



***JOINT STANDING COMMITTEE
ON THE CORRUPTION AND CRIME
COMMISSION***

**HOW THE CORRUPTION AND CRIME
COMMISSION CAN BEST WORK
TOGETHER WITH THE WESTERN
AUSTRALIAN POLICE FORCE TO
COMBAT ORGANISED CRIME**

**Report No. 10
in the 38th Parliament**

2010

Published by the Legislative Assembly, Parliament of Western Australia, Perth, September 2010.



Joint Standing Committee on the Corruption and Crime Commission

How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime

ISBN: 978-1-921355-83-7

(Series: Western Australia. Parliament. Legislative Assembly. Committees.
Joint Standing Committee on the Corruption and Crime Commission. Report 10)

328.365

99-0

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Report No. 10

Presented by:

Hon Nick Goiran, MLC and John Hyde, MLA

Laid on the Table of the Legislative Council and Legislative Assembly
on 9 September 2010

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COMMITTEE'S FUNCTIONS AND POWERS

On 25 November 2008 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

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

It is the function of the Committee to:

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

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

INQUIRY TERMS OF REFERENCE

That the Committee inquire into and report on:

- how the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime under potential amendments to the *Corruption and Crime Commission Act 2003*; and
- the implications of the above on the ability and capacity of the Corruption and Crime Commission to achieve the second of the stated purposes of the *Corruption and Crime Commission Act 2003* which is to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector (including, without limitation, the Western Australian Police Force).

CHAIRMAN'S FOREWORD

There is an undeniable attraction in the proposition that the CCC should be doing more to combat organised crime. The challenge for this Committee has been to unpick this proposition and return to the conceptual origins of the CCC, while at the same time informing itself as to the level of organised crime in Western Australia, and to form an assessment as to whether the resources of the CCC could be more usefully engaged in the fight against organised crime.

Throughout the course of this Inquiry both the CCC Commissioner and the WA Police Commissioner have remained firm in their support for a model that would see the jurisdiction of the CCC extended to allow the CCC to directly investigate organised crime. Such a model would see this jurisdiction triggered via references from a mooted Reference Group, consisting of the CCC Commissioner and the WA Police Commissioner (**Reference Group Model**).

Early in the course of this Inquiry the Committee made it known to the CCC and the WA Police that the Committee had concerns about the Reference Group Model and would need to be convinced as to its merits. To that end the Committee was careful to ensure that the CCC and the WA Police were integral parties to this Inquiry. Several rounds of hearings were conducted and the CCC and the WA Police were provided with the Committee's draft report, setting out its provisional findings and recommendations. Both agencies provided feedback on the draft report, whereupon a hearing was convened at which the CCC Commissioner and the WA Police Commissioner attended. A further hearing was attended by the head of the Serious and Organised Crime Division of the WA Police. The draft was then amended in light of the feedback and the fresh evidence received.

In the final analysis, it is the Committee's firm view that there are significant shortcomings in the Reference Group Model. The Committee concludes, after the benefit of reviewing the available evidence, including analysis of ICAC in Hong Kong, that the CCC's crime fighting role (as distinct from its corruption fighting role) is best left to its present function under the CCC Act, which is to confer Exceptional Powers upon the WA Police to fight organised crime.

This Report seeks to demonstrate that:

- having a strong corruption fighter is more important to our society than any possible gains that may flow from granting the CCC increased powers to combat organised crime;
- the evidence supports the conclusion that any additional funding to fight organised crime is better spent with the WA Police, than with setting up a new crime fighting capacity within the CCC; and
- given the historical link between organised crime and police corruption, the fight against organised crime is best served by the CCC in monitoring the WA Police for corruption.

CHAIRMAN'S FORWARD

The Committee believes it would be a mistake for the CCC to be given an expanded jurisdiction to fight organised crime along with the WA Police. The Parliamentary Inspector concurs with this view. The CCC must remain authentically independent from the WA Police.

The CCC is, and is perceived to be, the bastion of integrity in the Western Australian community. As a corruption fighter it is proving second to none. This is in no small measure due to the efforts and the dedicated work of the CCC Commissioner and his staff.

The CCC's most important function is to ensure that corruption in the WA Police is not allowed to flourish and propagate. The CCC can only effectively discharge this obligation if it remains authentically independent from the WA Police and maintains its reputation for integrity. The CCC's independence will be compromised and its integrity threatened if it is permitted to engage in joint operations with the WA Police to combat organised crime.

Ultimately the Committee respects the fact that some of its findings and recommendations may not be accepted by the CCC and the WA Police, who remain in favour of the Reference Group Model. The Committee has been careful to ensure that the views of the CCC and the WA Police are contained within this Report. As such this Report should inform debate on this topic if and when the Reference Group Model is presented to Parliament.

If any reform is to be considered in amending the CCC Act, the Committee strongly recommends that such reform be limited to improving and increasing the access of the WA Police to the Exceptional Powers under Part 4 of the CCC Act, with the CCC remaining the gatekeeper to such powers.

I acknowledge the significant contributions of the CCC and the WA Police to this Inquiry and thank them for their time and effort. I also acknowledge the contribution of the Parliamentary Inspector, the Honourable Chris Steytler QC, who provided a detailed submission and assisted the Committee at a number of hearings.

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

HON NICK GOIRAN, MLC
CHAIRMAN

GLOSSARY

Archer Report	<i>Review of the Corruption & Crime Commission Act 2003</i> , Gail Archer SC, February 2008
Assistant WA Police Commissioner Anticich	Nick Anticich, Assistant Commissioner of WA Police (Specialist Crime)
ATS	amphetamine-type stimulants
CCC / Corruption and Crime Commission / Commission	Corruption and Crime Commission of Western Australia
CCC Act	<i>Corruption and Crime Commission Act 2003</i> (WA)
CCC Commissioner	Commissioner of the Corruption and Crime Commission
CCC Commissioner Hammond	Hon Kevin Hammond, inaugural Commissioner of the Corruption and Crime Commission (2004 – 2007)
CCC Commissioner Roberts-Smith	Hon Len Roberts RFD QC, Commissioner of the Corruption and Crime Commission (2007 – present)
CMC	Crime and Misconduct Commission (Queensland)
Committee / JSCCCC	Joint Standing Committee on the Corruption and Crime Commission
Deputy WA Police Commissioner Dawson	Chris Dawson APM, Deputy Commissioner of WA Police
Detective Superintendent Carver	Charlie Carver, Detective Superintendent WA Police, head of the Serious and Organised Crime Division of the WA Police (2009 - present)
Exceptional Powers	powers under Divisions 2, 3 and 4 of Part 4 of the CCC Act which the WA Police Commissioner can apply to the CCC to use in an organised crime investigation conducted by the WA Police
Exceptional Powers Finding	an “exceptional powers finding” as contemplated by s 46(2) of the CCC Act
Fortification Removal Notice	a “fortification removal notice” as contemplated by s 72 of the CCC Act
Fortification Warning Notice	a “fortification warning notice” as contemplated by s 68 of the CCC Act
HKPF	Hong Kong Police Force
Hong Kong ICAC	Independent Commission Against Corruption (Hong Kong)
JSCCCC Report No 31	JSCCCC Report, <i>Inquiry Into Legislative Amendments to the Corruption and Crime Commission act 2003 – the Role of the Corruption and Crime Commission in Investigating Serious and</i>

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GLOSSARY

	<i>Organised Crime in Western Australia</i> , tabled with the Legislative Council on 9 November 2007 and the Legislative Assembly on 15 November 2007.
Kennedy Royal Commission Final Report	Kennedy Royal Commission Final Report, 3 March 2004
Kennedy Royal Commission Interim Report	Kennedy Royal Commission Interim Report, December 2002
NSW ICAC	Independent Commission Against Corruption (NSW)
Organised Crime Examination	an examination to which a person is summoned under an Organised Crime Summons
Organised Crime Summons	a summons issued under section 96 of the CCC Act on an application by the WA Police Commissioner under section 48 of the CCC Act
Parliamentary Inspector	Parliamentary Inspector of the Corruption and Crime Commission
Part 6 Powers	powers under Part 6 of the CCC Act which are available to the CCC in conducting a misconduct investigation
QPS	Queensland Police Service
Reference Group	a proposed reference group to be chaired by the WA Police Commissioner and the CCC Commissioner through which organised crime investigations involving the CCC are initiated and approved
Reference Group Model	the proposal contained in the Working Group Report for the CCC to conduct organised crime investigations via grants of authority from the Reference Group
WA Police	Western Australia Police
WA Police Commissioner	Commissioner of WA Police
WA Police Commissioner O'Callaghan	Dr Karl O'Callaghan APM, Commissioner of WA Police (2004 – present)
Working Group	working group consisting of representatives of the CCC, the WA Police, the Director of Public Prosecutions, the Department of the Attorney General and the State Solicitor's Office set up to examine the possibility of expanding the jurisdiction of the CCC to engage in joint operations with the WA Police to combat organised crime
Working Group Report	report submitted by the Working Group to the Attorney General, Hon Christian Porter MLA

EXECUTIVE SUMMARY

- 1 The CCC has a prevention and education function, a misconduct function and an organised crime function.
- 2 The CCC and the WA Police have submitted a joint proposal to the State Government that contemplates the CCC Act being amended to expand the organised crime function of the CCC.
- 3 The joint proposal contemplates that the CCC will be able to conduct organised crime investigations via grants of authority from a reference group chaired by the WA Police Commissioner and the CCC Commissioner (**Reference Group**). The proposal is referred to in this Report as the **Reference Group Model**.
- 4 This Report considers the merits and potential problems of the Reference Group Model.
- 5 At present the organised crime function of the CCC is to:
- authorise the WA Police to use Exceptional Powers under Part 4 of the CCC Act;
 - monitor and direct the use by the WA Police of such Exceptional Powers; and
 - issue Fortification Warning Notices.
- 6 The CCC only has an ability to investigate organised crime activity if such activity is connected with public sector corruption, or, more precisely, when the misconduct function of the CCC is engaged. This may occur if one or more of the following jurisdictional triggers (**Misconduct Jurisdictional Triggers**) are present:
- there are grounds for the CCC to reasonably suspect that a public officer had engaged in misconduct connected with organised crime; or
 - the CCC receives an allegation to the same effect.
- 7 In such circumstances where the misconduct function of the CCC is engaged by the presence of one or more Misconduct Jurisdictional Triggers, the CCC has the ability to investigate the associated organised crime activity as part of its misconduct investigation. There are limits, however, to the extent to which the CCC can investigate the associated organised crime activity. These limits have not been judicially tested, but the Committee would have thought that at the very least the investigation into the organised crime activity must have some connection with the public sector misconduct being investigated by the CCC.
- 8 The Reference Group Model is the means by which it is proposed that the CCC will acquire a jurisdiction to conduct organised crime investigations without the need for a Misconduct Jurisdictional Trigger. In other words, the CCC will be able to conduct organised crime investigations as if it were a fully fledged law enforcement agency, subject only to the requisite

grant of authority by the Reference Group. Furthermore, the Reference Group Model envisages the possibility that in addition to joint operations between the CCC and the WA Police, the CCC may be granted authorities by the Reference Group to conduct particular organised crime investigations on its own, or in partnership with law enforcement agencies other than the WA Police. It can thus be appreciated that the Reference Group Model, if enacted, will considerably expand the organised crime function of the CCC.

- 9 The WA Police and the CCC currently work together and engage in joint operations where the misconduct function of the CCC is engaged. A criminal investigation by the WA Police may overlap with a misconduct investigation with the CCC. In such circumstances there is usually close co-operation between the two agencies. The Reference Group Model is therefore not novel in providing for the possibility that the WA Police and the CCC may work together. What is novel is that the CCC will, by the Reference Group Model, acquire a jurisdiction to actively investigate organised crime, whereas in the past, this jurisdiction has been predominately exercised by the WA Police.
- 10 Anticipating the Government's move to place a bill before Parliament to expand the CCC's jurisdiction to combat organised crime along the lines of the Reference Group Model, the Committee commenced this Inquiry on 9 September 2009.
- 11 The Committee sought submissions and evidence as to the merits of the Reference Group Model from law enforcement agencies in Australia, with a particular focus on the Queensland Crime and Misconduct Commission. In addition the Committee travelled to Hong Kong to interview senior officials from the Hong Kong Independent Commission Against Corruption (Hong Kong ICAC), the Hong Kong Police Force, Professor Harold Traver,¹ and two oversight bodies of Hong Kong ICAC being the Hong Kong Legislative Council Panel on Security and the Operations Review Committee.
- 12 Upon consideration of the submissions and evidence the Committee is firmly of the view that the CCC's organised crime function should not be expanded to enable the CCC to conduct organised crime investigations, either in co-operation with the WA Police or by itself.
- 13 Chapter 1 describes the Reference Group Model, and the events leading up to its submission to the Government. The main features of the Reference Group Model are explained. Significant elements of the Reference Group Model have still yet to be agreed between the CCC and the WA Police. These elements have important implications for the authentic independence of each agency.
- 14 In order to form a view as to the merits of the Reference Group Model, it is important to understand precisely what role the CCC currently plays in fighting organised crime.

¹ Professor Traver is Professor of Sociology at Hong Kong Shue Yan University; and has taught for over 30 years at the University of Hong Kong where he founded that university's undergraduate criminal justice and post graduate criminology programs, as well as criminal justice programs in the University of Hong Kong's School of Professional and Continuing Education. He has edited a recent book, *Introduction to Crime, Law and Justice in Hong Kong*, and written articles on law enforcement such as *Controlling Triads And Organized Crime In Hong Kong*. He also teaches post graduate corruption studies at the Hong Kong University School of Professional and Continuing Education. Many of his students have gone on to be officers of Hong Kong ICAC.

- 15 Chapter 2 explains how the CCC authorises the WA Police to access Exceptional Powers to combat organised crime under Part 4 of the CCC Act.
- 16 Chapter 3 debunks some commonly held misconceptions about the CCC.
- 17 Chapter 4 sets out the arguments in favour of the Reference Group Model as put forward by the WA Police and the CCC.
- 18 Chapter 5 sets out the CCC's estimate as to how much it will cost for the CCC to have a 'mature' serious and organised crime function. The Chapter then sets out what the WA Police would do if such funding were given to the WA Police instead of the CCC.
- 19 Chapter 6 deconstructs the arguments in favour of the Reference Group Model. The Committee concludes that the CCC should not be given a jurisdiction to conduct organised crime investigations, but instead the Government's focus should be on fixing the problems that prevent the WA Police from fully accessing and utilising the Exceptional Powers in Part 4 of the CCC Act, as well as ensuring that the WA Police are adequately resourced.
- 20 In this regard the Committee makes six recommendations:

Recommendation 1 (page 91):

The *Corruption and Crime Commission Act 2003* be amended to clarify and ensure that:

- 1.1 The CCC can actively assist the WA Police in preparing for Organised Crime Examinations.
- 1.2 The CCC Commissioner and counsel representing the CCC can ask their own questions at an Organised Crime Examination to elicit information from a witness that would assist the WA Police.
- 1.3 In the event that a witness is evasive, there is no impediment for the CCC Commissioner to ask the questions, and make the directions necessary, so as to establish the grounds for effective contempt proceedings.
- 1.4 If the CCC Commissioner is of the view that counsel for the WA Police Commissioner is doing an inadequate job in examining a witness, and either is not extracting the information sought from the witness in an effective manner, or is not formulating the questions in precisely the right manner so as to establish a clear case of contempt, that the CCC Commissioner should be able to intervene.

Recommendation 2 (page 98):

The definition of “organised crime” in the *Corruption and Crime Commission Act 2003* be expanded so as to accommodate the concerns of the WA Police and the CCC that the present definition is unduly restrictive and prevents the WA Police from accessing the Exceptional Powers under Part 4 of the *Corruption and Crime Commission Act 2003*.

Recommendation 3 (page 139)

Any suggestion that a new serious and organised crime function of the CCC be funded at the expense of the CCC’s existing misconduct function should be rejected.

Recommendation 4 (page 145)

Emphasis needs to be given by the Government on giving additional resources to the WA Police to bring them up to a comparable standard with their State and Commonwealth counterparts, before any consideration should be given to giving additional resources to the CCC to enable it to undertake organised crime investigations.

Recommendation 5 (page 149)

If the Government considers the fight against organised crime deserves additional funding, then such funding is best made by conditional annual appropriations to the WA Police for spending on its Serious and Organised Crime Division

Recommendation 6 (page 191)

The CCC should not be granted an enhanced serious and organised crime jurisdiction.

21 The Committee’s findings are:

Finding 1 (page 97)

The Exceptional Powers regime under Part 4 of the *Corruption and Crime Commission Act 2003*, while it fell into abeyance after the failure of the contempt proceedings in *Aboudi v Hammond*, has been utilised by the WA Police in the last 18 months during Operation Jupiter.²

² In late 2007 after the Coffin Cheaters’ Bayswater clubhouse was firebombed, the WA Police commenced Operation Jupiter, a police venture to combat the criminal activities of bikies.

Finding 2 (page 131)

- 2.1 The Serious and Organised Crime Division of the WA Police is not overly focused on reactive policing and has dedicated quarantined resources to work on long term intelligence-led investigations.
- 2.2 The Serious and Organised Crime Division of the WA Police does not have exclusive access to the WA Police's covert technologies.
- 2.3 While organised crime is a high priority for the WA Police, it is not the highest priority. It must compete with other aspects of policing to use limited WA Police resources, both human and technological.

Finding 3 (page 139)

- 3.1 The CCC will require \$42.131 million over the next five years to have a "mature" serious and organised crime function, without diminishing the CCC's ability to discharge its existing misconduct and education and prevention function.
- 3.2 Beyond five years the CCC will require ongoing annual expenditure of at least \$9.4 million to maintain a serious and organised crime function.

Finding 4 (page 144)

- 4.1 The WA Police are under-resourced in combating organised crime compared to their State and Commonwealth counterparts.
- 4.2 Certain technologies to combat organised crime are now available to other law enforcement agencies throughout Australia that the WA Police do not have access to, and that this deficiency will not be remedied by the Reference Group Model.

Finding 5 (page 154)

Significant elements of the Reference Group Model are yet to be agreed between the CCC and the WA Police. These elements have important implications for the independence of each agency.

Finding 6 (page 164)

The Reference Group Model will do little if anything to alleviate feelings of mistrust held by the WA Police towards the CCC.

Finding 7 (page 165)

Should the CCC be given an enhanced organised crime function, it will compete with the WA Police for funding to discharge the same function.

Finding 8 (page 167)

The problem of the CCC recruiting skilled personnel from the WA Police will become more exacerbated if the CCC is given the jurisdiction to conduct organised crime investigations.

Finding 9 (page 169)

The Reference Group Model is an inefficient way to combat organised crime.

Finding 10 (page 172)

10.1 The public's confidence in the CCC is founded on the CCC's integrity and authentic independence.

10.2 The CCC will be exposed to greater risks of corruption should it engage in organised crime investigations.

10.3 A serious breach of security or act of corruption by a CCC officer in an organised crime investigation will likely seriously damage or even destroy the credibility of the CCC as an integrity agency.

Finding 11 (page 173)

The WA Police Commissioner's power of veto over CCC organised crime investigations means that the CCC is not authentically independent of the WA Police. This will adversely affect the public's perception of the CCC, and lead to a reduced confidence in the CCC.

Finding 12 (page 182)

In conferring a crime fighting role on the CCC it is inevitable that the CCC will feel that it has a stake in the operational success of an organised crime investigation. The CCC will be unable to bring a truly independent, dispassionate view as to the propriety of its own officers or those of the WA Police engaged in that operation.

Finding 13 (page 184)

There are competing considerations between misconduct inquiries and organised crime operations. In conferring a crime fighting role on the CCC, the CCC will be unable to bring a truly independent and dispassionate view as to when a misconduct investigation should yield to the operational considerations of an organised crime investigation.

Finding 14 (page 186)

If the CCC is to conduct organised crime investigations, the Office of the Parliamentary Inspector, with its current level of resourcing and the part time nature of the office, will be unable to undertake adequate oversight of the CCC

Finding 15 (page 187)

If the CCC is to conduct organised crime investigations, the Committee, with its current level of resourcing, will be unable to undertake adequate oversight of the CCC and the Parliamentary Inspector.

Finding 16 (page 190)

If the WA Police are given the power to self-authorise the use of Exceptional Powers beyond that which presently exists, this will lead to an unacceptable and unnecessary erosion of civil liberties in Western Australia, and would increase the risk of harm to the public.

Finding 17 (page 190)

Should the CCC be granted an enhanced organised crime function, together with the power to engage in controlled operations, there is a clear need for there to be checks and balances inserted in the legislation to require the CCC to seek, and obtain, independent authorisation to engage in any controlled operations, such as the sale of illicit drugs, that may endanger public health or safety.

22 Underpinning the Committee's findings are the following assumptions:

- Corruption in the public sector reduces the public's trust in the Government and Parliament, and if left unchecked is destructive to a democratic society.
- A corrupt free public sector is vital for business confidence and investment in Western Australia.
- Maintaining an effective bulwark against public sector corruption is vitally important in ensuring that Western Australia remains a truly democratic society.
- The CCC is the lead entity entrusted with the task of combating public sector corruption.
- Vital to the success of the CCC in combating public sector corruption is its integrity and independence.
- The CCC's integrity and independence will be compromised if it is allowed to engage in joint operations with the WA Police to combat organised crime.
- In the current political climate of affording greater powers to the WA Police, the interests of the community are best served by having the CCC remain a strong and authentically independent watchdog of the WA Police.

23 Annexure 1 sets out how the WA Police currently combats organised crime.

24 Annexure 2 sets out the corrupting influence organised crime has on law enforcement agencies and gives examples of police corruption and misconduct in the WA Police as revealed by the

Kennedy Royal Commission. The Committee has included this annexure to remind Parliament of the depth of corruption the WA Police descended to, without the presence of a strong corruption fighter such as the CCC. Hopefully it will alert Parliament to the danger in allowing the CCC to be directly engaged in organised crime investigations and inform the view that the best way the CCC can assist the fight against organised crime is to remain an ever vigilant watcher of the WA Police and the public sector generally.

- 25 Annexure 3 sets out the evidence received by this Committee and a former Committee in relation to the Queensland Crime and Misconduct Commission (CMC). The Committee had two meetings with the former Chairperson of the CMC, Mr Robert Needham, and one meeting with the former Assistant Police Commissioner of the CMC, Mr Felix Grayson. Mr Grayson's evidence was to the effect that significant problems have arisen when the CMC and the Queensland Police Service conducted joint operations. The Committee also received a submission from the Queensland Police Service.
- 26 Annexure 4 sets out the evidence received by the Committee during its investigative travel to Hong Kong, where the integrity agency there, the Independent Commission Against Corruption, does not engage in organised crime investigations, save only when there is an associated corruption element. The dominant message of the interviewees was that the key to success of a corruption fighting body such as the CCC is to maintain its integrity and independence. Reservations were expressed by the interviewees as to the CCC and the WA Police working side by side in a greater and an expanded operational capacity. The evidence gathered confirmed the Committee's view on what the *raison d'être* of the CCC should be, and that is to provide an effective bulwark against public sector corruption and misconduct, and in particular to be a strong overseer of the WA Police, so that our society will never degenerate to the point where Hong Kong found itself in 1974, where police officers kept ledgers on monies received from criminals to look the other way.

FINDINGS

Finding 1 (page 97)

The Exceptional Powers regime under Part 4 of the *Corruption and Crime Commission Act 2003*, while it fell into abeyance after the failure of the contempt proceedings in *Aboudi v Hammond*, has been utilised by the WA Police in the last 18 months during Operation Jupiter.

Finding 2 (page 131)

- 2.1 The Serious and Organised Crime Division of the WA Police is not overly focused on reactive policing and has dedicated quarantined resources to work on long term intelligence-led investigations.
- 2.2 The Serious and Organised Crime Division of the WA Police does not have exclusive access to the WA Police's covert technologies.
- 2.3 While organised crime is a high priority for the WA Police, it is not the highest priority. It must compete with other aspects of policing to use limited WA Police resources, both human and technological.

Finding 3 (page 139)

- 3.1 The CCC will require \$42.131 million over the next five years to have a "mature" serious and organised crime function, without diminishing the CCC's ability to discharge its existing misconduct and education and prevention function.
- 3.2 Beyond five years the CCC will require ongoing annual expenditure of at least \$9.4 million to maintain a serious and organised crime function.

Finding 4 (page 144)

- 4.1 The WA Police are under-resourced in combating organised crime compared to their State and Commonwealth counterparts.
- 4.2 Certain technologies to combat organised crime are now available to other law enforcement agencies throughout Australia that the WA Police do not have access to, and that this deficiency will not be remedied by the Reference Group Model.

Finding 5 (page 154)

Significant elements of the Reference Group Model are yet to be agreed between the CCC and the WA Police. These elements have important implications for the independence of each agency.

Finding 6 (page 164)

The Reference Group Model will do little if anything to alleviate feelings of mistrust held by the WA Police towards the CCC.

Finding 7 (page 165)

Should the CCC be given an enhanced organised crime function, it will compete with the WA Police for funding to discharge the same function.

Finding 8 (page 167)

The problem of the CCC recruiting skilled personnel from the WA Police will become more exacerbated if the CCC is given the jurisdiction to conduct organised crime investigations.

Finding 9 (page 169)

The Reference Group Model is an inefficient way to combat organised crime.

Finding 10 (page 172)

- 10.1** The public's confidence in the CCC is founded on the CCC's integrity and authentic independence.
- 10.2** The CCC will be exposed to greater risks of corruption should it engage in organised crime investigations.
- 10.3** A serious breach of security or act of corruption by a CCC officer in an organised crime investigation will likely seriously damage or even destroy the credibility of the CCC as an integrity agency.

Finding 11 (page 173)

The WA Police Commissioner's power of veto over CCC organised crime investigations means that the CCC is not authentically independent of the WA Police. This will adversely affect the public's perception of the CCC, and lead to a reduced confidence in the CCC.

Finding 12 (page 182)

In conferring a crime fighting role on the CCC it is inevitable that the CCC will feel that it has a stake in the operational success of an organised crime investigation. The CCC will be unable to bring a truly independent, dispassionate view as to the propriety of its own officers or those of the WA Police engaged in that operation.

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Should the CCC be granted an enhanced organised crime function, together with the power to engage in controlled operations, there is a clear need for there to be checks and balances inserted in the legislation to require the CCC to seek, and obtain, independent authorisation to engage in any controlled operations, such as the sale of illicit drugs, that may endanger public health or safety.

RECOMMENDATIONS

Recommendation 1 (page 91)

The *Corruption and Crime Commission Act 2003* be amended to clarify and ensure that:

- 1.1** The CCC can actively assist the WA Police in preparing for Organised Crime Examinations.
- 1.2** The CCC Commissioner and counsel representing the CCC can ask their own questions at an Organised Crime Examination to elicit information from a witness that would assist the WA Police.
- 1.3** In the event that a witness is evasive, there is no impediment for the CCC Commissioner to ask the questions, and make the directions necessary, so as to establish the grounds for effective contempt proceedings.
- 1.4** If the CCC Commissioner is of the view that counsel for the WA Police Commissioner is doing an inadequate job in examining a witness, and either is not extracting the information sought from the witness in an effective manner, or is not formulating the questions in precisely the right manner so as to establish a clear case of contempt, that the CCC Commissioner should be able to intervene.

Recommendation 2 (page 98)

The definition of “organised crime” in the *Corruption and Crime Commission Act 2003* be expanded so as to accommodate the concerns of the WA Police and the CCC that the present definition is unduly restrictive and prevents the WA Police from accessing the Exceptional Powers under Part 4 of the *Corruption and Crime Commission Act 2003*.

Recommendation 3 (page 139)

Any suggestion that a new serious and organised crime function of the CCC be funded at the expense of the CCC’s existing misconduct function should be rejected.

Recommendation 4 (page 145)

Emphasis needs to be given by the Government on giving additional resources to the WA Police to bring them up to a comparable standard with their State and Commonwealth counterparts before any consideration should be given to giving additional resources to the CCC to enable it to undertake organised crime investigations.

Recommendation 5 (page 149)

If the Government considers the fight against organised crime deserves additional funding, then such funding is best made by conditional annual appropriations to the WA Police for spending on its Serious and Organised Crime Division.

Recommendation 6 (page 191)

The CCC should not be granted an enhanced serious and organised crime jurisdiction.

MINISTERIAL RESPONSE

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

CHAPTER 1 THE PROPOSED MODEL FOR THE CCC TO CONDUCT ORGANISED CRIME INVESTIGATIONS

Introduction

- 27 At a time not disclosed to the Committee, but most probably in late 2008, a working group (**Working Group**) was established. The Working Group consisted of representatives of the CCC, the WA Police, the Director of Public Prosecutions, the Department of the Attorney General and the State Solicitor's Office.
- 28 The Working Group was set up to examine the possibility of expanding the jurisdiction of the CCC to conduct organised crime investigations in cooperation with the WA Police. A proposed model was signed off by the Working Group and submitted to the Government in the form of a report (**Working Group Report**).³ This proposed model has been referred to by the proponents as the **Reference Group Model**, and it is this term that will be used in this Report as referring to the proposed model put to the Government by the Working Group.
- 29 The Committee has actively sought to obtain a copy of the Working Group Report. On 29 September 2009 the Committee wrote to the Attorney General, Hon Christian Porter MLA, requesting a copy of the Working Group Report. The Attorney General responded by letter dated 1 April 2010 to the effect that the Working Group Report is a document that will be considered by Cabinet and is subject to Cabinet confidentiality, and as such, the Attorney General was not prepared to accede to the request.
- 30 From speaking with Hon Len Roberts-Smith RFD QC (**CCC Commissioner Roberts-Smith**), Dr Karl O'Callaghan APM (**WA Police Commissioner O'Callaghan**),⁴ and the former Director of Public Prosecutions and now Premier's counsel, Robert Cock QC, and having the benefit of written submissions from the CCC in this Inquiry, the Committee understands that the Reference Group Model closely reflects the terms of a joint proposal that was originally submitted to the Committee in 2007.

³ In a media conference held on 6 October 2009, CCC Commissioner Roberts-Smith said that the CCC and the WA Police have submitted a joint proposal to the Government setting out a proposed model on how the CCC ought to be able to investigate serious and organised crime.

⁴ WA Police Commissioner O'Callaghan confirmed a working group consisting of representatives of the WA Police, the CCC, the Director of Public Prosecutions, the Department of the Attorney General, the State Solicitor's Office and the Public Sector Commission had been formed, deliberated and presented to Government an agreed position paper on how the CCC and the WA Police could work together to combat organised crime. Mr O'Callaghan also confirmed to the Committee that a key feature of the proposed model was the formation of a Reference Group to be chaired by the WA Police Commissioner and the CCC Commissioner (Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009).

The Reference Group Model is one of a number of law and order reforms being considered by the Government

31 The Reference Group Model is one of a number of law and order reforms being considered by the Government.

Serious crime

32 The CCC believes that any move by the Government to increase the CCC's jurisdiction to combat organised crime will be accompanied by a grant of jurisdiction to the CCC to enable the CCC to investigate serious crime. In submissions dated 2 December 2009 the CCC advised the Committee that it believed that proposed amendments to the CCC Act will include the provision for the CCC to assist the WA Police or undertake investigations into crimes including but not limited to the following:

- theft, fraud, (state) tax evasion, property laundering;
- illegal drug dealings;
- obtaining financial benefit by vice engaged in by others;
- extortion, violence;
- bribery or corruption of, or by, an officer of the State;
- firearms, armament dealings;
- cybercrime;
- paedophilia; and
- terrorism.

33 The CCC has, since its 2007 submission, consistently recommended that its jurisdiction be extended to not only undertake organised crime investigations, but also serious crime investigations. The difference between the two types of investigations was explained by Acting CCC Commissioner Chris Shanahan SC in his letter to the Committee dated 16 April 2010:

Serious Crime Function Differs From Organised Crime Function

The Commission wishes to clarify its view of the difference between a "serious crime" and an "organised crime" investigation. The experience in the NSW and Queensland jurisdictions is that commissions of inquiry, through using their coercive hearing powers,

can contribute to the effectiveness of police investigations of serious crimes, not being organised crimes, which have proved intractable in the face of traditional policing techniques. Thus the CMC in Queensland and the NSW Crime Commission have used their powers to augment police investigations to assist in solving serious crimes, such as intractable murders and arsons. In some cases, while insufficient evidence was gathered to gain criminal convictions, there was sufficient evidence to enable coronial findings to provide some form of closure to affected families, which would otherwise not be available. Thus the serious crime investigative function has a distinct purpose and is highly valued and regularly used by police in Queensland and New South Wales.

A Commission serious crime investigative function, would differ from an organised crime investigative function, as it would have the distinct purpose of assisting police to solve intractable serious crimes that have not been susceptible to solution by traditional police investigative methodologies.⁵

34 No doubt many of the serious crimes listed above are committed by organised crime syndicates. There will be many instances, however, where serious crime will not have an organised crime aspect or a public sector misconduct aspect. The extent to which the CCC proposes to be involved in investigating serious crime not related to organised crime or public sector misconduct was not the focus of this Inquiry.

35 Hence it remains a relative unknown as to what proportion of the CCC's resources would be devoted to tackling serious crime that does not have an organised crime aspect or a public sector misconduct aspect. The CCC states that it anticipates that the WA Police will make increasing demands on the CCC to solve "intractable" serious crimes should the CCC be given a serious crime jurisdiction. As submitted by the CCC:

The Commission anticipates that once established, the use of its powers to assist police in successfully dealing with serious crimes will become a regular activity much valued by the police.⁶

36 The Committee's views as to whether the CCC should be given a serious crime jurisdiction are as follows:

- much of the evidence and arguments against the CCC acquiring an enhanced organised crime function discussed in this Report are also relevant to the issue of whether the CCC should have a serious crime jurisdiction; and
- a grant of a serious crime jurisdiction, unconnected with organised crime or misconduct, would be an entirely fresh grant of jurisdiction not contemplated by the current objectives of the CCC Act.

⁵ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

⁶ CCC submission to the Inquiry dated 2 December 2009, p 31.

Anti-association laws

- 37 The Government has foreshadowed introducing into Parliament legislation to enable criminal and organised crime groups to be declared illegal thereby empowering the WA Police to prevent members of such groups from associating. Hon Colin Barnett MLA said in his Premier's Statement on 23 February 2010:

*The Liberal-National government will also target organised crime, with the introduction of anti-association legislation aimed at groups who come together to engage in criminal behaviour. We will also broaden the powers of the Corruption and Crime Commission in this area.*⁷

- 38 The Police Minister, Hon Rob Johnson MLA, announced in Parliament on 18 June 2009:

*I just want to inform the house that the Attorney General and I are working on some legislation that we will be taking to cabinet. The legislation will be in two or three tranches. The first will give the Commissioner of Police the authority to be able to go to a Supreme Court judge to obtain what is known as a declaration, which means that a criminal or an organised gang can be declared as such. If the judge grants a declaration of that nature, it will give the Commissioner of Police the authority to prohibit or put prohibition orders in place to stop that organised gang member or that organised gang from associating with other known criminals or any other individual who the Commissioner of Police decides should be covered by the order. It will also cover situations in which gang members will be prohibited from going to certain public events when it is considered that they will be a danger to the public. That is one part of the legislation...*⁸

- 39 The Committee has not inquired into the merits or otherwise of the proposed anti-association legislation. The possibility that the WA Police may acquire increased powers in this area reinforces the Committee's view that the CCC needs to remain focussed on discharging its misconduct function, which includes monitoring the WA Police, rather than engaging in organised crime investigations.

⁷ Hon Colin Barnett, MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates*, 23 February 2010, p 34.

⁸ Hon Rob Johnson, MLA, Minister for Police and Emergency Services, Western Australia, Legislative Assembly, *Parliamentary Debates*, 18 June 2009, p 5267.

Increased powers for the WA Police to engage in controlled operations

40 The second tranche of law reform foreshadowed by the Police Minister in Parliament on 18 June 2009 contemplates the WA Police having increased powers to engage in controlled operations and assume identities. The Police Minister said:

There are other parts, which are very much covert operations in which an elite squad of police officers will be able to assume identities so that they are able to infiltrate the organised crime gangs. It is not just bkie gangs but any organised criminal gang.⁹

41 Mr Chris Dawson, Deputy WA Police Commissioner (**Deputy WA Police Commissioner Dawson**) advised the Committee on 31 March 2010 of a proposed 'Controlled Activities Act', whereby the WA Police would be given the power to conduct controlled operations and assume identities in their own right, without the need to seek approval from the CCC.¹⁰

42 The Committee has not inquired into the merits or otherwise of the proposed controlled operations legislation. The possibility that the WA Police may acquire increased powers in this area reinforces the Committee's view that the CCC needs to remain focussed on discharging its misconduct function, which includes monitoring the WA Police, rather than engaging in organised crime investigations.

New stop and search powers for the WA Police

43 On 14 October 2009 the Government introduced into Parliament the Criminal Investigation Amendment Bill 2009. The bill will insert new provisions into the *Criminal Investigation Act 2006* in a new section that will enable police officers to stop and search people in prescribed and declared areas without the consent of the person. Police officers also will not have to rely on the reasonable suspicion test in these areas. To provide some safeguards to the public, police officers can exercise these new search powers only within a public place contained in the specified or declared area.

44 The bill was passed by the Legislative Assembly. On 26 November 2009 the Legislative Council referred the bill to the Legislation Committee for consideration and report. The Legislation Committee is due to report to the Legislative Council on 21 October 2010.

45 The Committee has not inquired into the merits or otherwise of the bill. As with the other possible amendments, however, the possibility that the WA Police may acquire increased powers in this area reinforces the Committee's view that the CCC needs to remain focussed on discharging its misconduct function, which includes monitoring the WA Police, rather than engaging in organised crime investigations.

⁹ Hon Rob Johnson, MLA, Minister for Police and Emergency Services, Western Australia, Legislative Assembly, *Parliamentary Debates*, 18 June 2009, p 5267.

¹⁰ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, pp 5-6.

