



CORRUPTION AND CRIME COMMISSION

REPORT INTO THE DISCONTINUANCE OF A PROSECUTION AGAINST JOE McDONALD ON 24 MAY 2006

11 April 2008

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CORRUPTION AND CRIME COMMISSION

Hon Nicholas Griffiths MLC
President
Legislative Council
Parliament House
PERTH WA 6000

Hon Fred Riebeling MLA
Speaker
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Mr President
Dear Mr Speaker

In accordance with section 84 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"), I present the Corruption and Crime Commission's *Report Into the Discontinuance of a Prosecution Against Joe McDonald on 24 May 2006*.

The opinions, assessments and recommendations contained in this report are those of the Commission.

The Commission recommends that the report be laid before each House of Parliament forthwith pursuant to section 93 of the CCC Act.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Chris Shanahan', written over a large, faint oval shape.

Chris Shanahan SC
ACTING COMMISSIONER

11 April 2008

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
Investigation by the Commission	1
Assessment	2
Police: Opinion as to Misconduct	3
Inspector Hutchinson	3
Police Prosecutions: Discontinuing a Prosecution	4
Recommendation 1	4
Recommendation 2	4
Recommendation 3	5
Magistrate Lane: Opinion as to Sub-Section 27(3) Conduct	5
Recommendation 4	6
Decision to Conduct Hearings in Private	7
Delay	7
CHAPTER ONE	
INTRODUCTION	9
1.1 Background	9
1.2 Assessment of Allegations Against Magistrate Lane	11
1.2.1 Conduct that Falls within the Ultimate Limb of Sub-Section 27(3)	12
1.2.2 Commission Receives the Allegations Against Magistrate Lane	14
1.3 Scope and Purpose of Investigation by the Commission	14
1.4 Jurisdiction	15
CHAPTER TWO	
INVESTIGATION	17
2.1 Investigation Overview	17
2.2 Private Hearings	18
2.2.1 Sergeant McInerney	18
2.2.2 Sergeant Smith	19
2.2.3 Sergeant Ricciardi	19
2.2.4 Inspector Hutchinson	20
2.2.5 Superintendent Emmanuel	21
2.2.6 Magistrate Lane	22
2.2.7 Sergeant McInerney Recalled	24
2.2.8 Sergeant Smith Recalled	25
2.3 Statements	26
2.4 Interviews	27
2.5 Other Evidence	28
CHAPTER THREE	
ASSESSMENT AND OPINIONS	29
3.1 Whether any Member of the Western Australia Police has Engaged in Misconduct	29

3.2	Whether Magistrate Lane Engaged in Conduct of a Kind that, if Established, would Constitute Grounds for Removal from Judicial Office	32
3.2.1	Focus on the Conduct of Judicial Officers	33
3.2.2	Conversation with Sergeant McInerney Court 3.5	33
3.2.3	Conversation with Sergeant Smith at the Central Law Courts	35
3.2.4	Conduct, that if Established, would Constitute Grounds for Removal from Judicial Office	36
3.3	Commission's Overall Assessment	37

CHAPTER FOUR

RECOMMENDATIONS 39

4.1	Role of Police	39
	Recommendation 1	40
	Recommendation 2	40
	Recommendation 3	40
4.2	Role of Magistrate Lane	41
	Recommendation 4	41

APPENDIX

	Sergeant McInerney Email of 28 March 2006 (8.30 a.m.)	43
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EXECUTIVE SUMMARY

- [1] The Assistant Secretary of the Construction Forestry Mining and Energy Union (CFMEU), Mr Joe McDonald, was charged with an offence contrary to section 338A(d) of *The Criminal Code* on 12 July 2004. Subsequently the charge was amended by consent to allege an offence contrary to section 338B(b) of *The Criminal Code*, that:

... on the 8th day of July 2002 at West Perth [Mr McDonald] made a threat, namely that he would ensure that industrial action would be taken against Silent Vector Pty Ltd trading as Sizer Builders in respect to a building site at 12 Bellevue Terrace West Perth to compel Silent Vector Pty Ltd trading as Sizer Builders to remove Bulls Bricklaying from the building site at 12 Bellevue Terrace West Perth ...

- [2] Mr McDonald faced trial on this charge on 20, 21 and 22 March 2006 in the Perth Magistrates Court before Magistrate Barbara Lane. Sergeant Bill McLnerney, of the Western Australia Police (“WAPOL”) Prosecuting Division, conducted the trial for the prosecution. Mr McDonald was represented by Messrs Kevin Bonomelli and Tom Dixon. When the prosecution closed its case Mr McDonald did not call any evidence. After hearing final submissions Magistrate Lane reserved her decision until 24 May 2006, some two months later.
- [3] On 24 May 2006, before Magistrate Lane’s decision was due to be handed down, the prosecution applied to Chief Stipendiary Magistrate Stephen Heath seeking to withdraw the charge, effectively to discontinue its case. This application was successful and the charge against Mr McDonald was dismissed.¹

Investigation by the Commission

- [4] Following an allegation received by the Corruption and Crime Commission (“the Commission”), an investigation examined the circumstances surrounding the discontinuance of the prosecution with a view to assessing:
1. whether any member of WAPOL had engaged in misconduct; and
 2. whether Magistrate Lane had engaged in conduct “of a kind that, if established, would constitute grounds for removal from judicial office”.

¹ Refer to p.31, paragraph [130], of this report; the power to dismiss under section 25 of the *Criminal Procedure Act 2004* only arises when the prosecution has not adduced evidence – which is not the situation in this case.

[5] It is important to note that the Commission's investigation dealt with the allegations at 1 and 2 together because they were concerned with, amongst other things, alleged conversations between police officers and Magistrate Lane. These allegations dealt with the same factual matrix and they could not be investigated independently of each other.

Assessment

[6] At the outset of its investigation the Commission sought to establish the sequence of events that led to the dismissal of the charge against Mr McDonald. To a large degree the evidence obtained by the Commission on this point is consistent. The Commission's assessment of that evidence is as follows.

1. Sergeant McInerney conducted the trial, Magistrate Lane presiding, in the Perth Magistrates Court between 20 and 22 March 2006.
2. In the course of the trial Sergeant McInerney adduced all of the available prosecution evidence and then closed the prosecution case. Mr McDonald did not adduce any evidence in the defence case. After hearing final submissions for the prosecution and the defence Magistrate Lane reserved her decision until 24 May 2006.
3. Five days after the trial concluded, on 27 March 2006, Sergeant McInerney appeared before Magistrate Lane in Court 3.5 in the Perth Central Law Courts on other matters. At the completion of these proceedings Magistrate Lane spoke to Sergeant McInerney about the McDonald trial. Sergeant McInerney was left with the impression that the charge would be dismissed.
4. Sergeant McInerney reported this conversation to Inspector Kim Hutchinson, of the WAPOL Prosecuting Division.
5. Magistrate Lane and Sergeant Peter L Smith, of the WAPOL Prosecuting Division, had a conversation about the McDonald trial on 20 April 2006. It was Sergeant Smith's perception that the charge was probably going to be dismissed.
6. Sergeant Smith reported this conversation to Inspector Hutchinson.
7. Inspector Hutchinson ordered an independent review be conducted of the McDonald prosecution.
8. Sergeant Keith Ginbey, of the WAPOL Prosecuting Division, conducted a review of the matter and recommended that the prosecution be discontinued on the grounds that there were no reasonable prospects of conviction.
9. Inspector Hutchinson accepted Sergeant Ginbey's recommendation and made the decision to apply to discontinue the prosecution.

10. On 24 May 2006 (before Magistrate Lane's decision was due to be handed down) Senior Sergeant Corinne Edwardes, of the WAPOL Prosecuting Division, applied to the Chief Stipendiary Magistrate to discontinue the prosecution. This application was granted and the charge against Mr McDonald was dismissed.

Police: Opinion as to Misconduct

- [7] Misconduct within the meaning of the *Corruption and Crime Commission Act 2003* ("the CCC Act") is defined at section 4. Without seeking to detract from that definition, misconduct occurs if a public officer acts corruptly, takes advantage of his or her position in order to obtain a benefit or cause a detriment, or whilst acting or purporting to act in an official capacity commits an offence punishable by two or more years imprisonment. It also includes conduct relating to a lack of honesty or impartiality in the performance of a public duty or a breach of trust or misuse of information, provided that the conduct could also constitute a breach of any written law or constitute grounds for dismissal.
- [8] The Commission's investigation identified no misconduct by any of the police officers involved in the decision by police to apply to discontinue the prosecution against Mr McDonald.

Inspector Hutchinson

- [9] The investigation established that it was Inspector Hutchinson who ordered the independent review and who decided, on behalf of the Commissioner of Police, to apply to discontinue the prosecution against Mr McDonald.
- [10] When a trial has reached the stage that a magistrate has reserved his or her decision the prosecution and the accused must await that decision. The responsibility for handing down the decision rests with the judicial officer. The Commission notes that section 25 of the *Criminal Procedure Act 2004* only contemplates a prosecution being discontinued "if no evidence has been adduced". In this case all of the prosecution evidence had been adduced and arguably there was no power under section 25 to discontinue the prosecution once that evidence had been led.
- [11] In the Commission's opinion, Inspector Hutchinson's decisions were misguided because, as the prosecution had adduced evidence in the McDonald prosecution, there was, arguably, no power to dismiss the matter under section 25 of the *Criminal Procedure Act 2004*. While a qualified lawyer with more experience and a greater knowledge of the criminal law may not have made the same decisions as Inspector Hutchinson, this does not mean that his actions amount to "misconduct" within the meaning of section 4 of the CCC Act.
- [12] To identify misconduct the Commission must be satisfied that, in its opinion, a public officer's actions were motivated by an improper purpose, that the officer acted dishonestly, failed to act impartially or that the officer breached the trust

placed in him or her as an officer. In this case there is no evidence of this. Indeed, the Commission accepts that Inspector Hutchinson was at all times acting in what he thought was an appropriate manner. It necessarily follows that the Commission has identified no misconduct in that regard.

Police Prosecutions: Discontinuing a Prosecution

- [13] The Commission recommends that the WAPOL Prosecuting Division implements a policy, by amending *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997 (“WAPOL Policy”), requiring prosecutors to obtain legal advice from a qualified lawyer before any decision is made to withdraw a charge. Any amendments to the WAPOL Policy should be consistent with section 25 of the *Criminal Procedure Act 2004*.

