



CORRUPTION AND CRIME COMMISSION



REPORT ON AN ADMINISTRATIVE MATTER RELATING TO THE FUNCTIONS OF THE COMMISSION PURSUANT TO SECTION 88 OF THE CORRUPTION AND CRIME COMMISSION ACT 2003

5 NOVEMBER 2014

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Corruption and Crime Commission

Postal Address	PO Box 7667 Cloisters Square PERTH WA 6850
Telephone	(08) 9215 4888 1800 809 000 (Toll Free for callers outside the Perth metropolitan area.)
Facsimile	(08) 9215 4884
Email	info@ccc.wa.gov.au
Office Hours	8.30 a.m. to 5.00 p.m., Monday to Friday.

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CORRUPTION AND CRIME COMMISSION

Mr Nigel Pratt
Clerk of the Legislative Council
Parliament House
Harvest Terrace
PERTH WA 6000

Mr Peter McHugh
Clerk of the Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Dear Mr Pratt
Dear Mr McHugh

As neither House of Parliament is sitting, in accordance with section 88 and section 93 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"), the Commission presents its *Report on an Administrative Matter Relating to the Functions of the Commission Pursuant to Section 88 of the "Corruption and Crime Commission Act 2003"*.

The Commission notes that under section 93(3) of the CCC Act a copy of a report transmitted to the Clerk of a House is to be regarded as having been laid before that House.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Neil Douglas'.

Neil Douglas
ACTING COMMISSIONER

5 November 2014

ABBREVIATIONS AND ACRONYMS

("Annual Report")	<i>Annual Report 2013-2014 of the Parliamentary Inspector of the Corruption and Crime Commission</i> , tabled in the Parliament of Western Australia on 15 October 2014.
("the CCC Act")	<i>Corruption and Crime Commission Act 2003</i>
("the Commission")	Corruption and Crime Commission
OSU	Operations Support Unit
("WA Police")	Western Australia Police

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1. BACKGROUND

- [1] On 15 October 2014 the Parliamentary Inspector tabled his *Annual Report 2013-2014* ("Annual Report") in the Parliament of Western Australia. In the days following that tabling there was widespread media coverage of comments that the Parliamentary Inspector made in the Annual Report about the actions of the Corruption and Crime Commission ("the Commission") in respect of the misconduct and criminal investigations into Commission officers.
- [2] It is to be expected that particular attention and prominence would be given to any public comments made by the Parliamentary Inspector that are critical, or seen to be critical, of the Commission. Only the Parliamentary Inspector, as part of his or her statutory oversight role, is entitled to full access to the Commission's records and to obtain from the Commission any information relating to its operations and any conduct of its officers. In these circumstances, there is a reasonable expectation that public comments made by the Parliamentary Inspector, particularly public comments contained in an annual report, would be carefully considered, accurate and fairly represent the true position.
- [3] The media attention that immediately followed the Parliamentary Inspector's comments in his Annual Report focussed on assertions that:
- (1) "[the Commission's] own Parliamentary Inspector Michael Murray ... accused the CCC of attempting to thwart a police investigation into alleged criminality by its officers";
 - (2) "Mr Murray accused the CCC of hiding behind its secrecy provisions to withhold documents requested by police and also to delay access to staff at the centre of the allegations";
 - (3) the Commission had sought to "cover up" the claims of misconduct against Commission officers;
 - (4) in dealing with suspicions of misconduct involving its own officers the Commission had failed to apply the same rigorous standards as it applied to others;
 - (5) the Commission had sought to avoid having Commission officers dealt with properly and "according to law"; and
 - (6) the Commission had "done all [it] could to keep the Police out of the investigation".
- [4] On the day after the Parliamentary Inspector's comments were published the Premier responded to the "revelations" by the Parliamentary Inspector by saying that it was a "major embarrassment" for the Commission, that he "expected a higher standard" from the Commission and that:
- ... the Government was concerned about allegations against CCC officers "and we certainly want that to be brought totally to the surface and treated accordingly".*

"We will make sure the full force of the law applies to people that may have done the wrong thing in the CCC ..."

"They will not gain any exclusive or privileged treatment".

- [5] The Commission is used to public criticism, including criticism that is uninformed or speculative – in part because of the nature of the Commission's work and its statutory and operational constraints in disclosing information to the public. What distinguishes the most recent public criticisms is that the accusations against the Commission have been widely reported to have emanated from the Parliamentary Inspector himself. The resulting reputational damage to the Commission is illustrated by the editorial in *The West Australian* on 17 October 2014 which relied on the "revelations" contained in the Parliamentary Inspector's Annual Report to conclude that the Commission is "a tarnished organisation" and is in need of an overhaul to "restore public confidence" in it.
- [6] At the core of all these criticisms are serious misconceptions about the Commission's actions in responding to allegations of misconduct and criminality against its own officers, including the Commission's actions in relation to the Western Australia Police ("WA Police") investigation initiated by the Parliamentary Inspector. In essence, those actions cover two periods:
 - (1) before the WA Police investigation (from 9 July 2013 to 11 December 2013) – dealing with the Commission's responses to, and investigation of, those allegations; and
 - (2) after the WA Police investigation commenced (between 12 December 2013 and 19 March 2014) – dealing with the Commission's responses to issues relating to the production of documents to, and interviewing of Commission officers by, WA Police.
- [7] The Commission's actions are the subject of extensive documentation. That documentation provides compelling evidence that not only refutes the criticisms that have been made about the Commission, but demonstrates that the Commission has acted in accordance with the very high standards that the public are entitled to expect.
- [8] Identifying the true position, by reference to the relevant facts, would go some way towards addressing the damage that has been caused to the public's confidence in the Commission. Its more immediate effect would be to address the damaging effect that the recent public accusations and criticisms have had on staff morale, the Commission's capacity to attract and retain high quality staff and, more broadly, the Commission's capacity to carry out its functions most effectively.