46 The Committee was interested to obtain the CCC's views as to the stated intention of the Government to grant increased powers to the WA Police. In particular the Committee wanted to know if the CCC had any reservations as to the possibility that proposed stop and seizure powers for the WA Police would increase the risk of misconduct occurring. CCC Commissioner Roberts-Smith said in a public hearing of the Committee on 25 November 2009:

*In response to the question as to whether there is an increased risk of misconduct or corruption, I suppose one could make a general observation that, to the extent that any police agency is given more powers to deal at a physical level with individual members of the community, one might well anticipate that there will be more complaints than if those powers were not there. Whether or not there would be substance to those from time to time would depend on the circumstances of the particular case.*¹¹

47 After the public hearing CCC Commissioner Roberts-Smith was questioned further by journalists, and he was reported as saying:

*If people are stopped and searched and no reason is given, they might well feel that they ought not to be. And they may resist or not, but this is all speculative. Laws of that kind do carry a greater risk of misconduct or corruption. From the Commission's point of view, we would want to ensure that the exercise of those powers was appropriately oversighted, first within police and also obviously by us.*¹²

Features of the Reference Group Model

48 The Reference Group Model is the means by which the CCC will acquire the jurisdiction to conduct organised crime investigations.

49 Under the Reference Group Model, a reference group will be established and chaired by the CCC Commissioner and the WA Police Commissioner (**Reference Group**). The two commissioners will meet regularly to discuss:

- possible participation of the CCC in organised crime investigations with the WA Police; and
- possible grants of authority by the Reference Group to the CCC to conduct organised crime investigations on its own or in cooperation with other law enforcement agencies.

50 The Reference Group Model will not curtail the WA Police's ability to combat organised crime on its own or in cooperation with other law enforcement agencies.

¹¹ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 25 November 2009, p 5.

¹² 'Police power brings risk: CCC', *The West Australian* newspaper, 26 November 2009, p 11.

- 51 The Reference Group Model will not affect the ongoing ability of the WA Police to make applications to the CCC for Exceptional Powers. CCC Commissioner Roberts-Smith did note, however, that if the ability to self authorise the use of Exceptional Powers was directly conferred on the WA Police (as part of the other law and order reforms being considered by the State Government), then the Exceptional Powers regime in Part 4 of the CCC Act would be rendered “redundant”.¹³

The WA Police will have a right of veto

- 52 A key feature of the Reference Group Model is that both the WA Police Commissioner and the CCC Commissioner must agree before the CCC can conduct an organised crime investigation. The CCC Commissioner acknowledged to the Committee that the WA Police Commissioner has, by virtue of this requirement, an effective right of veto over any CCC proposal to conduct an organised crime investigation.

Chairman ...is it the case that the police would have the power of veto or right of veto on any joint operation?

Mr Roberts-Smith: Yes, that would inevitably follow, as would the commission. The concept simply is that the commissioner of WA Police and the commissioner of the CCC would have to agree on approving a reference of an organised crime investigation in which the commission could be involved. It necessarily follows from that that if one of them did not, it could not happen, or one of them later changed his or her mind, then it would stop.

Hon Matt Benson-Lidholm: It is not just a matter of the police commissioner vetoing —

Chairman : It has to be unanimous.

Mr Roberts-Smith: That is right.

Chairman: As soon as one does not agree, it is effectively a right of veto.

*Mr Roberts-Smith: Yes.*¹⁴

- 53 Even in situations where the CCC proposes to undertake an organised crime investigation by itself, or in conjunction with a law enforcement agency other than the WA Police, permission of the Reference Group (and by necessary implication, permission of the WA Police Commissioner) will be required. CCC Commissioner Roberts-Smith informed the Committee:

Even if WAPOL was not the agency with which the commission was then working, it would still be done only by way of a reference from the Commissioner of Police and the

¹³ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 4.

¹⁴ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 2 December 2009, p 11.

*Commissioner of the Corruption and Crime Commission and there would still be a WAPOL representative on the next level down, the joint management group. WAPOL would be involved all the way through, whether we were working with it on a particular investigation or with some other agency, such as the AFP, for example, or Customs or something like that.*¹⁵

- 54 The CCC does not consider that the right of veto of the WA Police will impinge on the CCC's independence. Once the CCC has received a grant of authority from the Reference Group to conduct an organised crime investigation, then the CCC's view is that it will be able to undertake that organised crime investigation without further direction or interference from the WA Police. The CCC has informed the Committee:

*As a member of the Reference Group, the Commissioner of Police will have no capacity to oversight or directly influence the priority given to any Commission investigation, the amount of resources allocated, or how they're deployed; those matters will be determined by the Commissioner of the Corruption and Crime Commission. The intent of the Reference Group is to enable cooperation through the demarcation of responsibilities and ensuring that the highest priority criminal targets are engaged without affecting the independence of either this Commission or WAPOL.*¹⁶

- 55 This passage indicates that once the CCC has received a grant of authority from the Reference Group, the WA Police Commissioner will be unable to revoke the grant of authority unilaterally. However, as previously noted, CCC Commissioner Roberts-Smith has said "*It necessarily follows from that that if one of them did not, it could not happen, or one of them later changed his or her mind, then it would stop*".¹⁷ There is an obvious contradiction here and reinforces the Committee's concern, (and subsequent finding in Chapter 6), that significant elements of the Reference Group Model have yet to be agreed.

The WA Police and the CCC will work independently but under coordinated direction

- 56 The CCC has informed the Committee:

The Commission's intention in respect of the Reference Group model is:

- (a) *Both WAPOL and the Commission will retain complete autonomy;*
- (b) *The Commission does not contemplate seconding WAPOL officers to the Commission in respect of either its misconduct or organised crime function*

¹⁵ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 17 June 2009, pp 9-10.

¹⁶ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

¹⁷ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 2 December 2009, p 11.

- (c) *Joint operations with WAPOL and/or other law enforcement agencies would see each operate independently but under coordinated direction (eg although CCC intelligence would be shared with WAPOL and other agencies, capability/methodology or how that was obtained would not).*
- (d) *It is not contemplated (nor possible under the CCC Act) that WAPOL would simply use the Commission's resources as it deemed necessary. If this was proposed to the Reference Group, the Commissioner of the Corruption and Crime Commission would have to veto such a proposition.*
- (e) *WAPOL would have the benefit of the output of the Commission's technological and other special capabilities, but not have direct access to the assets themselves. This way of operating is well established in other Australian jurisdictions.*
- (f) *The Commission comprehends the absolute importance of maintaining the integrity of its misconduct function and, depending on the legislative amendments proposed, will act to ensure effective and appropriate control measures are established to protect the integrity of the Commission's role in this regard.¹⁸*

57 Thus it is proposed that the WA Police and the CCC will work independently but under coordinated direction from the Reference Group. It is anticipated that the role of the Reference Group will be to agree common objectives and allocate responsibilities between the CCC and the WA Police. For example the Reference Group may decide for the WA Police and the CCC to commonly target an organised crime syndicate but to allocate surveillance of certain individuals within that crime syndicate to the CCC and other individuals to the WA Police, and to allocate the task of investigating certain aspects of the criminal activities of that syndicate to the CCC, and other aspects to the WA Police. As submitted by the CCC:

A joint investigation may involve CCC officers working on telecommunications interception, forensic accounting, intelligence analysis and target development in respect of some individuals, whilst WA Police utilise covert physical surveillance and other traditional police techniques (including perhaps the use of informants) in respect of other individuals in the same organisation. These would be different activities, but coordinated to achieve planned investigative outcomes.¹⁹

58 There appears to be little or no prospect that under the Reference Group Model, officers from the CCC and the WA Police will work together in the same office, use the same surveillance teams, access the same informants and share the same databases. Rather, the way that the CCC and the WA Police envisage working together is that each agency will operate independently using their own assets and personnel, but agree upon common objectives and will share intelligence.

59 Thus the WA Police and the CCC contemplate working in parallel with each other. There will be a few select individuals in the highest echelons of each agency that will be privy to the overall situation and who will coordinate information flow on a needs-to-know basis to the operatives at ground level. This will achieve, it is said, a measure of co-ordination between the activities of each

¹⁸ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

¹⁹ CCC submission to the Inquiry dated 9 July 2010, paragraph 7.

agency and will prevent, as much as possible, the agencies from unwittingly overlapping with each other. The integrity and independence of each agency is also said to be preserved.

The CCC contemplates being able to exercise Crime Commission type powers in conducting its own organised crime investigations

- 60 The CCC envisages that if it is given the ability to conduct organised crime investigations, as contemplated by the Reference Group Model, that the CCC Act will be amended to ensure that the Part 6 Powers presently available to it in its misconduct function will be available for its use in its expanded organised crime function.
- 61 The CCC contends that as it already self authorises the use of Part 6 Powers in the exercise of its misconduct function, the ability of the CCC to self authorise the use of Part 6 Powers to combat organised crime is an unremarkable proposition.
- 62 The CCC emphasises the magnitude and gravity of some of its misconduct investigations, suggesting that they would rival the magnitude and gravity of organised crime investigations.
- 63 The CCC also emphasises that the use of Part 6 Powers in its misconduct function is oversights by the Parliamentary Inspector, and that the Parliamentary Inspector would continue to oversight the CCC should it use Part 6 Powers in conducting organised crime investigations.

The CCC will need to be restructured

- 64 The CCC will need to be restructured to accommodate its dual role of misconduct agency and organised crime fighter.
- 65 The CCC acknowledges that taking on an active investigative crime role in addition to the CCC's existing misconduct role will require "careful management".²⁰
- 66 The CCC says it will be necessary to limit the interaction between the WA Police and the CCC such that there is "coordination and information exchange but limited integrated or joint activities".²¹
- 67 On 11 November 2009, CCC Commissioner Roberts-Smith was asked by the Committee how he reconciled the Reference Group Model, which would involve the CCC working side by side with the WA Police in combating organised crime, with the existing role of the CCC to oversee any misconduct in the WA Police. Mr Roberts-Smith said:

²⁰ CCC submission dated 24 July 2007, p 28.

²¹ CCC submission dated 24 July 2007, p 28.

There is, obviously, an inherent tension in that that would need to be managed ... one needs to recognise the tension, but it can be managed by organisational, structural and security measures ... For example, if WAPOL officers were working with commission officers in the commission, the organised crime investigators would be in a physically separate location within the commission from the misconduct investigators. There would be no physical access by the organised crime investigators – that is to say commission investigators or WAPOL investigators – to the misconduct investigation area. There would be no computer access ... There are security protocols that can be adopted. WAPOL officers would not have, for example, access to or any contact with our operation support unit, our covert operatives ... These are procedural things, organisational things, which we can put in place to ensure that our misconduct function is not compromised in any way by working with WAPOL officers in whatever configuration we actually choose to work with them.²²

Events leading up to the proposal

68 The argument for the CCC to have a more active organised crime fighting role has been around since before its inception.

The Kennedy Royal Commission Interim Report (2002)

69 The Kennedy Royal Commission Interim Report, published in December 2002, proposed that the Anti-Corruption Commission should be replaced by a new external oversight agency, called the Corruption and Crime Commission, and that this new agency should be given power to investigate organised crime. Commissioner Kennedy AO, QC chaired a conference attended by a number of interested persons, including representatives of the Queensland Crime and Misconduct Commission and of NSW's Independent Commission Against Corruption and Public Integrity Commission.

70 In the Kennedy Royal Commission Interim Report, Commissioner Kennedy identified competing considerations for and against the proposition that the new agency should be given power to investigate organised crime. These were as follows.

71 For the proposition:

- An external oversight agency can assist police investigations by the use of its Royal Commission type powers, which are not available to the police, such as the ability to compel witnesses to give evidence and to produce documents. These additional measures were considered to be of vital importance in fighting organised crime and its corrupting influence on police.

²² Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 11 November 2009, p 9.

- There is a demonstrated link between organised crime and corrupt police officers that enables criminal activities to proceed unhindered.
- Cost savings should be achievable by co-locating these areas of crime investigation with Royal Commission type powers in the one agency.²³

72 Against the proposition:

- The WA Police Force is the principal law enforcement agency, and there is no argument to suggest that it has been deficient in the detection, investigation and prosecution of organised crime.
- Placing a crime function within the external oversight agency might lead to an erosion in the confidence placed in the WA Police.
- Having the same agency exercise responsibilities for corruption and organised crime may lead to the loss of focus within the agency.
- The increased potential for the infiltration of corruption into a body that exercises both oversight and crime functions.
- The possibility of duplication of effort in the intelligence function.²⁴

73 Commissioner Kennedy recommended that the CCC should have the capacity to investigate serious and organised crime. He gave the following reason:

*The benefits of the ability to coordinate investigations, and the gathering of intelligence, and the use of the powers and facilities available, outweigh the disadvantage in the threat to security of the agency's operations.*²⁵

The Legislation Committee Report (2003)

74 The Corruption and Crime Commission Bill did not adopt the recommendation made by Commissioner Kennedy that the CCC be given an organised crime investigative function.

75 In December 2003 the Legislative Council Standing Committee on Legislation (**Legislation Committee**) produced a report on the Corruption and Crime Commission Bill.²⁶ The Legislation

²³ Kennedy Royal Commission Interim Report, paragraph 7.7.

²⁴ Kennedy Royal Commission Interim Report, paragraph 7.7.

²⁵ Kennedy Royal Commission Interim Report, paragraph 9.15.

²⁶ *Report of the Standing Committee On Legislation in relation to the Corruption And Crime Commission Act 2003 and the Corruption And Crime Commission Amendment Bill 2003*, December 2003.

Committee sought an explanation as to why the Bill did not confer on the CCC a jurisdiction to conduct organised crime examinations. The Committee was informed by the Crown Solicitor's Office that the recommendation was not adopted because:

[I]t was thought that responsibility for the investigation of serious and organised crime should remain with the Western Australian Police Service. Nevertheless it was thought that the CCC should have an oversight role in the investigation of organised crime. The Bill therefore gives the Commissioner of the CCC the powers of a special commissioner under the Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002.²⁷

76 The Legislation Committee considered that the advice from the Crown Solicitor's Office inadequately explained why the Kennedy Royal Commission's recommendation that the CCC have an investigative crime function was not adopted.

77 The Legislation Committee was of the view that there was significant merit in the CCC having an organised crime investigative function.

78 The Legislation Committee's reasoning was as follows:

- There is a widely acknowledged link between organised crime and police corruption.
- The link between organised crime and corrupt police officers enables criminal activities to proceed relatively free from police investigations.
- If corrupt police officers are discovered when the Police Service is investigating organised crime there is no security in relation to that information.
- It would therefore be preferable for there to be an agency external to the Police Service with the ability to investigate organised crime.²⁸

79 The Legislation Committee was of the view that the State Government should seriously consider amending the CCC Act to provide that the CCC has a function of investigating serious and organised crime.²⁹

²⁷ *Report of the Standing Committee On Legislation in relation to the Corruption And Crime Commission Act 2003 and the Corruption And Crime Commission Amendment Bill 2003*, December 2003, p 57, paragraph 5.2.

²⁸ *Report of the Standing Committee On Legislation in relation to the Corruption And Crime Commission Act 2003 and the Corruption And Crime Commission Amendment Bill 2003*, December 2003, pp 61-62, paragraphs 5.19, 5.20 and 5.24.

²⁹ *Report of the Standing Committee On Legislation in relation to the Corruption And Crime Commission Act 2003 and the Corruption And Crime Commission Amendment Bill 2003*, December 2003, Recommendation 12, p 63.

Commencement of the CCC (2004)

80 On 1 January 2004 the CCC Act came into effect and the CCC began operations. The first CCC Commissioner was the Hon Kevin Hammond (**CCC Commissioner Hammond**).

The Kennedy Royal Commission Final Report (2004)

81 In his final report published on 3 March 2004, Commissioner Kennedy said of the Exceptional Powers regime in Part 4 of the CCC Act:

[The] arrangement does not fully achieve the integration of the investigation of corruption and serious crime envisaged, but it does provide a legislative framework for a workable partnership between the CCC and the Commissioner of Police in relation to the investigation of organised crime.³⁰

82 Commissioner Kennedy also expressed the opinion that the definition of organised crime was limited and that it unduly restricted the exercise of the powers of the CCC. This was because the precondition that there must exist two or more persons committing two or more Schedule 1 offences prohibits the investigation of serious offending by a single person who may not be part of an organised crime group.

83 Commissioner Kennedy recommended that the CCC Act be amended by broadening the scope of the Exceptional Powers provisions to encompass instances when a single Schedule 1 offence had been committed, without the requirement that there be two or more persons involved.³¹

CCC submission (2005)

84 In December 2005, the CCC tabled out of session in both Houses of Parliament a report entitled *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*. (**CCC 2005 Submission**).³² The CCC 2005 Submission recommended that the CCC Act be amended:

- to permit the CCC to conduct organised crime investigations in joint task force arrangements with the WA Police and other law enforcement agencies;

³⁰ Kennedy Royal Commission Final Report, Vol 2, p 304.

³¹ Kennedy Royal Commission Final Report, Vol 2, p 305.

³² CCC, *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*, December 2005.

- to widen the definition of organised crime; and
- to strengthen the contempt powers of the CCC in light of the Supreme Court's decision in *Hammond v Aboudi*.³³

85 In support of its argument that the CCC should be able to conduct organised crime investigations the CCC asserted:

- Traditional policing techniques are constrained by the pressure of dealing with other criminal activity, that results in resource shortages and consequently can result in a tendency to focus on shorter term, reactive investigative strategies;
- Experience has shown that proactive, longer term operations specifically targeting criminal networks and using police investigative techniques combined with the special powers available to crime commissions, represent a far more effective approach to countering organised and serious crime;
- More often than not organised crime involves the corruption of public sector officers;
- The CCC requires the ability to investigate organised crime in order to fulfil its misconduct function; and
- The barrier created by the CCC Act is a contrivance at law that does not acknowledge the reality that organised crime and public sector corruption enjoy a symbiotic relationship.

The WA Police object to the CCC conducting organised crime investigations (2006)

86 WA Police Commissioner O'Callaghan informed the Committee in June 2010 that:

*I have always been supportive of the reference group model. I think it is a useful way of addressing organised crime.*³⁴

87 This should be compared with WA Police Commissioner O'Callaghan's views expressed to the Committee in March 2006. In response to the CCC 2005 Submission, WA Police Commissioner O'Callaghan wrote to the Committee by letter dated 26 March 2006. At that point in time, Mr O'Callaghan did not support the CCC's recommendation that the CCC Act be amended to permit the CCC to conduct organised crime investigations in joint task force arrangements with the WA Police and other law enforcement agencies. Mr O'Callaghan rebutted the CCC's assertion that

³³ In *Hammond v Aboudi* (2005) 31 WAR 533 the Court of Appeal of the Supreme Court of Western Australia found that the CCC had failed to establish that two witnesses in an Organised Crime Examination had committed contempt under s 160(1)(b) of the CCC Act.

³⁴ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 June 2010, p 22.

traditional policing techniques are constrained by the pressure of dealing with other criminal activity, which results in resource shortages and consequently can result in a tendency to focus on shorter term, reactive investigative strategies. The rebuttal was as follows:

There is no evidence put forward for this proposition. Nor is there any empirical basis on which it can be asserted that the Commission has greater expertise in this area than WA Police.

Currently, WA Police have a squad dedicated to the investigation of organised crime. Its operations are not “constrained” by the pressure of dealing with other criminal activity nor does that squad consider that its operations are under resourced or that its strategies are short term and reactive.³⁵

88 Mr O’Callaghan said that the WA Police agreed with the CCC that combining traditional police investigative techniques with the use of exceptional powers is superior to traditional police investigative techniques alone. However, Mr O’Callaghan made the point:

Under the current legislative regime, WA Police already have access to the exceptional powers. WA Police do not need to engage in joint operations with the Commission in order to access the exceptional powers.³⁶

89 Mr O’Callaghan said that while joint operations can be an effective way of increasing the resources devoted to a major operation, the WA Police were cautious about engaging in joint operations with the CCC for the following reasons:

1. *The Commission’s role under the CCC Act is to, in a quasi-judicial capacity, oversee access by WA Police to the exceptional powers. The Commission’s role is to ensure that WA Police do not misuse these coercive powers.*

If the Commission is to conduct joint operations with WA Police, it then takes on the role of investigator. This is inconsistent with its obligation to impartially regulate access to, and administration of, the exceptional powers. Public confidence in the conduct of WA Police in accessing the exceptional powers is enhanced by the Commission’s oversight. That confidence, not to mention public confidence in the Commission’s impartiality, may be compromised if the Commission has a direct interest in the outcome of investigations.

2. *If, as the Commission asserts, more often than not organised crime involves public sector corruption, it must follow that there is a risk that the public sector corruption will be found within the ranks of WA Police.*

If the Commission engages in joint operations with WA Police, the Commission, notwithstanding its appreciation of the risk of the connection between organised crime and public sector corruption, will be collaborating with those it is obliged

³⁵ Karl O’Callaghan, WA Police Commissioner, letter dated 25 March 2006, p 2.

³⁶ Karl O’Callaghan, WA Police Commissioner, letter dated 25 March 2006, p 3.

under the CCC Act to oversee. Furthermore, any agency that investigates organised crime runs the risk of itself being infiltrated by corruption.

3. *The public understands that the investigation of organised crime is the province of WA Police. If this function is given to the Commission, it may erode public confidence in WA Police.*
4. *With respect to the investigation of police misconduct, WA Police are answerable to the Commission. To be answerable to the Commission with respect to one area of its operation and to then be required to work jointly with the Commission with respect to organised crime may create a difficult relationship between the agencies.*
5. *The investigation of organised crime is a traditional core police function. Where this task is to be shared with another agency there is a risk that confusion and conflict may arise concerning who is ultimately responsible for the investigation, what matters are to be investigated and who makes operational decisions.³⁷*

Tensions between the CCC and the WA Police (2006)

90 WA Police Commissioner O'Callaghan said to the Committee on 25 October 2006:

I think it is fair to say that the relationship between the police and the CCC in this state is still developing, so it is a developing relationship. ... The CCC, of course, also has a core function of oversight, on the one hand, and wants to become involved in organised crime investigation, on the other hand, so there are some tensions there as well.

We have also had some fundamental differences of opinion with the CCC about some of the ways in which they go about their business.³⁸

91 CCC Commissioner Hammond said to the Committee on 22 November 2006:

The Commission's relationship with WAPOL is best described as multifaceted. At various times the Commission finds itself working in partnership with the police and at other times investigating them. This invariably results in a variety of tensions. That being said, at a senior level, we work cooperatively on the vast majority of occasions. The senior executives of both organisations meet as a group once a quarter and there are a variety of formal and informal liaison arrangements in place. Nevertheless, the reality is that there will always be tensions between the two organisations.³⁹

³⁷ Karl O'Callaghan, WA Police Commissioner, letter dated 25 March 2006, pp 3-4.

³⁸ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 25 October 2006, p 15.

³⁹ Kevin Hammond, CCC Commissioner, *Transcript of Evidence*, 22 November 2006, p 2.

Hon Len Roberts-Smith RFD QC becomes CCC Commissioner (2007)

92 CCC Commissioner Hammond retired on 30 March 2007. During CCC Commissioner Hammond's tenure the WA Police Commissioner made only:

- one application for an Exceptional Powers Finding; and
- one application to the CCC to issue a Fortification Warning Notice.

93 The current CCC Commissioner, Len Roberts-Smith, commenced his tenure on 5 June 2007. Mr Roberts-Smith began extensive consultations with the WA Police Commissioner to:

- increase the WA Police's use of Exceptional Powers under Part 4 of the CCC Act; and
- discuss a proposal that would overcome the WA Police's reservations about the CCC becoming involved in investigating organised crime.

CCC submission (2007)

94 In July 2007 the CCC made a written submission to the Committee (**CCC July 2007 Submission**). The submission proposed that the CCC should have an enhanced investigative crime function but one which focussed on the CCC having a "more independent role, complementing that of the police".⁴⁰

95 The CCC July 2007 Submission contained a recommendation that the CCC be given the jurisdiction to conduct independent organised and serious crime investigations. The CCC July 2007 Submission envisaged the CCC engaging in joint operations with the WA Police whereby the two agencies would work together on agreed, common objectives, while deploying resources independently and under the clear command and control of each agency.

96 The CCC July 2007 Submission contemplated that the CCC could only participate in an organised crime investigation if both the WA Police Commissioner and the CCC Commissioner agreed, via a reference group.⁴¹

97 The CCC July 2007 Submission made reference to the under utilisation of the WA Police of the Exceptional Powers.

The paucity of applications for access to the exceptional powers under Part 4 of the CCC Act, and the failure to produce satisfactory outcomes, means that the legislation and the

⁴⁰ CCC submission dated 24 July 2007, p 4.

⁴¹ CCC submission dated 24 July 2007, p 26.

*current arrangements supporting it have failed to achieve the CCC Act's purpose of combating and reducing the incidence of organised crime.*⁴²

- 98 The CCC July 2007 Submission sought to explain why there was a “reluctance” on behalf of the WA Police to apply for exceptional powers. In language critical of the WA Police, the submission noted:

The ... definition of organised crime, is relatively complex and discourages those unfamiliar with it from attempting to apply it.

... WAPOL has an inadequate understanding of how best to utilise the Commission's hearing powers....

... WAPOL has not sought to employ the full range of additional powers available to the police...

... WAPOL has a misapprehension that the ACC has no obligation to meet the stringent disclosure obligations necessitated by recent changes to criminal law.

... due to the restrictions of Part 4 of the CCC Act, WAPOL officers find themselves working in a complex, unfamiliar environment. This ... inhibits their capacity, and demonstrably their preparedness, to exploit the CCC Act's exceptional powers.

... WAPOL necessarily gives priority to the requirement to apply its relatively scarce resources in responding to the daily pressure of dealing with organised and other serious crime. The complexity of the CCC Act inhibits WAPOL's preparedness and capacity to invest the time to learn how to exploit the CCC Act's exceptional powers.

*... Law Enforcement Agencies are inherently parochial in regard to their capacity and preparedness to enter into partnerships with other agencies. WAPOL is no different in regard to its understandable desire to retain sole control of the organised crime function within the WA jurisdiction. WAPOL is also concerned about its capacity to conduct joint crime investigations with the Commission, given the Commission's integrity oversight function in regard to the police.*⁴³

- 99 One can infer from the above submission that the working relationship between the CCC and the WA Police was at a very low point in July 2007. It ought to be noted, however, that CCC Commissioner Roberts-Smith was only one month into his new job at the time the submissions were sent to the Committee.

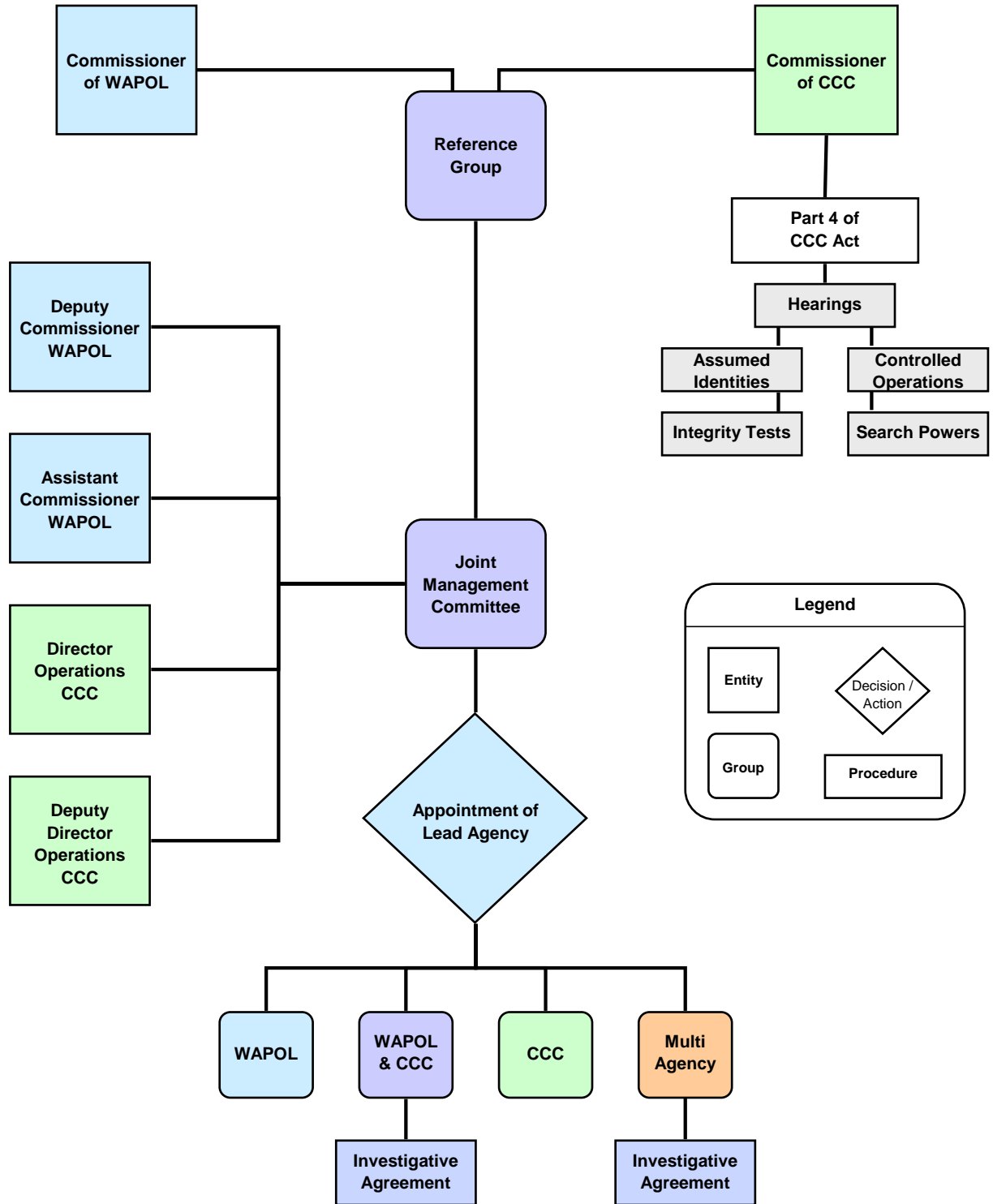
⁴² CCC submission dated 24 July 2007, p 3.

⁴³ CCC submission dated 24 July 2007, pp 7-9.

Joint proposal of the CCC and the WA Police (2007)

- 100 It is apparent to the Committee that soon after, or contemporaneously with, the presentation of the CCC July 2007 Submission to the Committee, Mr Roberts-Smith undertook extensive consultations with the WA Police Commissioner such that the relationship between their two agencies improved rapidly to the point where two months later the WA Police and the CCC submitted a joint proposal to the Committee setting out a model for the conduct of serious and organised crime investigations by the CCC in conjunction with the WA Police (**Joint Proposal**).
- 101 The Joint Proposal was attached to a letter to the Committee dated 19 September 2007 signed by CCC Commissioner Roberts-Smith and WA Police Commissioner O'Callaghan.
- 102 The Joint Proposal was accompanied by revised submissions from the CCC which had most of the negative criticism of the WA Police stripped out to be replaced by more neutral language which emphasised the inherent difficulties in Part 4 of the CCC Act, rather than any perceived shortcomings of the WA Police.
- 103 The Joint Proposal provided that the CCC could only participate in an organised crime investigation if both the WA Police Commissioner and the CCC Commissioner agreed, via a reference group.
- 104 The Joint Proposal consisted of two documents:
- a flow diagram; and
 - a one page document entitled "Proposed WA Organised Crime Investigation Model".
- 105 The flow diagram follows:

Proposed W.A. Organised Crime Investigation Model



106 The one page document entitled “Proposed WA Organised Crime Investigation Model” is reproduced below:

Proposed W.A. Organised Crime Investigation Model
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Role of Reference Group

- Determine organised crime priorities and terms of reference
- Determine broad strategic direction
- JMC could agree to and authorise reference triggering ability to apply to use special powers.
- Allow agencies to consult and work cooperatively but not contaminate either agencies investigative protocol.
- Role of JMC [Joint Management Committee]
- Ensure joint agency investigation done in accordance with MOU
- Agreeing on a “lead or coordinating agency” for each operation
- Appointment of a CIO
- Appointment of SIO’s
- Determine location and composition of Investigative Team
- Oversight conduct of investigations
- Make final determinations where CIO and SIO’s unable to reach agreement
- Manage media responsibilities
- Convene as and when necessary
- Ensuring that both the CCC and WAPS are advised of all relevant matters in a timely manner
- Give consideration to proceeds of crime issues
- Ensuring coordination between investigations under Investigative Agreement and activities under the National Counter Terrorism Plan
- Determine information and exhibit systems to be used
- Commission Post Operational Assessments and Quality Assurance Reviews

Role of SIO

- Primary decision-maker on investigative matters within respective jurisdiction.
- Ensure operational co-ordination of investigation
- Report to JMC representative in their jurisdiction.
- Determine frequency, format, security classification, dissemination and provision of quality control for information and intelligence sharing between agencies in consultation with CIO
- In event of terrorism investigation, ensure compliance with National Counter Terrorism reflect each jurisdiction’s SIO’s duties.

Role of CIO

- Reflect each jurisdiction’s SIO’s duties.
- CIO in consultation with SIO’s of each participating agency, will form an Investigative Management Group (IMG)
- Responsible for leading or coordinating an overall tactical command of joint agency investigation.
- Develop a Major Investigation Plan for the joint agency investigation.

107 The CCC and the WA Police were also in agreement that access by the WA Police to the Exceptional Powers under Part 4 of the CCC Act should be facilitated by a wider definition of organised crime. A proposed definition of “serious and organised crime” was enclosed with the letter of 19 September 2007. The proposed definition was the same as in the *Australian Crime Commission Act 2002* (Cth) but excluded federal crimes and added paedophilia and terrorism. In addition the proposed definition included the concept of ‘ancillary’ and ‘incidental’ offences as defined under the *Australian Crime Commission Act 2002* (Cth).

JSCCCC Report (2007)

108 On 15 November 2007, the Committee (differently constituted) tabled a report titled *Inquiry Into Legislative Amendments to the Corruption and Crime Commission Act 2003 – the Role of the Corruption and Crime Commission in Investigating Serious and Organised Crime in Western Australia* (**JSCCCC Report No 31**).

109 This followed a lengthy inquiry in the course of which the Committee conducted multiple hearings and received a number of submissions, including the Joint Proposal.

110 JSCCCC Report No 31 made a series of recommendations, one of these being that the CCC Act be amended to enable the CCC to have the necessary powers to conduct serious and organised crime investigations, either jointly with the WA Police or independently, subject to ‘bipartisan’ support from a reference group consisting of the WA Police Commissioner and the CCC Commissioner (Recommendations 5 and 6).

111 The reasoning that underpinned these recommendations was essentially as follows:

- Restrictions on the ability of the CCC to assist the WA Police in accessing and using Exceptional Powers had discouraged the WA Police from applying for those powers.
- The CCC has a crime investigation capability by virtue of its misconduct function and expertise drawn from a number of law-enforcement agencies in Australia. Precedent in other Australian jurisdictions suggests that crime commissions complement traditional policing methodologies and that joint strike teams on a range of high-level crime have made significant inroads into combating serious and organised crime activities.
- The CCC can supplement related investigations through the provision of its exceptional powers and specialist expertise. The specialist skills identified by the Committee included intelligence, financial investigation, computer investigation and forensic computer capabilities not generally available to the WA Police. The JSCCCC also referred to the CCC’s statutory powers. It mentioned, amongst other things, a submission by the Australian Federal Police to the effect that the coercive powers of the CCC were a valuable asset.

- Persons who are engaged with public sector officers in the conduct of serious and organised crime would be able to be pursued concurrently with a misconduct investigation by the CCC. Although a strong connection between public sector corruption and organised crime had not been identified in this State, a study, conducted in 2003, of organised crime and corruption in the public sector across a large sample of countries including Australia found a strong association between organised crime and public sector corruption. Also, there had been significant evidence of the connection in other Australian jurisdictions.
- The model proposed for the conduct of joint operations between the CCC and the WA Police and appropriate levels of demarcation in the management of the misconduct and crime function would assist in addressing concerns regarding empowerment of the CCC with dual functions.
- Support had been tendered by the Australian Federal Police and the Australian Crime Commission regarding the opportunity to conduct joint operations with the CCC, if the CCC was empowered with a crime function.
- In Queensland, the CMC had been able to establish clear lines of demarcation between its crime and misconduct functions and had a philosophy which was directed to fostering a partnership with the Queensland Police Service (QPS). After what was then 20 months of operations, there was no indication that the merger had adversely affected the working relationship with QPS (although it was acknowledged that this might be attributable to the CMC's policy of employing QPS officers, many of whom had ultimately returned to the QPS).
- The Kennedy Royal Commission acknowledged that, when investigating corruption by police officers, it was desirable for security reasons to exclude serving and ex-police officers from the process. It acknowledged that, in recommending a modified version of the CMC for Western Australia, this would bring police officers into the CCC. However, a reform in police culture and the CCC's improved ability to screen out suspect police officers from joint task forces would assist in mitigating risk.
- The Kennedy Royal Commission had commented on the complementary role performed by crime commissions in other Australian jurisdictions and the significant benefits this has had in terms of challenging serious and organised crime. The Moffitt, Woodward, Williams, Stewart and Costigan Royal Commissions had resulted in the establishment of the former National Crime Authority, now the Australian Crime Commission. This was on the basis that police forces, with their traditional methods of detection and investigation and their jurisdictional limitations, were ineffective in countering organised crime.
- The JSCCCC noted a submission by the CMC that an organised crime-fighting agency achieves effective outcomes only when it has the capacity to engage in investigations and does so in cooperation with state and national law enforcement agencies.

- The CCC Commissioner saw no conflict between an investigatory role by that body, on the one hand, and what the WA Police had regarded as its quasi-judicial role, on the other. This was because he currently authorised exceptional powers for misconduct investigations and believed that the circumstances pertaining to exceptional powers authorisations for crime investigations would be no different. The CMC had commented that it had managed the alleged conflict between its misconduct and organised crime functions through strict controls despite seconding police officers to the CMC.
- The JSCCCC believed that the CCC's recruitment practices and ongoing screening of its employees would reduce the risk of infiltration.
- In deciding to recommend that the CCC should have the ability to investigate serious crime, the Committee took into account problems that would otherwise be experienced in investigating offences because of the limitations imposed by the restrictive definition of organised crime. It referred to support for this initiative by the Kennedy Royal Commission and the Legislative Council's Standing Committee on Legislation. It considered that the CCC should be empowered to pursue serious and organised crime involving public sector corruption. Importantly, it considered that it was beneficial to extend these powers to incidental offences occurring in the context of serious and organised crime.
- The JSCCCC noted that, under the *Criminal Code* (WA), the maximum penalty of seven years imprisonment (used to define 'serious crime') applied to a 'considerable variation' of offences and that it might not be appropriate to apply Exceptional Powers to some of these.