Recommendation 1

That the Western Australia Police Prosecuting Division implements a policy, by amending *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997, requiring prosecutors, where practicable, to obtain legal advice from an appropriately qualified and experienced lawyer before any decision is made to apply to discontinue a prosecution in a Magistrates Court.

Recommendation 2

That the Western Australia Police Prosecuting Division review the terms of *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997, to ensure that it is consistent with section 25 of the *Criminal Procedure Act 2004*.

- [14] Further, the Commission notes paragraph 72 of the Director of Public Prosecution’s *Statement of Prosecution Policy and Guidelines 2005* (“DPP Guidelines”) and the policy to proffer the reasons for the termination of a prosecution “to an enquirer who has a legitimate interest in the proceedings, including representatives of the media”, except where “to do so would prejudice the administration of justice or would cause significant harm to a victim, witness or accused person”.
- [15] The provision by the Director of Public Prosecutions (“the DPP”) of reasons for the discontinuance of a prosecution, except in the circumstances noted in paragraph 72 of the DPP Guidelines, provides a mechanism for public scrutiny of the prosecutorial discretion to seek to discontinue a prosecution. The Commission recommends that the WAPOL Prosecuting Division implements a policy in similar terms to paragraph 72.

Recommendation 3

That the Western Australia Police Prosecuting Division implements a policy, by amending *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997, that provides for the publication of the reasons for an application by the Commissioner of Police to discontinue a prosecution in the Magistrates Court, except where to do so would prejudice the administration of justice or would cause significant harm to a victim, witness or accused person.

Magistrate Lane: Opinion as to Sub-Section 27(3) Conduct

[16] The Commission's jurisdiction in respect of Magistrates, as "holders of judicial office", appears at sub-section 27(3) of the CCC Act. In the circumstances of this case, for the Commission to be satisfied that the allegations against Magistrate Lane are made out, it would have to be satisfied that Magistrate Lane engaged in conduct that was "of a kind that ... would constitute grounds for removal from judicial office".

[17] Commissioner O'Callaghan in his letter of 15 June 2006 described the allegations against Magistrate Lane in the following terms,² that:

... if, after the close of evidence in Court and whilst judgement (sic) was reserved, Magistrate Lane has informally and privately communicated her intention to dismiss the charges against Mr McDonald to prosecutors without any notice or any opportunity of hearing given to any other party, that would be highly improper, indicating at least actual or ostensible bias or worse, tending to an attempt to pervert the course of justice. ...

[18] In the Commission's assessment of the available evidence, Magistrate Lane raised the issue of the McDonald trial with two prosecutors, including the trial prosecutor, at a time when the trial had been concluded; she had heard all the evidence to be presented and reserved her decision, which remained pending. Magistrate Lane raised the issue of the McDonald trial in the absence of the accused or his legal representatives.

[19] This assessment raises the question of whether Magistrate Lane's conduct fell within the category of conduct identified at sub-section 27(3) of the CCC Act being "conduct of a kind that ... would constitute grounds for removal from judicial office". Conduct that falls within this category has been described as, inter alia, being "so serious a departure from standards of proper behaviour that it would destroy the public confidence in the judge's ability to do his job or that it demonstrates the judge's unfitness for office".³ In the Commission's opinion this requires an assessment of Magistrate Lane's motivation in raising

² Refer pp.9-10, paragraphs [32]-[35], of this report.

³ Refer to Section 1.2.1, pp.12-14, paragraphs [45]-[50] of this report.

the issue of the McDonald trial with prosecutors in the absence of the accused or his legal representatives.

- [20] In the Commission's assessment the available material does not support a conclusion that Magistrate Lane deliberately attempted to influence the outcome of the McDonald matter.
- [21] The balance of the material gathered in the course of the Commission's investigation suggests that Magistrate Lane was motivated, amongst other matters, by concerns regarding the quality of the prosecution of the McDonald matter. It was her evidence, for example, that she wanted to ensure that Sergeant McInerney was appropriately supervised, that he was not allocated complex trials and that he was given proper training. Furthermore, Magistrate Lane's evidence makes it clear that she thought that police prosecutors should not be conducting criminal trials in the Magistrates Court. Certain aspects of the evidence of both Sergeant McInerney and Sergeant Smith tend to support Magistrate Lane's account in this regard.
- [22] Thus, the Commission is not of the opinion that Magistrate Lane engaged in conduct "of a kind that ... would constitute grounds for removal from judicial office". In proffering any opinion regarding the conduct of the "holder of judicial office" the Commission is obliged, pursuant to sub-section 27(4) of the CCC Act, to have proper regard to the independence of such judicial officers.
- [23] Were the Commission to proffer an opinion concerning the conduct of a judicial officer, being conduct less than that falling within the terms of sub-section 27(3) of the CCC Act, such an opinion may affect the capacity and ability of such a judicial officer to discharge his or her office were that judicial officer to continue to sit. For this reason the Commission having assessed Magistrate Lane's conduct and formed the opinion it falls outside the terms of sub-section 27(3)⁴ of the CCC Act, proffers no opinion on the propriety of that conduct.
- [24] In the Commission's opinion it would be appropriate were there a formal process by which Magistrates can raise concerns regarding the adequacy of prosecutorial services in the Magistrates Courts. This may best be achieved through the office of the Chief Stipendiary Magistrate.

Recommendation 4

That the Chief Stipendiary Magistrate consider the need for a process whereby he can formally raise Magistrates' concerns regarding prosecutors' performances in the Magistrates Court with either the Commissioner of Police and/or the Director of Public Prosecutions as appropriate, and for an education programme for Magistrates regarding appropriate ways in which to raise and communicate such concerns.

⁴ Refer p.11, paragraph 36, of this report.

Decision to Conduct Hearings in Private

[25] The Commission considered that to hold public hearings into these allegations must include evidence regarding the alleged conversations between police officers and Magistrate Lane. Public hearings of this type would involve the public airing of unproven allegations concerning Magistrate Lane's conduct that may create perceptions that reflect unwarrantedly on the Magistrate's capacity to discharge her judicial office and, as a consequence, affect her independence as a Magistrate. Such unwarranted perceptions affecting the independence of a Magistrate may also, more broadly, damage the administration of justice in this State.

[26] The Commission, having considered these matters and the effect of subsection 27(4) of the CCC Act which requires the Commission to "proceed having proper regard for preserving the independence of judicial officers", determined to hold any relevant hearings in private.

Delay

[27] The Commission acknowledges that it has taken considerable time to table its report in this matter. The Commission first prepared a proposed report for tabling in June 2007. The reasons for the further delay in preparing this report for tabling relate, amongst others, to new evidence, the availability of witnesses and the demands of satisfying section 86 procedural fairness obligations of the CCC Act.

CHAPTER ONE

INTRODUCTION

1.1 Background

[28] The Assistant Secretary of the Construction Forestry Mining and Energy Union (CFMEU), Mr Joe McDonald, was charged with an offence contrary to section 338A(d) of *The Criminal Code* on 12 July 2004. Subsequently the charge was amended by consent to allege an offence contrary to section 338B(b) of *The Criminal Code*, that:

... on the 8th day of July 2002 at West Perth [Mr McDonald] made a threat, namely that he would ensure that industrial action would be taken against Silent Vector Pty Ltd trading as Sizer Builders in respect to a building site at 12 Bellevue Terrace West Perth to compel Silent Vector Pty Ltd trading as Sizer Builders to remove Bulls Bricklaying from the building site at 12 Bellevue Terrace West Perth ...

[29] Mr McDonald faced trial on this charge on 20, 21 and 22 March 2006 in the Perth Magistrates Court before Magistrate Barbara Lane. Sergeant Bill McLnerney, of the Western Australia Police (“WAPOL”) Prosecuting Division, conducted the trial for the prosecution. Mr McDonald was represented by Messrs Kevin Bonomelli and Tom Dixon. When the prosecution closed its case Mr McDonald did not call any evidence. After hearing final submissions Magistrate Lane reserved her decision until 24 May 2006, some two months later.

[30] On 24 May 2006, before Magistrate Lane’s decision was due to be handed down, the prosecution applied to Chief Stipendiary Magistrate Stephen Heath seeking to withdraw the charge, effectively to discontinue its case. This application was successful and the charge against Mr McDonald was dismissed.⁵

[31] On 25 May 2006 the Corruption and Crime Commission (“the Commission”) received a complaint that Superintendent Mick Emmanuel, Officer in Charge of Police Prosecutions, failed to follow proper police procedure by not consulting with the complainant, witnesses and the arresting officer before deciding to withdraw the charge.

[32] By letter dated 30 May 2006, the Commission referred the allegation to WAPOL for investigation. That letter identified the following issues as requiring particular attention:

⁵ Refer footnote 1.

1. whether Superintendent Emmanuel breached police regulations by not notifying the arresting officer, the complainant and witnesses before withdrawing the charge against Mr McDonald;
2. whether Superintendent Emmanuel failed to properly consider the submissions provided to the prosecutor before withdrawing the charge; and
3. whether Superintendent Emmanuel failed to obtain the necessary legal advice before withdrawing the charge.

[33] These allegations were investigated by Deputy Commissioner Chris Dawson. By letter dated 15 June 2006 the Commissioner of Police, Karl O'Callaghan, advised the Commission that:

1. at the completion of the trial the police prosecutor was of the view that the prosecution was likely to fail as a number of the prosecution witnesses had not come up to proof;
2. Magistrate Lane had two separate conversations with two police prosecutors indicating that Mr McDonald's prosecution would fail;
3. two senior prosecutors reviewed the matter and concluded that the prosecution should be withdrawn, a result which was approved by the Acting Superintendent in charge of the Prosecuting Division;
4. the charge was withdrawn to minimise costs;
5. the Chief Stipendiary Magistrate dismissed the charge; and
6. there was no interference by any person concerning the police decision to withdraw the charge, other than the statements made to police by Magistrate Lane.

[34] Commissioner O'Callaghan described the allegations against Magistrate Lane in his letter in the following terms, that:

... if, after the close of evidence in Court and whilst judgement (sic) was reserved, Magistrate Lane has informally and privately communicated her intention to dismiss the charges against Mr McDonald to prosecutors without any notice or any opportunity of hearing given to any other party, that would be highly improper, indicating at least actual or ostensible bias or worse, tending to an attempt to pervert the course of justice. ...

[35] After considering Commissioner O'Callaghan's letter the Commission sought to assess whether the allegations regarding Magistrate Lane's conduct fell within its jurisdiction.

