

# **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, 10 NOVEMBER 2003**

### **Members**

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

**Committee met at 9.45 am****TANNIN, MR GEORGE****Crown Counsel,****Level 15, 141 St Georges Terrace,****Perth, examined:**

**The CHAIRMAN:** Good morning, Mr Tannin. On behalf of the committee I would like to welcome you to the meeting. You will have signed a document entitled Information for Witnesses. Have you read and understood that document?

**Mr Tannin:** Yes, I have. I indicate that I received a summons to appear. I was puzzled to receive a summons. I would perfectly happily come on request.

**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 you refer to during the course of the hearing for the record and please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers and make 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. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Because of the time constraints of the committee at the moment, we will courier your transcript to you as soon as we have it. It would be great if you could return it as quickly as you can. What do you see as the difference between a public authority and a public body?

**Mr Tannin:** This issue arose in the context of clause 4 of the Corruption and Crime Commission Bill. I am not the instructing officer on the Bill, but I was asked for some advice by the instructing officer, Ms Judith Tassef. In clause 4(d)(i), dealing with that broad purview of jurisdiction that is intended under the new Act, there is a reference to a public body; otherwise, the Act does not contain any definition of that term, and nor does the Interpretation Act. Comparatively in the Bill there is reference to a public authority and to a notifying authority, which, in turn, is defined very broadly under clause 3. The limit of my advice on it was whether it should be retained. I advised that it should be retained for a couple of reasons. It was the concept of public body that was found in the Anti-Corruption Commission Act. Again, it was undefined and none of us was entirely certain what it meant. However, I was concerned not to do anything that would at least be used as an argument that there had been a reduction in jurisdiction. As a matter of interpretation, if you change terms in one Act which succeeds another and remove those terms, by implication you have done something. It is always then left for the court to determine what it is. We are dealing with the context in this legislation in which those who come under scrutiny and who wish to challenge that scrutiny will relentlessly challenge it. As a matter of conceptual principle I was concerned not to do anything that reduced the jurisdiction.

Later Judith Tassef - I think as a result of some inquiries from members of this committee - asked me whether I had any examples of that. I wondered about that and I truly do not have any particular examples. If you look at the way clause 4(d)(i) works, you might argue that if the public officer engages in some kind of conduct that is adverse to the performance of another body which is public, that person might commit misconduct. The question is whether there are any public bodies that are

not notifying bodies. The only ones that conceptually could be part of that involve groups such as those constituted under the various Acts that deal with churches; for example, the Anglican Church of Australia Constitution Act 1960. However, I am not sure that we are particularly interested in scrutinising churches. One example of the other kind of body is Family Planning Western Australia, which is basically a private body that provides specialist services in sexual and reproductive health. It receives funding from both the State and Commonwealth Governments, but it is essentially a private organisation. I wondered whether private organisations that receive public moneys, whatever their intention, might be subject to scrutiny. It was that sort of thing that I was thinking about, but I cannot give you any particular concrete example about the issue greater than I have.

I might answer another point. In the end when Ms Tassef said to me that it may not really add anything, I think that was right and I said that, in that case, we would basically give up. In the end it is a policy issue for you, not for me.

**Hon PETER FOSS:** I will explain why you should not be puzzled. This committee has a fairly short time frame in which to deal with a whole lot of matters. This is only a small part of it.

[9.40 am]

We obviously have to make a decision about whether to recommend that this word should go or should be changed. We cannot make that recommendation unless we are able to give some sort of reason to the House as to why.

**Mr Tannin:** I fully understand that.

**Hon PETER FOSS:** We had written two letters trying to find out what it meant and neither of them took us any closer to finding out what it was all about. We thought, given the time limits that we have and that we tried writing twice, the time for writing had ceased and the time for getting you in here immediately without any delay had arrived.

**Mr Tannin:** I am actually pleased that we can sort it out.

**Hon PETER FOSS:** It is not an answer to us to be told that we are not going to persist with it. We have to make the decision because we are Parliament and the Government is not; that is the difference really. I would like to ask you a couple of questions, because I am a bit concerned about the definition of "public authority". Let us take a situation like a ministerial committee. The minister sets up a committee to review something commercially sensitive perhaps, and that committee meets to make recommendations to the minister, which will probably end up with an executive decision on the part of the minister or even the introduction of legislation. One of the persons on that committee, who is not a public officer, acts corruptly and takes money in order to make a recommendation that is corrupt. Does that person in any way come under the purview of this Bill? The committee has not been set up under any written law but, rather, under executive authority. It seems to me that the only way you could pick up that sort of person, who is neither a public officer nor a member of a public authority, is if the ministerial committee constitutes a public body. Do you think it could?

**Mr Tannin:** I share your concern about the need for prevention and scrutiny of the kind of corruption you have referred to. If I can examine the example a bit further, in the scenario that you have put, it would obviously depend on how the committee was constituted, whether it was being paid and -

**Hon PETER FOSS:** Let us say it is being paid - or maybe not, they could be volunteers.

**Mr Tannin:** What often happens is committees have at least one member who is a public servant of some kind and they have administrative facilities provided by the Crown and whatever. However, to deal with the evil that you have identified in the context of a private citizen who had corruptly

taken a bribe for some contractual or commercial matter, the Criminal Code itself would deal with secret commissions, which is what it would be.