2. PERIOD PRIOR TO WA POLICE INVESTIGATION

[9] Of particular importance in a fair and proper assessment of this matter, but not included in the Parliamentary Inspector's account of the relevant events in his Annual Report, are that:

- (1) the Commission was first notified in writing of the suspected misconduct on 9 July 2013;
- (2) the Commission officially reported the suspected misconduct to the Parliamentary Inspector on 18 July 2013;
- (3) the Commission immediately initiated its own investigation into the suspected misconduct, including compulsory examinations on oath or affirmation for all those involved;
- (4) during the course of its investigation the Commission provided the Parliamentary Inspector with progress reports of that investigation, later acknowledged by the Parliamentary Inspector who, some time after the conclusion of the Commission's investigation, wrote to the Commission on 3 December 2013 expressing his "gratitude to ... [Commissioner Roger Macknay, QC ...] and to all other Commission officers who have assisted in the investigation of these allegations for their diligence and regular communication with me on their progress";
- (5) after completing its investigation, the Commission sent to the Parliamentary Inspector, on 26 September 2013, its Final Investigation Report; and
- (6) the Commission's Final Investigation Report recommended to the Parliamentary Inspector that a brief of evidence be prepared in relation to the alleged theft of \$1,000 involving three Commission officers, and that this brief be forwarded to the Office of the Director of Public Prosecutions for advice on whether there was a *prima facie* case against the officers.

[10] In several passages of his Annual Report the Parliamentary Inspector's account of events conflates the investigation by the Commission and the WA Police investigation. This has resulted in the erroneous impression that particular actions were taken, not by the Commission on its own initiative, but as a result of the Parliamentary Inspector's involvement, or the WA Police investigation. For example, contrary to the impression from the Parliamentary Inspector's account:

- (1) it was the Commission's own investigation that "established a reasonable suspicion of criminal conduct by Commission officers" and it was the Commission that reached that conclusion;
- (2) the three Commission officers who were dismissed were dismissed by the Commission on its own initiative as a result of its own investigations. Neither the involvement of the Parliamentary Inspector nor the WA Police investigation had any bearing on

these dismissals. In fact, two were dismissed before the matters were referred to WA Police and the third was dismissed by the Commission shortly after the WA Police investigation commenced but with no causal connection; and

- (3) similarly, neither the involvement of the Parliamentary Inspector nor the WA Police investigation had any bearing on the Commission's decision not to renew the contract of employment of another Commission officer referred to in the Parliamentary Inspector's Annual Report.

[11] Under the heading of "Procedural changes to the OSU [Operations Support Unit]", the Parliamentary Inspector's Annual Report states:

As a consequence of the investigations into the allegations mentioned above, I am overseeing the implementation of wide-ranging changes to the procedures of the OSU. The procedures affected include:

- *the methods of purchasing, leasing and replacing Commission motor vehicles;*
- *the payment for fuel used by those vehicles;*
- *the receipt of, accountability for, and payment of, traffic infringement notices;*
- *the accumulation of demerit points;*
- *applications for Special Constable appointments;*
- *applications for assumed identities and their use in obtaining motor driver's [sic] licences;*
- *the provision of cash advances;*
- *the use of corporate credit cards and their proper acquittal;*
- *claims made for allowances and cash advances;*
- *the maintenance of financial documents and approvals, and*
- *the making of accurate entries into duty diaries, and other documents.*

[12] It can readily be appreciated that in his Annual Report the Parliamentary Inspector would wish to highlight his own role in "overseeing the implementation" of these changes. What would not be apparent to the reader, however, is that:

- (1) the Commission itself, from its own investigations, identified the need for changes to all of these procedures; and

- (2) the Commission itself initiated these changes and has continued to pursue best practice in developing and implementing the changes.

[13] Despite the impression to the contrary that has been garnered from reading the Parliamentary Inspector's Annual Report, the facts establish that the Commission:

- (1) acted promptly, decisively and properly in dealing with the allegations of misconduct against Commission officers; and
- (2) applied higher standards and took more rigorous action in investigating and dealing with allegations of misconduct against its own officers than it would have taken against officers from another agency.

3. DELAYING AND "THWARTING" ACCUSATIONS

3.1 Referral to WA Police

- [14] The Parliamentary Inspector reported that the Commission disagreed with his "decision to refer allegations to the Police for investigation when preliminary investigation [by the Commission itself] established a reasonable suspicion of criminal conduct by Commission officers". The Parliamentary Inspector reported on why he made his decision – but did not report on why the Commission disagreed with his decision.
- [15] As a result it is open to those reading the Parliamentary Inspector's Annual Report to speculate that the Commission disagreed with the decision to refer those allegations to WA Police because the Commission was seeking to avoid accountability and also to avoid "the full force of the law apply[ing] to people that may have done the wrong thing", and that the Commission was attempting to "gain an exclusive or privileged treatment" for its own officers.
- [16] In fact, the Commission disagreed with the Parliamentary Inspector's decision because the Commission had, and continues to have:
- (1) major concerns about the effect of that decision on the Commission's capacity to undertake its principal police oversight functions;
 - (2) serious doubts (confirmed by independent senior counsel advice) about the lawfulness of that decision, insofar as it involved WA Police undertaking general investigations into the operations of the Commission and the activities of its officers; and
 - (3) serious doubts about the efficacy and appropriateness of that decision – having regard to matters such as the Parliamentary Inspector's formal acknowledgement that WA Police undertaking the investigation were "not subject to [his] direction" and that "the direction and scope of the investigation is a matter for them".
- [17] The Commission expects that more detailed attention will be given to these matters. In the meantime, the seriousness of this issue is illustrated by the public statement by the Chairman of the Joint Standing Committee on the Corruption and Crime Commission on radio on 16 October 2014 that:

