



**Joint Standing Committee on the Corruption and Crime Commission**

**Parliamentary Inspector's report on  
misconduct and related issues in the  
Corruption and Crime Commission**

**Report No. 19  
June 2015**

Parliament of Western Australia

## Committee Members

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Chairman	Hon. Nick Goiran, BCom, LLB, MLC Member for the South Metropolitan Region
Deputy Chairman	Mr Peter Watson, MLA Member for Albany
Members	Hon. Adele Farina, BA, LLB, MLC Member for the South West Region  Mr Nathan Morton, BSc, GradDipEd, MLA Member for Forrestfield

## Committee Staff

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Principal Research Officer	Dr David Worth, DipAeroEng, MBA, PhD
Research Officer	Ms Jovita Hogan, BA (Hons)

Legislative Assembly	Tel: (08) 9222 7469
Parliament House	Fax: (08) 9222 7804
Harvest Terrace	Email: <a href="mailto:jscccc@parliament.wa.gov.au">jscccc@parliament.wa.gov.au</a>
PERTH WA 6000	Website: <a href="http://www.parliament.wa.gov.au/jscccc">www.parliament.wa.gov.au/jscccc</a>

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# **Joint Standing Committee on the Corruption and Crime Commission**

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## **Parliamentary Inspector's report on misconduct and related issues in the Corruption and Crime Commission**

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Report No. 19

Presented by

**Hon Nick Goiran, MLC and Mr Peter Watson, MLA**

Laid on the Table of the Legislative Assembly and Legislative Council  
on 17 June 2015



## Chairman's Foreword

This is an important and timely report prepared by the Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Hon Michael Murray QC, for Parliament on a number of serious allegations of misconduct made against officers of the Corruption and Crime Commission (CCC).

These allegations centre on the former Operational Support Unit (OSU) at the CCC. The PICCC's report outlines 23 allegations of misconduct that have been made and investigated by WA Police (WAPOL). This has been a very serious situation, if for no other reason than because the Commission is the key agency in the State's integrity framework. It is understandable that the PICCC describes the allegations as "among the most worrying allegations I have encountered in the short time I have been in office".

The Committee first became aware of the allegations in September 2013 and since then has been kept informed of developments by the PICCC and has also gathered information during closed hearings with the PICCC, the CCC and WAPOL.

The fact that these allegations are in relation to a number of individuals within the State's highest integrity body is a timely reminder that whenever greater power and discretion is granted to one or more individuals, it is essential that it is offset by a proportionate increase in the oversight of them.

The PICCC provided this report to the Committee on 10 June 2015 after receiving a comprehensive report from WAPOL on 27 March 2015. In the intervening period the PICCC provided a draft copy of his report under section 200 of the CCC Act to the CCC and five individuals named in the report who are no longer employed by the Commission. They were given an opportunity to make representations to the PICCC about the report before he provided it to the Committee.

The Committee has faced serious time constraints in reporting to Parliament on this report from the PICCC. The Houses are due to rise shortly for the Winter Recess. The Committee has not had sufficient time to consider in detail the three recommendations made by the PICCC and the implications of the proposed changes to the *Corruption and Crime Commission Act 2003*. The Committee makes no comment on these recommendations but has recommended to the Attorney General that the Government provide a response to them.

I thank the Parliamentary Inspector, Hon Michael Murray for his work in compiling this report, noting his stated intention to table further supplementary reports in due course. I also thank the PICCC's Executive Assistant, Mr Murray Alder, and the CCC's Commissioners that have provided information to the Committee over the past

18 months: former-Commissioner Roger Macknay QC and Acting Commissioners Neil Douglas and Christopher Shanahan SC.

I would like to thank my fellow Committee Members for their input on this report; the Committee's Deputy Chairman, the Member for Albany, Mr Peter Watson MLA; the Member for Forrestfield, Mr Nathan Morton MLA, and the Member for the South West Region, Hon Adele Farina MLC. The Committee members were ably supported by the Committee's Secretariat, Dr David Worth and Ms Jovita Hogan.

A handwritten signature in blue ink, consisting of a stylized 'N' and 'G' with a horizontal line extending to the right.

**HON NICK GOIRAN, MLC**  
**CHAIRMAN**

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## **Ministerial Response**

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Committee directs that the Minister representing the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.



# Findings and Recommendations

## **Finding 1**

**Page 8**

The Parliamentary Inspector has recommended three amendments be made to the *Corruption and Crime Commission Act 2003*.

## **Recommendation 1**

**Page 8**

The Attorney General report to Parliament as to the action, if any, proposed to be taken by the Government with respect to the three recommendations made by the Parliamentary Inspector of the Corruption and Crime Commission.



# Chapter 1

## Overview of PICCC's investigation of allegations against CCC staff

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*...among the most worrying allegations I have encountered in the short time I have been in office ... Hon Michael Murray QC, Parliamentary Inspector of the CCC.*

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### Introduction

This report by the Joint Standing Committee provides the Parliament with an important and timely report prepared by the Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Hon Michael Murray QC, on allegations of misconduct made against officers of the Corruption and Crime Commission (see Appendix A). The PICCC has provided this report to the Committee under sections 199 and 201 of the *Corruption and Crime Commission Act 2003*.

The PICCC was notified by the Corruption and Crime Commission's (CCC) then-Commissioner Roger Macknay QC of the first of these allegations in July 2013. The total number of allegations that have now been made is 23.<sup>1</sup> Their investigation has taken a significant effort and considerable resources over nearly two years by the PICCC, CCC staff and senior WA Police (WAPOL) officers.

The matter of the number allegations of misconduct that have been made is very serious as the Commission is the key agency in the State's integrity framework. The investigations of the allegations by the PICCC has been complicated by the limitations imposed on him by the CCC Act. His decision to hand the investigations to WAPOL has created significant tension between the agencies given the important role the Commission has in overseeing the actions of WAPOL officers. The investigations were further complicated as some of the allegations involved covert CCC staff, many of whom were ex-police officers.

Information about the investigations, the PICCC's reporting of them in his annual report, the CCC's response<sup>2</sup>, and the charging of ex-CCC staff with offences have all

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1 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Report on Misconduct and Related Issues in the Corruption and Crime Commission*, 10 June 2015.  
2 Corruption and Crime Commission, *Report on an Administrative Matter Relating to the Functions of the Commission Pursuant to Section 88 of the Corruption and Crime Commission Act 2003*, 5 November 2014. Available at: [www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202014/CCC%20Section%2088%20Report%20on%20an%20Administrative%20Matter.pdf](http://www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202014/CCC%20Section%2088%20Report%20on%20an%20Administrative%20Matter.pdf). Accessed on 17 June 2015.

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been reported in the local media.<sup>3</sup> Public comment on the investigation has been wide-ranging and has involved senior Government officials such as the Premier, Hon Colin Barnett MLA, “[b]ut it is a somewhat bizarre situation Gary, isn’t it, when you’ve got a Corruption and Crime Commission primarily there to oversight the police. And at the same time now we’ve got the police investigating staff members within the CCC.”<sup>4</sup>

The PICCC provided this report to the Committee on 10 June 2015 after receiving a comprehensive report from the WAPOL on 27 March 2015 on their investigation of the allegations. In the intervening period the PICCC provided a draft copy of his report under section 200 of the CCC Act to the CCC and five individuals named in the report who are no longer employed by the Commission. They were given an opportunity of making representations to the PICCC about the report before he provided it to the Committee.<sup>5</sup>

The Committee has faced serious time constraints in reporting to Parliament on this report from the PICCC. The Legislative Assembly is due to rise on 25 June 2015 for the Winter Recess while the Legislative Council is undertaking its Estimates hearings on the 2015-16 State Budget until the 26 June 2015. The Committee has not had sufficient time to consider in detail the three recommendations made by the PICCC and the implications of the proposed changes to the CCC Act. The Committee makes no comment on these recommendations but has recommended to the Attorney General that the Government provide a response to them.

Given the seriousness of the allegations and the Committee’s established convention to table reports from the PICCC within 30 days<sup>6</sup>, it has resolved to accede to the PICCC’s request to table the report as expeditiously as possible. The request for the urgent tabling of this report has also been supported by the CCC Commissioner.<sup>7</sup>

### **Advice from the PICCC**

The PICCC initially wrote confidentially to the Committee’s Chairman on 13 September 2013 about the allegations of misconduct within the Operational Support Unit (OSU) at the CCC. He provided copies of letters from then-Commissioner Macknay QC about the

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3 Mr Grant Taylor, “CCC man charged”, *The West Australian*, 15 August 2014, p26.

4 6PR Interview, 18 December 2013.

5 Mr Murray Alder, Assistant to the Parliamentary Inspector of the Corruption and Crime Commission, Email, 11 June 2015.

6 Joint Standing Committee on the Corruption and Crime Commission, *Report 2- Report on the Relationship Between the Parliamentary Inspector and the Commissioner of the Corruption and Crime Commission*, 19 March 2009, p45. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/89184E2961ABB3B548257831003E97B7/\\$file/JSCCCC%20report%20Relationship%20between%20PI%20and%20CCC.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/89184E2961ABB3B548257831003E97B7/$file/JSCCCC%20report%20Relationship%20between%20PI%20and%20CCC.pdf). Accessed on 17 June 2015.

