
CHAPTER 4

CRIMINAL JUSTICE COMMISSION

Introduction

4.1 The Committee's terms of reference required it to inquire into the role and conduct of the Criminal Justice Commission (CJC). The CJC is an independent statutory authority established by the *Criminal Justice Act 1989* of Queensland. The CJC indicated to the Committee that:

it does not regard the Senate's inquiry as displacing or substituting for the system of review of the Commission's activities provided for by the law of Queensland as embodied by the *Criminal Justice Act 1989*, namely review by the Queensland Supreme Court and by the PCJC.¹

4.2 The Committee was cognisant of its limitations in examining an authority established by an enactment of a State Parliament. In interpreting its terms of reference, the Committee focused on the role and conduct of the CJC only in relation to the whistleblower cases under consideration.

Establishment

4.3 The Criminal Justice Act of Queensland provides for the establishment and maintenance of a permanent body -

- to advise on the administration of the criminal justice system in Queensland with a view to ensuring its efficiency and impartiality;
- to continue investigations commenced by the Fitzgerald Commission of Inquiry;
- to investigate the incidence of organised or major crime;
- to take measures to combat organised or major crime for an interim period;
- to investigate complaints of official misconduct referred to the body and to secure the taking of appropriate action in respect of official misconduct;
- to hear and determine disciplinary charges of official misconduct in prescribed circumstances.²

4.4 The Act also details the functions and responsibilities of the CJC. The primary functions are to continually monitor, review, coordinate and initiate reform of the administration of criminal justice and to discharge such functions in the administration of criminal justice which in the CJC's opinion are not appropriate or cannot be effectively discharged by the Queensland Police Service or other agencies of the State.³

1 Submission, CJC, February 1995, p. 6.

2 *Criminal Justice Act 1989* (Qld), s.3.

3 Criminal Justice Act, ss. 21 and 23.

4.5 The CJC consists of five operations divisions - Official Misconduct, Intelligence, Witness Protection, Corruption Prevention, and Research and Coordination.

4.6 The Official Misconduct Division is the investigative unit within the CJC constituting approximately 60 per cent of the CJC's staffing and resources. Its function is to investigate the incidence of official misconduct generally in the State, including allegations of misconduct against members of the Queensland Police Force and of official misconduct by officers in other units of public administration. Within the Division is a Complaints Section which receives all complaints or information from any person concerning conduct that is perceived as, or may be, official misconduct. The Section has the power to decide not to investigate certain complaints including those which are frivolous or vexatious; it may also discontinue investigations.⁴

4.7 The CJC's establishment, role, functions and structure reflect recommendations made by the Fitzgerald Commission of Inquiry.⁵ The Fitzgerald report highlighted the difficulties of balancing accountability with the need for independence. It was concerned at the potential abuse of power in a body which may have a quasi-adjudicative function and was not confined to investigations.

4.8 The Fitzgerald report concluded:

The idea of an autonomous body [to combat corruption] can at first be comforting, because it is beyond the control of those in power who may be corrupt. However, just as such a body is (theoretically at least) beyond the reach of illegitimate power, it is also beyond the reach of practical proper control. If accountability is to be effective, it must be related to the exercise of power in specific cases, not just overall explanations. Accountability in the political sense is different from the necessary every day accountability when investigative powers are being exercised.

It is necessary that an independent body exist with the resources and powers to investigate official misconduct. It should not be autonomous.

For Queensland the preferable solution is that such an independent body exist as part of a wider structure which not only addresses official misconduct but which operates an integrated cohesive criminal justice administration.⁶

4.9 The Criminal Justice Commission, as established, closely reflects the conclusions and recommendations of the Fitzgerald report.

Accountability

4.10 Accountability of the CJC is provided for in the Criminal Justice Act through judicial and parliamentary review.

4 Criminal Justice Act, Part 2, Divisions 4 and 5.

5 Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report*, GE Fitzgerald (Chairman), 1989 (Fitzgerald report). See especially Chapters 10, 11.3 and Recommendations B.

