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Anti-Corruption Authorities and Accountability: The Western Australian Case

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Australia has participated enthusiastically in the surge of interest in anti-corruption agencies around the world over the past quarter century. Three Australian states established agencies to combat public sector corruption in the late 1980s and the other three have recently followed suit (see Prasser 2012).[1] The Western Australian Corruption and Crime Commission (CCC) which began operation in 2004, was the product of a decade and a half of experience with some form of anti-corruption agency in the State and of informed debate about the rationale for such a body, its desired functions and powers, and whether or how it could be rendered compatible with liberal democratic norms. Nevertheless, the CCC has proven a highly controversial body. Since it possesses great powers and operates with substantial autonomy, it is not surprising that complaints about the CCC – notably from media commentators, members of the legal profession, and current and former members of parliament – have cast doubt on its accountability. Given the experience behind the creation of the CCC, and the effort applied to developing its accountability arrangements in particular, it is good case for probing what accountability might require for an anti-corruption agency in a parliamentary democracy. The purpose of the paper is to explain and assess the design of the CCC's accountability regime. The paper establishes a conception of accountability which it uses to explain that design and to provide a general normative standard for evaluating it. Following a systematic discussion of accountability arrangements, attention is given to three important elements of the design which have generated public debate.

Accountability and Semi-Autonomous Government Agencies

Accountability is a contested and evolving idea (see Bovens 2007). In Westminster democracies there has been a strong tendency to assimilate accountability to the notion of control within an official hierarchy, with a minister responsible to parliament at the top. However, it has long been understood that agencies requiring a measure of autonomy to perform their roles need accountability arrangements which vary from those associated with a traditional ministerial department, and more recently changes in public

[1] The legislation creating the Australian agencies is as follows: (WA) *Official Corruption Commission Act* 1988; (NSW) *Independent Commission Against Corruption Act* 1988; (Queensland) *Criminal Justice Act* 1989; (Tasmanian) *Integrity Commission Act* 2009; (Victorian) *Independent Broad-based Anti-corruption Commission Act* 2011; (SA) *Independent Commissioner Against Corruption Act* 2012.

administration have encouraged new approaches to understanding and practicing accountability (Considine 2002; Day and Klein, 1987; Sinclair 1995; Woodhouse 2005). These deviations from core Westminster tradition have created a propensity to differentiate accountability from control and to see accountability regimes as including non-hierarchical relationships, outside the traditional channels of ministerial responsibility to parliament.

This paper follows Stone (1995, 509) in understanding accountability as 'the satisfaction of legitimate expectations about the use of administrative discretion' rather than in ways which imply particular institutional means.[2] Thus interpreted, accountability requires institutional mechanisms linking the agency to external actors with an interest in the agency's decisions, and hence in the way the agency uses its discretionary power. The legitimate expectations of those actors which accountability mechanisms must satisfy are socially determined and derive from such sources as legal and juridical norms, norms of administrative good practice, political values, cultural norms, and the like. Since only expectations regarded as legitimate, or justified, with reference to these sources are to be addressed, this notion of accountability is not reducible to responsiveness to groups or individuals (Mulgan 2003, 21), though requirements such as the timely provision of information or the provision of reasons for decisions may be part of accountability regimes. Contemporary accountability regimes may involve such other mechanisms as appeal or review processes; participation in decision making by representatives of particular groups or interests; requirements for decision makers to have certain qualifications; requirements for the answering of questions, or the rendering of formal accounts or statements of reasons; and external evaluation of decision making (Stone 1995, 510).

[2] Stone (1995) bases this understanding of accountability upon Linder's (1978, 182) observation that '[t]he quest for accountability is a response to the biases associated with discretion' and also Romzek and Dubnik's (1987) argument that accountability should be freed from its traditional association with answerability, or 'limited, direct and mostly formalistic responses to demands.' The definition follows from the observation that the possession of various sorts of discretion by administrators gives rise to expectations and suspicions in diverse groups and individuals with a legitimate interest in the decisions made, creating a need for the exercise of discretion to be justified or legitimized.

The CCC and its Predecessors

WA was one of the earliest Australian jurisdictions to establish a dedicated agency to deal with complaints regarding official corruption or misconduct. The Official Corruption Commission (OCC) established in 1988 had few powers and correspondingly slender accountability requirements. Referred to by its critics as a post box, its role was to receive allegations of corruption in the public sector, to refer these to an appropriate agency with authority to investigate and take action, and to consider the reports which the latter agencies were required to make to the OCC. Accountability, otherwise restricted by stringent non-disclosure requirements imposed on officers of the OCC by its Act, consisted in a requirement for the minister to review the commission after two years and prepare a report to be presented to each house of parliament.

The history of this initiative in WA is of the gradual acquisition of functions and powers, reflecting the course of political events, and consequent pressures to introduce more developed accountability arrangements.[3] In 1991, the Act was amended to enable the OCC, at its discretion, to report any findings of illegality to Parliament. Further amendments followed in 1994 and 1996, furnishing the OCC, from 1996 known as the Anti-Corruption Commission (ACC), with investigative functions in its own right. Evidence from witnesses interviewed in the course of such investigations was to be taken in private, and witnesses were thereby prevented from speaking about their experiences. In 1997 a Joint Standing Committee of Parliament (JSC) was established, with terms of reference requiring it to monitor and review the performance of the ACC and to report to Parliament on issues affecting the prevention and detection of corruption in the WA public sector. But the JSC's terms of reference also prohibited it from enquiring into particular investigations by the ACC, and it was further inhibited by non-disclosure requirements allowing the ACC to determine what information about the performance of its functions it would divulge.

By 2002, the JSC (1998) and the Kennedy Royal Commission (into possible corruption in the WA Police Force) had made a number of recommendations to further enlarge the role

[3] This paragraph draws on the history provided in Kennedy (2002, 11-20).

of the ACC (most importantly to embrace investigation of organized crime and the monitoring of investigation of misconduct among police officers), resolve existing anomalies in its powers, and rectify deficiencies in its accountability regime. The CCC's enabling legislation enacted in 2003 reflected these influences.[4] Kennedy's recommendations, in particular, were strongly informed by models in Queensland (from which the idea of a body with the combined functions of investigating both official corruption and organized crime was drawn) and New South Wales (whose Police Integrity Commission was the immediate model for power to conduct public hearings as well as for a means of monitoring the operational activities of the CCC).