7 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 15 June 2015.

matter. The PICCC also certified, pursuant to s208(5)(b) of the CCC Act, that in his view it was necessary in the public interest that the information and attachments he provided could be disclosed on a confidential basis solely with the other members of the Committee.<sup>8</sup>

While the PICCC had been advised by the CCC of the first allegation on 18 July 2013, he wrote later to the Committee in September 2013 as:

*My concern, of course, is that the diversity of the allegations now made may reveal a serious problem of systemic corruption within the Commission, or parts of it, but, hopefully, that may prove not to be the case. I will keep you informed, confidentially unless it comes to be a matter requiring a Report to the Committee.*<sup>9</sup>

The PICCC subsequently undertook to keep the Committee regularly apprised of developments in the investigation.

The Committee was provided by the PICCC with an update on progress and copies of relevant correspondence on:

- 13 September 2013;
- 29 October 2013;
- 3 December 2013;
- 25 February 2014;
- 10 July 2014;
- 12 November 2014;
- 21 November 2014;
- 16 April 2015; and
- 10 June 2015.

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8 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 13 September 2013.

9 Ibid.

The PICCC also provided evidence to the Committee about the investigations in six closed hearings. These hearings were held on:

- 16 October 2013;
- 6 March 2014;
- 18 June 2014;
- 22 October 2014;
- 1 December 2014; and
- 18 March 2015.

In his first hearing with the Committee on this matter, the PICCC described the allegations as:

*...among the most worrying allegations I have encountered in the short time I have been in office. It appears to involve a group of operatives within the Commission's Operational Support Unit, which ... is the unit with primary responsibility for carrying out covert surveillance and has other special powers .... So these are people exercising considerable power who operate in secretive circumstances, and it would seem likely that the governance structures tying the operation of the work of that unit and the attitudes of the people in it to the Commission itself have been rather less effective than those in senior levels of the Commission would have regarded as being in place. They have become something of a law unto themselves.<sup>10</sup>*

Subsequent to this hearing, the PICCC reached an impasse with then-Commissioner Macknay QC over his decision to involve WAPOL in the investigations. At a later hearing with the Committee the PICCC explained his reasoning for involving WAPOL:

*I discussed with the Commissioner the fact that in my view it was absolutely critical that there be no suggestion that the CCC was being left to investigate its own and to deal with the matter in-house; it needed to be dealt with in a transparent, open fashion according to the law in the ordinary way that applies to the allegation of criminal offences committed by any citizen. It seemed to me that the fact that the citizen who was the subject of those allegations was an officer of*

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<sup>10</sup> Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence, Closed Hearing*, 16 October 2013, p2.



*the CCC gave it no different dimension from the ordinary application of investigation and application of the criminal law.<sup>11</sup>*

Meanwhile, the PICCC made it clear to the Committee that he was concurrently overseeing the actions of the CCC in some disciplinary matters involving its staff:

*I have satisfied myself that the proposed action by the CCC is open and appropriate. With that rider, I have otherwise interfered not at all in that process, merely cautioning that care needs to be taken not to create any factual base for disciplinary action by the CCC which might ultimately conflict in any way with the factual scenario which may arise out of the prosecution of a criminal offence. ..., the traditional view of that— these matters when one is dealing with matters which may have an administrative significance as well as a criminal process significance— is that the criminal process goes first and is dealt with unsullied by any other competing strain of fact-finding and evidence gathering.*

*As to that, I thought it was appropriate, in those cases which appeared to carry the matter at least to the threshold point that it appeared there was evidence capable of being gathered and which would sustain a criminal prosecution, to use the power of the Inspector under section 196(3)(f) and (g) [of the CCC Act], which gives a very appropriately worded complete process of referral to other agencies, in this case the Police, for consideration, investigation and criminal prosecution, where appropriate.<sup>12</sup>*

About three months later, the PICCC reported to the Committee:

*Nonetheless, the investigation has proved to be enormously useful because it is exposing very substantial difficulties of a systemic nature, and I am satisfied they are being well-addressed now by the Commission.<sup>13</sup>*

## **Information provided to the Committee by the CCC Commissioners**

The Committee's main interaction with the CCC during the period of the investigation of the allegations against its officers has been through five closed hearings with then-

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11 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence, Closed Hearing*, 6 March 2014, p3.

12 *Ibid*, p4.

13 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence, Closed Hearing*, 18 June 2014, p7.

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Commissioner Macknay QC and the two Acting Commissioners, Mr Neil Douglas and Mr Christopher Shanahan SC. These were held on:

- 9 April 2014;
- 19 November 2014;
- 26 November 2014;
- 25 March 2015; and
- 15 April 2015.

Commissioner Macknay QC explained to the Committee, just before he left the Commission, that he believed that the misconduct in the CCC was limited to the OSU, which had been established and trained in preparation for the CCC to receive new powers to engage with organised crime under proposals to amend the CCC Act:

*...obviously the Commission has had a difficulty in one particular area. I should say that that area is not within the Commission proper. There has never been any suggestion that within the Commission proper there has been anything other than high standards and integrity. The particular area where there has been a difficulty was an area that was in abeyance to an extent waiting for this Bill [Corruption and Crime Commission Amendment Bill 2012], because if the Bill had become law, the role of the Commission was going to be such that there was going to be a greatly heightened need for the services of people in that particular area.*

*In those circumstances we just obviously had to keep it in existence and wait. That area has now been the subject of an extremely thoroughgoing review and those who have been considered unworthy to be with commission have been discharged. Completely different arrangements are in place and I am very confident that there would not be any repetition of poor behaviour.*

...

*The failure, of course, was at a management level as well; otherwise these things could not have occurred. That nature of the entity was such that ordinary audit arrangements were not easily able to be implemented. The Commission has always had an internal auditor; the external auditor, of course, is the Office of the Auditor General. In the past we have had an internal auditor, which was a firm of chartered accountants but a year or so ago we engaged an individual as an*

*internal auditor. He is now able to penetrate those sensitive areas of the Commission, where it was not deemed practical to have people go before. The level of our ability to exercise oversight in those areas is also enhanced as a result of that.*<sup>14</sup>

## **Hearing with WAPOL**

The Committee also took evidence from WAPOL about its investigations into the CCC misconduct allegations during a closed hearing on 17 September 2014. This hearing was primarily taking evidence to be used in the Committee's Inquiry into improving the working relationship between the Corruption and Crime Commission and the Western Australia Police.

At this hearing, Assistant Commissioner Gary Budge, who headed the WAPOL task force investigating the allegations, told the Committee of the frustrations with trying to extract appropriate information from the Commission:

*So there has been significant obstruction, I must say. There has been a reluctance to cooperate with us. Even last week we had a nonsensical situation in regard to another referral, where they provided us some material that we requested, and it is quite generic. We were asking for all information that they have in regard to a certain incident. They gave us material, but from reading the material we discovered there was obviously some material that was not provided. We asked them why they had not provided that, and they said because they did not think it was relevant; so they are making a decision on whether it is relevant. We are the investigating officers who should be making a decision, I believe, on whether it is relevant or not.*

*So, when we said, "Well, we want the material", they said, "Tell us what you want then; itemise it and we will then provide you the material." But, of course, we do not know what they have got. So, this situation has arisen where we have been restricted in the way we can go about our investigation because of their reluctance to cooperate with us in regard to what is described as serious misconduct, corruption or criminal behaviour.*<sup>15</sup>

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14 Mr Roger Macknay QC, Commissioner, Corruption and Crime Commission, Transcript of Evidence, Closed Hearing, 9 April 2014, p13.

15 Mr Gary Budge, Assistant Commissioner, WA Police, *Transcript of Evidence, Closed Hearing*, 17 September 2014, pp15-16.

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### The PICCC's recommendations

In this report to the Committee, the PICCC has made three recommendations that the CCC Act be amended:

1. to provide the Parliamentary Inspector with the power to certify the provision, in the public interest, of official information to the Police, or to another external investigative body, when the Commission or one of its officers is being investigated for a criminal offence.
2. to provide the Parliamentary Inspector with the function to oversee the investigation of a complaint made by the Commission, or by its officers, about the conduct of an officer of an external investigative agency which is investigating the conduct of the Commission, or its officers.
3. to make it compulsory for the Commission to notify the Parliamentary Inspector of any Commission misconduct investigation which is proposed to be commenced, or which has already commenced, in relation to a Police officer, or an officer of another investigative body, who is investigating the conduct of the Commission, or its officers.

#### Finding 1

The Parliamentary Inspector has recommended three amendments be made to the *Corruption and Crime Commission Act 2003*.

#### Recommendation 1

The Attorney General report to Parliament as to the action, if any, proposed to be taken by the Government with respect to the three recommendations made by the Parliamentary Inspector of the Corruption and Crime Commission.

### Conclusion

As a result of the investigations into the 23 allegations that the PICCC lists in this report, three CCC officers were dismissed by the Commission, four resigned and one senior officer did not have his contract of employment renewed. At the time of this Report, the Police have charged two officers with criminal offences relating to corruptly falsifying Commission records, and giving false evidence to a Commission examination conducted as part of its investigation of some allegations.

