REVIEW
INTO
THE EFFECTIVENESS
OF
VICTORIA'S INTEGRITY
AND
ANTI-CORRUPTION SYSTEM

SUBMISSION
BY
KEVIN LINDEBERG

3 April 2010

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The Public Sector Standards Commissioner
The Integrity and Anti-Corruption System Review
State Services Authority
3 Treasury Place
EAST MELBOURNE 3002

Dear Commissioner

Please find below my public submission which seeks to address the Review's terms of reference in the public interest.

Yours faithfully

KEVIN LINDEBERG

This public submission seeks to address the terms of reference:

The Public Sector Standards Commissioner is asked to consider whether any reforms are needed to enhance the efficiency and effectiveness of Victoria's integrity and anti-corruption system, including the powers, functions, coordination and capacity of the Ombudsman, Auditor-General, Office of Police Integrity, Victoria Police and the Local Government Investigations and Compliance Inspectorate.

ABBREVIATIONS

CMC	Crime and Misconduct Commission
ICAC	Independent Commission Against Corruption
CCC	Corruption and Crime Commission
PCMC	Parliamentary Crime and Misconduct Committee
PCCC	Parliamentary Corruption and Crime Committee
PICACC	Parliamentary Independent Commission Against Corruption Committee

For a range of reasons there appears to be an attraction towards the creation of integrity tribunals in governments across the Commonwealth of Australia as a cure-all for the governance symptoms which fall under the umbrella of "ensuring integrity in government" and Victoria now looks like following that trend.

Assuming that this review recommends the establish of a body like Queensland's Crime and Misconduct Commission ("**CMC**"), I submit that a matter of major concern should be addressed regarding how such an authority, with its prospective coercive and invasive powers, is held to account on behalf of the people of Victoria in order that it does not become a law unto itself.

If such a tribunal can not be held to account and its impartiality guaranteed, then it ought not be established because its impact on democracy may become worse than any hoped for cure to corruption in government. Such a tribunal may become a blockage in the administration of justice and intimidatory of an entire public administration, even the Parliament.

Integrity tribunals like the CMC, the Independent Commission Against Corruption ("**ICAC**") and the Corruption and Crime Commission ("**CCC**") are generally and supposedly held to account, on behalf of the people, by all-party Parliamentary oversight committees.

I strongly suggest, at worst, that this accountability mechanism, unless properly established, is fraught with such significant dangers that it can undermine public confidence in government by the rule of law, and, at best, shall never be fully successful because of the clash between the unavoidable necessity of independence for these integrity tribunals and because it is nearly always injurious to democracy when politicians cross the line and become decision-makers in the realm of criminal justice, most especially when the wrongdoing under their watch may involve their fellow politicians upon whom the fate of a government may depend including political careers.

It can be seen, rightly or wrongly, as mates investigating mates.

While this is a highly contentious proposition, it suggests, or presupposes, that the conduct of those politicians who hold down these onerous jobs within those committees may not always be of the highest standards of probity. I do not wish to tar all such politicians with the same brush, but the inevitable question arises, namely who shall watch the watchers, and consequently, where there is a weak link in the accountability chain, problems, sooner or later, arise.

It is those problems which this public submission attempts to wrestle with and recommend solutions in the public interest.

They are no academic but have arisen in Queensland's notorious Heiner Affair. http://www.heineraffair.info/ Lessons ought to be learnt from its failures so they are not repeated in Victoria.

It is an inescapable fact that by having Parliamentary oversight committees, such as those that watch over the CMC, ICAC and the CCC, the Doctrine of the Separation of Powers is seriously compromised. This Doctrine brings the Legislature into the area of administrating criminal justice which is normally the sole province of the Executive and the Judiciary. This encroachment ought not to be overlooked in this review because the consequences may be dire on public confidence in government due to the truism that power corrupts, absolute power corrupts absolutely.

The foundation stone of the concern was put succinctly by Lord Denning during a 1989 interview when he said:

> *"There is not supposed to be one law for the rich and powerful and another for the poor and oppressed. So, the next time anyone should come along and say to you, 'Do you know who I am?' I hope you would find Fuller's words useful, 'Be you never so high, the law is above you.'"*[1]

It is reinforced in another oft-stated ruling by Lord Hewart C.J. in ***R. v Sussex Justices*; *Ex parte McCarthy*** (1924) 1 KB 256, at 259 in which his Lordship said:

[1] See ***Gouriet v Union of Post Office Workers and others*** [1977] 1 All ER 696

> *"It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

The critical question at issue, namely, bias in decision making, was considered by Lord Denning M.R. in ***Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*** (1969) 1 QB 577 at 599 when he said:

> *"... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. ...Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough....There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"*

Consequently, the core concern is how to extract politics from politicians in decision making when it impacts on (their domain of) politics, especially when any such findings by oversight committees are generally non-justiciable if they remain within the relevant statute's guidelines.[2]

[2] *Corrigan v Parliamentary Criminal Justice Committee* [2000] QSC 96 (27 April 2000)

Both Parliaments of Queensland and Western Australia have attempted respectively to address this critical question of impartial decision-making.