6 Fitzgerald report., pp. 302-03.

Judicial review

4.11 The Act provides that a person who claims an investigation is being conducted unfairly or is not warranted in the first instance may make application to the Supreme Court for an order in the nature of a mandatory or restrictive injunction.⁷ The Committee acknowledges that judicial review is an appropriate form of accountability. However, the Committee also recognises that a Supreme Court action can be an expensive proposition and may effectively be a prohibitive form of action for many citizens. The question of whistleblowers' entitlement to legal aid and assistance is discussed in paras 2.77-2.80.

Parliamentary review

4.12 The Fitzgerald Commission recommended that a standing parliamentary committee, not charged with any other responsibility and known as the 'Criminal Justice Committee', should oversee the operations of the CJC. The Criminal Justice Act provides for this level of accountability of the CJC through a Parliamentary Committee known until recently as the Parliamentary Criminal Justice Committee (PCJC). The primary functions of the PCJC were to monitor and review the discharge of the functions of the CJC and to report to the Legislative Assembly on any matters pertinent to the CJC, the discharge of the CJC's functions or the exercise of its powers which in the PCJC's opinion the Assembly's attention should be directed.⁸

4.13 The powers and functions of the PCJC as it was established were not as strong or effective as those envisaged by the Fitzgerald Commission. The Commission had also suggested that the proposed Criminal Justice Committee should have the power to formulate policies and guidelines to be obeyed by the CJC, and to direct the CJC to initiate and pursue investigations or to report to Parliament.⁹ These two recommendations were not incorporated within the Criminal Justice Act.

4.14 However, the Criminal Justice Act specifically provided for the PCJC to undertake a review of the activities of the CJC after three years of operation and to report to the Legislative Assembly and to the Minister as to action that should be taken in relation to the Act or the functions, powers and operations of the CJC. The PCJC produced a comprehensive report in February 1995 pursuant to this statutory requirement. The report covered the structure of the CJC, reviewed its operating Divisions, the role and operation of the PCJC, and covered issues including whistleblowers, accountability of the CJC, the role of the Chairman and Commissioners and the investigation of elected officials.¹⁰ The Committee notes that the PCJC three yearly review also considered the non-implementation of the two Fitzgerald report recommendations and recommended that the Criminal Justice Act be amended to include them.¹¹

7 Criminal Justice Act, s. 34.

8 Criminal Justice Act, Part 4, ss. 111-118.

9 Fitzgerald, *op. cit.*, p. 309.

10 PCJC, *A report of a review of the activities of the Criminal Justice Commission pursuant to s.118 (1)(f) of the Criminal Justice Act 1989*, Report No. 26, 6 February 1995 (PCJC Report No. 26).

11 PCJC Report No. 26, pp. 13-16.

4.15 In September 1995, the Queensland Parliament enacted the Parliamentary Committees Act. This Act established a Legal, Constitutional and Administrative Review Committee which subsumed the functions of the PCJC including responsibility for monitoring the CJC. This new Parliamentary Committee will exercise all the statutory functions and powers of the former PCJC, which remain under the Criminal Justice Act. However, the new Committee will have the additional responsibility for the areas of administrative review, constitutional, electoral and legal reform. The Queensland Opposition strongly opposed this proposal, arguing on accountability terms that the CJC with its wide-ranging powers warranted the continuation of a separate parliamentary committee to monitor the CJC and its operations.¹²

Investigations

4.16 The Committee received in evidence many opinions critical of the CJC. The CJC indicated that many of the criticisms were based on a misunderstanding or lack of appreciation of the legal constraints of the Criminal Justice Act and the milieu within which it operates. Much of the criticism of the CJC related to its investigation of complaints - from an overly-legalistic interpretation of its jurisdiction in the determination of whether and to what extent a complaint should be investigated, to the conduct of proceedings and outcomes of investigations which have been undertaken.

4.17 The Criminal Justice Act provides the CJC with a limited jurisdiction to investigate. The CJC acknowledges 'this is one of the problems that vexes the general public and the persons who approach us'.¹³ While the CJC may have a limited jurisdiction to investigate, it does have significant powers with which to carry out its investigations.