... we now have a situation where we have actually got Police officers investigating the Corruption and Crime Commission ... I think that none of us would have anticipated that would be the case, and these are the types of things that eventually, when this matter finishes, whether that's in a few months' time, or whenever, the Committee is going to have a very good look [at] that. Because, if this were to happen again, I am not confident that the best way forward is to have Police investigating the CCC when it's the CCC's role to investigate the Police.

3.2 WA Police Request for Documents and Initial Responses

- [18] On 12 December 2013 WA Police wrote to Commissioner Macknay formally advising of the Parliamentary Inspector's referral of the allegations to WA Police for its investigation. The letter sought from the Commission documents that were identified in "Attachment A" and "Attachment B".
- [19] The documents listed in Attachment A were clearly relevant to the investigation of the specific allegations referred to WA Police. The Commission promptly provided these to WA Police and receipt was formally acknowledged in a letter to the Commissioner on 6 January 2014. No mention of this is made in the Parliamentary Inspector's Annual Report.
- [20] The Commission's prompt provision to WA Police of the documents in Attachment A is consistent with its repeated statements to WA Police and to the Parliamentary Inspector that, despite its concerns about the lawfulness and propriety of the Parliamentary Inspector's referral of the investigation to WA Police, the Commission was "anxious to co-operate" with the Police investigation and to ensure that those involved should properly be brought to account. This is far removed from the impression that the Commission's response was to delay and thwart the WA Police investigation.
- [21] The documents listed in Attachment B cover the period between 1 January 2011 and 31 August 2013. Many had no apparent relevance to the investigation of the specific allegations referred to WA Police for investigation. Indeed, the first letter from WA Police to the Commission (on 12 December 2013):
- (1) acknowledged that "the Commission may have a view on the sensitivity of particular records and documents that are the subject of this request";
 - (2) explained that "the material (sought) is necessarily comprehensive and covers a longer period in order to investigate specific issues raised by the Parliamentary Inspector";
 - (3) acknowledged, by way of example, that "the disclosure of records such as *surveillance running sheets* and *journals* of OSU operatives [may] raise specific concerns for the Commission"; and
 - (4) invited the Commission to discuss with WA Police any concerns of that type that it may have.
- [22] Plainly, as recognised at the outset by WA Police itself, this was not a simple matter of the Commission providing documents to WA Police to facilitate its investigation of specific allegations.
- [23] The Commission did not delay its response to the letter from WA Police. On 16 December 2013 – 4 days later, including a weekend – Commissioner Macknay wrote to the Parliamentary Inspector. The letter

set out examples of the nature and scope of the documents sought (in Attachment B) by WA Police. Examples included –

...

3. *All rosters, record of attendance, record of leave, record of absence, record of sick leave, record of training, record of overtime, surveillance logs and running sheets for officers of the Corruption and Crime Commission Operations Support Unit for the period of 1 January 2011 to 31 August 2013.*

...

8. *Any daily journal or day book of ... [four senior Commission officers] for the period 1 January, 2011 to 31 August, 2013.*

...

14. *Records of all financial expenditure, including but not limited to credit card and cash advances, acquittals and expenditure, including the contingency fund, by officers of the Corruption and Crime Commission, Operations Support Unit for the period of 1 January 2011 to 31 August 2013.*

...

21. *Records which list all operations conducted by the Operations Support Unit for the period 1 January 2011 to 31 August 2013.*

[24] The gravity of the Commission's concerns is illustrated by that last example (item 21). Since its inception the Commission had never given anyone, except the Parliamentary Inspector, details of the operations that it had conducted. The Commission was now being asked to give to WA Police – the very body over which it has primary oversight – a list of all operations conducted, over a period of more than two and half years, by the Operations Support Unit (OSU), which was responsible for all the Commission's covert surveillance activities.

[25] In his letter of 16 December 2013 to the Parliamentary Inspector Commissioner Macknay stated:

In the Commission's view the material sought is unrelated to any of the four matters removed by you. The demand for it is consistent only with the intention on the part of WA Police to carry out a general audit of the OSU for the period nominated.

... [WA Police] sought to justify the demand on the basis that the documents were required "in order to investigate specific issues raised by the Parliamentary Inspector".

The Commission is not aware of what those issues are, not having been informed of the same.

Production of some of the documents would be destructive of or extremely damaging to the Commission's ability to oversee WA Police, and ... [WA Police] does invite discussion.

If a financial audit be required, then, and with respect, WA Police is an inappropriate auditor, and the task is one for your office, having been created for that purpose, with the aid, if necessary, of additional officers who would be made subject to the secrecy provisions of the [CCC] Act.

The Commission considers, on material known to it, that ... [WA Police's] view that the matters referred by you would justify a coercive production of the general material for the specified period is a faulty one. There is plainly an urgent need for discussion about this matter.

