



**CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

**Report to the
Joint Standing Committee on the
Corruption and Crime Commission with
regard to the Commission's Organised
Crime Function and Contempt Powers**

December 2005

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**CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

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Speaker
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Parliament House
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Dear Mr President
Dear Mr Speaker

**REPORT TO THE JOINT STANDING COMMITTEE ON THE CORRUPTION
AND CRIME COMMISSION WITH REGARD TO THE COMMISSION'S
ORGANISED CRIME FUNCTION AND CONTEMPT POWERS**

In accordance with section 88 of the *Corruption and Crime Commission Act 2003*, I am pleased to present a special report into a general policy matter relating to the functions of the Commission, namely the Commission's organised crime function and punishment of contempt power.

I recommend that the report be laid before each House of Parliament forthwith pursuant to section 93 of the *Corruption and Crime Commission Act 2003*.

Yours sincerely



Kevin Hammond
COMMISSIONER

7 December 2005

PURPOSE

The purpose of this report is to identify the Commission's concerns about its:

- organised crime function and to recommend legislative changes to clarify and enhance this function; and
- powers to deal with contempt and to recommend legislative changes to enhance its ability to deal effectively with contempt of the Commission.

COMMISSION'S OPINION

It is the Commission's opinion that the intent of the Parliament with regard to organised crime, as represented in the CCC Act, cannot be achieved under the current legislative arrangements. It is the Commission's view that legislative amendment is the preferred course.

RECOMMENDATIONS

The Commission respectfully recommends that the Joint Standing Committee on the Corruption and Crime Commission:

- (1) recommends to the Parliament that the CCC Act be amended to permit the Commission to conduct organised crime investigations in joint task force arrangements with Western Australia Police and other law enforcement agencies;
- (2) recommends to the Parliament that the definition of organised crime in the CCC Act be amended; and
- (3) recommends to the Parliament that the contempt powers in the CCC Act be amended in light of the Court of Appeal decision in *Hammond v Aboudi*; *Hammond v Sorani*.

EXECUTIVE SUMMARY

There has been a growing awareness of the threat from organised crime in Australia since the early 1970s.

This threat has come from criminal networks, ethnic-based crime groups and other criminal groups such as motorcycle gangs and paedophile networks.

Their activities include the illicit drug trade, many aspects of the sex industry, vehicle rebirthing and the illegal exploitation of aquaculture products.

An evolving characteristic of organised crime is that groups that used to operate independently, and often competitively, now increasingly work collaboratively, and across state borders, not unlike legitimate businesses. This increased level of complexity and sophistication has increased the threat of organised crime and made successful investigation and prosecution more difficult.

Organised crime is characterised by opportunism and the capacity to shift resources swiftly while using apparently lawful enterprises to disguise their activities. It can be a major cause of serious misconduct and corruption by public officers.

Traditional policing methods have often proved ineffective in countering organised crime. Experience in other jurisdictions has shown that organised crime needs to be combated by:

- exceptional powers such as those granted to the Corruption and Crime Commission;
- comprehensive intelligence gathering; and
- adequate staff devoted solely to the task.

The threat of organised crime was recognised by the Parliament of Western Australia when it passed the Act. The first of its two purposes was “to combat and reduce the incidence of organised crime”. The Act prescribes the role of the Corruption and Crime Commission (the Commission) in this.

However, the Commission has been unable to fulfil its role in this area due to several factors.

- First, the Commission is not permitted to investigate organised crime under the current arrangements. Its statutory purpose is to grant exceptional powers to the police on a case-by-case basis to enable them to investigate organised crime more effectively. The powers can be granted by the Commission following an application by the Commissioner of Police.

However, since January 2004 the Commissioner of Police has made only one fortification removal application to the Commission, which is currently subject

to review in the Supreme Court, and one exceptional powers application under the CCC Act.

The Commission understands that the reasons why the Commissioner of Police has not sought more frequent access to the exceptional powers under the organised crime function include the complexity of both the Act's definition of organised crime and the special skills required in applying effective coercive powers in inquisitorial examinations under the auspices of the Act.

- Second, the definition of organised crime under the Act makes it difficult to investigate organised crime as the exceptional powers cannot be invoked unless:
 - there are at least two persons reasonably suspected to have committed or to be committing two or more Schedule 1 offences (a Schedule 1 offence is a serious offence under the *Criminal Code, Firearms Act 1973* or the *Misuse of Drugs Act 1981*); and
 - there is a requirement that the offences “are committed” rather than likely to be committed; and
 - there is substantial planning and organisation involved in the offences.

