

CORRECTED VERSION

LAW REFORM COMMITTEE

Review of the Members of Parliament (Register of Interests) Act 1978

Sydney —17 August 2009

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The Hon. Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption.

CHAIRMAN'S WELCOME

Mr CRIPPS— I prefer not to make any opening comments. I came here prepared to answer questions people might ask of me, but it is really not for me to tell the State of Victoria how it should conduct its affairs.

The CHAIR— That is fine. Can you tell us in general terms about how many investigations the ICAC has conducted into members of parliament and what were the sorts of outcomes of those investigations?

Mr CRIPPS— Yes. There have been about 15 in all since ICAC started, which was in 1988. Four only of them reached a conclusion on the face of it unfavourable to the parliamentarian.

One of them, of course, as you probably are aware, had the result of causing the Premier of the State to be declared having engaged in corrupt conduct, a pretty awful decision I have to say and I cannot imagine such a decision would be made again. It was made in circumstances where the Premier had committed no wrong, he had broken no law, he got advice that what he was doing was proper and he was declared corrupt because of the definition of corrupt conduct in our legislation, which said that if you behave dishonestly or impartially - and it was said he appointed an ex-minister to a position on a government body and that was said to be partial, but it could not be corrupt conduct, unless it was either a crime, which it was not, or it was disciplinary action, and it was not, because there was no disciplinary action, or could lead to dismissal from office, and for a staggering reason the commission found that it could have resulted in the Governor declaring that he lost his job.

I remember reading about that many years ago and I thought this was carting New South Wales back to the Stuarts. If you do not like the colour of their tie, you get rid of them. Anyway, the Court of Appeal put an end to that. It was a bit of a pity because it happened in the first three years of the life of the commission and it nearly wrecked the commission from there on. Everybody said, 'Look, sooner or later they will do something like this'. They didn't say that, but they said therefore you cannot trust them, standing royal commissions. You have probably heard all the arguments.

Since then there have probably been another 14, of which three only--

The CHAIR—Just before you go on, what was changed as a consequence of that early experience?

Mr CRIPPS—The only thing that was changed was they brought into existence - you could not get the Premier in this case, even if he had done something which was pretty awful, because nobody could get rid of them. As I say, we had not got to the point really where somebody could be got rid of just because someone did not like what they did. It would not have caught Greiner anyway I have to say. But what they did do, they brought in legislation that said they were going to have a parliamentary code of conduct and if your conduct amounted to a breach of the parliamentary code of conduct, that was the equivalent of a serious disciplinary proceeding which could be used to get rid of somebody.

The New South Wales Parliament brought in two. They brought in a parliamentary code of conduct and then they brought in a ministerial code of conduct. The ministerial code of conduct is quite detailed, but it cannot be used by ICAC. It says politicians have to behave honestly, and nobody is going to trust ICAC with that power. But they did have a members' code of conduct. The members' code of conduct says you cannot take bribes and you cannot have secondary employment and you must disclose your financial interests and the like.

The CHAIR—It may be incorrect but I have a sense you find that unduly constraining. Is that right?

Mr CRIPPS— No, I do not. It does seem to be that if you want to have a code of conduct that can be actually used in circumstances where people have engaged in corruption, on the one hand you have got to go in a more detailed way than just simply saying you cannot take bribes. Imagine having to tell a parliamentarian you cannot take bribes. You have lost the war before you have fought the battle. Everyone should know that. But it cannot be as detailed as the ministerial code of conduct. It has been sought to be used in circumstances where people did not know it formed part of the thing. They thought it did when it did not and said that some minister of the Crown has got up and made a statement which was not true and therefore they were corrupt. You would have to be very careful of what sort of code of conduct you had.

The CHAIR—You were going to run through quickly after the first one, then the others.

