"WHAT ABOUT THE PUBLIC INTEREST?"

By Professor Geoff Gallop

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I very much appreciate the opportunity to address this conference convened by Australia's three major anti-corruption agencies. I remember well the debates in the Western Australian Parliament and community about the merits or otherwise of anti-corruption agencies that preceded and followed the WA Inc. Royal Commission[1].

The first steps down the legislative track were rather hesitant and cautious but that was remedied with the establishment of the Corruption and Crime Commission in 2003. It left few if any stones unturned and, most importantly, was faithful to the recommendations of the WA Inc Royal Commissioners.

THE 2003 LEGISLATION AND ITS APPLICATION

Our aim at the time was to ensure it had sufficient powers to do the job and was in a proper position to determine whether its examinations were to be in private or public.

"The job" to which I refer wasn't just to deal with allegations of misconduct in the public sector but also to seek to prevent misconduct there through education and other strategies.

I know that the Corruption and Crime Commission has been the subject of criticism in the way it has conducted itself and that some have called for it to change its emphasis from public sector misconduct to serious and organised crime.

That its officers should be accountable for what they do goes without saying and that's why we established the Parliamentary Inspector and why the Parliament has been given a specific brief to be

[1] I refer here to the official Corruption Commission Act 1988 and amendments to create the Anti-Corruption Commission in 1996.

involved in supervision. Hopefully this institution answers the question: Who regulates the regulator, or, as Karl Marx put it in his Theses on Feuerbach, "Who will educate the educators?" They have been and should be vigilant and vigorous in their supervision.

WHAT SHOULD THE CCC BE DOING?

However, this notion of shifting effort and resources to serious and organised crime completely misses the point of the exercise. For a whole lot of reasons there are always going to be allegations about public sector misconduct and some – but not all – will be verified. By establishing Commissions to deal with these matters Queensland, New South Wales and Western Australia have regularised the system for members of the public to raise their concerns but more importantly given them the confidence that the matters will be taken seriously. As the Hon. Len Roberts-Smith a former Commissioner from WA said in a speech last year:

> The fact is... that virtually all of the work of the Commission is directed to achieving the purpose of improving the integrity of and reducing the incidence of misconduct in the public sector[2].

At this important time in the history of WA's Corruption and Crime Commission this is hardly the time to take our eyes off the ball. It should be a time for consolidation and, as the policy wonks call it, habituation and institutionalisation. As Nick Greiner former NSW Premier said of the role ICAC has played in NSW:

> I think ICAC is now doing exactly what it was created to do which is to try and change behaviours, change cultures, change approaches. It is not essentially about criminality even though there might be some. It is really about what's acceptable behaviour in public life[3].

[2] "The Role of the Corruption and Crime Commission in the constitutional system of Western Australia" Thursday, 19 August 2010, p.2
[3] Quoted in "The Role of the Corruption and Crime Commission", p.14

Greiner's comments lead me to note what has been a disappointment about the public perception of the work of the Corruption and Crime Commission. It doesn't make legally binding determinations or to quote Len Roberts-Smith again:

> ...an opinion that misconduct has occurred is not to be taken as a finding that a person has committed a criminal or disciplinary offence[4]

Although recommendations can be made "as to whether consideration should or should not be given to criminal prosecution or the taking of disciplinary action", this is not "core business"[5].

It follows that the true measure of success is the extent to which it builds "a culture of integrity" in the public sector, not how many charges are laid and criminal offences determined. Indeed it is part of that culture by its very existence.

It's not the only agency of accountability, nor does it investigate all the complaints it receives, some of these are referred to others such as the Ombudsman, the Public Sector Commission or the Auditor-General. I would argue, however, that it is now a lynch-pin of the system of public sector accountability. Take it out or dramatically alter its responsibilities and the public will be the loser.

Not without some pain and certainly not without some drawbacks it's brought some rationality to an otherwise confused situation when police investigated police, public servants investigated their political masters and parliamentarians had plenty of excuses for abusing parliamentary privilege.

LEAVE IT TO POLITCS?

There is a never-ending battle between power and principle within the political class and between opportunity and obligation in the bureaucratic class. It would be nice to think that the dynamics created by Opposition, Parliament and the media would harness governments to the requirements of good practice and that these three plus ministerial supervision would perform the same role for

[4] "The Role of the Corruption and Crime Commission" p.12
[5] Ibid, p.12

the public service. Add to all of that regular elections and our accountability requirements are set to be covered.

We might call it “the Westminster” view of politics. It’s used quite often in criticism of proposals like a Bill or Charter of Rights as well because they bring legal standards to bear in areas that are necessarily complex and contradictory. Rights can often conflict and there is often a “greater good” in any case, for example the protection of national security in the event of hostile attack.

What’s going on here is not just an argument about politics but also about lawyers and the law. Politicians and the public servants who work for them want power and the outcomes it can produce. They want to get on with the job but every day they feel the constraints of politics – parliamentary and media scrutiny. Why, they plead, should we create institutions like Corruption Commissions (and Charters of Rights for that matter) that add lawyers and their rigid thinking to the list of interrogators?

What I see in a lot of this criticism is the dropping of the ball of principle. It is true that principles are in and of themselves abstract and need to be applied in situations where they may clash or where strict adherence to them will mean compromise in respect of other objectives.

Let the politicians and public servants muddle through say the critics. Unless their chosen path about both means and ends is seriously at odds with public expectations about what is right and wrong why would we want to interfere?

THE PUBLIC INTEREST

What is at stake here is the public interest. This is, of course, a concept much criticised by political scientists for its abstractness on the one hand, and its blatantly political uses as a code word for executive power on the other. As an American political scientist has put it: “In an elected democratic polity public interest is whatever the majority in Congress or the Presidency say it is”.

The truth, however, is otherwise. It is true that it has to be applied in the real world of complexity and contradiction just as human rights charters have to be but that doesn't lessen its potency nor devalue its currency. In fact "acting in the public interest" is a legal obligation for both politicians and public servants. It has implications for the processes of government and also for the outcomes of government, although the latter are necessarily more open to the range of value differences that manifest themselves in the political community. When speaking to my students the Deputy NSW Ombudsman Chris Wheeler put it this way:

> The "public interest" is best seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term... is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (i.e. more 'public') concern[6].

It is one of the challenges of our system of government to oblige politicians and public servants to work out how to integrate power and principle without losing the value of each. On the one side, the pressure to perform and the need to influence and on the other, the obligation to follow due process in all of its guises. It's not easy and public officials sometimes fail in smaller ways or bigger ways. However, history tells us that power and principle can work together and when they do the outcomes are better and more sustainable. The accountability agencies of government have been established within government itself to assist in this process. They bring system and hopefully philosophical consistency to the debates and the investigations and recommendations they make about these matters.

It's much better that we have a Corruption Commission as we do for all concerned except perhaps for those who want to push the boundaries in the interests of self or party or both. Indeed the

[6] "The Meaning of the Public Interest", Graduate School of Government, University of Sydney, 26 September 2008.

creation and sustaining of our independent institutions of accountability (or the integrity branch as Jim Spigelman puts it) is one of the foundation stones of good government.