For example, Queensland has legislated to make decision-making bipartisan[3] in the handling of complaints involving potential wrongdoing, to offset a government (4-3) majority inside the Parliamentary Crime and Misconduct Committee ("**PCMC**"). That is, any majority must consist of at least one member from the non-government side.

Recent developments in the Heiner Affair on this critical point of bipartisanship ought to be examined by this review because it is being claimed by the PCMC that the bipartisanship obligation under s295 of the ***Crime and Misconduct Act 2001*** **(Qld)** only concerns a decision "to refer" a complaint, while a decision "not to refer" a complaint only needs the vote of the government majority. In effect, if this is correct – and it is being strongly contested as being not valid – it means that government members inside the PCMC can, at their whim, use their majority numbers to cover-up allegations against the government. Equally, it can also mean that the non-government minority can deny the requisite bipartisan decision for referral of allegations against its side of politics should the government majority want the matter investigated.

In Western Australia, the Parliamentary Corruption and Crime Committee ("**PCCC**") has been evenly established with 4 members, that is, 2 members being drawn from each side of politics thereby making sure that any majority decision is automatically bipartisan.

By imposing bipartisanship and then functioning properly, it becomes an watchdog device inside the parliamentary watchdog/oversight committee because it can be reasonably assumed, in the eyes of the Parliament and public, that whatever a refer/non-refer decision emerges, especially concerning highly contentious alleged complaints involving politicians, it enjoys cross-party support and is not the end result of abuse of power just because one side has the numbers.

[3] See section 295(3) of the *Crime and Misconduct Act 2001* (Qld).

In New South Wales, ICAC's Parliamentary oversight committee is not constrained by any obligation of bipartisanship in its decision making or by its make-up being even in number as occurs in Western Australia. In effect, government majority members can always control the destiny of the NSW's Parliamentary oversight committee's function, and, whether unavoidably so or otherwise because of 'normal' confidentiality safeguard imposed on Parliamentary oversight committees, all such conduct is cloaked by strict confidentiality requirements on all committee members. It might be said that they can see all the unhealthy cooking inside the kitchen and cannot inform the patrons.

The open forums of the Parliament normally enjoyed in democracies, once criminal justice deliberations become part of the Legislature, are closed down because of Standing Orders and, relevantly, the ***Crime and Misconduct Act 2001*** **(Qld)** which has established the PCMC under Part 3 of its provisions.

This secrecy is reinforced by the exemption generally imposed under Article 9 of the ***Bill of Rights 1689*** and may become the thin edge of the wedge in terms of openness, fairness, justice and accountability in the handling of criminal justice matters. This is because, as previously stated, the decisions of parliamentary committees are generally non-justiciable[4] whereas when criminal justice matters are handled by the Executive and Judicial arms of government they are reviewable by a court and appeal court.

The other related principle at play is that no man shall be a judge in his own cause - *nemo judex in sua causa.* In ***Dimes v. Grand Junction Canal*** (1852) 3 H.L.C. 759. Lord Campbell said at 793:

> *"….No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set*

[4] See ***Corrigan v Parliamentary Criminal Justice Committee*** [2000] QSC 96 (27 April 2000)

> *aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."*

Deane J. in ***Webb v. The Queen*** (1994) 181 C.L.R. 41, at 74 relevant said:

> *"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. . . . The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings."* (Underlining added)

It is clear that the issue of eradicating real or apprehended bias in decision-making is both real and important in this somewhat unique context. Another device used by the Parliaments of New South Wales and Western Australia, but not Queensland, is that the respective independent Parliamentary Commissioner/Inspector may be directly approached by a complainant with a grievance for examination, which, assuming the integrity of the office-holder, permits an investigatory avenue where party politics is taken out of the decision making. In the case of Western Australia, it is understood that the Parliamentary Inspector may even make a report direct to Parliament as well as to the oversight committee.

This statutory framework has caused conflict in Western Australia between the oversight committee, the integrity tribunal and the Parliamentary Inspector but nevertheless its adoption is strongly recommended should this review decide that an integrity tribunal ought to be brought into the accountability/anti-corruption mix for Victoria.

In Queensland, all complainants must seek a review the CMC's handling of their complaint through the PCMC and may not make a direct approach to the Parliamentary Commissioner.

Whether by direct approach from a complainant or by a referral from the Parliamentary oversight committee, the Parliamentary Commissioner/Inspector obviously holds a highly responsible position as a final arbiter and therefore ought to be a barrister (a) of impeccable ethical and professional standing, (b) not permitted to be nominated (i.e. head-hunted) for the position by the government so that his/her independence is not brought into doubt, and (c) recommended to the position only by bipartisan support inside the Parliamentary oversight committee.

While it may be breaking new ground, it is submitted, should bodies like the CMC and PCMC be recommended in this review to be set up, that any legislation, by special exemption, make findings by the Parliamentary oversight committee not subject to Article 9 of the ***Bill of Rights 1689*** because this area of decision making concerns issues of criminal justice, whose outcomes which may impinge on a person's liberty and reputation, and because the principle that no man should judge in his own cause (i.e. politicians investigating politicians) is fundamental in any properly functioning democracy.

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Kevin Lindeberg

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3 April 2010