Mr CRIPPS—Yes. After that there were three, and two of them were related to fairly flamboyant rorting of expenses that parliamentarians are entitled to when they live away from home and when they use equipment and things like that. The third one was technically corrupt. It was a minister of the Crown who in response to a letter from ICAC had said he had made no arrangements to go into private business when he left Parliament. In point of fact, he had. He had been doing a lot. So it was said that he told lies and this was contrary to their code of conduct. But the others, nothing happened to them.

Mr BROOKS—Of all of those cases, were any of those followed through to prosecutions in the courts?

Mr CRIPPS—Yes, the last one was.

Mr BROOKS—So one was?

Mr CRIPPS—Yes, and he pleaded guilty and he got a bond I think.

Mr FOLEY—After he had left?

Mr CRIPPS—He had left. By that time he had set up his own - Mr Face it was. He was the minister for gambling. He was going into the industry of lobbying the government for gambling. He had raised a problem which has now emerged much more in recent years, in Queensland particularly, but was not particularly regarded as very significant in whatever it was, 1996. They just thought it should have been declared, he should have told the truth.

Mrs KRONBERG—Should all State jurisdictions have an ICAC as a normal course of events?

Mr CRIPPS—I keep getting asked this question and I keep answering it by saying if you do not think public sector corruption is a problem in your State or if you think it is but you would rather keep it hidden, no, you should not have an ICAC, but if you think it is a problem and you do want to deal with it, the best way of dealing with it I think is to expose it. The mistake people make though is thinking because ICAC has the power to expose corrupt conduct, they also have the power to make sure it does not happen again.

You could not have an organisation of 150 people that literally monitored everybody's conduct in the community that relates to public sector corruption. You have to rely on the fact that if you have an institution like ICAC, which has been copied in Queensland and Western Australia, the principal function of the institution is to investigate and to identify corrupt conduct. It really is a matter for the agency, and if not the agency the government, and if not the government the Parliament I suppose, to put an end to that if they want to put an end to it, which they mostly do.

It is like human nature. You are always going to have corruption, and the more rules you make to avoid it, the more people will be careful to try to get around the rules, but I do think over a period people will learn that so far as the public sector is concerned at all events, corruption is something which should not be tolerated and it can lead to huge problems, as New South Wales has discovered. If any of you have read the reports we did last year on State Rail, millions and millions of dollars have been corruptly spent on procurement that did not ever happen.

That is the short answer, but of course you then have to decide what you want. It is a mistake to think that an ICAC is a law enforcement agency. It is not, and, indeed, I do not think it could be because we have the power to make people answer all questions we ask. There is no privilege against self-incrimination, there is no legal professional privilege, there is no right of silence, but that information we get cannot be used in criminal prosecutions. The result not infrequently is we have many disclosures of corrupt conduct, but the evidence that we get cannot be used in criminal proceedings.

Mrs KRONBERG—Is Habeas Corpus turned on its head?

Mr CRIPPS—No, I do not think so. We do not gaol anybody. We do not throw away the key. The closest we get is a power to arrest, and I have only executed it once in the period I have been there when

someone was about to step on a plane and go back to Lebanon. It was a very serious corruption this one, so we arrested him. The rule is they are brought before me. I tell them to surrender their passport and I advise them they can go to the Supreme Court and get my order set aside if they want to. What I usually do, or I did on that occasion and will do in the future, is then question them, do all the things I wanted to do, so they could go overseas.

Mr FOLEY—Of the 15 and the four you have taken us through, what has been the impact of the investigation? Is that declared? Is it public?

Mr CRIPPS—Yes.

Mr FOLEY—Even though no action is ultimately perhaps taken, I may be wrong but I am assuming that is the case, what--

Mr CRIPPS—Of those ones that I had excluded, there was not even a finding that they had engaged in corrupt conduct. One person was making all sorts of statements about his superannuation entitlement which were not true, but it did not amount to corrupt conduct. But that is all we can do. We cannot say that someone should be prosecuted for an offence, and we certainly cannot prosecute them. We can, however, give a recommendation that the DPP look at the admissible evidence and decide whether a prosecution should follow.

