Police Integrity Commission Amendment (Reports) Bill.

Second Reading

Mr TINK (Epping) [10.00 a.m.]: I move:

That this bill be now read a second time.

The object of the Police Integrity Commission Amendment (Reports) Bill is to amend the Police Integrity Commission Act in relation to the authorship of the commission's reports. First, the amendment will require that each report prepared by the Police Integrity Commission identifies its author or authors and, if there are two or more authors, to indicate the parts of the report for which each author is responsible. Second, the amendment is to ensure that in relation to any matter dealt with in a hearing under that Act, the author of the report is the person who conducted the hearing, unless that person is unavailable because of illness, death or other unavoidable cause. This bill should not be necessary, but I regret to say that it is. The former police Minister, Michael Costa, and I agree on the very poor performance of the Police Integrity Commission as outlined in the Operation Malta report to Parliament.

Operation Malta was probably the most important inquiry undertaken by the commission since its inception. It was to investigate the type of corruption alleged to have taken place within the senior echelons at the headquarters of NSW Police to scuttle aspects of the police royal commission reform process. Exceptionally serious allegations were made, an exceptionally serious hearing took place and the report was awaited with great interest. Because of the gravity of the inquiry it was strongly supported on a bipartisan basis. Both sides of Parliament agreed that this vitally important inquiry would produce a vitally important report. That proved to be the case when the hearing commissioner's statutory period of appointment expired, and the then Leader of the House and former Minister for Police, Mr Whelan, and I immediately agreed to propose urgent legislation to allow the commissioner to continue with the inquiry. Consequently, Parliament passed the legislation quickly and effectively on a bipartisan basis to extend the commissioner's period of office.

It is extraordinary that it was not until years later that the report of the inquiry finally emerged, on the eve of an election, after much public prompting by me and, I suspect, private prompting by the Government. In Parliament the report was condemned on a bipartisan basis. Mr Whelan's successor, Mr Costa, and I were strongly critical of the report. It is not often that the whole Parliament agrees in a matter of this gravity on a major reference to a watchdog such as the Police Integrity Commission. It is not often that there is complete bipartisan agreement to procedural motions, or to extending the terms of an office so that a job can be done fully and effectively and then agreement that the result we were all hoping and waiting for did not materialise; in fact, it was a really poor end result.

Against that background, I am deeply troubled that no-one at the Police Integrity Commission is prepared to take responsibility for the report—everything has been done in the name of the commission. Subsequently, many people who gave evidence to the inquiry lost their careers and there have been family break-ups. The whole process has devastated the lives of many people who appeared before the commission. I am concerned that the people who suffered most could broadly be categorised as whistleblowers or complainants in this case. An unfortunate outcome is that it will be a long time, if ever, before someone comes forward to the Police Integrity Commission with an allegation about misconduct in the upper echelons of the police service. It is clear from this report that any complainant will not get the backing of the commission. That does not mean that the commission has to accept a whistleblower's allegation; obviously any allegation would have to be rigorously tested.

At the end of the day the report of the Police Integrity Commission, or other body, must have due regard to the nature of the evidence, the evidentiary conflicts which may have emerged, and must make a proper, full and workmanlike attempt to work through the evidence, address the issues and come to some considered, proper and appropriate conclusions. As I

said, the problem with the Operation Malta report is that no-one at the Police Integrity Commission will take responsibility for it. One would search the report in vain to find the name of the author, or authors. The report is done under the name of the commission. For example, chapter 10 states several times, "It is the Commission's assessment". Almost every conclusion is built around the commission making a decision. It is fundamentally important that a person against whom an accusation is made should know the identity of the person making that accusation and should have an opportunity to test, or cross-examine, the person making the accusation.

These are fundamental legal principles. One can go back to 1215 and the days of King John and Simon de Montfort to work out the origins of these basic principles. Surely it is an equally basic principle that when a person sits in judgment or reaches conclusions about allegations and picks and chooses which witnesses to believe in whole or in part, then that person's identity should revealed. The person or persons decide that either the accuser or the accused is correct and must be accepted, for the following reasons, and on that basis arrives at conclusions.

People must know the identity of the person or persons who are reaching conclusions about them that may have an impact on their employment, personal life and so on. The report contains no reference to an individual being in any way responsible for its preparation. I tried to do the right thing and wrote to the Inspector of the Police Integrity Commission [PIC], the Hon. M. D. Ireland, QC, lodging a complaint about this issue. He received a reply from the PIC, and I am fundamentally unsatisfied with that reply, so I have no recourse but to test it with a bill. A letter from the PIC addressed to the inspector and dated 27 February 2003 states:

The complaint is premised on the notion that Assistant Commissioner Urquhart was the only person who could or should have prepared the Commission's report on Operation Malta.

Mr Urquhart was the person who heard all the evidence. The letter continues:

As it is not apparent whether Mr Tink considers that to be the case as a matter of law or general propriety, this response will address both aspects.