The PICCC also reported to the Committee that, following the WAPOL investigation, the Commission has subsequently paid \$269,533 to the Australian Taxation Office for a

Fringe Benefits Tax (FBT) liability for the year 2012-13, while the size of the FBT liability for the years prior to that remains unknown.<sup>16</sup>

While there have not been a significant number of criminal charges flowing from the PICCC's investigation of these allegations, he notes in his report that he was disturbed to find:

*The number and nature of allegations made against OSU officers in this matter, and the systemic nature of the conduct investigated, revealed a disturbing culture of entitlement and unaccountability in the OSU contrary to the standards and values expected of public officers, particularly those employed by the State's anti-corruption body.*<sup>17</sup>

Just before he resigned in April 2014, then-Commissioner Macknay QC instituted a 'root and branch' review of the Commission's procedures, especially those used within the OSU.<sup>18</sup> The Commission reported to Parliament on a major restructure and repositioning of the organisation when it tabled its 'The Repositioning Report' on 21 April 2015.<sup>19</sup>

In its Report 18, *Improving the working relationship between the Corruption and Crime Commission and Western Australia Police* tabled in March 2015, the Committee provided an alternative arrangement to the one pursued by the PICCC that it received information on in three overseas jurisdictions. The Committee was told in its briefings of the importance of an agreement between the Independent Police Complaints Commission (London), Garda Síochána Ombudsman Commission (Ireland), Police Ombudsman for Northern Ireland, and Police Complaints Commissioner for Scotland that allows each police oversight agency in these four jurisdictions to make special requests to each other for an independent review of a 'critical incident' that might affect public confidence in their respective organisations.

These arrangements are outlined in a Memorandum of Understanding (MOU) signed by the agencies. Dr Michael Maguire, the Police Ombudsman for Northern Ireland, told the Committee that this MOU allowed the oversight agencies to support each other, for example, when serious allegations might have been made against a senior member

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16 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 16 April 2015.

17 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Report on Misconduct and Related Issues in the Corruption and Crime Commission*, 10 June 2015.

18 Corruption and Crime Commission, *Report on an Administrative Matter Relating to the Functions of the Commission Pursuant to Section 88 of the Corruption and Crime Commission Act 2003* ("the *Repositioning Report*"), 21 April 2015, p3. Available at: [www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202015/Corruption%20and%20Crime%20Commission%20Repositioning%20Report.pdf](http://www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202015/Corruption%20and%20Crime%20Commission%20Repositioning%20Report.pdf). Accessed on 12 June 2015.

19 Ibid.

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of his staff. The external body would do an independent investigation and then provide their recommendations to him based on what they found.<sup>20</sup>

The Committee recommended to the CCC that it investigate such an arrangement with similar police oversight bodies in other Australian jurisdictions, as such an arrangement might be more speedily put in place than making amendments to the CCC Act.

Noting the PICCC's governance of these matters is a "work in progress", and his stated intention to "provide reports to Parliament... in due course", the Committee will continue to monitor the progress of the PICCC's investigations into the remaining allegations. It also intends in due course to assess the benefit and effectiveness of the secondment provisions available to the PICCC in section 212 of the CCC Act<sup>21</sup> and the implementation of new governance practices and procedures by the CCC.

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20 Dr Michael Maguire, Police Ombudsman for Northern Ireland, *Briefing*, 5 November 2014.

21 AustLII, *Corruption and Crime Commission Act 2003 - Sect 212*, nd. Available at: [www.austlii.edu.au/au/legis/wa/consol\\_act/cacca2003338/s212.html](http://www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s212.html). Accessed on 12 June 2015.

# Appendix One

## Parliamentary Inspector's Report

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### REPORT ON MISCONDUCT AND RELATED ISSUES IN THE CORRUPTION AND CRIME COMMISSION

Sections 199 and 201 of the *Corruption and Crime Commission Act 2003 (WA)*

10 June 2015

#### 1. PURPOSE

The purpose of my Report is to report to the Joint Standing Committee of the Corruption and Crime Commission of Western Australia in respect of the investigation of allegations of misconduct made against officers of the Corruption and Crime Commission, and of related issues, and to make recommendations for amendments to the *Corruption and Crime Commission Act 2003 (WA)*.

Three matters make it appropriate to make my Report now:

- a) On 27 March 2015 the WA Police provided me with a report of their investigation of alleged criminal conduct of Commission officers;
- b) On 21 April 2015 the Commission tabled in the Parliament its report titled 'The Repositioning Report', and
- c) On 28 April 2015 the Hon John McKechnie QC took up his appointment as the Commissioner of the Commission.

#### 2. EXECUTIVE SUMMARY

In July 2013, the Commission notified the Office of the Parliamentary Inspector of the Corruption and Crime Commission of allegations of misconduct made against some of its officers employed in its Operations Support Unit. The allegations were made by officers within the OSU, and related to conduct in the previous few years. As investigations progressed, historic and systemic problems in the OSU were discovered.

During the following year, the OPICCC received from the Commission 22 further notifications of allegations of misconduct made against OSU officers. All allegations were either investigated by the Commission under my oversight, or were removed from the Commission by me and referred to the Police for investigation. The Police

investigations of all but one of the allegations have been completed at the time of this Report, and I am continuing my investigation of other possible instances of misconduct within the Commission arising from the allegations.

The nature of the allegations was dishonesty, improper practices and abuse of statutory powers. The conduct investigated indicated systemic cultural, behavioural and managerial failures within the OSU, and failures by senior Commission officers who, at various times, had executive managerial responsibility for that unit.

The Commission initially intended to investigate all allegations and, where the possibility of criminality was uncovered, to instruct the Director of Public Prosecutions to prosecute those allegations. I rejected the Commission's intention in respect of prosecuting allegations which, in my opinion, after the Commission's initial investigation, disclosed the possibility of criminality. My reason for doing so was to ensure that proper standards of accountability, transparency and objectivity were adhered to.

On 3 December 2013, I referred a number of allegations to the Police for criminal investigation and, if appropriate, prosecution.

Friction subsequently arose between the Commission and the Police when the Commission resisted Police requests for access to documents and to Commission officers whose knowledge the Police believed was relevant to their investigations. The Commission's basis for this refusal was that s 152 of the Act did not permit the certification that disclosure was necessary in the public interest, as was requested by the Police. I disagreed with the Commission's reasoning for resisting the Police requests for information.

This situation generally continued during the following four months, and delayed the Police investigation into suspected criminality on the part of some OSU officers. Eventually, the requests of the Police were largely granted by the Commission.

During the Police investigation of the allegations, the Commission complained to me about the conduct of one of the investigating Police officers towards a Commission officer. The Commission told me that this placed it in a position where, in response, it had to assess the conduct of the Police officer for misconduct or reviewable Police action under the Act. An obvious possibility of conflict arose in these circumstances because the Police officer who was investigating Commission officers would himself be simultaneously investigated by Commission officers.

I have no jurisdiction under the Act in respect of the complaint made by the Commission to me, and the State's integrity statutory framework does not clearly provide a mechanism, or process, by which an objective overseer can protect the



interests of both the Commission and the Police officers concerned. My second and third recommendations below are designed to provide a solution to this problem

During the Police investigations, three Commission officers were dismissed by the Commission, four officers resigned and one senior officer did not have his contract of employment renewed.

At the time of my Report, the Police have charged two Commission officers with criminal offences relating to corruptly falsifying Commission records, and giving false evidence to a Commission examination conducted as part of its investigation of some allegations.

During the investigation of the allegations, the Commission reviewed its procedures within the OSU, and that unit's structure. I maintained oversight of these reviews, which have now been completed, subject to the decisions of the new Commissioner, the Hon John McKechnie QC, and their incorporation into the wider review of the management and administrative processes of the Commission, upon which the Commission has reported to the Parliament by its report titled 'The Repositioning Report'.

### **Recommendations**

I make the following three recommendations:

- 1. The Act be amended to provide the Parliamentary Inspector with the power to certify the provision, in the public interest, of official information to the Police, or to another external investigative body, when the Commission or one of its officers is being investigated for a criminal offence.**
- 2. The Act be amended to provide the Parliamentary Inspector with the function to oversee the investigation of a complaint made by the Commission, or by its officers, about the conduct of an officer of an external investigative agency which is investigating the conduct of the Commission, or its officers.**
- 3. The Act be amended to make it compulsory for the Commission to notify the Parliamentary Inspector of any Commission misconduct investigation which is proposed to be commenced, or which has already commenced, in relation to a Police officer, or an officer of another investigative body, who is investigating the conduct of the Commission, or its officers.**

### **3. THE OSU**

The (now renamed) OSU is a discrete unit of the Operations Directorate of the Commission which operates secretly from premises separate from the Commission's

premises in St George's Terrace. Its function is to provide surveillance and technical services to Commission investigators who are conducting operations.

Mr Craig McGowan was recruited by the Commission from Victoria in 2004 to form the OSU. The Commission in 2013 declined to renew Mr McGowan's contract of employment.