Jurisdiction - official misconduct

4.18 As has been noted, a major role of the CJC is to investigate complaints of official misconduct. The CJC has explained that in so far as it relates to the investigation of misconduct by public officials:

the jurisdiction of the Commission is limited to matters which reasonably raise a suspicion of "official misconduct" as defined in the Act. Essentially, that limits the investigative jurisdiction of the Commission to instances in which the conduct complained of:

- is not honest or impartial;
- involves a breach of the trust placed in a person by reason of their holding a position in a unit of public administration; or
- involves the misuse by any persons of information or material acquired in, or in connection with, the discharge of their functions or exercise of their powers [or] authority.¹⁴

12 Queensland Legislative Assembly, *Hansard*, 14.9.95, pp. 212-93.

13 Evidence, Mr Mark Le Grand, p. 89.

14 Submission, CJC, February 1995, pp. 2-3; evidence, Mr Mark Le Grand, pp. 89-90.

Furthermore the conduct will not amount to official misconduct unless it constitutes or could constitute a criminal offence or a disciplinary breach that provides reasonable grounds for termination of that person's services.¹⁵

4.19 The Act enables the CJC to investigate alleged misconduct by elected officials, including members of the Legislative Assembly and of local authorities. However, within the definition of official misconduct there is uncertainty as to whether the CJC has jurisdiction to investigate conduct which does not constitute a criminal offence. This is because in the case of elected members, there exists no code of discipline that prescribes standards of conduct.

4.20 In undertaking the investigation of elected officials, the CJC has advised the Committee that:

the conduct of elected officials will attract the Commission's jurisdiction only if the alleged conduct constitutes or could constitute a criminal offence. Therefore, there will be cases involving conduct by elected officials constituting an abuse or misuse of the powers of office which will not be subject to investigation by the Commission as the conduct falls short of criminal conduct.¹⁶

4.21 This difference in the investigation by the CJC of official misconduct between elected and non-elected officials appears to create an anomaly in the operation of the legislation. An action which could constitute official misconduct if undertaken by a public servant, for example, could be 'legitimised' if the decision to take the action were passed to a Minister of the Crown to be made. The CJC confirmed that if non-elected public servants acted in accordance with lawful directions given by their political (elected) masters, then those public servants could not be prosecuted for official misconduct by the CJC.¹⁷

4.22 This difference between elected and non-elected public officials as to what constitutes official misconduct was also discussed in general terms in reference to the destruction of evidence likely to be used in a court case. In reference to the limited application to parliamentarians, Mr Le Grand noted:

the extent to which parliament should regulate its own behaviour, short of criminal offences, is a very vexed question. [The CJC has] recommended that there should be a regime in place that would provide at least some level of external scrutiny where there was clear mens rea dishonesty, but really it is ultimately a matter for parliament to determine whether it will take that matter up or not ... a very strong argument can be made for the fact that parliament should not have visited upon it the disciplinary processes of unelected external bodies.¹⁸

15 Criminal Justice Act ss. 31 and 32 define official misconduct. This definition is similar to the definition of corrupt conduct in s. 8 of the *Independent Commission Against Corruption Act 1988* (NSW), although there are some variations; see PCJC Report No. 26, pp. 227-28.

16 Submission, CJC, February 1995, pp. 3-4.

17 Evidence, Mr Michael Barnes, p. 697.

18 Evidence, p. 698.

4.23 The Committee notes that the PCJC three yearly review of the CJC discussed the scope of the jurisdiction of the CJC to investigate suspected official misconduct on the part of elected officials. The PCJC particularly addressed the questions 'Does the Commission have jurisdiction to investigate elected officials?' and 'Should the Commission have jurisdiction to investigate elected officials for disciplinary matters?'. The PCJC made a number of recommendations including a strengthening of the CJC's jurisdiction in conjunction with the development of codes of conduct and associated ethics measures for members of the Legislative Assembly and local government councillors.¹⁹

4.24 The Committee considers that the CJC's inability to pursue the investigation of elected officials, who may have high public profiles, for possible misconduct reinforces an impression of a double standard operating for elected officials (including politicians and others) in the minds of the general public. The Committee therefore believes that the PCJC recommendations have merit.

4.25 The CJC was criticised for using the jurisdictional limitation argument to suit its own purposes and in general using legal technicalities to hide behind and not undertake appropriate or intensive investigations.²⁰ The interpretation of the CJC's jurisdiction and powers is clearly important in understanding how and why the CJC undertakes investigations in the manner in which it does.