Archer Report (2008)

- 112 A *Review of the Corruption and Crime Commission Act 2003* (**Archer Report**) was published by Ms Gail Archer SC in February 2008 and tabled in Parliament. The Archer Report made a series of recommendations, one of these being that the CCC Act be amended to enable the CCC to have the necessary powers to conduct serious and organised crime investigations either jointly with the WA Police, or independently, subject to 'bipartisan' support from a reference group consisting of the WA Police Commissioner and the CCC Commissioner (Recommendation 2, read with Recommendations 5 and 6 of JSCCCC Report No 31). The recommendations were made with the intention of improving the CCC's capacity to achieve its statutory objective 'to combat and reduce the incidence of organised crime'.
- 113 Ms Archer made no independent analysis concerning these recommendations, having found it unnecessary to 'reinvent the wheel', as she put it, given the thorough analysis that had been given to the critical issues by the Committee.
- 114 Ms Archer also endorsed Recommendation 8 of JSCCCC Report No 31, to the effect that the Act "be amended to enable the Parliamentary Inspector of the Corruption and Crime Commission to

undertake appropriate monitoring and auditing of the reference group". Again, she considered it unnecessary to make an independent analysis in that respect.

115 The Archer Report was tabled in the Legislative Assembly on 18 March 2008 by then Attorney General, Hon Jim McGinty MLA. Mr McGinty announced that the Labor government supported, in principle, Ms Archer's recommendation that the CCC be given an expanded function in dealing with serious and organised crime, to be exercised by agreement between the WA Police and the CCC.

116 Before a bill could be presented to Parliament to amend the CCC Act, an early State election was called, and on 7 September 2008 the Labor Government lost power to the incoming Liberal-National Government.

Government's support for the CCC to have an expanded role in combating organised crime

117 The Premier, Colin Barnett, supports the CCC being given an expanded function in dealing with serious and organised crime. On 30 December 2008, Premier Barnett was quoted by *The West Australian* newspaper as having said:

I do think we need a body that can deal with organised crime and deal with issues of improper or illegal conduct by people in public office and there has been, sadly, enough evidence of improper conduct of people in public office over recent years in WA," he said. "I would not take that position that we do not need a corruption body. But it's a large and expensive body and I would be far happier as a taxpayer to concentrate its resources on organised crime. "I think the public find this extraordinarily frustrating that the activities during the time of the previous Labor government are causing such delays, cost and diversion of the CCC away from dealing with organised crime."⁴⁴

118 On 3 February 2009, Premier Barnett said on ABC Radio:

the CCC under this Government will be using its resources more in fighting organised crime and a big part of that will be the dealing and distribution of drugs.

119 On 11 September 2009 the Attorney General, Hon Christian Porter MLA, was quoted by *The West Australian* as having said:

Robert Cock QC has been appointed as the State Government's special counsel and one of his roles will be to review the CCC Act to give greater emphasis to investigations on organised crime."⁴⁵

⁴⁴ 'Organised crime should be watchdog's main target, says Barnett', *The West Australian* newspaper, 30 December 2008, p 4.

⁴⁵ 'CCC defends record amid call for curb', *The West Australian* newspaper, 9 September 2009, p 19.

120 Premier Barnett said in Parliament on 23 February 2010:

*The Liberal-National government will also target organised crime, with the introduction of anti-association legislation aimed at groups who come together to engage in criminal behaviour. We will also broaden the powers of the Corruption and Crime Commission in this area.*⁴⁶

How this Inquiry was conducted

121 Anticipating the Government's move to place a bill before Parliament to expand the CCC's jurisdiction to combat organised crime, the Committee commenced this Inquiry on 9 September 2009.

122 The Committee sought submissions and evidence as to the merits of the Reference Group Model from:

- the CCC;
- the WA Police; and
- other law enforcement agencies in Australia with particular emphasis on the Queensland Crime and Misconduct Commission.

123 In addition the Committee travelled to Hong Kong to interview senior officials from the Hong Kong Independent Commission Against Corruption (**Hong Kong ICAC**), the Hong Kong Police Force, Professor Harold Traver, and two oversight bodies of the Hong Kong ICAC being the Hong Kong Legislative Council Panel on Security and the Operations Review Committee.

124 The Committee prepared a draft report setting out a number of provisional findings and recommendations. This was sent to the CCC and the WA Police in May this year, inviting feedback, which both agencies gave.

125 In response to the feedback the Committee convened a hearing on 23 June 2010 at which both CCC Commissioner Roberts-Smith and WA Police Commissioner O'Callaghan attended.

126 As a result of that hearing the Committee sent out a request to the CCC asking how much money it needed to fund an organised crime function within the CCC, without in any way diminishing the CCC's current work and capacity in its core areas of education, misconduct and oversight. The CCC responded by saying that it needed \$42 million over five years to provide a serious and organised crime function, supporting 49 additional full time employees.

⁴⁶ Hon Colin Barnett, MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates*, 23 February 2010, p 34.

- 127 The Committee then sent a request to the WA Police asking how they would acquit a similar amount in combating organised crime. The task of replying to this request was delegated to Detective Superintendent Charlie Carver of the Serious and Organised Crime Division. To help further his understanding of what the Committee was looking for by way of a response, the Committee provided Detective Superintendent Carver with a copy of the Committee's draft report.
- 128 The Committee determined that, as Detective Superintendent Carver is the current head of the Serious and Organised Crime Division, and, as such, will be tasked with the day to day implementation of the Reference Group Model, if it goes forward, it would very much assist the Committee to be aware of his views concerning the provisional findings and recommendations in the Committee's draft report.
- 129 Accordingly the Committee requested Detective Superintendent Carver's attendance before the Committee on 2 August 2010. He attended before the Committee and gave evidence. Two aspects of his evidence were of particular interest to the Committee:
- the WA Police needs urgent substantial funding, quarantined to the Serious and Organised Crime Division, to bring its capability up to that which Detective Superintendent Carver demonstrated is available to other interstate and national agencies; and
 - unless the CCC permit the WA Police to work as secondees within the CCC, there is unlikely to be the requisite degree of trust for the Reference Group Model to work.
- 130 The draft report was then amended in light of:
- the feedback by the CCC and the WA Police to the draft report;
 - the meeting at which both Commissioners attended before the Committee;
 - the funding estimates of the CCC, together with information as to how the WA Police would acquit a similar amount in the fight against organised crime; and
 - Detective Superintendent Carver's evidence.
- 131 The Committee then proceeded to adopt this Report, and an embargoed copy was sent to both Commissioners and the Parliamentary Inspector prior to tabling with Parliament.

Structure of this Report

- 132 Upon consideration of the submissions and evidence the Committee is firmly of the view that the CCC's jurisdiction should not be expanded to enable the CCC to conduct organised crime investigations, either in co-operation with the WA Police or by itself.

- 133 Chapter 1 describes the Reference Group Model, and the events leading up to its submission to the Government. The main features of the Reference Group Model are explained. Significant elements of the Reference Group Model have still yet to be agreed between the CCC and the WA Police. These elements have important implications for the independence of each agency.
- 134 In order to form a view as to the merits of the Reference Group Model, it is important to understand precisely what role the CCC currently plays in fighting organised crime. Chapter 2 explains how the CCC authorises the WA Police to access Exceptional Powers to combat organised crime.
- 135 Chapter 3 debunks some commonly held misconceptions about the CCC.
- 136 Chapter 4 sets out the arguments in favour of the Reference Group Model as put forward by the WA Police and the CCC.
- 137 Chapter 5 sets out the CCC's estimate as to how much it will cost for the CCC to have a 'mature' serious and organised crime function. The Chapter then sets out what the WA Police would do if such funding were given to the WA Police instead of the CCC.
- 138 Chapter 6 deconstructs the arguments in favour of the Reference Group Model. The Committee concludes that the CCC should not be given a jurisdiction to conduct organised crime investigations, but instead the Government's focus should be on fixing the problems that prevent the WA Police from fully accessing and utilising the Exceptional Powers in Part 4 of the CCC Act, as well as ensuring that the WA Police are adequately resourced.

CHAPTER 2 USE OF EXCEPTIONAL POWERS BY THE WA POLICE

Introduction

139 One of the two objectives of the CCC Act is to combat and reduce the incidence of organised crime.

140 The way the CCC Act achieves this objective is to allow the WA Police to make application to the CCC for, and to be granted access to, a suite of Exceptional Powers to combat organised crime.

141 From 1 January 2004 to 30 June 2008 the WA Police Commissioner made only:

- one application for an Exceptional Powers Finding; and
- one application for a Fortification Warning Notice.

142 In July 2007 the CCC argued that the low number of applications was evidence that the Exceptional Powers regime under Part 4 of the CCC Act was a failure and that the way to combat organised crime was to amend the CCC Act to enable the CCC to conduct its own organised crime investigations and that the CCC be able to self authorise the use of Part 6 Powers when conducting such organised crime investigations.

143 Since 30 June 2008, there has been a marked increase in the number of applications for Exceptional Powers by the WA Police.

144 The CCC now says that while the WA Police are making more applications to access Exceptional Powers, they are not getting as much out of the Exceptional Powers as they should be, and that the CCC could do a better job.

145 The CCC continues to argue that the way to combat organised crime is to amend the CCC Act to enable the CCC to conduct its own organised crime investigations and that the CCC be able to self authorise the use of Part 6 Powers when conducting such organised crime investigations.

146 The Committee believes that the focus should be on permitting the CCC to actively assist the WA Police to increase their competency in applying for and exercising the Exceptional Powers under Part 4 of the CCC Act, rather than to give the CCC an expanded organised crime function.

147 Set out below is a chronology detailing the WA Police's history of applying for Exceptional Powers.

Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002

148 Following the car bombing assassination of Don Hancock and Lou Lewis a cabinet task force under the Gallop Government was established to develop a comprehensive strategy to tackle organised crime. The Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001 was introduced into Parliament by Premier Gallop to give Western Australia:

*the toughest laws in Australia for combating the sinister and complex activities of criminal gangs.*⁴⁷

149 The rationale behind the Bill was that ‘ordinary’ police powers of investigation were insufficient in tackling organised crime. Premier Gallop said:

*Gangs and other organised crime groups are able to acquire substantial income or assets by means of ongoing criminal conduct, which is often of a serious nature. These groups have significant resources at their disposal and are able to direct those resources at avoiding detection by investigatory authorities and prosecution. As investigatory authorities do not have comparable resources, it is difficult to successfully trace and investigate these crimes using traditional means of investigation. Organised crime groups, including outlaw motorcycle gangs, also operate under a code of silence that surrounds the commissioning of offences committed by members of the organisations, and are prepared to use intimidation and violence to commit crime and prevent detection, apprehension and prosecution.*⁴⁸

150 The Premier emphasised the safeguards to be built into the legislation. Only organised crime was being targeted, and each and every time the WA Police Commissioner wanted to exercise the exceptional powers, he had to make an application to a Special Commissioner who had to be satisfied that it was in the public interest that the WA Police be given such powers.

151 The *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* came into effect on 15 July 2002. The Act permitted the WA Police Commissioner to make an application to a Special Commissioner (who must have been a judge of the District or Supreme Court) to access the exceptional powers under the Act.

152 The exceptional powers under the Act are not detailed in this Report, as they are very similar to the suite of Exceptional Powers that are now available under Part 4 of the CCC Act, and which are discussed below.

153 The Act also lowered the threshold test to be satisfied before a court could authorise the use of a surveillance device from “reasonable grounds for believing” to a test of “reasonable grounds for suspecting” in the case of an organised crime.

⁴⁷ Hon Geoff Gallop MLA, Premier, Legislative Assembly, *Parliamentary Debates*, 6 November 2001, p 5038.

⁴⁸ Hon Geoff Gallop MLA, Premier, Legislative Assembly, *Parliamentary Debates*, 6 November 2001, p 5038.

154 The Act was in operation from 15 July 2002 to the date of its repeal on 31 December 2003. In that time the WA Police Commissioner made only one (unsuccessful) application for the issue of a fortification warning notice.⁴⁹ The bulk of the Act⁵⁰ was incorporated into Part 4 of the CCC Act, which commenced operation on 1 January 2004.

Corruption and Crime Commission Act 2003

155 The CCC Act came into effect on 1 January 2004.

156 One of the two objectives of the CCC Act is to combat and reduce the incidence of organised crime.⁵¹

157 The way the CCC Act achieves this objective is to allow the WA Police to make applications to the CCC for, and to be granted access to, a suite of Exceptional Powers to combat organised crime.⁵²

158 As noted in Chapter 1, the CCC only has an ability to engage in organised crime investigations if the misconduct function of the CCC is engaged. This may occur if one or more of the following jurisdictional triggers (**Misconduct Jurisdictional Triggers**) are present:

- there are grounds for the CCC to reasonably suspect that a public officer had engaged in misconduct connected with organised crime; or
- the CCC receives an allegation to the same effect.

159 In such circumstances where the misconduct function of the CCC is engaged by the presence of one or more Misconduct Jurisdictional Triggers, the CCC has the ability to conduct investigations into the associated organised crime activity as part of its misconduct investigation. There are limits, however, to the extent to which the CCC can investigate the associated organised crime activity. These limits have not been judicially tested, but the Committee would have thought that at the very least the investigation into the organised crime activity must have some connection with the public sector misconduct being investigated by the CCC.

⁴⁹ CCC, *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*, December 2005, tabled out of session in the Legislative Assembly and the Legislative Council.

⁵⁰ The exceptional power enabling the WA Police Commissioner to apply for a surveillance warrant upon the lesser ground of reasonable suspicion was not incorporated into the CCC Act.

⁵¹ CCC Act, s 7A *The main purposes of this Act are - (a) to combat and reduce the incidence of organised crime...*

⁵² CCC Act, s 7B(2) *The Commission is to be able to authorise the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of organised crime.*

Exceptional Powers

160 The Exceptional Powers available to the WA Police, on application to the CCC, under Part 4 of the CCC Act are:

- the summoning and examining of witnesses, in coercive hearings;⁵³
- the conduct of controlled operations by police officers;⁵⁴
- powers of search and entry without a warrant;⁵⁵
- powers to stop, detain and search a person or conveyance without a warrant;⁵⁶
- the acquisition and use of assumed identities by a police officer;⁵⁷ and
- the conduct of integrity testing programs.⁵⁸

Anti-fortification powers

161 In addition to the Exceptional Powers, Part 4 of the CCC Act also contains provisions enabling:

- the WA Police Commissioner to apply to the CCC to issue a Fortification Warning Notice; and
- the WA Police Commissioner to issue a Fortification Removal Notice.⁵⁹

162 As described by the High Court,⁶⁰ the anti-fortification provisions are directed at the removal of heavy fortifications on premises suspected of being used by people involved in organised crime. The process to remove fortifications is begun by the WA Police Commissioner applying to the CCC to issue a Fortification Warning Notice. Once the CCC has issued this notice the WA Police Commissioner is able to take further action, such as the issue of a Fortification Removal Notice, without further recourse to the CCC.

⁵³ CCC Act, s 48, s 49 and s 50.

⁵⁴ CCC Act, s 64.

⁵⁵ CCC Act, s 52.

⁵⁶ CCC Act, s 53.

⁵⁷ CCC Act, s 60.

⁵⁸ CCC Act, s 64.

⁵⁹ CCC Act, s 68 and s 72.

⁶⁰ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4, Gleeson CJ at [3]

The CCC's oversight role with respect to exceptional powers and anti-fortification powers

163 The CCC has three functions – a prevention and education function, a misconduct function and an organised crime function.

164 The CCC's powers under the CCC Act, so far as they relate to the exercise of its **organised crime function**, are restricted to:

- authorising the WA Police to use Exceptional Powers;
- monitoring and directing the use by the WA Police of Exceptional Powers; and
- issuing Fortification Warning Notices.

The distinction between Exceptional Powers and Part 6 Powers

165 In the exercise of its **misconduct function**, the CCC has a suite of powers at its disposal. Most of these powers are contained in Part 6 of the CCC Act, and are referred to in this Report as **Part 6 Powers**. The Part 6 Powers are:

- the summoning and examining of witnesses, in coercive hearings;⁶¹
- powers of search and entry without a warrant;⁶²
- the acquisition and use of assumed identities;⁶³
- the conduct of controlled operations;⁶⁴ and
- the conduct of integrity testing programs.⁶⁵

166 As can be discerned the Exceptional Powers are very similar in nature to the Part 6 Powers.

167 The Exceptional Powers can only be exercised by the WA Police on application to the CCC in relation to an organised crime investigation, whereas the Part 6 Powers can only be exercised by the CCC in a misconduct investigation. Should a misconduct investigation necessitate an

⁶¹ CCC Act, s 96.

⁶² CCC Act, s 100.

⁶³ CCC Act, ss 102 – 118.

⁶⁴ CCC Act, ss 119 – 122.

⁶⁵ CCC Act, s 123.

investigation of associated organised criminal activity, then, and only then, can the Part 6 Powers be brought to bear by the CCC on organised crime as part of the misconduct investigation.

Coercive hearings

168 As noted above, the power to conduct a coercive hearing is both an Exceptional Power (to be used by the WA Police in an Organised Crime Examination) and a Part 6 Power (to be used by the CCC in a misconduct investigation). In other words:

- in the exercise of its **misconduct function** the CCC can issue a summons to a witness compelling the witness to attend an examination at which the witness must answer questions relevant to the **misconduct investigation** being undertaken by the CCC; and
- in the exercise of its **organised crime function**, the CCC, on application by the WA Police Commissioner, can issue an Organised Crime Summons compelling the witness to attend an Organised Crime Examination, at which the witness must answer questions asked by counsel for the WA Police Commissioner relevant to the **organised crime investigation** being undertaken by the WA Police.

169 Both are examples of coercive hearings. The coercive nature of the hearing lies in the fact that in both scenarios, if the witness fails to attend the hearing or fails to answer a question put to him or her, then the person is in contempt of the CCC, and may be fined or imprisoned by the Supreme Court of Western Australia.

How the CCC authorises the WA Police to access Exceptional Powers

170 Under the CCC Act, the WA Police Commissioner can make an application for the CCC to make an Exceptional Powers Finding. If the CCC makes an Exceptional Powers Finding, this triggers the ability of the CCC to then authorise the WA Police to use the Exceptional Powers.

171 In order to make an Exceptional Powers Finding the CCC must be satisfied that there are reasonable grounds for suspecting that one or more of the offences in the table below has been, or is being, committed in the course of organised crime.⁶⁶

⁶⁶ CCC Act, ss 5, 46.

Table of offences

Legislation	Section	Title of Offence	Years of Imprisonment	
Criminal Code	143	attempting to pervert the course of justice	7	
	145	aiding escape from custody	7	
	147	permitting escape	3	
	279	murder	Life	
	283	attempted murder	Life	
	292	disabling to commit indictable offence	20	
	293	stupefying to commit indictable offence	20	
	294	acts intended to commit grievous bodily harm or to prevent arrest	20	
	304	acts or omissions causing bodily harm or danger	7, 20	
	305	setting dangerous things for people	3	
	332	kidnapping	20	
	393	assault with intent to rob	10	
	397	extortion	14	
	398	attempted extortion by threats	20	
	399	procuring execution of deeds by threats	14	
	451A	endangering safe use of aircraft	20	
	454	causing explosion likely to do serious damage	20	
557	making or possession of explosives under suspicious circumstances	3		
563A	property laundering	20		
Firearms Act 1973	An offence against regulations made under s. 6(1) of the Firearms Act 1973 that - (a) is committed in respect of 2 or more firearms; or (b) is committed in respect of a firearm and in association with the commission, by the same or any other person, of an offence against s.557I of The Criminal Code (Possessing bulletproof clothing)			
Misuse of Drugs Act	An offence referred to in s.32A(1)(b) which is a serious drug offence in respect of: (a) a prohibited drug in a quantity which is not less than the quantity specified in <i>Schedule VII</i> ; or (b) 250 cannabis plants			
	<i>Serious drug offence</i>	6(1)	possession of a prohibited drug with intent to sell or supply	25
			manufactures or prepares a prohibited drug	
			sells or supplies, or offers to sell or supply, to another a prohibited drug	
	7(1)	possession of prohibited plant or any prohibited drug obtainable therefrom with intent to sell or supply to another	25	

172 Organised crime is defined as follows in the CCC Act:

*organised crime means activities of 2 or more persons associated together solely or partly for purposes in the pursuit of which 2 or more Schedule 1 offences are committed, the commission of each of which involves substantial planning and organisation.*⁶⁷

173 Before the CCC can make an Exceptional Powers Finding, it must also be satisfied that there are reasonable grounds for believing that the use of Exceptional powers would be in the public interest having regard to:

- whether or not the suspected offence could be effectively investigated without using the Exceptional Powers;
- the extent to which the evidence or other information that it is suspected might be obtained would assist in the investigation, and the likelihood of obtaining it; and
- the circumstances in which the evidence or information that it is suspected might be obtained is suspected to have come into the possession of any person from whom it might be obtained.

174 Once the CCC has made an Exceptional Powers Finding, the Exceptional Powers then become available to the WA Police.

175 The use of Exceptional Powers is subject to safeguards provided for by the CCC Act. For example:

- the CCC may give directions limiting the exercise of an Exceptional Power and may revoke or vary these directions;
- the CCC may at any time revoke an Exceptional Powers Finding;
- a police officer who exercises an exceptional power must submit a report to the WA Police Commissioner giving details and the WA Police Commissioner is obliged to give a copy of the report to the CCC as soon as is reasonably practicable after receiving the report;⁶⁸
- the CCC may direct the WA Police Commissioner or any other person to give the CCC details of the exercise of an Exceptional Power;⁶⁹
- a police officer to whom an assumed identity approval applies, or who is responsible for a controlled operation or to whom authority has been granted to conduct an integrity testing

⁶⁷ CCC Act, s 3.

⁶⁸ CCC Act, s 58.

⁶⁹ CCC Act, s 59.

program, must give a report to the WA Police Commissioner, who is to give a copy of it to the CCC as soon as is reasonably practicable;⁷⁰ and

- the CCC may direct the WA Police Commissioner or any other person to provide details of the acquisition and use of an assumed identity, controlled operation or integrity testing program.⁷¹

Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police (2004)

176 On 12 February 2004 the WA Police Commissioner applied to the CCC for the CCC to issue a Fortification Warning Notice in relation to the club house of the Gypsy Jokers Motorcycle Club (**Gypsy Jokers**) located at 10 Lower Park Road, Maddington.⁷²

177 In support of the application to the CCC, the WA Police Commissioner swore and filed an affidavit with 29 annexures and two exhibits, one of which was a videotape of the fortifications on surrounding premises.⁷³

178 The application was heard. The CCC granted the application and a Fortification Warning Notice was issued by the CCC on the Gypsy Jokers on 31 March 2004. The notice referred to the CCC's satisfaction that there were reasonable grounds for believing two matters of fact: first, that the club house was "heavily fortified", and secondly, that it was "habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime".⁷⁴

179 The notice went on to state that unless the WA Police Commissioner was satisfied that matters had been rectified within 14 days a Fortification Removal Notice might be issued.

180 On 14 April 2004, solicitors instructed by the Gypsy Jokers responded by letter to the fortification warning notice. That the club house was heavily fortified was not denied. Three matters were explained in the letter. First, the Maddington industrial area, in which the premises are located, was described as "an area of a high crime rate in particular for criminal offences of burglary and motor vehicle theft". Secondly, it was stated that the fortifications had received all necessary approvals. Thirdly, the fortifications were said to be necessary to ensure that "approximately 10 customised Harley Davidson Big Twin motorcycles", said to be valuable and regularly stored at the club house, were secured against theft. A key to the club house was provided to permit the WA Police Commissioner to enter the club house when "entitled to do so by Law". The letter did not

⁷⁰ CCC Act, s 61, s 64 and s 65.

⁷¹ CCC Act, s 62 and s 66.

⁷² *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4 at [135] per Crennan J.

⁷³ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4 at [136] per Crennan J.

⁷⁴ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4 at [137] per Crennan J.

address the WA Police Commissioner's belief that the club house was used by members of a class of persons who might reasonably be suspected of being involved in organised crime.⁷⁵

181 On 5 May 2004 the WA Police Commissioner issued a Fortification Removal Notice which indicated to the Gypsy Jokers that removal or modification of specified fortifications would need to occur before the WA Police Commissioner would be satisfied that the premises were no longer heavily fortified.

182 On 12 May 2004, the Gypsy Jokers applied to the Supreme Court of Western Australia for review of the WA Police Commissioner's decision to issue the Fortification Removal Notice. The WA Police Commissioner swore and filed an affidavit in the proceeding, in which he identified certain items of information as "confidential ... on the basis that their disclosure might prejudice the operations of the Commissioner of Police".⁷⁶

183 In the proceedings before Blaxell J in the Supreme Court of Western Australia, the WA Police Commissioner relied on the provisions of s 76(2) of the CCC Act and provided a redacted version of the affidavit containing the information which the WA Police Commissioner took into consideration when making his decision to issue the Fortification Removal Notice. The Gypsy Jokers only received the redacted version of the WA Police Commissioner's affidavit in which information identified by the WA Police Commissioner as confidential was blacked out. The balance of information in the affidavit identified 59 members of the Gypsy Jokers, all but one of whom the WA Police Commissioner alleged had criminal records, and included details of some 130 charges, with which the WA Police Commissioner alleged members or associates of the appellant had been charged. Of those charges, 17 were for Schedule 1 offences. That information related to the second matter of which the WA Police Commissioner had to be satisfied under s 72(2)(b). This conveyed, in broad terms, some information which the WA Police Commissioner took into consideration when he issued the notice.⁷⁷

184 In response to receiving only a redacted version of the affidavit, the Gypsy Jokers challenged the validity of s 76(2) of the CCC Act. Pursuant to s 43 of the *Supreme Court Act 1935 (WA)* two questions were referred to the Court of Appeal:

- is s 76 of the CCC Act valid? and
- in the alternative, is sub section 76(2) of the CCC Act valid?

185 At this point in time the WA Police Commissioner informed the Committee of his intentions not to make any fresh applications for anti-fortification powers until the validity of the anti-fortification provisions was settled.⁷⁸

⁷⁵ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4 at [139] per Crennan J.

⁷⁶ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4 at [142] per Crennan J.

⁷⁷ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4 at [154] per Crennan J.

⁷⁸ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 25 October 2006, pp 14-15.

- 186 On 27 February 2007 the Court of Appeal by a majority (Martin CJ and Steytler P; Wheeler JA dissenting) rejected the Gypsy Jokers' submission that s 76(2) of the Act so affected the institutional integrity, by detracting from the independence and impartiality of the Supreme Court, that it ceased to meet the constitutional requirements of Ch III of the Constitution.⁷⁹
- 187 The Gypsy Jokers appealed to the High Court. On 7 February 2008 the High Court by majority (Gleeson CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ, Kirby J dissenting) dismissed the appeal.⁸⁰
- 188 Thus, for a period of almost four years stretching from 12 May 2004 to 7 February 2008 the anti-fortification powers of the CCC Act were not used by the WA Police Commissioner, pending the resolution of the court proceedings.
- 189 Notwithstanding that the High Court has upheld the validity of the anti-fortification powers in the CCC Act, there is still reluctance by the WA Police Commissioner to use the anti-fortification powers. WA Police Commissioner O'Callaghan, informed the Committee in 2010:

*We have used division 6, which is the anti-fortification one, but it is legally very complex. The committee would know that the first one we put up took about four years to resolve. There is a reticence to take that any further.*⁸¹

- 190 The Committee is not aware of any further legal impediment to the WA Police Commissioner accessing the anti-fortification powers and would encourage the WA Police Commissioner to reconsider using these powers as and when applicable circumstances and/or situations arise.

Hammond v Aboudi (2005)

- 191 The first application made by the WA Police Commissioner for an Exceptional Powers Finding under the CCC Act arose in relation to the shooting of Troy Mercanti and the stabbing of Nabil Dabag at the Metro City Night Club in the early hours of 23 January 2005 (**Nightclub Incident**). A number of people were arrested and charged as follows:

- Nabil Dabag – grievous bodily harm (s 297 of the *Criminal Code*);
- Troy Mercanti – acts intended to cause grievous bodily harm (s 294 of the *Criminal Code*);
- John Kizon – accessory after the fact to in indictable offence, namely, acts intended to cause grievous bodily harm (s 562(1) of the *Criminal Code*) and attempt to pervert the course of justice (s 143 of the *Criminal Code*);

⁷⁹ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49

⁸⁰ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4.

⁸¹ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 67.

- David Morris – accessory after the fact to an indictable offence, namely, acts intended to cause grievous bodily harm (s 562(1) of the *Criminal Code*); and
- Adam Lloyd – attempt to pervert the course of justice (s 143 of the *Criminal Code*).⁸²

192 On 25 February 2005, on an application by WA Police Commissioner, the CCC made an Exceptional Powers Finding. There was no express reference to a “section 5 offence” being committed in the course of organised crime in either the application to the CCC or its finding. However, it is apparent from the CCC Commissioner's reasons that he had before him affidavit evidence regarding the activities of organisations known as Coffin Cheaters, Sword Boys and Scorpion Boys. After referring to those organisations, he then states his conclusion “that there were reasonable grounds to activate the exceptional powers as set out in section 46 of the Act”.⁸³

193 Fourteen persons in total were summonsed before the CCC.⁸⁴ Two of those are on the public record – Marco Sorani and Hasaneen Aboudi. Messrs Sorani and Aboudi were witnesses to the Nightclub Incident.

194 Messrs Sorani and Aboudi were summonsed before the CCC and examined by Mr George Tannin SC, counsel for the WA Police Commissioner. Present also was CCC Commissioner Hammond.

195 The men were shown surveillance footage at the nightclub. In answer to a number of questions asked of them by Mr Tannin, Messrs Sorani and Aboudi responded, in effect, that they were too drunk to recall anything of the incident in question.

196 After the first round of examinations, CCC Commissioner Hammond formed a preliminary view that Messrs Sorani and Aboudi had committed a contempt of the Commission. CCC Commissioner Hammond then wrote to Messrs Sorani and Aboudi advising them of his preliminary view. Mr Hammond identified the contempt as the provision of false answers, not the failure to answer, and summonsed them to attend a further examination.⁸⁵

197 At the second round of examinations Messrs Sorani and Aboudi responded again, in effect, that they were too drunk to recall anything of the incident in question.

198 CCC Commissioner Hammond then issued proceedings in the Supreme Court of Western Australia citing Messrs Sorani and Aboudi for contempt of the Commission. The CCC’s case was predicated on establishing that the witnesses had failed to answer questions as required by the CCC Commissioner.

⁸² *Hammond v Aboudi* (2005) 31 WAR 533 at 535, paragraph [3], per McLure JA.

⁸³ *Hammond v Aboudi* (2005) 31 WAR 533 at 540, paragraph [30], per McLure JA.

⁸⁴ CCC submission to the Inquiry dated 14 June 2010, pp 6-7.

⁸⁵ *Hammond v Aboudi* (2005) 31 WAR 533 at 536, paragraph [9], per McLure JA.

- 199 The contempt proceedings were unsuccessful. On 3 November 2005 the Court of Appeal dismissed the contempt proceedings.⁸⁶ The fact the witnesses answered all of the questions put to them (to the effect that they were too drunk to recall) was not fatal to the CCC's case as the Supreme Court said at law, where a witness purports to answer a question in terms that he was too drunk to recall, or could not remember, that person can still be said to have "constructively" failed to have answered the question. The Supreme Court held that for a constructive failure to answer questions to constitute contempt two criteria must be met. First the Court must be satisfied that the answer is knowingly false. The second is if the person intended to leave the question or questions unanswered. It is the second element that converts what would otherwise be perjury into a contempt. The general rule is that the appropriate response to false answers is a prosecution for perjury⁸⁷ and that the jurisdiction to commit a witness for contempt is to be exercised with extreme caution.
- 200 Apart from CCC Commissioner Hammond's opening remarks to the witness, there was no other occasion during the examinations where the witnesses were made aware of their failure to answer a question. It was never made clear to the witnesses that CCC Commissioner Hammond considered their answers (that they were too drunk to remember) as constituting a failure to answer, and that they were in danger of being held in contempt.⁸⁸
- 201 The contempt proceedings also failed on a second ground. The certificate accompanying the notice of motion did not identify the questions the witnesses had allegedly failed to answer.⁸⁹
- 202 In addition to the failure of the contempt proceedings, no one was successfully prosecuted for the Nightclub Incident. The use of the coercive hearings power was therefore a resounding failure.
- 203 One month after the Court of Appeal's decision, the CCC tabled a report with Parliament entitled *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*. Part of the report was devoted to an analysis of the failure of the contempt proceedings.
- 204 The report revealed that the CCC had wanted to assist the WA Police in their preparation for the Organised Crime Examinations, but the CCC had received "strong advice" from State Counsel that the CCC's sole role with regard to Organised Crime Examinations was "more a judicial one, and that it should not engage in the investigative process".⁹⁰ CCC Commissioner Hammond wrote:

⁸⁶ *Hammond v Aboudi* (2005) 31 WAR 533.

⁸⁷ The equivalent section in the CCC Act to the criminal offence of perjury is s 168 which provides that a person who, at an examination before the CCC gives evidence that the person knows is false or misleading in a material particular is guilty of a crime punishable by imprisonment for 5 years and a fine of \$100,000.

⁸⁸ *Hammond v Aboudi* (2005) 31 WAR 533 at 544, paragraph [48], per McLure JA.

⁸⁹ *Hammond v Aboudi* (2005) 31 WAR 533 at 547, paragraph [62], per McLure JA.

⁹⁰ CCC, *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*, December 2005, tabled out of session in the Legislative Assembly and the Legislative Council, p 14.

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

205 The report said that State Counsel had identified three grounds of appeal to the Court of Appeal decision. However the grounds of appeal are not revealed in the report. Neither did the CCC lodge an appeal.

206 The report noted a discrepancy between s 163(2) of the CCC Act and s 217(3) of the CCC Act. It is not made clear in the report whether the CCC thought that this discrepancy would have changed the outcome of the case. It is noted that counsel for the CCC Commissioner did not raise this discrepancy before the Court of Appeal in either his oral or written submissions.⁹¹

207 The report also complained of the delay between the commencement of the contempt proceedings in March 2005 and the Court's decision in November 2005. The report said:

*The process was too protracted. Such delays are likely to erode any compelling effect the power to commit may have.*⁹²

208 The Supreme Court denied that there was undue delay. The Acting Chief Justice wrote to the Committee and advised that an examination of the court file revealed:

*that there was no attempt by the solicitors for the Commission at an early stage to obtain an order for expedition, and that apart from a "formal" opposition to an adjournment at one stage, there was no concern expressed by counsel for the State about the pace at which the Court was dealing with the matter.*⁹³

209 The CCC then expressed the view that the appropriate response to the failure of the contempt proceedings was to amend the CCC Act to give the CCC the power to itself commit for contempt in an appropriate case, with a power to detain pending any genuine attempt to give true answers. This process, said the CCC, would signal a clear message to any person contemplating contempt of the Commission.⁹⁴

210 As to this suggestion (that the CCC should be given its own power to hold witnesses in contempt), the Acting Chief Justice, the Hon Justice Murray wrote to the Committee as follows:

⁹¹ The Hon Justice Murray, Acting Chief Justice, letter dated 10 March 2006, p 2.

⁹² CCC, *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*, December 2005, tabled out of session in the Legislative Assembly and the Legislative Council, p 16.

⁹³ The Hon Justice Murray, Acting Chief Justice, letter dated 10 March 2006, p 4.

⁹⁴ CCC, *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*, December 2005, tabled out of session in the Legislative Assembly and the Legislative Council, p 16.

I would draw to the attention of the Committee, the truly exceptional nature of the power to commit for contempt. Even in the Supreme Court, most of the contempt powers are exercisable only by the Full Court, rather than by a presiding judge.⁹⁵

211 His Honour also brought to the Committee’s attention the Western Australian Law Reform Commission’s Report on the review of the law of contempt (Project No 93, June 2003) and highlighted the following observations made by that commission:

- Even with judicial reform and codification the summary procedure for dealing with contempt continues to exhibit an absence of the usual safeguards that apply to criminal offences generally.
- The procedure impaired the presumption of innocence, gave rise to a reasonable apprehension of bias (as the person presiding over the hearing is the same person who determines whether there has been a contempt) and gives rise to a concern about whether the person would be afforded a fair hearing.
- The contempt procedure involved, in effect, a presumption of guilt.⁹⁶

212 It seems that the legal opinion received by the CCC in 2005 to the effect that the role of the CCC Commissioner in an Organised Crime Examination is a quasi-judicial one, continues to restrain the level of participation by the CCC Commissioner in Organised Crime Examinations.

213 The current CCC Commissioner, Len Roberts-Smith, has said to the Committee that it is not the role of the CCC to help improve the quality of Organised Crime Examinations conducted by the WA Police Commissioner, or to intervene in the examination of the witness to pose his own questions. Mr Roberts-Smith said that an Organised Crime Examination was a “Police” examination, and not a “CCC” examination. Mr Roberts-Smith said:

The current scheme under the legislation is to enable the Commissioner of Police to have a counsel representing the Commissioner of Police at those part 4 hearings who conducts the examination of the witnesses. It has been the practice for the Commissioner [of Police] to brief people at the private bar to do that, and I am not critical of them in any way, but the result is that those people tend to be coming in for the first time to conduct examinations of that kind.

We have a limited capacity—in fact, I suppose, really no capacity—under the legislation, under the scheme of it as it stands at the moment, to train counsel up when they are representing the Commissioner of Police. That is not our role.

If we have that oversight role, if it is a commission hearing, I will have counsel assisting me there, but their role is essentially limited to ensuring, or assisting me to ensure, that

⁹⁵ The Hon Justice Murray, Acting Chief Justice, letter dated 10 March 2006, p 2.

⁹⁶ The Hon Justice Murray, Acting Chief Justice, letter dated 10 March 2006, p 2.

*nothing that happens in the organised crime hearing steps outside the legislation. It is not to conduct the examination of the witnesses.*⁹⁷

Increased applications for Exceptional Powers following appointment of CCC Commissioner Roberts-Smith

214 The first CCC Commissioner (Hammond), retired on 30 March 2007. During his term as CCC Commissioner (3 years and 3 months) the WA Police Commissioner made only:

- one application for an Exceptional Powers Findings (the Nightclub Incident); and
- one application for a Fortification Warning Notice (*Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*).

215 The second, and current, CCC Commissioner (Roberts-Smith), commenced his tenure on 5 June 2007. Since his appointment the WA Police Commissioner has made 7 applications for Exceptional Powers Findings resulting in 29 coercive hearings being held in relation to Operation Jupiter.⁹⁸ No applications have been made by the WA Police Commissioner for the CCC to issue a Fortification Warning Notice.