Very powerful anti-corruption agencies have quickly become part of the machinery of government in the Australian states. Their powers typically go well beyond what has long been regarded as appropriate for a standing government agency, including the Ombudsman, the first of the modern 'integrity agencies', introduced to Australia in the 1970s (beginning with WA in 1974). The CCC was given the powers available to the Kennedy Royal Commission, including to summon witnesses and issue a warrant for the arrest of a witness who ignores a summons, to prohibit those providing evidence or appearing before it from disclosing these facts, to examine on oath, to detain a person or impose conditions on his release, to conduct covert operations involving otherwise illegal behavior such as controlled operations and integrity testing, to use assumed identities, (if authorised by judicial warrant) to make use of surveillance devices and intercept telecommunications, and to conduct public hearings. It is a portentous development in public administration that powers previously only regarded as acceptable for a Royal Commission, set up to examine particular matters for a limited period of time, have become an everyday tool of government. Satisfying legitimate expectations about the use of such discretion is both vitally important and a major challenge.

[4] Since the CCC does not presently have a direct role in investigating organized crime, the paper is focused on its misconduct function.

The CCC's Accountability Regime

The CCC has a sophisticated accountability regime, involving a multiple external stakeholders and multiple mechanisms. It is argued here that this regime is best understood with reference to the conception of accountability outlined above. Four sets of stakeholders can be identified: citizens in general, individuals making an allegation of misconduct, individuals under investigation, and parliament. The ways in which the CCC's legislative framework may be viewed as seeking to satisfy legitimate expectations are examined below for each of the stakeholders in turn.

This section is primarily concerned with exposition but it is intended that the framework also indicate broadly how an accountability regime for an anti-corruption agency should be constructed. This is not to say that the CCC's accountability arrangements are beyond criticism. Criticism will, however, be largely reserved for the subsequent section on issues.

Citizens in general

Citizens have a legitimate expectation that conduct within the public sector be ethical, in particular that the public sector is serving the public interest rather than the private interest of officials at the expense of the public interest. It follows that citizens should expect the public sector to be committed to combatting misconduct. The CCC, as the highest profile agency devoted to this purpose, is of special interest to the public. The latter have a legitimate expectation that such an agency be demonstrably assiduous in pursuing its purpose. On the other hand, since any citizen is potentially at risk of investigation by the CCC, there is a legitimate public expectation that such powers be used only as strictly required by their purposes and in ways which are as minimally invasive of civil liberties as possible. It is generally appropriate for citizens in a representative democracy to rely on their relationship with their parliamentary representatives, based on the electoral mechanism, to have these expectations satisfied. But it is often desirable for this to be supplemented with more direct forms of accountability.

Information is fundamental to the satisfaction of the legitimate expectations of all stakeholders. Citizens expectations are satisfied to a considerable extent through their elected representatives, but both are dependent on strong statutory reporting obligations. The CCC's reporting obligations were a response to criticism of the sacrifice of information flows on the altar of independence and operational integrity which characterized the regulation of the ACC (see Kennedy 2002, 18-20; JSC 1998). Non-disclosure provisions in that legislation meant that it was entirely up to the ACC to determine what it would disclose, and all examinations of witnesses by the ACC were required to be conducted secretly. In contrast, the CCC is required to report annually to parliament on a list of 17 matters, almost all of which relate to the uses it has made of its powers. All of its principal powers are covered by this list. The information provided in the annual reports would enable readers to satisfy themselves in a general way about the activities of the Commission and provide a basis for members of parliament to ask questions about the balance of activities undertaken by the CCC. A major perceived deficiency in the flow of information about the ACC was the lack of the ability of parliament to compel the disclosure of information about completed investigations or operational matters. In contrast, the CCC is permitted to report to parliament on (completed) individual investigations, and the JSC, whose terms of reference were revised on the establishment of the CCC, is not restricted as to the information it may receive or request. The *Corruption and Crime Commission Act 2003* permits the parliament to make rules requiring the CCC to report to parliament 'as and when' the rules specify. As a consequence, the CCC has met regularly with the JSC. Information flow was also assisted by the establishment of a Parliamentary Inspector of the CCC (PI) able to require any information and to report publicly.

Conducting the examination[5] of witnesses in public is an important aspect of the direct accountability of the CCC to citizens. As Salmon LJ has said, in the context of his investigation of tribunals of inquiry into British public administration, 'it is only when the public is present at an inquiry that it will have complete confidence that everything has been done for the purpose of arriving at the truth' (Salmon 1966, 38; cited by JSC 2012,

[5] The *CCC Act* deliberately refers to 'examinations' rather than 'hearings' in order to underline the fact that the CCC is not a body able to dispense punishment. That usage is followed here.

43). The CCC, like Royal Commissions and courts in their different ways, is a non-representative body with enormous power. An open process is arguably as important for the former body as the latter ones for satisfying citizens' expectations about the use of its powers. The Chief Justice of the WA Supreme Court concurs, arguing that an emergent norm of openness is relevant to the CCC: '… the net effect of [enhanced transparency in government] has been to develop a public expectation of transparency … in particular in an agency like the Commission. If that expectation is not fulfilled, it will inevitably breed suspicion and mistrust…' Martin CJ noted further that 'The exercise of these [the CCC's] important powers in public provides a significant constraint upon their potential for misuse' (JSC 2012, 46).[6]

Public examinations were not available to the ACC and this was widely criticised by members of parliament and others as reducing public confidence in that body. While the default position for the CCC is a private examination, '[t]he Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so' (s 140(2)). When the CCC was created, there was a general expectation that it would make significant use of public examinations, and this was arguably borne out in its practice once established. From the beginning of 2004 to mid-2011 the CCC dealt with 283 matters, of which 64 had examinations and 15 (involving 314 persons) of these had public examinations (CCC 2012, 1; JSC 2012, 3). Thus, 5.3 per cent of all matters and 23 per cent of matters involving examinations in this period gave rise to public examinations. Despite the CCC's discretion regarding the opening of an investigation, the regular use of public examinations for major investigations indicates that, over the first seven or eight years, these had become institutionalized as a significant element in the CCC's accountability regime.

