**INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE**

**CLOSED PROCEEDINGS**

Brisbane — 17 November 2015

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Professor Nicholas Aroney, Australian Research Council Future Fellow—The Centre for public, International and Comparative Law, The University of Queensland.

**The CHAIR** — I declare open this closed hearing of the IBAC Committee of the Parliament of Victoria. I welcome Professor Nicholas Aroney. All evidence taken at this hearing is protected by parliamentary privilege in accordance with the reciprocal provisions in defamation statutes in the Australian jurisdiction as if you were giving evidence in Victoria and as provided by the Victorian Defamation Act 2005, section 27, the Constitution Act 1975 and the Parliamentary Committee Act 2003. Any comments you make outside the hearing may not be afforded such privilege. Any reporting of these proceedings ensure qualified privilege for fair and accurate reporting as if the proceedings were in Victoria. All evidence given today is being recorded. The witness will be provided a proof version of the transcript in the next few weeks. Professor, would you care to begin your presentation to the committee before we go into question

**Prof ARONEY** — Thank you for the invitation to address you, and I do hope that my answers and comments can be helpful to you. I understand that you would like me to speak for perhaps 20 minutes covering some of the background and so forth, and then you will be asking me questions. You may wish to interrupt me. That's your prerogative of course. I thought I should first begin by explaining the background, as far as I understood it, to our appointment. And when I say 'our' I'm referring to the Honourable Ian Callinan, the former Justice of the High Court of Australia and I, to form a panel — an advisory panel, to give advice to the Attorney General. Our terms of reference focused on the Crime and Misconduct Act as it then was and the statutory framework within which the CMC operated, as well as other agencies, under that Act. Mr Callinan and I are, by profession, lawyers, so our focus was to examine these matters as lawyers and not with expertise that could also be relevant, say a policing expertise, or even an organisational expertise. We recognised our limitations in that respect and tried to focus on the statutory framework within which the CMC and other agencies operated.

Our appointment was to give advice to the executive. We were not given any special powers of inquiry. We weren't operating like a Royal Commission, and this was an important constraint — an appropriate constraint — on the way that we operated. We had a very small staff. It was Ian Callinan and I, along with a junior barrister and two administrators, and our goal was to go about our review as efficiently and effectively — and cost effectively — as possible, and we did try to do that, and I think we may have succeeded. As to the method we adopted in going about our review, we went through various steps. One of them was to review the legislation. Not just the Crime and Misconduct Act, but other acts that related to Queensland Government and constitutional responses to issues of corruption and so forth.

We reviewed the annual reports for the CMC, and we also read what we could find of the relevant academic and professional literature relating to these matters. I don't profess to have expertise in this very specific area. It was very much as a constitutional lawyer that I functioned. We engaged in correspondence and discussions with the relevant agencies including the CMC, and had meetings. We issued written questions to the CMC and received correspondence. And in one of the appendices to our report, that correspondence with the CMC is collected. We very early on issued invitations to the public to make submissions, and we received, from memory — it might have been a little over 60 written submissions from various persons who wished to make submissions to us.

In formulating our recommendations as well as in writing our report we drew on all of these sources of information that I have mentioned, and brought them together in our report. We also at the same time, through that process, monitored press reports of CMC activities and investigations, even though we did decide early on, and explained to the CMC that it wasn't our role to second guess any particular investigations that they were undertaking, but it was relevant for us to get a sense of how the CMC operated under the statutory framework to look at what was emergent at the time. And it was interesting to see how many times there were press reports of CMC involvement. And we did collect a list of those in one of the appendices to the report as well.

One of the things that did emerge by coincidence during our review was reports that some of the

important documents that the CMC held arising out of the Fitzgerald inquiry several decades ago had been approved for release to the public, and that created a real problem, and the Parliamentary Committee here in Queensland investigated the background as to why that had happened and how that had happened and made recommendations. Those recommendations of the Parliamentary Committee became part of the bigger picture to which the government and the parliament had to respond. Our report became one report amongst alongside that other report. I can't speak to that report, but that's something that was very relevant at the time.

