

STANDING COMMITTEE ON LEGISLATION

CORRUPTION AND CRIME COMMISSION ACT 2003 AND CORRUPTION AND CRIME COMMISSION AMENDMENT BILL 2003

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON MONDAY, 15 SEPTEMBER 2003**

SESSION 3

Members

**Hon Jon Ford (Chairman)
Hon Giz Watson (Deputy Chairman)
Hon Kate Doust
Hon Peter Foss
Hon Bill Stretch (substituted by Hon Derrick Tomlinson)**

[12.40 pm]

HEENAN, MRS ELIZABETH
President, Law Society of Western Australia,
examined:

WELDON, MR IAN
Treasurer, Law Society of Western Australia,
examined:

The CHAIRMAN: Good afternoon. On behalf of the committee, I welcome you to the meeting. You have both signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard please quote the full title of any document to which you refer during the course of this hearing for the record and please be aware of the microphones. Try to talk into them and ensure that you do not cover them with papers or make a noise near them.

I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. Premature publication or disclosure of public evidence may constitute a contempt of Parliament. It may mean that the material published or disclosed is not subject to parliamentary privilege.

Do you wish to make an opening statement?

Mr Weldon: The society has prepared a short written submission. The society also gave evidence to this committee on 6 March 2002, in a hearing into the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001. The society notes that some of its concerns raised at that time were taken on board, and some other concerns on that legislation have been addressed in this Bill. I mentioned that because the present Bill repeals that previous Act and embraces its provisions, with modifications. The society has the same concerns it raised in relation to the earlier piece of legislation in so far as there were no changes. We have also raised some fundamental concerns about the office and the tenure of the commissioner, under the new legislation. That, at this stage, is all I have to say by way of opening statement. We are here to try to assist. We welcome the chance to do that. Last time one of the criticisms the society made was that that legislation - I will call it the CIFRA - seemed to be somewhat rushed, in relation to what was seen to be a perceived need to act urgently. We think the suggestion that the present legislation be split so that this part of the legislation could be brought to this committee for further and more comprehensive review, was a constructive step. We welcome the chance to answer any questions the committee has, either in relation to the submissions we have made, or generally, so far as we can.

The CHAIRMAN: Would you expand on your comment about the tenure of the commissioner, including the qualifications? We have had some talk about whether the commissioner should be a sitting judge, who has been seconded to the commission for a period of four years and then allowed

back onto the bench, or should be a retired judge, or even a suitably qualified lawyer prior to the bench. We would like to hear your views about that.

Mr Weldon: At the moment, as we understand the legislation, any of those options is available. Under the former legislation - the CIFRA, if I may again call it that - my understanding is that originally there was provision for the special commissioner to be either a serving judge or a retired judge. Concerns were expressed then about the undesirability of appointing a serving judge. That was one of the changes that was, in effect, taken on board in the legislation, because, under that Act, the special commissioner was to be a retired judge. The society's submission on this does have some tensions within it. That is because this is a very difficult question. So far as a sitting judge is concerned, there are two concerns. One I will call the constitutional issue, of the extent to which it is appropriate at all to have a sitting judge exercising something like these quasi-executive powers. The High Court has said, for example, that some non-judicial tasks are simply incompatible with the holding of judicial office. It said that in cases I have referred to in the written submission. One was Kable, the other was Wilson, as I recall. Wilson was the case in which Justice Matthews of the Federal Court was appointed to carry out some function under the Aboriginal Heritage Act, or some legislation of that sort. That is particularly a federal issue, but of course there is at least a debate about the extent to which our Supreme Court, at least, is affected by that decision, it being a chapter III court; that is to say a court that forms part of the federal compact. It is a court from which, for example, an appeal lies to the High Court of Australia, which of course is a commonwealth court. There is at least an issue about the extent to which, for example, the appointment of a sitting judge would be open to challenge. In its written submission the society referred to a paper - in draft form at the time - written by Peter Johnston and Rohan Hardcastle in relation to the earlier legislation, in which that concern was expressed.

[12.50 pm]

Even if that is not right and it is not a concern, there is also a more fundamental or general point - that is, the reason that Governments like to appoint judges to royal commissions, commissions of inquiry and other offices is precisely because of their perceived independence and impartiality. That is necessarily compromised to some extent if judges are involved in matters that are the subject of political debate. It is arguably undesirable from a more general point of view to have serving and sitting judges drawn into matters that are more the subject of controversy than matters when they sit simply as judges. There are two concerns - a technical concern and more general concern about the effect on the judiciary generally by using them in this sort of capacity.