It then refers to the commission's report writing processes, which were put in place by Mr Urquhart in 1999. It states:

• They are quite detailed and involve a number of steps including:

• Review of evidence obtained and submissions by Counsel;

• Consideration of submissions by persons appearing with leave;

• Collation of relevant evidence to form the basis of the report in the format used by the Commission;

• Develop preliminary opinions, assessments and potential recommendations;

• Project review;

• Peer review;

• Senior officer review;

• Review and approval by the Commissioner.

Approval by the commissioner in this report did not mean Mr Urquhart, because he had retired; it meant Mr Griffin, the current commissioner, who heard none of the evidence in this inquiry. The next paragraph really bothers me. It states:

Those who contribute to the preparation of reports are many and varied, but include: the officer presiding over the hearing; Counsel Assisting the Commission; the Operational Lawyer responsible for the matter; the Report's Project Manager; Commission research staff; the Commission Solicitor, other senior Commission staff, and the Commissioner. The extent of the role of each individual will vary according to the complexity and size of the matter

under investigation. It cannot be said that any one single person sits down to 'write' a Commission report—they are the collaborative product of the officers by whom the Commission as an entity must act to form its mind and produce its written output.

I fundamentally reject that. It is a flawed and dangerous practice. It is grossly unfair and contrary to natural justice that these reports are written in that way. I raised a specific concern regarding conclusions drawn about Mr Brammer. The letter states:

As Mr Sage indicated, Judge Urquhart was indeed closely involved in all relevant steps in the Report's preparation, including formulation of the Commission's assessments and opinions concerning Mr Brammer.

The commission, which is a statutory body, is forming opinions. How the hell can some artificial construct form opinions about a witness? Human beings form opinions about other human beings. Someone in charge of an inquiry forms an opinion about a witness. It may be said that the Supreme Court has a view or has come to a view about a witness, allegation or some other matter, but in every case a judge puts his or her name to a judgment. The Supreme Court's work is done by delegation through a named individual judge who takes responsibility. I have been around long enough to know that judges use associates and other resources to assist in writing judgments. I do not have a problem with that because it is what happens in the real world; I dare say the same is done in the Industrial Relations Commission and other places. However, at the end of the day, a judge takes responsibility for the work. The judge may tell his associate that he does not accept what has been put to him or that it is incorrect and is therefore excluded. However, if the judge takes it on board, it becomes the judge's work and the judge is named as having done it. The letter continues:

As a matter of law, there was nothing untoward about the way in which the Operation Malta Report was prepared.

That is correct. Under the Act of Parliament that established this commission, there is nothing wrong in law with what the commission did. Of course, that is why I am trying to make a point by introducing this legislation—if what the commission did is correct in law, the legislation must be changed. I will again illustrate the commission's mind-set on this issue. The letter states:

Thus, the function of *preparing* a report upon an investigation expressly falls to the Commission, rather than to the Commissioner, an Assistant Commissioner, or any individual, it is a corporate function.

Now, here are the key words: "it is a corporate function". That is wrong and dangerous. It is against everything that English law and the principle of natural justice have stood for since 1215 and Runnymede. An individual must take responsibility for his or her work on behalf of a corporation or commission. The commissioner then goes on to point out that legal proceedings are different. He states:

A hearing before the Commission is conducted for the purposes of the particular investigation. In contrast to proceedings before the courts, its purpose is not to determine questions concerning the guilt or innocence of persons, or facts in issue.

The problem is that many reputations were trashed during the hearing and in the final report. Reputations were trashed and the conclusions—not findings in a formal sense—were extremely damaging. They were taken up as such by the media, particularly in relation to Mr Brammer. In the real world at the beginning of the twenty-first century, from the public's point of view those conclusions were as good as findings of guilt or innocence. In the hothouse media environment that we live in, they were in some sense even more damaging than a formal finding, probably because they were not formal findings. It has troubled me and has never been satisfactorily explained why when Mr Urquhart was reappointed to continue the investigation he was not appointed under the legislation that Mr Whelan and I agreed to put through Parliament; that is, his appointment was not extended by an Act of Parliament.

In effect, his term was extended by a special instrument executed by the then Acting Commissioner, Mr Sage, which gave Mr Urquhart the power to continue the hearing, but which specifically excluded the power to write the report—an issue that has never been satisfactorily explained. The Police Integrity Commission and Mr Sage have a responsibility to explain why they moved away from a resolution of the Parliament and a power given by

Parliament that expressly provided that Mr Urquhart would continue the hearings and he would also write the report. By a special instrument executed by the then acting commissioner, Mr Urquhart was allowed to run the hearing but he was not allowed write the report. That became a vital point.

Over 72 sitting days, 50 witnesses gave evidence in this inquiry. So Mr Urquhart, the person who heard all the evidence and who observed the demeanour of all the witnesses, did not write the report. If a matter that is heard by a Supreme Court judge is taken on appeal and there are major findings of fact on the evidence that has been presented which are said to remain in issue, an appeal court will not lightly overturn any finding of fact made by somebody who has observed the demeanour of witnesses. Appeal courts in this State can have made available to them the transcript of every word spoken by every witness in a case. They can have made available to them the printed record of every word that is said in a case. But, when all is said and done, appeal courts recognise that, when there is conflicting evidence, often the way in which that evidence was given will determine who is to be believed, and who is not to be believed. Appeal courts will not go through appeal books and transcripts of evidence and start second-guessing statements made by people in a lower court who listened to witnesses speak and heard them being cross-examined.

