

Legislative Council

Wednesday, 15 October 2008, Page 327

INDEPENDENT COMMISSION AGAINST CRIME AND CORRUPTION BILL

The Hon. A. BRESSINGTON (17:46): As I indicated in my speech on the Independent Commission Against Crime and Corruption Bill 2007, I believe this is possibly the single most important bill we will ever have to debate in this place. For this reason, I again will not be supporting the ICAC model proposed in the Independent Commission against Crime and Corruption Bill 2008 as I believe it is inherently flawed and will serve as another white elephant which will join the ranks of so many others in this state.

As I explained previously, if our ministerial officers, ombudsmen and regulatory and review bodies such as the Office of the Commissioner for Public Employment, Equal Opportunity, Health and Community Services Complaints, the Legal Practitioners Conduct Board, the Medical Board, the Police Complaints Authority, the court authorities and countless others actually worked to deliver justice, we would not be sitting here having this discussion. The difference between the current bill and the earlier version is not great enough to persuade me to support it, and it is not my intention to add another useless treadmill for people to walk when they encounter problems with a government department.

I understand that at the time that the Hon. Ian Gilfillan drafted his original ICAC bill, which he attempted to introduce in 1989, 1992 and 2005, it was largely based on the model used in New South Wales, a model which continues to contain problems for those trying to uncover corruption. I have studied and analysed the successes and failures of many whistleblower cases and I have reached the conclusion that the only way to stop government officials from evading accountability is to include the following features in any future bill.

First, the bill must contain objects that will articulate what its purpose and functions will be. It is glaringly obvious that words such as accountability, corruption and duty of care do not even make the definitions, much less steer us clearly to the bill's intent. I am advised that possibly the best definition ever developed for accountability is contained in the Commonwealth of Australia publication entitled *Accountability in the Commonwealth Public Sector: An Exposure Draft* in June 1991. This publication was followed by *Accountability in the Commonwealth Public Sector* in June 1993. These documents define accountability as follows:

Not simply providing information or answering questions but includes setting goals, providing and reporting on results, and the visible consequences for getting things right or wrong.

It sounds a bit like question time in this place. Sadly, but not surprisingly, this important publication is no longer in print, nor are its contents used or embraced by the commonwealth government and it has long since been lost and buried. *Black's Law Dictionary* definition of corruption is also worth using, and it states:

An act done with an intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully or wrongfully uses his station or character to procure some benefit for himself or another person, contrary to duty and the rights of others.

There are other definitions much less helpful. According to the *Macquarie Concise Dictionary of Modern Law*, student edition, (reprinted 1991) the definition of corruption is:

The procuring of the exercise of a public official's authority in a particular way by giving or promising reward.

The problem with this definition is that it links corruption to rewards or incentives which, in corrupt systems, are not often articulated, overt or immediately apparent but can be subtle or perceived—sufficiently to adversely influence an organisational culture. For example, departmental executives may perceive that board members of an organisation want a particular policy or procedural direction and then act accordingly leaving no paper trail, as it is simply not required to advance the organisational objectives. Often, however, the practices are driven by a perverse culture as if under instruction of a 'Code Red'. For example, what many believe has occurred over decades in an organisation such as WorkCover is that a direction was driven from the top down saying, 'We do not pay out injured workers.'

This value system is understood by the case managers. Therefore, what is translated into practice and ultimately delivered to workers at the coalface is a culture which says, 'We do not offer redemptions.' The experience of injured workers then becomes that of having their claims delayed, stalled and stonewalled by rude and abusive case managers. So, when the compilation and dissemination of the Scheme Critical List evolved, it was never a quantum leap for corporate officials to justify their actions as if it were entirely benign.

In child protection, one such 'Code Red' has been a philosophical direction saying, 'We don't have the time to chase difficult teens or resources to get involved in complex legal and family problems.' At the coalface, this has been translated into the practice that, 'Children have the right to choose to take illicit drugs and drink alcohol; therefore, we do not intervene where a child runs away from home.'

The experience of parents and guardians then becomes that of having their concerns about the safety and wellbeing of their children dismissed or trivialised and the child being left at the risk of abuse or exploitation which my Child Protection (Harbouring) Amendment Bill seeks to address in the future.

The second key problem with this ICAC bill is that it does not clarify whether only public officials are to fall within its power or whether it is intended to include people who behave in a corrupt manner in the private and non-government sectors or broader community, such as a social club. As it reads, there would be serious doubt, if not ambiguity, that, if a private corporation were to become involved in corrupt conduct, the corrupt conduct could be subjected to the scrutiny of this ICAC model or that the corrupt corporate officials could even be held liable for anything, much less

incur a jail sentence unless there has been direct involvement from some public official or office.

This was the experience with the Whistleblowers Protection Act when, in February 1999, WorkCover sought a legislative loophole from having lawfully to comply with the object of the Whistleblowers Protection Act 1993 by claiming to be a private business, which it never was. To the best of my knowledge, it has always been a public statutory authority. Such an attempt by the WorkCover Corporation to gain exemption from complying with the whistleblowers legislation was desperate at best.