- [26] This is another example of the Commission itself acting swiftly and advocating the need for urgency. The Parliamentary Inspector did not respond until 7 January 2014 – over three weeks later.
- [27] The Parliamentary Inspector's response on 7 January 2014 did not address the merits of the Commission's major concern that "[p]roduction of some of the documents would be destructive of or extremely damaging to the Commission's ability to oversee WA Police". Instead, it stated, in part, that:

The point is, that although the police become involved at my behest, the direction and scope of their investigation is a matter for them. If they choose to seek information about matters suggested by their inquiries that reveal other lines of investigation outside my referral, their capacity to pursue those lines of inquiry will depend upon their receipt of your co-operation and that of officers of the Commission, or upon their use of otherwise available statutory powers. I know of no provision of the [CCC] Act which gives the Commission and its officers immunity from the use of such powers.

- [28] On that approach, WA Police were free – without any intervention by the Parliamentary Inspector – to seek (and obtain) Commission documents and information on any matter they wished, even if the matter was outside the scope of the matters referred to them by the Parliamentary Inspector and even if the disclosure of the documents or information sought would be "destructive of or extremely damaging to the Commission's ability to oversee WA Police".
- [29] The Parliamentary Inspector concluded his response with the suggestion that:

... If there is tension between the facilitation of the police investigation generally and the work of the Commission, I would hope that a negotiated outcome which satisfies the needs of both agencies may be achieved ...

- [30] In his response the Parliamentary Inspector also disagreed with Commissioner Macknay's view and stated that he was satisfied that WA Police could enforce the request for such documents or information by using their statutory powers – such as the use of search warrants – against both the Commission and individual officers.

3.3 Interview of Commission Officers

- [31] In the letter from WA Police to the Commission on 12 December 2013 no specific reference was made to the interview of Commission officers. In the context of identifying any "delay" to the WA Police investigation, it is significant that this issue was not raised by WA Police until 6 January 2014. In its letter to the Commission on 6 January 2014, WA Police wrote:

*On a more general note, as I am sure you would appreciate, in order to conduct a thorough and proper investigation of the matters that the Parliamentary Inspector has referred, it will be necessary for Police investigators to interview a number of current and former employees of the Commission and view any relevant material in possession of the Commission. I am conscious of the secrecy provisions contained in Section 152 of the "Corruption and Crime Commission Act 2003" (WA) (**the Act**) and I can appreciate that such interviews etc by WA Police may lead to the disclosure of "official information" within the meaning of s 152(1) of the Act.*

In that regard, I suggest that you give urgent consideration to the provisions of section 152(4)(c) of the Act. As you would be aware, this provision enables the Commission to certify that "relevant persons" can disclose "official information" where it is "necessary in the public interest". In my view, it is necessary in the public interest for such disclosure to occur so that Police investigators can conduct appropriate investigations into the matters that have been referred to WA Police by the Parliamentary Inspector. Essentially, I am asking you to consider whether the release of this "official information" is necessary in the public interest, and if you form this view, for you to then certify such in line with section 152(4)(c) of the Act.

- [32] The Commission, as it repeatedly confirmed to both the Parliamentary Inspector and WA Police – by its words and actions – was anxious to cooperate with the WA Police investigation and to ensure that any wrongdoing by current or former Commission officers was promptly and thoroughly investigated and dealt with.
- [33] However, this was no simple matter. Never before had WA Police sought to interview Commission officers.
- [34] There were serious legal issues that needed to be addressed for the first time. Those legal issues arose from the requirements of section 152 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"). Under that section a current or former Commission officer is prohibited from disclosing any "official information" (that is, information acquired by the

officer by reason of, or in the course of, the performance of the officer's functions under the CCC Act).

- [35] One of the exceptions to that prohibition permits official information to be disclosed by a Commission officer if it is disclosed "when the Commission has certified that disclosure is necessary in the public interest" (section 152(4)(c)). In its letter to the Commission on 6 January 2014 WA Police sought from the Commissioner, in effect, a certificate for each of the current or former Commission officers whom WA Police wished to interview.
- [36] It was immediately apparent to the Commission that it would not have been lawful for the Commissioner to certify that it was necessary in the public interest for every current and former Commission officer, identified by WA Police as a potential interviewee, to disclose to WA Police whatever "official information" might be sought by WA Police. Instead, it was necessary for there to be some limitation on the type of official information in respect of which the Commissioner could lawfully certify that disclosure was necessary in the public interest. That limitation would need to be related in some way to the purposes of the criminal investigation into the specific allegations referred to WA Police by the Parliamentary Inspector.
- [37] An obvious complication was that among the documents sought by WA Police in Attachment B were documents that (as Commissioner Macknay informed the Parliamentary Inspector on 16 December 2013) appeared to have no relevance to the four specific allegations and the production of some of those documents "would be destructive of or extremely damaging to the Commission's ability to oversee WA Police". In these circumstances the Commission's view was that it was not lawfully open to the Commissioner to provide certificates in the terms sought by WA Police.
- [38] Two days after receiving the Parliamentary Inspector's response on 7 January 2014 the Commission sought the advice of independent Senior Counsel, Ms Patricia Cahill, SC. That advice, provided to the Commission on 14 January 2014, confirmed the Commission's view that:
- (1) the Commission could lawfully issue a certificate under section 152(4)(f) of the CCC Act to enable a Commission officer to disclose official information that "is relevant to specific allegations referred to [WA Police] by the Parliamentary Inspector"; and
 - (2) the disclosure of official information that is not reasonably required for the investigation into those allegations "may well be contrary to the public interest" – and, therefore, could not lawfully be the subject of a certificate under section 152(4)(c).
- [39] Further, contrary to the Parliamentary Inspector's view, Senior Counsel, Ms Cahill, also advised that, in the event that WA Police were to issue a search warrant or notice to produce documents or information (as foreshadowed by WA Police in its letter of 12 December 2013), the immunity provisions of section 152(7) of the CCC Act would apply and, in any event, a claim of public interest immunity could be made to prevent the disclosure of the documents or information in question.