1.2 Assessment of Allegations Against Magistrate Lane

[36] The Commission's jurisdiction with respect to the "holders of judicial office" is strictly limited. It is conferred at sub-section 27(3) of the Corruption and Crime Commission Act ("the CCC Act"), which states (underlining added):

(3) *An allegation about a person in his or her capacity as the holder of a judicial office must not be received or initiated by the Commission unless the allegation relates to —*

(a) *the commission or attempted commission of;*

(b) *the incitement of the commission of; or*

(c) *a conspiracy to commit,*

an offence under section 121 of "The Criminal Code" or is of a kind that, if established, would constitute grounds for removal from judicial office.

[37] The Commission cannot receive or initiate an allegation in respect of the "holders of a judicial office" other than in respect of allegations of the type identified at sub-section 27(3).

[38] In this instance the allegations concerning Magistrate Lane are not made in respect of an offence under section 121 of *The Criminal Code*. Thus, to fall within the Commission's jurisdiction, the alleged conduct must be "of a kind that, if established, would constitute grounds for removal from judicial office" - pursuant to the ultimate limb of sub-section 27(3) of the CCC Act.

[39] For the purposes of section 27 the term "holder of a judicial office" has the same meaning as it has in section 121 of *The Criminal Code*: see sub-section 27(6) of the CCC Act. Section 121 of *The Criminal Code*, in part, states:

*... The term "**holder of a judicial office**" in this section includes an arbitrator or umpire and any member of any board or court of conciliation or arbitration ...*

[40] A Magistrate appointed under the *Magistrates Court Act 2004* is the "holder of a judicial office" for the purposes of sub-section 27(3) of the CCC Act, and the Commission is obliged to exercise its jurisdiction under that provision in accordance with sub-sections 27(4) and 27(5) of the CCC Act, which state:

(4) *The Commission, when performing its functions in relation to the conduct of a holder of judicial office must proceed having proper regard for preserving the independence of judicial officers.*

(5) *When investigating a holder of judicial office, the Commission must act in accordance with conditions and procedures formulated in continuing consultation with the Chief Justice.*

- [41] The Commission has a general statutory obligation to receive allegations under section 24 of the CCC Act. The Commission is also empowered to initiate allegations of misconduct by way of propositions under section 26 of the CCC Act.
- [42] However, in the case of holders of judicial office the Commission's power to receive or initiate allegations about a person in their capacity as a "holder of judicial office" is limited by the terms of sub-section 27(3) of the CCC Act. The Commission must assess any allegation regarding the conduct of a person in his or her capacity as a holder of judicial office under sub-section 27(3) of the CCC Act to determine whether it falls within the terms of that sub-section before such an allegation can be received or initiated.
- [43] In doing so, the Commission will consider, in the course of applying sub-section 27(3), whether the allegation regarding the "holder of a judicial office" alleges conduct that "is of a kind that, if established, would constitute grounds for removal from judicial office" (underlining added).
- [44] Thus, the Commission's initial assessment considered whether the allegations against Magistrate Lane could be received under sub-section 27(3) of the CCC Act because, taken at their highest, they involved conduct "of a kind that, if established, would constitute grounds for removal from judicial office". In order to make that assessment the Commission first sought to identify conduct that falls within sub-section 27(3) of the CCC Act.

1.2.1 Conduct that Falls within the Ultimate Limb of Sub-Section 27(3)

- [45] In Australia, until the mid-sixties, Magistrates were part of the public service and held office at the "pleasure of the Crown".⁶ Since that time there has been "an increasing professionalisation of Magistrates as judicial officers".⁷ The tenure of magistrates in Western Australia is predicated on their continuing "good behaviour". The termination of a Magistrate's appointment is governed by the *Magistrates Court Act 2004*, Schedule 1, clause 15, which states:

A magistrate holds office during good behaviour but the Governor may, upon the address of both Houses of Parliament, terminate a magistrate's appointment.

⁶ Mack K and Roach Anleu S *The Security of Tenure for Magistrates* (2006) 30 *MULR* 370, at 374 and following: see also Gleeson CJ in *Forge & Ors v ASIC & Ors* [2006] HCA Trans 22 (7 February 2006) at 6 and *Spratt v Hermes* (1965) 114 CLR 226 per Windeyer J at 272.

⁷ *Ibid.*

- [46] This mirrors the terms of the *Act of Settlement 1701*, Article III, section 7, which is the mechanism by which judicial independence was entrenched in England at the beginning of the Eighteenth Century.
- [47] The English approach to judicial independence was formally incorporated, at a federal level, into the Australian Constitution by section 72(ii), which states:

72. The Justices of the High Court and of the other courts created by the Parliament - - ...

(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

- [48] It is widely accepted that tenure “during good behaviour” demands the same standard of judicial conduct as that which would justify removal on the grounds of “proved misbehaviour”.
- [49] Conduct that might be impeached under section 72 of the Australian Constitution was a focus of the Judicial Commission that reported to the Federal Parliament on 19 August 1986 in relation to the intention of Justice Murphy to resume his place on the High Court of Australia. Although Justice Murphy died on 21 October 1986 and the Judicial Commission did not complete its task, it did initially consider the meaning of “proved misbehaviour” pursuant to section 72(ii) of the Australian Constitution.⁸

In his reasons the Hon Sir George Lush said, at 18:

Accordingly, my opinion is that the word “misbehaviour” in S 72 is used in its ordinary meaning, and not in the restricted sense of “misconduct in office”. It is not confined, either, to conduct of a criminal nature.

And further:

If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them.

The Hon Sir Richard Blackburn offered this opinion, at 32:

The material available for solving this problem of construction suggests that “proved misbehaviour” means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question.

⁸ Parliamentary Commission of Inquiry Re The Honourable Mr Justice L K Murphy, *Ruling on Meaning of “Misbehaviour”*, Canberra, 19 August 1986.

The Hon Andrew Wells QC said, at 44-45:

Accordingly, the word “misbehaviour” must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the Constitution.

[50] It is a well-established principle that a judicial officer conducting a trial must act fairly and impartially which, in a criminal trial, generally means that the judge acts independently of the prosecution and receives submissions only in the presence of the prosecution and the defence. These propositions are considered at Section 3.2 below.⁹ They focus attention on the purpose, motivation and intent of any communications between the Bench and representatives of the accused or prosecution during a criminal trial.

1.2.2 Commission Receives the Allegations Against Magistrate Lane

[51] Having identified the type of conduct that falls within sub-section 27(3) of the CCC Act the Commission was required to make an assessment as to whether it should receive the allegations regarding Magistrate Lane.

[52] In this instance the allegations that Magistrate Lane may have spoken to police prosecutors (in the absence of the accused or his representatives) in respect of a matter then before her and whilst her judgement was reserved for the purpose of communicating “her intention to dismiss the charge against Mr McDonald to prosecutors without any hearing or notice or any opportunity of hearing given to the other party” alleges an impropriety and partiality that may, were it established, be in conflict with the role of a judicial officer and satisfy the ultimate limb of sub-section 27(3) of the CCC Act.

[53] It is the Commission’s assessment of those allegations that they do concern conduct “of a kind that, if established, would constitute grounds for removal from judicial office”. Accordingly, having made an initial assessment that the alleged conduct fell within the type of conduct described in the ultimate limb of sub-section 27(3), the Commission made the decision on 19 June 2006 to receive the allegations and to investigate them.

1.3 Scope and Purpose of Investigation by the Commission

⁹ Refer p.32, paragraphs [137]-[140] of this report: *Re JRL; Ex parte CJL* (1986) 66 ALR 239; *R v Magistrates’ Court at Lilydale; Ex parte Ciccone* [1973] VR 122; *The Anderson Group Pty Ltd v Tynan Motors Pty Ltd* [2006] 65 NSWLR 400; *Teakle v The State of Western Australia* [2007] WASCA 15; *Schreuder v Australian Securities Commission*, unreported; Sup Ct (Tas); No. LCA 106 of 1995; 14 June 1996; and *Ruffles v Chilman* (1997) 17 WAR 1.

[54] The scope and purpose of the investigation by the Commission was to examine the circumstances surrounding the withdrawal of a charge against the Assistant Secretary of the CFMEU, Mr Joe McDonald, in the Perth Magistrates Court on 24 May 2006, with a view to assessing:

1. whether any member of WAPOL had engaged in misconduct; and
2. whether Magistrate Lane had engaged in conduct “of a kind that, if established, would constitute grounds for removal from judicial office”.

[55] It is important to note that the Commission’s investigation dealt with the allegations at 1 and 2 together because they were concerned with, amongst other things, alleged conversations between police officers and Magistrate Lane. These allegations dealt with the same factual matrix and they could not be investigated independently of each other.

[56] Ultimately the Commission had to assess the evidence of both Magistrate Lane and various police officers. That evidence was relevant to both the allegations against police and the allegations against Magistrate Lane. The Commission’s assessment of such evidence was, therefore, relevant to each of the allegations described at 1 and 2 above. It is for these reasons that this report includes an assessment of Magistrate Lane’s evidence, an assessment that supports the Commission’s findings in respect of both sets of allegations.

1.4 Jurisdiction

[57] The Commission has jurisdiction to deal with allegations of misconduct concerning public officers.

[58] The CCC Act defines “public officer” by reference to the definition of that term in section 1 of *The Criminal Code*. Section 1 of *The Criminal Code* defines “public officer” to include “a police officer” and “any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not”. Accordingly, police officers fall within the jurisdiction of the Commission.

[59] The Commission’s jurisdiction in respect of holders of judicial office and the circumstances of its reception of the allegations concerning Magistrate Lane are discussed at Section 1.2 above.