Citizens with a personal interest in CCC proceedings

Citizens have a personal interest in proceedings if either they wish to make an allegation about misconduct or they are the subject of an investigation. In both cases they have

[6] JSC (2012, 48-49) records similar comments by Salmon LJ and Mason J supportive of openness in inquiries generally.

legitimate expectations and the accountability regime should contain mechanisms to ensure these are satisfied. Any person may make an allegation to the CCC. If the CCC decides not to act on the allegation the person must be notified of that decision. This provides a minimal level of satisfaction to the complainant that the allegation has received consideration. Arguably, the CCC should also be required to give a reason for the decision, though it might be thought that the personal interests involved are not of a kind which would require a statement of reasons. If the individual is not satisfied with the CCC's response, s/he is entitled to lodge a complaint with the Parliamentary Inspector of the CCC (PI). In 2011-12, for instance, the PI dealt with 19 complaints about CCC decisions not to investigate an allegation of misconduct (including 10 about police officers) or about perceived inadequacies of CCC investigations (PI 2012, 12).

Persons who are the subject of an investigation have an undeniable interest at stake, and a legitimate expectation that their basic rights not be adversely affected without due process. But, given the intrusive and coercive nature of the powers available to the CCC to assist its investigations, it is clear that diminution of rights is necessarily entailed. As the second CC Commissioner noted, parliament's decision to create the CCC explicitly reflected 'the willingness of government and the community to accept the suspension of fundamental civil rights in the interests of detecting forms of serious wrongdoing with the capacity to undermine the integrity of public institutions' (Roberts-Smith 2010, 1). The CCC's legal framework for misconduct investigations contains various mechanisms which aim to minimize the effect on the rights of the person under investigation. The principal means is to restrict the limitation of rights to the investigative process and to deny the CCC a disciplinary role.[7] It is empowered to make assessments and form opinions about the occurrence of misconduct, make recommendations about whether consideration should be given to prosecution or disciplinary action, and to report these to parliament. But it is prohibited from drawing conclusions about whether a criminal or disciplinary offence has been or potentially may be committed by an individual. That nothing done by the CCC can have a direct and binding legal effect on the rights of the

[7] But the CCC can and does lay criminal charges and conduct prosecutions. But where a matter is complex or must be tried in the District or Supreme Court, the prosecution is normally conducted by the Director of Public Prosecutions (Roberts-Smith 2010, 12).

individual is assumed to impose a reasonable limit on the harm done to rights in the investigative process.

Various elements of the legal framework also attempt to mitigate that harm. While an individual is prohibited from disclosing that s/he is the subject of a CCC investigation, s/he may disclose restricted matters to a legal practitioner for the purpose of obtaining legal advice. The CCC is able to detain or impose conditions on the release of a person, but that person is able to apply to the Supreme Court for a review of such a decision. The individual is also permitted legal representation at examination conducted by the CCC – though this may be of limited use since most of the rights possessed by an individual subject to investigation or prosecution in the justice system are denied in this process. Before reporting anything adverse to a person or body, the Commission is required to give the person or body 'a reasonable opportunity to make representations' to the Commission (s 86). Where the CCC recommends that consideration be given to prosecuting a person, the prosecuting body must notify the person prior to a charge being laid and the CCC must disclose to the prosecuting body all material relevant to the prosecution in its possession; which material, in turn, is required to be disclosed to the accused.

Arguably, a citizen aggrieved at his/her treatment by the CCC, either during the process of investigation or by the publication of an opinion that their activity constitutes misconduct, has a legitimate expectation that s/he may make a complaint and have this independently investigated. That is the normal expectation of Australian citizens dealing with contemporary governmental agencies. Two mechanisms are available to a complainant in the case of the CCC. The complainant may seek judicial review or investigation by the PI, or both. Under the *CCC Act* there is no right of legal appeal from a misconduct opinion (or from any decision or activity of the CCC). But the courts may determine that the CCC has exceeded its authority. As Martin CJ said in *Cox v. the CCC* 2008, in considering this question the court needs to relate the limitations on the use of power ordinarily assumed by the courts to apply to an administrator – such as procedural fairness, taking into account an irrelevant consideration, failure to take into account a relevant consideration – to the relevant statutory context. Because the CCC is an

investigative body and possesses broad statutory powers, it may be difficult to make a case that it has exceeded its jurisdiction. In *Cox*, Martin CJ argued that, even if a court drew such a conclusion, it would not be open to a court to quash a CCC report supporting a misconduct opinion with no legal effect. However, it could grant declaratory relief to address the injury to a person's reputation.

The other avenue open to the aggrieved citizen is to seek an investigation by the PI. However, the scope of the investigation the PI may undertake and the nature of the action and consequences that may flow from such an investigation have been the subject of dispute in the early years of the CCC's existence. These matters are discussed further below. For the present, it may be suggested that a complainant who has been the subject of a published CCC misconduct opinion, with the injury to reputation that would entail, has a legitimate expectation that the investigative process and reasoning on which such an opinion is based – which the courts may be unable to question – be examined by a competent independent authority with the capacity to issue a public report contesting the initial opinion.

Parliament

In Westminster democracies, parliament is the heart of the system of governmental accountability. The central mechanism is ministerial responsibility, which establishes a hierarchy of relationships of control from official to minister to parliament to citizens, with no shortcuts (Parker 1981). In the case of statutory authorities, in order to ensure a degree of independence from the government of the day, ministers are distanced from day to day administration. But ministers often remain quite important to accountability arrangements, especially where they have power to direct the agency. Due to the nature of the CCC's mission, potentially involving the investigation of ministers, the accountability regime of the CCC breaks more radically with ministerial responsibility. Ministers need to be much further removed from administration and from the accountability regime. The role vacated by the minister is filled to an extent by the parliament.