4.26 The CJC is sensitive to this criticism, indicating to the Committee that:

It is all very well to say that that is a very narrow interpretation of our function, as some have sought to say, but a commission such as our own already has a very rocky road to travel. If we start to set our own agenda, make our own laws, go our own way, regardless of the parameters of the law of the land, the rule of law, where are we going to end up? Clearly, you would be looking perhaps at complaints from another point of view and you would be rightly scathing to say, 'Here is this organisation having the audacity and presumption to act well beyond its lawful authority to do so.' We cannot do that.²¹

4.27 The CJC continually emphasised to the Committee that the rule of law is paramount. The CJC is established under an Act of Parliament which defines its functions, responsibilities and powers. Officers may:

understand the situation of, and [they] sympathise with, those who feel frustrated by the CJC's inability to act when they believe sincerely that there are matters of injustice, matters of miscarriage of justice and matters of abuse of justice occurring or have occurred. But there is simply nothing we can do about that ...

For us to step outside our legislation to undertake functions that we have not been given through the parliament by the people of this state, to exercise powers we do not have and to exercise jurisdiction we do not have, would

19 PCJC Report No. 26, Chapter 14, pp. 225-32.

20 For example, evidence, Mr Bill Zingelmann, p. 254 and Mr Matthew Ready, p. 575.

21 Evidence, Mr Mark Le Grand, p. 676.

clearly be acting ultra vires and it would be an abuse of power. It may well open the officers of the commission who knowingly engaged in going beyond their functions and beyond their responsibilities to an action against themselves. Certainly, they would stand outside the protection of the Criminal Justice Act for their own personal and civil liability and a case could be mounted that a deliberated abuse of power puts them in breach of section 138 of the Criminal Justice Act.

It is fine to say that the CJC is taking a narrow view, but that is the view it is required to take of its function by the law of this state. It has no choice in that matter.²²

4.28 The Committee is concerned that this approach, while being a correct statement of the legal situation, has the effect of leaving jurisdictional gaps through which many people are falling. The Committee notes that both the CJC and PCJC have recommended many amendments to the Criminal Justice Act. However, the CJC has expressed concern that a number of these recommendations are yet to be implemented, although they are under consideration by an Interdepartmental Working Group.²³

Assessment of complaints

4.29 As noted in paragraph 4.6, the Criminal Justice Act provides that the Complaints Section may decide not to investigate complaints, including those which are frivolous or vexatious or, if from an anonymous source, lack substance or credibility. It may also discontinue the investigation of a complaint.²⁴ Thus the CJC is provided with a degree of discretion in the undertaking of investigations.

4.30 The CJC has indicated that all complaints are assessed via a preliminary investigation with a view to determining whether the material available to support the complaint raised 'a reasonable suspicion of official misconduct so as to justify full investigation'.²⁵

4.31 Similarly, if complaints are received from persons who believe that as a result of providing information, they have been subjected to reprisals, victimisation or other adverse or prejudicial treatment, the CJC will undertake a preliminary inquiry. This may involve seeking a report on the matter, interviewing persons against whom the allegations have been made and examining files. However, unless this preliminary inquiry indicates some substance to the allegation, the CJC does not pursue the matter to a full investigation.²⁶

4.32 The CJC emphasises that investigations necessarily impact adversely upon the persons subject to investigations and that these persons also have rights. In addition, investigations involve the commitment of resources at substantial public expense.

22 Evidence, Mr Mark Le Grand, pp. 200-01.

23 CJC submission to PCJC Review of the Commission's Activities, Chapters 11 & 12; reproduced in CJC submission, 15.8.95.

24 Criminal Justice Act, s. 38.

25 Submission, CJC, February 1995, p. 4.

26 Evidence, Mr Mark Le Grand, pp. 672-3.

4.33 The question of resources has been raised by many people who wished to challenge the procedure or conduct of certain investigations. They indicated they were unable to compete with the legal and financial resources available to the CJC or other instrumentalities of the state.

Conduct of proceedings

4.34 The CJC's conduct of its investigative proceedings was commented upon in a number of cases considered by the Committee.²⁷ Most notably was Mr Gordon Harris' recourse to the Supreme Court to ensure he received procedural fairness in a CJC investigation. The settlement reached provided Mr Harris with certain rights of cross-examination and access to documents.