3.4 Legislative Obstacles and the Commission's Proposed Solutions

[40] On 14 January 2014, the same day that the Commission received the advice from Senior Counsel, Ms Cahill, Commissioner Macknay wrote to the Parliamentary Inspector. That letter informed the Parliamentary Inspector:

- (1) of the reasons, based on the advice from senior counsel, why the Commission was unable to certify that it was in the public interest to provide WA Police with information that related not to specific allegations, but to a general audit by WA Police of the operational workings of the OSU;
- (2) that the immunity powers of section 152(7) of the CCC Act would apply to any attempt by WA Police to obtain the information by issuing a search warrant or a notice to produce information or documents; and
- (3) if a stalemate occurred "which will end up in the Supreme Court ... [i]t would then be necessary for the Commission to make clear that its inability to comply with any demand for documents stems solely from the inappropriateness of the method used to try and gain access to those documents ..."

[41] Commission Macknay reiterated that:

The Commission is anxious to cooperate and ensure that any failings in the OSU are dealt with.

[42] These were not empty words. After explaining, on the basis of independent senior counsel's advice, why the Commission was unable to provide WA Police with all the documents that it had sought, Commissioner Macknay suggested two ways in which all the documents sought by WA Police could be provided by the Commission – lawfully and immediately.

[43] The first was for the Parliamentary Inspector himself to require the Commission to produce the documents under section 196(3) of the CCC Act. It would then be up to the Parliamentary Inspector to use those documents in whatever way he saw fit within the broad scope of the Parliamentary Inspector's statutory functions. Those functions include dealing with matters of misconduct (including suspected criminality) on the part of officers of the Commission (section 195(1)(b)), investigating any aspect of the Commission's operations or any conduct of officers (section 196(3)(a)), and consulting, cooperating and exchanging information with independent agencies and appropriate authorities, including WA Police.

[44] Secondly, Commissioner Macknay suggested that:

... the issue can be resolved simply and appropriately by the expedient of any relevant police officers being sworn by the Parliamentary Inspector, so as to ensure the safeguards provided by

the [CCC] Act to prevent misuse of information about the Commission were in place.

- [45] There could scarcely be a plainer demonstration of the Commission's intentions and commitment underlying its statement to the Parliamentary Inspector that it was "anxious to cooperate and to ensure that any failings in the OSU are dealt with". After identifying the legal hurdles that applied to the Commission providing the documents sought directly to WA Police, the Commissioner suggested two ways in which those obstacles could immediately be overcome and the Parliamentary Inspector himself would have the responsibility of determining what documents or other information could appropriately be provided to WA Police without compromising the Commission's functions of overseeing WA Police.
- [46] The Commission's actions also constitute a compelling rejoinder to the suggestions that the Commission attempted to delay or thwart the WA Police investigation or that it was somehow attempting to give privileged treatment to current or former Commission officers.
- [47] The Commission did not receive a response from the Parliamentary Inspector until 4 February 2014 – another three weeks later.
- [48] Just two days after writing to the Parliamentary Inspector, and without waiting for the Parliamentary Inspector's response, Commissioner Macknay wrote to WA Police (on 16 January 2014). That letter:
- (1) referred to the advice from senior counsel and explained why the Commission was unable, under section 152(4)(c) of the CCC Act, to certify that disclosure of all the documents sought by WA Police would be in the public interest;
 - (2) also referred to the advice of senior counsel that the effect of section 152(7) of the CCC Act was to render the Commission immune from coercive measures (such as the issue of search warrants) that might be taken by WA Police to attempt to enforce production of the documents; and
 - (3) reiterated that the Commission "is anxious to avoid any conflict in relation to the matter" and outlined the two suggestions that the Commissioner had made to the Parliamentary Inspector to resolve the obstacles to the Commission providing all the documents to WA Police, and urged WA Police to themselves raise these matters with the Parliamentary Inspector.
- [49] That, in itself, may well be regarded as an appropriate and sufficient response by the Commission. However, once again, the Commission took the initiative. Commissioner Macknay informed WA Police that the Commission was "anxious to cooperate with any mandated enquiry into its affairs". Consistently with that statement, the letter also advised that:

The Commission is able to provide documents relating to the specific matters referred by the Parliamentary Inspector, subject to redactions

where necessary to protect sensitive information unrelated to the particular investigation.

I enclose a list setting out the Commission's response in relation to each of the categories of document[s] sought in Attachment B.

The documents able to be released will be provided as soon as redaction is completed.

- [50] In relation to 20 of the 21 categories of documents listed in Attachment B the Commission undertook to provide, if it had not already provided, all documents (redacted as necessary) that related to the specific investigations. Only in relation to item 21, which (as previously noted) requested "[r]ecords which list all operations conducted by the Operations Support Unit for the period 1 January 2011 to 31 January 2013", did the Commission indicate that no records would be provided – solely because the Commission was unable to certify that it would be in the public interest to do so.
- [51] As noted, on 4 February 2014 the Parliamentary Inspector responded to the Commission's letter of 14 January 2014. In that response he expressed his disagreement with the Commission's interpretation of various provisions of sections 152 and 153 of the CCC Act and expressed the view that he doubted whether information obtained by WA Police, under compulsion or with the cooperation of the Commission, would be "disclosed" within the meaning of the CCC Act.