I might also say some things about the key findings of our review, which I understand is one of the questions that you're interested in. And if I can put them in fairly simple terms, I think there were six particular problems that we identified. The first was the problem of ineffectiveness. We could call that a needle in a haystack problem. The CMC was being swamped by trivial, frivolous and irrelevant complaints alongside, occasionally, complaints that concerned matters that were serious and needed to be investigated. The needle in a haystack problem occurs when an agency receives such a very, very large number of complaints, most of which are trivial, it is very difficult to identify the important ones that need to be followed up.

To put that into some context, according to the CMCs own annual report in the 2011–12 year they received more than 5000 complaints containing over 12,000 allegations of misconduct or corruption of one kind or another. And those numbers don't represent all of the complaints that were working their way into the Queensland integrity system, because that didn't include complaints that were being made within the departments, either to a director general or a manager, and were being managed by ethical standards units in the different departments. Many of those complaints were referred to the CMC, but not all of them were. Some were so patently trivial or irrelevant that they weren't. So we don't know how many numbers of complaints or allegations were being made in total.

We also observed that according to the figures we estimated that there had been a 42 per cent increase in the number of complaints being received by the CMC over a five year period leading up to that date. So there was a sense in which there were a very large number of complaints coming in and we tried to put that into perspective by comparing that to the number of complaints that were publicly being referred to by similar agencies in other states, bearing in mind the different jurisdiction that each entity has, as well as the population of each state and the size of the public sector of each state. And I couldn't give you the exact figures, but in our report we did a comparison, and it looked to us like the number of complaints coming up in Queensland was disproportionately large compared to any other state, and we asked the question "Why?".

So that was an important question, because it went to two things: the efficiency and effectiveness of the system. Efficiency because of lots of resources and money were being spent on dealing with a lot of complaints, and secondly, effectiveness because the needle in the haystack problem is that when you have so many complaints, identifying the really serious ones that could lead to uncovering of corruption could be overlooked. And in fact while we were undertaking our review it came to light that a very serious fraud had occurred at Queensland Health by one individual by the name of Barlow, and the amount of the fraud was over $16 million of the course of several years. And from memory on at least two occasions a complaint or information about this individual came to the CMC, was referred back to the relevant ethical standards unit and was not taken further.

And so it was missed for several years. And in this particular case Barlow was only caught when he pushed the envelope too far too many times and got caught out in terms of the magnitude of the amount of money he was trying to defraud Queensland. And there's detail in our report about that. And there was a separate report on that by the CMC itself subsequent to that event. So it seemed to us that this was an illustration of remarkable magnitude of the needle in the haystack problem: that very serious fraud was occurring and had been occurring over several years but was not picked up until later, by chance in a sense, whereas there was a deluge of many trivial complaints having to be administered.

Related to that was a second problem, of duplication. We noticed that in Queensland there had been a proliferation of anti-corruption agencies and offices, and while their functions are defined by legislation, and there is often a particular reason for their establishment, the very large number of agencies and offices undertaking these inquiries can lead to several problems. Problems of, on one hand, duplication and therefore inefficiency where the same matter is considered by different agencies, or also, relatedly, the problem of buck passing between the agencies, of referring the matter to the other agency to deal with. And the Barlow case seemed to illustrate something of that as well.

A third problem that we identified was the problem of the grudge informer. During the course of our inquiries, the CMC provided us with a precis of a random sample of 60 complaints which described the nature of the complaint. On our review of it, it seemed evident to us that most of them were highly trivial and it was difficult to identify any sense of seriousness in the substance of the complaint. But of course, because complaints are made they have to be taken seriously because you never know, as in the Barlow case, something serious could have been happening. But in addition to complaints that were frivolous or irrelevant or baseless, there was also evidence occasionally of complaints that were malicious or vindictive, that seemed to have been motivated by personal vendettas, personal disagreements, political disagreements of all sorts.

And we were concerned that this was also a misuse of the process, because even if an individual about whom a complaint had been made is vindicated, and it's shown that they have no case to answer, the process itself can be the punishment, because you can be put through enormous strain: financially, personally, psychologically, impacts on your family, when you are investigated. And, in addition, and there was this related concern that such investigations were often made public. The mere fact that you were being investigated was made public. It happened at a high profile level for some politicians in the state but my personal concern was not so much the impact on politicians, with all due respect, but on ordinary public servants who in their daily lives don't expect to be attacked or criticised, especially unjustly. So there's a balance always to be drawn in these things because corruption is a very serious matter, but maintaining a person's reputation and not allowing it to be improperly despoiled is also a very important balancing consideration. And so there was this problem of the grudge informer.