Mr Nic Anticich, Director Operations who held his position from June 2004 to August 2009, was responsible for Mr McGowan and the performance of his professional duties from May 2005 until August 2009.

Mr Robert Sutton, who was Acting Director Operations from August 2009 to February 2013, and who acted as Executive Director between 29 March 2012 and 5 April 2012, and between 30 April 2012 and 13 May 2012 before his resignation, was responsible for Mr McGowan and the OSU during the two periods in which acted as Executive Director.

Mr Michael Silverstone, Executive Director, was responsible for Messrs McGowan, Anticich and Sutton in the performance of their duties during their employment with the Commission and, ultimately, for the organisational environment in which the culture of the OSU was created and maintained by Mr McGowan.

Due to its physical separation from the Commission, the OSU operated largely as a distinct body from its inception and during the period when the conduct with which my Report is concerned, occurred:

- its location was kept secret from almost all other Commission officers, as are its officers' identities;
- many of its operating policies and procedures were separate from those which govern other Commission officers;
- its officers had extensive business and private use of surveillance vehicles hired, or purchased, by the OSU to carry out the unit's operations;
- its officers acquire and use assumed identities, evidenced in various ways, including driver's licences issued under false names, addresses and dates of birth. Some officers had multiple such driver's licences issued to them, and
- monies were and are kept at the OSU to reimburse its officers for expenses incurred in the fulfilment of their operations.

As a consequence of the review of the OSU conducted because of the events giving rise to my Report, the Commission renamed the OSU the Investigation Surveillance Service in 2014. However, for the purposes of my Report, the unit will be referred to as the

OSU. The work done by the Commission to remedy the governance and financial accountability issues which have arisen, as I understand it, is discussed in Part 9 of my Report.

#### **4. THE ALLEGATIONS**

The allegations made against the relevant OSU officers since July 2013 to the time of my Report were:

1. the theft of \$1000 of Commission funds in May 2011, the making of false entries in records to conceal the theft, and the giving of false sworn testimony to an Acting Commissioner during an investigation into the allegation;
2. the theft of glasses from hotels at which a number of OSU officers had been drinking;
3. the improper interference in a Commission tender procurement process for the purchase and installation of telecommunications interception systems;
4. the making of false entries in records representing that officers were working when they were fishing, and the unlawful claiming of meal allowances during this activity;
5. the improper interference with a personnel employment selection process;
6. the improper interference with a WAPOL investigation by holding property on behalf of a Police officer against whom a search warrant was being executed by officers of the Police Internal Affairs Unit;
7. the falsification of meal claim allowances during a surveillance operation;
8. the misuse of an assumed identity in a private commercial transaction;
9. the repair of a privately-owned motor vehicle at the OSU premises during working hours;
10. the unauthorised use of OSU equipment while the officer worked in a private capacity in his own business;
11. the false representation to the Commissioner of Police in an application for Special Constable status that the Commission had conducted a thorough integrity check of the applicant officer when such a check had not been conducted. This allegation evolved into a broader investigation after it was ascertained that no such integrity check had ever been conducted by the

Commission in respect of any such application, despite representations to the contrary;

12. the failure of an OSU officer to disclose to the Commission that he had been arrested and convicted of possessing a prohibited drug during his employment in the Commission;
13. a false representation made to the Australian Taxation Office in 2006 about the percentage of time that OSU motor vehicles were used for official and private purposes for the purpose of assessing Fringe Benefits Tax. The false representation significantly underestimated the percentage of time that such vehicles were used for private purposes, and was used for the calculation of tax in ensuing years. The Commission's FBT tax liability for the 2012-2013 financial year only, after negotiation with the ATO, has subsequently been reassessed at \$269,533 (not including penalties and interest). In all the circumstances uncovered by the investigation of this allegation, it is open to consider that the false representation was for individual OSU officers to avoid having to pay a contribution under a vehicle scheme for the benefit of using Commission vehicles extensively for private purposes;
14. the falsification of a motor vehicle logbook representing that an officer was driving in one suburb when the vehicle he was driving was detected by a traffic speed camera in another suburb;
15. the improper purchase of two motor vehicles from a friend who is a vehicle dealer, and the receipt of gifts for the purchases which were shared with other OSU officers;
16. the improper use of a driver's licence obtained under an assumed identity;
17. multiple allegations received from the Police during their investigation of criminal conduct involving the improper use of driver's licences obtained under an assumed identity;
18. the unlawful obtaining of driver's licences under the assumed identity provisions of the Act, and the subsequent accumulation by single OSU officer of demerit points in excess of the statutory limit of 12, but incurred under more than one assumed driver's licence;
19. uneconomic and irregular practices in purchasing and hiring motor vehicles, including the possibility that four-wheel drive vehicles were purchased by some OSU officers due to their private four-wheel drive interests;

20. the unlawful installation of Commission property in the construction of a new private residence of an OSU officer;
21. multiple allegations of favouritism in recruitment processes for employment with, and promotion in, the OSU;
22. multiple allegations of bullying, sexism, harassment and racial discrimination by OSU officers against colleagues, and
23. officers dissuading other officers from cooperating with the Commission's investigation of the allegations.

At the time of my Report, some allegations remain the subject of investigation by me and by the Police. The resolution of these investigations will be reported in one or more further reports which will be tabled with the JSC at the appropriate time.

## **5. MANAGEMENT OF THE INVESTIGATION PROCESSES**

### **The Commission's internal misconduct investigations**

After the Commission notified me under s 196(4) of the Act on 18 July 2013 of various allegations, I met with Commissioner Macknay QC and other senior Commission staff on a number of occasions, and it was decided that the most appropriate course of action was for selected senior Commission investigators, under my oversight, to conduct preliminary investigations into the allegations.

During this investigation process the Commission reported to me regularly and, upon receipt of an investigation report, I made my final assessment under s 196(4) of the Act as to whether the allegation would remain with the Commission for further determination, including the imposition, where necessary, of remedial disciplinary action, or whether I would remove the allegation from the Commission under s 196(5) for further investigation and determination.

Any disciplinary action to be taken by the Commission against any Commission officer was first communicated to me so that I oversaw this process to ensure its effectiveness and appropriateness.

This basic framework of investigation and oversight was subsequently extended to the other allegations as they were received during the following period up to the making of my Report.

### **My referral of allegations to the Police**

For the purposes of objective accountability and transparency, I decided from the outset that an allegation in relation to which the Commission's preliminary investigation provided apparently credible evidence to raise a reasonable suspicion of

criminality by a Commission officer, should not be investigated and prosecuted by the Commission, but by the Police.

On 3 December 2013 and 1 July 2014, when the preconditions just described were met, I removed some allegations from the Commission under s 196(5) of the Act and referred them to the Police under s 196(3)(f) and (g) for investigation and, if appropriate, prosecution.

### **The position adopted by the Commission**

The Commission did not agree with my decision on 3 December 2013 to refer some allegations to the Police for investigation and prosecution. When I first met with Commissioner Macknay QC and other senior Commission officers about the allegations in July 2013, they said to me that the Commission intended to investigate the allegations and, where evidence of criminality existed, the Commission would assemble a brief of evidence.

That brief of evidence would then be forwarded to the Director of Public Prosecutions for advice as to whether the Commission should lay charges. They said during our meeting that the proposed approach was how similar instances of suspected criminality within the Commission had been addressed in the past.

Upon subsequent enquiry, however, I discovered that the only instance recorded by my office in which criminal proceedings were commenced against a Commission officer, was when former Parliamentary Inspector, Mr Malcolm McCusker QC, oversaw an internal investigation of the conduct of Acting Commissioner Ms Moira Rayner in 2005. In September of that year, Mr McCusker QC referred that internal investigation to the Commissioner of Police for criminal investigation and prosecution (both of which subsequently occurred).

After I rejected the Commission's suggestion, the Commission suggested that I should investigate those allegations, if necessary, with the assistance of Police officers who could be seconded to my office specifically for that purpose. I also rejected that suggestion.

After I referred certain allegations to the Police on 3 December 2013 (and informed the Commission of it), Deputy Commissioner Dawson of the Police wrote to the Commission on 12 December 2013 requesting access to a list of documents and forensic material which were considered to be relevant to the Police investigation of those allegations. He explained to the Commission that this approach was preferable to executing a search warrant on its premises to obtain those documents.

Deputy Commissioner Dawson also suggested to the Commission that, should it be concerned about the sensitivity of any documents sought, he and Commissioner Macknay QC should meet to discuss the matter.

In a letter to me dated 16 December 2013, Commissioner Macknay QC said that the Commission considered that some documents requested by the Police were unrelated to the allegations I had referred, and consistent only with an intention on the part of the Police to conduct a 'general audit' of the OSU. He added that the production of some (unspecified) documents by the Commission would be destructive of, or extremely damaging to, the Commission's ability to oversee the Police. He described as 'faulty' the Police view that it could obtain and execute a search warrant on the Commission to obtain the documents requested.