4.35 The CJC has responded that at all times it strives to apply procedural fairness and that its greatest application is to the CJC's hearings and reports. The High Court ruled in 1992 in *Ainsworth v Criminal Justice Commission* that the CJC was required to observe procedural fairness in all proceedings conducted in the discharge of any of its functions and responsibilities. The CJC indicated that procedures had been formulated to ensure that procedural fairness was afforded. These procedures were detailed in the CJC's submission to the Committee.²⁸

4.36 However, these procedures which govern the conduct of public hearings have been challenged in the Gordon Harris case. In relisting the hearing date for 12 December 1991 following the Supreme Court settlement, the CJC sought information from Mr Harris' solicitors concerning the witnesses they proposed to call and the particulars of matters to be canvassed in evidence. Mr Harris' counsel did not provide this information on the grounds that it was unnecessarily detailed and when the hearing resumed objected to who should preside over the hearing. This led to the matter being adjourned indefinitely (see paras 6.34-6).

4.37 The CJC has argued that it does not allow witnesses to be called to public hearings without its having been given some indication of the matters to be canvassed with them, or a copy of a statement setting out the evidence which is to be obtained from the witnesses, 'in the interests of procedural fairness and in conformity with its procedures'.²⁹ In relation to the Harris hearing, the CJC asserted that 'it was in fact to avoid a denial of natural justice that the Commission was obliged to adjourn the hearing'.³⁰

4.38 Mr Harris used the alleged denial of natural justice by the CJC during this hearing process at his trial before Mr Gribbin, SM. Although Mr Gribbin rejected this submission, he was critical of some of the CJC's procedural requirements. In particular, Mr Gribbin discussed the questions of bias, disclosing evidence of prospective witnesses and cross-examination (see para 6.35).

27 For example, evidence, Mr Robin Rothe, p. 426; submission, Mr Kevin Lindeberg, 25.1.95, p. 4; submission, WAG, 26.1.95, p. 11.

28 Submission, CJC, February 1995, pp. 88-91; see also submission, Mr Robert Butler, 25.5.95, pp. 143-5, for discussion of impact of Ainsworth case on CJC.

29 Submission, CJC, February 1995, p. 94.

30 Submission, CJC, February 1995, pp. 95-6.

4.39 The CJC referred to Mr Gribbin's comments as follows:

The effect of the Magistrate's ruling in this matter was that, although he did not agree with the procedure which the Commission had adopted during its hearing, he did not think that Harris had suffered any detriment as a result of being refused the opportunity to call and cross-examine Huey.³¹

4.40 Although the Criminal Justice Act enables the CJC to conduct its proceedings as it considers proper,³² the CJC's wide discretionary powers were circumscribed by the decision in the Ainsworth case. It appears that these court criticisms have influenced the apparently rigid procedures adopted by the CJC to govern the holding of public hearings. The Committee believes the CJC should give consideration to allowing a degree of flexibility in the operation of their procedures for public hearings without reducing their commitment to procedural fairness.

4.41 The Committee also notes that the PCJC three yearly review of the CJC reached a number of conclusions and made recommendations relating to investigative hearing powers and conduct.³³

4.42 A further area of contention which arose in the Committee's consideration of the cases involving the CJC was in relation to the suggestion that people who had complained to the CJC were victimised by becoming the subject of official misconduct hearings.

4.43 A number of claims were made concerning alleged investigations which involved people from organisations not within the definition of a 'unit of public administration' or that certain procedures had not been followed in the conduct of the investigations. The Butler/Channel 7 and Kerin/Ready submissions stated that Mr Matthew Ready, Mr Robert Butler and Channel 7 were the subject of official misconduct hearings.³⁴

4.44 The CJC responded that these claims were not correct as these people had never been the subject of official misconduct hearings but had merely been summoned to give evidence at hearings in which they were relevant witnesses.³⁵ The practice of describing these people as 'relevant witnesses' does not take into account the detriment these people appear to have suffered as a result of their appearance at the various CJC hearings. For example, both Mr Butler and Mr Ready were criticised in CJC reports and discredited as a result. Based on evidence it received, it is the Committee's view that the CJC has argued technicalities which may be legally correct but which do not appreciate the significant concerns of the people involved nor the impact events had on their personal lives.