However, the beauty of this strategy was that it immediately put the corporation beyond the reach of the Anti-Corruption Branch and simultaneously created the most absurd situation where the Whistleblowers Protection Act could not be applied to charge any person for any act of corruption, fraud, maladministration or wrongdoing, either by government or by private agency, with the hardest of evidence because the government officials were making up their own rules for how the act would be interpreted, applied and enforced.

It also created a precedent whereby other government agencies could conceal themselves as private businesses, giving them the green light to pollute, deceive and roort taxpayers with no risk of getting caught, much less prosecuted, in the course of allegedly pursuing statutory functions.

The case that best highlights this fact is the matter of Mr Mark Moore-McQuillan, who alleges relentless persecution by officers of the WorkCover Corporation for alleged fraud that they themselves had orchestrated. Despite its renegeing upon an agreement entered into on the instruction of the Workers Compensation Tribunal to re-examine its position on Mr Mark Moore-McQuillan's case, pending the outcome of a favourable opinion from an independent QC, and the opinion of the QC concluding that 'Mr Mark Moore-McQuillan was not guilty of any act of alleged fraud', no penalty was ever imposed upon the corporation by the tribunal for its part in his litigation and persecution.

The opinion of Mr Chris Kourakis (who was then queen's counsel and who was previously the solicitor-general and is now a judge of the Supreme Court) came hot on the heels of (1) a finding by the Workers Compensation Tribunal (JD 1/98) that there had been no evidence of fraud by Mr Mark Moore-McQuillan and that the evidence of the corporation had been found wanting; and (2) a further appeal to the Full Bench of the Tribunal (JD 50/98) in which three judges found that WorkCover's position was wholly unreliable and incapable of constituting the basis for a finding, even on a civil onus.

On several occasions, Mr Mark Moore-McQuillan attempted to have responsible officers investigated for illegal conduct under section 122(4) of the Workers Rehabilitation and Compensation Act 1986. However, lawyers for the WorkCover Corporation successfully argued before various courts and the Workers Compensation Tribunal that it could not be held liable for any unlawful act whatsoever.

The implication for whistleblowers is that responsible officers handling the disclosure of corruption or unlawful activity under the Whistleblowers Protection Act cannot find unlawful conduct where, in fact, the Crown claims that there has been no unlawful activity by virtue of their immunity. Thus, in practice, it becomes lawful for the Crown to act unlawfully—again, no victim, no crime.

When approached by Mr Mark Moore-McQuillan requesting a full investigation into his case, the Anti-Corruption Branch claimed to have no powers to investigate a private agency (WorkCover), which it claims the WorkCover Corporation to be. This is in direct contempt of the Full Supreme Court judgment of *WorkCover v Saunders and Bawden* of December 1995, which ruled that the WorkCover Corporation was not a private person or a corporation but a statutory body with the role of fulfilling statutory functions.

So, here we have a blatant example of the Crown in South Australia playing jurisdictional ping-pong by giving the corporation an exemption from compliance under the Whistleblowers Protection Act so that it does not have to act upon or facilitate disclosures of wrongdoing or maladministration by its own officers. For example, if a person seeks to make disclosures of possible criminal activity by an agency, even the State Ombudsman claims that he is required to refer the matter to the Anti-Corruption Branch. Whistleblowers are now being told that, in fact, no-one has that authority at all.

It is a dangerous situation when government agencies can proactively set out to sabotage any hope of exposing corrupt activities by their own high-ranking public officials. Whistleblowers who have attempted to use the Whistleblowers Protection Act to date have found it impossible to get courts or tribunals to investigate or rule on the conduct of government authorities representing the interests of the Crown, whatever the merits of the case. Yet now the Anti-Corruption Branch has also weighed in, dishonestly claiming to have no powers to investigate the WorkCover Corporation as it deemed it a private business—which it was not then and never has been.

The problem of a private business acting illegally and against the public interest ultimately arises from government's failure to regulate the so-called private businesses to which it has delegated statutory functions and powers anyway. It has become a free-for-all, and the message to government agencies is now: do whatever you want as long as you are a private business.

The frightening thing is that we now have the revolving-door syndrome operating for the corporation so that it can become whatever it wants to be—a private agency, capable of avoiding investigation and prosecution on the one hand, and a government agency, capable of framing innocent citizens for alleged acts of fraud on the other—in order to secure dishonest convictions and judgments which, even if proved to be false or malicious, cannot result in anyone being held liable.

Mr Mark Moore-McQuillan now faces the real prospect of being imprisoned for his efforts to establish his innocence, whilst the people who are responsible for devastating this man's life are able to escape any accountability for their part in

bringing an innocent man to the brink of suicide and bankruptcy and causing the terrible devastation of his health and livelihood.