The serious disadvantages attendant to this approach include:

- no action under the Act can be taken against an individual person committing two or more Schedule 1 offences;
 - no action can be taken even if there is a reasonable suspicion that an offence is likely to be committed; and
 - offences such as bribery, corruption, fraud, theft, illegal gambling and tax evasion, to name a few, are excluded from the definition.
- Third, on 3 November 2005 the Western Australian Court of Appeal delivered its decision in *Hammond v Aboudi* and *Hammond v Sorani* (the contempt decision). It found that the Commission had failed to establish that two witnesses in an organised crime examination had committed contempt under s160(1)(b) of the *Corruption and Crime Commission Act 2003* (CCC Act) by failing to answer questions.

This is a significant obstacle to the use of the exceptional powers under the Act as the capacity of the Commission to compel responses to questions is seriously weakened.

While State Counsel has identified three grounds for appeal, the Commission is not inclined to pursue redress through the High Court due to the relative complexity, high cost and likely delay attendant to such an action.

Rather, the Commission seeks legislative amendment to the CCC Act in order to clarify and strengthen the powers to deal with organised crime examinations.

An Investigative Organised Crime Function

While traditional policing agencies deal with organised crime, it is but one component of a very broad spectrum of work. Organised crime investigations, by their very nature, require a long-term focus and investment. However, there is constant pressure on the police to apply resources to meet urgent day-to-day policing needs. A very strong case exists for establishing a working arrangement that offers the opportunity to 'quarantine' resources for the long-term protracted investigations that are the trademark of effective organised crime investigations.

Various Australian governments have created crime and anti-corruption commissions with exceptional powers to address the limitations of traditional law enforcement measures in combating organised crime as identified in the findings of a number of Royal Commissions. These crime and anti-corruption commissions are not intended to be alternative police forces.

Experience has shown that combining traditional police investigative techniques with the use of exceptional powers has facilitated more effective, proactive investigations into organised crime than has been achieved by traditional criminal investigatory methods. Successful investigations using these means have helped reduce the threat posed by organised crime. The exceptional powers provided to other crime commissions have also been used to investigate complex, serious crimes that have been difficult to solve.

However, the CCC Act does not enable the Commission to participate in organised and serious crime investigations. The Commission has previously identified this as a concern in its 2004-5 Annual Report.

PART 1: THE ORGANISED CRIME ENVIRONMENT

Since the early 1970s, in Australia, there has been a growing awareness of the threats from organised crime, particularly the insidious growth in the illicit drug trade.

According to the Australian Institute of Criminology the increasing awareness occurred around the same time that new criminal milieux began to emerge in some of the smaller capital cities in Australia. These groups remain smaller than the well established criminal networks in the major cities of Sydney and Melbourne.

Organised crime in Australia is now characterised by a combination of:

- local criminal milieux which are typically loosely structured groups involved in a variety of criminal activities that are often interwoven with legitimate enterprises. (These are often referred to as Established Criminal Networks (ECNs));
- networks or 'secret societies' emanating from other countries which have connections in Australia, and are characterised by shared cultural characteristics such as ethnic backgrounds, birthplace or language; and
- other criminal groups, such as paedophile networks and motorcycle gangs.

An evolving characteristic of organised crime is that groups that used to operate independently, and often competitively, now increasingly work collaboratively, and across state borders, not unlike legitimate businesses. This has significant ramifications in terms of the level of threat and complexity that organised crime now represents. The desire to legitimise profits often sees organised crime groups using real businesses to mask their illegal activities and eventually in some cases moving from crime to legitimate business.

The Western Australian Environment

Organised crime in Western Australia manifests in a number of forms and is engaged in criminal activity across a number of areas.

Perhaps the most visible form of organised crime are the motorcycle gangs and the 'street gangs'. These gangs are obvious through their use of colours, patches, club premises, and even a dress code. Some gangs are based on ethnic background. At the other end of the spectrum of organised crime groups are the much less visible and smaller in number groups involved in paedophilia and child sex crimes.

There are also a number of Established Criminal Networks, that have their genesis in ethnically based crime groups.