**Hon PETER FOSS:** I know the behaviour can be prosecuted. All this corrupt behaviour can be prosecuted, but is it within the purview of this body to go looking for it?

**Mr Tannin:** I think in the example I gave where there is a public element of the committee - whether it is facilities or some members - a corruption body will focus its inquiry through the doorway of jurisdiction, if you like.

**Hon PETER FOSS:** But there has to be corrupt behaviour by some body, and if those people over whom it has jurisdiction were perfectly innocent, how could they take a complaint about Joe Blow's feelings because he happens to be a protesting civil servant on the committee?

**Mr Tannin:** In this Bill, as in the Anti-Corruption Commission Act and as is common in anticorruption jurisdictions, to the extent of its jurisdiction the corruption body will inquire. Where it cannot inquire and where it sees behaviour that is arguably improper, it has a duty and a power to share its information with other authorities.

**Hon PETER FOSS:** It might not know that this person acted corruptly. All it knows is that the committee split 3-4, with this person being on the 4 side, and suddenly the next day he comes back and it is 4-3. The other members do not know why he changed his mind; all they know is that he did. In fact, and as somebody affected by the decision suspects, the fourth person changed sides because of a bribe. I am just giving an example. It seems to me that under those circumstances, unless the words "public body" are picked up, there is no jurisdiction. That is partly because of the definition of "public authority". Paragraphs (a), (b), (d) and (e) of the definition are not right; paragraph (c) is the only one that possibly lets you in. It states -

an authority, board, corporation, commission, council, committee . . . established under written law;

**Mr Tannin:** Yes.

**Hon PETER FOSS:** So, as soon as you do not have a written law, (c) does not grab it.

**Mr Tannin:** That is right; it is completely excluded under the ejusdem generis rule.

**Hon PETER FOSS:** Yes. It seems to me that we might be able to insert "or an executive authority" or some such words to pick up a decision derived from the minister. I think that would pick up a committee set up by a director general, for instance. However, a director general is nearly always either exercising statutory power or delegated executive power.

**Mr Tannin:** You can do it as a matter of drafting; I accept that. You could say, for example, "any committee appointed by a minister or by the Executive Government". You then face, I think, the more fundamental policy issue - which is for you, of course, not me - of how far you want this new body to focus.

**Hon PETER FOSS:** We have picked up contractors and subcontractors - admittedly a specific kind - but it just seems to me that these committees are very much carrying out the functions of government. There is no argument about it because they are actually doing it on behalf of government. It is not a question of having contracted out something and some people saying they think government should be doing it and other people saying they do not think government should be doing it. This is where a function has remained with government but you have delegated the decision-making power in some part to people who are going to make a recommendation to you. I understand the policy is for us; however, it seems to me that unless either we put that specific amendment in paragraph (c) or "public body" is kept in clause 4, there is no way to pick up a committee. I am not even certain that clause 4 picks up the committee. That is why I am rather interested to know if you think it would.

**Mr Tannin:** No, I am not sure that it would.

**Hon PETER FOSS:** Might it?

**Mr Tannin:** It might. That is the best answer I can give you.

**Hon DERRICK TOMLINSON:** Could I follow this through. Mr Tannin, you gave us an example of a body in receipt of public funds, which might be conceived of as a public body. Let us take the example of the community controlled health services or, as they used to be called, the Aboriginal medical services.

[9.50 am]

There are 13 in Western Australia. They received between them something like \$13.5 million in funding, which was channelled or funnelled through the Office of Aboriginal Health from the commonwealth office. In recent years two of those bodies have been the subject of public comment. Derbarl Yerrigan was one. Regardless of the power struggle within it, two independent audits drew attention to questionable auditing practices. Subsequent inquiries indicated prima facie evidence of fraud. Charges were laid and subsequently dropped. Derbarl Yerrigan was technically insolvent and was accumulating debts of up to \$6 million. There is an allegation that Derbarl Yerrigan received funds from the public purse while it was technically insolvent. The Kalgoorlie Aboriginal medical service - I do not know its Aboriginal name - was also investigated for similar matters. The Auditor General could not investigate those bodies because they are outside his terms of reference. They were non-government organisations in receipt of public funds. He could audit them only at the request of the Attorney General. He could not even audit them at the request of Parliament. Parliament could have investigated them but that required a decision of one or other of the Houses, and so far that has not been forthcoming. These bodies, which come under the notion of public bodies, were in receipt of very substantial funds and were performing a public health function with the blessing of government and state authorities, yet they were outside their scrutiny.

**Mr Tannin:** I do not know how each of the bodies you have referred to is constituted. If they were, for example, created under particular legislation -

**Hon PETER FOSS:** The federal legislation that deals with Aboriginal corporations.

**Mr Tannin:** As I say, if they were created on a state basis, they would be notifying authorities. I just do not know enough about the facts. I accept in principle that bodies that receive public funding should in principle be subject to the responsibility of public scrutiny. I do not see that one can logically argue against that. I take the view that if you do anything in a democracy, you must do that thing responsibly.