CHAPTER TWO INVESTIGATION

2.1 Investigation Overview

- [60] When the Commission decided to commence its own investigation the then Commissioner, Commissioner Hammond, consulted the Chief Justice of Western Australia, in respect of that portion of the proposed investigation dealing with Magistrate Lane as required by sub-section 27(5) of the CCC Act.
- [61] Commissioner Hammond also discussed the Commission's intention to conduct the proposed investigation with the Parliamentary Inspector.
- [62] The consultations and discussions between the then Commissioner and the Chief Justice and the Parliamentary Inspector related to the investigation described at Section 1.3 above.
- [63] As a result of those consultations and discussions it was decided that the Commission would initially obtain statements from the police prosecutors who had spoken to Magistrate Lane about this matter following the conclusion of the McDonald trial on 22 March 2006. Those statements were subsequently obtained and considered.
- [64] The Commission considered that to hold public hearings into these allegations must include evidence regarding the alleged conversations between police officers and Magistrate Lane. Public hearings of this type would involve the public airing of unproven allegations concerning Magistrate Lane's conduct, allegations that may create perceptions that reflected unwarrantedly on the Magistrate's capacity to discharge her judicial office and, as a consequence, affect her independence as a Magistrate. Such unwarranted perceptions affecting the independence of a Magistrate may also, more broadly, damage the administration of justice in this State.
- [65] The Commission, having considered these matters and the need to give effect to sub-section 27(4) of the CCC Act which requires the Commission to "proceed having proper regard for preserving the independence of judicial officers", determined to hold any relevant hearings in private.
- [66] In further consultation with the Chief Justice (and with the knowledge of the Parliamentary Inspector) it was decided that, in view of the seriousness of the matter, the Commission should conduct a series of private hearings.
- [67] Those hearings were conducted at various times between 6 July 2006 and 29 October 2007. In addition to conducting private hearings, the Commission also obtained statements, conducted interviews and gathered other evidence.
- [68] The information obtained by the Commission during the course of its investigation is summarised below.

2.2 Private Hearings

2.2.1 Sergeant McInerney

- [69] Sergeant McInerney, of the WAPOL Prosecuting Division, was initially examined at a private hearing on 6 July 2006. The Parliamentary Inspector was present during the course of this examination.
- [70] Sergeant McInerney gave evidence that at the completion of a sentencing matter three or four days after Mr McDonald's trial, Magistrate Lane advised him that she wanted to speak to him about the McDonald matter. According to him Magistrate Lane said something to the effect that, "You have to prove all the elements of the charge" and then referred to the need for "a more robust prosecution".¹⁰
- [71] Sergeant McInerney said that he realised that "the prosecution may not have been substantial" but that he thought "the prosecution proved their case".¹¹ His evidence was that Magistrate Lane then said something about there being "ramifications across the board", that the matter could "be dealt with in other manners" (sic) and that she referred to costs against the prosecution amounting to many thousands of dollars.¹²
- [72] Sergeant McInerney got the impression from Magistrate Lane's comments that the prosecution had failed, although he indicated that Magistrate Lane had not told him what her decision was going to be.¹³
- [73] Sergeant McInerney's evidence was that, following the conversation with Magistrate Lane, he returned to his office and spoke to Inspector Kim Hutchinson about the conversation he had just had with Magistrate Lane.¹⁴ Inspector Hutchinson suggested that Sergeant McInerney make a note of the conversation, so he sent himself an email summarising the discussion. That email, dated 28 March 2006 and sent at 8:30 a.m., reads as follows:

On the afternoon of Monday March 27th 2006 in Court 35 (sic) before Ms LANE. Ms LANE spoke to me regarding the McDONALD trial and how she believed that I had to prove all elements and the trial may fail because of this. She was basically giving me the heads up that she will dismiss. She stated that there were alternatives and that there would be ramifications across the board with the defense (sic) winning. i.e. withdraw so the \$20000 they will request will not be granted etc.

¹⁰ Sergeant McInerney, Transcript 6 July 2006 at p.6.

¹¹ *Ibid.*

¹² *Ibid* p.7.

¹³ *Ibid* pp.9-10.

¹⁴ *Ibid* p.11.

2.2.2 Sergeant Smith

- [74] Sergeant Peter L Smith, of the WAPOL Prosecuting Division, was initially examined at a private hearing on 6 July 2006.
- [75] Sergeant Smith gave evidence about a conversation he had with Magistrate Lane on 20 April 2006. His evidence was that on that day he was walking past a cafeteria on Floor 2 of the Central Law Courts with Sergeant Leo Ricciardi when Magistrate Lane called out his name. He then walked towards Magistrate Lane in company with Sergeant Ricciardi. According to Sergeant Smith, Magistrate Lane said to him that she had concerns about Sergeant McInerney's understanding of trial issues and that she suggested "that he might need some training".¹⁵ His recollection was that Magistrate Lane then mentioned the McDonald trial and said that it was "seriously flawed" and said something about the likelihood of there being "significant costs".¹⁶
- [76] It was Sergeant Smith's perception that the matter was probably going to result in a dismissal.¹⁷ Sergeant Smith gave evidence that he may have informed Magistrate Lane that he would review the matter, or have it reviewed.¹⁸
- [77] Following the conversation with Magistrate Lane, Sergeant Smith returned to his office and relayed the exchange to Inspector Hutchinson who said that he wanted the brief reviewed.¹⁹ That task was then passed to Sergeant Keith Ginbey.²⁰ Sometime later Sergeant Smith received a telephone call from Magistrate Lane enquiring about the McDonald matter and he advised her that Sergeant Ginbey was conducting a review.²¹
- [78] Later Inspector Hutchinson informed Sergeant Smith that the matter was to be withdrawn.²² Inspector Hutchinson told Sergeant Smith that he had contacted the lawyer for the accused and the case officer about the decision and Sergeant Smith offered to contact Magistrate Lane.²³ Sergeant Smith subsequently called Magistrate Lane advising her of the decision and she responded by saying "that was appropriate".²⁴

2.2.3 Sergeant Ricciardi

- [79] Sergeant Ricciardi, of the WAPOL Prosecuting Division, was examined at a private hearing on 6 July 2006.

¹⁵ Sergeant Smith, Transcript 6 July 2006, pp.16 –17.

¹⁶ *Ibid* p.17 and 19.

¹⁷ *Ibid* p.19.

¹⁸ *Ibid* p.18.

¹⁹ *Ibid* p.21 and following.

²⁰ *Ibid* pp. 21-22.

²¹ *Ibid* p.22.

²² *Ibid* p. 21 and 23.

²³ *Ibid* p. 24.

²⁴ *Ibid* p.25.

[80] Sergeant Ricciardi's evidence concerning the discussion with Magistrate Lane outside the cafeteria reflected Sergeant Smith's evidence. Sergeant Ricciardi said that at the time of the conversation he had just started work as a prosecutor and had been prosecuting for seven working days, and stated that he didn't know Magistrate Lane at that stage and didn't know what Magistrate Lane and Sergeant Smith were talking about.²⁵ However, he could tell that Magistrate Lane wasn't happy about something and he heard her use the word "incompetent".²⁶ Sergeant Ricciardi also said that he heard the Magistrate say that the matter needed to be dealt with.²⁷ Sergeant Ricciardi was then introduced to Magistrate Lane and they had a general conversation about unrelated matters. Sergeant Ricciardi left with Sergeant Smith.²⁸

2.2.4 Inspector Hutchinson

[81] Inspector Hutchinson, of the WAPOL Prosecuting Division, was examined at a private hearing on 14 July 2006.

[82] Inspector Hutchinson's evidence was that, after court one day, Sergeant McInerney told him that Magistrate Lane had indicated that police would "probably lose" the McDonald matter. Because Inspector Hutchinson was busy, he advised Sergeant McInerney to "make a note of it in case we need it later on".²⁹

[83] About three weeks prior to 17 May 2006 Sergeant Smith spoke to Inspector Hutchinson in the passageway. Inspector Hutchinson recalled that Sergeant Smith told him that when "he was with a new prosecutor, Sergeant Leo Ricciardi, and was in the process of leaving the precincts of the court", Magistrate Lane had "advised him or spoke with him, telling him that in relation to the McDonald matter, that we" [the police] "had lost the matter, and that he had better get someone or someone had better take a look at it because we" [the police] "were going to get severely criticised".³⁰ On that basis, Inspector Hutchinson asked Sergeant Ginbey to review the matter.³¹

[84] Inspector Hutchinson gave evidence that on either 16 or 17 May 2006 he received Sergeant Ginbey's report recommending that the matter be withdrawn.³² Inspector Hutchinson read the report, reviewed the evidence and agreed with the recommendation that there was no evidence to support the charge against Mr McDonald.³³ He said that the final decision to withdraw the charge against Mr McDonald was made by him after he had spoken to the case officer, Detective Senior Constable Gerry Taylor.³⁴ He maintained that he had never spoken to Magistrate Lane about the McDonald matter or any

²⁵ Sergeant Ricciardi, Transcript 6 July 2006, p.29.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid* pp.27-30.

²⁹ Inspector Hutchinson, Transcript 14 July 2006 p.19.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid* pp.20-21.

³³ *Ibid* p.20.

³⁴ *Ibid.*

other matter (other than appearing before her once on an unrelated bail application).³⁵ He said that the only part Magistrate Lane's intervention had to play in his decision was to stimulate the review and that the decision to withdraw the matter was based entirely on Sergeant Ginbey's review and his own re-examination of the evidence.³⁶

- [85] Having made the decision to apply to withdraw the prosecution, Inspector Hutchinson contacted the defence barrister, Mr Bonomelli, and advised him of the decision. He said that he offered to have the matter brought forward but that Mr Bonomelli said to just leave the dates as they were.³⁷
- [86] In the end it was Sergeant Smith who advised the court about what was happening, but because Sergeant Smith was required to go on circuit to Albany, Senior Sergeant Corinne Edwardes applied to withdraw the matter.³⁸
- [87] In his evidence Inspector Hutchinson admitted that he had never before come across a situation where police had "withdrawn a charge after all the prosecution evidence has been led, the defence case has been run, the closing submissions have been made and ... the matter has been adjourned for the Magistrate to consider his or her decision".³⁹

2.2.5 Superintendent Emmanuel

- [88] Superintendent Emmanuel was examined at a private hearing on 14 July 2006.
- [89] Superintendent Emmanuel gave evidence that on 24 May 2006 Inspector Hutchinson brought it to his attention that the McDonald matter had been to court and was withdrawn, and that the media had an interest in it.⁴⁰ He asked Inspector Hutchinson why he had not been told about this, and Inspector Hutchinson told him that he had thought it appropriate that he handle it himself.⁴¹
- [90] Superintendent Emmanuel gave evidence that Inspector Hutchinson had told him that it had been brought to his attention that the Magistrate had inferred to Sergeant McInerney that the prosecution would probably fail and he had therefore initiated a review of the matter.⁴²
- [91] Inspector Hutchinson then provided Superintendent Emmanuel with a copy of Sergeant Ginbey's report. Superintendent Emmanuel then reviewed the report and all the other relevant papers prior to preparing a briefing note for the Assistant Commissioner and a response for the media.⁴³

³⁵ *Ibid* pp.24-25.