The products and services marketed by organised crime groups range in nature and variety. Organised crime is involved in the manufacturer or cultivation and supply of

illicit drugs, many aspects of the sex industry and sexual servitude, illegal exploitation of aquaculture products (marron, lobster and abalone) and vehicle re-birthing to name a few.

Some of these groups are based in Western Australia but their illicit activity is not confined to this jurisdiction. Similarly, interstate groups can operate in Western Australia. Geography and traditional jurisdictions work in favour of organised crime and market forces influence greatly where and how it operates. The best defence is to create an environment that is hostile and at the very least no less hostile than that of neighbouring jurisdictions. Organised crime will gravitate to those locations in which it can operate with fewer hindrances. It is interesting to note that motorcycle gangs are an international phenomenon and certainly are based in every Australia state, yet it would appear that both their profile, suspected criminal activity and prevalence seem much greater in Western Australia.

Organised crime in Western Australia continues to grow and evolve. It is characterised by opportunism and the capacity to shift resources swiftly while exploiting apparently lawful enterprises to disguise their activities. While traditional policing techniques are effective they are constrained by the pressure of dealing with other criminal activity, that results in resource shortages and, consequently, can result in a tendency to focus on shorter term, reactive investigative strategies.

Experience has shown that proactive, longer term operations specifically targeting criminal networks and using police investigative techniques combined with the special powers available to crime commissions, represent a far more effective approach to countering organised and serious crime.

Misconduct and Organised Crime

More often than not organised crime involves the corruption of public sector officers. Consequently, targeting organised crime enables the identification of public officers who are acting corruptly. This view is reinforced by the fact that the two most significant investigations of high-level corruption undertaken by the Commission were in relation to a ministerial chief of staff and a local government employee and former mayor. In both these cases, these matters were brought to the attention of the former Anti-Corruption Commission as a consequence of organised crime investigations undertaken by another agency that gave rise to suspicion about their conduct. In the course of investigations into organised crime in Western Australia, the activities of both these officers were identified and then formally disseminated. Had these organised crime investigations not occurred then in all likelihood the individuals in question and their allegedly corrupt activities would not have been discovered.

The Commission requires the ability to investigate organised crime in order to fulfil its misconduct function. The barrier created between the two functions by the CCC Act is a contrivance at law that does not acknowledge the reality that organised crime and public sector corruption enjoy a symbiotic relationship.

PART 2: CURRENT CCC SUPPORT TO POLICE ORGANISED CRIME INVESTIGATIONS

Section 7A of the CCC Act, lists as the first of its two main purposes:

to combat and reduce the incidence of organised crime

However, the Commission cannot itself investigate organised crime under the current arrangements. It achieves its statutory purpose by granting exceptional powers to the police on a case-by-case basis to enable the police to more effectively investigate organised crime.

The provisions in Part 4 of the CCC Act, “Organised crime: exceptional powers and fortification removal”, are taken from the *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* (Exceptional Powers Act).

The Exceptional Powers Act was introduced in response to the Hancock and Lewis bombing and had motorcycle gang activities as its focus. It commenced on 15 July 2002 but between then and the time of its repeal on 1 January 2004, the Commissioner of Police made only one (unsuccessful) application under that Act, which was for the issue of a fortification warning notice.

The Commissioner of Police has made only one fortification removal application to the Commission (which is currently subject to review in the Supreme Court), and one exceptional powers application under the CCC Act (which was the subject of the contempt proceedings discussed above).

The Commission understands that the reasons why the Commissioner of Police has not sought to access the exceptional powers under the organised crime function more frequently include the complexity of the definition of organised crime, the complexity of conducting inquisitorial examinations, and some confusion concerning the respective roles of the Commissioner of Police and the Commission.

The Commission has spent considerable time discussing the CCC Act with senior police officers responsible for organised crime investigations attempting to find an effective way to apply it. The Commission’s view is that the police have found the different approach required for the effective use of the organised crime powers uniquely different to the police preferred method of investigation.

While the CCC Act constrains the Commission from actively participating in conjunction with the police in organised crime investigations, the police have sought operational support assistance from the Commission. The Commission has provided limited assistance by means of having some of its officers sworn as special constables under Section 35B of the *Police Act 1892*. This has assisted the police to meet some operational requirements but is irregular and could be regarded by some as being beyond the lawful scope of the CCC Act. The Commission would prefer to formalise these support arrangements through amendment to Part 4 of the CCC Act to enable it to participate in joint task forces with the police.