3.5 Further Legal Issues

- [52] On 7 February 2014 the Parliamentary Inspector wrote to WA Police expressing his views on the legal issues that had been identified (but warning WA Police that his views "may not be taken by the Police as legal advice"). Among the Parliamentary Inspector's views, all of which were different to the views of Commissioner Macknay and the advice of Senior Counsel, Ms Cahill, in respect of the matters on which her advice was sought, were that:
- (1) WA Police could execute a search warrant against the Commission and Commission officers;
 - (2) a Commission officer who provided documents or information to WA Police would not "disclose" those documents or information for the purposes of section 152(2)(b) of the CCC Act; and
 - (3) the "difficulty raised by the Commissioner in his letter dated 14 January 2013 does not exist".
- [53] As a result the Commission sought further independent legal advice, this time from Mr CL Zelestis, QC, a former Parliamentary Inspector. The advice from Mr Zelestis does not support any of the views expressed by the Parliamentary Inspector about the interpretation of the relevant

legislative provisions. Among the conclusions in the advice from Mr Zelestis, given to the Commission on 14 February 2014, are:

...

- (10) *[i]n my view, it is clear that the provision of official information by an officer of the Commission or a Commission lawyer to another person, whether under statutory compulsory process or not, would amount to disclosure of official information. Not only is that the plain meaning of the words used, in the context, but there is no aspect of the subject matter or purpose of the provision which points in a different direction.*

...

- (16) *... the commencement of a police investigation of a matter relating to the Commission or any of its officers could not possibly justify disclosure of official information under s.152(4)(b) or s.152(7).*

...

- (22) *... it may often be the case that disclosure ... of some official information relating to the suspected commission of an offence would be necessary in the public interest and should be so certified by the Commission under s.152(4)(c) ...*

- (23) *With respect to disclosure for the purposes of a general police investigation which does not relate to particular instances of conduct that may give rise to offences, I agree with the views expressed by Ms Patricia Cahill SC in her memorandum dated 13 January 2014 ... [that] there are insufficient grounds for concluding that disclosure in these circumstances is necessary in the public interest.*

- [54] The advice from Senior Counsel, Mr Zelestis, also confirmed the Commission's concerns about the lawfulness and appropriateness of the Parliamentary Inspector's referral of these matters to WA Police for investigation.

3.6 Responses to WA Police Concerns

- [55] In his letter to Commissioner Macknay on 7 February 2014 the Parliamentary Inspector reported that he had met with WA Police officers heading the WA Police investigation that he had initiated and stated:

At our meeting yesterday ... [WA Police] expressed their concerns to me about the delays the Police are encountering in their criminal investigation which commenced some two months ago. They say that those delays are being caused by the Commission's decision not to provide them with documents which they consider relevant to their criminal investigation, and by the Commission's decision to prevent

officers of the Commission, whom the Police wish to interview, from being spoken to unless the Police first fulfil certain conditions.

These conditions, ... [WA Police] say, include advance notification of the identity of the people proposed to be interviewed, the nature of the questions to be asked of them, and the scope of the subject-matter to which those questions will be restricted, before you will consider specific certification to permit the interview to proceed and information to be supplied.

- [56] In relation to the first of those three conditions, there was no question that "advance notification of the identity of the people proposed to be interviewed" was required. The Commissioner could not issue a certificate to a person without knowing the identity of that person. As to the second and third conditions, these were proposed to ensure that the Commissioner was provided with sufficient information to enable him to be satisfied, in relation to each certificate, that the public interest test was satisfied – in accordance with the requirements of the CCC Act.
- [57] On 14 February 2014 (the same day as the Commission received the advice from Senior Counsel, Mr Zelestis), the Commissioner wrote to WA Police in response to the concerns outlined in the letter from the Parliamentary Inspector dated 7 February 2014.
- [58] In relation to the documents that had been sought in Attachment B, the Commissioner noted that:
- (1) most of those documents had either been provided or arrangements had been made for their delivery; and
 - (2) as to the remaining documents that related to "the proposed general audit of the OSU", the Commission's position, now confirmed by further independent senior counsel advice, remained the same as set out in the Commission's letter of 16 January 2014.
- [59] As to WA "Police interviews with Commission officers", the Commissioner informed WA Police that:
- ... the Commission has not, and would not, take any step to impede that occurring.*
- The Commission's response in relation to any officer who informs the Commission that he has been approached for an interview is to simply inform the officer of the relevant provisions of the ... [CCC Act] and suggest that independent legal advice be obtained, on the basis that the Commission will meet the cost of that advice.*
- The individual officer's decision in relation to Police interview is then entirely for that officer.*
- [60] As to the terms of the certificates to be issued to Commission officers to enable them to disclose "official information" to WA Police in interviews, the Commissioner stated that, based on further advice from senior counsel in

relation to that issue, the terms of the certificate would relate to "any of the four discrete allegations referred to Police by Mr Murray in December 2013".

