-only indemnity. Evidence derived by later investigation from the evidence subject to the indemnity remains admissible. Limiting protection in this way provides a very effective investigative tool. The testimony of minor participants may thus be used to assemble a case against those who really control a criminal enterprise. Furthermore the evidence given at a hearing may suggest other lines of inquiry and thus indirectly facilitate proof of guilt either of the person examined or of others. Nevertheless the compromise effected by the above scheme provides at least partial protection if the person subjected to coercive process is subsequently charged.

Moreover the Commission has a discretion to close a hearing to the public "if it considers that an open hearing would be unfair to a person or contrary to the public interest"<sup>32</sup> or, even if the hearing remains open, to prohibit publication of material for the same reasons.<sup>33</sup> These powers may be and often are invoked to eliminate the risks of damage to reputation and prejudice to any ensuing criminal proceedings.

20 Id ss75(1), 121.

21 Id s71.

22 Id ss82, 123.

23 Id ss84(2)(a), 124.

24 Id s84(2)(b).

25 Id s84(2)(c).

26 Id ss77, 78, 124.

27 Id s69.

28 Id ss74, 76.

29 Id s94.

30 Id s96.

31 "A person concerned in the proceedings" within the meaning of s95(1) of the Act is entitled to legal representation. See *Re Whiting* [1994] 1 QDR 561. See also *Corns*, above n2.

32 Above n30 90(2).

33 Id s88.

When it has completed its investigation the Commission makes no determination of guilt. Rather the Chairperson, if s/he considers it desirable, transmits the report on the investigation to relevantly “the Director of Prosecutions, or other appropriate prosecuting authority, with a view to such prosecution proceedings as the Director of Prosecutions or other authority considers warranted”.<sup>34</sup> Furthermore such a report must include “all relevant information known to the Official Misconduct Division [which] supports a defence that may be available to any person liable to be charged in consequence of the report”.<sup>35</sup> The decision whether to prosecute or not is then entirely a matter for the prosecuting authority. Thus there is no adverse finding by the Commission which might, if made public, prejudice any criminal trial which may follow.

Probably the most effective protection against abuse of power by the Commission and prejudice to a fair trial is the unremitting scrutiny to which it is subjected. Principally this is scrutiny by the all party Parliamentary Criminal Justice Committee constituted under the Act and empowered inter alia “to monitor and review the discharge of the functions of the Commission as a whole and of the Official Misconduct Division in particular”<sup>36</sup> and to report to Parliament on such matters.<sup>37</sup> Members of the Committee, like officers of the Commission, are subject to an obligation to maintain confidentiality concerning information which has come to their knowledge by reason of their office.<sup>38</sup> The Commission is therefore in a position to report to the Committee candidly and comprehensively on all aspects of its activities and to answer questions and provide any additional material requested from time to time. This mechanism of accountability does not eliminate the prospect of oppressive use of the Commission’s coercive powers but certainly diminishes it. So too do other less formal safeguards such as the attention the Commission attracts from Parliamentarians generally and from professional and community groups and the intense interest of the media in the Commission’s work. Furthermore it is significant to note that under the Act the Chairperson must have served as a Supreme Court Judge or be qualified to so serve<sup>39</sup> and one member of the Commission must be “a person in actual practice as a legal practitioner ... who has demonstrated an interest and ability in civil liberties”.<sup>40</sup> At least two of the five Commissioners are therefore unlikely to be law enforcement zealots and to date none of Commissioners except the inaugural Chairperson, Sir Max Bingham QC, has come from a law enforcement background. In the result the legislative and political context in which the Commission operates ensures that there exist checks and balances which limit invasion of the traditional rights of the citizen.

### *Proposals for Reform*

It remains to be considered whether the Commission’s jurisdiction and powers should be maintained. Probably least controversial is the Commission’s jurisdiction with respect to the investigation of official misconduct. It was concern about abuse of public office which

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34 Id s33(2)(a).

35 Id s33(3)(b).

36 Id s118(1)(a).

37 Id s118(1)(b).

38 Id s132(3).

39 Id s9(1).

40 Id s9(2)(a). The present incumbent of this position is Lew Wyvill QC, a former President of the Queensland Council for Civil Liberties.

led to its establishment following the Fitzgerald Inquiry and alleged abuses of that kind still constitute the bulk of its investigative work. There is obvious good sense in the maintenance of a function which permits external independent scrutiny of the conduct of officers in the public sector. Internal investigative units, especially if denied coercive powers, are, it is submitted, neither credible nor effective.