216 By June 2009 CCC Commissioner Roberts-Smith was describing the relationship between the two Commissioners as “excellent”. Mr Roberts-Smith pointed to a renewed interest by the WA Police Commissioner in applying for Exceptional Powers and that the WA Police were finding them helpful in their investigations:

*... for several years, after some initial attempts to use Part 4 that were rather significantly unsuccessful—if I can use that expression—the police were very reluctant to make applications, and, in fact, did not make any applications, for exceptional powers. That was the subject of comment in annual reports by Commissioner Hammond at the time, in which he pointed out that the commission was doing nothing in relation to organised crime because the police were not making any of these applications. In fact, since I started in June 2007—after some work between us on this—Commissioner O’Callaghan and I had long discussions about these things and the police began to make applications for exceptional powers finally. **I have now granted five of them in that time, and all of those are still ongoing operations. I can say that the police are finding them particularly helpful in their investigations, as is no doubt apparent from the fact that they keep applying for them.***⁹⁹

(emphasis added)

⁹⁷ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, pp 2-3.

⁹⁸ In late 2007 after the Coffin Cheaters’ Bayswater clubhouse was firebombed, the WA Police commenced Operation Jupiter, a police venture to combat the criminal activities of bikies.

⁹⁹ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 17 June 2009, p 14.

217 CCC Commissioner Roberts-Smith noted, however, that difficulties have arisen with respect to the manner in which the WA Police has exercised search and seizure powers (being one of the Exceptional Powers):

Even assuming that were the case—they have made six applications so far to date. The regime under our act for the police to use the extraordinary powers is really quite complex; for example, the power to stop, search and detain without a warrant. To my knowledge they have sought only to do that on about three occasions under the rubric of one or more of the extraordinary powers findings that I have made. In none of those instances did it work well for them. Largely that was because of the further constraints in the act on the circumstances in which they can exercise those powers. In my monitoring of their use of those powers, I have pointed out that they have a difficulty with this or that aspect because it is arguable whether it falls within the scope of the section. They do not like having to stop and think about these things in the course of a live operation. One really cannot expect them to have to do so. Life is not like that when police are on the street trying to respond to an immediate challenge. There are difficulties.¹⁰⁰

218 In September 2009 WA Police Commissioner O’Callaghan confirmed to the Committee that he was making substantially more applications to the CCC for access to Exceptional Powers than ever before. He said:

Something like 29 coercive hearings have been implemented since we put Operation Jupiter on the ground. Operation Jupiter has been the catalyst for increasing the cooperation between Western Australia Police and the Corruption and Crime Commission. It is fair to say that in the early days there was a reticence for the two agencies to work together. The police were not accessing the powers. There were issues of trust, issues of perceived competence and, I suppose, issues of culture to stop those things from occurring. Since Jupiter has been in place, we have sought extraordinary powers under division 2, the examination of witnesses before the commission; division 3, the power of entry, search and related matters; and division 5, the power to undertake controlled operations. ...Jupiter has made six applications for a full suite of powers, all of which have been granted.¹⁰¹

219 The Committee notes WA Police Commissioner O’Callaghan’s evidence that the low number of applications by the WA Police in the past were attributable to issues of trust, perceived competence and differences in culture between the CCC and the WA Police.

The CCC’s views on the competency of the WA Police

220 It seems that issues of perceived competence still loom large. From time to time CCC Commissioner Roberts-Smith has made statements to the effect that the WA Police are not getting as much out of the Exceptional Powers as they should be, and that the CCC could do a better job.

¹⁰⁰ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 2 December 2009, p 9.

¹⁰¹ Karl O’Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 7.

- 221 It is instructive to track the CCC's criticisms of the WA Police's competency back to 2005, and to observe how the criticisms have aligned with the CCC's recommendation for an increased organised crime jurisdiction.
- 222 In December 2005 CCC Commissioner Hammond, explained the low numbers of applications for Exceptional Powers by the WA Police Commissioner in the following terms:

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

...The Commission has spent considerable time discussing the CCC Act with senior police officers responsible for organised crime investigations attempting to find an effective way to apply it. The Commission's view is that the police have found the different approach required for the effective use of the organised crime powers uniquely different to the police preferred method of investigation.¹⁰²

- 223 In March 2006 WA Police Commissioner O'Callaghan, wrote to the Committee in the following terms:

The reluctance of WA Police to make application to the Commission for activation of the exceptional powers is not indicative of a failure or inability to address organised crime. For the reasons already outlined in the Commission's report, the restrictive definition of organised crime limits the opportunities to access the exceptional powers. It is also important to appreciate that, in other cases, sufficient evidence has been gathered using conventional means so as to not require recourse to the exceptional powers.¹⁰³

- 224 On 25 October 2006, the Committee asked representatives of the WA Police as to why the WA Police were not making applications for Exceptional Powers. Their responses were as follows:

Coercive hearings

the Western Australian Police organised crime division already uses coercive hearing powers and the special powers of the Australian Crime Commission. We have been doing that for a long time.

– Karl O'Callaghan, WA Police Commissioner

¹⁰² CCC, *Report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the Commission's Organised Crime Function and Contempt Powers*, December 2005, tabled out of session in the Legislative Assembly and the Legislative Council, p 7.

¹⁰³ Karl O'Callaghan, WA Police Commissioner, letter dated 25 March 2006 at p 3.

Exceptional powers (which includes coercive hearings)

the process, for us at least, is too cumbersome, but we are willing to make further applications. We firmly support the need for powers, and will have a number of opportunities in the near future that have already been discussed with the CCC. Therefore, it is not as if we are doing nothing. We are talking to the CCC, and we have a number of opportunities that we are working on with them at the moment.

- Karl O'Callaghan, WA Police Commissioner

Anti-fortification powers

Until the present application [Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police] is resolved we really have no intention of making any further applications under the fortification provisions, because there is just no point until we get the High Court decision on that.

- Karl O'Callaghan, WA Police Commissioner

225 In July 2007 the new CCC Commissioner (Roberts-Smith) only one month into his new job, made a submission to the Committee in the following terms:

The granting of exceptional powers that WAPOL have only sought to exercise twice, the last time two years ago, reinforce their redundant nature and question their usefulness.¹⁰⁴

226 Accompanying that submission was a suggestion by Mr Roberts-Smith that the function of the CCC to confer Exceptional Powers to the WA Police should be replaced by an amendment to the CCC Act providing for the establishment of crime commission powers within the CCC (being in effect a proposal that the Part 6 Powers be made available to the CCC in conducting organised crime investigations as opposed to limiting these powers to misconduct investigations).

227 The submission made reference to the under utilisation of the WA Police of Exceptional Powers:

The paucity of applications for access to the exceptional powers under Part 4 of the CCC Act, and the failure to produce satisfactory outcomes, means that the legislation and the current arrangements supporting it have failed to achieve the CCC Act's purpose of combating and reducing the incidence of organised crime.¹⁰⁵

¹⁰⁴ CCC, *Submission to the Joint Standing Committee on the Corruption and Crime Commission – An Investigative Crime Function for the Corruption and Crime Commission*, July 2007, p 31.

¹⁰⁵ CCC, *Submission to the Joint Standing Committee on the Corruption and Crime Commission – An Investigative Crime Function for the Corruption and Crime Commission*, July 2007, p 3.

228 The submission sought to explain why there was a “reluctance” on behalf of the WA Police to apply for Exceptional Powers. In language critical of the WA Police, the submission noted:

The ... definition of organised crime, is relatively complex and discourages those unfamiliar with it from attempting to apply it.

... WAPOL has an inadequate understanding of how best to utilise the Commission’s hearing powers

... WAPOL has not sought to employ the full range of additional powers available to the police ...

... WAPOL has a misapprehension that the ACC has no obligation to meet the stringent disclosure obligations necessitated by recent changes to criminal law.

...due to the restrictions of Part 4 of the CCC Act, WAPOL officers find themselves working in a complex , unfamiliar environment. This ... inhibits their capacity, and demonstrably their preparedness, to exploit the CCC Act’s exceptional powers.

... WAPOL necessarily gives priority to the requirement to apply its relatively scarce resources in responding to the daily pressure of dealing with organised and other serious crime. The complexity of the CCC Act inhibits WAPOL’s preparedness and capacity to invest the time to learn how to exploit the CCC Act’s exceptional powers.

... Law Enforcement Agencies are inherently parochial in regard to their capacity and preparedness to enter into partnerships with other agencies. WAPOL is no different in regard to its understandable desire to retain sole control of the organised crime function within the WA jurisdiction. WAPOL is also concerned about its capacity to conduct joint crime investigations with the Commission, given the Commission’s integrity oversight function in regard to the police.¹⁰⁶

229 One can infer from the above submission that the working relationship between the CCC and the WA Police was at a very low point in July 2007.

230 As previously noted in Chapter 1 it is apparent to the Committee that soon after, or contemporaneously with, the presentation of these submissions, CCC Commissioner Roberts-Smith undertook extensive consultations with the WA Police Commissioner such that the relationship between the two Commissioners improved rapidly to the point where two months later the WA Police and the CCC submitted the Joint Proposal described in Chapter 1 of this Report.

231 The Joint Proposal was notable in that it was accompanied by submissions from the CCC which had most of the negative criticism of the WA Police stripped out to be replaced by more neutral language which emphasised the inherent difficulties in Part 4 of the CCC Act, rather than any perceived shortcomings of the WA Police.

¹⁰⁶ CCC, *Submission to the Joint Standing Committee on the Corruption and Crime Commission – An Investigative Crime Function for the Corruption and Crime Commission*, July 2007, pp 7-9.

232 In 2008 CCC Commissioner Roberts-Smith argued that simply giving the WA Police access to Exceptional Powers was not the solution. The WA Police have to be able to use Exceptional Powers in a constructive manner. This involved gaining experience and expertise in how to conduct coercive hearings, and how to use other Exceptional Powers to maximum advantage, and that the WA Police, as an organisation, and the nature of policing itself, were not conducive to the WA Police developing and retaining this experience and expertise. CCC Commissioner Roberts-Smith told a Commonwealth Parliamentary Committee in July 2008:

On resourcing such special or exceptional powers will ordinarily require the provision of additional resources or infrastructure to the law enforcement agency responsible for making them work. They mostly cannot be seen simply as an add-on to traditional policing techniques. While that may seem on first blush a logical approach, the use of such powers and legislation is not simply another accoutrement for police officers or investigators.

On training, as with any new tool or power there is a need to educate and train personnel in its use. People need not only to know of its existence but also to understand how it works and to be trained and competent in their use of it. It is necessary to develop a pool of experience and expertise...

Legislation alone is not the answer, and I can draw on the experience of the Corruption and Crime Commission of Western Australia. The experience of dealing with crime matters within the commission has two components. The first is the commission's own experience of the application of the organised crime provisions of the Corruption and Crime Commission Act 2003. The second is the experience of commission officers. They include two former heads of the Perth regional office of the National Crime Authority, a number of experienced former police investigators drawn from state and federal police agencies and a number of support staff who are former officers of the Australian Crime Commission, the National Crime Authority and the New South Wales Crime Commission.¹⁰⁷

233 In March 2010, the CCC Commissioner informed the Committee that there was still room for improvement in the way the WA Police conducted Organised Crime Examinations:

It has been the practice for the Commissioner [of Police] to brief people at the private bar to do that, and I am not critical of them in any way, but the result is that those people tend to be coming in for the first time to conduct examinations of that kind...

...What we have seen is that on a number of occasions, although those hearings have been useful for the police and they have got some quite good material from them, it is apparent that they are not being used as effectively as they could be.¹⁰⁸

¹⁰⁷ Len Roberts-Smith QC, CCC Commissioner, Commonwealth Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into Legislative Amendments to Outlaw Serious and Organised Crime Groups, Perth, 4 July 2008.

¹⁰⁸ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 2.

234 CCC Commissioner Roberts-Smith said that the WA Police have developed a measure of expertise in applying for Exceptional Powers, but that this had been undone by a rotation of staff within the WA Police. He said:

We reached a stage relatively recently, I think, where they [the WA Police] actually had quite a good understanding in that they were able to put together their own applications fairly quickly without having to and fro with commission officers over a period of time to develop them. The process was working reasonably smoothly; not still, though, I have to say, in terms of the actual exceptional powers hearings, although that depended on which counsel they were using, and some, of course, were developing a bit of experience of it. However, as of quite recently, there has been a complete shift of police personnel throughout all of those particular parts of WAPOL that have been dealing with us in that organised crime area. I do not think it is necessary to give details of names, positions and so forth, but the fact is we are now dealing with a completely new group of people at the level of the officers who are in charge of these particular activities... That again, I think, is the sort of difficulty police forces have. There is to a degree, I suppose, a problem of reinventing the wheel or a loss of continuity—however one might describe it—in terms of their activities.¹⁰⁹

235 As can be seen from the above, CCC Commissioner Roberts-Smith is of the view that the WA Police have lost most of their experience in making applications for Exceptional Powers and that counsel used by the WA Police to conduct Organised Crime Examinations are of variable quality and experience.

236 The solution to this lack of competence and experience by the WA Police, according to the CCC Commissioner, is to allow the CCC to conduct organised crime investigations and for the CCC to conduct Organised Crime Examinations. CCC Commissioner Roberts-Smith submitted that the CCC has expertise in conducting coercive hearings that the WA Police does not, and that this expertise could be usefully applied if the CCC were to be given an enhanced organised crime jurisdiction. The CCC could then conduct its own coercive hearings into organised crime. CCC Commissioner Roberts-Smith said:

...the commission, over the past six years, has developed a degree of understanding and expertise in the application of—that is, the use of—the coercive hearings power in particular, which, as we have identified, does require quite special skills to apply effectively. We have seen that quite a lot; that is to say, we have seen when it has worked and we have seen when it has not.

Our own lawyers within the commission have the ongoing expertise, but also, of course, if we are engaging counsel at the private bar, which we also tend to do, we tend to brief the same people. Under our legislation we have every authority and opportunity to train them up in how to conduct hearings and work with our investigators in the strategies and techniques that are to be applied.

¹⁰⁹ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 8.

*Under the proposal for the commission to have an active organised crime capability, we would conduct those hearings as commission hearings, so we would have that expertise brought to bear in the way we currently do in relation to misconduct hearings.*¹¹⁰

237 By letter dated 16 April 2010, Acting CCC Commissioner Chris Shanahan QC wrote (CCC Commissioner Roberts-Smith being on leave) as follows:

*Under the current arrangements, the Commission responds to WAPOL applications to access the so-called exceptional powers. WAPOL's preparedness and ability to access this has waxed and waned over the past six years. While a range of reasons exist for this, any objective assessment would suggest that the CCC Act's scheme for dealing with organised crime has failed. To fail to address the legislative constraints on the Commission or merely to supplement WAPOL resources will not correct this failure.*¹¹¹

238 The Committee notes that the tone of this submission is a return to the CCC's stance of July 2007, that the Exceptional Powers regime has been a failure. The submission seems out of kilter with the recent 29 coercive hearings conducted as part of Operation Jupiter, and the WA Police Commissioner's evidence to the Committee that the coercive hearings power has enabled the WA Police to obtain a "much better look on organised crime"¹¹² and that the WA Police will continue to apply for Exceptional Powers.¹¹³ The description of the Exceptional Powers regime under Part 4 of the CCC Act as a failure is also contrary to the evidence of the "excellent relationship" said to now exist between the CCC Commissioner and the WA Police Commissioner. CCC Commissioner Roberts-Smith said to the Committee in June 2009:

*Certainly, the relationship between the present Commissioner of Police and me is an excellent relationship, and that is apparent from the things that we have been discussing this morning and the progress that we have been able to make on those things. It is also apparent, I would suggest, arising out of the use that the police are making of our exceptional powers under part 4 of the Corruption and Crime Commission Act 2003.*¹¹⁴

Committee's observation

239 The Committee is concerned that one obvious area of reform is being overlooked by the CCC, and that is to make the necessary amendments to the CCC Act to enable the CCC to help improve the WA Police conduct Organised Crime Examinations.

240 The CCC refers to its experience in conducting coercive hearings in the exercise of its misconduct function, and suggests this as a reason why it should be given an enhanced role in fighting

¹¹⁰ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 2.

¹¹¹ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 2.

¹¹² Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 3.

¹¹³ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 5.

¹¹⁴ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 17 June 2009, p 14.

organised crime. It argues that to use the coercive hearings power takes experience and specialist skills, and that the WA Police do not have this skill or experience.

241 The CCC contend that:

- The CCC Act prohibits the CCC from actively assisting in Organised Crime Examinations.
- The role of the CCC Commissioner is limited to a quasi-judicial role.
- The role of counsel assisting the CCC is limited to advising the CCC Commissioner as to whether the Organised Crime Examination is being conducted in accordance with the CCC Act.

242 According to the CCC, the end result is that the WA Police are conducting ineffectual Organised Crime Examinations, and the CCC cannot intervene to help out.

243 The solution according to the CCC is let the CCC conduct its own organised crime investigations, and to conduct its own Organised Crime Examinations.

244 The Committee disagrees. First of all the central tenet of this Report is that the CCC should not have the ability to conduct its own organised crime investigations. Second, it seems apparent to the Committee that even if the CCC was to be given a jurisdiction to conduct organised crime investigations, the WA Police will continue to undertake the bulk of organised crime investigations, and will, presumably, have a continued need to access the Exceptional Powers. In this context, WA Police Commissioner O'Callaghan informed the Committee that the WA Police intends to continue to access the Exceptional Powers.¹¹⁵

245 If, in the CCC's view, the WA Police are not up to the mark in conducting Organised Crime Examinations, then there is a need to address this inadequacy. As the CCC have expertise on how to conduct coercive hearings in the exercise of its misconduct function, then clearly the answer lies in permitting the CCC to provide this assistance, whether by training or otherwise.

246 As noted previously, the CCC point to a legal opinion obtained from State Counsel in 2005 to the effect that the CCC's role in an Organised Crime Examination is not an investigative one, and is more akin to a quasi-judicial role, and that this limits the CCC's ability to assist the WA Police in preparing for an Organised Crime Examination, and prevents the CCC Commissioner from asking his own questions in an Organised Crime Examination.

247 As an interim measure, it would surely be open to the WA Police to brief the same barristers at the bar that the CCC currently briefs in conducting CCC misconduct examinations.

¹¹⁵ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 5.

248 The Committee is of the view that it is clearly desirable:

- for the CCC to actively assist the WA Police in preparation for Organised Crime Examinations;
- for the CCC Commissioner and counsel representing the CCC to ask their own questions at an Organised Crime Examination to elicit information from a witness that would assist the WA Police;
- in the event that a witness is evasive, for there to be no impediment for the CCC Commissioner to ask the questions, and make the directions necessary, so as to establish the grounds for effective contempt proceedings; and
- if the CCC Commissioner is of the view that counsel for the WA Police Commissioner is doing an inadequate job in examining a witness, and either is not extracting the information sought from the witness in an effective manner, or is not formulating the questions in precisely the right manner so as to establish a clear case of contempt, that the CCC Commissioner should be able to intervene.

249 Accordingly the Committee makes the following recommendation:

Recommendation 1

The *Corruption and Crime Commission Act 2003* be amended to clarify and ensure that:

- 1.1** The CCC can actively assist the WA Police in preparing for Organised Crime Examinations.
- 1.2** The CCC Commissioner and counsel representing the CCC can ask their own questions at an Organised Crime Examination to elicit information from a witness that would assist the WA Police.
- 1.3** In the event that a witness is evasive, there is no impediment for the CCC Commissioner to ask the questions, and make the directions necessary, so as to establish the grounds for effective contempt proceedings.
- 1.4** If the CCC Commissioner is of the view that counsel for the WA Police Commissioner is doing an inadequate job in examining a witness, and either is not extracting the information sought from the witness in an effective manner, or is not formulating the questions in precisely the right manner so as to establish a clear case of contempt, that the CCC Commissioner should be able to intervene.

250 The CCC responded to this recommendation by saying that whilst it is well intentioned, it assumes that the CCC Commissioner and his counsel have sufficient knowledge of the matter to enable them to constructively contribute to the forensic examination process while avoid inadvertently asking questions or revealing information that would otherwise compromise the investigation. This is only possible, says the CCC, if the CCC is part of the overall investigative process and strategy.¹¹⁶

251 The Committee's view is that it is not necessary for the CCC to have been involved in the actual investigation in order for the CCC Commissioner, and the CCC counsel to actively participate in an Organised Crime Examination.

252 With respect to the efficacy of Organised Crime Examinations, it seems apparent to the Committee that there is presently a level of dysfunction between the two agencies that can only partially be addressed by legislative amendment. The Committee considers that the appropriate and measured response to the CCC's assertions that the WA Police are not getting the most out of Organised Crime Examinations is not for the CCC to take over this power as part of a wholesale grant of new jurisdiction, but rather for the CCC and the WA Police to be encouraged to work together to improve the WA Police's ability to conduct effective Organised Crime Examinations.

253 In the Committee's view:

- the WA Police need to ensure that expertise gathered as a result of conducting Organised Crime Examinations is not lost by having officers rotated out of the Serious and Organised Crime Division en bloc;
- the WA Police need to provide comprehensive briefs to the CCC as a precursor to any Organised Crime Examination so that the two agencies can work together to maximise the forensic advantages offered by such examinations; and
- the CCC needs to work more closely with, and if necessary train, officers of the WA Police so that the WA Police can obtain the most out of the Organised Crime Examinations. If the CCC considers that the legislation at present is an impediment to this happening, then the CCC Act should be amended to overcome this impediment.

254 The evidence is that, of all the possible areas of interaction between the two agencies, assisting each other in preparation for Organised Crime Examinations is the most likely to result in genuine cooperation. Felix Grayson, formerly the most senior Queensland Police officer within the CMC said:

I would advise WA Parliament not to permit the CCC to conduct joint operations with the police, but to enhance the police access to extraordinary powers by the CCC. Such an emphasis would facilitate the greatest incidence of the CCC and the police working together rather than in competition with each other.

¹¹⁶ CCC's response dated 14 June 2010 to Committee's draft report, p 16.

*If [the WA Police] are able to access extraordinary powers more easily and have the resources to conduct investigations, that is the way to go.*¹¹⁷

255 Accordingly the Committee reaffirms its recommendation as set out above.

Coercive hearings and the right to silence

256 At common law, a person has a right to silence when questioned by police. It is an aspect of the privilege against self-incrimination. The privilege against self-incrimination confers immunity from an obligation to provide information tending to prove one's own guilt. A person is not bound to answer any question or produce any document or thing if that material would have a tendency to expose that person to conviction for a crime.¹¹⁸

257 The privilege against self incrimination has been described by the High Court as a human right rather than simply a rule of evidence.¹¹⁹

258 In 2000 the New South Wales Law Reform Commission (NSWLRC) examined claims that the right to silence was being particularly misused by experienced criminals who engaged in organised crime.

259 The NSWLRC noted that there was no Australian research into whether "experienced" offenders remain silent more often than offenders. English studies had concluded that suspects with access to legal advice were more likely to say nothing during police questioning than those without legal advice.¹²⁰ The NSWLRC also made note of several research studies in England and Northern Ireland as to whether repeat offenders were more likely to invoke the right to silence than others. The results were mixed leading the Royal Commission on Criminal Justice to conclude that the research evidence neither confirmed nor refuted the suggestion that the right to silence when questioned by police was used by a disproportionate number of experienced criminals.¹²¹

260 The privilege against self incrimination can be abrogated by statute.

261 Pursuant to the CCC Act, the right to silence is abrogated in two ways:

- in the exercise of its misconduct function the CCC can issue a summons to a witness compelling the witness to attend an examination at which the witness must answer questions relevant to the misconduct investigation being undertaken by the CCC; and

¹¹⁷ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 17.

¹¹⁸ *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 288.

¹¹⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

¹²⁰ Law Reform Commission of New South Wales, Report No 95, *The Right to Silence*, 2000, at [2.69].

¹²¹ Law Reform Commission of New South Wales, Report No 95, *The Right to Silence*, 2000, at [2.68].

- in the exercise of its organised crime function, the CCC, on application by the WA Police Commissioner, can issue an Organised Crime Summons compelling the witness to attend an Organised Crime Examination, at which the witness must answer questions asked by counsel for the WA Police Commissioner relevant to the organised crime investigation being undertaken by the WA Police.

262 Both are examples of “coercive hearings”. The “coercive” nature of the hearing power lies in the fact that if the witness fails to attend or fails to answer a question then the person is in contempt of the Commission, and may be fined or imprisoned by the Supreme Court of Western Australia.

263 The balance of this section is devoted to an examination of the effectiveness of coercive hearings in the context of Organised Crime Examinations.

Is the coercive hearings power an effective tool in combating organised crime?

264 The evidence received by the Committee suggests that the coercive hearings power has on occasion broken the code of silence that exists between bikies,¹²² and is instrumental in obtaining evidence from persons who operate on the periphery of organised crime activity, and to whom the threat of imprisonment is real and persuasive.

265 Robert Needham, Chairperson of the Queensland Crime and Misconduct Commission (CMC) from January 2005 to December 2009, had this to say about the benefits of coercive hearings:

*It [the coercive hearings power] can be very, very powerful. Often you are not cross-examining the person who is thought to have committed the offence; you are examining all the associates and you know what they have been doing and can complete the picture and it can give you the evidence to prosecute them with.*¹²³

266 Mr Felix Grayson, former Assistant Commissioner of Queensland Police Service, and, at the time of his retirement in 2009 the most senior police officer within the CMC, said:

*To investigate organised crime you really have to conduct protracted investigations that require the use of those coercive powers. You do not see many investigations where you get down to the root of the cause or you identify all aspects of a criminal network without having access to those coercive powers, those extraordinary powers.*¹²⁴

¹²² Evidence received in closed hearing that for operational reasons cannot be disclosed.

¹²³ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, p 16.

¹²⁴ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 8.

267 The CCC provided the following information to the Committee setting out the number of Exceptional Power Findings made by the CCC on applications by the WA Police, and the number of witnesses examined.

Exceptional power findings granted to the WA Police over the life of the CCC¹²⁵		
Year	No of exceptional powers findings	No of witnesses examined
2004/05	1	14
2005/06	0	0
2006/07	0	0
2007/08	0	0
2008/09	6	20
2009/10 (to date)	1	2

268 It can be seen from the above table that for a period of 3 years after the Nightclub Incident and the failure of the contempt proceedings in *Aboudi v Hammond*, the WA Police made no applications for Exceptional Power Findings, but that in the last 20 months there has been a resurgence in the number of applications coinciding with the WA Police's implementation of Operation Jupiter.¹²⁶

269 Unlike the testimony from the Queensland witnesses, the testimony of WA Police Commissioner O'Callaghan was somewhat more equivocal as to the benefits of coercive hearings. In September 2009 WA Police Commissioner O'Callaghan said:

*... the coercive powers that the Corruption and Crime Commission have enable us to have a much better look at organised crime than we can otherwise do.*¹²⁷

270 A provisional finding was made by the Committee that the Exceptional Powers regime under Part 4 of the CCC Act, while it may have been underutilised in the past, is now proving effective. The response from the WA Police was that it was not. WA Police Commissioner O'Callaghan wrote:

¹²⁵ CCC letter dated 14 June 2010, pp 6-7.

¹²⁶ In late 2007 after the Coffin Cheaters' Bayswater clubhouse was firebombed, the WA Police commenced Operation Jupiter, a police venture to combat the criminal activities of bikies.

¹²⁷ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 2.

This is a broad-sweeping commendation of the current scheme and makes comment on two issues, utilisation and effectiveness. In relation to the former, we have seen the number of applications vary and while there would appear to have been a spike in applications last year this has diminished recently. Two matters had been contemplated for consideration by WA Police, in one case an application was rejected by the CCC on the basis it did not satisfy the requirements of the CCC Act definition of organised crime.

The case in question was a murder and serious assault involving known members of a street gang. The suspects, the living victim and witnesses refused to speak to police. The spontaneous nature of the crime, the need to establish purposes and rely on two or more Schedule ...The definition[of organised crime] is a major impediment and the fact it must relate to a crime that has occurred limits its application in proactive organised crime investigations.

To the issue of effectiveness, there is no empirical data either presented in the [draft] report or known to us that measures this qualitatively. It is not apparent on what basis this finding is made...¹²⁸

- 271 This view was reinforced by WA Police Commissioner O'Callaghan in a subsequent hearing with the Committee:

Our statement about the committee's [provisional] finding that it is now proving effective is that the simple use of the part 4 powers does not necessarily mean that it is effective. I would not like to extrapolate that to say that, because the police made more applications, it is effective. The effect is where you get an outcome from it. I think there have been some significant problems with that, not the least of which has been the definition of organised crime. I think we have outlined an example of where that was the case. While, with good intention, we increased the number of applications we made, that went up for a while and went down as soon as we found that some of that was not useful.¹²⁹

- 272 As a result of the feedback of the WA Police, the Committee was faced with conflicting evidence. On the one hand the evidence from Queensland is that coercive hearings have been very useful in investigating serious and organised crime. On the other hand the evidence from the WA Police Commissioner is that whilst coercive hearings have been conducted, the information derived has not been particularly useful, and the restrictive definition of organised crime has prevented the WA Police from making at least one application.

¹²⁸ Karl O'Callaghan, WA Police Commissioner, letter dated 11 June 2010, p 2.

¹²⁹ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 June 2010, p 10.

273 Accordingly the Committee does not propose to make a finding as to the effectiveness of coercive hearings, or of the Exceptional Powers regime as a whole, unless and until the definition of organised crime is widened (see below). In the interim the most that can be said is as follows:

Finding 1

The Exceptional Powers regime under Part 4 of the *Corruption and Crime Commission Act 2003*, while it fell into abeyance after the failure of the contempt proceedings in *Aboudi v Hammond*, has been utilised by the WA Police in the last 18 months during Operation Jupiter.

274 The Committee considers that the appropriate and measured response to the CCC's assertions that the WA Police are not getting the most out of the coercive hearings power is not for the CCC to take over this power as part of a wholesale grant of new jurisdiction, but rather to fix the problems in the existing jurisdiction. This involves, as noted previously, removing the legislative impediments to the CCC actively assisting the WA Police in preparing for and conducting coercive hearings (see Recommendation 1) and in widening the definition of organised crime as discussed below.

Widening the definition of organised crime

275 The WA Police submit the current definition of organised crime is too narrow, which in turn is restricting their ability to make applications for Exceptional Powers. Detective Superintendent Carver said:

*The definition is a major impediment, and the fact that it must relate to a crime that has occurred limits application in proactive organised crime investigations.*¹³⁰

276 In order for the WA Police to access Exceptional Powers, the CCC must first make an Exceptional Powers Finding. In order to make an Exceptional Powers Finding the CCC must be satisfied that there are reasonable grounds for suspecting that one or more of the following offences has been, or is being, committed *in the course of organised crime*:

277 The WA Police and the CCC have submitted on many occasions that the definition of organised crime is unduly restrictive, as opposed to the broader definition of "serious and organised crime" in the *Australian Crime Commission Act 2002* (Cth) which incorporates concepts of "ancillary" and "incidental" offences.

¹³⁰ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 14.

- 278 In 2007 this Committee (differently constituted) recommended the adoption of the definition of “serious and organised crime” in order to widen the gateway by which the WA Police can access the Exceptional Powers (Recommendation 1 – JSCCCC Report No 31).
- 279 The Committee agrees that the definition of organised crime should be expanded to accommodate the concerns of the WA Police and the CCC, so as to allow the WA Police easier access to the Exceptional Powers.
- 280 However the Committee has not examined, nor does it recommend, a formula of words by which the definition can be expanded. In this regard, the Committee does not comment on the proposed draft amendment as contained in Recommendation 1 of the JSCCCC Report No 31. Rather, the Committee is content at this stage to express its in-principle agreement to the proposition that the existing definition is too restrictive, and should be expanded to accommodate the concerns of the WA Police and the CCC that the present definition is unduly restrictive and prevents the WA Police from accessing the Exceptional Powers under Part 4 of the CCC Act. Accordingly the Committee makes the following recommendation:

Recommendation 2

The definition of “organised crime” in the *Corruption and Crime Commission Act 2003* be expanded so as to accommodate the concerns of the WA Police and the CCC that the present definition is unduly restrictive and prevents the WA Police from accessing the Exceptional Powers under Part 4 of the *Corruption and Crime Commission Act 2003*.

Checks and balances

- 281 The ability of the CCC to confer upon the WA Police the coercive hearings power is a substantial and fundamental ingress into a citizen’s right to silence. The threat of imprisonment for failing to answer a question as directed by the CCC Commissioner at an Organised Crime Examination is a fundamental incursion of a person’s civil liberties.
- 282 In providing the WA Police with access to a coercive hearings power, Parliament has made the determination that there exists sufficient justification for abrogating a citizen’s right to silence if two criteria are met:
- the coercive hearing is used in the context of fighting organised crime; and
 - the CCC must first be satisfied that the use of the coercive hearing would be in the public interest.

- 283 Parliament has also provided the CCC extensive means by which to monitor the exercise of Exceptional Powers by the WA Police so as to prevent the WA Police from abusing these powers.
- 284 It is the Committee's view that Parliament struck the right balance in allowing the WA Police access to Exceptional Powers, subject to CCC oversight. The Committee is very concerned at any suggestion that the WA Police be given the powers to self authorise any or all of the Exceptional Powers and in particular the coercive hearings power. At the heart of the issue is that these Exceptional Powers should be subject to meaningful and intense scrutiny, so as to guard against the risk of the WA Police abusing their powers.

CHAPTER 3 MYTHS AND MISCONCEPTIONS ABOUT THE CCC

Introduction

285 In the CCC's short history, three factors have emerged which have led to the current push for the CCC to assume greater powers to tackle organised crime:

- First is the mistaken view that the CCC is failing in its mandate to combat organised crime.
- Second is the perceived view that the CCC is failing to get convictions in its misconduct function.
- Third is a perceived view that the public would like the CCC to tackle organised crime.

The mistaken view that the CCC is failing in its mandate to combat organised crime

286 The CCC began on 1 January 2004. It has always had only a limited organised crime function, despite the fact that one of its expressed objectives under the CCC Act is to combat and reduce the incidence of organised crime.

287 This is no fault of the CCC, as the CCC Act only allows for the CCC to combat organised crime by authorising applications made by the WA Police for access to the Exceptional Powers under Part 4 of the CCC Act or investigating organised crime where public sector misconduct is suspected.

288 The CCC only has an ability to investigate organised crime activity if, and only if, such activity is connected with public sector corruption, or, more precisely, when the misconduct function of the CCC is engaged. This may occur if one or more of the following jurisdictional triggers (**Misconduct Jurisdictional Triggers**) are present:

- there are grounds for the CCC to reasonably suspect that a public officer had engaged in misconduct connected with organised crime; or
- the CCC receives an allegation to the same effect.

289 In such circumstances where the misconduct function of the CCC is engaged by the presence of one or more Misconduct Jurisdictional Triggers, the CCC has the ability to investigate the associated organised crime activity as part of its misconduct investigation. There are limits, however, to the extent to which the CCC can investigate the associated organised crime activity.

These limits have not been judicially tested, but the Committee would have thought that at the very least the investigation into the organised crime activity must have some connection with the public sector misconduct being investigated by the CCC.

290 The CCC Commissioner described the limits of the CCC's jurisdiction to investigate organised crime activity in the following terms:

What the commission can do is conduct an investigation into alleged misconduct and that investigation must be centred on a public officer, under the legislation. If that misconduct involves criminal offences, such as corruption, bribery, drugs—whatever else it may be; all sorts of criminal offences—which commonly occurs, then the scope of the investigation may well cover those activities but only to the extent of or in relation to its investigation of the alleged misconduct of the public officer. So to give a minor example, if we were looking at a prison officer who was apparently taking drugs into a prison, then obviously that person would be buying the drugs from someone. There would be offences involved around that. Our investigation might well involve surveillance of the public officer and the public officer's associates to ascertain where the drugs were coming from, to establish that they were illegal drugs, that they were going to the public officer, what he was doing with them and so on, whether there was money involved—all those peripheral things. If it got to the point where we decided to move and charge the public officer, perhaps we would do so in a context in which the public officer was receiving the drugs from his or her supplier and we would in an appropriate case move in and arrest both of them and charge both of them. But we would not get beyond those people who are actually dealing with the public officer because they are, obviously, literally both sides of the same coin in terms of the commission of particular offences. To the extent that in the course of our operation we became aware of intelligence which extended beyond that, maybe the supplier was getting the drugs from a bikie group or whatever it might be, we would and we routinely do pass on criminal intelligence to WAPOL or indeed other agencies. It may be that if it was coming in by boat, we might inform customs—pass on the information to customs or the AFP and so on. We have very good relationships, information and intelligence sharing with most law enforcement agencies in that way.

So that is how we would do that but we, as you would see, might come across, and indeed we have come across, organised crime components of investigations of that kind. Where it is seen to be a particularly serious matter or was otherwise relevant, as I say, we would pass it on to WAPOL and they may well conduct an operation themselves on the organised crime people, on the bikie gang or whoever it might be. We would share intelligence both ways on that to the extent that it might help us with our public officer, they would share with us, and we would share with them. So that sort of thing happens now, but we cannot investigate organised crime absent an allegation of misconduct against a public officer.¹³¹

291 CCC Commissioner Roberts-Smith has on a number of occasions sought to go on the public record to dispel the common myth that the CCC is an active player in the fight against organised crime. *The West Australian* newspaper reported on 18 February 2009:

¹³¹ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 23 June 2010, p 6.

On organised crime, Mr Roberts-Smith again pointed out that the CCC's charter did not allow it to take a direct role in the battle but rather to assist police by ceding to them their extraordinary powers particularly to search and hold without warrant and to compulsorily require that questions were answered on threat of indefinite imprisonment.¹³²

292 On 4 October 2009, *The Sunday Times* newspaper published an article reporting that the CCC had spent at least \$75.5 million to get just 41 people convicted, and that after 1006 investigations, that resulted in just 65 people being charged.¹³³ What the journalist had done was to aggregate the total operating budget of the CCC since its inception in 2004, and compared that to the convictions flowing from charges laid by the CCC. The issue gained some currency in the media, which resulted in the CCC Commissioner holding a media conference on 6 October 2009 to dispel what he said were “strange myths and misconceptions” about the CCC.

293 During the media conference CCC Commissioner Roberts-Smith addressed three issues:

- First, the notion that the CCC isn't investigating organised crime and it ought to be.
- Second, that the CCC had somehow failed to secure convictions.
- Third, that the CCC was not getting “success”.