- [61] On 17 February 2014 WA Police sought certificates, in the terms proposed by Commissioner Macknay, in respect of a list of current and former officers identified in lists attached to that letter. In relation to the remaining documents that had been sought by WA Police, but not provided by the Commission, WA Police welcomed the Commissioner's offer to discuss the matter and suggested a meeting.
- [62] On 20 February 2014 Commissioner Macknay wrote to WA Police enclosing "certificates pursuant to section 152(4)(c) of the ... [CCC Act] in relation to each of the particular investigations and present or past Commission officers Police wish to interview". As for the remaining documents, the Commissioner emphasised that "the Commission is acting on legal advice from senior counsel" including "formal advice received from Mr CL Zelestis, QC, the leader of the Perth Bar, and a former Acting Parliamentary Commissioner of the Commission". The Commissioner proposed a meeting for early the following week.
- [63] On 25 February 2014 Commissioner Macknay met with WA Police. Despite earlier agreeing to the terms of the certificates as proposed by the Commission, WA Police were concerned that the terms of the certificates would not allow the disclosure of information evidencing criminality not related to previously notified allegations. The Commissioner agreed to provide replacement certificates, in broader terms, to allow the disclosure of official information relating to any criminal behaviour.
- [64] On 11 March 2014 the Commission received a hand-delivered letter from WA Police dated 28 February 2014. No explanation was provided for this delay by WA Police. The letter referred to the agreement reached at the meeting of 25 February 2014 and asked that the Commission provide:
- ... a general dispensation ... [to] provide certainty to any serving or former CCC officer that if they have any information of alleged criminal, corrupt or serious misconduct, they would not and nor should not feel constrained or prevented from disclosing to WA Police such information for fear of prosecution under a secrecy provision.*
- [65] On 19 March 2014 Commissioner Macknay signed a certificate authorising 66 named individuals (which included Commission officers, former officers and private individuals) to disclose to WA Police official information which may reveal the carrying out of a criminal offence or serious misconduct by any officer of the Commission. (Incidentally, the private individuals were from an accounting firm that had been engaged by the Commission to provide advice in relation to aspects of the Commission's procedures that had been identified for review by the Commission. These private individuals are within the scope of the expression "officer of the Commission" as defined in section 3(1) of the CCC Act.)

4. OTHER ASPECTS OF THE ANNUAL REPORT

[66] Reference has earlier been made to the way in which the Parliamentary Inspector's Annual Report dealt with the Commission's actions before the WA Police investigation began (section 2 of this report) and after the WA Police investigation began (section 3 of this report).

[67] There are other aspects of the Annual Report that illustrate the misleading impression it gives about the Commission's actions. An example is the paragraph (on p.6) stating:

Tensions subsequently arose between the Commission and the Police when the Commission suggested to them and to my Office that the secrecy provisions of the Act prevented it from releasing documents to the Police which the Police thought were relevant to their investigation. The Commission adopted the same position in relation to requests from the Police to interview its officers as suspects or witnesses in respect of possible criminality within the Commission. The Commission's position changed in time, but the Police investigation was undoubtedly delayed.

[68] First, it is misleading to say that the Commission "suggested" to WA Police and the Parliamentary Inspector "that the secrecy provisions of the Act prevented it from releasing documents to the Police which the Police thought were relevant to their investigation". The use of "suggested" trivialised the issue and contributed to the impression that resulted in the media reports that "Mr Murray accused the CCC of hiding behind its secrecy provisions to withhold documents requested by Police and also to delay access to staff at the centre of the allegations".

[69] It was never merely a suggestion. The Commission made it very clear, in its correspondence with WA Police and the Parliamentary Inspector, that:

(1) "[p]roduction of some of the documents would be destructive of or extremely damaging to the Commission's ability to oversee WA Police"; and

(2) the Commission could not lawfully disclose to WA Police all the information that it had sought.

[70] The gravity of the issue, and the serious consideration given to it by the Commission, is evidenced by the Commission's rare (if not unprecedented) action of seeking and obtaining advice from two independent senior counsel (each of whom confirmed the Commission's legal interpretation of the relevant provisions of the CCC Act, contrary to the views expressed by the Parliamentary Inspector).

[71] Secondly, it is misleading to say that "the Commission's position changed in time". The Commission did not change its position in relation to the fundamental issue that the constraints in the CCC Act prevented it from lawfully disclosing to WA Police all the information that WA Police had sought. Indeed, the Commission has never disclosed to WA Police all the

information that WA Police sought. What the Commission did was to explore cooperatively and expeditiously with WA Police ways in which as much information as possible could be given to WA Police to facilitate its investigation, but within the constraints of the CCC Act provisions.

[72] The next paragraph in the Annual Report states:

Police investigation into suspected criminality on the part of Commission officers may not be delayed, or thwarted, by a decision of the Commission to withhold documents from the Police, or access to suspects or witnesses, who the Police wish to interview, where, as was the case in respect of the matters that I referred to the Police for investigation, a proper reading of the Act leads to the conclusion that leave should be granted by the Commission to facilitate the Police enquiries.

[73] The reference to "a proper reading of the Act" is misleading. The Parliamentary Inspector had his own views of how the relevant provisions of the Act should be read. Those views were materially different from the views of the Commission (supported by advice from the two independent senior counsel). In these circumstances, to describe the Commission's views of the relevant provisions of the CCC Act as "suggest[ions]" and his own views as "a proper reading of the Act" misrepresents the true position and further contributed to the impression that resulted in the media reports referred to earlier.