31 Submission, CJC, February 1995, p. 97.

32 Criminal Justice Act, s. 92.

33 PCJC Report No. 26, pp. 53-75.

34 Submission, Butler/Channel 7, 3.2.95, pp. 6-7; submission, Kerin/Ready, 8.2.95, p. 4.

35 Evidence, Ms Theresa Hamilton, pp. 221-4 ; responses by the Criminal Justice Commission to Channel 7 submission and to the submission and evidence of Mr Matthew John Ready, August 1995.

Appointment of investigators

4.45 A particular criticism of the CJC was in relation to the appointment of people from both within or outside of their permanent staff, who may have or have had in the past known political affiliations, to undertake investigations. In some instances such people conducted what were regarded as politically sensitive investigations. Examples referred to in evidence were the appointments of Mr Noel Nunan to examine matters relating to the Heiner documents case and of Mr Michael Barnes to conduct the Cape Melville investigation.³⁶

4.46 The CJC responded in relation to the Noel Nunan appointment that:

Such an allegation smacks of McCarthyism. In a democratic, pluralist society, the Commission finds such criticism abhorrent. The Commission is unconcerned with a person's political preferences; it is only concerned with his or her integrity and professional competence.³⁷

4.47 In this context the Committee notes the response by Mr Barnes to questions about political affiliations which, while being accurate, was less than helpful for the Committee's understanding of the issue.³⁸

4.48 The Committee makes no assessment of the manner in which such appointees have conducted themselves. However, the Committee believes that greater sensitivity could be exercised in making such appointments to ensure that not only will justice be done but will be perceived to be undertaken in a totally independent manner. As one witness declared:

in any investigatory process, we need to understand that the basic principles of natural justice are observed and that those persons who have a conflict of interest, in any shape or form, should not be appointed to conduct any investigation or any hearing into any matter.³⁹

Investigative outcomes

4.49 The CJC was criticised for inaccuracies in reports or material following up their investigations or inquiries (see for example, Robin Rothe case, para 7.125-8). It was submitted that if the CJC got the details of a particular issue or case wrong, no credibility could be given to the outcome of the inquiry. The worse case scenario was that the inaccuracies could be a deliberate falsification of evidence leading to conspiracy or cover-up theories.

4.50 The CJC indicated that there was nothing sinister behind such errors and pointed to its heavy workload which resulted in typographical errors which, although regrettable, are inevitable. Similarly the detailed responses provided on complex issues would perhaps inevitably contain some minor mistakes. The CJC regards it as unfair to suggest that it got an

36 Submission, Mr Kevin Lindeberg, 25.1.95, p. 29; evidence, p. 49; submission, Mr Doug Slack, MLA, 27.1.95, p. 5.

37 Submission, CJC, February 1995, p. 39.

38 Evidence, Mr Michael Barnes, p. 520.

39 Evidence, Mr Eric Thorne, p. 60.

investigation wrong due to some minor errors in a response, given that a lengthy investigation undertaken by them may not have found evidence of official misconduct or criminal offence. The CJC noted 'we are ultimately human beings under incredible pressure'.⁴⁰

4.51 However, the CJC was equally critical of witnesses who may have made honest mistakes in their evidence or in their understanding of questions. The Committee accepts that people will place different interpretations on events and does not believe that such people should be so severely criticised for making, probably unwittingly, errors of a minor nature.

4.52 There appears to be a general expectation that the CJC will initiate action over those cases where an investigation indicates a basis for legal action. However, the CJC has no prosecutorial function. The Criminal Justice Act provides for the CJC to investigate a complaint and report to a prosecuting authority. The report may contain a recommendation in relation to prosecution proceedings. It must be accompanied by all relevant information that supports a charge that may be brought against any person in consequence of the report or supports a defence that may be available to any person liable to be charged. The prosecuting authority then determines whether prosecution proceedings are warranted.⁴¹