294 CCC Commissioner Roberts-Smith addressed the first issue in the following precise and accurate manner:

Why isn't the Commission investigating organised crime has a very simple answer and that is that the Corruption and Crime Commission Act does not allow the Commission to actively investigate organised crime. Our function in relation to organised crime is to make exceptional powers available to the West Australian Police on their application if the Commissioner is satisfied of certain criteria which are set out in the Act. If I am so satisfied then I can make those exceptional powers available to the Police for them to use in the course of their investigations. It is not a Commission investigation. We then monitor their exercise of those powers and review them on completion and that is the extent of our organised crime responsibility under the Act.¹³⁴

295 CCC Commissioner Roberts-Smith said that such powers had been granted six times. He also said:

I should also point out to those who might have suggested that the commission has been remiss because we haven't seen organised crime figures dragged into the commission for public hearings, that the Act specifically prohibits hearings on organised crime applications ... from being public.¹³⁵

¹³² ‘CCC’s chief goes in to bat for vexed watchdog’, *The West Australian* newspaper, 18 February 2009, p 21.

¹³³ ‘CCC’s \$75m waste’, *The Sunday Times* newspaper, 4 October 2009.

¹³⁴ Len Roberts-Smith QC, CCC Commissioner, media conference, 6 October 2009.

¹³⁵ Len Roberts-Smith QC, CCC Commissioner, media conference, 6 October 2009.

296 CCC Commissioner Roberts-Smith said the CCC could have a significant impact on organised crime if given the right resources.

*What we're seeking is an extension of our jurisdiction with our existing powers, to enable us to actively investigate organised crime using our existing powers.*¹³⁶

The perceived view that the CCC is failing to get convictions in its misconduct function

297 The CCC has had its fair share of detractors and downfalls. Most notably:

- In August 2005, the public confidence of the CCC was damaged by revelations that an Acting Commissioner of the CCC, Ms Moira Rayner, had allegedly tipped off the then Clerk of the Legislative Council, Mr Laurie Marquet, that his phone conversations may have been intercepted by the CCC.¹³⁷
- Mr Malcolm McCusker AO QC was the inaugural Parliamentary Inspector of the Corruption and Crime Commission. During his tenure as Parliamentary Inspector from 1 January 2004 to 31 December 2008, he prepared five reports which were critical of certain actions of the CCC. The five reports are:
 - (i) *Report made pursuant to section 199 of the CCC Act on the Parliamentary Inspector's Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission ("The Commission") Concerning Mr John D'Orazio* tabled in Parliament on 18 July 2007;¹³⁸

¹³⁶ Len Roberts-Smith QC, CCC Commissioner, media conference, 6 October 2009.

¹³⁷ Mike Silverstone, Executive Director of the CCC, *The Corruption and Crime Commission of Western Australia*, p 7, paper delivered at the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006, Parliament House, Sydney. In a report to the Committee, Parliamentary Commissioner Malcolm McCusker QC, found that Ms Rayner's actions amounted to misconduct rather than constituting a criminal offence. Nevertheless Robert Cock, Director of Public Prosecutions, decided that in the public interest Ms Rayner should stand trial. Ms Rayner was later found not guilty of attempting to pervert the course of justice.

¹³⁸ Parliamentary Inspector, *Report made pursuant to section 199 of the CCC Act on the Parliamentary Inspector's Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission ("The Commission") Concerning Mr John D'Orazio*, which appears at Appendix Two to Report No. 28 of the Joint Standing Committee on the Corruption and Crime Commission of the 37th Parliament of Western Australia entitled *Parliamentary Inspectors Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission Concerning Mr John D'Orazio*, tabled in the Legislative Assembly on 18 July 2007 (Tabled Paper No. 2860).

- (ii) *Report on the Corruption and Crime Commission's Opinion of "Inappropriate Conduct" by Mr John D'Orazio* deemed tabled in Parliament on 7 April 2008;¹³⁹
 - (iii) *Report on the Corruption and Crime Commission's Findings of "Misconduct" by Mr Paul Frewer* tabled in Parliament on 26 February 2008;¹⁴⁰
 - (iv) *Report on the Corruption and Crime Commission's Investigation and Finding of "Misconduct" by Mr Michael Allen* tabled in Parliament on 11 March 2008;¹⁴¹ and
 - (v) *Report on the Corruption and Crime Commission's Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn Dated 26 September 2008 (Lee Report)*, deemed tabled in Parliament on 24 December 2008.¹⁴²
- Such was the relationship between Mr McCusker and the CCC that the CCC unsuccessfully sought an injunction preventing Mr McCusker from tabling his Lee Report with Parliament.¹⁴³
 - On 2 July 2008, Mike Allen was acquitted of charges of seeking to mislead the CCC.¹⁴⁴
 - On 28 August 2008, Michael Moodie was acquitted of charges laid by the CCC of fraud and uttering.¹⁴⁵ The CCC appealed against the acquittal and on 25 March 2009 the

¹³⁹ Parliamentary Inspector, *Report on the Corruption and Crime Commission's Opinion of "Inappropriate Conduct" by Mr John D'Orazio*, transmitted to the Clerks of the Legislative Assembly and Legislative Council on 7 April 2008 (Legislative Assembly Tabled Paper No. 3765).

¹⁴⁰ Parliamentary Inspector, *Report on the Corruption and Crime Commission's Findings of "Misconduct" by Mr Paul Frewer*, dated and transmitted to the Clerks of the Legislative Assembly and Legislative Council on 8 February 2008 and tabled in the Legislative Assembly on 26 February 2008 (Tabled Paper No. 3514).

¹⁴¹ Parliamentary Inspector, *Report on the Corruption and Crime Commission's Investigation and Finding of "Misconduct" by Mr Michael Allen*, dated 7 March 2008 and tabled in the Legislative Assembly on 11 March 2008 (Tabled Paper No. 3654).

¹⁴² Parliamentary Inspector, *Report on the Corruption and Crime Commission's Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn Dated 26 September 2008*, dated and transmitted to the Clerks of the Legislative Assembly and Legislative Council on 24 December 2008 (Legislative Assembly Tabled Paper No. 525).

¹⁴³ *Re Parliamentary Inspector of the Corruption and Crime Commission; ex parte Corruption and Crime Commission* [2008] WASC 305 (Western Australian Supreme Court, Martin CJ, 18 December 2008). See also the Committee's Report No 2, *Report on the Relationship between the Parliamentary Inspector and the Commissioner of the Corruption and Crime Commission*, tabled with the Legislative Council and Legislative Assembly on 19 March 2009.

¹⁴⁴ CCC media statement, *Acquittal of Mike Allen on false evidence charges*, 2 July 2008.

¹⁴⁵ *Moodie cleared of fraud charges*, WAToday.com, accessed at www.watoday.com.au/wa-news/moodie-cleared-of-fraud-charges-20080828-44ge.html on 27 April 2010.

Supreme Court ordered a retrial.¹⁴⁶ At the retrial, on 18 March 2010, Mr Moodie was again acquitted of all 100 criminal charges.¹⁴⁷

- On 6 March 2009, Julian Grill was acquitted of charges of seeking to mislead the CCC.
- On 28 February 2009, charges against David McKenzie for seeking to mislead the CCC were dismissed.¹⁴⁸
- On 27 August 2009, the CCC Commissioner issued an apology to Mark Brabazon.¹⁴⁹
- On 9 September 2009, charges of corruption initiated by the CCC against former Member of Parliament, Shelly Archer, were withdrawn by the DPP.¹⁵⁰
- On 4 October 2009, *The Sunday Times* newspaper published an article reporting that the CCC had spent at least \$75.5 million to get just 41 people convicted.¹⁵¹
- On 10 May 2010, Brian Burke, Julian Grill and Nathan Hondras were acquitted of corruption charges initiated by the CCC.¹⁵²

298 There was a danger that in light of the above, the public was forming the view that the raison d'être of the CCC was to secure criminal convictions, and was failing in that role, and that the apparent low number of convictions was a poor return on the CCC's annual operating budget.

299 In his media conference of 6 October 2009, CCC Commissioner Roberts-Smith addressed the apparent lack of convictions as follows:

*In terms of the 51 people who it has charged with criminal offences over the last five or so years, and whose cases have been completed in court, (the CCC) has obtained convictions in 42 of those cases. That's a conviction rate of over 80 per cent. Any DPP office in Australia would be happy with that outcome.*¹⁵³

¹⁴⁶ CCC wins appeal against Moodie acquittal, 25 March 2009, accessed at <http://www.abcscience.net.au/news/stories/2009/03/25/2525694.htm?site=perth> on 27 April 2010.

¹⁴⁷ Moodie acquitted on travel rort charges, 18 March 2010, [thewest.com.au](http://au.news.yahoo.com/thewest/a/-/breaking/6949747/moodie-acquitted-on-travel-rort-charges/), accessed at <http://au.news.yahoo.com/thewest/a/-/breaking/6949747/moodie-acquitted-on-travel-rort-charges/> on 27 April 2010.

¹⁴⁸ Blow to Corruption Watchdog, ABC News online, accessed at <http://abc.gov.au/news/stories/2009/02/28/2503950.htm?site=southwestwa> on 27 April 2010.

¹⁴⁹ CCC media statement, *Adverse mentions against Mr Mark Brabazon in Smiths Beach report withdrawn*, 27 August 2009.

¹⁵⁰ CCC media statement, *Commission comment on withdrawal of charges against Ms Archer*, 9 September 2009.

¹⁵¹ 'CCC's \$75m waste', *The Sunday Times* newspaper, 4 October 2009.

¹⁵² 'Watchdog in firing line over Burke case', *The Australian* newspaper, 12 May 2010.

¹⁵³ Len Roberts-Smith QC, CCC Commissioner, media conference, 6 October 2009.

But convictions is not what the commission is about in any event. The commission is effectively a standing royal commission. Our primary function under the act is to maintain the integrity of the public sector and to reduce the incidence of misconduct in the public sector and we do that in a whole range of ways.

300 CCC Commissioner Roberts-Smith then pointed to the successes and achievements of the CCC, and said that the CCC had:

- Enabled government departments and agencies to deal with misconduct themselves;
- Conducted hundreds of corruption prevention and misconduct prevention risk programs and workshops;
- Conducted more than 1000 investigations;
- Handled more than 12,000 allegations of misconduct, and monitored more than 8000 investigations conducted by agencies and departments;
- Reviewed almost 9500 investigations by departments and agencies; and
- Dealt with almost 7000 allegations against police.

301 To this list, the Committee notes that in the course of public hearings, the CCC revealed conduct that led to the resignation of four State Ministers during the Carpenter Labor Government.

302 One particular portion of CCC Commissioner Roberts-Smith's media conference particularly resonated with the Committee, and is reproduced in full. CCC Commissioner Roberts-Smith was asked whether he would be concerned if the CCC was not able to investigate misconduct with the intensity it now does. This was a follow up to the journalist's earlier question about whether taking on an organised crime fighting role would detract from the CCC's misconduct function. Mr Roberts-Smith's answer was thoughtful and insightful, and posed the question as to what importance our community places on integrity in the public sector.

In the end it is a matter for Parliament and is also a matter for the community. The Commission will do whatever Parliament tells it to do in terms of its legislation. But perhaps we need to think about what we are talking about when we are talking about misconduct.

We are talking certainly about criminal offences. Corruption for example is obviously misconduct. It is one form of misconduct. But there are various categories of misconduct under our Act as well which don't necessarily constitute criminal offences. We are talking about things like public officers acting contrary to the public interest.

We are talking about public officers making decisions on the basis of influence which has been exerted on them by people whether it be political or personal.

We are talking about public officers who are assaulting people and I hark back to the Department of Education report Sexual Assaults on Students. Obviously allegations of

assault are quite common in relation to police officers and that is to be expected because of the sort of powers they have to exercise.

We are talking about public officers who are dealing with matters on the basis of benefiting themselves or friends rather than the public interest.

We are talking about the disclosure of confidential information. The classic example of that is the disclosure of information from a public officer that resulted in the death of Don Hancock. My understanding is that whoever disclosed that thought it was an innocuous disclosure at the time. It obviously wasn't. Disclosure of confidential information by public officers is a very, very important issue for members of the community at the moment because there is so much confidential information on so many Government databases. We have seen examples of that recently.

We are talking about public officers not only disclosing confidential information of that kind but disclosing to friends or commercial acquaintances or people with whom they are working, confidential information regarding around planning issues or commercial activities.

I guess the question is does the community want a public sector where public officers are not making decisions or acting in the public interest but are acting out of personal reasons of this kind or behaving without integrity and you might think the answer to that quite possibly is that the community would be appalled to think that was happening and could happen without being exposed and without integrity measures being put in place to prevent it. In that sort of area which as I said does not necessarily involve the commission of criminal offences but may, I mean obviously if a public officer was given a bribe that is corruption – that is a criminal offence – but I've already talked about other forms of misconduct which aren't.

What we are talking about are things which destroy community confidence in the public sector, and the Government and ultimately the Parliament and if community confidence in those essential instruments of our State is destroyed then the whole process of governance of the State is called into question. Now that is what we are talking about when we are talking about the ramifications of misconduct and it becomes then a matter for you and for the community to decide whether the community wants a Commission like this to oversight and deal with those things and put measures in place to either prevent them or deal with them when they occur.¹⁵⁴

303 CCC Commissioner Roberts-Smith's comments appeared to be well received and a journalist penned an article entitled *CCC a clear winner on integrity*, in *The West Australian* newspaper the following day. It began:

The constant stream of politicians calling for the Corruption and Crime Commission to switch its attention to organised crime contains more than just a strong whiff of self-interest. The CCC has come under renewed attack in recent weeks for failing to secure convictions against high-profile targets, even though it has an 80 per cent conviction rate on all charges it has laid.

¹⁵⁴ Len Roberts-Smith QC, CCC Commissioner, media conference, 6 October 2009.

But as a clearly frustrated Len Roberts-Smith pointed out at a press conference yesterday, criminal charges and convictions are really just coincidental to the commission's main task of maintaining and improving the integrity of the State's public sector, including parliamentarians. On that score the CCC has been singularly successful in shining a light on some of the dubious practices that existed before the explosive Smiths Beach public hearings that dominated the headlines in the summer of 2006-07.¹⁵⁵

304 The article posed the question – despite the fact that the public hearings gave rise to few charges and even fewer convictions, would it have been better if the public had never found out about the activities of lobbyists Burke and Grill.

305 The answer, it would seem, is that the public has confidence in the CCC, and wants it to continue to expose corruption and misconduct in the public sector. The empirical evidence for this is to be found in a survey commissioned by the CCC in February 2008 and which is discussed below.

The perceived view that the public would like the CCC to be doing more to combat organised crime

306 Politicians from both sides of the political spectrum have called for the CCC to focus its attention on organised crime. It has been argued that the public would expect this.

307 In February 2008 the CCC commissioned an independent research survey of 380 Western Australians. The participants were asked nine questions. The resulting survey was published by the CCC on 27 February 2008 in a report entitled *Public Perceptions Survey*, which can be found on the CCC's website.¹⁵⁶

308 The survey did not ask if the CCC should be doing more to fight organised crime. Of the nine questions the following questions are of relevance to this report.

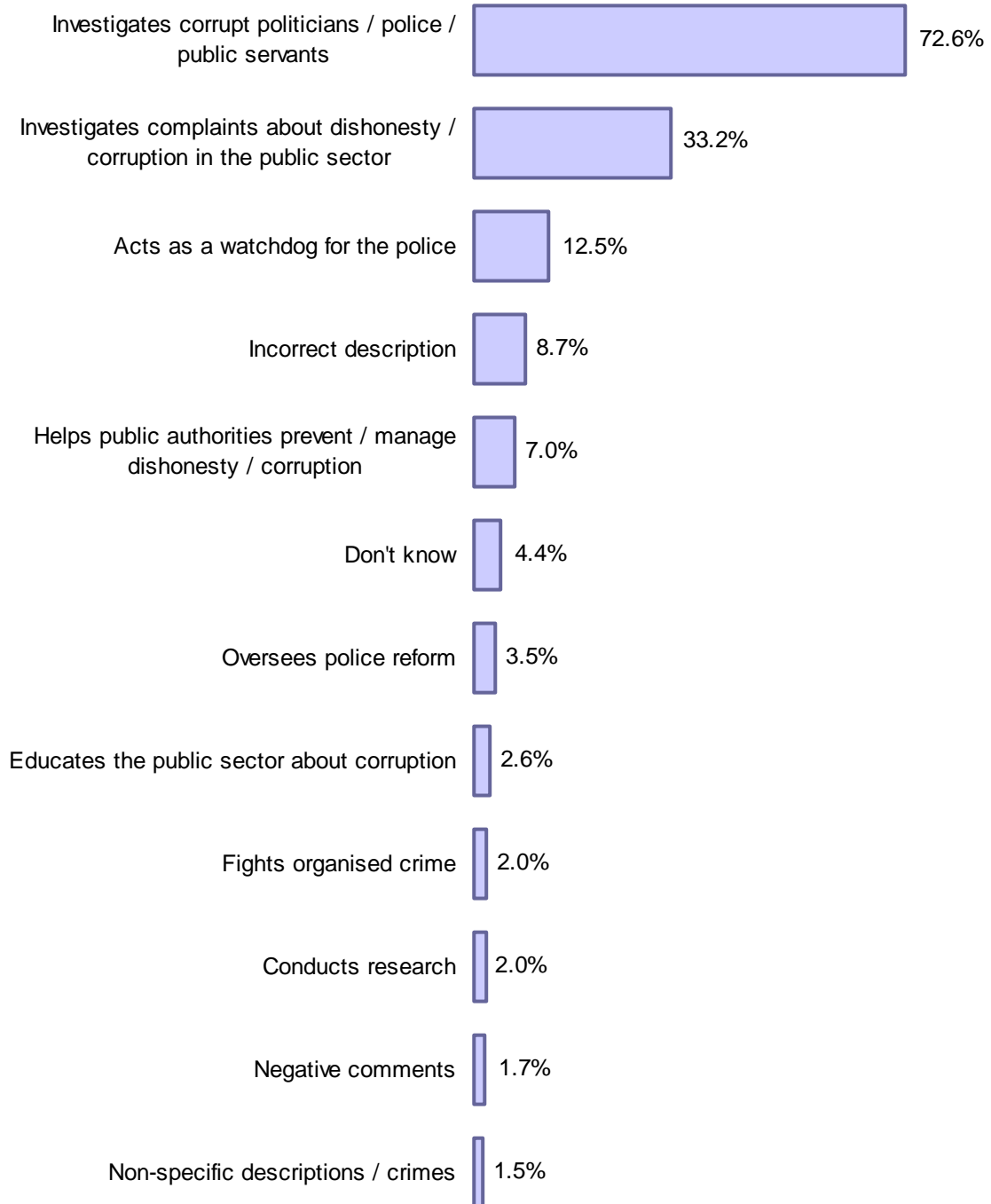
- Using your own words can you tell me what the CCC does?
- If you made a complaint to the Corruption and Crime Commission do you feel confident that they would properly investigate a complaint? If no, why do you say that?
- Could you please tell me if you agree or disagree with this statement: I feel that it is important for a body like the CCC to be independent from government, ie not under direct influence or control but accountable to parliament?
- What do you think about the power the Corruption and Crime Commission has? Do you think they have too much power?

¹⁵⁵ 'CCC a clear winner on integrity', *The West Australian* newspaper, 7 October 2009, p 21.

¹⁵⁶ CCC, *Public Perceptions Survey*, 27 February 2008, accessed at www.ccc.wa.gov.au/files/pubs/public-perceptions-survey-2008-02-27.pdf on 8 February 2010.

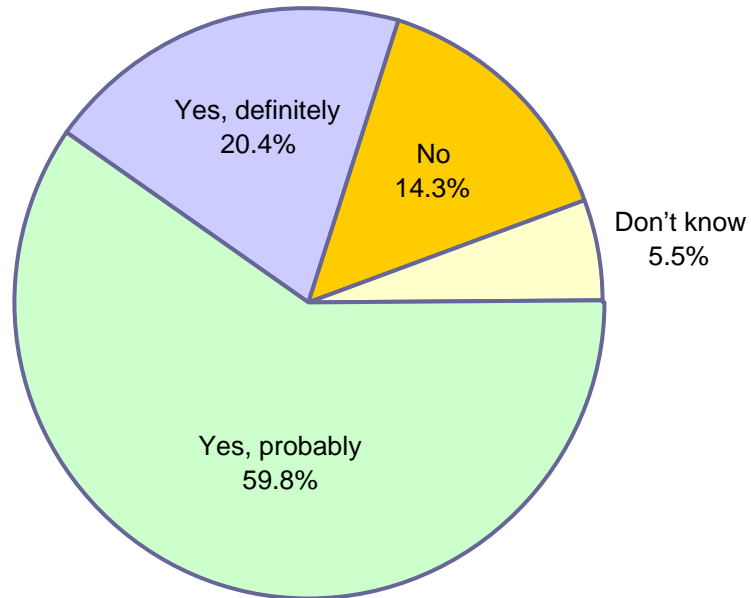
309 The results follow:

Using your own words, can you tell me what the CCC does?

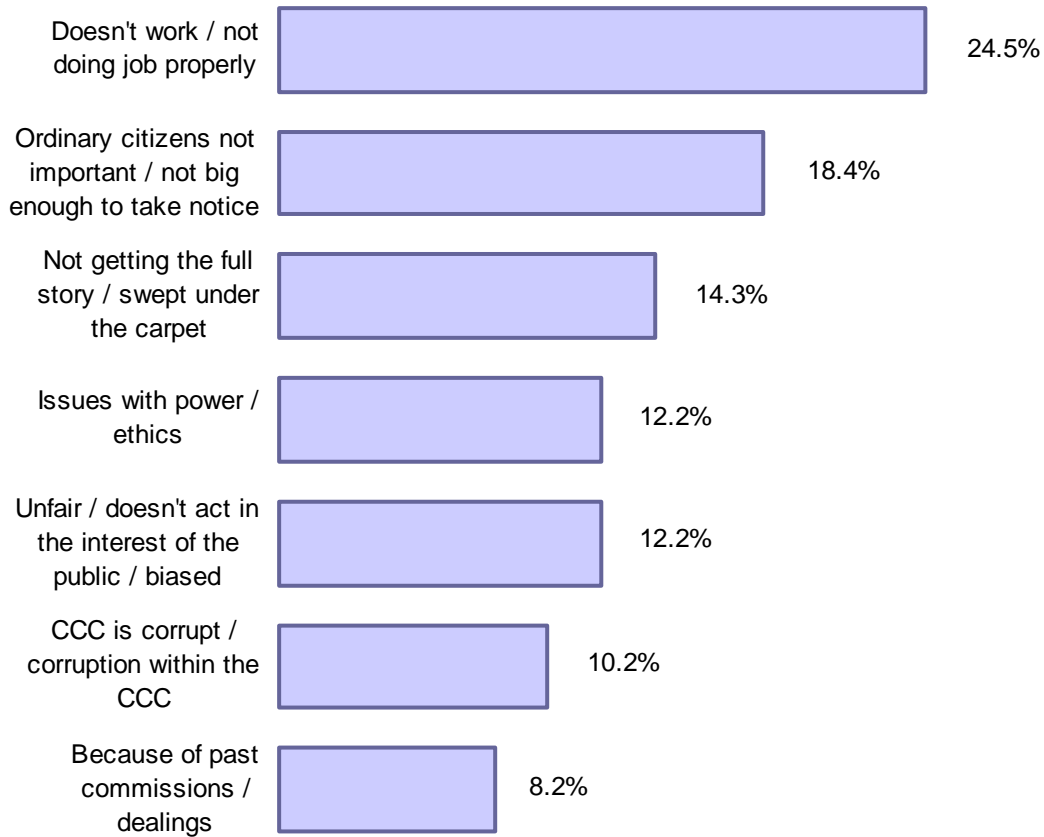


310 As can be seen, as at February 2008 the Western Australian public did not associate the CCC as an organised crime fighting body.

If you made a complaint to the CCC, do you feel confident that it would be properly investigated?

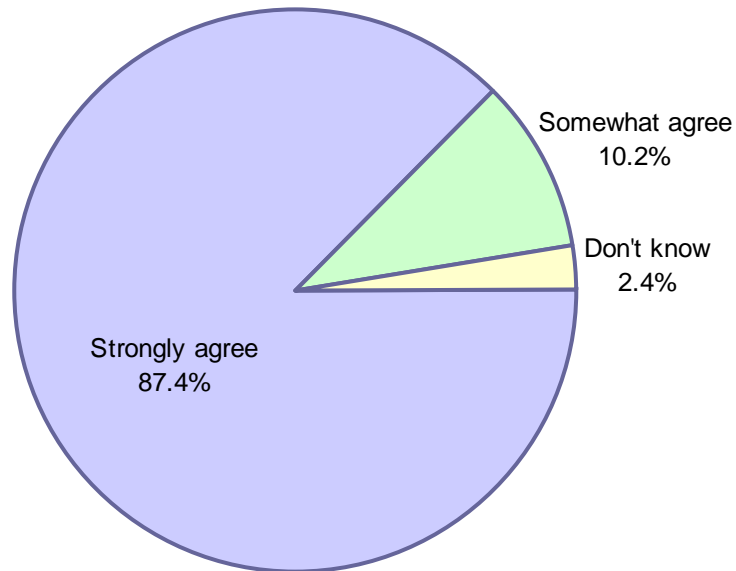


If no, why do you say that?



311 Over 80% of respondents were confident that the CCC would investigate their complaint properly. Of the 14.3% of respondents who were not confident their complaint would be investigated properly, only 10.2% thought the CCC was corrupt. In other words only one in every 100 persons believes the CCC is corrupt. That is an outstanding vote of confidence in the integrity of the CCC. This data is important as it indicates that the CCC is perceived as a bastion of integrity by the public, and is presently enjoying the confidence of the public.

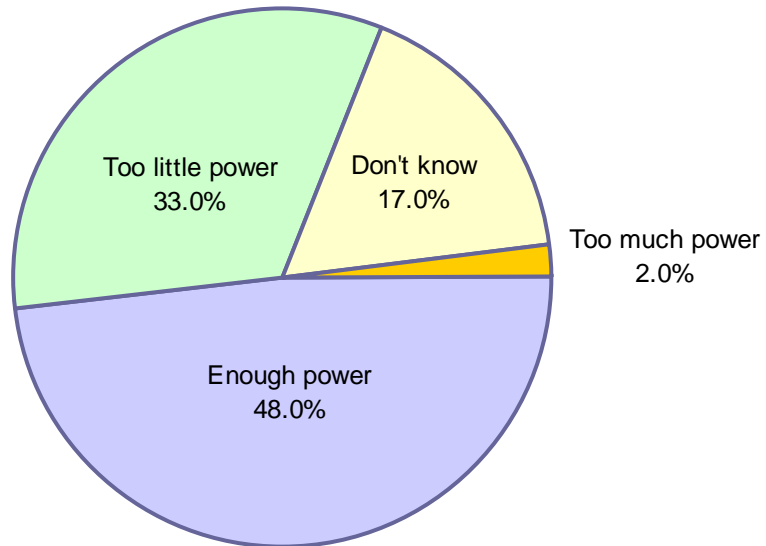
I feel that it is important for a body like the CCC to be independent from government, ie not under direct influence or control but accountable to Parliament



³¹² Over 97% of respondents consider it important for the CCC to be independent. ¹⁵⁷ This data highlights the importance that the public places on the CCC's independence.

¹⁵⁷ 87.4% strongly agreed, 10.2% somewhat agreed.

**What do you think about the power the Corruption and Crime Commission has?
Do you think they have -**



313 This data shows that the public does not think that the CCC is abusing its powers, as half of the public think the CCC has the right amount of power, and a third of the public think that the CCC can be trusted with more power.

CHAPTER 4 THE PROPONENTS OF THE REFERENCE GROUP MODEL – THE WA POLICE AND THE CCC

The WA Police

314 The Committee held four closed hearings with representatives of the WA Police.

- On 23 September 2009 the Committee met with:
 - (i) Karl O’Callaghan, WA Police Commissioner;
 - (ii) Chris Dawson, Deputy WA Police Commissioner; and
 - (iii) Nick Anticich, Assistant WA Police Commissioner (Specialist Crime).¹⁵⁸
- On 24 March 2010 the Committee met with:
 - (i) Nick Anticich, Assistant WA Police Commissioner (Specialist Crime);
 - (ii) Jim Migro, Detective Superintendent, Serious and Organised Crime Division, WA Police; and
 - (iii) Dominic Staltari, Assistant WA Police Commissioner, Professional Standards.
- On 31 March 2010 the Committee met with:
 - (i) Chris Dawson, Deputy WA Police Commissioner (and also acting in his capacity as the Acting WA Police Commissioner as Karl O’Callaghan was on leave); and
 - (ii) Nick Anticich, Assistant WA Police Commissioner (Specialist Crime).
- On 2 August 2010 the Committee met with:
 - (i) Charlie Carver, Detective Superintendent Serious and Organised Crime Division, WA Police; and
 - (ii) Pete Davies, Acting Detective Inspector, Serious and Organised Crime Division, WA Police.

315 Both WA Police Commissioner O’Callaghan, and Deputy WA Police Commissioner Dawson have spent their entire careers serving the people of Western Australia as police officers, both having graduated from the WA Police Academy in the latter half of the 1970s.¹⁵⁹

¹⁵⁸ Mr Anticich was formerly Director of Operations at the CCC.

- 316 The Committee provided WA Police Commissioner O'Callaghan with a draft of this Report, and gave the WA Police a period of 4 weeks within which to make any supplemental submissions.
- 317 Throughout the Inquiry, the Committee made it known to the WA Police that the Committee expected the WA Police to come up with a convincing rationale why it supported the Reference Group Model. At the outset the Committee indicated its view that if the only reason the WA Police supported the proposal was to get access to the CCC's range of assets (both technical and personnel) to assist the WA Police in investigating organised crime, then that should be solved by adequately resourcing the WA Police, rather than risk contaminating and/or diluting the oversight role of the CCC.

What is the WA Police's motivation in supporting the Reference Group Model?

- 318 The Committee were particularly keen to understand the rationale behind the WA Police's support for the Reference Group Model, especially in light of the fact that in 2007, the WA Police Commissioner put a submission to the Committee opposing any move to grant the CCC the ability to engage in organised crime investigations. In other words, the Committee were particularly keen to explore why there had been a change in the WA Police's position. Separately CCC Commissioner Roberts-Smith had advised the Committee :

*It is important to bear in mind that it is a joint proposal. There was for many years a very strong degree of resistance from WAPOL to the commission being involved in organised crime investigations or, indeed, doing anything else at all that might impact on their criminal-type investigations or on other work. Therefore, it is very significant that we have got to the stage at which what has been put forward is a joint proposal from WA Police and the commission in relation to this.*¹⁶⁰

- 319 When asked in September 2009 why the WA Police needed the assistance of the CCC in fighting organised crime, WA Police Commissioner O'Callaghan said:

*I guess that it is simply around the powers that the Corruption and Crime Commission can use. One of the issues that we have is that some crimes, particularly organised crimes, are extremely difficult to resolve using the powers available to police. For argument's sake, the coercive powers that the Corruption and Crime Commission have enable us to have a much better look at organised crime than we can otherwise do.*¹⁶¹

¹⁵⁹ WA Police, *Annual Report 09*, September 2009, p 7.

¹⁶⁰ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 17 June 2009, p 13.

¹⁶¹ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 2.

320 That did not strike the Committee as particularly persuasive, as it is presently open to the WA Police to apply to the CCC for the use of Exceptional Powers. Accordingly the WA Police Commissioner was asked why the establishment of a reference group would change or improve the current situation. He responded:

*It makes sure that both commissioners are well informed about what is going on. Another thing it does is that it makes sure that the commissioners are working to priorities. One of the things about organised crime is that it is a very big animal to deal with. There are limited resources in the state to be able to put to these things. We need to be well lined up on exactly what our priorities are and what we are going to deal with first and so on down the line. That level of communication is really important to us in making that response.*¹⁶²

321 Deputy WA Police Commissioner Dawson put forward another rationale:

The way in which the CCC can assist us, as the Commissioner touched on, is that its additional resources and its own activities can complement what is happening with Western Australia Police investigations, whether it is through further technical assistance, covert assistance and all sorts of things. The CCC has capabilities that can complement what WA Police is doing, and it can deal with those further.

*... It comes down to the optimisation of limited resources and the blunt reality of the amount of technical capability through covert listening devices, surveillance teams and whatever is a best practice which is joined up resources...*¹⁶³

322 At that point in time the Committee formed the view that two reasons were being proffered by the WA Police as to why the co-operative model with the CCC was desirable, namely:

- to enable the WA Police enhanced access to the Exceptional Powers, such as coercive hearings; and
- the CCC has useful resources which could be used in an organised crime investigation run by the WA Police.

323 Deputy WA Police Commissioner Dawson then made the following statement:

*People who are targets of both misconduct or integrity-type commissioning are often organised crime figures that Western Australia Police have their own independent need and desire to deal with. If we are able to join up all forces, coupled with the use of coercive examinations, it does optimise all the resources, otherwise we will have a capability in one agency that is potentially and presently underutilised in terms of the sorts of target that we can use.*¹⁶⁴

¹⁶² Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 3.

¹⁶³ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, pp 4-5.

¹⁶⁴ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 5.

- 324 The Committee is not convinced that CCC targets are often organised crime figures – of all the public documents produced by the CCC, including reports tabled in Parliament in which the CCC expresses opinions of misconduct against individuals, none have been made against anyone who could be described as an “organised crime figure”.
- 325 Deputy WA Police Commissioner Dawson’s evidence was also at odds with the evidence given by WA Police Commissioner O’Callaghan, in 2006 before the Committee where WA Police Commissioner O’Callaghan said:

*We refute the assertion made by the CCC that more often than not organised crime involves the corruption of public sector officers. That perception is not shared by the Western Australian Police, nor was it shared by the Kennedy Royal Commission. Our statistics and our experience show that the link is fairly infrequent.*¹⁶⁵

- 326 In June 2010, WA Police Commissioner O’Callaghan put forward another rationale as to why the WA Police were in favour of the Reference Group Model. He said that the CCC would be able to devote dedicated resources to focus on organised crime targets, whereas the WA Police could not guarantee such a dedicated effort due to the reactive nature of policing. This evidence is explored later in this Chapter in more detail under the heading **CCC proactive, WA Police reactive?**

The Reference Group Model – an efficient model to combat organised crime?

- 327 It is proposed that the WA Police and the CCC will work independently but under co-ordinated direction from the Reference Group. It is anticipated that the role of the Reference Group will be to agree common objectives and allocate responsibilities between the CCC and the WA Police. For example the Reference Group may decide for the WA Police and the CCC to commonly target one organised crime syndicate but to allocate surveillance of certain individuals within that crime syndicate to the CCC and other individuals to the WA Police, and to allocate the task of investigating certain aspects of the criminal activities of that syndicate to the CCC, and other aspects to the WA Police.
- 328 As noted in Chapter 1 of this Report there appears to be little or no prospect that under the Reference Group Model, officers from the CCC and the WA Police will work together in the same office, use the same surveillance teams, access the same informants and share the same databases. Rather, the way that the CCC and the WA Police envisage working together is that each agency will operate independently using their own assets and personnel, but agree upon common objectives and will share intelligence.
- 329 Thus the WA Police and the CCC contemplate working in parallel with each other. There will be a few select individuals in the highest echelons of each agency that will be privy to the overall

¹⁶⁵ Karl O’Callaghan, WA Police Commissioner, *Transcript of Evidence*, 25 October 2006, p 15.

situation and who will coordinate information flow on a needs-to-know basis to the operatives at ground level. This will achieve, it is said, a measure of co-ordination between the activities of each agency and will prevent, as much as possible, the agencies from unwittingly overlapping with each other. The integrity and independence of each agency is also said to be preserved.

330 Deputy WA Police Commissioner Dawson informed the Committee that the proposed working arrangements between the two agencies may result in operatives in each agency being unaware of the day to day activities of their counterparts, and that this was an efficient model for combating organised crime. He said:

*... it is actually quite conducive to conducting a very complex investigation by not having operatives on the ground know what the other ones are doing. That might sound rather strange but that is the nature of very sophisticated criminal enterprises.*¹⁶⁶

331 Deputy WA Police Commissioner Dawson explained:

- Organised crime operates in cells.
- Having the CCC investigate certain aspects of a network and the WA Police investigate other aspects would lead to a greater overall understanding of the criminal network.
- Criminals may be led into a false sense of security if they become aware of the WA Police investigations in one area and this would open up the possibility of the criminals to be blindsided by the CCC, who would be investigating another area of their operations.¹⁶⁷

332 The Committee has considered this rationale and finds that it has a number of weaknesses, which are discussed in Chapter 6.

CCC operatives – tailor-made for organised crime investigations?

333 Deputy WA Police Commissioner Dawson said to the Committee that the CCC had a body of investigators that are tailor-made for investigating organised crime. Mr Dawson said:

The history of the CCC and like bodies is that they predominantly source their people from other law enforcement agencies, predominantly from state and Federal Police jurisdictions. Predominantly, most of the people who make up those types of organisations are very experienced investigators. They do not have to be home-grown from Western Australia to do their job. Equally so, from a technical and other support perspective, logistically, if they are not police, they will come from a military type

¹⁶⁶ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 3.

¹⁶⁷ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 3.

*background and have the same sorts of capabilities. That is who they target and that is who works there. Essentially, we have the same sort of clientele.*¹⁶⁸

The relationship between the WA Police and the CCC – is co-operation possible?

334 WA Police Commissioner O'Callaghan informed the Committee on 23 September 2009:

*Notwithstanding the fact that the reference group has not formally been established, the Corruption and Crime Commissioner and I meet on a regular basis to discuss these things, in particular, strategic priorities around organised crime. It is fair to say that over the past two years, at least since the current commissioner [Roberts-Smith] has been there, the relationship as far as talking about strategic priorities on organised crime has improved immeasurably. A lot of that strategic work is already being done.*¹⁶⁹

335 Mr Jim Migro, Detective Superintendent, Serious and Organised Crime Division, WA Police informed the Committee that there is a Joint Operations Management Group (JOMG) in place in Western Australia, the members of which include other law enforcement agencies in Western Australia, including the CCC. JOMG looks at all serious and organised crime investigations in Western Australia.¹⁷⁰

The CCC

336 The Committee received a number of submissions from the CCC as to why it should be given the jurisdiction to engage in organised crime investigations. Chapter 1 sets out the chronology of the submissions received by the Committee up until the point in time that the Committee commenced this Inquiry. An example of these earlier submissions is as follows – in 2007 CCC Commissioner Roberts-Smith wrote to the Committee in the following terms:

The Commission has the necessary investigative and technical skills to undertake organised crime investigations. The Commission's multi-disciplinary investigative teams have broad experience in complex and protracted investigations; experience which is well suited to organised crime investigations.