One of the problems that an institution like ICAC has is this— Twice a year we have to go to the parliamentary joint committee, which is an oversight body for ICAC, and the first question that is always asked is how many prosecutions have resulted, and my response always is X but you cannot judge ICAC by prosecutions, but everyone forgets that because we get asked the same question next time around.

Mr FOLEY—I suppose there is more a question of are those remaining ones that are not taken through to prosecutions, are they publicly reported?

Mr CRIPPS—Yes.

Mr FOLEY—What has been the impact of that public reporting, even though no finding has been made?

Mr CRIPPS—I do not know frankly. We do not report on every investigation. The investigation has got to get to a point where there is a public inquiry. We publish detailed reasons as to why we have come to a conclusion either they have engaged in corrupt conduct or they have not engaged in corrupt conduct. That is made public. The effect on a politician in respect of whom a finding has been made that they have not engaged in corrupt conduct, I cannot think it would be very significant. It could be adverse. I suppose everyone says once you pitch the mud around, some sticks. I do not think it has had an effect.

It certainly has had an effect on the people who have been found to engage in corrupt conduct. So much so that, even though Greiner I am sure must have been given advice the day after that decision came out that he would win it on appeal, he could not sustain confidence as being Premier of the State and he resigned.

Mr FOLEY—We heard some earlier evidence around the importance of, if you like, the compliance or an investigatory role, a broader ethical standards framework. We have heard lots of debate about which bits fit where, how you can lift the standards and more generally the education role, pitching to the better angels type stuff. How do you see that broader framework operating, and is the New South Wales model ratcheted together as things have emerged or does it have some sort of coherence about trying to lift overall standards of which compliance and enforcement against corrupt activities is a part? How do you see the whole framework?

Mr CRIPPS—There was a tendency when I got there for people to think that ICAC had two essential functions. One was to investigate and expose corruption and the other was education of public bodies about the dangers of corruption and how you avoid it. It did not take me long to come to the conclusion that they were just two sides of the one coin really. Activities were designed to minimise the incidence of corruption.

Perhaps the most effective and detailed, immediate way is certainly to expose it, but there are lots of other

ways you can do it by education and the like, and I am very supportive of that approach. I have a few misgivings when I pick up a code of conduct and the first thing I see is you have got to behave ethically, because I have got no idea what they are talking about really. You might find out later when you find out what their job is, what their functions are and all sorts of things, but I do not think that matters so much really, so long as you get across a good risk management, a good identification of how you deal with it, you make sure it is dealt with across the board, you make sure that if there is a rule about gifts and benefits, that applies to the top fellow as well as the bottom person.

Mr FOLEY—You do not think there is any benefit of a high level set of ethical behaviours and goals, underpinned by some more detailed principles and then underpinned even further by quite detailed codes?

Mr CRIPPS—I know I should say that is a good thing but my experience is no, I do not. I do not think it has much on it at all.

Mr FOLEY—Why is that?

Mr CRIPPS—Human beings, being what they are. I don't know what this big ethical standard is below which everything works. What is it?

Mr FOLEY—We have had lots of submissions as to some of the worth of that. We are happy to provide you with some of the transcript.

Mr CRIPPS—I suppose I am being more frank than I should be. You have to remember that organisations like mine have a vested interest in making sure that the importance of their work is not underestimated. I just don't. This is not to say that I do not think that education does not have a powerful effect in diminishing the instances of corruption. I know that with people who are dishonest, it doesn't matter what you tell them, it doesn't matter how ethically they have to behave, and the people who are intrinsically honest you don't have to tell them either. They find it insulting to be told this. The difficulty is those people in the middle.

If you maintain proper standards and enforce them, and that is what you really have to do, you have to maintain the proper standards and you have to enforce them and by enforcing them I mean, which has not happened in New South Wales, you not only declare people have behaved corruptly, but you make sure that they do not resign with all their entitlements and you make sure if you can that a lot of effort is put into prosecuting. If people realise both of those things they might be caught and they will be punished. That is probably the best. I appreciate that is not the Archbishop's view of human nature, but it is mine.

