

## Submission to the PCCC Review of the Crime and Corruption Commissions Activities

From Barry Thomas

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It may be helpful to set out some of my legal experience to judge the relevance of my submission. I was appointed a Crown Prosecutor in 1978 and conducted many trials and appeals. I was later a team leader in the Criminal Justice Commission for 5 years and oversaw a multidisciplinary team investigating numerous allegations of Official Misconduct and corrupt behaviour. I prepared briefs for the Special Prosecutor on matters arising from the Fitzgerald enquiry. I was team leader for CJC public hearings and led or was involved in investigations leading to several of the reports cited by the CCC in its 30-year celebration of the Fitzgerald inquiry. I was also a barrister in private practice and then President and CEO of the Mental Health Review Tribunal for 12 years.

I have experience of making notifications to the CCC of suspected Corrupt conduct and being subject to complaint and investigation by the CCC. It is my experience of the current processes of the CCC which have caused me great concern and cause me to make this submission

I will address my submission to some of the terms of reference and provide a case study to assist an understanding of my submissions.

In summary I submit

.The CCC governance fails when it does not apply the law concerning its central role and misidentifies what falls within corrupt conduct. That is particularly of concern when the senior members of the CCC are the people determining all matters to be investigated, devolved or dismissed as the primary action for complaints.

.The situation that the CCC has placed itself in concerning devolving investigations is that on one hand it warns the public that senior public servants may act improperly to favour political views or to hide information perceived as disclosing problematic behaviour .On the other hand the CCC then puts that class of senior public servants in direct control of choosing the investigator for a particular issue in circumstances where the investigator has an obvious pecuniary interest in keeping their customer satisfied. I submit that it is vital to cease the direct fee for service arrangement which the CCC has established.

It should be relatively straightforward for the CCC to interrogate the CCCs own data to include the outcomes of the complaints and show a percentage of sustained complaints over recent years. This would demonstrate exactly how high the corruption risk is and if the CCC strategies and results are assessed as effective by the community.

### **Background**

The CCCs structure and processes are in large part a result of amendments from 2015 when it received its current title following amendments made by Act 21 of 2014. This followed a review conducted by the former High Court Judge the Hon I Callinan.A.C. and Professor Aroney in March 2013.

The explanatory note to the amendments indicates that matters targeted by the amendments included

- . Public Confidence in the CCC
- . Timeliness of the investigation of complaints
- . Operational and corporate governance structures within the CMC

. Instituting Five yearly reviews of the CCC

Some of the practical changes made were that:

The role of the Chairperson and the CEO were altered to cause structural separation of those roles and to address the perception that the CCC was dilatory in completing investigations.

The use of devolved investigations was encouraged to enable the CCC to address more serious issues and better use its resources.

The amendment changed the definition of 'official misconduct' to a new concept of 'corrupt conduct' that was intended, with other amendments, to raise the threshold for conduct that is subject to the CCC's jurisdiction.

The CCC was to devolve matters to departments where appropriate

The CCC was to show how it monitored investigations to ensure they were dealt with in a timely way and what action it took if the standard timeframe of 12 months was not met.

Both the review and the legislation had an emphasis on the CCC dealing with complaints in a timely way. This was to be the case whether the CCC investigated the matter or devolved it to a department. The CCC could retake a devolved investigation as part of this scheme.

### **Corporate Governance**

When the CCC receives a complaint, its procedure is to make an assessment within 4 weeks. This seems to involve that the matter is considered by a committee composed of the Chairperson, the CEO and other senior officers of the CCC.

Integral to the effective assessment of complaints is an understanding within the CCC of what is Corrupt Conduct which is a core consideration of the CCC. If it starts from a misunderstanding of its own jurisdiction such an error casts great doubt on the steps that follow this decision-making.

My experience gives me a good understanding of the pressure that mounts in organizations to achieve results in investigations and prosecutions. However importantly there is an overriding need to serve the law and contribute to delivering justice that can never be overlooked.

It is also clear from regular Media reports that the CCC fails to instigate let alone complete timely investigations despite the majority of matters it received being devolved to departments. The maxim Justice delayed is justice denied remains relevant today.