We also observed, fourthly, a tendency to an emphasis on process over substance, particularly in relation to the CMCs work in relation to misconduct as opposed to its crime function. For example, our interest was in the efficiency and effectiveness of the agency. It seemed to us that a measure of the effectiveness of an agency is to look at the number of complaints that are coming in, how efficiently they are investigated. But if we are to reflect on the effectiveness of the system, we need to know how many of these complaints and investigations end up in recommendations for disciplinary action, the charges to be laid, are people to have their employment terminated, or are criminal convictions laid?

And what was surprising to us was that the CMC didn't normally report about those end consequences in relation to misconduct. It did in relation to crime but not in relation to misconduct. And even when we asked them the question, they were not able to answer what proportion of the complaints were ending up with some consequence that showed that there had been misconduct or that there had been corruption or illegality in some way or another. So that concerned us because it suggested to us a tendency to bureaucratise the process and to emphasise how much investigations are being undertaken, how quickly they're being processed, but not with much focus on outcomes or a balance of how efficient and effective the system was, given this deluge of complaints and allegations that were being made.

One of our recommendations was for an implementation panel to be formed to consider how best to implement our recommendations and to reflect critically on them. In the aftermath, the Government also organised an organisational review of the CMC run by Mr McKelty and you could, if you wish, look at his review and his recommendations as well. One of the things that he observed, from

recollection, is that while the CMC clearly needs to be an independent agency, independent of government, the very independence of the CMC had fostered a culture of inefficiency within the organisation. And words such as tardiness, passive work ethic, resistance to change, defensiveness and staleness in personnel were used to describe the agency, and that this undermined confidence in the CMC on the part of people who had direct dealings with it.

Fifthly, and I might close my remarks with these last two points, we became concerned that on occasion there were disproportionate responses to cases. So that, to use another phrase, there was a tendency sometimes to strain at gnats while swallowing camels; a disproportionally tough response to less serious cases while missing the really serious ones. And some of the submissions we received from individuals or from organisations whose members had been investigated drew attention to those sorts of instances, of a sense of disproportion in the way the CMC was responding.

And finally, sixthly, we became aware of a problem of conflicts of interest, or potential for conflicts of interest. Because what made the CMC quite unique at the time, and continues to make the CCC in Queensland unique, is the range of powers and responsibilities that are vested in the one organisation. Compared to all the other Australian states, there is not one organisation that has responsibility for so many functions relating to corruption and crime. Later I might be able to expand on that. But one of the concerns we had flowing from this was the potential for a conflict of interest because one of the CMCs responsibilities was an educative one, a training one, a preventative one, where they would provide advice and guidance to government departments about how best to prevent corruption, how best to construct systems that will prevent it and make it unlikely; certainly a worthy goal that needs to be done.

But the CMC also had the role of investigating breakdowns in procedures and working out why something had gone wrong. And we perceived potential for a conflict of interest when the same agency, on one hand, educates and trains and develops systems, and then is asked to investigate cases where systems break down. And that led us to conclude that it would be wiser for our system to separate the functions of education and prevention, on one hand, from the function of investigation. And that's why we recommended that the Public Service Commission be given the educative role. The reason why we thought the Public Service Commission was appropriate was that we observed that part of its role was already about maintaining integrity within the public service, but also about the efficiency with which the public service operated.

And to use the Barlow case as another example, one of the things that we might have hoped would have drawn the attention of management to Barlow was his work ethic. He didn't comply with procedures. He worked late at night. He didn't seem to be supervised very well at all. It's not clear that he was really doing his work properly. And it seemed like the Public Service Commission was well situated, because of its concern to encourage efficiency and effectiveness in the public service itself, to maintain processes that would guard against corruption. To put it in a pithy way, there's something dishonest about not doing a proper day's work, just as there is something obviously dishonest about stealing from your employer. And if you are not doing your full day's work, you're already acting dishonestly in a sense, and one thing can lead to another.