³⁶ *Ibid* pp.25-26.

³⁷ *Ibid* pp.21-22.

³⁸ *Ibid* p.22.

³⁹ *Ibid* p.25.

⁴⁰ Superintendent Emmanuel, Transcript 14 July 2006 p. 4.

⁴¹ *Ibid*.

⁴² *Ibid* pp.5-6.

⁴³ *Ibid* pp.6-7.

2.2.6 Magistrate Lane

- [92] Magistrate Lane was initially summonsed to give evidence at a private hearing on 18 August 2006. However, on that occasion she presented a medical certificate from a doctor, dated 17 August 2006, stating that she was unfit for duty for a period of two weeks. As a result of receiving this certificate Commissioner Hammond adjourned the examination.
- [93] Magistrate Lane was recalled to give evidence at a private hearing on 18 September 2006. At that appearance she presented another medical certificate from the same doctor. This certificate, dated 14 September 2006, stated that she was unfit to instruct counsel and to give evidence for a period of two weeks.
- [94] In March 2007 the Commission made further attempts to establish Magistrate Lane's account of the circumstances surrounding the discontinuance of the prosecution of Mr McDonald.
- [95] Magistrate Lane was ultimately examined at a private hearing on 25 July 2007. On this occasion she did not present a medical certificate.
- [96] Magistrate Lane could not remember having a conversation about the McDonald trial with Sergeant McInerney in Court 3.5 on 27 March 2006.⁴⁴ Magistrate Lane's recollection was that, after the McDonald trial, the next time she spoke to Sergeant McInerney was in the car park of the Kings Hotel.⁴⁵ Magistrate Lane gave the following evidence. On this occasion they crossed paths and Sergeant McInerney said something like he ... "had a hard time of it", to which Magistrate Lane replied, "You had enough breaks to go to the DPP or get advice".⁴⁶ Magistrate Lane, in response to questions put by counsel, indicated that she then asked why the Director or Public Prosecutions ("the DPP") didn't do the trial. On her account, Sergeant McInerney explained that it had been dumped on him on the Thursday before the trial.⁴⁷
- [97] Magistrate Lane also gave evidence that she spoke to Sergeant Smith about the McDonald trial. Magistrate Lane said that she had just finished reading the transcript of the McDonald trial.⁴⁸ Magistrate Lane stated that when she saw Sergeant Smith and another policeman walking past the coffee cart on Level 2 of the Central Law Courts she said "hello" and Sergeant Smith introduced her to the other police officer.⁴⁹ After the introductions were over Magistrate Lane made a complaint to Sergeant Smith about Sergeant McInerney. In making that complaint Magistrate Lane used the word "incompetent". She then made reference to a recent case where she had granted him a number of adjournments to get legal advice.⁵⁰

⁴⁴ Magistrate Lane Transcript 25 July 2007 p.14.

⁴⁵ *Ibid* pp.6 and 16.

⁴⁶ *Ibid* p.8 and p.10.

⁴⁷ *Ibid* p.46.

⁴⁸ *Ibid* p.50, see also p.22.

⁴⁹ *Ibid* pp.17-19.

⁵⁰ *Ibid* pp.19-21.

- [98] This was a reference to the McDonald trial.⁵¹ However, Magistrate Lane gave evidence that she couldn't remember but was "fairly sure" that she did not actually use the name Joe McDonald or the McDonald trial when complaining to Sergeant Smith about Sergeant McInerney. Although Magistrate Lane conceded that Sergeant Smith "might have asked" her "Which matter was that?" and, if so, she "would've said McDonald".⁵²
- [99] On her account Magistrate Lane said something like, "the DPP should've handled it", and she and Sergeant Smith talked about the use of DPP prosecutors in the Children's Court. Magistrate Lane also told Sergeant Smith that if prosecutors aren't properly trained they'll end up paying costs.⁵³ According to Magistrate Lane this was a general comment and she did not specifically mention costs in the McDonald matter.⁵⁴ Magistrate Lane said that Sergeant Smith responded to her complaint by asking for a copy of the transcript. Magistrate Lane agreed to do this and subsequently made arrangements to provide the transcript of the McDonald matter to Sergeant Smith.⁵⁵ It was her impression that Sergeant Smith was going to read the transcript to see how Sergeant McInerney had performed.⁵⁶ Sergeant Smith received the transcript.⁵⁷
- [100] Magistrate Lane asserts that it was her assessment of Sergeant McInerney's performance during the McDonald trial that he didn't cope well and that he didn't understand the legal issues involved.⁵⁸ When she read the transcript she became quite annoyed at his incompetence.⁵⁹
- [101] According to Magistrate Lane this is why she complained to Sergeant Smith. At a general level she was concerned that a police prosecutor would be allocated a complex three day trial against experienced counsel. In her view the matter should have been handled by somebody with legal qualifications.⁶⁰ On an individual level Magistrate Lane was hoping that Sergeant McInerney's performance would be monitored, that he would be given some more training or that he would not be allocated such complex matters.
- [102] Magistrate Lane denied telling Sergeant Smith that the prosecution case was "seriously flawed". She also denied telling him what the likely outcome of the McDonald trial would be.⁶¹
- [103] After the conversation with Sergeant Smith, Magistrate Lane went to her office, put the trial transcript in an envelope and gave it to her secretary to pass on to Sergeant Smith.⁶²

⁵¹ *Ibid* p.19.

⁵² *Ibid* pp.20 and 26.

⁵³ *Ibid* and at pp.20 and 24.

⁵⁴ *Ibid* pp.20-21 and p.28.

⁵⁵ *Ibid* p.28.

⁵⁶ *Ibid* p.26.

⁵⁷ *Ibid* p.32.

⁵⁸ *Ibid* pp.11 and 22.

⁵⁹ *Ibid* p.22.

⁶⁰ *Ibid* p.11.

⁶¹ *Ibid* pp.26-27.

- [104] The next time she heard about the matter was in the Duty Court after Anzac Day. Sergeant Smith, who was the prosecutor that day, told her that the transcript had gone missing. Magistrate Lane asked her Judicial Support Officer to sort it out.⁶³
- [105] The next occasion that Magistrate Lane spoke to Sergeant Smith was when she called him to get her transcript back. According to Magistrate Lane she needed the transcript so that she could finish writing her judgment. Sergeant Smith told her that another prosecutor, Sergeant Ginbey, was looking at it. Magistrate Lane responded by saying that she would get another copy.⁶⁴
- [106] Magistrate Lane's evidence was that she didn't finish writing the judgment because on Thursday 18 May 2006 she was allocated to do the Kalgoorlie Circuit for the week commencing 22 May 2006. Although she took some cases to Kalgoorlie to read, she got sick while she was up there and didn't get around to it. Then on Thursday 25 May 2006 "Liat" (Ms Liat Ofrie) called her while she was in Kalgoorlie to tell her that the McDonald matter had been withdrawn.⁶⁵
- [107] When Magistrate Lane got back from Kalgoorlie she wiped the tape that contained her partially recorded judgment and she bundled all her papers together and filed them away.⁶⁶
- [108] During her examination Magistrate Lane denied that Sergeant Smith called her prior to 24 May 2006 to advise her of the police decision to withdraw the charge.⁶⁷ However, in a written and signed statement dated 11 August 2007 (provided after her examination during the Commission's private hearing) Magistrate Lane qualified that evidence in this way:

... I recall another conversation with Sergeant Smith, I do not recall the date. He informed me that their report had concluded that Sergeant Mclnerney had not competently handled the McDonald matter. I think this was before I went to Kalgoorlie because I was not aware of what they intended to do. I became aware when a clerk from the courts advised me in Kalgoorlie that the matter had been withdrawn, otherwise I would not have taken my cases to Kalgoorlie. ...

2.2.7 Sergeant Mclnerney Recalled

- [109] Sergeant Mclnerney was recalled to give evidence on 31 August 2007. On that occasion he clarified the meaning of the email he sent himself on 28 March 2006.

⁶² *Ibid* p.28.

⁶³ *Ibid* p.31.

⁶⁴ *Ibid* p.32.

⁶⁵ *Ibid* pp.36-40.

⁶⁶ *Ibid* p.40.

⁶⁷ *Ibid* p.37.

- [110] As to the phrase, “the trial may fail because of this”, he said that this was his interpretation of what Magistrate Lane had said. According to Sergeant McInerney Magistrate Lane didn’t use the word “fail”. She did however say words to the effect that the prosecution had to prove all the elements of the offence.⁶⁸ The sentence in his email, “She was basically giving me the heads up that she will dismiss”, was also his interpretation. Sergeant McInerney’s evidence was that because Magistrate Lane said that he had to prove all of the elements of the offence, because she referred to “ramifications across the board” and because of her reference to costs, he thought that she was going to dismiss the matter.⁶⁹
- [111] When asked about that part of the email that referred to “the defense” (sic) “winning”, he said that this too was his interpretation. Finally, according to Sergeant McInerney, the reference in the last sentence to “withdraw so the \$20000 they will request will not be granted etc” was again his interpretation of what Magistrate Lane had said. It was Sergeant’s McInerney’s evidence that Magistrate Lane had said the word “costs” or “costly”. He could not recall whether she used a figure or not. Sergeant McInerney denied that Magistrate Lane told him directly that the matter was going to fail, although he was left with this impression.⁷⁰ When it was put to him, Sergeant McInerney confirmed that the conversation with Magistrate Lane near the Kings Hotel did take place. His recollection of events was consistent with hers.

2.2.8 Sergeant Smith Recalled

- [112] Sergeant Smith was recalled to give evidence on 31 August 2007.
- [113] He confirmed that Magistrate Lane did disclose to him that her complaint about Sergeant McInerney concerned the McDonald trial.⁷¹ It was his recollection that she said that Sergeant McInerney didn’t seem to understand the issues. He conceded that she may also have used the word “incompetent”. Sergeant Smith could not recall Magistrate Lane talking about the DPP during their conversation.⁷² On the issue of costs, Sergeant Smith’s evidence was that Magistrate Lane suggested that there would be significant costs to the community if prosecutors weren’t properly trained and that ultimately she suggested that the McDonald prosecution was “flawed” and that it would result in “significant costs”.⁷³ When asked whether Magistrate Lane actually used the word “flawed”, Sergeant Smith said that he thought that was the word that she used but conceded that “it could be my assessment”.⁷⁴ In any event he was left with the perception that Magistrate Lane considered the “prosecution case was flawed”.⁷⁵

⁶⁸ Sergeant McInerney Transcript 31 August 2007 p.9.