I will provide some examples later of matters of delay or inappropriate pursuit of targets of CCC investigations.

One matter which demonstrated both the impact of delay and more worryingly that the CCC does not understand a central issue to its jurisdiction is the judgement of the Supreme Court delivered on 26 11 2019 by Justice Brown in *Walters v Drummond* reported at 2019 QSC 332

This case concerned a Professor in charge of a Cardiology unit at a Public hospital who was accused of fraud and reported to the CCC around December 2017 .The CCC decided to commence a Public Interest Review monitored by the CCC .Then an investigation was conducted by Qld Health through investigators retained from BDO. The Cardiologist was then suspended in September 2018 and liable to disciplinary proceedings. He challenge this action in the Supreme Court

In the judgement of Justice Brown, it was said;

[12]

“Following the BDO Report being provided first to Mr Drummond (a health Official) and then to the CCC, Ms Neri (a Health Official) informed the CCC that Metro North was taking disciplinary proceedings against Professor Walters as a result of the BDO Report. On 21 September 2018 the CCC agreed with that course, although the basis upon which it was regarded as appropriate for them to comment on the matter is not apparent, given that none of the matters to be assessed on behalf of the CCC were found to be substantiated.<sup>[6]</sup> Mr Drummond subsequently decided to suspend Professor Walters on 24 September 2018, pursuant to s 189 of the *Public Service Act 2008* (Qld), which again suspended him from his clinical role at TCPH, not just his role in administration.”

Then at [113]

“In my view, there has been an error of law by the Investigators in deciding that Professor Walters was guilty of maladministration as a result of the conflation of maladministration and corrupt conduct and the misapplication of those terms, by which findings were made that were unsupported by evidence.”

At para 208 the Court said

“Given that this was the first stage of disciplinary action and, on the face of the Report, findings of maladministration were made after an investigation with which the CCC expressed agreement, Mr Drummond’s belief that Professor Walters was so liable was not legally unreasonable, albeit upon analysis, the findings of BDO relied upon and the comments of the CCC were flawed.”

The judgement shows that the CCC involved itself in an area outside its responsibility thereby contributing to specialist cardiac surgeon being wrongly suspended by Qld health for over a year because the CCC inappropriately and gratuitously supported an erroneous report. Importantly the judgement shows that CCC didn’t understand their central jurisdiction and advised Qld health quite wrongly that maladministration was corrupt conduct. It took a Supreme Court challenge to establish the error. A person who was a rare asset to the community was stopped from operating to save lives for over a year.

It should be remembered that the High court had addressed a similar issue only three years before in *ICAC V Cunneen and Ors* 2015 HCA 14

A High Court summary of 15 4 2015 states

“Today the High Court held, by majority, that the New South Wales Independent Commission Against Corruption (“ICAC”) has no power to conduct an inquiry into allegations that were made against the respondents, because the alleged conduct was not “corrupt conduct” as defined in s 8(2) of the Independent Commission Against Corruption Act 1988 (NSW) (“the ICAC Act”). “

This decision made only a few years previously should have been uppermost for the CCC but instead it made a similar error about the essential nature of its jurisdiction namely did an activity fall within the definition of Corrupt Conduct. At the time I saw a CCC comment on its website which quoted the dissenting judgement from the High Court as if it was in fact the preferred law. Ms Cunneen QC wrote an article “Great harm to innocent people “which describes the impact on those wrongly subject to the attention of anticorruption bodies. She observed that she had to risk her family home to clear her name. Most people don’t have a medical defence fund to help challenge being wrongly investigated by the CCC or dealing with their failures to adequately assess the results of a devolved investigation.

The law should be applied consistently and correctly by the CCC and lead to predictable results and not by creating surprise moments because of a personal view of what should be the law .The CCC governance fails when it does not apply the law concerning its central role and misidentifies what falls within corrupt conduct. That is particularly of concern when the senior members of the CCC are the people determining all matters to

be investigated, devolved or dismissed as the primary action for complaints. This also reflects on the question of CCC outcomes because if the responsibility of instituting investigations resides at the top of the CCC so does any refusal to investigate serious matters reported to the CCC and not investigated. The CCC investigations of local Councils, particularly the Ipswich Council has been highlighted recently however this complaint had been raised in parliament for many years before any action was finally taken, presumably the delay was because the matters were not assessed by the CCC as serious.