So they are the six problems that we observed and, to my mind, they're the most important things that come out of our report. It's possible to debate what are the best responses to these sorts of problems, and that's a much more difficult task. And that's why I wanted to emphasise those six problems that I think the Queensland experience suggested we needed to give consideration to.

**Mr WELLS —** Thanks, Professor. So we will go to questions. With your recommendations to Government, not all of them are accepted. Can you go through which main ones or which ones that concerned you were not accepted, and were you satisfied with the reasons that the Government gave you of why they weren't being accepted?

**Prof ARONEY** — I can take you through those, our recommendations and the responses. It might take a little while but I'm happy to do so.

**Mr WELLS —** Do you want to cover the main points?

**Prof ARONEY** — I will try to do that, as best I can.

**Mr WELLS** — Yes.

**Prof ARONEY** — Our first recommendation was that there should be an administrative restructure of the CMC conducted by the Public Service Commission, and broadly the Government accepted that recommendation. Our second recommendation was that people holding management positions within the Government should have a clear obligation to take reasonable steps to maintain procedures that will prevent corruption within their departments, and the Government accepted that proposal. In that respect, we proposed an amendment to the Act in specific terms that could give effect to that. But we also made clear, in relation to any drafting recommendations, that these should be seen as early first drafts. And so in relation to that recommendation and all the other suggested legislation, the Government generally accepted our recommendation in principle but then made clear, in accordance with our recommendations, that the exact drafting might differ from our recommendations.

We recommended that the threshold for the definition of official misconduct in Queensland be lifted. Now, this was as a result of our comparison of the Queensland Act with the legislation in the other states. In Queensland, and I've got the language here that I could give you, official misconduct was defined as:

> Conduct that could, if proved, be a criminal offence or a disciplinary breach providing reasonable grounds for termination.

And those words "conduct that could, if proved" contained a double conditional, as it were. The words 'could' and, secondly, 'if proved', have that effect. And none of the other states created that double conditionality. It's very ambiguous. It caused the threshold for when official misconduct occurred to be so low that it encouraged people to make complaints when there was only some suspicion that had not very much foundation. So we recommended that the double conditionality be removed. That the word "would" be used instead of "could" so that it would read:

> Conduct that would, if proved, be a criminal offence.

We didn't see the need for a second conditionality. And the Government, in principle, I think accepted that recommendation. Relatedly, there was also the question of the 'duty' to notify the CMC that's placed on public servants. The threshold at which you have an obligation to notify varies across the states, and once again in Queensland the threshold was lower. It was lower than Mr Fitzgerald had recommended in his report. He had recommended, and the other states tend to, to set the threshold at the level of a 'reasonable suspicion' that misconduct has occurred or corruption has occurred. Our Act provided that the duty arose just when you had a 'suspicion' that that occurred. And the Crown solicitor had given advice that, on the meaning of the statute, a mere allegation would be sufficient to create the obligation to refer the matter.

In the CMC's materials they tried to explain for public servants and members of the public what this all means in practise. They said that a mere allegation, provided you don't know it is false, is enough to trigger your obligation to refer the matter to the CMC. So we recommended that Queensland adopt the standard that was in the other states by reference to reasonable suspicion as opposed to just a bare suspicion, whether reasonable or not. This, along with some of our other recommendations, was geared to trying to deal with the deluge of complaints that were coming into Queensland.

The hypothesis of our report was that we have the fact that proportionately many more complaints had been coming into Queensland. Why? Is Queensland more corrupt than the other states or not? Well, there was no evidence of convictions to warrant the conclusion that it was due to a large corruption problem comparative to other states. And so our hypothesis was that the thresholds were too low, and that was contributing to the problem. In addition, there were provisions in the Act for dealing with vexatious complaints but technically, as we explained in our report, the threshold for proving a vexatious complaint was too high, and the CMC had never prosecuted anyone for a vexatious complaint. And so there were no consequences for somebody who maliciously was misusing the process as well. So we hypothesised that these things needed to be tightened up. We recommended to the Government they do that and, in principle, they accepted those recommendations.