...the Commission's capital investment since 2003 in its considerable technical and other investigative resources places it in a very strong position to establish efficiently a highly proficient crime commission capability, and its recent investigations of public sector

¹⁶⁸ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 4.

¹⁶⁹ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 2.

¹⁷⁰ Jim Migro, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 24 March 2010, p 5.

*misconduct demonstrate the Commission's well-developed capacity to conduct covert, long-term investigations, employing the full range of law enforcement capabilities. Also many of the Commission's staff have organised crime investigative backgrounds, from serving in the Australian Federal Police, National Crime Authority, Australian Crime Commission, NSW Crime Commission, NSW Police Integrity Commission and the Wood Royal Commission. The knowledge and skills these officers have applied in recent Commission investigations have led to the recognition of their prowess and the transportability of their skills within the law enforcement community, resulting in them attracting offers of employment from the Australian Crime Commission to work in its organised crime portfolio.*¹⁷¹

337 Following the commencement of this Inquiry, the CCC provided submissions in December 2009 in which the CCC submitted that it can bring various 'specialist capabilities' to bear to 'supplement and complement' the WA Police's organised crime investigations.¹⁷²

338 By letter dated 16 April 2010 the CCC set out seven propositions that "best explain the case for providing the Commission with a serious and organised crime investigative function":

- 3.1 *The effective disruption and reduction of organised crime requires the application of traditional policing in tandem with the specialist capabilities of a crime commission.*
- 3.2 *The provision of the proposed serious crime and organised crime investigative functions to the Commission would greatly enhance efforts to combat and reduce the incidence of organised crime in Western Australia.*
- 3.3 *The Commission's capacity to conduct more complex, long running organised crime investigations and to provide assistance in dealing with specific serious crime matters would complement, not compete with or replace, WAPOL's capacity to deal with serious and organised crime.*
- 3.4 *The Commission's specialist capabilities, when combined with the full range of its coercive powers, will significantly complement traditional police methodologies used to investigate serious and organised crime, including the provision of improved intelligence to other LEAs, especially WAPOL.*
- 3.5 *The CCC's specialist skills and investigative approach when brought to bear in a strategic, deliberate, structured and cooperative way with WAPOL and other LEAs will create considerable synergies, including enhanced deterrence, in dealing with serious and organised crime.*
- 3.6 *A Commission serious crime investigative function, would differ from an organised crime investigative function, as it would have the distinct purpose of assisting police to solve intractable serious crimes not susceptible to traditional policing techniques.*

¹⁷¹ CCC submission dated 24 July 2007, page 16.

¹⁷² CCC submission dated 24 July 2007, page 16.

- 3.7 *The expansion of the Commission's jurisdiction to include a serious and organised crime investigative function will have resource implications.*¹⁷³

Hearings with the CCC Commissioner

339 In addition to the submissions received from the CCC, the Committee held a number of hearings with CCC Commissioner Roberts-Smith.

340 Since his appointment in June 2007, CCC Commissioner Roberts-Smith has been demonstrably keen for the CCC to engage in organised crime investigations. An example of his evidence to the Committee is as follows – on 17 June 2009 the CCC Commissioner informed the Committee:

*...what we bring to the table here is, if you like, a niche capability. It is important to appreciate that there is no intention whatsoever, and no suggestion, that the commission is going to be another police force. We are not a police force, and we are not going to operate that way. We bring particular capabilities, apart from the suite of coercive powers, for example; we have technical and investigative capabilities, which the police do not have.*¹⁷⁴

341 Set out below are an account of the arguments and submissions that CCC Commissioner Roberts-Smith has put to the Committee about the merits of the Reference Group Model.

Would the organised crime function complement the CCC's existing misconduct function?

342 CCC Commissioner Roberts-Smith has said that if the CCC were given the power to conduct organised crime investigations, that this would compliment the corruption and misconduct fighting aspect of the CCC's operations, insofar as the CCC may well uncover corrupt public officials, including police, in the course of their covert surveillance. CCC Commissioner Roberts-Smith said to the Committee:

... it is certainly my view, and it would be the Commission's view, that there is a necessary link between organised crime and public officers. Organised crime cannot succeed without subverting public officers – not just police officers but others.. One of the benefits the Commission sees in having a capacity to investigate organised crime itself – not the only benefit but one of them – would enable us to approach the problem from the other way. ... If we had a capacity to investigate organised crime, there would be plenty of targets out there ... and who might well lead us back to police officers or other public

¹⁷³ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 4.

¹⁷⁴ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 17 June 2009, p 15.

*officers with whom they are engaging, which we cannot get to from the other side, so there is a complementarity to our misconduct function in that respect ...*¹⁷⁵

343 The above quote is but one of many instances where the CCC Commissioner has stated that there is an established link between organised crime and public sector misconduct. In April 2010 the CCC wrote to the Committee as follows:

In relation to the links between corruption and organised crime, Mr Tony Kwok Man-wai, former head of ICAC Operations has stated:

Corruption rarely exists alone. It is often a tool to facilitate organised crimes. Over the years, ICAC have investigated a wide range of organised crimes facilitated by corruption. Law enforcement officers have been arrested and convicted for corruptly assisting drug traffickers and smugglers of various kinds; bank managers for covering up money laundering; hotel and retail staff for perpetuating credit card fraud. In these cases, we need to investigate not only corruption, but some very sophisticated organised crime syndicates.

*The Commission endorses Mr Kwok's remarks. Organised crime requires the support and facilitation that corrupt police officers provide in order to thrive. While the Commission has enjoyed considerable success in dealing with misconduct, its view is that in order to better deal with corruption it needs to have the ability to target organised crime in order to reach public officers who have not, and would not otherwise, come to its attention.*¹⁷⁶

344 The evidence from Queensland is that organised crime investigations rarely reveal corrupt police officers. Mr Felix Grayson, former Assistant Commissioner of the Queensland Police Service, and who, on his retirement in 2009, was the highest ranked police officer working within the CMC, said:

... one of the reasons for the amalgamation of the QCC to the CJC was a strong belief that organised crime could not exist without police being corrupted or officials being corrupted and that there would be a symbiosis of the two areas working together to conduct investigations into organised crime to look at the corruption aspects of organised crime as well as the criminal aspects. When we run investigations, we do get some hint at times through telephone intercepts and listening devices that criminals may have contact with certain police officers. However, one never knows whether that contact is by way of them being developed as human sources and the relationship is legitimate—or perhaps was originally and has changed. In none of the investigations at any stage during the time I was at the CJC and the CMC did we run an operation that was both organised crime and corruption [together]. Most of our investigations are drug related; it always seems to come back to drugs or money laundering from them. We never really had a secondary operation running that was a joint operation between the crime

¹⁷⁵ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 11 November 2009, p 10.

¹⁷⁶ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 4.

*and misconduct areas—that is, corruption. Therefore, that defeats the argument for having it within that one organisation as well.*¹⁷⁷

Is the CCC tailor-made to conduct complex long running investigations?

345 With the all important caveat that it would need to be adequately resourced, the CCC says that it has the capacity to undertake complex long running investigations.

346 CCC Commissioner Roberts-Smith submits that the CCC's security, secrecy, resources and personnel as being ideally suited to participate in in-depth infiltration of organised crime syndicates.

347 The CCC submits that the WA Police have a limited capacity to conduct long running complex investigations, due to the WA Police's understandable focus on reactive policing and limited resources, and that the CCC would be able to provide dedicated close knit teams of specialised investigators to work on matters for many months, if not years, to provide deep penetration of criminal networks and provide valuable intelligence.

348 The CCC propose having a 'far greater proportion of financial and intelligence analysts in its investigations teams combined with specialist lawyers, than is usual in standard police investigations'.¹⁷⁸

349 The CCC said:

*The capacity of the police to conduct long running complex covert criminal investigations is sometimes limited by the volume of crime with which they must deal, which in turn necessitates and compels a more reactive approach. This volume, combined with an emphasis on investigations such as murders, serious sexual crimes and the like, means that covert investigation resources face numerous demands and competing priorities. In the face of these pressures, long-term covert organised crime investigations can have difficulty in gaining access to the required resources, particularly where they would be committed to the investigation for a sustained period.*¹⁷⁹

¹⁷⁷ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, pp 9-10.

¹⁷⁸ CCC submission to the Inquiry dated 2 December 2009, paragraph 4.

¹⁷⁹ CCC submission to the Inquiry dated 2 December 2009, paragraph 3.

The CCC has a formidable surveillance and telephone intercept capacity

350 The CCC submitted to the Committee that it has a very well developed surveillance capability that it plans to expand and it already has a sound telecommunications and electronic intercept capability which it is currently in the process of upgrading.¹⁸⁰

351 With respect to telephone intercept capabilities, CCC Commissioner Roberts-Smith said to the Committee:

*It is true to say, for example, that the police obviously have access to telephone interception powers, as we do. That is true but the reality is our capability is actually a lot better than theirs, and our ability to implement telecommunications interception quickly and effectively is a much better capability than the police are able to exercise for a range of reasons, many of which have to do with the way they are structured and so on.*¹⁸¹

The CCC has expertise in conducting coercive hearings that could be used in the fight against organised crime

352 The CCC has the power to conduct a coercive hearing in the exercise of its misconduct function. The CCC submitted to the Committee that the CCC has expertise in conducting coercive hearings that the WA Police does not, and that this expertise could be usefully applied if the CCC were to be given an enhanced organised crime jurisdiction. The CCC could then conduct its own coercive hearings into organised crime. CCC Commissioner Roberts-Smith suggests that the WA Police have insufficient resources or experience to make use of the exceptional powers (which include coercive hearings). In 2008 CCC Commissioner Roberts-Smith told a Commonwealth Parliamentary Committee:

On resourcing, such special or exceptional powers will ordinarily require the provision of additional resources or infrastructure to the law enforcement agency responsible for making them work. They mostly cannot be seen simply as an add-on to traditional policing techniques. While that may seem on first blush a logical approach, the use of such powers and legislation is not simply another accoutrement for police officers or investigators.

On training, as with any new tool or power there is a need to educate and train personnel in its use. People need not only to know of its existence but also to understand how it works and to be trained and competent in their use of it. It is necessary to develop a pool of experience and expertise...

¹⁸⁰ CCC submission to the Inquiry dated 2 December 2009, paragraph 4.

¹⁸¹ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 17 June 2009, p 15.

*Legislation alone is not the answer, and I can draw on the experience of the Corruption and Crime Commission of Western Australia. The experience of dealing with crime matters within the commission has two components. The first is the commission's own experience of the application of the organised crime provisions of the Corruption and Crime Commission Act 2003. The second is the experience of commission officers. They include two former heads of the Perth regional office of the National Crime Authority, a number of experienced former police investigators drawn from state and federal police agencies and a number of support staff who are former officers of the Australian Crime Commission, the National Crime Authority and the New South Wales Crime Commission.*¹⁸²

353 On 31 March 2010, CCC Commissioner Roberts-Smith said:

... the commission, over the past six years, has developed a degree of understanding and expertise in the application of—that is, the use of—the coercive hearings power in particular, which, as we have identified, does require quite special skills to apply effectively. We have seen that quite a lot; that is to say, we have seen when it has worked and we have seen when it has not.

The current scheme under the legislation is to enable the Commissioner of Police to have a counsel representing the Commissioner of Police at those part 4 hearings who conducts the examination of the witnesses. It has been the practice for the Commissioner[of Police] to brief people at the private bar to do that, and I am not critical of them in any way, but the result is that those people tend to be coming in for the first time to conduct examinations of that kind.

We have a limited capacity—in fact, I suppose, really no capacity—under the legislation, under the scheme of it as it stands at the moment, to train counsel up when they are representing the Commissioner of Police. That is not our role.

If we have that oversight role, if it is a commission hearing, I will have counsel assisting me there, but their role is essentially limited to ensuring, or assisting me to ensure, that nothing that happens in the organised crime hearing steps outside the legislation. It is not to conduct the examination of the witnesses.

What we have seen is that on a number of occasions, although those hearings have been useful for the police and they have got some quite good material from them, it is apparent that they are not being used as effectively as they could be.

Our own lawyers within the commission have the ongoing expertise, but also, of course, if we are engaging counsel at the private bar, which we also tend to do, we tend to brief the same people. Under our legislation we have every authority and opportunity to train them up in how to conduct hearings and work with our investigators in the strategies and techniques that are to be applied.

¹⁸² Len Roberts-Smith QC, CCC Commissioner, Commonwealth Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into Legislative Amendments to Outlaw Serious and Organised Crime Groups, Perth, 4 July 2008.

Under the proposal for the commission [CCC] to have an active organised crime capability, we would conduct those hearings as commission hearings, so we would have that expertise brought to bear in the way we currently do in relation to misconduct hearings.¹⁸³

CCC proactive, WA Police reactive?

354 CCC Commissioner Roberts-Smith has also argued that the WA Police is hamstrung in combating organised crime because of the reactive nature of policing, and that the WA Police have difficulty in keeping intact medium to long term team of investigators to undertake deep penetration of organised crime syndicates. The CCC, on the other hand, is able to provide tight knit investigative teams and can undertake long investigations without been distracted by day to day policing demands. CCC Commissioner Roberts-Smith said to the Committee in December 2009:

I emphasise that the CCC has the capability and intent to bring to the fight against organised crime a primarily strategic and targeted approach, but one which nonetheless retains the capacity to react to immediate or short-term opportunities to explore organised crime vulnerabilities. In the context of organised crime, both of those are important. Both of those are areas in which WAPOL, for example, has significant deficiencies in the capability to bring to bear a strategic and targeted approach using the limited resources they have. It does not matter how much resources they have. They are a big organisation, they have enormous demands on their resources and they are primarily directed to meeting what is happening on a day-to-day basis. We can bring a much more targeted and much more strategic approach.¹⁸⁴

355 The 2009-10 WA Budget Statements note:

Policing has a highly reactive nature, with demand for resources between the services reflective of initiatives to deal with criminal activities, traffic policing and other important aspects of policing. The cost of services often reflects significant variations from year to year, as these demands are met.¹⁸⁵

356 It must be noted that not all police work is reactive. The 2009-10 WA Budget Statements describes the following as a significant issue impacting the WA Police:

Continuing advancement in analytical and intelligence services to support agency priorities, including a focus on intelligence-led policing.¹⁸⁶

357 Initially the WA Police denied the CCC's assertion that the reactive nature of policing prevented it from undertaking long term investigations. WA Police Commissioner O'Callaghan said in 2006:

¹⁸³ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 2.

¹⁸⁴ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 2 December 2009, p 8.

¹⁸⁵ Government of Western Australia, *2009-10 Budget Statements*, Budget Paper No.2, Vol 2, p. 566.

¹⁸⁶ Government of Western Australia, *2009-10 Budget Statements*, Budget Paper No.2, Vol 2, p. 564.

*Currently, WA Police have a squad dedicated to the investigation of organised crime. Its operations are not “constrained” by the pressure of dealing with other criminal activity nor does that squad consider that its operations are under resourced or that its strategies are short term and reactive.*¹⁸⁷

358 When the Committee interviewed Mr Robert Needham, Chairperson of the CMC, Mr Needham informed the Committee that one of the benefits of the CMC was that, unlike the Queensland Police Service, its crime fighting personnel were not susceptible to being pulled off an assignment to engage in reactive policing work, such as Schoolies Week on the Gold Coast. The Committee asked the WA Police whether there existed the possibility that police officers could be pulled off organised crime investigations to respond to other policing needs, such as Australia Day fireworks. The following exchange took place

***The Chairman:** ... I am curious to know whether, when there are special events-by special events I mean the fireworks on Australia Day, the leavers’ weekend for the year 12s every year-the impression, as a layperson, is that the commissioner basically then says, “Everyone drop everything; we need everyone to be worried about these events.” When that type of call is made, does that impact upon these 150 personnel or are they excluded from that type of thing?*

***Mr Anticich:** My experience-I will be qualified by it-is that most of those resources are in addition to what is in existence. It is either on recall or additional duties. It does not diminish the current capabilities, certainly within the serious and organised crime area. That has certainly been my experience.*

***Mr Staltari:** My experience as a commander at some of those events is that we draw from the greater police population because the type of personnel we need are not specialised as such but do just general policing. We tend to draw from the greater population. That being said, of course, there is some contribution from the crime portfolio but not to any great extent.*

***The Chairman:** It is interesting because it has been put to me that one of the compelling reasons you need to have an anti-corruption body such as the CCC involved in investigating organised crime is that they would not be able to be called upon for these special events. They would be, if you like, untouchable for that and therefore those human resources would be able to be continuously devoted to this important area. But if I understand it correctly, that is probably not an issue in WA.*

***Mr Anticich:** I think it would be right to say that in both instances in relation to serious and organised crime, no matter what the agency, there is a requirement to have dedicated, quarantined resources to work on these things long term. They take months, if not years sometimes, to be brought to conclusion, so there is a requirement to quarantine dedicated resources.*¹⁸⁸

¹⁸⁷ Karl O’Callaghan, WA Police Commissioner, letter dated 25 March 2006, p 2.

¹⁸⁸ *Transcript of Evidence*, 24 March 2010, p 7.

359 In light of the above evidence, the Committee made a provisional finding that *the Serious and Organised Crime Division of WA Police is not overly focused on reactive policing and has dedicated quarantined resources to work on long term intelligence-led investigations.*

360 This provisional finding was included in a draft report provided to the WA Police Commissioner, the CCC Commissioner and the Parliamentary Inspector. As noted elsewhere in this Report, the feedback from the WA Police Commissioner and the CCC Commissioner was such that the Committee considered that a further round of consultative talks was necessary and on 23 June 2010 the Committee held a closed hearing with the two Commissioners.

361 At this closed hearing WA Police Commissioner O’Callaghan spoke about the reactive nature of policing:

Dr O’Callaghan: [WAPOL] is a dynamic organisation and gets pulled in different directions. ... the police go about their business and variously give attention to an organised crime target and then do not, depending on the pressures of the day. While giving police more resources and clearing up that section of the act would possibly improve the situation, it does not guarantee that there will be a consistent effort on key organised crime targets because of the way WAPOL is structured and what it is required to respond to.

...

The Chairman: Would it not be a possibility to silo some officers or a group and tell them that they are just working on this organised crime investigation, much as what would happen if the CCC was involved?

Dr O’Callaghan: Policing has never done that. I would suspect that pressure would only need to mount in serious crime—murder or something—to eventuate something in the organised crime sphere, and police will have to attend to the priority and drop the longitudinal investigation. That is how we have to work because we would be criticised if we did not. Sometimes even quarantined people get used for that. I have been in the police for 37 years and I have never seen it work any other way. I do not think it can work any other way in policing because that is the type of organisation it is.

Mr Roberts-Smith: As Commissioner O’Callaghan says, if a competing serious crime investigation suddenly requires those same assets, they will probably have to be allocated to do the short-term investigation or whatever it is and maybe come back to organised crime later. Again, it is much more complex than just saying there is a group of people who do not do anything else.

Dr O’Callaghan: That is exactly what has happened in the past six months because we had quite a difficult start to the year with a number of homicides. Covert resources—telephone intercept resources—are dragged off to deal with those immediate problems. They are not part of the organised crime division; those resources are drawn from a separate place in the organisation to help with different types of investigations.¹⁸⁹

¹⁸⁹ *Transcript of Evidence*, 23 June 2010, pp 10-11.

362 The Committee was concerned, in light of this fresh evidence, that:

- there may be very real constraints on the ability of the Serious and Organised Crime Division to engage in protracted long term investigations of organised crime targets; and
- the constraints take the form of pressure on the WA Police to have to divert resources, both human and technological, to respond to incidents of serious crime not necessarily related to organised crime.

363 The Committee subsequently had the opportunity to raise this issue with the current head of the Serious and Organised Crime Division, Detective Superintendent Carver. He advised the Committee that:

the only reactive investigations undertaken by the serious and organised crime division mainly involve OMCGs and also some of the fraud matters that come before you and also some of the sex crime reactive side, but we have people to investigate those issues. The long-term, longstanding operational matters that we have go on for months and sometimes a year or so; it takes that long to get to the end.... They are not disrupted.

...[policing] serious and organised crime is not impacted on by normal-type policing events. If they are, it is very short term, which does not impact on ongoing operations.

...The only thing that would stop us doing our investigations into organised crime—from a divisional and also for commercial crime—would be a natural catastrophe or some sort of CT or terrorism event where everybody would be hands to the wheel and we would down tools and it would be priorities if that happens. But short of that happening, I do not see us being [disrupted].¹⁹⁰

¹⁹⁰ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, pp 14-20.

364 The Committee asked Detective Superintendent Carver to respond to the suggestion that the CCC's capacity to mobilise resources to deal with organised crime outbreaks may be far more expeditious than what the WA Police could achieve. The response was emphatic:

We have at our disposal five and a half thousand police members. One of our big strengths is our ability to mobilise on a particular day, time or issue. When it comes to serious and organised crime, we are probably one of the very few areas that is proactive in policing; therefore, to a certain degree we have been quarantined to do those proactive jobs. ... when it comes time for those big issues to occur, we are left alone. I still have capacity within my staff to be able to move some of the people to do that work, if they are not attached essentially to an operation, but it does not impact on the operations as such. If it did, they would not go across and do that job. It is an understanding.¹⁹¹

365 As a result of the Detective Superintendent Carver's evidence, the Committee is reassured that the Serious and Organised Crime Division of the WA Police is not overly focused on reactive policing and has dedicated quarantined resources to work on long term intelligence-led investigations.

366 However, in light of WA Police Commissioner O'Callaghan's evidence, two qualifications have been added to the Committee's finding as follows:

Finding 2

- 2.1** The Serious and Organised Crime Division of the WA Police is not overly focused on reactive policing and has dedicated quarantined resources to work on long term intelligence-led investigations.
- 2.2** The Serious and Organised Crime Division of the WA Police does not have exclusive access to the WA Police's covert technologies.
- 2.3** While organised crime is a high priority for the WA Police, it is not the highest priority. It must compete with other aspects of policing to use limited WA Police resources, both human and technological.

¹⁹¹ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 23.

The CCC submits that the Australian Crime Commission is of limited assistance to the WA Police and that the CCC can fill the gap

367 CCC Commissioner Roberts-Smith said:

it is reasonable to anticipate a diminished or diminishing capacity of the Australian Crime Commission to deliver support to Western Australian police in light of competing national priorities and budget pressures” and that the proposed Reference Group Model “will ensure that the Corruption and Crime Commission of Western Australia will be able to support Western Australian police in meeting the serious and organised crime challenges specific to Western Australia.”¹⁹²

368 This point of view was echoed by WA Police Commissioner O’Callaghan, in 2008:

The federal government has imposed a 2.3 per cent efficiency dividend on many of its agencies. This will particularly affect the Federal Police and the Australian Crime Commission, both of which are organisations with which Western Australia Police work closely. We estimate that the cut to the Australian Crime Commission, which is responsible for dealing with organised crime, will be something like \$3 million, or 50 full-time employees across the country. Many of those people are employed as analysts. We expect that to have an impact on our capacity at the state level to respond to organised crime. That is the best information I can provide at the moment, based on what the Australian Crime Commission has told us. It is because of the federal government’s efficiency dividend. We think there will be an impact on the Federal Police as well, and that may affect our airport deployment at some stage.¹⁹³

369 And again in 2009:

One thing about the operation of the Australian Crime Commission is that it is necessarily limited by the amount of resources that is put in by the federal government. On the Australian Crime Commission board are representatives from Customs, Australian Tax Office, state police and federal police, and they are working together. Not all the determinations that are put forward on organised crime are approved. They do not necessarily get managed by the Australian Crime Commission if they do not meet some of the priorities. That does not mean to say that the states do not get left with a problem that they still have to respond to. While there are national and international networks, a lot of the people involved in this state might not be touched by the Australian Crime Commission in an investigation, because it works on a series of priorities.¹⁹⁴

¹⁹² Len Roberts-Smith QC, CCC Commissioner, Commonwealth Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into Legislative Amendments to Outlaw Serious and Organised Crime Groups, Perth, 4 July 2008.

¹⁹³ Karl O’Callaghan, WA Police Commissioner, Western Australia, Legislative Assembly, *Parliamentary Debates*, Estimates Hearing, 22 May 2008, p 402.

¹⁹⁴ Karl O’Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 7.

CHAPTER 5 HOW MUCH WILL IT COST FOR THE CCC TO HAVE AN ENHANCED ORGANISED CRIME JURISDICTION?

Funding estimates submitted by the CCC to the Committee

370 Detective Superintendent Carver said:

*Serious organised crime fighting is a very expensive business to get into.*¹⁹⁵

371 The operating budget of the CCC for 2010/11 is \$30,189,000. In this Inquiry the Committee sought to ascertain the level of additional recurrent funding that would be required to fund an effective organised crime fighting capability within the CCC.

372 It appears that the WA Police were under the erroneous impression that conferring an organised crime jurisdiction on the CCC would be cost-neutral. According to the WA Police the CCC has a ready made and tailored organised crime fighting capacity that can simply be unlocked by legislative amendment without any additional cost to consolidated revenue. Assistant Commissioner for WA Police, Nick Anticich said:

*I think there is a broader issue. Later next month the deputy commissioner and I hope to brief the Minister and the Attorney General on this very issue. There is an internal review of our capacity currently being undertaken. It is our intention to portray the particular issue on the basis of seeking some additional funding. My understanding of what is recommended is that there is no intention to additionally resource the CCC; rather, the intention is to unlock the current resources that sit idle while we have to borrow or lend resources from other agencies. **I understand that what is being proposed is cost neutral.** What we are trying to do is unlock the current resource that sits there and that we cannot call on to assist...to qualify that, when I say 'idle' resources, I mean that we cannot use them in relation to organised crime, but that is not to say that they are not being used within the misconduct frame.*¹⁹⁶

373 It became apparent to the Committee that the only way an enhanced organised crime jurisdiction could be funded on a "cost neutral" basis was if there were significant cutbacks to the CCC's existing misconduct and education and prevention functions.

¹⁹⁵ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 8.

¹⁹⁶ Nick Anticich, Assistant WA Police Commissioner (Specialist Crime), *Transcript of Evidence*, 24 March 2010, p 4.

374 At a media conference held on 6 October 2009, CCC Commissioner Roberts-Smith, was asked if he was concerned that taking on an organised crime function would detract from the CCC's misconduct function, and allow more misconduct to occur in the public sector and Parliament. He responded:

*I guess all one can say about that is that if Parliament chooses to give the Commission a function which it presently does not have and for which it presently is not resourced, one would expect some resourcing would be made available to enable us to take on the new function.*¹⁹⁷

375 Since 2007 the Committee has sought and received estimates from the CCC as to the projected cost of funding an enhanced organised crime jurisdiction within the CCC. The figures supplied by the CCC are predicated on the CCC assuming not only an enhanced organised crime jurisdiction, but a serious crime jurisdiction as well. This may reflect the CCC's belief that any move by the Government to increase the CCC's jurisdiction to combat organised crime will be accompanied by a grant of jurisdiction to the CCC to enable the CCC to investigate serious crime. As noted in Chapter 1, a relative unknown is what proportion of its resources the CCC would devote to tackling serious crime that does not have an organised crime aspect or a public sector misconduct aspect. The CCC anticipates that the WA Police will make increasing demands on the CCC's resources in helping to solve "intractable" serious crimes if the CCC is granted a jurisdiction to investigate serious crime. As submitted by the CCC:

*The Commission anticipates that once established, the use of its powers to assist police in successfully dealing with serious crimes will become a regular activity much valued by the police.*¹⁹⁸

376 The first detailed estimate was provided by the CCC to the Committee in 2007. It consisted of three funding models as follows:

Model One (Current Capability) This is based on the Commission's current budget and staffing and involves a prioritisation of investigative activities (using the Case Categorisation and Prioritisation Model) with the investigative crime and misconduct functions competing for resources. The benefit is deemed by the Commission to be budget neutrality, however, it is contended by the CCC that this would have a significant impact on the numbers of concurrent misconduct and crime investigations that could be conducted.

Model Two (Basic Capability) This allows for the establishment of a basic, stand-alone organised crime unit to conduct serious and organised crime investigations. Strengths of the model are noted by the CCC as a reduced impact on misconduct investigations and the ability to commit resources to longer-term proactive investigations. The weaknesses are perceived to be some competition for resources with the misconduct function and a restriction on the number of investigative crime matters that could be undertaken concurrently.

¹⁹⁷ Len Roberts-Smith QC, CCC Commissioner, media conference, 6 October 2009.

¹⁹⁸ CCC submission to the Inquiry dated 2 December 2009, p 31.

*Model Three (Full Capability) The model provides a full, standalone capability, the strengths of which lie in independent resources and the ability to conduct multiple organised crime inquiries. The establishment of such a capability within the CCC with crime commission powers, capable of complementing the organised crime activities of WA Police, is considered by the Commission to be a valuable investment by the State Government.*¹⁹⁹

377 The comparative cost analysis provided by the CCC was as follows:²⁰⁰

Model	Additional Resources	Supplementary Funds
Current Capability	Nil (some internal position transfers may be required)	Nil
Basic Capability	25 full time equivalent positions specialized equipment	\$3.6m recurrent \$0.5m capital
Full Capability	41 full time equivalent positions Specialised equipment	\$6.1m recurrent \$1.75m capital

378 In December 2009 the CCC submitted:

In the absence of clear government guidance as to the intended content of any legislative changes, the Commission is unable to provide any meaningful analysis or information as to likely costs and consequences for the Commission's other functions. ...That being said, I wish to make a number of points.

- (a) *First, the Commission is a creature of its legislature. Accordingly, the Commission's outputs and structure directly reflect the CCC Act.*
- (b) *Second, there is some growth in real terms in the Commission's recurrent budget to accommodate a very modest crime investigative function.*
- (c) *Third, such natural growth will not be sufficient to provide an effective crime function.*
- (d) *Fourth, therefore the Commission will require either some supplementation of its recurrent budget or will have to redirect internal resources to support the crime function.*
- (e) *Fifth, should an internal redirection of resources be required, it is the Commission's very strongly held position that these resources come from its misconduct investigations unit and associated capabilities. [emphasis added]*

¹⁹⁹ CCC, *Submission to the Joint Standing Committee on the Corruption and Crime Commission – An Investigative Crime Function for the Corruption and Crime Commission*, July 2007, p 19.

²⁰⁰ CCC, *Submission to the Joint Standing Committee on the Corruption and Crime Commission – An Investigative Crime Function for the Corruption and Crime Commission*, July 2007, p 20.

*Specifically, the Commission believes that it is essential that it preserve its corruption & misconduct prevention capability.*²⁰¹

379 As can be seen from the above, in the absence of substantial additional funding, an enhanced organised crime fighting capability must come at the expense of the misconduct or education and prevention function of the CCC.

380 In March 2010 the CCC Commissioner gave evidence to the Committee that a significant organised crime functionality within the CCC could be opened up with (a) modest additional funding together with (b) some “cost-shifting” within the CCC. The CCC Commissioner said:

*...what sort of money are we talking about? We are talking, I suppose, about a range of between \$2 million and \$5 million over, say, four or five years and some cost shifting within the commission itself. We can accommodate a degree of cost shifting. That is, overall, not a large amount of money. Let us say \$5 million over five years. We are talking about a police budget of \$950 million. If they cannot do it effectively now with \$950 million, another \$5 million will not make any difference. You will get a lot better bang for the buck out of the commission.*²⁰²

381 The Committee refers to this funding option as the “**Cost-Shifting Option**”.

382 The Committee was most concerned the Cost-Shifting Option would mean that significantly fewer resources would be devoted by the CCC in discharging its misconduct and education and prevention function. This was put to the CCC Commissioner who responded by guaranteeing that the level of oversight of the WA Police would not be diminished if the Cost-Shifting Option was pursued. To the Committee, this obviously meant that the level of oversight of other Government agencies would have to be reduced. That was equally unacceptable to the Committee. By letter dated 24 June 2010 the Committee asked the CCC to provide its estimates for the CCC to provide an effective organised crime fighting capacity, *without diminishing its existing misconduct and education and prevention functions.*

²⁰¹ CCC submission to the Inquiry dated 2 December 2009, paragraphs 27-28.

²⁰² Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 18.

\$42 million over the next 5 years

383 The CCC responded by letter dated 9 July 2010 with the following estimates to fund, in their words, a ‘mature serious and organised crime function’ without any diminution of the CCC’s ability to discharge its existing misconduct and education and prevention functions.

Summary of CCC estimated costs to provide a serious and organised crime function						
Financial year	2011-12	2012-13	2013-14	2014-15	2015-16	
Employee benefits	2,942	5,589	5,655	5,720	5,720	
Other expenses	1,116	2,204	3,714	3,714	3,714	
Additional assets	1,635	408	-	-	-	
TOTAL (\$000’s)	5,693	8,201	9,369	9,434	9,434	42,131

384 Thus, the CCC will require \$42.131 million over five years to have a “mature” serious and organised crime function, without diminishing the CCC’s ability to discharge its existing misconduct and education and prevention function.

385 The CCC advised that the establishment of a mature serious crime and organised crime function would require the CCC to employ an additional 45 full time employees, with roughly half of the additional work force being procured in the year 2011-12, and thereafter running with a full complement of employees. Once established, the CCC’s total full time employees would be 199.

386 The CCC advised that beyond 2015-16, the annual costs of maintaining a mature serious and organised crime function within the CCC will be at least in the order of \$9.4 million.

387 When providing its estimates as to the cost of funding a serious and organised crime function to the Committee, the CCC provided a table showing estimates surpluses of \$7 to \$8 million for the next five years. The CCC then said that if these projected surpluses were redirected to funding the serious and organised crime function then the additional cost would only be \$3.018 million over five years.

388 The Chairman of the Committee wrote to the CCC on 16 July 2010 seeking clarification of these figures in the following terms:

I seek clarification from you on how it can be said that the funding of an increased organised crime function can come out of “projected surpluses”. I would have thought (and I stand to be corrected) that if Treasury were made aware that it is the expectation of the CCC to underspend its appropriation in the order of \$7 to \$8 million each year for

the next five years, then logically Treasury would respond with commensurate reductions in appropriations over that time period and that therefore there would be no more “projected surpluses”.

Accordingly I believe that the Committee is obligated to report to Parliament in terms of \$42 million being required over 5 years, rather than suggesting a figure of \$3.018m over 5 years.²⁰³

- 389 The CCC wrote to the Committee saying that it agreed that the Committee is obligated to report to Parliament in terms of \$42 million being required over five years rather than suggesting a figure of \$3.018 million over five years. With respect to funding out of “projected surpluses” the CCC advised:

First ... DTF [Department of Treasury and Finance] is aware of the prospect of projected surpluses. The Commission is currently in discussion with DTF in regards to this. A likelihood of these discussions will see a revision upwards of the unaudited actual total cost of services for FY 09/10 which will lead to a realignment of the forward estimates over the next five years. Once settled these will result in a considerably smaller amount than the previously identified \$7 to \$8 million, but still a significant forecast surplus will arise. These funds, in the current circumstances absent any legislative amendment, will likely be returned to government.

Second ...the Commission maintains a close and transparent relationship with DTF. DTF has been aware of the likelihood of the projected surpluses absent a change to the Commission’s jurisdiction for sometime. Over the last 18 months, government has signalled the intention to change the Commission’s jurisdiction and given the nature of those changes were unknown it was agreed that it would be imprudent to change the projected forward estimates.

This approach appears congruent with the Attorney General’s response to a question from Mr J R Quigley during the 2010-11 Budget Estimates Committee Hearing on 1 June 2010:

Mr J R Quigley: *In relation to the question that I had my hand up for, the Attorney General referred in a prior answer to the Premier’s public statements about a shift of focus – that is, towards organised crime and the criminal element ... My concern is that there does not appear to be any capacity in the budget for the CCC to take on this extra load. In 2008-09 it was allocated \$23.1 million and then it increased in 2009-10 to \$27 million, and then it increases to \$29 million and to \$32 million. There does not appear to be any allocation of extra funding to cover this extra task. Although they are good statements, there does not appear to be the proper provision.*

Mr C. C. Porter: *That is a very interesting question, because it is predicated on the assumption that what the Premier is speaking about when he talks about reform in this area and a shift in focus in the matters that are being investigated is not true reform. Simply giving the CCC more power and more resources is not*

²⁰³ CCC, letter dated 23 July 2010, p 5.

the type of reform that is being spoken about, but, rather, the power is the expanded use of existing powers in different areas. I think that the way that the CCC needs to be viewed in that regard is that it is not a yearly mutually exclusive exercise. The CCC will be with us for some period and its longevity will depend on its ability to investigate both organised crime and corruption and misconduct in a body such as the police force. The mix of those things will wax and wane over time, from year to year and over the mid-term. My view is that the CCC does not require extra funding; it is already a very well funded organisation.

On face value, the Attorney General appears to indicate the intention that the Commission is to develop a serious crime and organised crime investigative function within the existing parameters of its forward estimates as published on 20 May 2010.²⁰⁴

Committee's findings and recommendations

390 The Committee makes the following findings and recommendations:

Finding 3

- 3.1 The CCC will require \$42.131 million over the next five years to have a "mature" serious and organised crime function, without diminishing the CCC's ability to discharge its existing misconduct and education and prevention function.
- 3.2 Beyond five years the CCC will require ongoing annual expenditure of at least \$9.4 million to maintain a serious and organised crime function.

Recommendation 3

Any suggestion that a new serious and organised crime function of the CCC be funded at the expense of the CCC's existing misconduct function should be rejected.

²⁰⁴ CCC, letter dated 23 July 2010, pp 4-5.

The CCC says it will give more “bang for your buck” than the WA Police

391 In 2007 the CCC pointed to its capital investment since 2003 in technical and other investigative resources and argued that it could establish quickly a highly proficient crime commission capacity. The CCC also said:

While it may be considered that such additional funds could simply be provided to Western Australian Police to enhance its current organised crime investigation activities, the considerable size of that organisation and the significant scale of its other core responsibilities create a real risk that this funding would be effectively spread across the breadth of its activities or redirected away from organised crime investigations as the pressure to reallocate resources in response to other arising priorities and emergencies exerts its influence.