#### CONFLICTS OF INTERESTS: SETTING THE EXAMPLE

Much public comment is made by the CCC on others avoiding conflicts of interest and declaring any that may exist in a timely manner.

My experience is that the executive of the CCC does not observe such practices in a timely manner.

I include a Case study that provides examples of this and have documentation to support the case study.

### **Corruption Function**

#### **The devolution Principal**

The CCC appears to devolve most complaints made to it.

This means that it returns to the department concerned the entire running of the investigation including drawing up the terms of reference for the investigator, deciding who will be the investigator, what documents will be made available to the investigator etc. Notably an investigator has no power to compel any person to speak with them or produce any documents to them. The CCC by contrast has greater powers to require production of documents and summon people to investigative hearings.

It appears that many department's devolved investigations are contracted out to a variety of sole traders and companies who become approved suppliers to the government. Clearly there is a direct pecuniary benefit in continuing to supply this service to departments. I have in my role as President used one of the larger suppliers of investigative service on the recommendation of Qld health. The matter was not complex but in a small organization it needed some independence in the investigation. I was troubled that towards the end the investigator offered me a copy of the draft report and asked for any concerns I had or if there were other findings I wished to have included. I did not accept the offer or ask for inclusions as I wanted an independent report. However it showed me there is real potential for interference by a senior officer of a department suggesting to the investigator a desirable outcome be added or the omission of criticism before delivery of a final report.

Such a concern was recognised by Justice A Lyons in a matter concerning a Health Department investigation in her Judgement in *VegaVega v Hoyle* reported 2015 QSC 111

This arose from a Qld Health investigation of a surgeon where a difficult surgery had gone wrong;

Justice Lyons stated in her Judgement;

Ms Read states that she was advised by Ms McMullen, chief legal counsel for Qld Health, on 8 May 2014 that her appointment as an investigator had commenced. She considered, therefore, that she could not continue to provide advice to the Health Service or Qld Health about matters relating to the clinical incident and that her role would be that of an investigator only. Ms Read states:<sup>[25]</sup>

“On 8 May 2014, I telephoned my contacts at CQHHS [Health Service] to advise that I had been appointed as an investigator by the Director General and would no longer be able to provide advice to the Department [Qld Health] or CQHHS [Health Service]. My recollection is that I made these calls in the afternoon of 8 May 2014 after I received my instrument of appointment and discussed this issue with Ms McMullen.”

Later Justice Lyons said:

140. [144]

“In this case, two issues concern me. Firstly, the closeness of the association between the investigator and the firm which was providing legal advice to both Qld Health and the Health Service. Secondly, the fact that prior to the appointment of Ms Read, she was aware that a decision had been reached by Qld Health to suspend Dr Vega Vega’s employment and there had been a notification to the AHPRA. There is no doubt that Minters was involved in those decisions and that Ms Read was actively involved in the file at the time those decisions were made. In my view, a reasonably well informed observer might conclude that this does “not look good” because it gives rise to a perception that a concluded view, although a preliminary view, had already been reached about the very matters which were the subject of the inquiry.

141. [145]

The affidavit material also reveals that Minters is the firm that Qld Health often engages for legal advice and there is certainly a familiarity in the tone of the correspondence with the chief legal officer, Ms McMullen, and the two solicitors. I note that Ms Read and Ms Fairweather state that they were simply facilitating the administrative aspects of the investigation and did not take part in the investigation per se. However, it is clear that both Ms Read and Ms Fairweather were involved in decisions about the procedure which was to be adopted. In particular, they made key decisions about the nature of the interviews, the nature of the information which was to be disclosed to Dr Vega Vega and the timetable for the provision of information”

Ultimately Justice Lyons expressed a sense of “unease and disquiet” in relation to the association between the lawyers and decisionmakers but she decided on the evidence available that the requisite standard of proof was not met in this aspect of the case and the Doctor was successful in his challenge on other grounds.