Mr FOLEY—It depends which Archbishop.

Mrs VICTORIA—I have a question about the way you go about investigating and whether parliamentary privilege actually gives you any grief and, if so, what's the better way?

Mr CRIPPS—Okay. We had a case before I came here. There was a member here on whom a search warrant was conducted. It went on three or four times. We only had one problem with this person, and he complained that we had breached parliamentary privilege. It has turned out they had a parliamentary committee, and it happened before I came here, who said there was an accidental breach. I have to say I don't want to be smart after the event but it would never have happened when I was there but what happened was the people came into the parliamentary premises and took a big hard drive. They had no idea what was in the hard drive. It turned out there was some parliamentary privileged material in it.

What you would have done in those circumstances, you would have thought, is take that up to the Speaker or the President and say I want this locked this up until it is looked at and you tell us whether or not there is a question of parliamentary privilege. That did not happen. Having done that, it turned out that what it was, was utterly irrelevant to the investigation that was going on, but it got the parliamentarians very excited that their privilege had been violated.

Since then I have had conversations with the Speaker and the President as to how this should be treated. The view is in the future, which should always have been the case I think, that if there is an execution of a search

warrant on parliamentary premises, if there is a possible question, and there must be with a hard drive as nobody knows what's in it, it goes and gets locked up until such time as they can determine it.

Mrs VICTORIA—Who will determine that?

Mr CRIPPS—I will come to this. This is the next question. The question as to what amounts to parliamentary privilege and how it should be determined is a pretty tricky area. This Parliament takes the view that anything that is used in Parliament, speeches and the like, and the record of that, that is privileged. We have no problem with that. Anything that has come into existence for use but has not yet been used, we have no problem with that.

This Parliament takes the view that if there is something in a member's office and if that member says although there is nothing in the wind I might want to use this in five years' time, it is privileged. I don't think it is privileged. However, this is a question for the Parliament. The next question is who decided this? Is it the Parliament who decides the limits of parliamentary privilege, and then what amounts to parliamentary privilege?

Is that for Parliament to decide? Mostly it is decided by the courts in circumstance where you can't wait, like in defamation or something where the issue comes up and you can't wait, so the courts have done it but an issue will arise in the future some time as to whether this is a parliamentary matter or something the judiciary has to keep out of.

In England they say it is all the Parliament. Westminster says it is all the Parliament. In America they say it is the judiciary, because there is a constitution.

Mrs VICTORIA—We have constituents who come to us with lots of information on a daily basis, and it may well be that they have given you something in good faith and asked you to keep it confidential. How does that affect our relationship with our constituents giving us information? Again it might not be for a year or two that it becomes relevant.

Mr CRIPPS—If you get it for the purposes of exercising your functions in the Parliament it is privileged. You may if it is proper but the one I disagreed with them about was a particular parliamentarian was writing a book and all the information he had had nothing to do with what he was going to do in Parliament. In fact, one of the allegations against him was he should not have been writing a book in parliamentary time. But it is there if it is going to be used in Parliament.

The CHAIR—If I could amplify the point that is there, what if it is about making a representation to a Minister, so it is your relationship with the executive, and all of us would do that. We would write to the Minister on behalf of some concern.

Mr CRIPPS—I am not sure about that, how the legislation fits. You would have to see whether the Parliament thinks that is privileged. It seems to me that this is a decision for the Parliament really.

Mostly, I think, the Parliament would decide what could amount to parliamentary privilege. It is probably for the courts to decide, 'Well that could be but have the facts supported that?'. I think it is a matter for the Parliament. Let me say that the legislation in New South Wales makes sure that the only privilege that is recognised is parliamentary privilege. Confidentiality is not recognised. Secrecy is not recognised for anybody, including parliamentarians.

Mrs KRONBERG—In terms of secrecy, what if it is a national security level of secrecy, if that comes into it?