In its 2004-2005 Annual Report, the Commission concluded that an amendment to the CCC Act is required to permit the Commission to work in joint task force arrangements with the police.

The police, in a letter to the Commission dated 13 October 2005, advised its full support for the Commission's recommendations in its Annual Report concerning organised crime. Deputy Commissioner Dawson, writing on behalf of the Commissioner of Police, also said:

In respect of the comments in regard to the problematic thresholds and definition of 'organised crime', the legislation in the Commonwealth and Queensland Statutes do provide suitable models to base amendments to the Corruption and Crime Commission Act 2003. In essence, the Western Australia Police consider legislative amendment is both necessary and important in combating organised crime.

The opportunity for this agency to also work collaboratively with the Corruption and Crime Commission in joint task forces is also welcomed.

Under the current legislative arrangements, the CCC Act is not achieving its purpose. The paucity of exceptional powers applications and findings is indicative of the obstacles the current form of the CCC Act presents.

PART 3: AN INVESTIGATIVE ORGANISED CRIME FUNCTION

Within Australia a number of Royal Commissions have been established to investigate and report on organised crime. Emerging from these commissions has been the recognition that traditional policing methods were inadequate and new arrangements for combating organised crime were needed.

Various Australian governments have created crime and anti-corruption commissions, with exceptional powers, to address the inadequacies of traditional law enforcement measures in combating organised crime. These inadequacies have been identified in the findings of a number of Royal Commissions. These crime and anti-corruption commissions are not intended to be alternative police forces.

While traditional policing agencies deal with organised crime, it is but one component of a very broad menu of work for them. Establishing alternative working arrangements offers government an opportunity to 'quarantine' resources for the long-term protracted investigations that are the trademark of effective organised crime investigations, rather than having these resources dispersed, responding to day-to-day policing issues. Organised crime investigations by their very nature require a long-term focus and investment.

Experience has shown that the combination of traditional police investigative techniques with the use of exceptional powers has facilitated more effective

investigations into organised crime than that achieved by traditional criminal investigatory methods. Successful investigations have helped reduce the threat posed by organised crime. The exceptional powers provided to the commissions can also be used proactively in an investigation into organised crime.

The particular exceptional powers include:

- power to conduct coercive hearings, including *in camera hearings*;
- power to compel the production of documents and things; and
- power to search premises and seize items without a warrant.

To date no Australian police force has been given the coercive exceptional powers that Royal Commissions or standing commissions have been granted.

The Federal Government and all states and territories maintain traditional police forces as their prime law and order resource.

Some jurisdictions have, however, sought to increase the effectiveness of their police services in meeting the threats from organised crime by establishing standing commissions provided with exceptional coercive powers. This dual approach has provided those jurisdictions with an enhanced organised and serious crime investigative capacity.

This dual approach ensures that the coercive exceptional powers are restricted to a specific organisation rather than being generally available to a police service. This provides an important safeguard for the community.

Accordingly:

- | |
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| <p>(1) The Commission recommends that the CCC Act be amended to permit it to conduct organised crime investigations in joint task force arrangements with Western Australia Police and other law enforcement agencies.</p> |
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PART 4: THE CCC ACT'S DEFINITION OF ORGANISED CRIME

The CCC Act's definition of organised crime, taken directly from the Exceptional Powers Act, does not sit well with the reality of criminal investigations.

The effectiveness of the organised crime function is constrained by the definition of organised crime and the limited list of offences in Schedule 1, both of which were imported directly into the CCC Act from the *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* (the Exceptional Powers Act).

The Commission has, from the start, had reservations about the definition of organised crime, which is so circular and difficult to fathom that, in the Commission's view, the implementation of the organised crime function has always been vulnerable to legal challenge.

The Schedule 1 offences actually reflect motorcycle gang culture and not the full range of offences in which established criminal networks engage.

The definition of organised crime and the current list of offences do not fit with the modern organised crime environment. This prevents the proper investigation of the range of offences in which organised crime elements engage.

In introducing the definition to the Parliament in 2001 in the Exceptional Powers Bill, it is evident from Hansard that the Government deliberately chose to fix a high threshold for invoking the special powers. It requires at least two persons reasonably suspected to have committed or to be committing two or more Schedule 1 offences.