The CCC's own report of 2 July 2020 on investigations into allegations of concerning School Principal reinforce this possibility of lack of independence in institutions.

As was said in the report

"It exposes how one senior public servant's over-responsiveness to a politician resulted in decision-making being infected by perceived political influence, and how that politician allowed herself to be involved in departmental decision-making processes.

The report details a lack of transparency and a willingness to manufacture information to support a decision after the event, involve others in the deception, and prevail upon others to destroy a record relating to the deception"

This characteristic of protecting the Minister or the Department has been subject to repeated comment in commissions of inquiry .In his report for the Qld Hospitals inquiry the Hon Davies QC commented adversely on Qld Health's Culture of Concealment in respect of the Department and the Ministers behaviour concerning Dr Patel, Dr Berg and Mr Barlow .All these matters were referred to the Anti-corruption body which failed to properly investigate the matters when they were first reported to them.

Nevertheless, despite repeated experience of the Health departments behaviour the CCC still choses to devolve a large number of complaints it receives to Departments including Qld Health for their investigation. The lived experience within Health that the CCC will fail to set limits on their behaviour, as it failed previously makes some comfortable that not much changes.

I submit that it is vital to cease the direct fee for service arrangement which the CCC has established.

Various options exist to address the ongoing tension arising from the CCC devolving investigations to the body with an investment in covering up any departmental failures.

The CCC could accredit investigators for certain levels of investigation. The CCC could randomly nominate one or more investigators or which businesses the department must engage and pay for a matter. Such a process would be more likely to address the potential for departments to repeatedly engage those investigators who are known to understand and be over-responsive to the departments need to have a good outcome for the department's reputation.

It is not clear from the CCC website if departmental investigators are assessed in any way by the CCC or if investigators used by departments are part of an entirely unregulated industry with no established standard for their skills or training. I am aware of former interstate and Qld police, social workers, lawyers and Corporate services officers who profess to be investigators in workplaces. It may be that people with no powers and no training in criminal investigation could already be assigned devolved investigation of allegations which include potential criminal activity. Perhaps the CCC can provide clarity if this is thought desirable. Investigations have serious consequences it would be expected that the CCC knew the skill and qualifications held by those carrying out a devolved CCC investigation.

The situation that the CCC has placed itself in concerning devolving investigations is that on one hand it warns the public that senior public servants may act improperly to favour political views or to hide information perceived as disclosing problematic behaviour .On the other hand the CCC then puts that class of senior public servants in direct control of choosing the investigator for a particular issue in circumstances where the investigator has an obvious pecuniary interest in keeping their customer satisfied. To apply the words of Justice Lyons this creates a sense of unease and disquiet. The CCC may be appointing Caesar to investigate Caesar particularly in matters which may have potential to embarrass a Department or the Government.

Devolved investigations are meant to be completed within the 12 months of the complaint being received. Completing an investigation may be substantially more than the first inquiry particularly when meeting the

obligations of natural justice to allow a person to comment on information adverse to them. The CCC has power to direct investigations, supervise time taken and to retake matters.

The annual reports or dashboard do not appear to contain a report by the CEO of the occasions on which the CEO has exercised any of the commissions powers to manage the compliance of departments in completing timely investigations. Timeliness is a matter of importance in the legislation and is important to those subject to complaint. The annual report for 2018/19 shows that one in 5 matters are not completed within the 12 months. It does not say what action was taken in respect of that outstanding 20% to ensure completion. Importantly it is unclear if they were matters within the CCC or devolved to Departments and why the time limits were not complied with.

### **The CCC reporting on complaints of corruption**

Media reports that the CCC is investigating Complaints of corruption against an identifiable or named person are very stressful to that person and their family. The media reports issued by the CCC are the Responsibility of the CCC executive.