Parliament's legitimate expectations necessarily overlap with those of citizens in general, described above, due to the representative role of the former. Parliament's relationship with the CCC is also shaped by its role as author of the statutory scheme to combat misconduct in the public sector. This gives it a responsibility to ensure the effectiveness of that statute (in satisfying the legitimate expectations it shares with citizens in general). In order to discharge that responsibility, parliament needs to perform three functions: (i) to monitor the activities of the CCC; (ii) to investigate suggestions or indications that the CCC might not be performing appropriately, or as well as it might, and publicize its conclusions; and (iii) if necessary, to take remedial action, either by inducing the CCC to modify its practice or by making amendments to the statutory scheme. This set of functions is broadly equivalent to the functions of 'explanation and rectification' widely associated with modern ministerial responsibility.

In the case of the CCC, parliament is assisted to perform its oversight role by two more specialised bodies, a standing committee of the parliament (JSC) and a Parliamentary Inspector (PI). The JSC, required by the *CCC Act* and established by Standing Orders, has a broad mandate to 'monitor and report' on the CCC. While the Act does not prevent the Committee from investigating individual complaints and operational matters, it apparently envisaged investigations of this kind being undertaken by the PI, which it establishes and authorizes *inter alia* 'to investigate any aspect of the Commission's operations or any conduct of officers.' The PI is given explicit, detailed powers to conduct such investigations and may make recommendations to the CCC. The PI's functions may be performed on his/her own initiative, at the request of a minister, in response to a matter reported to the PI (including by someone with a grievance against the CCC), or in response to a reference from either House, the Standing Committee, or the CCC.

The PI represents a selective outsourcing of the parliament's accountability function, justified by a desire to preserve the independence of the CCC. The legislation describes the PI as an 'officer of the Parliament' with responsibility for 'assisting the Standing Committee in the performance of its functions'. The term officer of the parliament seems

to have no legally defined meaning in WA[8] but loosely describes an arrangement whereby parliamentary responsibilities are located in an independent authority which reports directly to parliament (note Grove 2002). The close association with the parliament is reinforced by the fact that appointment of the PI requires the approval of a majority of the Standing Committee and 'bipartisan support'. As is apparent from the PI's ability to act on his/her own initiative and to report directly to parliament (effectively an unchecked power to publish), this office has significant autonomy within the CCC's accountability framework.

The JSC and the PI are clearly designed to perform the first and second of parliaments functions with regard to the CCC. Taking remedial action, the third function, is also obviously within the capacity of the parliament where this involves change to the statute. However, the prospects of statutory change promoted by the JSC on the basis of its monitoring and investigative work are uncertain in an environment where the legislative initiative rests normally with the executive as is the case in Australian parliaments. The other possibility for remedial action suggested above is inducing the CCC to modify its practice. This may perhaps be viewed as inappropriate given the independence the CCC is supposed to exhibit. But it may also be the more reliable of the means for the parliament, and the JSC in particular, to exert influence. The JSC has a degree of authority with the CCC due to the fact that the appointment of a Commissioner (similarly to a PI) requires the approval of a majority of the Standing Committee and bipartisan support, and removal requires an address from both houses of parliament in the same session. Probably a more potent means of bringing pressure on the CCC is the JSC's ability to request the PI to investigate and report on any aspect of the CCC's activity, which may lead to a public report and recommendation by the PI that the CCC make particular changes. Further, because it lacks the ministerial advocate in cabinet a mainstream department has, the CCC has a strong incentive to build a good (responsive) relationship with the JSC, the governmental entity with which it has most contact, as a means of ensuring the parliamentary support needed to ensure its autonomy, its budget, and the status of its statutory office-holder.

[8] Underlining the loose descriptive nature of the term, the PI does not appear under the heading 'Parliamentary Officers' on the WA Parliament's own web site.

Minister

We have emphasized the highly attenuated role of ministers in the accountability regime of the CCC. The minister's role in this regard is largely limited to being able to request the PI to investigate an aspect of the CCC's operations (s 195) and, three years after the commencement of the CCC's enabling legislation, to carry out a review of the act and present a report based on that review (s 226). Given the executive's assumed role of initiating most legislative change in modern Australian government, it is perhaps understandable that the minister was assigned this role. But it is notable that the legislation specifies a one-off, rather than a periodic, review, signifying that this element is not part of the CCC's ongoing accountability framework. A different, arguably more appropriate, approach is adopted in Queensland, where review of the Crime and Misconduct Commission (CMC) is placed with the counterpart to the JSC.

A model of the accountability regime of the CCC is presented in Figure 1.

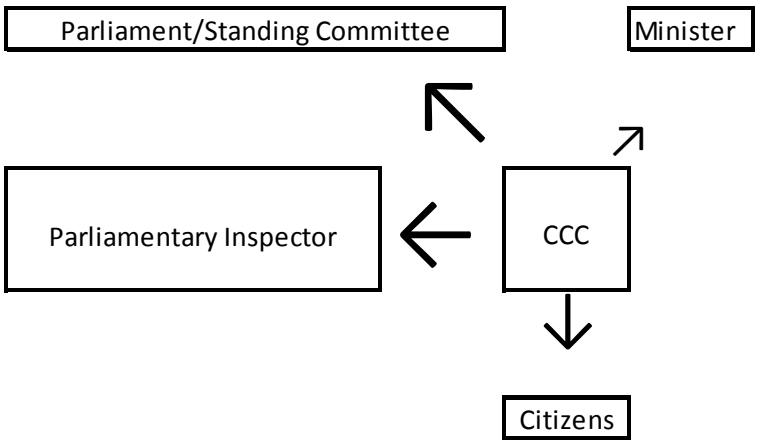

Figure 1: Representation of the Accountability System of the CCC

The spatial arrangement in Figure 1 is not particularly significant. The CCC is located below actors which are part of the parliament, the institution with 'make and break' power over the CCC, and might be described as having an 'upwards accountability' relationship with these actors. The CCC and the PI, as statutory agencies, are placed on the same level, but it is not especially illuminating to describe their relationship as one of

'horizontal accountability'. The placement of citizens at the base of the figure, suggesting a relationship of 'downwards accountability', is less meaningful. The intention is merely to indicate that the CCC has relationships with citizens which, as described above, are distinct from other elements of the accountability regime. The arrows indicate the direction and importance of the main relationships.