The expenditure of a relatively small amount on the establishment of a new capability, which complements WAPOL’s organised crime activities, through the establishment of crime commission powers within the Corruption and Crime Commission is likely to yield a far higher return on investment than simply placing those funds with WAPOL.²⁰⁵

392 In March 2010, CCC Commissioner Roberts-Smith said:

...what sort of money are we talking about? We are talking, I suppose, about a range of between \$2 million and \$5 million over, say, four or five years and some cost shifting within the commission itself. We can accommodate a degree of cost shifting. That is, overall, not a large amount of money. Let us say \$5 million over five years. We are talking about a police budget of \$950 million. If they cannot do it effectively now with \$950 million, another \$5 million will not make any difference. You will get a lot better bang for the buck out of the commission.²⁰⁶

What the WA Police would do with an extra \$50 million over 5 years

393 In order to test the CCC’s assertion that with additional funding it could deliver more “bang for your buck” than the WA Police with similar additional funding, the Committee asked the WA Police how it would acquit \$42 million over the next five years, with combating organised crime as the prime mandate.

²⁰⁵ CCC, *Submission to the Joint Standing Committee on the Corruption and Crime Commission – An Investigative Crime Function for the Corruption and Crime Commission*, July 2007, pp 20-21.

²⁰⁶ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 18.

394 The WA Police Commissioner responded by saying that the additional funding it would seek over five years would be \$50.36 million to be acquitted as follows:

Additional funding sought by the WA Police to fight organised crime²⁰⁷			
Equipment	Acquisition of technical surveillance equipment, including cutting-edge covert tracking equipment and computer systems. This funding will also facilitate the upgrading of existing Technical Unit equipment and the Telephone Intercept platform along with the appropriate training and licensing costs.		\$27,500,000 over five years
Specialist positions	Number and Level of Staff Required	Estimated Cost per annum	
Computer Network Engineers	2 x Level 6	\$250,000	
Forensic Accountants (unexplained wealth – self funding)	3 x Level 6	\$300,000	
Financial Accountants	4 x Level 5	\$370,000	
Solicitors, DPP secondment	2 x Level 8	\$280,000	
Paralegals	3 x Level 3	\$165,000	
Covert online operatives	2 x Level 5	\$185,000	
Monitoring personnel for Telephone Intercept and Listening Devices	16 x Level 3	\$880,000	
Criminal Intelligence Analysts	5 x Level 5	\$460,000	
Transcribing Services		\$600,000	
Translating Services, Secure and trusted translators	6 x Level 3	\$330,000	
Technicians for build, installation and use of technical equipment	2 x Level 7	\$240,000	
Expert re Mobile Phone Data extraction	2 x Level 5	\$182,000	
Disclosure officers	6 x Level 3	\$330,000	
		\$4,572,000 per annum	\$22,860,000 over five years
TOTAL			\$50,360,000

²⁰⁷ Karl O'Callaghan, WA Police Commissioner, letter dated 13 August 2010.

395 Due to operational sensitivities, the WA Police Commissioner was expressly asked not to particularise, by way of open letter, the nature of the technical equipment that would make up the bulk of the \$27.5 million. The WA Police Commissioner did confirm that the technical equipment was of the type outlined to the Committee during a confidential briefing provided by the WA Police. The Committee's view is that this equipment is needed by the WA Police to keep pace with the increasingly sophisticated counter-surveillance techniques being implemented by organised crime syndicates.

Extra resources should be directed to the WA Police, not the CCC

396 The WA Police are under-resourced in combating organised crime compared to their State and Commonwealth counterparts. Detective Superintendent Charlie Carver, head of the Serious and Organised Crime Division of the WA Police said:

In my estimation we have a long way to go to get to where our other law enforcement agencies, such as the New South Wales Crime Commission and Purana²⁰⁸ over in Victoria, are at.²⁰⁹

397 Mr Anticich, Assistant WA Police Commissioner (Specialist Crime) said:

Certain technologies are now available to other law enforcement agencies throughout Australia that WA Police do not have access to.²¹⁰

398 Deputy WA Police Commissioner Dawson said:

The reality of it is that the capabilities we have technically to assist in investigations is continually under huge demand and it is being stretched.²¹¹

²⁰⁸ The Purana Task Force was the name of the police unit that investigated the Melbourne gangland killings during the 2000s. The task force was established by Victoria's Chief Commissioner of Police Christine Nixon in 2003.

²⁰⁹ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 21.

²¹⁰ Nick Anticich, Assistant WA Police Commissioner (Specialist Crime), *Transcript of Evidence*, 24 March 2010, p 2.

²¹¹ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 8.

399 On one occasion that the Committee is aware of, the WA Police lacked the hardware necessary to continue a covert surveillance that had been commenced in the Eastern States. The WA Police had to plead with a Commonwealth law enforcement agency to access its technology and the people to use it as the WA Police did not have that technology or the requisite skilled personnel. The Committee concurs that it was a most undesirable state of affairs for the WA Police not to have this technology and skilled personnel in its own right. The point was also made that the Commonwealth law enforcement agency, in lending the technology and personnel to the WA Police, had to postpone one of its own operations, which is equally problematic.²¹²

400 Mr Dawson identified the scarcity of technology and associated skilled operators as the real pressure points for the WA Police. Mr Dawson said:

*It is not so much the case that we do not have enough eyes, hands and feet, but it is the right people who have the particular skills and the assets they use that are routinely those pressure points.*²¹³

401 Organised crime syndicates are fast adopters of technology, and for the WA Police to be truly effective, the WA Police must be adequately resourced to counter, and exceed, the ability of criminal syndicates to use readily available technology to stifle law enforcement methods. Mr Anticich said:

*the reality is that organised crime fully understands the enemy, which is law enforcement, and how it operates. It knows our techniques, it understands how we go about our business. It forces us to evolve and to come up with different and innovative techniques to deal with the problem.*²¹⁴

402 Up to date technology and experienced personnel are essential in gathering intelligence. Mr Anticich informed the Committee:

*We must have the capability and technology to surveil and gather operational intelligence as it is unfolding and then we must be able to respond to it. All of those are very resource intensive. They are very expensive and they require both human and financial capital. It is a very expensive game to be involved in.*²¹⁵

²¹² Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, abridged summary of in camera evidence published with permission of Mr Carver.

²¹³ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 10.

²¹⁴ Nick Anticich, Assistant WA Police Commissioner (Specialist Crime), *Transcript of Evidence*, 24 March 2010, p 4.

²¹⁵ Nick Anticich, Assistant WA Police Commissioner (Specialist Crime), *Transcript of Evidence*, 24 March 2010, p 3.

403 Because of WA's isolation, the WA Police are unable to borrow assets from State counterparts. Mr Dawson said:

*We have, in this wonderful state we are in, the tyranny of distance. It is not realistic for us to actually say to one of our allied organisations, "Can you quickly redeploy your assets over the border?"*²¹⁶

404 Further exacerbating the WA Police's problem is that the CCC cannot, under the terms of the CCC Act, loan equipment or personnel to the WA Police.

405 It must be appreciated that even under the proposed Reference Group Model, the CCC will still not be able to, nor be willing to, loan equipment or personnel to the WA Police. The CCC Commissioner wrote:

*It is not contemplated (nor possible under the CCC Act) that WAPOL would simply use the Commission's resources as it deemed necessary. If this was proposed to the Reference Group, the Commissioner of the Corruption & Crime Commission would have to veto such a proposition.*²¹⁷

406 The Committee makes the following finding:

Finding 4

- 4.1** The WA Police are under-resourced in combating organised crime compared to their State and Commonwealth counterparts.
- 4.2** Certain technologies to combat organised crime are now available to other law enforcement agencies throughout Australia that the WA Police do not have access to, and that this deficiency will not be remedied by the Reference Group Model.

407 The Committee finds it very unsatisfactory that the WA Police is not as well equipped in terms of specialist equipment and personnel as its State and Commonwealth counterparts. Emphasis needs to be on giving additional resources to the WA Police to bring them up to the same standard as their States and Commonwealth counterparts, before any consideration should be given to giving additional resources to the CCC to enable it to undertake organised crime investigations.

408 The Committee, the CCC Commissioner and the WA Police are unanimous in the view that the WA Police, as the premier law enforcement agency in Western Australia, should have access to the most up to date technology to combat organised crime. This technology includes state of the

²¹⁶ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 8.

²¹⁷ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

art surveillance and GPS tracking hardware, and other covert recording devices. CCC Commissioner Roberts-Smith agreed with the Committee that:

I think that quite clearly WAPOL ought to be as well resourced as it can possibly be in terms of police officers, physical assets, technical capability and the like.²¹⁸

409 The Committee makes the following recommendation:

Recommendation 4

Emphasis needs to be given by the Government on giving additional resources to the WA Police to bring them up to a comparable standard with their State and Commonwealth counterparts, before any consideration should be given to giving additional resources to the CCC to enable it to undertake organised crime investigations.

Quarantined funding for the Serious and Organised Crime Division

410 The WA Police has a billion dollar annual budget. If the Government were to allocate additional funds to the WA Police with the expressed desire that it be used to combat organised crime, the WA Police Commissioner said he would not give a guarantee that all of the funding would be spent on combating organised crime. During a closed hearing the Committee asked the CCC Commissioner how much funding the Commission would need to undertake an effective organised crime capacity without sacrificing its existing misconduct function. A ballpark figure was used as a discussion point. WA Police Commissioner O'Callaghan was asked how he would acquit the same amount in the fight against organised crime. His answer was instructive:

For argument's sake, if we spent a chunk of that money on telephone intercept capability and covert resources, they would still not be dedicated to organised crime. You have to understand that they could be used for major crime investigations and other types of investigations. It would certainly increase our capacity in terms of technology, but what I could not guarantee to this committee is that all of that capacity would go to organised crime. It would go to the response that WA Police provides generally.

.... But what I will caveat this amount of money with is that we will not guarantee that we dedicate it only to organised crime; it will be dedicated to the police investigative function.²¹⁹

411 From the above there is a real prospect that if additional funding was allocated to the WA Police to combat organised crime, only a percentage would be used to fund the capital and operating needs of the Serious and Organised Crime Division. This evidence supports the CCC's submission that any additional funding to the WA Police to combat organised crime would be a drop in the

²¹⁸ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 9.

²¹⁹ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 June 2010, p 16.

ocean, whereas any additional funding to the CCC would be quarantined and focussed specifically on delivering organised crime outcomes.

- 412 To overcome these concerns, the Committee considered whether funding could be quarantined to the Serious and Organised Crime Division by way of conditional appropriations to the WA Police. Quarantined funding would certainly meet with the approval of the current head of the Serious and Organised Crime Division of the WA Police, Detective Superintendent Charlie Carver, who said to the Committee:

*Serious organised crime fighting is a very expensive business to get into ... I am also very cognisant of the fact that money is finite within WAPOL and that it needs to be distributed across the whole organisation. May I also be so bold as to say that if some funding were to be made available, it be quarantined or tied specifically to the fight against serious organised crime. If this is done, the results will only continue to get better.*²²⁰

- 413 The Committee was informed there was some precedent for conditional funding as moneys are available each year to be spent on the purchase of drugs by the Organised and Serious Crime Division in undertaking controlled operations under the *Misuse of Drugs Act 1981*. Such conditional funding is made pursuant to arrangements that have been in place since 1994.²²¹

- 414 The Committee considered whether conditional appropriations may conflict with the “operational independence” of the WA Police Commissioner.

- 415 The doctrine of “operational independence” can be best demonstrated by the occasions on which it has been invoked. On occasion the Opposition of the day will seek to hold the Police Minister accountable for a perceived shortcoming in policing, to which the Police Minister will invoke the convention of the “operational independence” of the WA Police as a defence. In 1989 the then Premier Hon Peter Dowding (Labor) said in Parliament:

*In this State police matters are not subject to political direction and they should not be...[the Minister for Police] has no part to play in police operational matters. ... I can say to the House and to the public that if people think that Ministers or the Cabinet should be involved in the operational matters of the police, they are sadly mistaken.*²²²

²²⁰ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 18.

²²¹ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 18.

²²² Hon Peter Dowding MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates*, 14 November 1989, p 4450.

416 In 2009 the current Police Minister, Hon Rob Johnson MLA said in response to a question whether the Government would guarantee the continued existence of a police station in a Labor electorate:

*Whether a police station stays open or is closed is basically an operational matter for the Commissioner.*²²³

417 The convention of the “operational independence” of the WA Police has also been used to attack the incumbent Police Minister in cases where the Opposition perceives that the Police Minister has been directing, or otherwise exerting pressure on, the Police Commissioner to further the political agenda of the incumbent Government.

418 In 2000 the then Police Minister Hon Kevin Prince (Liberal) said:

*The general public are entitled to have a police service removed from inappropriate pressure. It is the commissioner’s job to use the best policing methods available against crime and to spend the budget allocated to the service by government accordingly.*²²⁴

419 Hon Jeff Carr, former Minister of Police (1983-1986) in the Brian Burke Labor government, wrote in his autobiography:

Police are different

There is a crucial distinction between the Police portfolio and other Departments or Agencies within the Government and that is the independence of the Police in operational matters. That is, of course, entirely appropriate as it removes the opportunity for any Minister to interfere improperly or to manipulate enquiries being undertaken by the Police.

*While I defend, totally, this independence, it was nevertheless frustrating at times when weaknesses in operational procedures appeared obvious to me as the Minister.*²²⁵

420 Barry Mathews, a former WA Police Commissioner (2000 - 2004) said in a television interview in 2004:

*there will always be differences of view between a commissioner of police and a minister of police, particularly over where the boundaries are in terms of whose responsibility it is for what.*²²⁶

²²³ Hon Rob Johnson MLA, Minister of Police, Western Australia, Legislative Assembly, *Parliamentary Debates*, 8 April 2009, p 3004.

²²⁴ Hon Kevin Prince MLA, Police Minister, Ministerial Statement, 12 October 2000.

²²⁵ Jeff Carr, *I Do Recall*, Sid Harta Publishers Pty Ltd, Victoria, 2008, p 296.

²²⁶ *ABC Stateline* 2004, Western Australia Transcript, <http://www.abc.net.au/stateline/wa/content/2004/s1095479.htm>

421 Section 5 of the *Police Act 1892* (WA) provides that:

... every Commissioner of Police shall be charged and vested with the general control and management of the Police Force of the said State ...

422 Unlike other State jurisdictions this section is not qualified by the words “subject to the directions of the Minister/Governor in Council”²²⁷ In New South Wales the Wood Royal Commission stated:

*In the course of round table discussions it was said that there is a recognised convention that the Minister is concerned with matters of ‘policy’ and not with ‘operational’ matters.*²²⁸

²²⁷ In Victoria, the Chief Commissioner has the superintendence and control of the force, “subject to the directions of the Governor in Council.” *Police Regulation Act 1958* (Vic), s 5(1); In South Australia, the Commissioner is responsible for the control and management of SA Police, subject to the *Police Act 1998* (SA) and “any written directions of the Minister” *Police Act 1998* (SA), s 6; In New South Wales the Commissioner is responsible for the management and control of the NSW Police Force, “subject to the direction of the Minister” *Police Act 1990* (NSW), s 8(1); In Queensland, the Commissioner is responsible for the efficient and proper administration, management and functioning of the police, and must comply with all directions given by the Minister under section 4.6 of the *Police Service Administration Act 1990* (Qld), *Police Service Administration Act 1990* (Qld), ss 4.6 and 4.8; In Tasmania, the Commission is responsible for the efficient, effective and economic management and superintendence of the Police Service “under the direction of the Minister” *Police Service Act 2003* (Tas), s 7(1).

²²⁸ The Hon JRT Wood, *Final Report of the Royal Commission into the New South Wales Police Force*, Volume 2, 1997, p 237 at paragraph 3.26.

423 The Committee's view is that the doctrine of "operational independence" is not transgressed if what is being sought to be appropriated to the WA Police is genuine *additional* funding that would otherwise be directed to the CCC. Accordingly the Committee considers that conditional annual appropriations to the WA Police for spending on its Serious and Organised Crime Division is a viable option for Parliament to consider and makes the following recommendation:

Recommendation 5

If the Government considers the fight against organised crime deserves additional funding, then such funding is best made by conditional annual appropriations to the WA Police for spending on its Serious and Organised Crime Division.

CHAPTER 6 WHY THE REFERENCE GROUP MODEL IS A BAD IDEA

Introduction

424 In the current political climate where the Government is committed to giving more powers to the WA Police, the Committee is uncomfortable by any proposal that may lead to:

- a perception that the CCC is not authentically independent of the WA Police;
- an increased risk to the integrity of the CCC; and
- reduced funding to the CCC's misconduct function.

425 The Reference Group Model is such a proposal.

426 However the Reference Group Model also has the promised dividend of convicting more persons who engage in organised crime.

427 At the heart of the Committee's findings is a view that the risks and problems associated with the Reference Group Model are too significant to outweigh the potential benefits, especially as alternative law reform can achieve similar outcomes with less risk.

Dispute over power of veto

428 The Committee understands that there is still a dispute as to whether and in what circumstances the WA Police will be able to exercise a power of veto with respect to a CCC organised crime investigation. Mr Anticich, Assistant Commissioner of WA Police, informed the Committee:

*We think we have addressed all those prickly issues. There is potentially one around veto that seems to be a little bit up in the air, around whether in fact there is a right of veto by, I think, the commissioner of Western Australia Police. I cannot think of circumstances in which that might occur, to be quite honest, but it is still on the table for discussion. **Our belief** is that it is a functional engaging process that will enable discussion around a successful decision.²²⁹*

(emphasis added)

²²⁹ Nick Anticich, Assistant Commissioner of WA Police (Specialist Crime), *Transcript of Evidence*, 24 March 2010, pp 16-17.

429 The WA Police are of the view that as the primary law enforcement body in the State, they should have the final say of the tactical oversight of any operations involving the CCC. Deputy WA Police Commissioner Dawson said:

*It is not contemplated that the CCC would go off on its own to investigate organised crime. It would only be under the umbrella of the joint approach.*²³⁰

430 The CCC on the other hand has informed the Committee:

*The Commission intends bringing these capabilities, in conjunction with the Commission's investigators, to bear on crime targets, both **independently** of, and in partnership with WAPOL and other Federal and State law enforcement bodies in order to both supplement and complement the capacity and strengths of these agencies.*²³¹

(emphasis added)

431 A key feature of the Reference Group Model is that both the WA Police Commissioner and the CCC Commissioner must agree before the CCC can conduct an organised crime investigation. The CCC Commissioner has acknowledged to the Committee that the WA Police Commissioner has, by virtue of this requirement, an effective right of veto over any CCC proposal to conduct an organised crime investigation.

Chairman ...is it the case that the police would have the power of veto or right of veto on any joint operation?

Mr Roberts-Smith: Yes, that would inevitably follow, as would the commission. The concept simply is that the commissioner of WA Police and the commissioner of the CCC would have to agree on approving a reference of an organised crime investigation in which the commission could be involved. It necessarily follows from that that if one of them did not, it could not happen, or one of them later changed his or her mind, then it would stop.

Hon Matt Benson-Lidholm: It is not just a matter of the police commissioner vetoing —

Chairman : It has to be unanimous.

Mr Roberts-Smith: That is right.

Chairman: As soon as one does not agree, it is effectively a right of veto.

Mr Roberts-Smith: Yes.²³²

432 Even in situations where the CCC proposes to undertake an organised crime investigation by itself, or in conjunction with a law enforcement agency other than the WA Police, permission of

²³⁰ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, pp 4-5.

²³¹ CCC submission to the Inquiry dated 2 December 2009, paragraph 7.

²³² Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 2 December 2009, p 11.

the Reference Group (and by necessary implication, permission of the WA Police Commissioner) will be required. CCC Commissioner Roberts-Smith informed the Committee:

*Even if WAPOL was not the agency with which the commission was then working, it would still be done only by way of a reference from the Commissioner of Police and the Commissioner of the Corruption and Crime Commission and there would still be a WAPOL representative on the next level down, the joint management group. WAPOL would be involved all the way through, whether we were working with it on a particular investigation or with some other agency, such as the AFP, for example, or Customs or something like that.*²³³

433 The CCC does not consider that the right of veto of the WA Police will impinge on the CCC's independence. Once the CCC has received a grant of authority from the Reference Group to conduct an organised crime investigation, then the CCC's view is that it will be able to undertake that organised crime investigation without further direction or interference from the WA Police. The CCC has informed the Committee:

*As a member of the Reference Group, the Commissioner of Police will have no capacity to oversight or directly influence the priority given to any Commission investigation, the amount of resources allocated, or how they're deployed; those matters will be determined by the Commissioner of the Corruption and Crime Commission. The **intent** of the Reference Group is to enable cooperation through the demarcation of responsibilities and ensuring that the highest priority criminal targets are engaged without affecting the independence of either this Commission or WAPOL.*²³⁴

434 The Committee notes that the above passage indicates that once the CCC has received a grant of authority from the Reference Group, the WA Police Commissioner will be unable to revoke the grant of authority unilaterally. However, as previously noted, CCC Commissioner Roberts-Smith has said "*It necessarily follows from that that if one of them did not, it could not happen, or one of them later changed his or her mind, then it would stop.*"²³⁵ There is an obvious contradiction here and reinforces the Committee's concern that significant elements of the Reference Group Model have yet to be agreed.

435 The Committee is concerned as to references by the CCC to the "intent" of the Reference Group Model, and the WA Police's expressions of "belief" as to what is envisaged by the Joint Reference Group. Clearly, important details concerning the power of veto by the WA Police Commissioner have not been resolved including:

- whether the WA Police will have the ability to rescind an authority granted by the Joint Reference Group; and
- who will have the final say where a WA Police organised crime investigation overlaps with a CCC misconduct investigation.

²³³ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 17 June 2009, pp 9-10.

²³⁴ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

²³⁵ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 2 December 2009, p 11.

436 The Committee makes the following finding:

Finding 5

Significant elements of the Reference Group Model are yet to be agreed between the CCC and the WA Police. These elements have important implications for the independence of each agency.

The expectations of the WA Police will not be met

437 The WA Police see the benefit of the Reference Group Model as being able to tap into the resources of the CCC to assist the WA Police in their fight against organised crime. Deputy WA Police Commissioner Dawson told the Committee on 23 September 2009:

*The way in which the CCC can assist us, as the Commissioner touched on, is that its additional resources and its own activities can complement what is happening with Western Australia Police investigations, whether it is through further technical assistance, covert assistance and all sorts of things. The CCC has capabilities that can complement what WA Police is doing, and it can deal with those further. What we are not seeking, and nor is the CCC seeking, is for the CCC to have its own unfettered investigations into organised crime.*²³⁶

438 The CCC Commissioner, however, has made it clear that:

- He will not permit WA Police officers to work within the CCC.

*The Commission does not contemplate seconding WAPOL officers to the Commission in respect of either its misconduct or organised crime function.*²³⁷

- The WA Police will have no say in how assets of the CCC are to be deployed

*It is not contemplated (nor possible under the CCC Act) that WAPOL would simply use the Commission's resources as it deemed necessary. If this was proposed to the Reference Group, the Commissioner of the Corruption & Crime Commission would have to veto such a proposition.*²³⁸

- Once the Reference Group grants authority to the CCC to undertake an organised crime investigation, the priority, allocation of resources, and the manner in which the

²³⁶ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, pp 4-5.

²³⁷ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

²³⁸ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

investigation will be undertaken will be decisions solely made by the CCC without direction from the WA Police.

*the Commissioner of Police will have no capacity to oversight or directly influence the priority given to any Commission investigation, the amount of resources allocated, or how they're deployed; those matters will be determined by the Commissioner of the Corruption and Crime Commission.*²³⁹

- The CCC will not reveal to the WA Police the true measure of their covert surveillance capabilities, nor reveal their network of informants and other sources of intelligence.

*WAPOL is not aware of the full extent of the commission's capability. That is a deliberate policy on the part of the commission, because obviously in the exercise of our misconduct function, if we are investigating experienced police officers for corruption or whatever else, we will often be dealing with people who are very experienced in surveillance and things of that kind, and we need to stay ahead of the game, as it were, and to have capabilities for surveillance and so forth of which they are not aware; and we do have that.*²⁴⁰

- The WA Police can only expect to receive the final product of the CCC's intelligence gathering capabilities, that is to say, the intelligence reports, and even then the CCC reserves the right to censor such information as would compromise CCC's investigations into the WA Police.

*WAPOL would have the benefit of the output of the Commission's technological and other special capabilities, but not have direct access to the assets themselves.*²⁴¹

⁴³⁹ The Committee is concerned that expectations of the WA Police will not be met by the Reference Group Model and that on the occasions when the WA Police request assistance from the CCC by way of access to CCC's assets, their requests will be rebuffed.

A clash of two cultures

⁴⁴⁰ The CCC and the WA Police have acknowledged the tensions between the respective agencies by virtue of the CCC's role as the overseer of the WA Police.

⁴⁴¹ There are also clear differences in culture between the two agencies. The CCC places a premium on security, whereas the WA Police's law enforcement role necessitates rapid transmission of real time information. In 2002 the Commission for Review of FBI Security Programs noted:

²³⁹ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

²⁴⁰ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, pp 6-7.

²⁴¹ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

*In a criminal investigation, rules restricting information are perceived as cumbersome, inefficient, and a bar to success. A law-enforcement culture grounded in shared information is radically different from an intelligence culture grounded in secrecy.*²⁴²

442 The CCC and the WA Police submit that the tensions and differences in culture are not incompatible with the two organisations working together. Both organisations say that at the highest echelons of each organisation there is a mutual respect and desire to co-operate. Nevertheless both organisations acknowledge that the tensions between the two agencies cannot be entirely eradicated.

443 Sometimes these tensions boil over into public disputes. On 18 October 2006 *The West Australian* newspaper ran an article which raised apparent concern on the part of an ‘unidentified’ WA Police officer that search warrants executed by the CCC on 11 July 2006 were compromised from the first minute, that there was no methodology and the search was disorganised.²⁴³ WA Police Commissioner O’Callaghan, was quizzed about this article by the then Chairman of the Committee on 25 October 2006. WA Police Commissioner O’Callaghan indicated:

*...some fundamental differences of opinion with the CCC about some of the ways in which they go about their business.*²⁴⁴

444 The Committee wrote to the CCC seeking clarification as to whether there were any significant differences of opinion between the WA Police and the CCC as to how the CCC conducts its business. CCC Commissioner Roberts-Smith responded to the Committee in a written submission dated 24 July 2007. The CCC Commissioner wrote:

*This incident perhaps highlights cultural differences and natural tensions that exists when the two agencies are working together while, concurrently, one maintains the responsibility of general oversight of the activities of the other. It is inevitable that some police officers will be critical and distrustful of an agency oversighting their conduct.*²⁴⁵

445 In Queensland, the then Chairperson of the Crime and Misconduct Commission, Mr Robert Needham, acknowledged that there was a tension between the CMC’s role as crime fighter, and CMC’s role as corruption fighter when engaging in joint operations with the Queensland Police Service:

*...with individual police officers we are seen as the bogeyman because we investigate complaints against them and we are not particularly liked because of that. So, there is that tension...*²⁴⁶

²⁴² *A review of FBI Security Programs*, Commission for Review of FBI Security Programs, March 2002, pp 1-2.

²⁴³ ‘Inside Cover’, *The West Australian* newspaper, 18 October 2006, p 2.

²⁴⁴ Karl O’Callaghan, WA Police Commissioner, *Transcript of Evidence*, 25 October 2006, p 15.

²⁴⁵ CCC submission dated 24 July 2007, p 23.

²⁴⁶ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, pp 4-5.

The Reference Group Model will not adequately address tensions between the two agencies

- 446 As noted in Chapter 1 of this Report there appears to be little or no prospect that under the Reference Group Model, officers from the CCC and the WA Police will work together in the same office, use the same surveillance teams, access the same informants and share the same databases. Rather, the way that the CCC and the WA Police envisage working together is that each agency will operate independently, using their own assets and personnel, but agree upon common objectives and will share intelligence.
- 447 Thus the WA Police and the CCC contemplate working in parallel with each other with shared objectives and sharing intelligence. There will be a few select individuals in the highest echelons of each agency that will be privy to the overall situation and who will coordinate information flow on a needs-to-know basis to the operatives at ground level. This will achieve, it is said, a measure of co-ordination between the activities of each agency and will prevent, as much as possible, the agencies from unwittingly overlapping with each other. The integrity and independence of each agency is also said to be preserved. Deputy WA Police Commissioner Dawson informed the Committee that the proposed working arrangement may involve the operatives in each agency being unaware of the day to day activities of their counterparts, but that this was nevertheless an efficient model for combating organised crime.
- 448 The Committee was most concerned to receive evidence and form a view as to whether the proposed working arrangement between the CCC and the WA Police would work in practice, and the extent to which the inherent distrust that must exist between an oversight agency and law enforcement agency could be overcome. The Committee took evidence from Queensland, Hong Kong and the current head of the Serious and Organised Crime Division, WA Police. The following is a summary of the evidence received.

The Queensland experience

- 449 In Queensland, the Chairman of the CMC, Robert Needham, informed the Committee that in his view, unless the CCC accepted secondees from the WA Police to work within the crime fighting arm of the CCC, it would be unlikely for the CCC to ever have meaningful co-operation with the WA Police. He said:

*quite frankly, if they do not have police officers in the CCC, I do not know that there will ever be good cooperation in investigating together organised crime. You might get it in the use of the CCC's hearing powers...*²⁴⁷

- 450 Over a quarter of CMC's staff comprise serving officers of the Queensland Police Service (QPS) (82 out of a 315). All of the CMC's surveillance officers are serving QPS officers. All of CMC's

²⁴⁷ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, pp 20-21.

technical officers (being the operatives who install listening devices) bar one are serving QPS officers.

451 While the head of the CMC's crime fighting area is a civilian lawyer, the next senior position in the CMC's crime fighting unit is a serving chief superintendent of the QPS. The chief superintendent liaises directly with the chief superintendent in the State Crime Operations Command of the QPS. Most of the interaction between the QPS and the CMC's crime fighting unit occurs by way of this liaison, as well as direct communications between QPS officers on the one hand and serving QPS officers in the crime fighting unit of the CMC on the other.

452 Mr Needham indicated that were it not for the presence of serving QPS officers in CMC's crime fighting unit, the CMC would not be accepted as a working partner by the QPS. Mr Needham said:

But if you were looking at the idea of the CCC doing the sort of work that we are doing. I think it would not be well accepted by WA Police at all when there are more civilians within the CCC. In our crime area, they are working in with mainly the police here and with civilians as well because it is headed up by a civilian, but we have a chief superintendent of the Queensland Police Service as the head police officer in our crime area. He liaises straight back into the QPS with the chief superintendent in the state crime operations command. If we did not have that sort of situation ... we would not be looked at by the Queensland Police Service.²⁴⁸

453 The Committee also took evidence from Mr Felix Grayson. Mr Grayson is a Former Assistant Commissioner of the CMC. He was the most senior QPS officer within the CMC. In September 2009 Mr Grayson retired. During his 36 years with the Queensland Police Service he performed various roles, the greater proportion of which involved criminal investigation, including organised crime and official misconduct and corruption.

454 In 2003 Mr Grayson took over as Director of Crime Operations at the CMC at the rank of Detective Chief Superintendent. He was responsible for major and organised crime investigations conducted by the CMC in partnership with the QPS and other law enforcement agencies. This role was recognised as being critical to the success of operations as it is the main interface between the CMC and the QPS and it is responsible for operational decision making, the negotiation and acquisition of both physical and human resources from the QPS to support operations, and solving a range of issues that arise when two or more agencies operate together.

455 In January 2007 Mr Grayson was promoted to Assistant Commissioner of the CMC. As assistant commissioner he was the director of witness protection and operation support and the officer in charge of the CMC police group. He sat on the senior executive of both the QPS and the CMC. As such, he was able to liaise directly with the chief executive officers of both organisations, thereby enabling him to garner support for operations and resolve issues or problems at the most senior level. This applied equally to misconduct and crime investigations.

²⁴⁸ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, p 16.

456 During his 10 years experience investigating organised crime as part of an oversight body (the Queensland Criminal Justice Commission and then the CMC) and conducting joint operations with the QPS, Mr Grayson encountered the following issues and difficulties with police working together with its oversight agency to combat organised crime.

457 The first issue identified by Mr Grayson is a conflict of interest. Mr Grayson said:

I do not believe the investigation of organised crime sits comfortably with an anti-corruption body, particularly when you are relying on the organisation you are overseeing — and at times investigating — for operational support and intelligence. One moment you are seeking assistance and the next you are investigating its members. There have been occasions on which the very officers who are part of our joint investigations were targeted and prosecuted by us.²⁴⁹

458 The second issue identified by Mr Grayson is the resentment of the oversight body by state police. Mr Grayson said:

I strongly assert that this issue presents the biggest issue for the Corruption and Crime Commission should it adopt an organised crime function. The cold, hard fact of the matter is that no organisation likes its oversight body or auditor. This is particularly so with police organisations because they possess a strong culture of solidarity and they tend to close ranks when under investigation.²⁵⁰

459 The third issue identified by Mr Grayson is operational integrity. Mr Grayson said:

Maintaining operational security can be problematic when there is joint agency management and the day-to-day running of operations. The risks are heightened when you have too much rotation of staff provided by the state police. This is an area in which petty jealousies and resentment can result in the release of operational information — for example, sensitive intelligence and tactical information being passed on to unauthorised personnel or, even worse, informants. I saw this happen on occasions during investigations that I worked on. This not only compromises the operation but also places covert operatives and investigating police at great risk.²⁵¹

460 Mr Grayson concluded by saying:

The success of joint task forces and operations depends on trust and respect amongst its members and between the agencies involved. It is my contention that this has been and always will be difficult if the joint agency task force sits within an anti-corruption body, or what has often been referred to as a schizophrenic organisation, such as the CMC.

While the CJC and CMC have had many successes over the years, the abovementioned issues have been unnecessary distractions that have prolonged operations and/or wasted

²⁴⁹ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 21.

²⁵⁰ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 4.

²⁵¹ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 4.

*time and resources; alternatively, they have caused investigations to be terminated prematurely, thereby attaining results that could have been far better.*²⁵²

461 Mr Grayson has approved the following as representing his view:

I would advise WA Parliament not to permit the CCC to conduct joint operations with the police, but to enhance the police access to extraordinary powers by the CCC. Such an emphasis would facilitate the greatest incidence of the CCC and the police working together rather than in competition with each other.

*If [WA Police] are able to access extraordinary powers more easily and have the resources to conduct investigations, that is the way to go.*²⁵³

462 A more detailed account of the evidence of Mr Needham and Mr Grayson can be found in Appendix Three to this Report.

The Hong Kong experience

463 The Committee travelled to Hong Kong to gather evidence from the Independent Commission Against Corruption in Hong Kong (**Hong Kong ICAC**) and the Hong Kong Police Force (**HKPF**).

464 When the Committee undertook this Inquiry, it was under the impression that joint operations between Hong Kong ICAC and HKPF were a regular occurrence and that the Committee could derive valuable insight into how the CCC could work with the WA Police by speaking with officials from Hong Kong. The basis of this belief was Hong Kong ICAC's web site, which devoted a significant section²⁵⁴ to spruiking the success of a joint taskforce between Hong Kong ICAC and HKPF which investigated allegations of fraud and corruption in the wake of the collapse of the Overseas Trust Bank (OTB) in 1985. The task force, which was labelled a 'dream team of Hong Kong crime-fighters' worked together for 16 months and led to five convictions, including the three top management positions of the bank, and two persons extradited from the United States. The website noted that building up mutual trust among officers from different work cultures within a short period of time was no easy task. Initial interaction was stilted and awkward as demonstrated by the following transcript reproduced on Hong Kong ICAC's website:

Policeman: Sir, I'm PC 7324

ICAC investigator: Don't call me 'sir', call me by my name! We all address even our chief commander as Tony.

Policeman: Yes, sir!

²⁵² Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 5.

²⁵³ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 17.

²⁵⁴ http://www.icac.org.hk/new_icac/eng/cases/otb/index.htm

ICAC investigator: I've told you not to call me 'sir', haven't I?

Policeman: No, sir! You are indeed sir. How can I not call you sir?

ICAC Investigator: -----

465 Hong Kong ICAC Head of Operations Tony Kwok Man-wai, said:

This was the first joint task force between Police and the ICAC. And due to historical reasons, I was initially quite worried whether we could build up mutual trust. In fact, in the beginning, there were some misunderstandings. On one occasion, the ICAC officers gathered together for a meeting to discuss some ICAC internal matters. That created some concerns from the Police officers. They thought that we were talking about police corruption. In the end, I decided all these meetings should be transparent and open. Every morning I chaired a meeting with all officers present so that the progress could be discussed among all of us. I always ensured in every team, there were an ICAC officer and a police officer present so that they could work together. In a way, we were lucky because in the beginning we were faced with a crisis. This crisis enabled us to work together for the same goal and it worked.²⁵⁵

466 When the Committee arrived in Hong Kong and began interviewing witnesses, it quickly became apparent that apart from the OTB case, significant joint operations between Hong Kong ICAC and HKPF were few and far between. Reference was made to a joint task force formed in 2001 which operated out of Hong Kong ICAC's head office where HKPF concentrated on the money laundering aspect of the investigation, while Hong Kong ICAC concentrated on bankers being bribed for providing assistance to the money laundering syndicate through various bank accounts. But apart from this 2001 operation, representatives of HKPF said that joint operations with Hong Kong ICAC were very rare and that there was nothing that Hong Kong ICAC had to offer HKPF by way of investigative capability.

467 The Committee notes that in the rare example of a joint operation between Hong Kong ICAC and HKPF, the Hong Kong ICAC Head of Operations said that the way he overcame initial mistrust by HKPF officers was to ensure that "in every team, there were an ICAC officer and a police officer present so that they could work together".²⁵⁶

468 A more detailed account of the evidence gathered by the Committee in Hong Kong can be found at Appendix Four to this Report.

²⁵⁵ Transcript of interview with Tony Kwok Man-wai, ICAC website, located at, http://www.icac.org.hk/new_icac/eng/cases/otb/cooperate.htm on 22 February 2010.

²⁵⁶ Transcript of interview with Tony Kwok Man-wai, ICAC website, located at, http://www.icac.org.hk/new_icac/eng/cases/otb/cooperate.htm on 22 February 2010.

Detective Superintendent Charlie Carver

469 Detective Superintendent Charlie Carver is the current head of the Serious and Organised Crime Division of the WA Police. As he will be charged with the responsibility of implementing the Reference Group Model if it comes into operation, the Committee was keen to ascertain his views as to whether the Reference Group Model would work in practice.

470 At the outset Mr Carver was very complimentary of the CCC regarding the manner in which it provided assistance to the WA Police in conducting coercive hearings during Operation Jupiter. Also, he clearly relished the possibility of working closely with the CCC to combat organised crime. However, he was concerned as to the following views expressed by the CCC Commissioner as to how he (the CCC Commissioner) saw the Reference Group Model working:

The Commission does not contemplate seconding WAPOL officers to the Commission in respect of either its misconduct or organised crime function.