Mr CRIPPS—I doubt whether we would ever touch national security. You have to remember that what we are concerned with is public sector corruption in the State of New South Wales. What you are talking about may very well be a problem if ever the central government gets around to it, but we could theoretically get it in the case of the police.

ICAC always has the power to say what will be released and what won't. There have been a couple with the police and it gets to me only and nobody else unless it has to move further forward.

Mr FOLEY—How much frivolous material is presented against public officers, particularly politicians?

Mr CRIPPS—We get about 2 700 complaints or reports from members of the public and heads of divisions. Heads of departments have to report suspicion of corruption. People in the community can just do it. Most of them are complaints, and that's people in the community, probably about 1600 or 1700. The rest are made up of protected disclosures and heads of department.

Of those 2 700 probably 70 at the most would get to the point where we are going to take it further. Of that 70 you would probably get no more than about six or seven public inquiries in a year.

One of the problems as you know is you say to people what do you mean by the word corruption, they don't know. They think corruption is awful but when you ask them to think what it means, they don't know. Often people tend to think, particularly in planning, if someone says they are going to put a swimming pool next door to me and they are going to make too much noise and worry the children and I protested to the council but the council passed it, therefore the council must be corrupt. 36 percent of our complaints are from planning decisions by councils.

We got a corker last year which you probably read about. I think people in Iceland even read about the Wollongong inquiry because of all that sex as well as everything else. That was a big one. It was a big council and there was bad corruption, but most of them go nowhere because there is just no evidence of corruption.

Mr FOLEY—This committee has conducted an inquiry in relation to vexatious litigants so we well understand.

Mr BROOKS—What test do you have to meet, whether it is internal or legislative before you would execute a warrant and go in and search a parliamentarian's office?

Mr CRIPPS—You have to be satisfied that there is likely to be a reasonable prospect that there is evidence there that will be relevant to the inquiry you are undertaking.

Mr BROOKS—Do you have to satisfy yourself as Commissioner or do you have to satisfy a judge?

Mr CRIPPS—Me.

Mr BROOKS—We have been talking about values and ideals and quite lofty things but to get down to tintacks, what sort of resources are required to run ICAC? What is the budget?

Mr CRIPPS—Our budget is about 18 million, I think. It depends what people want. I notice in the Sydney Morning Herald today it says that the Liberal Opposition says that when they get into Parliament they are going to pass legislation making sure ICAC starts investigating political donations. If they do that they will have to decide one of two things, either ICAC stops its other work entirely or they treble its staff.

Mr BROOKS—Trebling its budget?

Mr CRIPPS—They would have to do that. You just could not do it. I think it is probably a good idea that there is an inquiry into the extent of political donations and how they should be treated and what problems should be identified if you get rid of them, you know, the usual arguments everyone is aware of. ICAC could not down tools on every bit of corruption that we get to, to get into that area, not unless we get a huge increase in our budget.

Mr BROOKS—Referring to the process of the budget, and this is tintack stuff, how are you funded? Do you simply put forward to the government of the day a proposed budget?

Mr CRIPPS—Yes.

Mr BROOKS—Or do you have to argue your case?

Mr CRIPPS—The organisation is set up to be wholly independent of government, not the

Parliament, which some people think. We are not independent of Parliament. What Parliament has created it can uncreate. Although we have jurisdiction over judges, we are not independent of the courts either. We are liable to judicial review. Realistically we are not that independent of government because we need government funds to work.

The budget has been around 18 million or its equivalent for a long time. Sometimes we get involved in a bit of extra expense which we didn't want to, where we have a huge amount of stuff going and they will give me the money when I do that. I have never had any attempt by government to put the weights on me.

There has been a tendency in government for them to write saying that all agencies will do this and that and then I write back and say yes, but not me and they write back and say yes, that was a mistake, but I think that is a bureaucratic way they do things.

Recently, for example, we got a direction saying we couldn't employ any senior counsel without the authority of the Attorney-General and I had to say, 'What do you mean? What if we are investigating a parliamentarian, or even for that matter the Solicitor-General?'. Anyway, they wrote back and said sorry we didn't really mean this to apply to you.