Hon PETER FOSS: To go past that, our advice is if a sitting judge were appointed, that person would have to resign. Technically, that person, when involved in any controversy, would not be a judge, but would have the right to return at the end of the time as a commissioner. I do not know whether that makes a significant difference, but in law at least the person would have a right to be a judge, but not be a judge.

Mr Weldon: That is a very interesting suggestion. It might be designed to overcome what I call the Kable matter - that is, named after the New South Wales case in which this issue was discussed.

Hon PETER FOSS: It may overcome the chapter III problem. What effect does it have on your perceptions?

Mr Weldon: With respect, it does not overcome that problem. It might overcome the technical problem. Whether it does is an interesting question upon which I would not be best qualified to talk. The committee has access to people like Jim Thompson, and even Peter Johnston himself, for expert advice on that sort of issue. It is arguable that it would overcome the difficulty. However, with respect, it would not address the second more general concern; namely, that a judge would be taken away from the exercise of judicial office and drawn into matters that are controversial and, arguably, more political than his normal jurisdiction.

Mrs Heenan: It could lead to those concerns being translated when that person returned to be a serving judicial officer because to some extent that person would carry with him or her any problems that had arisen during the term as commissioner.

Hon PETER FOSS: The sort of exchange that took place between Mr O'Connor and Mr Quigley might not be terribly nice if the person in the position were a judge on temporary attachment.

Mr Weldon: That is exactly right.

Mrs Heenan: And yet to address the question of security of tenure, which we are also concerned about in our submission, one has the problem if the serving judge who must resign is not entitled to go back. Presumably, that person would not be at the end of his or her career as this is a fairly demanding role. The security of tenure aspect then arises.

Hon PETER FOSS: They will have a right to return under the Bill.

Mr Weldon: Having addressed those concerns from the point of view of judicial appointment, there is another concern entirely. This was raised in the paper. In a sense this is in conflict with what I earlier said - this is a matter for the committee to determine ultimately, I suppose. If someone were appointed who is not a judge at all, although the security of tenure as we understand it is for the term of office, it is a maximum four-year term - that is, up to four years. Therefore, the term could be for six months or a year. Any person appointed to a position like that, or any position, who needs to look for reappointment at the end of the tenure does not really have the independence that the office requires. I understand there is a real difficulty because the commission will work only if the person appointed is up to the job. Getting the right person for the job is absolutely essential. If you pick someone who in the end is not suitable, you need to have some provision to deal with it. I am not talking about addresses to both Houses. I refer to a person who turns out not to be effective in the role. Tensions arise in all of these matters. The society takes the view that you do not have real independence if you are looking over the shoulder during the second half of the term to see whether you will be reappointed. If you take somebody from the independent bar who takes such a position, he or she will cease practice and not take briefs, and two or three years in such a job might be a disaster.

Hon DERRICK TOMLINSON: In more ways than one, perhaps!

Mr Weldon: In many ways. That person might be looking for reappointment as commissioner or some other appointment, such as to the court; therefore, he or she would look to the Executive Government for the appointment. It is not a desirable position. I have made the point in the past about the Director of Public Prosecutions. This is without any reference to holders of that office, but in this State, unlike New South Wales, we have a DPP who has tenure for five years, and depends on executive reappointment. The DPP has tenure for life in New South Wales, or until aged 72 years, I believe. That is a second consideration. It poses a difficulty.

Hon PETER FOSS: If you get a dud, you are stuck with him.

Mrs Heenan: That is the tension.

Mr Weldon: One is stuck with a dud, or at least someone who has security in office and cannot be removed.

Hon PETER FOSS: A DPP and a judge are different. If a dud judge is appointed, it is considered to be part of the problem of judicial independence. I do not refer to a judge who is so bad to be capable of dismissal. A dud is the problem of those who appointed him. The DPP is an executive role. You cannot afford to have somebody like that in the executive role. Independence is fine up to a point. It is not a paramount consideration with the DPP as it is in the case of judicial authority. It is more important that they get the job done. With judicial independence, the independence itself is a vital part of being a judge. I would not think that independence is a vital part of being a good DPP, or commissioner in this case.