⁶⁹ *Ibid* p.11.

⁷⁰ *Ibid* pp.11-16.

⁷¹ Sergeant Smith Transcript 31 August 2007 p.31.

⁷² *Ibid*.

⁷³ *Ibid* p.32.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

- [114] Sergeant Smith said that at the end of his conversation with Magistrate Lane the review was, in his mind, a review “to determine the ability of that prosecutor at the time”. When asked how the review became a review about the prospects of conviction in the McDonald matter, Sergeant Smith said that when he got back to the office he spoke to Inspector Hutchinson, and Inspector Hutchinson said, “Just review the whole brief”. When it became apparent that Sergeant Smith wouldn’t have enough time to review the brief, Inspector Hutchinson instructed Sergeant Ginbey to “have a look at it”.⁷⁶
- [115] Sergeant Smith testified that there was a mix-up with the transcript. He said that he went down to Listings to pick it up but was told that it wasn’t there. In the end Sergeant Smith spoke to Magistrate Lane about it and she arranged for it to be delivered to him. It was not Sergeant Smith’s recollection that this conversation took place in the Duty Court.⁷⁷
- [116] As to the telephone call from Magistrate Lane, Sergeant Smith reiterated his previous evidence that Magistrate Lane had called him to find out what was happening with the brief. He told Magistrate Lane that it was being reviewed by Sergeant Ginbey, although he didn’t tell her what kind of review was being conducted. Sergeant Smith denied that Magistrate Lane had called to get her copy of the transcript back.⁷⁸
- [117] As to the telephone call he made to Magistrate Lane, Sergeant Smith confirmed that the purpose of this call was to advise her that the prosecution would not be proceeding, and that he had done this. He denied that he told Magistrate Lane that the Ginbey review had concluded that Sergeant McInerney had not conducted the trial competently.⁷⁹

2.3 Statements

- [118] Statements were obtained from the following additional witnesses.

(a) Sergeant Ginbey

Sergeant Ginbey conducted a review of the trial transcript and concluded that there were no reasonable prospects of conviction.

(b) Senior Sergeant Edwardes

Senior Sergeant Edwardes was instructed to discontinue the prosecution by Inspector Hutchinson on 24 May 2006.

⁷⁶ *Ibid* pp.34-36.

⁷⁷ *Ibid* pp.36-38.

⁷⁸ *Ibid* pp.38-42.

⁷⁹ *Ibid* pp.42-43.

2.4 Interviews

[119] Interviews were conducted with the following additional witnesses.

(a) Mr Kevin Bonomelli

Mr Bonomelli was the criminal lawyer who represented Mr McDonald at the trial, and had no contact with Magistrate Lane or police prosecutors prior to the decision to withdraw the prosecution.

(b) Mr Tom Dixon

Mr Dixon was the industrial advocate who represented Mr McDonald at the trial, and had no contact with Magistrate Lane or police prosecutors prior to the decision to withdraw the prosecution.

(c) Mr Ashley Dias

Mr Dias was the Judicial Support Officer who was in Court 3.5 on 27 March 2006 during the time of the alleged conversation between Magistrate Lane and Sergeant McInerney, but could not recall what was said.

(d) Ms Marisa Diletti

Ms Diletti, Magistrate Lane's Secretary, was asked by the Magistrate to send a copy of the trial transcript to Sergeant Smith for the purposes of review.

(e) Ms Stephanie Smith

Ms Smith, a Magistrate's Society Secretary, said that she remembered taking a transcript down to Listings for Marisa and leaving it with a lady by the name of Anna.

(f) Ms Anna Patelli

Ms Patelli, Magistrates Court Listings, recalled someone saying that a prosecutor was going to pick up "this thing", and thought that it had been picked up.

(g) Mr Edward Casey

Mr Casey is a Judicial Support Officer at the Perth Magistrates Court, and had no recollection of being asked by Magistrate Lane to check on the whereabouts of a transcript for Sergeant Smith or anyone else.

(h) Ms Liat Ofri

Ms Ofri rang Magistrate Lane in Kalgoorlie to advise her that the prosecution had been discontinued.

2.5 Other Evidence

[120] Other evidence obtained by the Commission included the following:

1. the transcript of Mr McDonald's trial;
2. a court tape of the hearing held in Court 3.5 on 27 March 2006;
3. the email from Sergeant McInerney to himself dated 28 March 2006;
4. the court file re Mr McDonald's Charge No. PE 31946/04; and
5. Magistrate Lane's court roster for the relevant period.

CHAPTER THREE ASSESSMENT AND OPINIONS

3.1 Whether any Member of the Western Australia Police has Engaged in Misconduct

[121] Misconduct occurs if a public officer acts corruptly, takes advantage of his or her position in order to obtain a benefit or cause a detriment, or whilst acting or purporting to act in an official capacity commits an offence punishable by two or more years imprisonment. It also includes conduct relating to a lack of honesty or impartiality in the performance of a public duty or a breach of trust or misuse of information, provided that the conduct could also constitute a breach of any written law or constitute grounds for dismissal.

[122] At the outset of its investigation the Commission sought to establish the sequence of events that led to the dismissal of the charge against Mr McDonald. To a large degree the evidence on this point is consistent. The Commission's assessment of that evidence is as follows.

1. Sergeant McInerney conducted the trial, Magistrate Lane presiding, in the Perth Magistrates Court between 20 and 22 March 2006.
2. In the course of the trial Sergeant McInerney adduced all of the available prosecution evidence and then closed the prosecution case. Mr McDonald did not adduce any evidence in the defence case. After hearing final submissions for the prosecution and the defence Magistrate Lane reserved her decision until 24 May 2006.
3. Five days after the trial concluded, on 27 March 2006, Sergeant McInerney appeared before Magistrate Lane in Court 3.5 in the Perth Central Law Courts on other matters. At the completion of these proceedings Magistrate Lane spoke to Sergeant McInerney about the McDonald trial. Sergeant McInerney was left with the impression that the charge would be dismissed.
4. Sergeant McInerney reported this conversation to Inspector Hutchinson, of the WAPOL Prosecuting Division.
5. Magistrate Lane and Sergeant Smith, of the WAPOL Prosecuting Division, had a conversation about the McDonald trial on 20 April 2006. It was Sergeant Smith's perception that the charge was probably going to be dismissed.
6. Sergeant Smith reported this conversation to Inspector Hutchinson.
7. Inspector Hutchinson ordered an independent review be conducted of the McDonald prosecution.

8. Sergeant Ginbey, of the WAPOL Prosecuting Division, conducted a review of the matter and recommended that the prosecution be discontinued on the grounds that there were no reasonable prospects of conviction.
9. Inspector Hutchinson accepted Sergeant Ginbey's recommendation and made the decision to apply to discontinue the prosecution.
10. On 24 May 2006 (before Magistrate Lane's decision was due to be handed down) Senior Sergeant Edwardes, of the WAPOL Prosecuting Division, applied to the Chief Stipendiary Magistrate to discontinue the prosecution. This application was granted and the charge against Mr McDonald was dismissed.

[123] It is therefore necessary to look at each of these steps to determine whether any of them, or any combination of them, amounts to misconduct.

[124] In respect to Points 1-4 above, the Commission accepts Sergeant McInerney's evidence that five days after the hearing of the McDonald prosecution he appeared before Magistrate Lane in Court 3.5 in the Perth Central Law Courts in respect of another matter. Further, that on that occasion and at the conclusion of the proceedings in respect of another matter Magistrate Lane spoke to Sergeant McInerney about the McDonald trial. Sergeant McInerney was left with the impression, because of what Magistrate Lane said during the course of this conversation, that the charge against Mr McDonald would be dismissed.⁸⁰

[125] The Commission accepts that Sergeant McInerney had an obligation to communicate the fact of his conversation with Magistrate Lane to Inspector Hutchinson. The Commission is of the opinion that he acted properly in this regard.

[126] Turning to Points 5 and 6 above, the Commission accepts Sergeant Smith's account that Magistrate Lane instigated a conversation with Sergeant Smith about Sergeant McInerney and specifically identified the McDonald trial. Although Sergeant Smith may have said that he would review the matter, his actions reveal no impropriety. Furthermore, it was entirely appropriate for Sergeant Smith to report back to Inspector Hutchinson about what Magistrate Lane had said. To the extent that Sergeant Smith's account differed from that given by Magistrate Lane, the Commission accepts Sergeant Smith's account. Even in her own statement of 11 August 2007 Magistrate Lane conceded that her own account of "events, times and conversations is impaired and incomplete". Sergeant Smith's evidence was consistent. In contrast to Sergeant's Smith's evidence, Magistrate Lane's evidence tended to lack coherence and structure.

⁸⁰ The Commission deals with its assessment of what was said during this conversation in Section 3.2.2, p.33, paragraph [145], of this report.

- [127] The Commission accepts, to the extent that there are some stark differences between Magistrate Lane and Sergeant Smith's evidence, that Magistrate Lane proffered her best recollection, but the Commission prefers Sergeant Smith's evidence.
- [128] Finally, turning to the process by which the charge against Mr McDonald was dismissed (see points 7-10 above), although Senior Sergeant Edwardes applied to have the matter discontinued, she was acting on express instructions, and there can be no suggestion of impropriety on her behalf. Sergeant Ginbey too was acting on instructions. Furthermore, his review of the matter illustrated adequate research and sound reasoning. The Commission is of the opinion that he acted properly.
- [129] Ultimately, it was Inspector Hutchinson who ordered the independent review and decided to apply to discontinue the prosecution. In the Commission's opinion those decisions were misguided.
- [130] When a trial has reached the stage where the Magistrate has reserved his or her decision, the prosecution must wait for that decision. At that point the responsibility rests with the judicial officer. The Commission notes that section 25 of the *Criminal Procedure Act 2004* only contemplates a prosecution being discontinued "if no evidence has been adduced". In this case evidence had been adduced by the prosecution and, arguably, there was no power under section 25 to grant the discontinuance sought.
- [131] Although a qualified lawyer with more experience and a greater knowledge of the criminal law may not have made the decisions that Inspector Hutchinson made, this does not mean that his actions amount to misconduct.
- [132] To identify misconduct the Commission must be satisfied that, in its opinion, a public officer's actions were motivated by an improper purpose, that the officer acted dishonestly, failed to act impartially or that the officer breached the trust placed in him as an officer. In this case there is no evidence of this.
- [133] Indeed, the Commission accepts that Inspector Hutchinson was at all times acting in what he thought was an appropriate manner. It necessarily follows that the Commission has identified no misconduct in that regard.
- [134] The Commission is of the view that the McDonald matter should be a catalyst for a review of the WAPOL Policy regarding how and when it seeks to discontinue prosecutions. This issue is discussed further in Chapter 4, pp.39-41.
- [135] Before moving to the issue of Magistrate Lane, a comment needs to be made about Superintendent Emmanuel.
- [136] The Commission accepts that Superintendent Emmanuel had no involvement in the decision to apply to discontinue the charge against Mr McDonald. His involvement in the matter commenced on 24 May 2006 after the prosecution had been dismissed and the media took an interest. It follows that no adverse

opinion has been formed by the Commission regarding the conduct of Superintendent Emmanuel.