I replied to Commissioner Macknay QC's letter on 7 January 2014. As to the matters then under discussion, I said:

1. *I have made a number of specific referrals of allegations notified to me by the Commission and removed to my office. I have taken that course where there has been established to be reliable information of serious misconduct by way of the possible commission of criminal offences, offences against the Act, or otherwise. Those referrals have been for the purpose of further police investigation and, where appropriate, prosecution by ordinary criminal processes. I will continue to take that course where further matters are notified to us by the Commission, after investigation by the Commission under my oversight;*
2. *Where the police become involved in that way, I retain an interest by way of information oversight of the police investigations, but they are otherwise to be carried out by the use of the ordinary powers of police investigation and, as I read the Act, it has nothing to say about the powers available to be exercised by the police. They are not subject to my direction, although I retain the power to make the determination of misconduct and exercise my statutory powers in that regard as required;*
3. *The point is, although the police become involved at my behest, the direction and scope of their investigation is a matter for them. If they choose to seek information about matters suggested by their inquiries that reveal other lines of investigation outside my referral, their capacity to pursue those lines of inquiry will depend upon their receipt of your cooperation and that of officers of the Commission, or upon their use of otherwise available statutory powers. I know of no provision of the Act which gives the Commission and its officers immunity from the use of such powers;*

4. *All of the above is concerned with matters which come to me initially under s 196 of the Act, but in my view the outcome may be the same if the police discover some matter in the course of their investigations which they think proper to bring to my attention outside the statutory processes discussed above; and*
5. *I am concerned with matters of misconduct on the part of officers of the Commission. I have an original function or statutory duty in that regard under s 195(1)(b) and I have all necessary powers, including referral to an agency such as the police, under s 195(2) and s 196(3)(f) and (g). Without wishing to prejudice any such matter, my inclination would be to make referrals to the police to secure consistency in the manner in which such matters are to be investigated and, where necessary, prosecuted.*

Commissioner Macknay QC replied by letter on 14 January 2014, saying that s 152 of the Act is indeed a section which gives the Commission and its officers the immunity just described. His reasoning was:

1. *s 152(1) defines 'court' as including a person having the power to require the production of documents, and therefore the Police were to be considered a Court for the purpose of that section because they have the power to obtain a search warrant from a Court, and may execute that warrant on the Commission in order to search for, and to seize, documents;*
2. *s 152(1) defines 'produce' as including 'to permit access to', and*
3. *s 152(7) states that an officer or lawyer of the Commission cannot be required to produce or disclose any official information in or to any court except for the purpose of certain prosecutions and disciplinary action, so, therefore, s 152 gave the Commission immunity from cooperatively providing the documents sought to the Police, or to be subjected to a search warrant which provided the Police with the authority to seize them.*

Commissioner Macknay QC added:

4. *the Police do not have a general power to investigate criminal offences committed by a Commission officer discovered during their investigation of the allegations I had referred to them;*
5. *the Police investigation pursuant to my referral of allegations was, in fact, a general audit of the OSU and not an investigation of suspected criminal offences, and that the carrying out of a general audit by the Police would provide them with knowledge of the operational workings of the OSU;*



6. *the Police investigation would be detrimental to the Commission's oversight of the Police;*
7. *the Act creates a veil of secrecy around the Commission's operations which can only be penetrated by the Parliamentary Inspector;*
8. *the Commission was unable to certify that releasing the documents sought by the Police was in the public interest, acting on the advice of senior counsel that such certification could only be related to the specific allegations referred to the Police;*
9. *my referral of the allegations to the Police for investigation, and the Police seeking documents from the Commission that were relevant to their investigation, were an inappropriate method to gain access to those documents;*
10. *the criminal investigation into the allegations should be conducted by me with the assistance of seconded Police officers, and*
11. *the Commission would resist, in the Supreme Court, an attempt by the Police to execute a search warrant.*

I disagreed with Commissioner Macknay QC's reasoning. Parliament has not given immunity to the Commission and its officers from criminal investigation and prosecution by s 152, or any other provision, of the Act.

In a letter dated 16 January 2014 to Acting Deputy Commissioner Duane Bell of the Police, Commissioner Macknay QC repeated his reasoning to refuse access to the documents sought by the Police. He also refused Police requests to interview current and past Commission officers who may wish to provide information to the Police investigation because there would be an 'absence of knowledge as to what information might be disclosed at an interview'.

On 4 February 2014, I wrote to Commissioner Macknay QC and said:

1. *without cooperation between the Commission and the Police, the ability of the Police to conduct its criminal investigation would necessitate its use of coercive powers granted to it under statute and the common law;*
2. *information obtained by the Police from the Commission, whether cooperatively or under compulsion, would not be 'disclosed' by the Commission for the purpose of s 152(2)(b) of the Act because s 3(1) defines 'disclose' to mean publish, divulge or communicate information (that is, by virtue of an act of the officer which was performed voluntarily);*

3. *if, however, the process of the Police investigation involved the disclosure of official information, no offence would be committed by the officer if the Commission certified under s 153(4)(c) and (5) that the disclosure was in the public interest;*
4. *the provision of the information sought by the Police was in the public interest because it was imperative that the Police investigation should ensure that criminal offences of the kind referred by me had not been, and were not being, systemically committed;*
5. *the Police cannot be considered a 'court' within the meaning of s 152(7) of the Act, and*
6. *the Police may not 'misuse' information obtained during their investigation, and such information could not be detrimental to the Commission in the performance of its statutory function of overseeing the Police. The information could only be used for the purpose of any prosecution deemed to be appropriate.*

On 6 February 2014, I met with Deputy Commissioner Dawson and Assistant Commissioner Budge APM of the Police, at their request, to discuss the difficulties being encountered by the Police investigation. The following day I wrote to Mr Dawson and expressed my views as to why I considered Commissioner Macknay QC's reasoning to be erroneous. I said:

*It would obviously be desirable that the Commission certified that the disclosure in the context of this investigation of anything which amounted to official information is in the public interest to ensure, not only that specific allegations of the commission of offences or other serious misconduct by Commission officers are fully investigated and, if necessary, prosecuted, but also that the public has the assurance that the possibility that other like misconduct, or offences, by Commission officers which may have occurred has been thoroughly investigated, exposed and remedied, or that no such systemic problems exist.*

On the same day I wrote to Commissioner Macknay QC informing him of my meeting, and provided him with a copy of my letter to Mr Dawson.

On 10 February 2014, Deputy Commissioner Dawson of the Police informed me that the Police investigation remained delayed because of the position taken by the Commission. He said that the Police had been in contact with current and past Commission employees, and all of them were willing to talk voluntarily to the Police investigators, but had been advised by the Commission of its view of s 152 of the Act.

On 14 February 2014, Commissioner Macknay QC wrote to Deputy Commissioner Dawson and again described the Police investigation as a general audit, and said that any search warrant issued by a Court to the Police to search and seize documents held by the Commission would be resisted in the Supreme Court.

However, Commissioner Macknay QC denied that the Commission had impeded the Police attempts to interview Commission officers, explaining that the Commission simply informs officers who have been approached by the Police of the 'relevant provisions' of the Act, and that the Commission would pay for any independent legal advice its officers may seek. He concluded his letter by suggesting that if the Police provided the Commission with the names of the Commission officers it wished to interview, then he would certify that the interview was in the public interest.

Also on 14 February 2014, Commissioner Macknay QC wrote to me and said that the reiteration in my letter dated 7 February 2014 of the powers of the Police to seek a search warrant to obtain documents sought from the Commission would be regarded by the Police as an endorsement of the reasonableness of that course. He added that I had adopted an 'unusual position'.

On 17 February 2014, Deputy Commissioner Dawson wrote to Commissioner Macknay QC informing him that his position continued to hinder the Police investigation.

On 28 February 2014, Deputy Commissioner Dawson wrote to Commissioner Macknay QC and acknowledged their agreement reached at their meeting on 25 February 2014. That agreement was that the Police would provide Commissioner Macknay QC with a list of Commission officers to whom the Police wished to speak concerning the allegations they were investigating, and that he would consider providing a certification under s 152(4)(c) of the Act that disclosure of official information by those officers was necessary in the public interest where that information related to 'criminal, corrupt or serious misconduct' by Commission officers.

Deputy Commissioner Dawson also said that a general dispensation would provide certainty to any serving or former Commission officers who provided such information that they would not, nor should, feel constrained or prevented from doing so for fear of prosecution under the Act's secrecy provision.

On 6 March 2014, Deputy Commissioner Dawson wrote to me and said:

1. *he had met with Commissioner Macknay QC on 25 February 2014 and voiced his concerns about the lack of information and records being provided by the Commission, and again explained why the materials sought – particularly financial records of the OSU – were necessary for the Police investigation;*

2. *despite Commissioner Macknay QC telling him on 19 December 2013 that the Commission had conducted a thorough investigation of the OSU and had tackled the unit with rigour, an internal financial audit of the unit had only recently been commenced by the Commission, and would take several weeks to conclude, and*
3. *he questioned Commissioner Macknay QC's opinion that it would be an offence under s 152 of the Act for a Commission officer to speak with the Police about corruption, criminal offences or serious misconduct by Commission officers;*
4. *he had asked why Commissioner Macknay QC was only prepared to certify that it was in the public interest for any particular Commission officer to provide information about an allegation of corruption, criminal offences or serious misconduct which had been referred to the Police for investigation, but not to provide information about other incidents of that kind not known by the Police; and*
5. *he said that Commissioner Macknay QC had replied that had Deputy Commissioner Dawson requested a general dispensation so that Commission officers could speak freely to the Police, he would have considered it.*

During the period of this correspondence, some OSU officers whose employment with the Commission ceased had left Western Australia. This further hindered the Police investigation because those officers could not be interviewed before they departed this State.