Mr Weldon: If that is right, one wonders why there is the limited attempt in the Bill to give them -

Hon PETER FOSS: It is a consideration, but not essential. It is good to have, in the same way that one might have a panoply of desirable characteristics for an appointee. One is unlikely to get all of them. A degree of independence is reasonably important, but not as essential, as it is in the case of a judge.

Mrs Heenan: To a certain extent it is attempted to be addressed in the Bill by giving anyone who has been a judicial officer a right to return.

Hon PETER FOSS: That has its own problems.

Mrs Heenan: Although it creates tension.

Mr Weldon: You cannot remove the commissioner during his or her term of office, other than through a petition of both Houses. That is akin to the judicial provision. One wonders why it is appropriate, and then find that the term is only two years. You might have difficulty attracting somebody of the right calibre to a job like this if it is thought that it might be for four years. It is asking a legal practitioner to give up a practice to do so.

Hon PETER FOSS: The current Anti-Corruption Commission Act has another method - a person is nominated by a panel comprising the Chief Justice, the Chief Judge and the Solicitor General. Therefore, if that panel keeps putting up the same name, it is a bit hard for that person not to be appointed. That provides a check and balance to some degree.

[1.00 pm]

Mr Weldon: That might be a more appropriate mechanism. I do not know.

Mrs Heenan: Under this it is the Premier on consultation is it not?

Hon PETER FOSS: Yes, but you have to get a nomination from that panel otherwise he cannot put them up. He cannot just pick another name.

Mr Weldon: These are not easy issues; they are very difficult issues. Those are the concerns that we had.

Hon PETER FOSS: Do you have a problem with that method of nomination?

Mr Weldon: No, I do not think I do.

Hon KATE DOUST: On that last page of your submission you referred to the role of the position of parliamentary inspector and you stated that -

... where the Parliamentary Inspector is perceptibly or demonstrably of lesser standing than the Commissioner there could be obvious difficulties in the performance of the supervisory role.

Why do you take that view?

Mr Weldon: If, for example, a Supreme Court judge was the commissioner and a legal practitioner was the parliamentary inspector - who might not be the parliamentary inspector after his or her four-year term when they go back to practice - he or she might find it difficult to effectively criticise the performance of the commissioner. It is a reality -

Hon PETER FOSS: Who "is" going back.

Mr Weldon: Quite. It is just a reality that lawyers respect hierarchies to some extent and we thought that it might be more appropriate -

Hon KATE DOUST: That is obvious.

Hon PETER FOSS: Totally, to some extent.

Mr Weldon: Entirely; all right, I will concede.

Hon KATE DOUST: Let us be blunt about the pecking order.

Mr Weldon: Exactly. One could see, for example, that it would not be hard to have a provision that states who the office of parliamentary inspector is held by. For example, if the commissioner were a Supreme Court judge, the position would be held by a judge of the Supreme Court or whoever. Some sort of provision would qualify the office or the entitlement to hold the office of inspector by reference to the holder of the office of the commissioner. I do not quite know how you rank the status between judges. I can understand that the judges themselves, District or Supreme Court judges, would be easy enough, but as far as independent practitioners are concerned, I do not quite know how you would rank them. It would not be hard to devise some kind of mechanism. We thought it would have been desirable for the inspector to at least be of equal if not superior status to the commissioner.

Hon PETER FOSS: There are two things to note. First, it makes it hard if a Supreme Court judge is the commissioner because it is going to be hard to find someone who is sufficiently senior. They have partly overcome the problem in Queensland by making the inspector an agent of the supervisory parliamentary committee. The oversight body is the Parliament, which has worked reasonably well to confirm the authority of the inspector in any event, because you are not dealing with another individual, you are dealing with the Parliament, and most people understand reasonable accountability to Parliament.

Mr Weldon: I thought you were going to say that it might be hard to get one Supreme Court judge to criticise another. I do not know how hard that would be, but it would be preferable if the institution of Parliament could be seen as being the superior -

Mrs Heenan: Final accountable body.

Mr Weldon: Yes, that would be better. It would be an improvement and it would overcome that difficulty.

Hon PETER FOSS: It seems to have worked in Queensland anyway. It also makes it very hard to sue the parliamentary inspector. That happened at one stage in Queensland, and when dealing with the Parliament it becomes a little hard to sue; you cannot actually sue the Parliament.

Mrs Heenan: Bearing in mind that the inspector is examining very serious offences on behalf of the commissioner, it makes it extraordinarily difficult if it is someone perceived to be of a lesser status.