People in public office rarely have the luxury of defending themselves publicly at the time. Codes of Conduct deny public servants the right to make unauthorised media releases. Delay in resolving the matter means people move on and many conclude that what was reported must be right as no report is published that no charges will be laid. Most people have no prior experience of media exposure for anything, let alone being alleged to be corrupt after a career of trying to do the right thing. The current process used by the CCC followed by months or years of delay may well deliver the punishment to innocent people well before the CCC delivers any exoneration if that is ever provided. I note that when the CCC investigated the Parole board a recommendation it made was to obtain a media office. It is not clear how many media officers the CCC employs but it is a favoured course of conduct. Clearly the CCC understands the use of media and marketing but only to promote its own reputation but not to consider the impact on those unable to afford a media manager.

Publication impacts on careers, family and with added impact on friends and professional colleagues who turn their faces away. Not only do people get suspended but if they seek other employment then any government role requires submitting a personal particulars form or similar which requires disclosure that one is subject to CCC investigation. That cripples most employment applications. A significant part of legal and other professional work now is sourced from government bodies such as Legal Aid, DPP, Commonwealth Solicitor, Hospitals, Community clinics, Boards or Tribunals etc. A person with a Public Service career is greatly disadvantaged as against other applicants when searching for employment while subject to investigation. Maintaining professional skills and accreditation can depend on demonstrating ongoing experience in a clinical setting which may become impossible during the investigation and so professional registration lapses. A sizeable financial loss is often associated with being investigated and the cost of challenging flawed findings can be prohibitive particularly with the risk of appeals involving Bodies with multimillion dollar budgets. This type of harm to an individual may well be the aim of anonymous complaints in the first place.

The CCC chooses when to make a media release about investigations. It announces findings by media release ripe with a belief of its own infallibility, as *Walters v Drummond* shows the CCC didn't understand correctly what corrupt conduct included in late 2018 and CCC wrong advice played into a cardiac surgeon's suspension. This publication of allegations or findings has a lasting effect on a person's life. It has little regard for the well-known impacts on the mental health of those named and shamed well before they are subject to any judicial process. If the allegations were lodged anonymously the CCC publishing the investigation details acts as a force multiplier of the harm intended by the author of a poison pen letter which would otherwise be of minimal impact in the public sphere. Any analysis of the CCC figures demonstrates that the number of persons convicted of corruption compared to the number of allegations is a very low percentage. That may explain why the CCC chooses media releases as the chosen form of communication. It creates a general impression of activity and industry which is inconsistent with real world outcomes. The CCC's own statistics on the dashboard don't show outcomes but rather allegations without any table of outcomes. The annual reports also remain

quite obscure as to detail of outcome, gender or other matters which may show both the good and the harm done by CCC activity

While the CCC annual report of 2018 to 2019 shows that a one in five matters take more than the 12 months to complete it remains unclear what is done to drive departments to comply when devolved matters are delayed. Delay exacerbates any initial publicity of the investigation. What the website and reports also omits is what happened to the hundreds or thousands of people cleared of allegations across time but who endured investigation by the CCC. The annual report shows that in 2018/2019 of the thousands of allegations assessed only 10 people in the whole public service had disciplinary recommendations made against them by the CCC i.e. not yet determined and 23 people were charged with corruption offences but not yet convicted.

### **The CCC Dashboard**

When one looks at the CCC data dashboard it seems that Qld Health, which is perhaps one of Qld largest employers, also attracts the most complaints in some areas e.g. a total of 3095 for the period on the dashboard and some 794 are abuse authority which includes benefiting another. Some 321 are related to recruitment and selection processes. Given the low number of disciplinary recommendations it may well be that in a department which employs a large percentage of women the CCC is actually enabling complaints of nepotism to be used to discriminate against well qualified women seeking positions or promotion and creating opportunities for victimization. When one adds that to the delay in concluding investigations then the harm the CCC contributes could be significant. Essentially the dashboard is devoid of results or gender or other information which could inform the public of how effective the CCC is and whether there is a discriminatory aspect to complaints made or complaint handling. It picks the most sensational figure of untested allegations for its Dashboard and omits the outcomes. This may well serve to artificially inflate the public perception of corruption risks.

It should be relatively straightforward for the CCC to interrogate the CCCs own data to include the outcomes of the complaints and show a percentage of sustained complaints over recent years. This would demonstrate exactly how high the corruption risk is and if the CCC strategies and results are assessed as effective by the community.