4.53 The CJC emphasised that once the prosecuting authority 'determines that prosecution proceedings are not warranted the CJC is *functus officio*, that is, it cannot proceed further'.⁴² The CJC, for example, stressed that in Mr Huey's case charges had been dismissed at committal. It was then determined by relevant authorities, the Director of Prosecutions and the Attorney-General, without any contribution from the CJC, that proceedings would not be renewed. Mr Huey resigned from the Police Service shortly thereafter. Under s. 33 of the Criminal Justice Act the CJC's role was at an end.⁴³

4.54 With respect to misconduct tribunals, the CJC does not determine whether a matter is to be pursued in a misconduct tribunal. Such a matter is referred to an independent counsel, who determines whether the evidence gathered by the CJC is properly the subject of such proceedings, and such proceedings are conducted by persons independent of the CJC.⁴⁴

4.55 The CJC has recognised that formal investigation leads to a low rate of complainant satisfaction. It attributes this to the adversarial nature of the criminal justice system and the fact that it is based upon the presentation of admissible evidence. There will likely be a proportion of complaints which cannot be substantiated through the accumulation of sufficient admissible evidence to place a person before the courts or a disciplinary tribunal, no matter how efficient the investigation.⁴⁵ The Committee believes that additional factors such as delays in investigations and perceived procedural difficulties such as those referred to in paragraph 2.45 also contribute to these low satisfaction levels.

40 Evidence, Mr Mark Le Grand, p. 471.

41 Criminal Justice Act, s.33.

42 Submission, CJC, February 1995, p. 5.

43 Evidence, Mr Mark Le Grand, pp. 204-05.

44 Evidence, Mr Rob O'Regan, p. 198.

45 Evidence, Mr Mark Le Grand, pp. 471-72.

Whistleblower protection

4.56 The CJC has been criticised for its apparent inaction in protecting whistleblowers. Only one legal action had been commenced under the statutory provisions in a four year period.

4.57 Again much of this criticism appeared to be based upon a lack of understanding of the statutory provisions that existed at the time. The provision of whistleblower protection was limited to those who were victimised for providing information to the CJC. It could not be used to protect a person who had provided information to any other body, including the police. The CJC conceded these limitations in the protection it could offer, noting in a response to Mr Robin Rothe, 'in view of the wording of these sections of the [Criminal Justice Act] the jurisdiction of the Commission is quite limited and unfortunately the Commission is unable to assist you'.⁴⁶

4.58 Undertaking legal action to protect whistleblowers generates its own problems. Speaking from its own experience the CJC warned that legal action was a response of last resort and not necessarily the best response to victimisation. To take legal action to force an employer to reinstate an employee could be expensive, time consuming and uncertain in addition to creating an atmosphere of hostility and resentment in the workplace.

4.59 The CJC referred to the legal action it had taken under the Act and the complications arising from the court action. These included delays, mounting costs and argument as to whether the person involved was a whistleblower entitled to the protection afforded by the Act.⁴⁷

4.60 If there is to be a likelihood of success with any legal action for protection, there needs to be evidence of victimisation. The CJC described the dilemma as that existing between an employee who claims to have been dismissed or otherwise prejudiced for blowing the whistle and should therefore be protected, and employers who maintain they should have the right to dismiss or demote employees who are not working satisfactorily without having to rebut claims of whistleblowing. Most employers are astute enough to be able to attribute a plausible reason for an employee's dismissal or demotion. To obtain evidence that a dismissal was for more sinister reasons takes intensive investigation. The CJC concluded:

we have to accept that the ultimate truth is that nobody will ever be able to help everybody who believes they have been victimised for being a whistleblower. That is the real world. In many cases, the supporting evidence will simply not be there.⁴⁸

4.61 The Committee accepts that evidentiary concerns are relevant in the legal protection afforded to whistleblowers. In the Queensland jurisdiction the *Whistleblowers Protection Act 1994* considerably strengthens the legal privilege, protection and rights of compensation given to a person who makes a public interest disclosure.⁴⁹ The CJC acknowledged that the Act has

46 Submission, Mr Robin Rothe, 22.6.94, Attachment 9, p. 7.

47 Evidence, Mr Mark Le Grand, pp. 475-76.

48 Evidence, Mr Mark Le Grand, p. 477.

49 *Whistleblowers Protection Act 1994* (Qld), Part 5.

drastically widened the area of protection and provided the CJC with greater power to protect whistleblowers. The CJC advised the Committee that it was in the process of redrawing its literature and advices to witnesses in view of the expanded protection it can now provide whistleblowers.⁵⁰

4.62 The Committee also notes that the PCJC three yearly review of the CJC considered whether the CJC was an appropriate authority to protect whistleblowers and the role and function of the Whistleblower Support Program.⁵¹ The PCJC concluded that the Whistleblower Support Program was an important function of the CJC which should be recognised by its constitution as a separate organisational unit within the CJC. The PCJC made recommendations on the accountability of whistleblower support within the CJC to ensure the independence and integrity of the scheme.