Much more debatable is the Commission's jurisdiction with respect to organised or major crime. It might be argued that the task of fighting organised crime should be left to the Police Service. This, however, is a prescription for failure. The Police, confined as they are to traditional investigative techniques, which are essentially reactive in nature, are less likely to gather evidence implicating major participants in criminal enterprises, especially in syndicates with elaborate networks facilitating cultivation or manufacture, distribution and sale of illicit drugs. Exposure of the activities of such enterprises in all their complexity depends upon access to witnesses and records access which really depends upon resort to coercive powers. Only then is it possible to establish the participation of those who finance and direct the criminal activities of others.

While the National Crime Authority has similar jurisdiction and powers with respect to organised crime, the existence of that federal body provides no justification for excluding the Commission from the area. The National Crime Authority may act only after having been given a reference to conduct a special investigation. The reference must be granted by the Commonwealth and/or State and Territory Governments and approved by the Inter-Governmental Committee of Ministers responsible within their jurisdictions for the *National Crime Authority Act 1984 (Cth)*. The Commission on the other hand is not subject to political direction in ordering its priorities and has a discretion to range more widely. Of course, wherever it goes in any such investigation the Commission must operate within the constraints already discussed.

It is more difficult to argue that the Commission should retain its jurisdiction with respect to major as distinct from organised crime. It is the special character of the latter its systematic pervasive activity and its potentially pernicious effect on public life which justifies recourse to more drastic powers. There is, however, nothing "special" about major crime except that it is serious. Nevertheless the community has an interest in seeing that those who commit serious crime but who remain undetected after exhaustive Police investigation are ultimately brought to justice. If this interest is to be served a diminution in civil rights may sometimes be necessary. At present under the provisions of the *Criminal Justice Act* it is for the Commission to decide whether the major crime jurisdiction should be invoked.<sup>41</sup> A better arrangement, it is submitted, would be for this delicate adjustment of competing interests to be made by the Supreme Court.

One power which might be removed from the Commission's armoury without detriment to its investigative capacity is the power to carry out surveillance authorised by the Chairperson where this would otherwise constitute an offence or an unlawful purpose.<sup>42</sup> In conferring this power the Act gives effect at least in part to a recommendation of the Fitzgerald Inquiry but the power is unnecessarily drastic and the Commission has chosen not to use it.<sup>43</sup>

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41 Id s23(f)(iv).

42 Id s84(1).

43 See above n4, par 10.2.3. The recommendation in the Report was that the power like other special powers to be conferred on the Commission be "subject to strict judicial controls to be established by legislation".

A more fundamental proposal is that none of the Commission's powers be exercisable unless judicial approval has first been obtained. As already indicated such approval is a condition precedent to the exercise of many of them. Should this be the general rule? It is interesting to note that Mr Fitzgerald was of that opinion. He wrote in his Report:

The Official Misconduct Division would have access to more powers than most investigative bodies. Each such power should only be able to be used by any member of the Official Misconduct Division on judicial authority. The standard of control on the exercise of those powers must be unreservedly high. The circumstances of and need for the exercise of the power must be recorded, even when it touches on confidential or sensitive matters. Where the matters are confidential, the record should be kept secret, to be viewed only by the leave of the Court [on public interest immunity principles].

Even in circumstances of dire emergency, judicial authority should be mandatory.<sup>44</sup>

This emphatic recommendation was not fully adopted in the provisions of the *Criminal Justice Act*. The Act does not require judicial authority for the exercise by the Commission of two powers which it uses frequently and which are especially important the power to obtain information, records and things and the power to summon persons to give evidence at investigative hearings. However, there are, it is submitted, good reasons for the exemption. First the Commission must in accordance with section 22 of the Act "at all times act independently, impartially, fairly and in the public interest". This is not a mere pious exhortation to behave justly but an enforceable obligation. Commission officers are ever mindful of the fact that every investigative step (including resort to compulsory powers) is liable to summary challenge on the ground of unfairness.<sup>45</sup> Second the necessity for judicial approval before exercising these powers would greatly complicate and delay any investigation likely to warrant summoning numerous witnesses and calling for the production of documents from numerous sources. Many of the Commission's investigations relating to organised crime are of this kind. Certainly success in negotiating any but the shortest and most obvious money trail depends upon ready access to financial records from many institutions. It is submitted that the various safeguards which have been discussed above provide sufficient protection for the citizen against arbitrary or oppressive use of these powers.

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44 Ibid.

45 Id s34.