Hon DERRICK TOMLINSON: We have something of a misnomer in the Bill before the House. We are talking about a parliamentary commissioner, but the parliamentary commissioner is in no way beholden to the Parliament and may report to the Parliament. It is appointment by the Executive Government.

Mr Weldon: You said parliamentary commissioner. Do you not mean the parliamentary inspector?

Hon DERRICK TOMLINSON: Yes, sorry.

Mr Weldon: The parliamentary commissioner is the Ombudsman.

Hon DERRICK TOMLINSON: Yes, sorry. Different jurisdictions use different terms and we have looked at so many I get confused all the time.

Mr Weldon: I take your point.

Hon DERRICK TOMLINSON: The parliamentary inspector is in no way beholden to the Parliament. The difference between New South Wales and Queensland is that in New South Wales the inspector and the police integrity commissioner are appointees of the Executive Government. In Queensland, the inspector is called the parliamentary commissioner and is an appointee of the Parliament and is directed by and reports to a parliamentary committee. Therefore, the power of the

inspector is the power of the Parliament. That is quite different from the power of the inspector in New South Wales, part of which attaches to his or her position as a senior judge compared with the commissioner. One is a retired Supreme Court judge, the other is a retired District Court judge. The pecking order or the hierarchy is there in New South Wales and works by virtue of them being independent of Executive Government, even though they were appointed by Executive Government, and they are also independent of Parliament. In Queensland there is one QC and one senior junior, but the senior junior is the parliamentary inspector. His power or authority derives from Parliament. I am even getting confused, but there are two quite different sources of authority.

Mr Weldon: Either would be preferable to this present one, I would have thought. Put like that, I could not offer a comment on which we think would be the preferable of the two.

Hon DERRICK TOMLINSON: No; I am reinforcing your proposition that if we are going to have both officers appointed by Executive Government or the Premier, then notice has to be given to the seniority of the those persons in terms of their oversight functions.

Mrs Heenan: That certainly is something that the Law Society council has looked and is really part of our submission, but we have not addressed the Queensland model with the equivalent of the inspector appointed by the Parliament.

The CHAIRMAN: What would be the Law Society's position if the committee made a recommendation that the parliamentary inspector should be a senior junior who was an agent of the supervisory parliamentary committee and that the commissioner should be a judge? Do you think that could work?

Mrs Heenan: To be fair, we would be expressing a personal opinion, because we work on a strict committee/council system. However, we would be concerned at the independence of the three arms of government if you bring in that Queensland structure. The other model has more attractions for us because it preserves the independence of this particular role and it is seen to be a more judicial role and independent -

Hon PETER FOSS: Which one are you referring to go?

Mrs Heenan: This is the junior senior model or where there is a District Court and a Supreme Court judge in those two positions with a clear seniority, or a practitioner and a District Court judge with a clear position of seniority, but both the legal practitioners remain quite separate from parliamentary appointed person, which is the Queensland position for the inspector.

Hon PETER FOSS: We have a problem with the parliamentary inspector who is responsible for the Parliament. It is probably a misnomer to call him a parliamentary inspector if he is an independent body. Therefore, what is the better form of accountability; is it somebody who is totally independent of anybody or Parliament? I suppose it is not unfair to say that parliamentarians lean towards Parliament as the ultimate in accountability.

Mrs Heenan: That is certainly something we could look at again and perhaps come back to you with a further submission if you wish.

Hon DERRICK TOMLINSON: From a personal observation of a parliamentarian, I would prefer the provision in the Bill; that is, the New South Wales model, because one of the things we must recognise is that the Corruption and Crime Commission will investigate parliamentarians and the Executive Government, or has the power to investigate the Executive Government. Therefore, I argue that that person must be a step removed from the Parliament. There must be that separation.

Mrs Heenan: As I said to you initially, that is my personal view, but we will certainly take back the other view to Law Society Council and come back to you with a firm view on which model it would prefer as distinct from the model with the levels of seniority taking effect, which is not built into the Bill at the moment.

The CHAIRMAN: Within the Bill before the House at the moment the commission has two functions. One is to look into corruption and the other utilises similar powers to the exceptional powers model and hands over the investigation to the police with regard to organised crime. Have you any comment with regard to the commissioner dealing with corruption and organised crime?