To my mind, these were the most important recommendations. I would be happy to expand some more but I appreciate that you want me to focus on other issues.

**Mr RICHARDSON —** Just in relation to that vexatious litigant point, in practicality, how much does that — how much did that actually translate through your review? Was it something that was occurring, or was it something that needed to just be tightened up? And I ask that in a concern that, and more broadly with the statutory declaration requirement, that it could be a threshold people aren't comfortable with, particularly middle management or, you know, lower public servant ranking. So is that — how is that played out in leading up to your conclusions in your report?

**Prof ARONEY —** I hope this answers your question helpfully. One of the things that I reflect on in the aftermath of our report and how it was received not just by government, by how it played all out, is my conviction that we need to be evidence-led when we deal with these matters. However, a lot of the commentary on our recommendations responded immediately without any reflection on whether they are going to work or not. It would be important, I think, to look at the experience over the subsequent year or two, after many of our recommendations were adopted and changes were made, to look at what effect they have had.

I did glance at the CCCs most recent report and it did strike me that fewer complaints were being received, by a substantial margin, so our recommendations had had an effect, one might hypothesise. At the same time, the CCC was able to point to a substantial number of charges or disciplinary action being made.

So the CCC has recognised the need to evaluate the effectiveness of the system from the moment of complaint all the way through and what seems evident is that corruption is being uncovered effectively. I couldn't tell you whether there was a larger number of cases uncovered, or the same number or fewer over the last two years compared to in previous years, but an evidence-led evaluation of the measures that we introduced would do that.

Introducing a certification requirement would cause people to be less inclined to make allegations; that's evidently true. The question is whether it's going to affect people who are malicious or frivolous, or whether it's going to affect the cases where corruption is occurring or not. I think that has to rest on the evidence, not just a feeling or a view that this will scare people off, or it won't scare people off, or it will scare the wrong people off.

And one of the other things that never was taken into consideration by those who criticised our recommendations was that already there is whistleblower protection legislation in Queensland, and we didn't recommend any changes to that and that would have continued to protect whistleblowers. And I think, if I understand it correctly, it would have still enabled people to make anonymous complaints and it would never have prevented the CMC from acting on its own motion to investigate a matter. We didn't particularly have a concern about the CMC itself, it was more about the statutory framework within which it was being forced to operate. There were still these protections.

An evidence-based assessment would see whether the whistleblowing legislation was sufficient to encourage people who seriously needed to blow the whistle do so and to feel protected in doing so.

**The CHAIR —** Simon.

**Mr RAMSAY** — Thank you. Just a brief question. Well, it's in part A and B, if you don't mind.

**Prof ARONEY —** Yes.

**Mr RAMSAY —** It refers to the thresholds, I guess, and we've heard — well, we have been party to some discussion around thresholds both within our own state in relation to serious corruption and also here in Queensland. So your review didn't indicate you would support sort of statutory obligations to the new Commission in relation to investigative work, yet it seems you wanted to provide some terminology around misconduct, or around that, that you felt would perhaps allow the Commission not to have to get bogged down in all those (indistinct) complaints that they have indicated to us that they have received.

So I was just wondering, has that worked in — do you believe that has worked currently now with the thresholds they have got and the work that they're doing, particularly such a large agenda, really, compared to how IBAC is in relation to conduct — serious corruption in relation to conduct. So it was about a balance of not having statutory obligations, but changing the terminology in relation to official misconduct and also protecting the civil liberties of those that might be being complained about in relation to one investigation that might take place. So can you give us an overview — are you happy where it's sitting at the moment, or do you see further improvements in relation to the current legislation.

**Prof ARONEY —** We didn't recommend that an obligation be placed on the CMC to focus on serious corruption, because it was our assessment from the evidence that we uncovered that it wasn't a lack of willingness on the part of the CMC to focus on the serious matters that was the concern. It was the deluge of complaints that had to be administered. That was an assessment of the CMC in the particular circumstances at the time on the evidence that came before us. I wouldn't wish to generalise to other states or other situations, because there are contexts that are different and personnel operating within the organisations that are different, so it would be difficult to draw a line; one would have to be very careful about that.