Issues

The discussion above has suggested that the accountability of the CCC is appropriately understood in terms of a conception of accountability as the satisfaction of legitimate expectations. Further, it was shown that mechanisms are in place to address the legitimate expectations of all relevant stakeholders. But are these mechanisms well designed for their purpose? The remainder of the paper seeks to answer this question, in selective fashion, by examining those issues about the design and operation of the accountability regime which have attracted most attention in public debate.

The Effectiveness of the Standing Committee

The JSC has been a relatively uncontroversial element of the accountability regime but its centrality makes any disquiet important. As the principal parliamentary focus of responsibility for oversight, the Committee has received criticism from those, including MPs, who have been unhappy with the CCC and failed to find institutional support for their criticism. Such critics have tended to view the Committee's oversight as excessively tame. It is worth asking, therefore, whether there are factors likely to weaken the capacity or will of the Committee, causing it perhaps to be 'captured' by the body it oversees, an outcome widely observed in the literature on public administration.

The capacity for effective oversight in the JSC, as in other parliamentary oversight committees, requires a number of things (note Griffith 2005, 21-22). First, its composition should reinforce its independence. The JSC is required by *CCC Act* to comprise equal membership from each house. Legislative Assembly Standing Orders specify a four member committee and informal agreement has guaranteed an even balance between governing and opposition parties. As with select and standing committees of the Legislative Assembly generally, all members have only a deliberative

vote and tied votes pass in the negative. The composition of the Committee has thus ensured that it is not controlled by either governing or opposition parties and also encourages bipartisanship. An appropriate balance seems also to have been struck between continuity of membership, important for the accumulation of experience in the area, and change, to ameliorate the possibility of excessive closeness to CCC personnel or the PI. Members have typically served for several years.

Secondly, the JSC requires powers appropriate to its remit. Like other standing and select committees of the WA Parliament, it is equipped with power to call for 'persons, papers and records'. This seems adequate for the performance of a broad monitoring role. Unlike its Queensland counterpart, the JSC cannot question witnesses under oath, but the PI can, and in WA it is the latter agent who investigates complaints and conducts reviews of CCC investigations. Importantly, the JSC is not limited in its ability to acquire information by either its terms of reference or the *CCC Act*.

Thirdly, the Committee needs adequate resources. The JSC has two full time staff. Annual reports indicate that this is not always sufficient but that additional staff are made available as needed. There is no indication in this source that the work of the committee has been adversely affected by lack of staff or funds.

Fourthly, while no committee is able to ensure that its recommendations will be accepted, the Committee should be able to require government to provide a response to a recommendation advocating governmental action (such as legislative change) and to conduct follow up inquiries to highlight ongoing concerns. These requirements seem to be satisfied. Timely governmental responses to committee recommendations are required by Legislative Assembly Standing Orders and the Parliament's web site shows that, where requested, responses are typically forthcoming. The Committee has the capacity to initiate inquiries, including successive inquiries on the same matter, within its terms of reference, and its terms of reference seem broad enough to cover anything relevant to the CCC or the PI.

Fifthly, since the Committee was evidently not expected to play a primary role in reviewing particular activities of, and making recommendations to, the CCC, its relationship with the PI (who is explicitly authorized to perform this role) is vital to the JSC's ability to exert influence over CCC administration. While the PI is required to assist the JSC in the performance of its functions, the statutory relationship is significantly less close than in Queensland. WA arrangements differ from those in Queensland in a number of ways: complaints about the CCC are not required to be made to the JSC and it does not control investigation of complaints by the PI; the PI does not discharge his/her functions exclusively as the agent of the JSC and, as noted above, may receive references from a variety of sources; the PI is not required to table reports with the JC rather than directly with the parliament, or even to show a report to the JSC prior to tabling. The Queensland Parliamentary Commissioner is possibly more at risk of being excessively influenced by the agenda of executive government than the PI since the *Crime and Misconduct Act* gives the governing party control of a majority of the committee's membership. But WA arrangements certainly raise more questions about the ability of the JSC to exert due influence over the PI. The evidence of the reports of the JSC and PI, however, suggests that there has been a close and productive working relationship and that the JSC has been actively involved in facilitating the investigation of matters involving the CCC which have aroused public interest, including by formally referring one to two matters a year to the PI.

The JSC thus satisfies the basic institutional requirements of capacity for effective oversight. Moreover, there is little evidence of capture by the CCC and significant evidence to the contrary, including the JSC's disagreement with or criticism of positions or practices adopted by the CCC in relation to issues dealt with in the following two sections of this paper.

However, the comprehensive differences between the WA and Queensland models of parliamentary committee and the statutory inspector raise questions about the adequacy of the JSC's role and may have inspired some criticism of the JSC. Do citizens have a legitimate expectation that their parliamentary representatives will be actively involved in

the process of investigating complaints (and more general matters of concern or public interest on which the PI may launch own-motion inquiries) against a body with enormous power to affect their lives adversely? This is arguably the most reliable means of ensuring that community standards (that is, citizens legitimate expectations) are applied to the task of assessing whether the CCC's powers have been used appropriately in particular cases. Alternatively, are citizens' legitimate expectations as well or better served by receipt and investigation of complaints by a competent independent authority? There is no obviously preferable approach: Queensland has embraced the first rationale and WA the second. A separate question is what authority the PI, whether acting on his own motion or at the request of the committee, has to review CCC investigations which generate complaints or concerns. This question is considered below.