After this period the Commission gradually released more information to the Police, and more access was gained by the Police to Commission officers. The Police laid charges against two former OSU officers in August 2014, and their investigations into other allegations which I referred to them during the relevant period, continued.

However, on 28 October 2014, Assistant Commissioner Budge wrote to me and said:

1. *on 1 July 2014, I had referred an allegation (allegation 13 referred to earlier in my Report) to the Police for investigation. The nature of the allegation was that false statements were made by senior Commission officers to the Australian Taxation Office in 2005 concerning the Commission's Fringe Benefits Taxation liability;*
2. *on 2 July 2014, the Police wrote to the Commission and asked for access to all documents and materials generated by the Commission to assess and to carry out its preliminary investigation of the allegation;*

3. *on 6 August 2014, the Deputy Director Assessment Monitor and Review in the Commission delivered a single lever-arch folder containing some Commission documents. Upon review of those documents, the Police concluded that additional material, held by the Commission, was required for the Police to conduct its investigation;*
4. *on 4 September 2014, with a view to expedite its investigation, the Police met with Deputy Director and he advised them that he was in possession of further material. He said that upon receiving approval, he would make the materials available for viewing and / or copying;*
5. *on 8 September 2014, the Police delivered a letter to the Commission asking to view all the material the Deputy Director had relied on when making his assessment of the allegation. Later that day, the Deputy Director telephoned the Police and requested a letter specifying the documents the Police wished to view, and that he would make them available;*
6. *on 25 September 2014, the Police delivered a letter to the Commission highlighting the difficulty they have in specifying documents when they do not know the full scope of material gathered, or viewed, by the Deputy Director during his assessment and preliminary investigation. The letter requested the Deputy Director to retrace his footsteps and to gather 'all documents and materials' he had previously viewed so that the Police could examine them. 10 documents referred to by the Deputy Director in his original assessment report, which had not been given to the Police, were highlighted as examples of the documents sought;*
7. *on 21 October 2014, the Commission provided to the Police two DVD's containing emails and a file containing some of the 10 documents mentioned above, but the Police were told that a number of the documents, which were referred to in the assessment report, could not be located; however, searches for them were continuing; and*
8. *at the time of writing to me, despite repeated requests, it was apparent to the Police that not all records that the Deputy Director had used during his assessment and preliminary investigation had been provided to the Police; that without access to those records the Police were unable to determine if the allegation involved criminality on the part of a number of senior Commission officers, and that the piecemeal approach taken by the Commission in providing documents had 'delayed and frustrated' the Police investigation.*

Assistant Commissioner Budge sought my assistance in finding a way to end the impasse. Of course, I made then and make now no judgment about the rights or wrongs of the position adopted by persons on either side of the exchange of correspondence reported to me.

On 30 October 2014, I wrote to Acting Commissioners Shanahan SC and Douglas and provided them with a copy of Assistant Commissioner Budge's letter to me. I said that I had encouraged the Police to renew their contact with the Deputy Director, and reiterated that when I had informed the Commission on 1 July 2014 of my referral of the allegation to the Police I explained that the Police would appreciate the assistance of the Commission to conduct their criminal investigation. I urged cooperation, and suggested that the Deputy Director should not attempt to determine whether or not any particular document he used in his assessments of the allegation would advance the Police investigation.

On the same day, I wrote to Assistant Commissioner Budge, provided him with a copy of my letter to the Acting Commissioners, and said that beyond my suggestion for cooperation there was nothing further I could do to facilitate the Police investigation. On 6 November 2014, the Police informed me that the situation had improved, and that further documents were being supplied by the Commission.

## **6. THE POLICE INVESTIGATIONS**

I have been provided with a comprehensive report of the outcome of various concluded investigations conducted by the Police in relation to matters I referred to them. I do not, for the purposes of my Report, propose to refer to the process adopted, the particular documents examined, or the identity of the Commission officers interviewed as persons of interest or witnesses, in any detail.

Were that to be asked of me, I reserve for consideration at that time the extent to which I may, or should, make specific disclosures having regard to the applicable provisions of the Act: ss 202, 207 and 208 of the Act.

The Police identified the 'investigative constraints' to which I have referred in Part 5 of my Report. They described the position adopted by the Commission as 'an untenable position for investigators in that [the Commission] was seeking to determine what material may or may not be disclosed for a criminal investigation into its own officers'.

The report makes it clear that the Police wished to conduct a full audit of OSU expenditure and to have access to documentation of the OSU which may have established whether the matters referred by me 'were isolated, part of a systematic course of conduct, or may have led to the exposure of other criminal behaviour or serious misconduct'.

The Police report makes the additional, to my mind valid, point that the position adopted by the Commission overlooked the matter of gathering supporting or propensity evidence within the meaning given to that term by s 31A of the *Evidence Act 1906 (WA)*; i.e.: similar fact evidence, or evidence of other conduct of the accused having a probative value in respect of the offence charged.

Further, the refusal of the Commission to provide a general certification that it was in the public interest that disclosure could occur of matters related to the Police investigations, generally described by reference to the nature of the conduct alleged and referred for investigation by me, is said by the Police to have prevented Commission officers who wished to cooperate from disclosing official information.

To the extent that it is necessary here to refer to specific matters investigated by the Police, I do so as follows:

- An allegation of the theft of \$1,000 in May 2011 resulted in two officers being charged with the falsification of a record by a public officer and one of them being charged with giving false testimony. Those matters are being, or have been dealt with in the District Court.
- The alleged theft of glassware from a hotel in June 2011 generally produced no outcome because of insufficiency of evidence. It was considered, rightly in my view, that it was not in the public interest to prosecute the one officer who was involved against whom there was a case.
- An allegation of the fraudulent falsification of travel and meal claims after a fishing trip when officers should have been involved in surveillance work was investigated and led to the conclusion that there was insufficient evidence of the necessary intention to defraud, but there were flaws in the process of record keeping, to which the Commission has attended.
- In respect of one such matter involving a trip to Jurien Bay in July 2013 the matter was referred to the DPP who expressed the opinion that there were insufficient prospects of conviction, and, in any event it was not in the public interest otherwise to prosecute.
- An allegation that Mr McGowan, and another two senior Commission officers who are no longer employed by the Commission were instrumental in causing the Commission to provide false and misleading information to the Australian Taxation Office (ATO) in respect of the fringe benefit tax implications arising out of the private use of Commission motor vehicles, upon investigation resulted in the conclusion that no individual could be prosecuted for making a false or misleading statement contrary to s 115 of the *Fringe Benefits Tax Assessment Act 1986 (Cth)* or under the *Criminal*

*Code*. The Commission negotiated a settlement of its tax liability with the ATO.

- An allegation by a Commission officer that another officer, with aid, had stolen some Commission property was not made out by reason of the lack of direct evidence.

As I have said, there are other matters in respect of which investigations by the Commission under my oversight are continuing, some of them spawned by being brought to the attention of investigating Police and reported to me. I have not removed them from the Commission generally because they are of a kind which does not immediately suggest that there is credible evidence of the commission of a criminal offence.

They are often, however of a kind which reveal systemic problems which are to be addressed by the Commission subject to my oversight; e.g.:- in respect of the acquisition of assumed identities, drivers licences to support such identities, applications for status as a special constable, etc. These are matters upon which I shall report individually when they are ready.

In my view the Police report is a disturbing document in the context of my Report because, although there is nothing to establish that the outcomes might have been different had the Commission not adopted the position it did, but had facilitated the process of investigation by providing the general public interest certification sought by the Police and urged by me, there is clear evidence of the impediments encountered by the Police, in my view unnecessarily.

## **7. CONCLUSION AND RECOMMENDATION**

In summary, as I understand it, the four main reasons upon which the Commission's decision not to provide the Police with access to all documents and to all Commission officers sought for interview after my referral of allegations on 3 December 2013 was made, were:

1. providing details of the operations of the OSU to the Police during its criminal investigation of that unit's officers would compromise the Commission's ability to continue to conduct its misconduct investigations against the Police;
2. when the Commission, or its officers, are the subject of an allegation of criminal conduct which has been referred by the Parliamentary Inspector to the Police, the use by the Police of their powers to investigate crime is confined to the subject-matter of that specific allegation;



3. the secrecy provisions of the Act do not permit the Commission to disclose documents sought by the Police which are beyond the subject-matter of the allegation referred by the Parliamentary Inspector; but
4. the Parliamentary Inspector has the power to fully investigate criminal conduct by the Commission, or its officers.

These four reasons were reiterated, and adhered to, by Acting Commissioner Douglas in the Commission's Report dated 5 November 2014.