Mr Weldon: At this stage the society does not have a view and I do not really have a view. I have heard the view expressed in which one colloquial phrase was used to describe the person as a super cop - someone who has these combined powers - and that that is undesirable. There is a view that, in the end, I found difficult to articulate, which is why it is not in the written submission that I had some part in preparing. It was the view of some members of the Law Society council to that effect. It may well be that the Criminal Lawyers Association, which is also to make a submission to this committee, has views along those lines. There seems to be two, in some ways, different functions. One is that the former legislation seemed to make an attack on what is called organised crime, or clearly that the legislation was aimed particularly at bikie gangs. There was no doubt about that. It had quite a different function from the Anti-Corruption Commission, which would also be effectively replaced by this legislation. I would be happy to listen or try to address any particular concerns, but I do not know if the society at the moment has a philosophical or fundamental difficulty with that position.

[1.15 pm]

That is the only answer I can give at the moment. We note, for example, that as far as organised crime is concerned, in effect, the provisions of the former Act were never invoked. There have been no special commissioners. In fact, the last time the society addressed this committee the investigation into the alleged murder of Detective Hancock was well under way. As we speak, that trial is under way in the Supreme Court. As the society said last time, in one sense those powers were never required to solve or complete the investigation into that particular crime. I do not know whether that has any bearing on the extent to which those powers are necessary or organised crime is still seen as an issue.

Hon PETER FOSS: That was almost a crime by organised criminals rather than an organised crime. It is a fairly usual by-product of organised crime, but it is not the type of crime that organised criminals usually indulge in other than as a by-product.

Mr Weldon: Yes. Now that you have said that, it is interesting whether that would fit within -

Hon PETER FOSS: It does fit.

Mr Weldon: It does fit because sufficient offences were committed around and about it. I agree that that must be right. No doubt organised crime is designed for things like drug production -

Hon PETER FOSS: And prostitution and the like.

Hon DERRICK TOMLINSON: You referred to the alleged murder of Don Hancock as the crime committed by an organised group. There was also the bombing of the Ora Banda pub and so on, which are crimes committed by an organised group, rather than organised crime.

The CHAIRMAN: And the murder of the bikie.

Hon DERRICK TOMLINSON: In your opinion does Western Australia need a crimes commission?

Mr Weldon: Of this sort?

Hon DERRICK TOMLINSON: Of any sort, given our population, the extent of organised crime and the competence of the Police Service to satisfactorily resolve most of the serious offences.

Mr Weldon: It could only be a personal opinion, because it has not been put or discussed -

Hon DERRICK TOMLINSON: That is why I suggested that it would be an opinion.

Mr Weldon: I do not think we will know until we try. For example, there is a continued availability of drugs and serious drugs and I am not talking so much about the minor use of cannabis. I lived in Kalgoorlie for a number of years and I used to think it was extraordinary that a town that is so small and isolated cannot control its drug problem. Kalgoorlie has only one main street and railway. However, it never happened and drugs continued to be available during the time I was there. We have to set up a commission to see how it works, what might be uncovered and the extent to which organised crime is involved in activities like drugs and prostitution, otherwise we probably will not know. I do not want to go too far off the question, but the whole issue of prostitution -

Hon DERRICK TOMLINSON: It is a hypothetical question.

Mrs Heenan: But if we are looking at this office, that is only one half of it, the organised crime aspect. There is also the misconduct aspect with public officers and I think perhaps that is where it is more important.

Hon DERRICK TOMLINSON: I have no question about its requirement in areas of misconduct. It gets back to the question of having confidence in our public sector. We must never lose sight of the fact that the origin of the Anti-Corruption Commission was the royal commission into the commercial activities of government and other matters. Commissioner Kennedy referred not to the investigation of crime per se, but maintaining public confidence in the trust that he has given to public officers.

Mrs Heenan: There is also the educational role.

Hon DERRICK TOMLINSON: That is quite different from the pursuit of criminals and matters of crime.

Mrs Heenan: Yes. It could be divorced from the Bill and left with the police.

Hon PETER FOSS: It has been really. It appears that although the commissioner has power to investigate, the police also retain the power to investigate by getting an authority from the commission. It is a bit bizarre whether it is in there or not. The royal commission took the view that it had not been given to them.

Mrs Heenan: And there are certain things they can do without a warrant.

Hon PETER FOSS: It keeps a lot of the provisions of the exceptional powers Bill, but it allows the commission to be the special commissioner. It also allows commission staff to do all the things the police do. It is all very strange.

The CHAIRMAN: Thank you very much for appearing today.

Mrs Heenan: Thank you for giving us the opportunity.

Committee adjourned at 1.20 pm