The Role of the Parliamentary Inspector

The scope of the PI's authority to oversee the work of the CCC has been one of the most controversial issues in the operation of the CCC's accountability regime. The controversy had a high public profile from mid-2007 to early 2009 following the tabling in parliament of several reports by PI McCusker critical of CCC investigations (PI 2007, 2008, 2008a, 2008b, 2008c) and the CCC responded by tabling a report critical of the PI's approach (CCC 2008) and applying to the Supreme Court in an attempt to prevent the presentation of a PI report.

The dispute focused on interpretation of the *CCC Act* but was based on conflicting views of the role of the PI in reviewing particular investigations conducted by the CCC. A JSC report on the issue set out the rival positions of the PI and the CCC (JSC 2009). The PI claimed that: 'the Parliamentary Inspector can review the "adequacy" of an investigation undertaken by the CCC … and even if there hasn't been an "inadequacy" of an investigation, the Parliamentary Inspector can still express a view that it is not arguable that the Misconduct Opinion was open on the evidence available'(JSC, 22). Support for this view might be provided by s 195 of the Act which, *inter alia*, permits the PI to 'audit the operations of the CCC for the purpose of monitoring compliance with the laws of the state' (s 195(1)(a)), 'audit any operation' of the CCC(s 195(1)(cc)) and 'assess the

effectiveness and appropriateness of the CCC's procedures'(s 195(1)(c)). Support is also provided by the Attorney-General's Second Reading speech which refers to the PI 'ensuring that the CCC's operations and exercise of powers conform to, and are conducted in accordance with, basic principles underlying the law' (25). A legal opinion supporting the PI argued that the 'audit power' of the PI bore 'a close analogy with the powers of administrative review' except for the fact that the PI 'does not have the power to quash decisions of the Commission, only to report to Parliament about them' (24).

Alternative views were expressed in statements by the CCC and a legal opinion supporting the CCC (25-29). It was suggested that s 195(1)(cc) is not applicable to CCC because it 'is directed to the audit of exceptional powers made available under Part 4 of the *CCC Act* (which are concerned with organised crime, and not the misconduct function of the CCC)' (26). The CCC claimed, further, that s 195(1)(c) permits assessment only of its 'instructions, standard operating procedures, general directives or the like' rather than particular investigations'(29). It also claimed that '[t]he "process" of reasoning, or "process" by which the Commission has expressed itself, or by which its opinions were reached, in a particular report, do not sit within any ordinary meaning of the word "procedures" in the context of s 195' (29). The CCC's legal advice seems less opposed to the PI's position, in holding that 'proper "audit" of the CCC's operations may require detailed attention to be given to the particular circumstances of an investigation'; and that 'the Parliamentary Inspector is not confined to the lawfulness of such procedures but may also assess their appropriateness.' It conceded also that 'in some cases the manner of exercise of the CCC's powers may affect the outcome of a particular investigation'; and 'to that extent, the Parliamentary Inspector's audit of the CCC's operations and an assessment of its procedures might involve a consideration of particular conclusions reached by the CCC, and may lead the Parliamentary Inspector to recommend to the CCC that it change its opinion or withdraw its recommendation' (26). However, it argued that 'the further step taken by the Parliamentary Inspector of expressing a different view as to the ultimate conclusion on the evidence, was not part of the Parliamentary Inspector's functions'(26).

The JSC sought to resolve the dispute by calling all parties to a closed workshop and having them agree to a process through which to identify the issues of principle on which they differed, with a view to determining whether any legislative reform is needed. Importantly, the JSC also articulated its view of the approach the PI should adopt. It accepted that 'the Parliamentary Inspector should have the power to review the "adequacy" of a CCC investigation, with the word "adequacy" open to a plain English understanding.' However, it sought to constrain, or regulate, a PI review by specifying the criteria he/she should address. These were as follows: whether the CCC has acted fraudulently (bad faith); has failed to afford natural justice or has acted in excess of its jurisdiction (illegality); has not acted up to the standards of a competent CCC (negligence); has made errors of fact, or the CCC's reasoning is illogical (irrationality); and whether there is room for improvement to achieve best practice.' The JSC suggested that any PI report critical of the CCC should relate closely and transparently to these criteria, and reflect a 'detailed consideration' of relevant case law and precedent (31).

An associated issue, on which the CCC and the PI were even more divided – and the JSC internally divided – is the ability of the PI to table critical reports in the Parliament. For the PI the relevant authority was provided by s 195 (1)(e), permitting him 'to report and make recommendations to either House of Parliament and the Standing Committee'. The CCC argued that the PI did not have the power to table reports on particular investigations of individual misconduct. Support for this view was provided by s 205 which states that the a report by the PI must not include 'information that may reveal the identity of a person who has been, is, or is reasonably likely to be investigated by the Commission or has been, is, or is likely to be a witness', or 'information that may indicate that a particular investigation has been, is, or is reasonably likely to be, undertaken by the Commission'. The CCC held that reports critical of its misconduct investigations should be provided privately to it or to the JSC (which may then decide whether anything should be said publicly and not parliament (35); and, further, that the JSC should be able to vet other PI reports before they are tabled in parliament (JSC, 33).

The JSC rejected the CCC's argument on the grounds that the key words 'reveal' and 'indicate' in s 205 show that this provision does not prohibit reporting on matters which have been publicised already by the CCC. However, it recommended that the Act be amended so that the PI is normally required to table reports (and any opinions adverse to a person or body which is likely to be made public) with the Committee, inter alia to ensure that their contents are scrutinized by parliament before they are given the imprimatur and protection of the parliament (44-45). The dissenting view of one member of the JSC was that such change would be undesirable as it would reduce the independence of the PI, which is important to 'balance … the extraordinary powers provided to the CCC' (45).