#### Point 1

The effect of the Commission's reasoning is to elevate the OSU's surveillance activities, which are carried out in support of the Commission's misconduct function, above the power of the Police to investigate crime. As a matter of general principle, the criminal law in this State extends to all persons. The provisions of the Act do not alter this principle in favour of the Commission, or its officers.

The Commission's argument overstates the position for three reasons. First, the law prevents the Police who investigate suspected criminality within the OSU from misusing any information obtained from the Commission. Secondly, the information sought by Police concerned past – not present – activities of the OSU, so no current operation conducted by the OSU could be compromised. Thirdly, the Police have indicated that they are not interested in the methods used by the OSU, and have nothing to learn from them.

#### Point 2

The Act does not curtail the general powers of investigation granted to the Police by statute and the common law in instances where the Parliamentary Inspector refers an allegation of suspected criminality by the Commission, or its officers to them. The flawed reasoning of the Commission on this point can be simply illustrated by two examples.

In the first example, let us assume that a Police officer, in the circumstances described, is investigating offence A (an allegation referred by the Parliamentary Inspector), and discovers evidence of offence B (for instance, a previously unknown fraud, or an offence confessed by a Commission officer during an interview for offence A). The Commission's reasoning necessarily means that the Police officer is precluded from unilaterally investigating offence B, or indeed from arresting and charging the Commission officer who confessed.

Instead, the Police officer would have to report his suspicion of offence B to the Commission itself, or to the Parliamentary Inspector, for no other government agency in this State has jurisdiction to receive such an allegation. If the Police officer reported offence B to the Commission, the Commission would be obliged by s 196(4) of the Act

to notify the Parliamentary Inspector of the allegation. Upon being reasonably satisfied that offence B may have been committed, the Parliamentary Inspector might then refer the allegation under s 196(3)(f) and (g) to the Commissioner of Police for investigation and prosecution.

If the Police officer reported offence B directly to the Parliamentary Inspector, then upon gaining the same level of satisfaction that offence B may have been committed, the Parliamentary Inspector would take the action under s 196(3)(f) and (g) of the Act just described.

In either instance, the investigation of offence B would return to the Police who first discovered it. Why? Because it should be the Police who investigate suspected criminality on the part of the Commission, or its officers. This is the basic principle which is challenged by the Commission.

In the second example, let us assume that a person goes to the Police and says that he or she has just bribed a Commission officer (or the Commissioner himself) to induce the officer to cease a Commission investigation into his or her activities. Once again, by the Commission's reasoning, the Police officer to whom the bribery was reported could not respond to it, but would have to report the allegation to the Commission, or to the Parliamentary Inspector, and the matter would be dealt with as described above.

Delays inconsistent with the proper and efficient pursuit of justice, and inconsistent with good sense, would inevitably follow.

In neither the Commission's correspondence concerning the OSU, or in its report dated 5 November 2014, did the Commission identify the source of law which curtails the general investigative powers of the Police when the Commission, or its officers, is the object of a criminal investigation. Nor has the Commission explained why such a circuitous journey taken in dealing with the identification of offence B is contemplated by the provisions of the Act, or by the general law.

Contrary to its own position, the Commission has, during the ongoing investigation of the OSU, acted consistently with the principle that the Police are empowered to respond to suspected offences beyond those allegations referred by the Parliamentary Inspector.

For instance, during the Police investigation of the OSU they formed a suspicion that multiple instances of misconduct of a criminal nature may have been committed by OSU officers. These matters involved the improper use of driver's licences obtained by OSU officers under their assumed identities. The Police reported their suspicions to both the Commission and me, and those allegations became the subject of investigation. However, at no time did the Commission suggest that the Police could

not, at law, investigate the matters on the basis that they had not first been referred by me.

Finally, it seems necessary to point out that the Commission itself, in its investigation of a complaint of misconduct, does not consider itself confined by the subject-matter of that complaint when investigating the relevant public officer, or associated officers. There are many examples in which the Commission, since its inception, has widened the scope of its initial investigation of a complaint of misconduct in order to capture other possible acts of misconduct, including criminal offences.

For example, the Commission's Smiths Beach investigation commenced with a single complaint of misconduct against a council. However, over the following years, the Commission continued to commence separate misconduct investigations into a wider range of public officers whose dealings with Messrs Burke and Grill were suspected by the Commission to be improper. Many of those investigations were prompted by covertly obtained information collected by the Commission during its investigation of a different allegation. Some of the investigations included criminal investigations of non-public officers, like Messrs Burke and Grill.

It is, therefore, inconsistent for the Commission to suggest that it may pursue its own suspicions of misconduct, but that the Police do not have the same power when investigating suspected crime by the Commission, or its officers.

### Point 3

It is my opinion that the Commission was able to lawfully exercise the power under s 152(4)(a) and / or s 152(4)(c) of the Act to disclose to the Police the official information which the Police considered relevant to its investigation.

It is inconceivable that a criminal investigation into the conduct of the Commission, or its officers, particularly when the conduct being investigated is suspected of being systemic in nature, could properly be considered subservient to any other circumstance, which may have the effect of delaying, or resulting in the refusal of, the release of information sought by the Police.

Section 152(4)(a) of the Act permits disclosure of official information by a Commission officer 'under or for the purposes of the Act'. One of two main purposes of the Act under s 7A(b) is to reduce the incidence of misconduct in the public sector. The Commission is, of course, part of the public sector, and the Police in the present case were investigating allegations of serious misconduct which had been referred to them under the Act.

A disclosure by the Commission of the information sought by the Police in this case, in my opinion, would clearly have been for a purpose of the Act.

Section 152(4)(c) of the Act permits disclosure of official information by a Commission officer 'when the Commission has certified that disclosure is necessary in the public interest'. It is my opinion that the disclosure of official information by the Commission to assist the Police in its investigation into suspected systemic criminality following upon a referral by the Parliamentary Inspector would be in the public interest.

Additionally, under s 7B(3) of the Act, the Commission must:

*help public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct.*

The position taken by the Commission was, in my opinion, inconsistent with the course which should be taken to advance the achievement of the purposes of the Act.

#### Point 4

There are a number of statutory reasons why the Commission's last suggestion could not be adopted, the most obvious being that the Act does not grant the Parliamentary Inspector, as a function under s 195 of the Act, a criminal jurisdiction.

A Police officer seconded by the Parliamentary Inspector under s 212 of the Act must act under the Parliamentary Inspector's direction within the scope of the functions ascribed by s 195, and not under the direction of the Commissioner of Police.

Authority and power inherent in the officer's status as a Police officer, therefore, cannot form part of the assistance the seconded officer provides to the Parliamentary Inspector. The secondment power of the Parliamentary Inspector is, therefore, merely a convenient means to quickly obtain greater investigative (or other) resources when circumstances demand it (such as an Inquiry conducted under s 197 of the Act).

The Commission's assertion that the matters which underpin its concerns described in Point 1 above would be alleviated if I first investigated the allegations (with or without the assistance of seconded Police officers), and having obtained the documents sought by the Police, subsequently provided those documents to them for the purpose of their separate criminal investigation, are plainly misconceived. The documents and information obtained could only be used by the Parliamentary Inspector in the exercise of a jurisdiction conferred by s 195 of the Act. So much is made clear by s 197(1).

Further, an inquiry by the Parliamentary Inspector under s 197 of the Act is conducted pursuant to nominated provisions of the *Royal Commissions Act 1968 (WA)*, the effect of which, inter alia, is to render inadmissible in proceedings in a court, evidence obtained by me as the Parliamentary Inspector in pursuit of my function, for example, to deal with misconduct on the part of the Commission, or its officers.

The practical effect of the position adopted by the Commission in respect of the Police criminal investigation reveals a flaw in the Act which, in my opinion, requires amendment to eliminate. The flaw is that the Commission's consideration of the position in respect of the operation of the secrecy provisions of the Act may result in delay, or refusal of the provision of, official information under s 152(4) of the Act to the Police, or to another investigative body, which is investigating suspected criminal conduct by the Commission, or one of its officers, albeit, for reasons which may appear to it to require strict adherence to the secrecy provisions of the Act.

When a law enforcement agency is faced with such circumstances, the Act leaves the agency with no alternative but to apply for, and to execute, a search warrant on the Commission to obtain that information. It would be inimical to the effective functioning of the integrity of the system should the situation ever arise where such measures needed to be resorted to.

When the Police are called upon to investigate allegations of the commission of criminal offences by Commission officers upon a referral for good reason by me, the Commission should not be put in the position of making the decision whether the disclosure of office information should be permitted in the public interest.

The issues of effectiveness, timeliness, transparency and independent accountability dictate that in the circumstances described the responsibility should be mine to decide upon the extent of disclosure of official information which is necessary in the public interest.

I therefore make the following recommendation so that the situation described above does not occur again:

- 1. The Act be amended to provide the Parliamentary Inspector with the power to certify the provision, in the public interest, of official information to the Police, or to another external investigative body, when the Commission or one of its officers is being investigated for a criminal offence.**

## **8. THE COMMISSION'S COMPLAINT AGAINST POLICE**

On 11 March 2014, the Commission complained to me about an alleged telephone conversation between an officer of the Commission and a Police investigator who was investigating the allegations of criminality which I had referred on 3 December 2013.