5. CONCLUSIONS

- [74] The Commission was deeply disappointed to discover that a small group of Commission officers, in one of the Commission's surveillance units, may have engaged in misconduct and possibly criminal conduct. As the State's principal integrity agency, the Commission has very high expectations of the conduct of its officers.
- [75] From 9 July 2013, when it was notified in writing of the allegations against the officers, the Commission has acted swiftly and openly to ensure that the allegations were thoroughly investigated and appropriate action taken not only in relation to the particular officers concerned (including those having the relevant management responsibilities) but also in relation to improvements that were needed to Commission policies, procedures and practices.
- [76] By way of illustration, after being notified of the suspected misconduct of its officers:
- (1) the Commission promptly reported the matter to the Parliamentary Inspector;
 - (2) the Commission provided, and has continued to provide, the Parliamentary Inspector with relevant documents and information, much of which has been at the initiative of the Commission, as well as in response to requests from the Parliamentary Inspector;
 - (3) the Commission immediately initiated its own investigation into the suspected misconduct, including compulsory examinations on oath or affirmation for all those involved;
 - (4) during the course of its investigations the Commission provided the Parliamentary Inspector with progress reports of that investigation, later acknowledged by the Parliamentary Inspector who, at the conclusion of the Commission's investigation, wrote to the Commission on 3 December 2013 expressing his "gratitude to ... [Commissioner Macknay ...] and to all other Commission officers who have assisted in the investigation of these allegations for their diligence and regular communication with me on their progress";
 - (5) as a result of its own investigation:
 - (a) the Commission itself determined that there was a reasonable suspicion of criminal conduct by Commission officers and the Commission itself recommended to the Parliamentary Inspector that further investigation into criminal conduct be undertaken;
 - (b) the Commission dismissed three officers, two being dismissed before the matter was referred to WA Police and the third shortly after the WA Police investigation commenced but with no causal connection; and

- (c) the Commission decided not to renew the contract of employment of a senior Commission officer who had relevant management responsibilities but was not involved in any of the suspected criminal conduct;
 - (6) the Commission undertook a thorough audit and review of its surveillance unit (OSU) and made significant personnel and operational changes to improve its accountability and management;
 - (7) the Commission has been transparent in highlighting these matters in its *Annual Report 2013-2014*; and
 - (8) from its own investigations the Commission identified changes needed to improve its practices and procedures and (with full disclosure to, and in cooperation with, the Parliamentary Inspector) the Commission has implemented, and continues to implement, those changes.
- [77] Many of the specific criticisms resulting from the comments made by the Parliamentary Inspector in his Annual Report related to the three-month period between 12 December 2013 and 19 March 2014. During that period, from the commencement of the WA Police investigation, issues relating to the production of Commission documents to WA Police, and the information that could be given by Commission officers who were interviewed by WA Police, were considered and resolved.
- [78] The major accusations made against the Commission were that, during this three-month period, the Commission delayed and thwarted the Police investigation.
- [79] In fact, over the three-month period, the evidence from the relevant documentation establishes that:
- (1) on every occasion, the Commission replied promptly to correspondence from the Parliamentary Inspector and WA Police. The same cannot be said of the Parliamentary Inspector. For example, on each of two separate occasions the Parliamentary Inspector took three weeks to respond to a letter from Commissioner Macknay. Those six weeks alone constitute almost half of the three-month period;
 - (2) the Commission's overriding objective was to cooperate with and assist the WA Police investigation – but in accordance with the Commission's obligation to comply with the provisions of the CCC Act;
 - (3) the situation was unprecedented. For example:
 - (a) never before had WA Police investigated Commission officers; and

- (b) never before had the Commission provided to anyone except the Parliamentary Inspector details of the operations that it had conducted, yet it was now being asked to give to WA Police – the very body over which it has primary oversight – information that included a list of all operations conducted by its covert surveillance unit (OSU) over a period of more than two and a half years;
- (4) the situation raised serious legal issues, including whether, and if so how, various provisions of the CCC Act, including strict "non-disclosure provisions" applying to the Commission and its officers, would apply to this unprecedented situation;
- (5) because various legal views expressed by the Parliamentary Inspector about critical CCC Act provisions were contrary to the views of the Commission, the Commission sought advice from two independent senior counsel (whose advice confirmed the Commission's view of each of the legal issues in contention);
- (6) the Commission promptly gave WA Police all the documents and information sought by WA Police that appeared to be relevant to the specific allegations of criminality referred to WA Police for investigation by the Parliamentary Inspector;
- (7) on the basis of independent senior counsel advice, the Commission identified legal obstacles preventing or restricting the Commission and its officers from providing the remainder of the documents and information that had been sought by WA Police;
- (8) the Commission itself proposed to the Parliamentary Inspector two simple solutions, either of which would have overcome those obstacles and allowed complete and immediate access to all the Commission's documents and information;
- (9) the Parliamentary Inspector declined to adopt either proposed solution;
- (10) as a result the Commission and WA Police were required to work within the constraints of those legal obstacles to achieve the objectives of ensuring that the Commission provided WA Police with all documents and information relevant to its investigations, but not documents or information that, if given to WA Police, "would be destructive of or extremely damaging to the Commission's ability to oversee WA Police"; and
- (11) in all the circumstances, including that this was unprecedented and raised serious legal issues and complex implementation issues:
 - (a) the three-month period taken to resolve all these issues was reasonable; and

- (b) the resolution of these issues would not have been achieved without both the Commission and WA Police acting expeditiously in good faith to ensure that, within the constraints of the law, WA Police were provided with all the documents and information relevant to its investigations.

[80] In short, the allegations that have been made against the Commission, including the delay and thwarting allegations, are not only baseless but grossly misrepresent the true position which is that the Commission has acted throughout in accordance with the highest standards that apply to this State's principal integrity agency.