The number of anonymous complaints received do not appear on the dashboard. The rise of trolling provides a powerful example that anonymity is accompanied by disinhibition. This is a risk that the CCC should be alert to in receiving anonymous complaints. The CCC should provide data about the number of complaints received anonymously, the gender of those subject to complaint and whether the CCC assessed the matter for investigation.

### **Investigative powers and hearings**

I am familiar with investigative hearings having conducted quite a number over my career. They are nothing like a trial and do not require findings as do trials. The MHRT when I was president would conduct up to 13,000 hearings a year and take evidence in each and make appealable findings. It had a budget of around \$10,000,000. No doubt any investigative hearing requires preparation but so does a proper police interview. The focus on a relatively small number of hearing days as a sizeable burden for the CCC seems somewhat misleading. Several hearings were to assist police investigations and not about CCC investigation so the preparation work should have been a police service workload to brief counsel appearing before a sessional commissioner in many of the hearing. In 2018-2019 only 36 days of hearings related to corruption hearings. The reporting indicated that the CCC is very sparing in using hearings in corruption investigations. That number tells a story about where its focus is as an anticorruption body lies when the anticorruption hearings are exceeded by its criminal investigation hearings by over five and a half times.

There are several matters reported which raise the question of the effectiveness and bureaucratic overlay which exists within the CCC and causes excessive delay in completing investigations. I set out below some of matters which received media attention and reflect those concerns.



The ongoing failure until recently to investigate the Ipswich City Council despite repeated allegations raised in Parliament over many years

I have already drawn attention to the CCC gratuitous and erroneous involvement discussed by Justice Brown in *Walters v Drummond* which resulted in a cardiac surgeon being suspended for over a year.

The case of Sgt Flori who was investigated and charged and pursued over many years until acquitted by a jury over his whistleblowing about other police and the unlawful assault of a man in a watchhouse

The yearlong suspension of the Public Trustee Mr P Carne to finally be cleared in the last week.

Ongoing delay in resolving the matter against Mr Barbagallo the Chief of staff to the Premier.

My own situation of lodging a notification with the CCC in August 2016 about a unqualified lawyer member of the MHRT who was appointed years before I became president to then be pursued for 3 years for allegedly covering up the very matter I reported and other issues until I was cleared in September 2019.

The delay in investigating the Deputy premier over complaints received last November 2019 until she was cleared recently

The timing of actions of the CCC when acting to frustrate a legal process instituted for victimization as a whistle-blower of the former Logan CEO. The CCC publicly relied on her for its charges which it promotes as a success while adding to her stress and ongoing difficulty through the timing of its actions.

A lack of timeliness was a major reason for the 2014 amendments I am concerned that the CCC has developed a bureaucratic tick and flick approach to its role. The use of statics that operate on allegations which may not even reach the threshold for investigation without providing other data is suggestive of creating fear without reliable data. This allows the CCC to use figures to claim a quality service. One average could be taken from the 2018/19 Annual report is that the CCC received almost \$1million per person arrested by the CCC and less than 40% of those were arrested for corruption related charges. Only 10 public servants were recommended for disciplinary charges, it may be that none of that was for corruption related activity. The contrast between allegations and outcomes is significant.

### **Oversight arrangements**

The PCCC provides oversight of the CCC and the ability of people to raise concerns with the PCCC is a valuable resource. Presently a complaint to the PCCC may be responded to by the CCC in a private hearing after it is provided with the written complaint. The complainant has no access to the hearing, or the material proved by the CCC to the PCCC and therefore is unable to comment to provide context or rebut incorrect material with documentary proof. It may be possible for the CCC to prepare a response to the complaint that can be provided to a complainant so there at the least is a limited chance to rebut obvious errors in the CCC material.

As the PCCC meets occasionally the process of determining a complaint may become extended given its other responsibilities. In an already stressful situation, some brief updates may comfort people that the matter is still under active consideration.

I attach a Case study which may be of assistance in understanding the submission.



Barry Thomas

10/8/2020

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