And as to the second part of your question, if I understand it correctly, have the changes been effective? I'm not aware of evidence to suggest that they have not, and I think that's the best I could say. This is consistent with my conviction that this needs to be evidence-based. I haven't undertaken a careful analysis of the evidence to form a clear view about how well the CCC is now focused on the important cases. I do see suggestions from its most recent annual report that not only does it continue to intend to be well-focused on the serious cases, but there seems to be evidence that it is doing so effectively because of the story it can tell about the number of complaints that are coming in and the number of complaints that are ending up with prosecutions or disciplinary action being undertaken.

I'm afraid that's about all that I feel I could say about the matter; except that, if you don't mind me saying again, that we need to be evidence-based in the way that we assess the effectiveness of these measures.

**The CHAIR —** Just getting back to one of the first points you made about the ineffectiveness of the CMC, why then, if that's the case — I mean, because one of the reasons why we have these bodies is to make sure that the public has confidence that something is going to happen in the organisation — they were receiving 5000 complaints. So why were people sending in the complaints? There must have been some level of confidence that they would be looked at, or addressed, or was it more that

there was the grudge factor, the vindictive, malicious factor. Is that the sense of the 5000 complaints that were coming through?

**Prof ARONEY —** Yes. We came to the conclusion that there were several factors influencing the number of complaints. So one factor will be, in many cases, that a public servant or a member of the public has a genuine concern or a suspicion of misconduct and believes that it is the right thing to do, to issue a complaint. I would hypothesise — because we didn't talk to everybody who makes complaints — but I would hypothesis it was because they had confidence in the process, or sufficient confidence to make it worthwhile.

But then, in addition to that, we also sensed that we could see complaints that, in their description, on the face of them, were very trivial, or baseless, or quite irrelevant — not even within the jurisdiction of any of the agencies, at worst, maladministration, lethargy, [indistinct], all sorts of other sort of bad governance sorts of issues, but not misconduct, as it was defined. And then there was evidence of malicious or vexatious complaints being made as well.

Because we didn't have the resources — and it would have been a very difficult undertaking to go to those 5000 complainants or a representative sample of them and, in a scientific way, find out what are the different motives on their evidence and so forth — I can't answer your question with any more specificity than that.

**The CHAIR —** Okay. Any other questions? Tim?

**Mr RICHARDSON —** Yes. Just — the Victorian jurisdiction at the moment has an issue with its threshold test and that is serious corrupt conduct and frustrations about that threshold being too high to undertake investigations. It's likely that the government will look to lower that threshold. What are some of the learnings or cautions that you would put forward in assessing where that level forms given the Queensland experience over the last few years in the review that has been undertaken?

**Prof ARONEY —** Can I answer that with the qualification this is based on my recollection of the Victorian legislation at the time that was in draft and being developed even as we were making our report, and I read some of the criticisms of that legislation as well. I felt that some of the publicly stated criticisms were not attending to the entire effect of the legislation. I'm afraid I can't, just off the top of my head, recall exactly the grounds upon which I formed that view. But I want to say this again, that we need to be evidence-based when we assess these things and often criticisms that are made are from the point of view of wishing to assert a certain point of view.

Understandably, that is what a vibrant democratic debate is about, but often it involves focusing on one element, say, the definition of serious corrupt conduct, and not on other elements of the legislation which gives IBAC the capacity to undertake inquiries to make an assessment as to whether it should take it further or not. And I seem to recall that the legislation seemed to give IBAC the room to do that. Now, whether in practice that is happening, of course, that's something for you to assess and for the people of Victoria to assess.

The main point that I would make is that to really work out whether the entire legislative package is enabling an agency to be effective or not, and not just a particular definition. That's part of the reason why we thought there were several thresholds that were relevant and the vexatious litigant provisions as well, because it's the overall effect of the legislation that's important and not just one particular definition, even though each will have its effect on the practices of agencies.

**The CHAIR —** Professor, we are extremely grateful for your insight to the review that you carried out on the CMC and we thank you very much for your time. Thank you.

**Prof ARONEY —** You're welcome. Thank you.

**The CHAIR —** We will close the hearing.

**Mr RICHARDSON —** Thank you.

**Witness withdrew.**

**Committee adjourned.**