Debriefings and surveys of clients

4.63 As noted in paragraph 4.55, the CJC has acknowledged the low rate of complainant satisfaction with the outcome of investigations. The CJC has attempted to lessen the dissatisfaction of people who have gone to the CJC with a complaint which appears to have some substance but over which the CJC can take no further action due to lack of substantiating evidence. The CJC indicated that it provides a personal debriefing for every complainant, taking them through the case and explaining why the CJC could not reach the point of substantiation of evidence.⁵²

4.64 The whistleblowers support program is also intended to assist people dissatisfied with the process which they believe has let them down. The CJC is introducing processes such as mediation as alternatives to formal investigations. While informal resolution processes lead to higher rates of satisfaction, they are useful mainly for lesser matters.

4.65 The CJC has attempted to monitor the operation of its complaint investigation procedures in order to establish whether the procedures can be improved by asking people to complete a complaint investigation questionnaire. This questionnaire was referred to rather disparagingly in evidence.⁵³

4.66 The CJC responded that the procedure was commenced in mid-1994 on an ad hoc basis. However, with only a few people having responded, the procedure was suspended until early 1995 when more questionnaires were distributed.⁵⁴

4.67 This process appears to have been conducted somewhat haphazardly. The limited response could indicate, as suggested at the hearing, that people were completely satisfied with the investigation or alternatively that they believed it would be a waste of time for them to respond. The Committee believes that the information which could be gained by the CJC

50 Evidence, Mr Mark Le Grand, p. 511.

51 The Whistleblower Support Program was established by the CJC in June 1994 and is described in the CJC's submission, February 1995, Annexure A, pp. 114-6.

52 Evidence, Mr Mark Le Grand, pp. 236, 479.

53 Evidence, Mr Robin Rothe, pp. 423-24.

54 Evidence, Mr Michael Barnes, p. 508.

through an effective survey and debriefing program would be particularly useful in identifying concerns and problems held by people as a result of their involvement with the CJC. To be visibly seen to be seeking, acknowledging and responding to people's concerns could only assist in diminishing the perceived or real concerns which have been expressed over the CJC's existing complaint investigation procedures. The Committee notes Mr Le Grand's undertaking that 'we are trying again and will continue to refine the process'.⁵⁵

General comments

4.68 Based on the evidence received, there appears to the Committee to be a considerable lack of understanding of certain powers and procedures governing the CJC and its operations. While the CJC possesses extensive powers in many areas - such as in investigations - it is limited in other areas of its operations. The Committee suspects that both the CJC and certain whistleblowers may on occasions interpret the wording of the Act to suit their own purposes. These are impressions the Committee has formed and, as is the situation with much of the material placed before it during the inquiry, it is difficult to be conclusive.

4.69 Stemming from these misunderstandings and/or interpretations of powers there appears to have developed a considerable animosity at a personal level between a number of people involved in certain cases and officers of the CJC. The officers of the CJC claim to have been defamed through unsubstantiated allegations of being politically influenced, incompetent and corrupt. Whistleblowers claim that allegations are not properly considered and are rejected through a process of personal vilification.

4.70 The Committee has witnessed aspects of both claims during the course of its inquiry. Obviously, the existence of such a situation in a handful of cases is not conducive to sound administration of justice. Moderation is a difficult quality to retain in many of these situations. Mr Robert Butler suggested that people have been so personal and emotive because they genuinely believe in what they are fighting for. The CJC has referred to these people as 'obsessive'. Mr Butler prefers to refer to them as 'tenacious'.⁵⁶

55 Evidence, Mr Mark Le Grand, p. 508.

56 Evidence, Mr Robert Butler, p. 180.