3.2 Whether Magistrate Lane Engaged in Conduct of a Kind that, if Established, would Constitute Grounds for Removal from Judicial Office

[137] In addressing this issue it is worth reflecting on the observations of Mason J in the High Court case of *Re JRL; Ex parte CJL* (1986) 66 ALR 239 at 244:

A central element in the system of justice administered by our courts is that it should be fair and this means that it must be open, impartial and even-handed. It is for this reason that one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented to him in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides.

In the same case Dawson J, at 260, opined:

The basic principles of natural justice establish the right of each party to put his case and to be heard by an impartial judge. To hear one party or a witness in his cause behind the back of the other party is to deny to the latter the right to be heard because he cannot know what has been said and so cannot be certain of the case which he has to meet.

[138] In *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 McInerney J at 127 stated:

The sound instinct of the legal profession - - judges and practitioners alike - - has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get underway, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.

[139] In *The Anderson Group Pty Ltd v Tynan Motors Pty Ltd* [2006] 65 NSWLR 400 it was observed by the New South Wales Court of Appeal that it is "a golden rule" of our judicial system that there should be no communication between a judge and a party to the proceedings pending delivery of a reserved judgment.

[140] Other cases dealing with out-of-court communications with a judicial officer include *Teakle v The State of Western Australia* [2007] WASCA 15; *Schreuder v Australian Securities Commission*, unreported; Sup Ct (Tas); No. LCA 106 of 1995; 14 June 1996; and *Ruffles v Chilman* (1997) 17 WAR 1.

3.2.1 Focus on the Conduct of Judicial Officers

- [141] All of the above cases reinforce the proposition that it is generally inconsistent with the obligations of a judicial officer to determine cases fairly and impartially, for a judicial officer to have a private conversation with a party to the proceedings in the absence of the other party whilst the proceedings remain on foot and a decision is pending. Of course there may be unusual or unforeseen circumstances, inadvertent contact between a judicial officer and counsel or misunderstandings that explain such circumstances in a manner that suggests no impropriety of the type that characterises conduct under sub-section 27(3) of the CCC Act.
- [142] The Commission is concerned only with assessing the conduct of a judicial officer that may fall within sub-section 27(3) of the CCC Act. It is not concerned with, nor legally entitled to decide, tangential issues such as whether parties to court proceedings have been afforded natural justice or a fair trial. The Commission's task focuses attention on assessing the conduct of a judicial officer and forming an opinion whether such conduct meets the relevant test. This in turn focuses attention on the purpose, motivation and intent of the judicial officer when discharging or purporting to discharge his or her judicial office.
- [143] The authorities indicate that it is unwise for a Magistrate who is considering a reserved decision to communicate with one of the parties to the proceedings in the absence of the other party - whether regarding the performance of a prosecutor or counsel or the merits of the matter. A statement by a judicial officer regarding the performance of a prosecutor or counsel may be misunderstood by the party, to whom such statements are made, as a statement regarding the merits of the case and some indication as to the prospective outcome. In any event to do so may afford such a party an unfair advantage over any other party to such proceedings.
- [144] The crux of the allegation against Magistrate Lane is that she discussed the McDonald trial with police prosecutors on at least two separate occasions in the absence of Mr McDonald and his legal advisors. The first conversation is alleged to have taken place in Court 3.5 with Sergeant McInerney. The second conversation is alleged to have taken place near the cafeteria in the Central Law Courts with Sergeant Smith in the presence of Sergeant Ricciardi.

3.2.2 Conversation with Sergeant McInerney Court 3.5

- [145] As to the first conversation, the Commission has examined the tape recording of the proceedings in Court 3.5 on Monday 27 March 2006 but the recording stops at the end of the criminal matter that was then before the Court. As such, there is no recording to establish what was said.
- [146] Sergeant McInerney's email ("McInerney email") to himself remains the only contemporaneous written account and is inherently the most reliable source as

to what occurred.⁸¹ In that email, titled “McDonald J”, Sergeant McInerney attributed the following comments to Magistrate Lane specifically in respect of the McDonald matter, “I had to prove all the elements, there were alternatives” and “there would be ramifications across the board”. In his evidence he also said that she talked about costs. Magistrate Lane had no memory of this conversation. Sergeant McInerney accepted that the email remained his best recollection of these events.⁸²

[147] Sergeant McInerney sought to clarify the meaning of the email in his evidence of 31 August 2007. Sergeant McInerney was asked by Counsel Assisting the Commission to identify which parts of the email recorded what Magistrate Lane actually said and those parts which recorded his understanding of what Magistrate Lane said.

[148] In respect of the latter matters these questions were put in the form of what Sergeant McInerney interpreted or understood Magistrate Lane’s comments to mean.⁸³ It was clear that Sergeant McInerney maintained his evidence that he had a discussion with Magistrate Lane regarding the McDonald matter on the afternoon of Monday 27 March 2006 in Court 3.5.⁸⁴ There was no matter Sergeant McInerney had before Magistrate Lane other than the McDonald prosecution immediately prior to the discussion in Court 3.5.⁸⁵

[149] Further, in the context of the discussion about the McDonald prosecution, Sergeant McInerney gave evidence that Magistrate Lane had indicated that the prosecution needed to prove all the elements of the offence, but she did not say “which elements”.⁸⁶ Sergeant McInerney understood, as a result of his conversation with Magistrate Lane, that the McDonald prosecution may fail because of Magistrate Lane’s comment regarding proving all the elements, and her comment which Sergeant McInerney understood to refer to “ramifications across the board, and that it can be very costly”, and that “there were a number of alternatives”.⁸⁷ Sergeant McInerney later indicated that Magistrate Lane had used the phrase, “ramifications across the board” in this context, and that he understood from his discussion with Magistrate Lane that “the defence may - may win – be successful with that”.⁸⁸ Sergeant Smith remembered Magistrate Lane indicating that the prosecution “is a very costly matter” or “It ... could be a very costly matter. Something - something like that”.⁸⁹

[150] The Commission has noted the evidence regarding Sergeant McInerney having a slight hearing impediment but accepts Sergeant McInerney’s evidence that he had no trouble hearing Magistrate Lane on 27 March 2006.⁹⁰

⁸¹ A copy of this email appears in the Appendix to this report, p.43.

⁸² Sergeant McInerney Transcript 31 August 2007 p.5.

⁸³ *Ibid* pp.5-6.

⁸⁴ *Ibid* p.7.

⁸⁵ *Ibid*.

⁸⁶ *Ibid* pp.7-9.

⁸⁷ *Ibid* pp. 11-12.

⁸⁸ *Ibid* pp.12-15.

⁸⁹ *Ibid* p.15.

⁹⁰ *Ibid* p.19.

[151] Despite the lack of an audio recording, the Commission accepts that Magistrate Lane did speak to Sergeant McInerney about the McDonald trial in Court 3.5 on the afternoon of 27 March 2006. That date place and time are specifically mentioned in the McInerney email. The evidence of Sergeant McInerney is corroborated in that respect by the email he sent himself and the testimony of Inspector Hutchinson who remembers Sergeant McInerney raising the issue with him shortly thereafter. The conversation with Magistrate Lane was a significant matter to Sergeant McInerney in the sense that he immediately raised it with a superior.

[152] To the extent that Sergeant McInerney's evidence differed from that given by Magistrate Lane, the Commission accepts Sergeant McInerney's account. Even in her own statement of 11 August 2007 Magistrate Lane conceded that her own account of "events, times and conversations is impaired and incomplete". Sergeant McInerney's evidence was consistent and frank, and it was corroborated by his email to himself on Tuesday 28 March 2006 at 8:30 a.m., recording the events of the previous day. The McInerney email was produced at a time when none of the matters dealt with in this report were in dispute. In contrast to Sergeant McInerney's evidence, Magistrate Lane's evidence tended to lack coherence and structure.

[153] In the Commission's assessment Magistrate Lane had a conversation with Sergeant McInerney regarding the McDonald trial in Court 3.5 on the afternoon of 27 March 2006 at a time when she had heard all of the evidence in the matter and her decision was reserved. This conversation took place in the absence of the accused or his legal representatives. It included remarks by Magistrate Lane, in respect of the McDonald matter, to the effect that:

1. the prosecution needed to prove all the elements of the offence;
2. there would be "ramifications across the board";
3. "there were a number of alternatives"; and
4. the prosecution "is a very costly matter or it could be a very costly matter, Something - something like that".

Further, that as a result of these remarks, Sergeant McInerney was left with the reasonable impression that the McDonald prosecution may fail.

3.2.3 Conversation with Sergeant Smith at the Central Law Courts

[154] It was the evidence of Sergeant Smith, corroborated by Sergeant Ricciardi, that Magistrate Lane commenced the conversation near the cafeteria in the Central Law Courts by complaining about Sergeant McInerney and suggesting that he might need some training. Sergeant Smith also said that Magistrate Lane expressed the view that the McDonald prosecution was "flawed" and that it could result in "significant costs".⁹¹

⁹¹ Sergeant Smith Transcript 31 August 2007 p.32.