The Commission's complaint was that the Police investigator, in seeking to interview another Commission officer, had exerted improper pressure in an effort to obtain the officer's agreement to be interviewed about a particular document in the possession of the Police officer.

The Commission said that the Police investigator had said to the Commission officer that the officer was not suspected of criminality, but that the document may form part of the Police brief of evidence against the other Commission officer who was being investigated.

In his letter to me, Commissioner Macknay QC said:

*It is the case that if the Police investigation was being carried out by officers seconded to your office, they would be subject to your direction and control.*

*The Commission is now in a position where an assessment will have to be made as to whether a Police officer conducting an investigation into the Commission may have engaged in misconduct or reviewable Police action in the course of that investigation.*

The Commission officer did not pursue the complaint against the Police investigator. The Commission officer who was being investigated by the Police was later charged with criminal offences.

Although Commissioner Macknay QC complained to me about the issue, it is not my function under the Act to receive and to determine a complaint against the conduct of a public officer in this, or in any other, circumstance.

However, the issue may reveal flaws in the State's existing statutory misconduct framework.

Generally where a complaint is made (other than by the Commission) about the conduct of a Police officer, the State's existing misconduct statutory framework gives the Police the power to investigate that complaint. The framework also gives the Commission the power to oversee the Police investigation of that complaint. Should the complaint be of sufficient seriousness, the Commission itself may conduct the investigation, and may exclude the Police from taking any further steps to investigate the complaint.

However, in the unique circumstances of this case in which it was the Commission itself that complained about the conduct of a Police officer who was, at that time, investigating suspected criminality by Commission officers, the difficulties which arose are readily apparent:

- The Act does not provide for a source of oversight, external to the Commission and the Police, to ensure that the interests of both the Police investigator and the Commission are respected and protected, and that the Police investigation process is conducted according to law;

- The Act allows the Commission to complain to the Police about the conduct of the Police investigator, to commence its own investigation into its own complaint, and to exclude the Police from it. That seems to me to be an unsatisfactory process, which might adversely affect the conduct of the original Police investigation.
- The Act permits the Commission to commence an investigation of the Police investigator's conduct without first complaining to the Police. The problem which would then arise is that neither the Police nor the Parliamentary Inspector would be aware of the Commission's investigation, and that investigation would therefore not be subject to any active oversight.

### **Recommendations**

Having regard to my existing statutory powers to have access to the documents and other information of the Commission, my statutory onus to maintain confidentiality over those things, and my powers of compulsion, I make the following recommendations to address the flaw described:

- 2. The Act be amended to provide the Parliamentary Inspector with the function to oversee the investigation of a complaint made by the Commission, or by its officers, about the conduct of an officer of an external investigative agency which is investigating the conduct of the Commission, or its officers.**
- 3. The Act be amended to make it compulsory for the Commission to notify the Parliamentary Inspector of any Commission misconduct investigation which is proposed to be commenced, or which has already commenced, in relation to a Police officer, or an officer of another investigative body, who is investigating the conduct of the Commission, or its officers.**

## **9. GOVERNANCE CHALLENGES**

### **The Commission's new model**

I have referred in passing to the Commission Report, tabled in the Parliament on 21 April 2015, titled 'The Repositioning Report'. I was previously aware of the work being done to produce this document and the associated Commission Report entitled the 'Misconduct Intelligence Assessment of the Western Australian Public Sector' (MIA) which was ultimately tabled on 26 March 2015.

I had, of course, in relation to the various matters notified to me under s 196(4) of the Act, arising out of the actions of officers in the OSU and otherwise in the Commission, had various informal discussions with the Acting Commissioners in which systemic and governance issues and possible remedies therefor were adverted to. I met with each of

the Acting Commissioners on a fortnightly basis as one of them took up the duties of office from the other.

As the work of making changes to the internal processes of the Commission proceeded towards the finalisation of the Repositioning Report and the MIA I was briefed upon the proposals and generally approved them, although with some reservations which are irrelevant to the purposes of this report.

Suffice it to say that I generally approved the measures proposed to strengthen the Commission's governance and accountability – measures designed to subject discrete units of the Commission's operational capacity to the control of senior management.

Changes were made to provide officers with more concrete and updated guidance in relation to such matters as documentation of work activities, the use of motor vehicles, obtaining and the use of assumed identities, obtaining drivers' licences as evidence of assumed identities, and the like. The governance of some such particular matters is a work in progress upon which it will be more useful, in my view, for me to provide reports to Parliament through the JSC in due course.

However, it is appropriate that I should comment now upon the general structural remedies instituted by the Commission, as described in Chapter, 3 of the Repositioning Report. I have been made aware and have approved the actions generally described in [47] of the Report. They are measures designed to make the various elements or units of the Commission more exposed to central administration and oversight in relation to the exercise of the functions and powers of the Commission, as well as particular remedial measures to improve the governance of the conduct of officers and their financial accountability.

The implementation of this approach can be seen reflected in the use of what are described in section 2.3.4 of the Report as 'multi-disciplinary operational teams', bringing together under the oversight of the Commissioner the various elements of the Commission required to deal with a particular matter, including units concerned with audit, surveillance, evidence gathering, investigation, etc.

It seems to me that if the diverse elements of the Commission responsible for the various aspects of the Commission's work in the performance of its statutory functions are routinely required to do their work subject to more intensive oversight by senior management, the effectiveness of the Commission itself must be enhanced, as must its accountability.

Finally, in this connection, I have been pleased to see that an aspect of the proposals is to strengthen the capacity and independence of the legal section of the Commission. Ready access to reliable legal advice must be of considerable assistance to those officers concerned with operational activities.



## **Some final conclusions**

The number and nature of allegations made against OSU officers in this matter, and the systemic nature of the conduct investigated, revealed a disturbing culture of entitlement and unaccountability in the OSU contrary to the standards and values expected of public officers, particularly those employed by the State's anti-corruption body.

In some instances, the conduct which this culture encouraged was suspected of having violated State, and possibly Commonwealth, criminal laws.

It was Mr McGowan who formed the OSU in 2004; it was he who created, and managed the enforcement of, the practices and procedures of the OSU, and it was he who, as Deputy Director Operations from 2008, had executive managerial responsibility for the conduct of its officers, and for the unit's culture.

Mr McGowan's employment with the Commission concluded during the investigations into the allegations the subject of my Report when the Commission elected not to renew his contract. He returned to Victoria during the Police investigation but an interview (which was electronically recorded) was conducted with him.

He tells me that changes in his employment caused him to be re-located at the Perth office of the Commission away from the OSU in 2008. At that time he was also beset by personal tragedy and was caused to take extensive leave. In those circumstances, he says, he struggled from time to time to perform the duties of his office.

He says that his management style was to maintain an 'open door' policy and to encourage more junior officers to report any concerns to him. He concedes that a group of OSU officers 'guarded their actions' and their responses to the conduct of others, from him.

The conduct the subject of the various allegations made occurred in an organisational environment. Executive managerial responsibility rested not only with Mr McGowan, but also with senior Commission officers. In this respect:

- Mr Nic Anticich, Director Operations from 2004 to August 2009, was responsible for overseeing and managing Mr McGowan from May 2005. Mr Anticich acted on three separate occasions during this period as Executive Director;
- Mr Robert Sutton, Deputy Director Operations from 2004 to his resignation in February 2013, as earlier indicated, acted as Director Operations, and from August 2009, upon Mr Anticich's resignation, he acted, at all times, either in that position or as Executive Director. In his role as Acting Executive Director, Mr McGowan and the OSU reported to him; and

- Mr Michael Silverstone, Executive Director from 2004 to October 2014, was responsible for overseeing and managing Messrs McGowan, Anticich and Sutton, and was ultimately responsible for the organisational environment in which the OSU culture existed.

Reform of the operational and accountability procedures of the OSU will depend on the efficacy of the changes made, as described in the Commission's Repositioning Report and discussed above, together with the leadership of Commissioner John McKechnie QC and his executive management team.

Despite the damaging facts uncovered by the investigations into the allegations described in my Report, a number of points need to be made in respect of the place of the Commission as an integral part of the State's statutory integrity framework, and to recognise the standing and commitment of the vast majority of Commission officers who remain untainted by the allegations investigated, and who uphold the standards, values and principles expected of the State's anti-corruption agency.

Since the Commission referred the initial allegations to me in July 2013, the senior executive group and the Commission investigators appointed to conduct the preliminary investigations have demonstrated commitment and energy in uncovering facts, and in making changes to the procedures of the OSU designed to prevent a recurrence of the conduct with which my Report deals.

Finally, Acting Commissioners Christopher Shanahan SC and Neil Douglas have demonstrated an enormous capacity to deal with the wide-ranging legal and organisational issues associated with these events, and in guiding the Commission through the consequent turmoil until the reform process being undertaken by the Commission can be assessed and driven by the new Commissioner and Executive Director.

**HON MICHAEL MURRAY AM QC**

**PARLIAMENTARY INSPECTOR**

## Appendix Two

### Committee's functions and powers

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On 21 May 2013 the Legislative Assembly received and read a message from the Legislative Council concurring with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.