The provision does not allow for a reasonable suspicion that an offence is likely to be committed. It is difficult to apply because the definition of "organised crime" speaks of offences that "are committed" and for each of which there is substantial planning and organisation. However, a sole person can commit Schedule 1 offences (not involving planning and organisation as an element), and consequently the notion of conspiracy, that is indicative of organised crime, does not feature.

The CCC Bill was introduced in the Legislative Assembly on 15 May 2003 and was the repository of the provisions in the Exceptional Powers Act, allowing police to access special investigative powers in organised crime investigations, as again defined by reference to two or more persons associated together in pursuit of two or more scheduled offences that have been committed or are being committed.

On 26 June 2003, the CCC Bill was referred to the Legislative Council's Standing Committee on Legislation (the Committee).

The Committee reviewed the recommendations made by the Western Australia Police Royal Commission (PRC) recommendation in its Interim Report and considered schemes in other states. The Committee said (page 60) that the advice of the Crown Solicitor (now State Solicitor):

inadequately explains why the (PRC) recommendation that the CCC have an investigative crime function has not been adopted.

The Committee recommended (page 63) that:

the Government seriously consider amending the (CCC Act) to provide that the (CCC) is to perform a function of investigating serious and organised crime and that if the Act is not amended the issue be specified as an issue to be addressed in the statutory review of the Act.

The CCC's position had also been advocated by the PRC.

In its Interim Report, issued in December 2002, the PRC recommended that the proposed new anti-corruption body have an investigative crime function to investigate serious and organised crime (page 105). The PRC, through its Round Table Conference consultative process, considered the Crime and Misconduct Commission, Independent Commission Against Corruption, NSW Corruption Commission and Police Integrity Commission models.

The PRC discussed the arguments for and against the proposition that the new body have the capacity to investigate organised crime in its Interim Report at pages 45 to 47.

The PRC noted (page 54) that:

there was strong support from the interstate agencies for an organised crime function for the oversight agency and "little disagreement" about this in the Conference.

In its Final Report, delivered to the Governor on 30 January 2004, and tabled in the Legislative Assembly on 2 March 2004, the PRC commented (Volume 2, Part 2, page 304) that the Government's approach of transferring the Exceptional Powers Act provisions to the CCC;

does not fully achieve the integration of the investigation of corruption and serious crime envisaged, but it does provide a legislative framework for a workable partnership between the CCC and the Commissioner of Police in relation to the investigation of organised crime.

However, the conclusion concerning a workable partnership has not occurred in practice.

The PRC said further (page 304):

However, the most substantial difficulty remaining is the jurisdiction in which the powers may be exercised. Section 3 of the (CCC Act) defines organised crime as being:

activities of 2 or more persons associated together solely or partly for purposes in the pursuit of which 2 or more Schedule 1 offences are committed, the commission of each of which involves substantial planning and organisation.

The definition of organised crime is limited and unduly restricts the exercise of the powers of the Corruption and Crime Commissioner. The precondition that there must exist two or more persons committing two or more Schedule 1 offences prohibits the investigation of serious offending by a single person, who may not be part of an organised crime group.

At the time of finalising this Report, one application under the (Exceptional Powers Act) had been made, which seems remarkable given that the Act has been law for over 18 months. That would seem to indicate that the legislation has been of limited utility. The New South Wales Crime Commission, which was the successful model for the Royal Commission recommendation in the Interim Report, has been able to lend its powers to the New South Wales Police in relation to the investigation of serious unsolved murders, and other serious individual offences, because of the wider and more flexible definition in the New South Wales Crime Commission Act 1995.

It is recommended that the (CCC Act) be amended by broadening the scope when the CCC may exercise the exceptional powers to encompass instances when a single s. 5 offence has been committed, without the requirement that there be two or more persons involved.

Motorcycle gang activities, while a continuing criminal threat, are but one part of the organised crime threat. There are new and emerging challenges that require relevant bodies to take a fresh look at the best way to address these threats to the community.

It is inevitable that public officers and others will, at times, engage in organised crime. The interaction between public officers and non-public officers involved in organised crime causes some investigative difficulties for the Commission. The Commission is currently involved in a number of such investigations some of which are made more difficult when police officers are the subject of investigation and are engaged with organised crime elements.