Another vital feature of the ICAC model I propose is that the only persons who can be brought before an ICAC body are those at the level of ASO5 (and possibly even ASO6, above or equivalent), namely, those who hold the title of board member, chairperson, chief executive officer, director or senior manager or those who hold a similar senior rank within an organisation. Existing law enforcement and regulatory bodies should be able properly to address and resolve all other lower-level crime, fraud or wrongdoing within the community. Indeed, that is why we have the Police Complaints Authority and the courts; it is their rightful role and function to investigate these primary offences.

The objective must be to ensure that corrupt officials at the top of the hierarchy cannot be so well protected from scrutiny as to use the receptionist, janitor, base-grade clerk or someone's ex-spouse as a scapegoat when things go bust and heads must finally roll. If we do not limit the range of people who can answer to the charges of corruption, we will see patsies being brought before the ICAC rather than the big fish at the top of the food chain.

The purpose of limiting who can be brought before an ICAC to answer charges is also to ensure that under-staffing or under-resourcing cannot be used as a standard catchcry not to investigate, as is currently the case, by existing complaints and review authorities. This stipulation will also ensure that every complaint, review, investigative or judicial authority that got away with covering up corruption of the law or process—perhaps bodies such as crown law, ombudsmen, the Police Complaints Authority, professional boards and associations, etc.—cannot escape all other levels and forums of scrutiny.

It will also serve to ensure that those officials who have remained blind, deaf and dumb to the corruption being disclosed can be held accountable and brought in to answer charges directly. It will send the message that the buck will ultimately stop with them. If the ICAC cannot guarantee executive, judicial and parliamentary accountability, the three arms of government become the problem, as they have historically in such serious cases of crime and corruption.

Another feature of a solid ICAC bill would be that the rules of evidence must be adhered to, albeit not in the strictest sense. Currently, clause 93 (Evidence and Procedure) of the bill provides:

The commission is not bound by the rules of evidence and may inform itself on any matter in such manner as it considers appropriate.

We know from the experience of existing whistleblowers that this will be abused to later mean that no rules have to be applied at all; at least that is how judges and arbitration officers at the Workers Compensation Tribunal have used identical legislative passages in the Workers Rehabilitation and Compensation Act. Of course, this has been a corruption of the intent of this provision in such legislation as, in truth, that passage is intended not to bind the commission or authority so as to be limited or restricted in how far they can delve into a matter, and it seeks to enable a much deeper

level of investigation which, if the strictest rules were applied, they would be unable to undertake. Instead, decision makers at the Workers Compensation Tribunal have seized on this provision to justify ignoring all corroborative evidence placed before it and to come up with highly suspect decisions in keeping with the special treatment that the scheme-critical cases seem to attract.

Another vitally important feature of a sound ICAC model would include a requirement that the commission submit an annual report to parliament detailing the outcome and/or progress in cases under consideration. Every case brought before the ICAC must be resolved or be seen to be advancing towards resolution within a time frame. It is imperative that no case is left to drag on indefinitely whilst whistleblowers cannot move on with their lives.

Dr Robert Moles's case sat for years before the Medical Board without resolution, as did the application for the review of the Keogh case before Mr Kourakis (which sat for four years). In another case, a file sat with a former state ombudsman for three years, only to be told that the office would not in fact be investigating—not that the office had investigated and found no cause of action. I am told that some cases—many relating to freedom of information applications—have received no notification from this office in more than seven years.

There also needs to be a stipulation that dismissal, resignation and/or passage of time must not become grounds to disqualify a case from being brought before an ICAC. Often corrupt organisations will shuffle officers in and out of jobs long enough to take the heat off the person—or other high ranking officials—who may be involved in dishonest activity, but only long enough to do a circuit, before being reinstated in the role where they could do more damage.

We know that one very high ranking officer in WorkCover has been rotated around strategically to avoid ever being in a place, or a position, where he could be subpoenaed to answer questions, but he has always enjoyed having influence over cases in which many injured workers have alleged wrongdoing.

Also, the South Australian Association of Social Workers has previously used a social worker's resignation as grounds for non-investigation, as occurred in the Butcher of Bega case—to justify the New South Wales Medical Board doing nothing despite countless complaints, by which time he had been dismissed from his position.

This provision must also ensure that, even where a person is moved out of their substantive position, the ICAC can call them in anyway, perhaps even to the point of extradition if a person should move states, for example. No one must be allowed to evade having to answer questions by going interstate or overseas long enough to delay or frustrate the outcome.

There are scores of other changes and requirements that I believe need to be made and considered, but I will finish at this point by saying that the establishment of an institution such as an ICAC is not one which should be rushed through with no real community-based input to give people false hope. This state is already saturated with both malignant and benign complaints authorities, whether through incompetence or corruption. We need to ask ourselves who we want an ICAC to work for—the elite in

our community who can afford legal representation and who can exert political influence and pull strings for political mileage, or the common person in the street. This ICAC model can do nothing for the common person.

Debate adjourned on motion of Hon. T.J. Stephens.