- [155] Magistrate Lane denied that she told Sergeant Smith that the McDonald prosecution was flawed. In the end Sergeant Smith conceded that it may have been his assessment that Magistrate Lane's view was that the prosecution case was flawed rather than that she used the word "flawed", although he thought she had.⁹²
- [156] In any event, as a result of this conversation Sergeant Smith was left with the perception that Magistrate Lane considered the conduct of the McDonald trial by Sergeant McInerney was flawed.⁹³ Magistrate Lane conceded that she did mention the issue of costs to Sergeant Smith, but only generally and not about the McDonald trial in particular. To the extent that it is necessary to decide the point, the Commission prefers the evidence of Sergeant Smith because of Magistrate Lane's impaired and incomplete recollection (refer to her statement of 11 August 2007)⁹⁴ and the quality of her evidence described above.
- [157] In the Commission's assessment Magistrate Lane did have a conversation with Sergeant Smith near the Central Law Courts cafeteria in the terms described by Sergeant Smith. The Commission accepts that Magistrate Lane expressed her view in words to the effect that the McDonald prosecution was flawed and that it could result in significant costs. This conversation took place at a time when Magistrate Lane had heard all of the evidence in the matter and her decision was reserved. It took place in the absence of the accused or his legal representatives.

3.2.4 Conduct that, if Established, would Constitute Grounds for Removal from Judicial Office

- [158] The Commission has so far stated its assessment that Magistrate Lane engaged in the conversations with Sergeants McInerney and Smith identified above at a time when her judgment was reserved and in the absence of the accused or his legal representatives.
- [159] This assessment raises the question whether Magistrate Lane's conduct "was of a kind that, if established, would constitute grounds for removal from judicial office", or in other words "so serious a departure from standards of proper behaviour that it would destroy the public confidence in the judge's ability to do his job" or that "it demonstrates the judge's unfitness for office" (refer footnote 3). This requires an assessment of Magistrate Lane's purpose, motivation and intention in speaking to Sergeants McInerney and Smith in the identified conversations whilst her judgment in the McDonald matter was reserved.
- [160] The available evidence does not support a conclusion that Magistrate Lane in conducting these conversations deliberately attempted to influence the outcome of the McDonald matter.
- [161] Indeed, the balance of the evidence tends to suggest that Magistrate Lane was motivated by concerns regarding the quality of the prosecution by

⁹² *Ibid* p.32.

⁹³ *Ibid* p.32.

⁹⁴ Refer p.24, paragraph [108], and p.35, paragraph [152], of this report.

Sergeant McInerney in the McDonald matter. Such concerns and appropriate action to address such concerns is in the public interest. However, the manner in which such concerns are addressed must be carefully considered.

- [162] It was Magistrate Lane's evidence, for example, that she wanted to ensure that Sergeant McInerney was appropriately supervised, that he was not allocated complex trials and that he was given proper training.⁹⁵ Furthermore, Magistrate Lane's evidence makes it clear that she thought that police prosecutors should not be conducting criminal trials in the Magistrates Court. Certain aspects of the evidence of both Sergeant McInerney and Sergeant Smith tend to support Magistrate Lane's assertions in this regard.
- [163] For example, Sergeant Smith said that Magistrate Lane commenced her conversation with him by making a complaint about Sergeant McInerney. In the course of making that complaint she went on to make comments about the McDonald trial. And Sergeant McInerney's evidence clearly reveals that Magistrate Lane started out by telling him that he needed to address each of the elements of the offence. In seeking to reinforce her point she then went on to discuss the implications of failing to do so in the context of the McDonald trial.
- [164] Thus, the Commission considers that Magistrate Lane was motivated by public interest concerns and intended to address the quality of the prosecution in the McDonald matter and, whilst the Magistrate chose to address these concerns by engaging in the conversations with Sergeants McInerney and Smith referred to above, the Commission is not of the opinion that she engaged in "conduct of a kind that would if established constitute grounds for removal from judicial office".
- [165] For the purposes of completeness the Commission notes that there were at least three other conversations between Magistrate Lane and the two Sergeants. As to the conversation between Magistrate Lane and Sergeant McInerney near the Kings Hotel, the Commission takes the view that this was an inadvertent and very brief conversation. Although the McDonald trial was discussed, the conversation was very superficial and was of no consequence. As to the telephone call from Magistrate Lane to Sergeant Smith, the Commission notes that this was an extension of the earlier conversation near the cafeteria in the Central Law Courts and is to be considered in the same category. As to the telephone call from Sergeant Smith to Magistrate Lane, this was simply a courtesy call. However, it must be said that this latter conversation was a product of the earlier conversations.

3.3 Commission's Overall Assessment

- [166] The Commission's overall assessment of this matter is that on 20 April 2006 Magistrate Lane discussed the McDonald trial with Sergeant Smith while making a complaint about Sergeant McInerney. As a result of this conversation Sergeant Smith had a conversation with Inspector Hutchinson

⁹⁵ Magistrate Lane Transcript 25 July pp.11 -12.

that led to a review of the McDonald prosecution. That review led to an application by police for the charge to be dismissed.

- [167] It is the Commission's assessment that Magistrate Lane's conversation with Sergeant Smith was the catalyst for a chain of events that led to the ultimate dismissal of the charge. Magistrate Lane is therefore, at least, partly responsible for the withdrawal of the McDonald prosecution on 24 May 2006.
- [168] The Commission has identified no "misconduct" by any person within the meaning of the CCC Act, nor any conduct by Magistrate Lane falling within that described at sub-section 27(3) of the CCC Act.

CHAPTER FOUR RECOMMENDATIONS

4.1 Role of Police

[169] The decisions made by Inspector Hutchinson were in the Commission's opinion misguided. As stated above, a qualified lawyer with more experience and a greater knowledge of the criminal law may not have made the decisions that Inspector Hutchinson made.

[170] The conduct of prosecutions in Magistrates Courts by WAPOL is currently the subject of *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997 ("WAPOL Policy").

[171] The Commission is of the view that the McDonald matter should be a catalyst for a review of the WAPOL Policy as it relates to discontinuances.

[172] The WAPOL Policy applies, *inter alia*, to all applications conducted in courts of summary jurisdiction on behalf of the Commissioner of Police. It provides that the:

... prosecution of a charge should not proceed, even when a prima facie case exists, unless it is in the public interest to do so. This requires in part, the balancing of the proper administration of criminal justice against available resources. In evaluating the public interest the following is relevant, although not exclusive ...[here there is a list of some 23 dot points] ...

... Where it is considered inappropriate in the public interest to proceed with a charge, or it is more appropriate in the public interest to reduce by amendment or substitution the severity of a charge, that decision will be left to a Portfolio Head, a Regional Officer, the State Crime Commander, the Superintendent (Prosecuting) or the delegate of one of those officers ...

[173] The Commission recommends that the WAPOL Prosecuting Division implements a policy, by amending the WAPOL Policy, requiring prosecutors to obtain legal advice from a qualified lawyer before any decision is made to withdraw a charge. Any amendments to the WAPOL Policy should be consistent with section 25 of the *Criminal Procedure Act 2004*.

[174] The Commission notes that the implementation of this policy in country areas is problematic. However, the policy outlined above should be implemented where practicable.

[175] The Commission notes that WAPOL has engaged Mr Brent Meertens, a Consultant State Prosecutor at the DPP, to head up the WAPOL Prosecuting Division. The Commission acknowledges and welcomes this initiative.

Recommendation 1

That the Western Australia Police Prosecuting Division implements a policy, by amending *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997, requiring prosecutors, where practicable, to obtain legal advice from an appropriately qualified and experienced lawyer before any decision is made to apply to discontinue a prosecution in a Magistrates Court

Recommendation 2

That the Western Australia Police Prosecuting Division review the terms of *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997, to ensure that it is consistent with section 25 of the *Criminal Procedure Act 2004*.

- [176] The Commission notes paragraph 72 of the Director of Public Prosecution's *Statement of Prosecution Policy and Guidelines 2005* ("DPP Guidelines") and the policy to proffer the reasons for the termination of a prosecution "to an enquirer who has a legitimate interest in the proceedings, including representatives of the media", except where "to do so would prejudice the administration of justice or would cause significant harm to a victim, witness or accused person".
- [177] The provision by the DPP of reasons for the discontinuance of a prosecution, except in the circumstances noted in paragraph 72 of the DPP Guidelines, provides a mechanism for public scrutiny of the prosecutorial discretion to seek to discontinue a prosecution.
- [178] The Commission recommends that the WAPOL Prosecuting Division implements a policy in similar terms to paragraph 72. The implementation of this recommendation would make such decisions available on the same basis in Magistrates Courts as they are currently available from the DPP in respect of the discontinuance of indictable matters in superior courts.

Recommendation 3

That the Western Australia Police Prosecuting Division implements a policy, by amending *The Western Australia Police Service Statement of Prosecuting Policy and Principles*, September 1997, that provides for the publication of the reasons for an application by the Commissioner of Police to discontinue a prosecution in the Magistrates Court, except where to do so would prejudice the administration of justice or would cause significant harm to a victim, witness or accused person.

4.2 Role of Magistrate Lane

- [179] The Commission makes no recommendations in this report about Magistrate Lane. It is noted that Magistrate Lane gave evidence that her concerns regarding the adequacy of police prosecutions in the Magistrates Court were shared by her colleagues.⁹⁶
- [180] For this reason the Commission does, however, recommend that the Chief Stipendiary Magistrate consider the need for a process whereby he can formally raise Magistrates' concerns regarding prosecutors' performances in the Magistrates Court with either the Commissioner of Police and/or the Director of Public Prosecutions as appropriate, and an education programme for Magistrates regarding appropriate ways in which to raise and communicate such concerns.

Recommendation 4

That the Chief Stipendiary Magistrate consider the need for a process whereby he can formally raise Magistrates' concerns regarding prosecutors' performances in the Magistrates Court with either the Commissioner of Police and/or the Director of Public Prosecutions as appropriate, and for an education programme for Magistrates regarding appropriate ways in which to raise and communicate such concerns.

⁹⁶ *Ibid* p.12.

APPENDIX

Sergeant McInerney Email of 28 March 2006 (8.30 a.m.)

MCINERNEY Bill [PD05419]

From: MCINERNEY Bill [PD05419]
Sent: Tuesday, 28 March 2006 08:30
To: MCINERNEY Bill [PD05419]
Subject: McDONALD J.

On the afternoon of Monday March 27th 2006 in Court 35 before Ms LANE. Ms LANE spoke to me regarding the McDONALD trial and how she believed that I had to prove all elements and the trial may fail because of this. She was basically giving me a heads up that she will dismiss. She stated that there were alternatives and that there would be ramifications across the board with the defense winning. i.e. withdraw so the \$20000 they will request will not be granted etc.