Although the Commission is able to work effectively with the police, the Commission and the police could together investigate more effectively if both had the same enhanced powers to apply to the investigation of all individuals involved, whether they be public officers or non-public officers. In the current circumstances the Commission can wield very considerable powers in relation to quite minor matters in the case of public officers which may not be applied to non-public officers even in the most serious of circumstances.

Further, the inability of the Commission to participate in investigations denies the State access to a considerable resource in applying inquisitorial investigative techniques in partnership with the police. The transposition of the Exceptional Powers Act provisions into the CCC Act has created tensions and confusion as to its intent and meaning of the definition of organised crime within Part 4 of the CCC Act.

Accordingly:

(2) The Commission recommends that the definition of organised crime in the CCC Act be amended.

PART 5: OTHER CONCERNS ABOUT THE ORGANISED CRIME FUNCTION

There are a number of other concerns in relation to the organised crime function provided for in Part 4 of the CCC Act. These give rise to uncertainty as to the authority and role of the Commission with regard to the conduct of examinations related to its organised crime function.

- First, Her Honour Justice McLure, at paragraph 40, in her reasons in the Court of Appeal contempt proceedings regarding Mr Aboudi and Mr Sorani casts, in passing, some doubt about the validity of their examinations by the Commission.

The court made the comment that the Commission's statement as to scope and purpose of the first and second examinations raises questions about the validity of those examinations. However, the court also commented that as the issue was not brought up in the hearing and in light of the court's conclusion on the application, it was unnecessary to take the issue any further.

What the court seemed to be suggesting in paragraph 40 is that statements made by the Commissioner to the witnesses at the commencement of each of the first and second examinations in relation to the scope and the purpose of the investigation were such that they may have rendered the examinations themselves invalid.

The court's concern appears to be in relation to the reference in the Commission's statements to "other offences" which, in the court's view, may have taken the examinations out of the scope permitted by section 47 of the CCC Act because the subject matter upon which the witnesses were examined was not strictly relevant, that is, they did not relate to the investigation of the nominated section 5 offences.

- Second, the Commission's view is that the judgement adopts what appears to be an overly restrictive approach in defining what matters may be canvassed at an organised crime examination and has not acknowledged section 49(2) of the CCC Act, which provides:

a person representing the Commissioner of Police may, so far as the Commission thinks proper, examine any witness summoned under an organised crime summons on any matter that the Commission considers relevant to the investigation.[emphasis added]

- Third, the Court, at paragraph 43 of its judgment, clearly had the impression that the Commissioner of Police was not represented, whereas in fact he was represented by State Counsel. This is a process issue that needs and will receive attention.

- Fourth, in terms of the fairness of the examination procedure, the Commission maintains that the two examinations were conducted with fairness to the two witnesses in that they were cautioned by the Commissioner repeatedly. The witnesses were extremely confident as to how to conduct themselves in order to frustrate the intent of the hearing process. This devalued the examination process as the witnesses' conduct could not be adequately challenged.
- Fifth, while initially the Commission had sought to advise the police in their preparation for the examinations, State Counsel's strong advice was that the Commission's sole role with regard to these proceedings was more a judicial one, and that it should not engage in the investigative process.

While acknowledging the complexity of these types of examinations, it is the Commission's view that had its officers been directly engaged in the preparation for and conduct of the examinations, the witnesses' response would have been markedly different. This is not to say that witnesses would have definitely responded fully and truthfully to questions asked, but it is the Commission's belief that there would have been stronger grounds for contempt proceedings if the Commission was a participant in the investigation, including any inquisitorial examinations.

The Commission believes that, in relation to organised crime examinations broadly speaking, the issues identified above require attention and there needs to be a shift in emphasis in the CCC Act from its quasi-judicial role to a participative role.

PART 6: CONCERNS ABOUT THE COMMISSION'S CONTEMPT POWERS

On 25 February 2005 the Commissioner of Police applied to the Commission under section 46 of the CCC Act for an exceptional powers finding to enable the police to more effectively investigate two suspected "section 5 offences" connected with events at the Metro City Nightclub on 23 January 2005. The section 5 offences were an offence of intending to cause grievous bodily harm and an offence of attempting to pervert the course of justice, with which Mr Troy Mercanti and Mr John Kizon had, respectively, been charged.

(A section 5 offence is defined as a Schedule 1 offence committed in the course of organised crime.)