**Hon DERRICK TOMLINSON:** Under the term “public body” as it was used in the ACC Act and as it has been transferred into this Bill, they could be investigated?

**Mr Tannin:** That could arguably be so, but I cannot say that that could clearly be so. If you are going to make a policy determination that that should be the case, you will need to make additions to the definition to make that clear.

**Hon DERRICK TOMLINSON:** Thank you.

**Hon PETER FOSS:** It has been suggested to us that the Act should make provision for how the Corruption and Crime Commission can offer indemnities to rollover witnesses. The recommendation to us is that it should be arranged through the Attorney General. I cannot see that we need to put that in the Act. That could be done just by asking the Attorney General.

**Mr Tannin:** The Attorney General can do that anyway, as can the Director of Public Prosecutions. There are profound ethical problems with giving indemnities and immunities anyway, and they should be limited.

**Hon PETER FOSS:** The point I am making is this: we could say that it could be arranged through the Attorney General. He will still make his own decisions for his own reasons and based on his

principles. I cannot see that putting it into the Act would add anything. You do not need an Act of Parliament to ask the Attorney General to give a rollover witness -

**Mr Tannin:** Absolutely right.

**Hon PETER FOSS:** Thank you. The other suggestion that has been made to us is that most of the offences that may be committed by Corruption and Crime Commission officers are summary matters and therefore are subject to a 12-month time limit. It has been submitted that given that such offences constitute a significant abuse of power and trust and that investigations may take some time to complete or to come out, there should be a clause that indicates that a prosecution can be commenced at any time. Are there any problems in making summary offences prosecutable at any time?

**Mr Tannin:** The whole idea of limitations in summary offences is very difficult. I am trying to think of the name of one of the Acts. Some of the occupational health Acts have 12-month limits. In the fisheries regime there is a two-year limit. Limitations always impact on the capacity of a body to investigate. That is absolutely right. However, limitations in relation to summary offences tend to protect people from what is seen as a capacity to abuse prosecutorial discretions over what are relatively trivial matters. My own thinking is that, generally, summary investigation limitations should be set at about two or three years across the board. If you cannot do an investigation in two or three years and get it right, you are not very competent. You cannot give an absolute licence to people to take their time and to look at it years later. They could look at it 10 years later and hang it over someone.

**Hon PETER FOSS:** The problem, of course, is that he might not find it. I remember the classic example, which was the government tapes file. That was the blue file that Brian and Terry Burke had of transcripts that they had taped of Ray O'Connor. It did not come out until two years later that they had even done it. By that stage, of course, it was only a summary offence and it was 12 months after the date on which a prosecution could have been brought for that offence. It did not come out while he was the Premier, for obvious reasons, and it was unlikely to do so. They are saying that the problem is that these are the people who will be in charge of covert-type operations and how on earth will anybody know that they have been breaching their Act until, possibly, some time after?

**Mr Tannin:** I obviously do not want to comment on any specific examples, but where evil conduct which might itself constitute a simple offence or just a summary matter is revealed in circumstances years later, the only time when its seriousness would be glaring enough to cause public concern I think would inevitably be associated with other offences. I have reached for my copy of the code. For example, I have had situations when simple offences have been committed and the limitation has passed, but often two or three people will have been involved. You then look at conspiracy charges under the code, and limitations do not apply to them. My view about limitation periods is that they can be easily manipulated. You are creating a body that will have very wide investigative powers. You need to keep a rein on it, but I am not in any way casting aspersions on those people.

**Hon PETER FOSS:** Can we get over it by saying that the prosecution can be brought at any time with the consent of the Attorney General? That stops abuse.

**Mr Tannin:** Yes, it would.

**Hon PETER FOSS:** It would also stop abuse the other way.

**Mr Tannin:** That can do it, yes. My recommendation to you, which is for you to at least consider, is to give a blanket time limit of three years. Again, without casting aspersions on Attorneys General - I acted for you as Attorney General - the way Attorneys General generally operate is that they consult and apply their minds properly to their jobs.

[10.10 am]

In the end, if that discretion is given to the Attorney General, it is given to the Director of Public Prosecutions.

**Hon PETER FOSS:** Or the Crown Solicitor.

**Mr Tannin:** Or the Crown Solicitor. However, it will be given to someone who then may be susceptible to the influence of an enthusiastic corruption fighter or police squad.

**Hon PETER FOSS:** Not all Attorneys General are so susceptible.

**Mr Tannin:** They have different enthusiasms from time to time, as members know. The point is that if an objective limit is set, which is a time which is not malleable, everybody knows where they stand and there cannot be any suggestion that the Attorney General, the DPP or the crown counsel were improperly influenced in some way.

**The CHAIRMAN:** Thank you very much, Mr Tannin.

**Mr Tannin:** Thank you. I will take more time to answer the committee's questions next time.

**Committee adjourned at 10.11 am.**