They tend to do it but I have said to them in recent years you have got a bit toey about this, you had better look at it again. I have to say in all honesty I have never had a problem of thinking that anyone has put the weights on the Commission.

Mr FOLEY—Do you go through the equivalent of whatever the Department of Justice is here, or the Premier?

Mr CRIPPS—The Premier. The government organisation, under the umbrella they have for Treasury and everything, we are where you go to the Cabinet Office.

Mr FOLEY—In the budget papers you appear somewhere in the Premier's Office?

Mr CRIPPS—In the Premier and Cabinet box, yes.

Mr BROOKS—Is the current budget adequate?

Mr CRIPPS—I think it was okay but I don't think it is any more. We had a huge year last year and that meant that a number of investigations were put on hold and they are now coming to the point of having to be done and we will have to stop doing them unless we get an increase. I have put in a submission for an increased budget. We had the justification because State Rail took up a huge amount of time last year, as did the Wollongong Council.

Anyway, I will wait and see if I get that. I am only asking for about an extra 3 million.

Mr BROOKS—How many of your staff would be involved in media or PR work in terms of public communication?

Mr CRIPPS—I'm not one of them. I won't give interviews because I get into trouble for that. I just say why don't you read the reports but that proves too much for most journalists. We have a media person there, but that's the only person. She is the only person who can speak to the media.

The CHAIR—How do you review yourself? How do you know you are doing a good job in reducing corruption? We are particularly interested in members of parliament, how to improve their game?

Mr CRIPPS—One problem is you never know how much corruption there was to start with, you never know how much there is now and you never really know how much what you did stopped what might otherwise have happened, but I think you are entitled to look back in New South Wales, for example, and see what passed muster in the 1980s and which has now since been shown to be highly conducive to corruption, like conflicts of interest, secondary employment by politicians, post-separation employment when they leave parliament, and you see these issues have really emerged to be conducive to corruption. You would have to say as a matter of common sense, having identified areas that people never thought would be conducive to corruption, you probably are reducing corruption. Certainly, one is reducing it in the more flagrant form.

I cannot speak for Victoria, but in New South Wales, I remember in the 1960s the Attorney General withdrew a charge against - it was only negligent driving - against his nephew and he said when he was found out, 'It would be a sad day for democracy when you couldn't help your family.' Nobody would say that any more I don't think. In those days it was acceptable to say it.

On the other hand, you are conscious of the fact that often the very exposing of corruption can make corrupt people do the same thing in a more difficult way to pick it up. I think the only way you can ever deal with corruption is to keep on exposing it.

The CHAIR—This very high number of unsubstantiated complaints that do not go forward, is that part of a picture where because a body to which you can direct complaints exists, people are therefore much more likely to do it and then it goes into a vicious cycle of undermining public confidence?

Mr CRIPPS—I don't know about that. When the public hear that there have been 2 700 complaints about corruption and then they find that probably only five of those really ultimately turn out to have exposed corrupt conduct, I do not know what view they take. But if you analysed it in a bit of depth, you would realise that one of the reasons is that a huge number relate to planning, as I say, and are no more than an exercise of a discretion that does not satisfy one party. A huge number, would you believe, relate to the tax department, over which we have got no jurisdiction anyway because it is a Federal body. So if people actually looked at them, they would realise that there were not that many, whether not looking at them that deeply has an effect of diminishing confidence in the public sector.

We do surveys every four years and the question asked is— Do you believe there is less corruption in New South Wales as a result of the ICAC? The answers are usually in the 80 to 90 percent yes, they do. I know they could be examined and say what do you know about all this, but there is their perception.

The CHAIR—Thank you very much for coming along. You will receive the transcript. We have valued your input very much.

Mr CRIPPS—If there is anything else you would like to me to address my mind to, if you put it in writing, I will certainly drop a note to that effect.

Witness withdrew.