The issues raised by these disputes about the desirable powers of the PI are important for accountability. The reason is something only incidentally addressed in the debate between the several parties: the ability of the CCC to issue an official opinion in public that someone has been responsible for misconduct (s 18). All parties to the WA discussion understood that where such an opinion is issued, this tends to be injurious to the person's public standing. It has often been said in wider public debate that such public 'shaming' and the cautionary message this sends is part of the role of anti-corruption commissions. The CCC prefers to make the point that a misconduct opinion is not a finding of legal fact and has no effect on legal rights of the individual. It has tended, as a result, to see no need for a remedy for a misconduct opinion other than judicial action where the CCC has acted beyond its authority in some way. Beyond this, it has seemed to believe, all that is needed is for the press and the public to be educated about the difference between misconduct opinions and legal findings. But this is surely specious. Distinctions between opinions and findings will never be widely appreciated, especially as the press has no interest in complicating its reports of these matters. Moreover, an official opinion can harm an individual even where it does not lead to legal consequences. Consequently, as the JSC recognized, there is a legitimate expectation, not least by the person most closely involved, that a misconduct opinion should not be beyond review on other than purely legal grounds. Review for adequacy is a necessary counterpart of the power to issue a misconduct opinion.

The JSC's criteria for such reviews are reasonable, both as a means of ensuring that the exercise is a review and not merely an alternative opinion and as a basis for further productive debate about differences of view between the CCC and the PI. But its desire for PI reports to be tabled with it as an 'accountability' measure seems misplaced. It was influenced by the situation in Queensland, where the Parliamentary Commissioner of the CMC has no power to table reports directly with parliament. But in Queensland the CMC does not have the power to issue misconduct opinions either.[9] In the WA context, accountability requires the satisfaction of legitimate expectations about the CCC's discretion to issue misconduct opinions. The means provided by the legislation, an independent review by the PI, are appropriate, and the ability to publish the outcome is a necessary part of that independence.

The Use of Public Examinations

It was explained above that public examinations, by directly satisfying the expectations of citizens that the CCC's powers are used appropriately, may function as a mechanism of accountability. The CCC's public examinations have become controversial for several reasons related to legitimate expectations about the CCC's use of its discretion. First, it is said that they have been used to pursue other, more questionable, purposes alongside accountability. They may, for instance, become a type of 'show trial', designed to send a warning to potential perpetrators of misconduct. This entails the notion of public examination as punishment by public shaming. Since the CCC is supposed to be solely an investigative body such use of its powers is arguably illegitimate. Secondly, and relatedly, it has been argued that the weighing process required by the *CCC Act* to justify a public examination has not been performed appropriately by the CCC, leading to overuse of public examinations. Thirdly, questions have been raised about the procedural fairness of the CCC's public examinations.

Several sets of stakeholders are engaged by these criticisms. Citizens have a legitimate expectation that the CCC will comply with standards in the use of discretion that it

[9] According to the Chairman of the CMC, interviewed by the JSC, a CMC report sets out 'the evidence uncovered by the CMC's investigation, together, if appropriate, with a recommendation that prosecution proceedings or disciplinary action should be considered' (JSC 2009, 49).

expects of other public sector agencies. Those subject to investigation have a legitimate expectation that an investigative body will not seek to punish them, nor abuse their entitlement to procedural fairness. Parliament has a legitimate expectation, first, that statutory guidelines are sufficient to ensure that the CCC makes appropriate decisions, and, secondly, that such guidelines are appropriately interpreted and followed by the CCC.

Criticisms along the lines of those summarised above appear in a major report by the JSC (2012). The analysis which follows, examining each area of criticism in turn, focuses on that report. Regarding the first criticism, the JSC has noted that the CCC 'makes much of the benefits of exposure' (JSC 2012, 50). In its submission to the JSC's inquiry, the CCC makes clear that it does not believe that strong evidence of misconduct should prevent the convening of a public examination (CCC 2012, 28-29). If such evidence were instead immediately passed on to a prosecuting authority, opportunities to minimise misconduct, including through immediate action by public authorities, might be lost (CCC, 28-29). The CCC cites the example of misconduct by authorized motor vehicle examiners which, if not for a public examination in 2009, would not have come to public attention until a year later when the CCC's opinions were tabled (29). In the CCC's view, the risk to safety posed to a large section of the community justified the public examination.

The JSC found all of this unpersuasive, seemingly on the grounds that the notion of punishment is inextricably, and illegitimately, linked to any use of public examinations other than for their value in furthering an investigation aimed at forming an opinion about whether misconduct has occurred (see JSC 2012, 52-53). A possible difficulty with this argument is that the Act also speaks of 'the benefits of public exposure' and requires the CCC to consider these when deciding whether to hold a public examination. The CCC has both a 'misconduct function' and a 'prevention and education function' and is required to 'ensur[e] that in performing all of its functions it has regard to … prevention and education' (s 18). On the other hand, the CCC is authorized to conduct examinations 'for the purposes of an investigation' (s 137) and, by implication, not for any other purpose. It can be deduced that the statute requires any benefits of public exposure to be a

secondary consideration.[10] Interestingly, there is little reference in the CCC's submission to the role of public examinations in assisting investigations and little indication that they have provided such assistance. It is said that public examinations might help an investigation by encouraging additional witnesses to come forward. However, the PI, in his submission to the same inquiry, disputed the value of this benefit since, as far as he was aware, it was 'unusual' for a witness to come forward in these circumstances.

It seems to follow that public examinations would be difficult to justify. We have seen that they were held, to mid-2011, for less than 25 per cent of the matters for which an examination has been conducted. But the implication of the JSC's report is that this is far too often. The analysis by the JSC and the PI of the weighing process required by the Act prior to the opening of an investigation to the public also supports this conclusion. This takes us to the second criticism. The CCC may open an investigation 'if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so' (s 140). The PI and the JSC argued essentially that the CCC has over-emphasized the former benefits and underemphasized the latter concerns. Public benefits had, they considered, been exaggerated due to an overestimate of the value of public examinations, compared with reports, as a means of publicity. With regard to private interests, it is pertinent that the JSC inquiry was reopened and completed in the wake of the suicide of a witness who was to have been subject to a CCC public examination. It is understandable that this would have sensitised MPs, and the public they represent, to the potentially major adverse consequences of public examinations. The PI proposed and the JSC recommended adding to s 140 that the CCC must have regard for 'any credible risk to the health and safety of any person affected'. The PI also identified the risk of unwarranted damage to reputation as another consideration for which the CCC had not had sufficient regard, and to which its attention needed to be explicitly directed by its inclusion in s140. Again the JSC concurred (JSC 2012, 24-25). The JSC observed that the potential for harm to reputations is further exacerbated by sensational press reporting. It argued the CCC should also factor

[10] But if this was the intention of the Act, it is perhaps surprizing that s 140, which governs the decision to open an investigation to the public, does not make this explicit.

this into the weighing process.