The person who heard all that evidence and who was available to write the report did not write the report. On Mr Sage's order, he was precluded from writing the report, even though this Parliament passed a resolution that empowered Mr Urquhart to write the report. Why did that happen? One would have to ask: Did somebody benefit? I think somebody benefited. The only substantial witness who gave evidence after counsel assisting was changed was the Commissioner of Police, Mr Ryan. That problem was compounded. At the beginning of 2002, after evidence had been given by every witness as to matters of substance, other than Mr Ryan, counsel assisting the Police Integrity Commission in this matter was appointed to the Supreme Court.

Mr Donovan was given the job of cross-examining Mr Ryan, even though he had no background in the case up to that point, apart from reading the transcripts. For as long as I am a member of this Parliament, I will regret making one decision, and everyone makes bad judgments from time to time. I never queried the timing of that appointment to the Supreme Court. That was a major mistake and failure on my part. I decided not to make a comment and to let it go. I believe that the consequences of that are still being felt. Mr Buddin may well be a worthy member of the Supreme Court, but I believe that there was no need for him to be appointed at that time. An acting judge could have been appointed, or the appointment could have been delayed. But the appointment was made when one of the major witnesses was yet to give evidence, which destroyed the continuity of evidence and prevented anybody with any background in the case from being able to test the witness.

The combination of Mr Urquhart not being able to do the report and counsel assisting being replaced by a new man before Mr Ryan gave his evidence destroyed all continuity of evidence and, in my view, destroyed the credibility of this report. This bill will attempt to ensure that that never happens again. Chapter 11 of the report names a number of persons as being affected persons, that is to say, persons identified as those against whom possible criminal allegations had been made during the course of the hearing. They were—and this is already a matter of public record—James Ritchie, Paul Herring, Michael Lazarus, Dean Olsen, Ken Seddon, Malcolm Brammer, Clive Small, Ken Moroney, Jeff Jarratt and Peter Ryan. I went through the electronic record of the transcripts and I found that all those people, bar one, gave evidence before 2002. So all those people could have had criminal findings made against them. I hasten to add that the commission made no such findings against them.

Regardless of that finding, it was fundamentally unsatisfactory that the thread between counsel assisting and all those witnesses, including Mr Ryan, was lost. That was compounded by the fact that Mr Urquhart had been relieved of his responsibility for writing the report—something that we only established recently. The detail in some parts of the report is totally inadequate and, in other parts, it is damning of individuals. At times the writer made findings when plainly there was no basis for making those conclusions, other than that he or she was looking at documents from an appeal court rather than at documents from a court of first instance. We know a little about the authorship of the report, if only because of the great work done by the honourable member for Cronulla at a hearing of the Committee on the Office of the Ombudsman and the Police Integrity Commission. He cross-examined the current commissioner. On 20 September 2002, at page 40 of the transcript, Mr Griffin

concedes:

The Commission report will be prepared within the Commission and Judge Urquhart is not writing it and therefore may have little to do with the actual construction of the report.

The current commissioner gave sworn evidence to this parliamentary committee to the effect that the person who heard the evidence was not writing the report. The honourable member for Cronulla asked, "Who in the commission is responsible for it now?" Commissioner Griffin said, "I am." The honourable member for Cronulla asked, "Will you be writing the report?" Commissioner Griffin said, "No, but I will be signing the final copy when I am convinced it is what the Commission wants to put out." So the person responsible for the report and who signed it did not write or hear any of the evidence. He then goes on to state:

We see it as a Commission report, not Judge Urquhart's report or Mr Sage's report or my report …

At the bottom of page 40 he states that, because counsel assisting had gone on the Supreme Court bench, Brian Donovan—who was the new counsel assisting who was brought on board only after all these witnesses, except Ryan, had been dealt with—"will and has already contributed largely to the process." It appears that one of the major authors of the report is Donovan, who did not hear most of the evidence that was given. Against that background, there have been some pretty strong findings against some people—if not in form then certainly in substance. I refer in particular to page 117 of the report and to some findings against Mr Brammer, which were devastating. Honourable members should bear in mind that, by this time, this man was the chief investigator for the Independent Commission Against Corruption. The report states:

Ultimately, Brammer seeks to justify the reference to this material by the support it may lend to his conclusion concerning Seddon's "questionable ethical standards".

It is hard not to conclude that the Spa report was as much about the personal antipathy between Seddon and Brammer, and the opportunity it provided Brammer to defend his own work against attack by others, as it was about identification of risks to the Service.

This is a report apparently written by a person who did not even hear the evidence of either Seddon or Brammer. That is what the principle of natural justice since 1215 is about. Unless the person is prevented from writing a report, by death or incapacity, the identity of that person must be known. The responsibility for such a conclusion must be taken in the report, and that is what Commissioner Urquhart should have done all along.

Pursuant to sessional orders business interrupted.