The Commission, being satisfied of the matters to be addressed under section 46, made an exceptional powers finding (which finding was not impugned in the subsequent Court of Appeal judgement). This paved the way for the Commissioner

of Police to ask the Commission to summons and examine, on oath, two witnesses, Mr Aboudi and Mr Sorani. Neither Mr Aboudi nor Mr Sorani had been charged with any offences.

The purpose of an organised crime examination is to facilitate the police investigation of a suspected section 5 offence that has been or is being committed.

Mr George Tannin SC, State Counsel, appeared for the Commissioner of Police and asked questions of the two witnesses. At the start of each examination the Commissioner informed the witness that he would be in contempt if he failed to answer any question the Commissioner required him to answer.

After the first round of examinations, in relation to the series of questions put to the witnesses in their respective examinations, the Commission formed a preliminary view that the witnesses had committed contempt under the CCC Act, wrote to the witnesses advising them of this preliminary view and summoned them to attend a further examination.

At the second examinations, the witnesses answered the questions in the same manner.

Through State Counsel, the Commission commenced contempt proceedings by filing an application in the Supreme Court, supported by a certificate under section 163(1) of the CCC Act setting out the details of the actions the Commission considered amounted to contempt. The Commission's application was heard on the papers, with oral submissions, by three judges of the Court, sitting as the Court of Appeal.

The Contempt Decision

The Commission has received clear and firm advice from State Counsel that there are three grounds of appeal to the High Court in relation to the Court of Appeal's findings that the Commission had not established the elements of contempt in section 160(1)(b) of the CCC Act.

In addition to the grounds of appeal identified by Mr Tannin SC, which flow directly from the particular circumstances in the examinations of Mr Aboudi and Mr Sorani, the Commission has two other specific concerns about contempt, highlighted by the Court of Appeal decision.

- First, the Court of Appeal referred to section 163(2) of the CCC Act, which states:

A certificate presented under subsection (1) is prima facie evidence [emphasis added] of the matters certified in it.

The Court did not discuss section 217(3) of the CCC Act, which does not sit comfortably with section 163(2). Section 217(3) of the CCC Act provides:

In contempt proceedings under Part 10, a certificate of the Commission stating any fact relevant to those proceedings is sufficient evidence [emphasis added] of the fact stated.

This raises a difficult and fundamental question about the meaning and effect of the Commission's certificate in a contempt case. This needs to be clarified by legislative change.

- Second, the Commission notes the time that elapsed between the initial examinations in March 2005 and the Court's decision in November 2005. The process was too protracted. Such delays are likely to erode any compelling effect the power to commit may have.

The Commission's view is that it should have the power to itself commit for contempt in an appropriate case, with a power to detain pending any genuine attempt to give true answers. Further, the Supreme Court could have an appeal power and, if minded to do so, could release the contemnor on bail under bail constraints, pending an appeal to the Court. This process would signal a clear message to any person contemplating contempt of the Commission.

Legislative Change Preferred to Appeal

The Commission will not seek special leave to appeal to the High Court, for four reasons.

- First, special leave to appeal is extremely difficult to obtain.
- Second, the delay will be significant. State Counsel's advice is that the initial application for special leave will not be heard before April 2006. If special leave is granted the full hearing will not take place before October 2006 and the Commission would not expect a decision until some time in 2007.
- Third, if special leave were granted it is anticipated that the High Court would require the Commission to indemnify Mr Aboudi and Mr Sorani for their costs. The Commission is not keen on expending its funds in such a manner.
- Fourth, even if an appeal is successful, the outcome would not address fundamental difficulties with the legislative scheme in relation to contempt, which are likely to cause long-term problems if not addressed.

Having weighed up the risk of not succeeding on appeal, the delay inherent in any appeal to the High Court, the likely costs, and the limited long-term benefits even if an appeal is successful, the Commission believes the best remedy would be to address the problems with the current contempt scheme through legislative change.

Accordingly:

(3) The Commission recommends that the contempt powers in the CCC Act be amended in light of the Court of Appeal decision in *Hammond v Aboudi*; *Hammond v Sorani*.

PART 7: CONCLUSION

This report has identified the Commission's concerns about:

- its organised crime function and recommends legislative changes to clarify and enhance this function;
- its powers to deal with contempt and recommends legislative changes to enhance its ability to deal effectively with contempt of the Commission; and
- makes three recommendations for amendment to the CCC Act.