If public benefits (compared with those delivered by a CCC report alone) are generally small and private costs large, the prescribed weighing process should ensure that public examinations occur, in the words of the JSC, 'very rarely'(JSC, 17).

The third criticism concerns procedural justice. It was widely appreciated when the CCC was established that its examination processes would not accord witnesses similar rights to witnesses in court proceedings. The justification was that the CCC was an investigative agency with no capacity to make determinations which would affect the rights of individuals. Examinations for such an agency may, as the PI observed, be 'more akin to police interviews than they are to court proceedings' (JSC, 29). But the consequences of an examination, specifically its capacity to unjustifiably harm reputations, are very different when it is held in public. The PI has noted that CCC investigations in general are apt to be misunderstood:

> 'A misconception that can arise when the CCC commences an investigation is that the CCC has decided that there has been some impropriety, particularly on the part of those persons whose conduct is being scrutinised. There is a tendency to treat the investigation as if charges had been brought by the CCC against particular individuals only after all the evidence had been considered and a decision made that there was a proper basis to believe that certain individuals may be found to be guilty of corruption, crime or misconduct. The result is that the investigation by the CCC is seen to be a process that is like a trial when that is not the case' (PI 2013, 11).

Those comments were made in a report on a *private* investigation into an allegation about the WA Police Commissioner. They are even more applicable to a public investigation where the evidence is likely to be more extensive and considered, and the processes, including some visible role for legal representatives, more like a court, at least to the uninitiated observer. If the process is perceived by the public as akin to a trial, with the misconduct opinion at its conclusion appearing something like a judge's verdict, it can have serious consequences for the individuals under investigation regardless of whether it affects their legal rights. Arguably, in such circumstances, many of the protections applicable in a judicial process should be available to individuals under examination.

This, essentially, is the view expressed in the JSC report (2012, 32), which found that 'the manner in which the CCC conducts public examinations leaves a good deal to be desired.'

The JSC identified a number of areas in which procedural fairness needs augmentation. First, at the beginning of the process, it argued, the Commissioner should be subject to a statutory requirement to 'sign a statement explaining why the public interest outweighs the potential for prejudice or privacy infringements', provide a copy to the person to be the subject of the examination, and give that person the opportunity to 'make representations as to why the statement may be incorrect' (JSC, 28) Secondly, although the CCC is required to inform a witness of the general scope and purpose of the investigation – albeit permitting the CCC to neglect this requirement if it deems this 'undesirable' – the JSC heard evidence, including from the PI, which convinced it that the CCC too often gave insufficient information to witnesses. Thirdly, while the CCC is required to give persons adversely treated by a report a reasonable opportunity to make representations, the JSC concluded that this was insufficient because the opportunity came late in the process and representations were easily dismissed. It suggested that representations might be included verbatim in CCC reports and, further, that persons subjected to 'adverse questioning' at a public examination ought to have the right to respond during the examination rather than several months later when a draft report is prepared (33-34). More generally, the JSC argued that the CCC should be required to conduct examinations, especially those open to the public, in accordance with Salmon's principles of fair procedure for public inquiries. These include informing witnesses of allegations against them and the substance of the supporting evidence; giving witnesses the opportunity to be questioned by their own counsel (presently at the discretion of the CCC); hearing any witnesses a person called before an examination may wish to call; and allowing witnesses to test, by cross-examination conducted by their own counsel, any evidence which may affect them (35, 39).

The JSC's critique of the use of public examinations by the CCC has considerable force, but is not without inconsistencies. While it argues that public examinations should be

conducted ‘very rarely’, it devotes the final chapter of its report to acknowledging, and supporting, the centrality of the ideal of openness, or ‘transparency’, to modern public administration. The latter view accords with our argument that public examinations have an important accountability function for a body such as the CCC. But if they are to be used only very rarely, they will be unable to make a significant contribution to accountability. This aspect of the JSC’s analysis is unconvincing. However, it is not difficult to agree with the notion that greater procedural fairness is required in CCC public examinations. Witnesses rightly see much similarity between a court process and a public examination; in particular, both can inflict great personal harm. As the JSC report states, reputations are easily damaged without justification in a public examination and the damage is not easily rectified. Procedural fairness, to minimize unwarranted harm, is thus arguably a legitimate expectation of persons called before a public examination.

From an accountability perspective – that is, satisfying citizens’ legitimate expectations – it would be desirable to encourage the use of public examinations where there is a strong public interest in holding them.[11] They can even, as the JSC has noted, assist persons under investigation to restore their public standing. But the quid pro quo for relatively frequent public examinations should be stronger requirements of procedural fairness to provide a means of satisfying the legitimate expectations of persons called to appear in these forums.

Conclusion

The paper has elaborated a conception of accountability as ‘the satisfaction of legitimate expectations about the use of discretion’ by applying it to the circumstances of a particular anti-corruption agency. It has been suggested that this conception assists understanding of the CCC’s accountability framework by illuminating relevant stakeholders, institutional mechanisms and their interrelations. It is suggested, further, that the conception of accountability assists evaluation of that framework, a task

[11] The CCC’s reported tests of the public interest seem relevant, if insufficiently formalised. These are separately identified as the number of people affected (CCC 2012, 1) and the seriousness of the allegations, whether the alleged practices are widespread, and whether they are occur frequently (35).

undertaken selectively here through an analysis of aspects of the framework or its implementation which have attracted public criticism.

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