It is not contemplated (nor possible under the CCC Act) that WAPOL would simply use the Commission's resources as it deemed necessary. If this was proposed to the Reference Group, the Commissioner of the Corruption & Crime Commission would have to veto such a proposition.

... the Commissioner of Police will have no capacity to oversight or directly influence the priority given to any Commission investigation, the amount of resources allocated, or how they're deployed; those matters will be determined by the Commissioner of the Corruption and Crime Commission.²⁵⁷

WAPOL is not aware of the full extent of the commission's capability. That is a deliberate policy on the part of the commission, because obviously in the exercise of our misconduct function, if we are investigating experienced police officers for corruption or whatever else, we will often be dealing with people who are very experienced in surveillance and things of that kind, and we need to stay ahead of the game, as it were, and to have capabilities for surveillance and so forth of which they are not aware; and we do have that.

WAPOL would have the benefit of the output of the Commission's technological and other special capabilities, but not have direct access to the assets themselves.²⁵⁸

471 Mr Carver was concerned, on reading the above, that the CCC would enter into the proposed Reference Group Model with an attitude and philosophy that would not be conducive to a productive working relationship. Mr Carver said:

The [Reference Group] model could be a great idea, but it will not work with the current attitude and philosophy.²⁵⁹

²⁵⁷ Chris Shanahan SC, Acting CCC Commissioner, letter dated 16 April 2010, p 3.

²⁵⁸ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, pp 6-7.

472 Mr Carver was most concerned about the CCC Commissioner's statement that he would not permit secondees from the WA Police to the CCC. Mr Carver said:

I would like to point out the comments of the Commissioner of the CCC ... that the Commission does not contemplate seconding WAPOL officers to the Commission in respect of either its misconduct function or organised crime function. If that is the case, it is my view that the relationship will not work as effectively as it could as it demonstrates the distrust of WAPOL officers, which, again on the coalface, makes it very difficult. I cannot see how a workable agreement could be reached if one party is not willing to disclose or work with the other agency's officers. As stated by Mr Grayson, a commitment to joint operations when one body is an oversight body is very problematic. The dynamic nature of serious and organised crime investigations dictates the need to have a flexible and harmonious investigative team. They cannot work in isolation or silos without open communication lines from top to bottom and the will to cooperate and share.²⁶⁰

473 Mr Carver said:

I will go on record to say that I would prefer to work with the CCC using their abilities with technical capabilities, but there has to be a need to share. If they do not share, I would say that would be almost impossible to work with.²⁶¹

Committee's observations

474 The evidence from Queensland, Hong Kong and Mr Carver is that in order to minimise distrust and promote meaningful co-operation between an integrity agency and a police force, the integrity agency must be prepared to admit integration and co-mingling of the rank and file of the police force with the operatives of the integrity agency. In Hong Kong it appears that integrated joint operations are the rare exception. In Queensland it appears that the CMC crime area is effectively a branch office of the QPS, subject only to a civilian boss.

475 In Western Australia, the CCC Commissioner has made it abundantly clear that he will not permit WA Police officers to work within the CCC. There appears to be little or no prospect that under the Reference Group Model, officers from the CCC and the WA Police will work together in the same office, use the same surveillance teams, access the same informants and share the same databases. Rather, the way that the CCC and the WA Police envisage working together is that each agency will operate independently using their own assets and personnel, but agree upon common objectives and will share intelligence.

²⁵⁹ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 17.

²⁶⁰ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 14.

²⁶¹ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 12.

476 In light of:

- the CCC Commissioner's evidence that he will not allow police officers to integrate with CCC staff;
- Mr Needham's evidence that unless the CCC accepted secondees from the WA Police to work within the crime fighting arm of the CCC, it would be unlikely for the CCC to ever have meaningful co-operation with the WA Police;
- Mr Grayson's evidence; and
- Mr Carver's evidence,

the Committee makes the following finding:

Finding 6

The Reference Group Model will do little if anything to alleviate feelings of mistrust held by the WA Police towards the CCC.

477 Mr Carver agreed with this finding saying:

... I concur with this finding if the present arrangements are kept. There has to be a willingness to cooperate and exchange information to achieve results. Due to the misconduct oversight of WAPOL by the CCC, I do not know whether this could ever be resolved as it is problematic. I use the New South Wales Crime Commission as an example. It does not have misconduct oversight, so the relationship works very well and has clear lines of responsibility. I am on the telephone at least four times a week to the New South Wales Crime Commission and work in conjunction with it. It is working very, very well with seconded officers from New South Wales [Police]...²⁶²

²⁶² Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 15.

Competition and inefficiencies

478 In his submission to this Inquiry, the current Parliamentary Inspector, Christopher Steytler, said:

*Human experience suggests that, when separate bodies are tasked (in a comparatively small city) with the same function, there will be competition between them, with resulting inefficiency and duplication of effort. This might especially be so when one of the two bodies has the responsibility for investigating misconduct and corruption on the part of the other.*²⁶³

Competition for funding

479 The competition referred to above was apparent when the CCC Commissioner gave evidence as to the additional funding that would be needed for the CCC to carry out organised crime investigations:

*... what sort of money are we talking about? We are talking, I suppose, about a range of between \$2 million and \$5 million over, say, four or five years and some cost shifting within the commission itself. We can accommodate a degree of cost shifting. That is, overall, not a large amount of money. Let us say \$5 million over five years. We are talking about a police budget of \$950 million. If they cannot do it effectively now with \$950 million, another \$5 million will not make any difference. You will get a lot better bang for the buck out of the commission.*²⁶⁴

480 Notwithstanding the natural competition, CCC Commissioner Roberts-Smith agreed with the Committee that:

*I think that quite clearly WAPOL ought to be as well resourced as it can possibly be in terms of police officers, physical assets, technical capability and the like.*²⁶⁵

481 The Committee makes the following finding:

Finding 7

Should the CCC be given an enhanced organised crime function, it will compete with the WA Police for funding to discharge the same function.

²⁶³ Christopher Steytler QC, Parliamentary Inspector, submission to the Inquiry dated 29 January 2010, p 20.

²⁶⁴ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 18.

²⁶⁵ Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 31 March 2010, p 9.

482 Mr Carver agreed with this finding and said:

... I concur with this finding and have some serious concerns about the ability of the CCC, with limited human resources even in the future, to be able to operate in the same jurisdiction. The CCC will fall across the same targets in Western Australia that law enforcement agencies are working on. The AFP, customs and the ACC are currently operating in the same environment. These law enforcement agencies have a close working relationship with WAPOL and share on a daily basis. I have customs people embedded in my office upstairs on the seventh floor of Curtin House. I have AFP officers embedded as well. The sharing of information is constant; it has to be to keep in front. They share information and work together on joint agency operations as previously shown to you. The CCC has indicated that it is not willing to share or disclose methodology or information with WAPOL. Again, this is problematic.²⁶⁶

Skilled personnel

483 The Committee was informed that the WA Police faces a very real challenge to retain police officers with the specialist skills necessary to combat organised crime. Personnel trained and experienced in undertaking covert surveillance, and in highly specialised forensic sciences (including forensic accounting) are highly marketable in Australia, and are regularly poached by rival law enforcement agencies (Federal and interstate), the private sector, and the CCC itself. Deputy WA Police Commissioner Dawson said:

*On the point of remuneration, analysts attract a higher grade and remuneration at the CCC than they do in the Western Australia Police—that is just one example. **So they will get purloined, if I can use that term, by not only the CCC, but they will also be grabbed by Deloitte or any other consultants that might want to protect their own assets; they will particularly go to law enforcement, such as police, and say, “We can use your capability and we’ll pay you a handsome dividend...***

[what] hurts us as an organisation is when we have just trained a tactical or a technical operative and we have invested a lot of public money to do that and then they get a skill set which is very, very appealing to other employers, both across government and private enterprise; we want to try to actually hang on to these people but they are in great demand.²⁶⁷

(emphasis added)

²⁶⁶ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 16.

²⁶⁷ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 10.

484 The Committee can see that the problem of the CCC recruiting skilled personnel from the WA Police will become more exacerbated if the CCC is given the jurisdiction to conduct organised crime investigations.

485 The Committee makes the following finding:

Finding 8

The problem of the CCC recruiting skilled personnel from the WA Police will become more exacerbated if the CCC is given the jurisdiction to conduct organised crime investigations.

486 Mr Carver agreed with this finding and said:

*I concur with this finding and if the CCC were to recruit experienced investigators and analysts from WAPOL after investment in the training and development of investigators, it would seriously deplete our ability to conduct and succeed in serious organised crime investigations.*²⁶⁸

Unwillingness to share information

487 There may well be a reluctance of the WA Police to share information.

*Police develop a proprietary interest in their cases, especially ones in which they have invested special efforts as for example dangerous arrests, long stakeouts, or simply the nature of the particular case.*²⁶⁹

488 Similarly the CCC will not reveal to the WA Police the true measure of their covert surveillance capabilities, nor reveal their network of informants and other sources of intelligence.

²⁶⁸ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 16.

²⁶⁹ *The Independence of the Prosecutor – A Police Perspective*, paper delivered by Detective Chief Superintendent Rod Harvey, New South Wales Police Service, accessed at www.aic.gov.au/events/aic_upcoming_events/1996/~media/conferences/prosecuting/harvey.ashx on 8 February 2010.

The Reference Group Model is inefficient

489 In 2002, the Commission for Review of FBI Security Programs noted:

*Operational efficiency is important, and tightening controls on classified information will come at a cost in resources and efficiency.*²⁷⁰

490 It seems an unremarkable proposition that the tight controls over information flow that will be implemented in the Reference Group Model must lead to operational inefficiencies. Information flow within one organisation is difficult enough to facilitate. The problems of sharing information across different organisations, where operational security is a paramount consideration, must be even more difficult.

491 Detective Superintendent Charlie Carver, head of the Serious and Organised Crime Division of the WA Police, spoke of the importance of trust that must exist between law enforcement agencies for them to work effectively together. Mr Carver said that if the WA Police could not work together with the CCC “in the same environment” using the CCC’s technology it would be “problematic”.

492 Mr Carver agreed with the proposition put to him that the CCC, in order to carry out an organised crime function, would need to establish a similar network of connections and relationships with law enforcement agencies across Australia that the WA Police had, and that this would lead to “duplication right across the board”. Mr Carver said:

*WAPOL currently conducts joint operations with LEAs [Law Enforcement Agencies] across the country on a regular basis. It may be confusing for other LEAs to deal with an agency of similar operational background and investigative practices if both are conducting investigations into serious organised crime.*²⁷¹

493 Mr Carver said:

*Having another agency investigating organised crime in this state would only confuse things. It would be easier if sections of the CCC act were changed to allow investigations on the request of the Commissioner of Police to the CCC for exceptional powers and if those powers were broadened for greater use. If the CCC cannot assist and our own capabilities are inadequate, as we have found them to be in the past, other avenues and ways will have to be found, including utilising other law enforcement agencies such as the ACC and the AFP. The CCC will have a stake in fighting organised crime by way of coercive hearings and the utilisation of technical ability not presently held by WAPOL.*²⁷²

494 The Committee is of the view that the Reference Group Model will lead to inevitable overlap of roles, duplication of deployed resources and hinder the free flow of intelligence. Furthermore,

²⁷⁰ A review of FBI Security Programs, Commission for Review of FBI Security Programs, March 2002, p 73.

²⁷¹ Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 16.

²⁷² Charlie Carver, Detective Superintendent, Serious and Organised Crime Division, WA Police, *Transcript of Evidence*, 2 August 2010, p 17.

such difficulties will be magnified by the CCC Commissioner's insistence that the WA Police will not be allowed to work within the CCC as secondees. The Committee makes the following finding:

Finding 9

The Reference Group Model is an inefficient way to combat organised crime.

495 For the sake of clarity the Committee does not criticise the CCC Commissioner for deciding not to allow the WA Police to work within the CCC as secondees. To allow WA Police secondees within the CCC in its proposed organised crime unit would clearly increase the risk of the CCC's integrity oversight function being compromised. But this serves to highlight the inherent conflicts at play, and demonstrates the fact for the CCC to have a dual role as an integrity agency and as a crime fighter, there must be inevitable compromises in both functions for both to co-exist in the same entity.

The proposal is predicated on a false assumption

496 The Reference Group Model is predicated on a false assumption that the Exceptional Powers regime under Part 4 has been a failure. The Committee's view is that it is premature to conclude that the Exceptional Powers regime has been ineffective. What is required is a proportionate and measured response to the problems raised by the CCC and the WA Police as to the functioning of the Exceptional Powers regime. The Committee has made two recommendations in this regard. First the CCC Act should be amended to permit the CCC to assist the WA Police in preparing for and conducting Organised Crime Examinations (see Recommendation 1). Second the definition of organised crime should be widened to permit the WA Police to make more applications for Exceptional Powers (see Recommendation 2). It is, in the Committee's view, a disproportionate response to the identified problems to scrap the Exceptional Powers regime altogether and replace it with a wholesale grant of jurisdiction to the CCC. Such a proposal removes the important checks and balances that are built into the existing Exceptional Powers regime.

The Reference Group Model carries with it an unacceptable risk that the CCC's integrity and independence will be compromised

Integrity issues

497 An integrity agency, such as the CCC, runs a significant risk of having its integrity compromised if it undertakes a crime fighting role. This is because of the enhanced risks that individuals within the agency will succumb to the temptations posed by organised crime, or that its security will be compromised by external attacks from organised crime.

498 Justice Wood, the former Commissioner of the NSW Police Royal Commission, wrote in 2007 of the need for an integrity agency, such as the CCC to ensure that pursuit of a crime function does not come at the expense of the agency's integrity:

*It is in the area of investigations of major crime, particularly where the agency is part of a joint task force, or lends its assistance to another law enforcement body that has a significant potential for corruption risks. An agency with those powers will have to act carefully and have proper controls, if it is to avoid any compromise of its operations or of its staff which would destroy its primary integrity enforcement role.*²⁷³

499 Western Australia has already experimented with three models of an integrity agency:

- Official Corruption Commission (1988 – 1996);
- Anti-Corruption Commission (1996 – 2003); and
- Corruption and Crime Commission (2004 – present).

500 Integrity and independence are the twin pillars upon which the public's confidence in its integrity agency rests. If either pillar is compromised, public confidence in the agency will crumble.

501 Integrity means "moral uprightness and honesty."²⁷⁴ Nowhere is it written in the CCC Act that the CCC should conduct itself with integrity in carrying out its functions and exercising its powers under the CCC Act, but no doubt it would be accepted by all that the CCC must be, and perceived to be, a bastion of integrity. This is because without integrity the public and the public sector will lose confidence in the CCC, and the CCC will become ineffectual in discharging its responsibilities under the CCC Act.

502 The CCC depends on members of the public coming forward to lodge complaints about public sector agencies. If the CCC was not perceived to be an institution of integrity, the public would not waste their time in submitting complaints.

²⁷³ James Wood AO QC, 2007, *Ensuring Integrity Agencies Have Integrity*, AIAL Forum, No 53, pp 13-14.

²⁷⁴ *The Australian Concise Oxford Dictionary*, 4th edition.

503 It is also vitally important that the CCC enjoys the confidence of the public sector in addition to the public. The CCC regularly tells public sector agencies how they can improve themselves. If the CCC was not perceived to be an institution of integrity, its attempts at reform would be viewed as hypocritical, and public sector agencies would only pay lip serve to the CCC.

504 Mike Silverstone, the current Executive Director of the CCC, said of the demise of the Anti-Corruption Commission:

*the legitimacy of the [Anti Corruption] Commission was undermined by a lack of transparency resulting in a loss of public confidence. Clearly, the legislation under which the Anti-Corruption Commission operated was flawed. Eventually, large sections of the public, media and Parliament lost confidence in the Commission.*²⁷⁵

505 The CCC itself acknowledges the following:

*The insidious nature of organised crime is such that the potential for the corruption of police and other law enforcement agencies is an ever-present threat. The possibility of police officers engaging in misconduct while working jointly with the Commission would pose a risk to the CCC's reputation and credibility as an integrity enforcement agency. Consequently, this is seen as undesirable.*²⁷⁶

506 WA Police Commissioner O'Callaghan wrote to the Committee in 2006 as follows:

... If, as the Commission asserts, more often than not organised crime involves public sector corruption, it must follow that there is a risk that the public sector corruption will be found within the ranks of WA Police.

*If the Commission engages in joint operations with WA Police, the Commission, notwithstanding its appreciation of the risk of the connection between organised crime and public sector corruption, will be collaborating with those it is obliged under the CCC Act to oversee. Furthermore, any agency that investigates organised crime runs the risk of itself being infiltrated by corruption.*²⁷⁷

507 The Committee is concerned that it would take but one serious breach of security, or act of corruption on behalf of a CCC officer in the conduct of an organised crime investigation to destroy the credibility of the CCC as an integrity enforcer. The Committee has in mind the circumstances surrounding the very public fall from grace of Mark Standen, a senior officer in the NSW Crime Commission.

508 The Committee considered the corruption risk posed by CCC officers investigating organised crime is of an order of magnitude greater than currently posed by CCC officers investigating public sector corruption. The ability of say, a public servant working in the Department of Health

²⁷⁵ *The Corruption and Crime Commission of Western Australia*, Mike Silverstone, Executive Director of the CCC, Paper delivered at the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006.

²⁷⁶ CCC submission dated 24 July 2007, p 28.

²⁷⁷ Karl O'Callaghan, WA Police Commissioner, letter dated 25 March 2006, p 4.

to extort or compromise a CCC operative is likely to be limited at best, when compared to that of organised crime syndicates and outlaw motorcycle gangs. Similarly the propensity of a CCC operative to empathise with, or alternatively be seduced by the lifestyle of, underworld crime figures must be considerably greater than that associated with any public servant.

509 The Committee makes the following finding:

Finding 10

10.1 The public's confidence in the CCC is founded on the CCC's integrity and authentic independence.

10.2 The CCC will be exposed to greater risks of corruption should it engage in organised crime investigations.

10.3 A serious breach of security or act of corruption by a CCC officer in an organised crime investigation will likely seriously damage or even destroy the credibility of the CCC as an integrity agency.

The authentic independence of the CCC will be compromised

510 In February 2008, the CCC commissioned an independent research survey of 380 Western Australians.²⁷⁸ 97.6% of respondents agreed that it was important that the CCC should be independent from Government.²⁷⁹

511 Independence is therefore a quality that is critical to the public's confidence in the CCC.

512 The Reference Group Model contemplates that WA Police Commissioner will have a power of veto over whether the CCC can engage in an organised crime investigation. This power of veto means that the CCC is not truly independent of the WA Police.

513 Furthermore, at the Reference Group and the proposed Joint Operations Management Group level, the WA Police will gain an insight into the operational capacity of the CCC.

514 In this regard it must be noted that the former Director of Operations of the CCC, Mr Nick Anticich, moved across to the WA Police and became Assistant Commissioner of WA Police (Specialist Crime). Little if anything was made of the implications of this move at the time. There

²⁷⁸ CCC, *Public Perceptions Survey*, 27 February 2008, accessed at www.ccc.wa.gov.au/files/pubs/public-perceptions-survey-2008-02-27.pdf on 8 February 2010.

²⁷⁹ 87.4% strongly agreed, 10.2% somewhat agreed.

is no legislative restriction on WA Police officers being recruited by the CCC, or vice versa. The CCC Act does however prevent a police officer serving as the CCC Commissioner.²⁸⁰

- 515 The point must be made that the Reference Group Model envisages working relationships being formed between CCC personnel and WA Police personnel, which gives rise to the possibility of personal friendships forming. When added to the growing list of former employees of each organisation now working for the other organisation, the perception of reduced independence must surely arise whenever the CCC's ability to oversee the WA Police is called into question.
- 516 The Committee makes the following finding:

Finding 11

The WA Police Commissioner's power of veto over CCC organised crime investigations means that the CCC is not authentically independent of the WA Police. This will adversely affect the public's perception of the CCC, and lead to a reduced confidence in the CCC.

The CCC will be conflicted in discharging simultaneously a corruption fighting role and a crime fighting role

- 517 Combating organised crime require police to be innovative, adaptive and to operate on the edge of the law where legislative powers impinge on civil liberties. This is not a criticism, but a fact. The WA Police have been armed with a wide range of legislative powers to combat organised crime and are expected to use them. The WA Police, if they hope to gain an advantage over their criminal counterparts, have to use these powers to their fullest.
- 518 In the fight against organised crime the WA Police are required to make a myriad of judgments ranging from high level strategic decisions, to planning and implementing complex operations to day to day value judgments in the field, where officers, in particular detectives and undercover operatives, regularly have to make snap judgments in the face of situations that change quickly and dramatically.
- 519 Ever present in this grey area of policing is the CCC. Its role is clearly demarcated by the CCC Act. Firstly, whenever the WA Police apply to the CCC for Exceptional Powers under Part 4 of the CCC Act, the CCC must be satisfied as to a range of criteria before conferring such powers on the WA Police. Secondly, and more globally, the CCC's role is to ensure that the WA Police do not overstep the mark and engage in misconduct or criminal conduct. In exercising both of these functions the CCC is not responsible for or concerned with the operational success of the WA

²⁸⁰ CCC Act, s 10(3).

Police's operations.²⁸¹ The CCC is able to bring an objective view on the conduct of the WA Police, and is not concerned as to whether its intervention would be damaging to the operational objectives of the WA Police.

520 In conferring a dual role on the CCC it is inevitable that the CCC will feel that it has a stake in the operational success of an organised crime investigation. The danger then is that the CCC will be unable to bring a truly independent, dispassionate view as to the propriety of its own officers or those of the WA Police engaged in that operation. Even if the CCC believes that it can, it is suggested that the mere attempt will undermine public confidence.

521 A salient warning can be drawn from the experience of the Federal Bureau of Investigation (FBI). Louis Freeh became arguably the most influential director of the Bureau since J Edger Hoover. He publicly espoused the necessity of the FBI being the bastion of integrity. For example he began a speech *A Report to the American People on the Work of the FBI, 1993 – 1998*, with the words of Psalm 101:

He who walks in the way of integrity

shall be in my service

No one who practises deceit

can hold a post in my court.

No one who speaks falsely

can be among my advisors

522 Freeh actively sought to establish FBI offices in other countries, including Russia, and to enter into long term partnerships with foreign police departments. To make this work, Freeh not only had to persuade foreign powers, but also had to prevail in turf battles in Washington. After all, it had been a long-held axiom that the FBI operated domestically and the CIA globally. Freeh argued that with drugs, terrorism and cyber-crime spreading around the globe, the Bureau would be more effective in protecting Americans at home by having a permanent presence abroad.²⁸²

523 Controversially, the expansion posed moral and ethical issues. FBI agents operating on foreign soil would be forced, at times, to look the other way when valuable evidence was gathered through torture and other practices that would be prohibited in America. Otwin Marenin, a criminal justice professor at Washington State University, who has studied the FBI's overseas practices said:

²⁸¹ Save only in a limited sense that on application for Exceptional Powers the CCC must have regard to whether the suspected offence could be effectively investigated without using the Exceptional Powers sought.

²⁸² David A Vise, *The Bureau and the Mole: The Unmasking of Robert Philip Hanssen, The Most Dangerous Double Agent in FBI History*, 2002, p 148.

*They do not ask, 'How did you question them?' They will just ask, 'Is it good information You learn how to live with that part even though you wouldn't do it yourself.'*²⁸³

- 524 According to Pulitzer Prize winning journalist David A Vise, Freeh made a secret deal with Saudi Prince Naif, brother of King Fahd, to return a Saudi Arabian bombing suspect being held in a federal prison in Atlanta to a jail in Riyadh where human rights groups say torture is routinely used. Freeh's pact permitted FBI agents to watch Hani Al-Sayegh's interrogation through a one-way mirror and submit questions to his Saudi inquisitors. Al-Sayegh was a suspect in the 1996 Khobar Towers bombing that claimed the lives of 19 U.S. servicemen in Saudi Arabia. He had reneged on his pledge to cooperate with U.S. law enforcement authorities. The official line was that Freeh merely was ensuring that FBI agents would have access to whatever information the Saudis obtained, whereas to Clarisa Bencomo, a researcher with Human Rights Watch who monitored Al-Sayegh's case closely, it seemed that the FBI considered the information that may come out of Al-Sayegh to be more useful or worthwhile to them than the possibility of Al-Sayegh being tortured or executed.²⁸⁴
- 525 The FBI experience highlights the possibility of a remodelled CCC experiencing similar moral and ethical issues, such as looking the other way if its partner agency engages in questionable practices.

Undercover operatives

- 526 The CCC uses undercover officers in its misconduct function.
- 527 If the CCC was given the jurisdiction to engage in organised crime investigations, there is little doubt that the CCC would engage undercover officers in organised crime investigations.
- 528 Undercover operatives are at a high risk of becoming corrupted by organised crime.
- 529 In *S v State of New South Wales*²⁸⁵ Harrison J of the NSW Supreme Court was called upon to adjudicate on a claim made by a female undercover police officer (S) that the NSW Police Force was responsible for her sustaining psychiatric damage as a result of her stressful job. S was not corrupt. She was described by the trial judge as an outstanding undercover operative, if not an outstanding police officer generally, driven by a strenuous ambition to perform well in her job and possessed of conspicuous intelligence and capacity.
- 530 Her evidence gives some insight as to the moral and ethical dilemmas faced by undercover operatives. The case gives a fascinating and chilling account of how S, who was obviously a highly ethical and courageous individual, dealt with the constant dangers of her job and the moral

²⁸³ David A Vise, *The Bureau and the Mole: The Unmasking of Robert Philip Hanssen, The Most Dangerous Double Agent in FBI History*, 2002, p 148.

²⁸⁴ David A Vise, 'New Global Role Puts FBI in Unsavory Company', *Washington Post Sunday*, 29 October 2000.

²⁸⁵ *S v State of New South Wales* [2008] NSWSC 933.

dilemma of getting people to trust her, and then giving evidence against them. S formed personal feelings for a number of the targets of her undercover work, many of whom were subsequently arrested and imprisoned. She felt as if she had betrayed them. She wondered why she was doing her job. In evidence she said:

*I was involved in an operation and I was meeting a lot of people involved in the drug trade. They were mainly street level dealers and I, they seemed to be just dealing to support their habit and they were friendly to me, they were trying to help me. I was just having a few concerns about how do we go about, if I start an operation how do I go about when these people are arrested and probably put into gaol, I was having problems with the implications of that.*²⁸⁶

531 The trial judge gave a further example:

*She formed an ambivalent friendship with this target and was invited to his wedding and to his child's christening. He cooked meals for her and disclosed details of his criminal dealings ... This man was arrested as a result of the evidence gathered by the plaintiff and her partner. She had mixed feelings about this, including betrayal. She received no assistance from anyone about how to come to terms with these conflicting emotions. The plaintiff said that they were to become a pattern in her time as an undercover operative.*²⁸⁷

532 On one occasion S worked with a police informant who was a violent criminal. He told her about his family and some of his life history and disclosed matters to her which possibly amounted to the admission of a serious crime. S said that she was horrified by this and did not know what to say. However, she made no record of it in her operation report and did not record it anywhere else. In a court case, she was cross examined on this topic, to test her veracity as a witness. She said that initially she did not “add two and two together”,²⁸⁸ and that when she did, she did not want to compromise the investigation she was working on, and also that she feared that he had contacts within the Police and that if she did report him, he would know it was her.

533 No criticism is made by the trial judge of her failure to report the confession to her superiors, but it does reveal the difficult situations that undercover operatives face in covert operations.

534 S spoke of the pressures of being an undercover operative:

*I was aware of the stress that people can be under by my observations, and the stress that people can be under in regards to pressures from other police to get the job done, to have a time limit, to do your best, to do your best and get the job done. There was a lot of pressure from other police who, who just seemed to think that you just go out there and set up the deal and they were only there for the buy/bust part and they just seemed to think that – it was a lot of pressure to produce outcomes, to produce results.*²⁸⁹

²⁸⁶ *S v State of New South Wales* [2008] NSWSC 933 at [28].

²⁸⁷ *S v State of New South Wales* [2008] NSWSC 933 at [30].

²⁸⁸ *S v State of New South Wales* [2008] NSWSC 933 at [51].

²⁸⁹ *S v State of New South Wales* [2008] NSWSC 933 at [107].

535 While S ultimately failed in her negligence claim against the State, the trial judge made the following findings and observations:

- The work performed by S was inherently stressful. S gave evidence of many situations in which she found herself in the company of potentially violent and dangerous individuals in contrived circumstances over extended periods with the over-riding objective of deceiving them.
- There are ongoing problems associated with the need of an undercover officer to lead a double life and to alternate between two or among multiple identities and personalities.
- In general terms there is evidence supporting the fact that the nature of undercover work is not only all embracing but has a tendency to isolate officers who perform it from others of their colleagues in more traditional roles. This is because of the need to protect the identity of undercover officers, and open professional relationships with ordinary police are contraindicated for that reason at least.
- Undercover officers are in many respects out of touch with the day-to-day aspects of ordinary policing and some period of readjustment is often required.
- Irrational suspicion has sometimes attached to officers known to have worked undercover and discrimination and isolation often results.
- Undercover duties have a tendency to interrupt what is the usual or expected career milestones and progression, thereby impeding or postponing promotion to higher ranks.²⁹⁰

536 The obvious point must be made that if the CCC begins to investigate organised crime, the risk of CCC undercover officers becoming corrupt will significantly increase. The case detailed above demonstrates that the risks are not limited to blatant corruption, or succumbing to the temptations of an organised crime lifestyle, but also includes under cover operatives becoming empathetic to the criminals they are associating with, and having clouded judgment as a result.

537 The obvious point to be made is if such corruption or misconduct occurs by a CCC operative, the reputation of the CCC as an integrity agency will suffer.

538 The WA Police do not need access to the Exceptional Powers under the CCC Act to undertake covert operations with respect to illicit drug investigations and prostitution. The *Misuse of Drugs Act 1981* permits the WA Police Commissioner to authorise any person (not just a police officer) to act as an undercover officer, and while that person's authority is in place, that undercover operative can acquire and have in his possession a prohibited drug or prohibited plant for the purpose of detecting the commission of an offence.²⁹¹ Furthermore, the undercover agent has a limited immunity from prosecution.²⁹² The Minister for Police is entitled to request the WA Police

²⁹⁰ *S v State of New South Wales* [2008] NSWSC 933.

²⁹¹ *Misuse of Drugs Act 1981* (WA), s 31(2)

²⁹² *Misuse of Drugs Act 1981* (WA), s 31(3)

Commissioner to provide a written report setting out the particulars of the activities of undercover officers authorised under the Act.²⁹³

539 There is a similar ability for the WA Police to engage undercover officers in relation to prostitution investigations. Section 35 of the *Prostitution Act 2000* (WA) permits the WA Police Commissioner to authorise a police officer to act as an undercover officer, and to do anything specified in the authorization given by the WA Police Commissioner for the purpose of detecting the commission of an offence.²⁹⁴ So long as the undercover officer acts within the scope of his or her authority, the undercover officer does not commit an offence and is not liable as a party to an offence committed by another person.²⁹⁵ The Minister for Police is entitled to request the WA Police Commissioner to provide a written report setting out the particulars of the activities of undercover officers authorised under the Act.²⁹⁶ The Act further provides that the identity or purpose of an undercover officer may, for the time being, be concealed or misrepresented for the purpose of detecting the commission of an offence.

540 While the use of police undercover officers to purchase drugs is legal and enjoys the strong support of the judiciary, Steytler J (now the Parliamentary Inspector) sounded a warning in *R v Gurka* (2001),²⁹⁷ where Gurka unsuccessfully sought to appeal his sentence of 8 years imprisonment for two charges of selling heroin to an undercover police officer and one charge of possessing heroin with intent to sell or supply. The first sale was of 6.93 grams (48% purity) for which \$2400 was paid. The second sale was of 3.3 grams (40% purity) for which \$1300 was paid. With respect to the attempted third sale, \$10,000 was to have been paid for 27.6 grams (76% purity). On the role of the undercover officer, Steytler J said:

While I would not wish to be taken to be encouraging undercover police operatives to facilitate the commission of an endless number of offences in order to push up the total sentence which might consequently be imposed upon the offender (a practice which would, self-evidently, be inappropriate), it does not seem to me to have been unreasonable, in this case, for the police operative to have given to the applicant the opportunity (which he was only too anxious to take) to make more than one sale. By this means it could be demonstrated that the first offence was not merely an isolated incident and also, as regards the third transaction, that the applicant was prepared to sell a relatively large quantity of heroin. As soon as these things were established, the applicant was arrested and charged.

541 The point to be made is that there exists the possibility for an unbridled use of controlled operations to amount to misconduct. The CCC, if it were to be given a jurisdiction to engage in organised crime investigations, would be conducting controlled purchases of drugs, just as the WA Police are doing now.

²⁹³ *Misuse of Drugs Act 1981* (WA), s 31(7).

²⁹⁴ *Prostitution Act 2000* (WA), s 35(4).

²⁹⁵ *Prostitution Act 2000* (WA), s 35(5)(a).

²⁹⁶ *Misuse of Drugs Act 1981* (WA), s 31(6).

²⁹⁷ *R v Gurka* (2001) 120 A Crim R 407.

- 542 The obvious question that has to be asked is how the CCC could seek to put its misconduct hat on and assess the propriety of the use by the WA Police of controlled operations, when it itself will be an active promoter of controlled operations, which may involve CCC operatives handling drugs, engaging in elaborate sting operations and undertaking what would otherwise be illegal activities but for the amnesty granted by the controlled operations legislation.
- 543 The use of undercover operatives is a high risk area of misconduct for the WA Police. It is therefore important for the CCC to be closely monitoring the WA Police's use of undercover operatives from an independent perspective.

Informants

- 544 The WA Police regularly use informants. Informants are the most valuable tool available to successfully target upper echelon drug distributors. Without their assistance at the early stages of an investigation, successful prosecutions would be almost impossible.
- 545 A police officer's relationship with an informant can be very complex. The police officer (known as the handler) will seek to exploit whatever means are at his disposal to achieve the end result that the informant will provide useful intelligence to the police officer. The police officer has to form a judgment as to whether the potential informant will respond more readily to a reward, or respond more readily to fear of punishment, or a combination of both. It may also be that the handler will seek to develop a relationship of trust with the informant, in the course of which confidences will be exchanged.
- 546 It can readily be appreciated that in this grey area of cultivating informants corruption and misconduct can arise. Sometimes the police officer will become so immersed in the relationship and consumed by a desire to take down the crime syndicate that the police officer will engage in conduct that, to him, is perfectly explicable, legitimate and noble but to an outsider looking in, reeks of misconduct. Equally, in this grey area, there lies the potential for spectacular results to be achieved in uncovering organised criminal activity.
- 547 Police decisions not to charge largely determine the outer limits of law enforcement. These police decisions, unlike their decisions to charge, which thereby invokes the criminal process, are generally of extremely low visibility and consequently are seldom the subject of review.²⁹⁸
- 548 It has been argued that it is necessary for police officers operating in the field to be able to exercise discretion not to charge a person who may be found to be in possession of drugs or otherwise observed to be engaging in illegal conduct. While most police services in Australia have strict protocols wrapped around the extent to which a police officer may seek to offer immunity from prosecution in order to cultivate an informant, there will always be factual scenarios which will tempt a police officer not to obey strict protocols, in order to achieve operational objectives.

²⁹⁸ Goldstein, Joseph, 'Police Discretion Not to Invoke the Criminal Process; Low Visibility Decisions in the Administration of Justice', *The Yale Law Journal*, Volume 69, March 1960.

- 549 It should be appreciated that these are decisions facing police officers in the field on a daily basis. To use an example, it would beggar belief that a surveillance team monitoring the movements of a suspected drug trafficker would arrest the suspect if he was observed to be jaywalking. The dilemma for the surveillance team becomes more acute if in the course of the surveillance, they observe other parties engaging in drug transactions, but not the suspect himself, or the suspect is observed to be engaging in a drug transaction of a small quantity of drugs, and not the large quantity that intelligence suggests that the suspect may be expecting to deal with. The stakes increase markedly if the police are using an informant or have an undercover officer in place. At what stage will an arrest be made, if to do so will blow the cover of the informant or undercover operative?
- 550 To use another example, the police may purchase drugs in controlled operations from drug suppliers, using information obtained from an informant to identify and contact the supplier. It may be prudent for a number of controlled purchases to be undertaken, before making the arrest, so as to maximise the chances that the identity of the informant will be protected.
- 551 There also may be delicate questions of timing. The police may receive information as to a large cannabis crop in a remote locality. 24 hour surveillance may not be possible. The police then run the risk that the crop may be cultivated by wrongdoers without detection. The police are faced with a difficult decision as to when to seize the crop, or to wait and hope that the perpetrators will be caught at the scene.
- 552 From the above examples it can be appreciated that police officers may wish to exercise a discretion not to charge a person for a criminal offence for a number of reasons, including:
- preventing a surveillance team from coming to the attention of criminals;
 - protecting an informant;
 - protecting an undercover officer;
 - maximising the prospects of apprehending more serious criminals;
 - maximising the prospects of apprehending the target on more serious crimes; and
 - maximising the prospects of obtaining better evidence.
- 553 However it can also be readily appreciated that in exercising a discretion in this manner, criminal activity may be allowed to be undertaken without sanction. If the objective of the police operations is not achieved, and a conviction of a major criminal is not secured, the police officers involved may well face accusations that they engaged in corrupt behaviour.
- 554 The Kennedy Final Report (2004) refers to three instances in which an agreement was struck between a suspect and the police, whereby in return for the suspect becoming an informant, the police would lower the charges against the suspect or not charge the suspect at all.²⁹⁹

²⁹⁹ Kennedy Royal Commission Final Report, Vol 1, pp 200-201, 240-242, 271.

Commissioner Kennedy does not go so far as to label the entering into of such an agreement between the police and a potential informant as misconduct.

555 According to the Kennedy Final Report (2004):

- There was an accepted practice during the 1980s and 1990s for the WA Police investigating crimes to place undue reliance on information from informants in order to identify offenders, and then to press for or fabricate confessions as evidence of their guilt, forsaking other investigatory practices. Such an approach has had negative cultural implications. Unregulated association with, and the manipulation of, criminals in order to gain intelligence led to behavioural issues that were incompatible with the standards of integrity required of police.³⁰⁰
- The use of informants has proved to be of doubtful value.³⁰¹ The motives of informants are often mischievous and their actions are often motivated by self-interest. Relationships between police and informants have been poorly administered and are very much open to abuse. Informant management plans are now generally in use in police services. They impose onerous obligations upon police who wish to utilize the services of informants, to the point that the practice of using informants has been significantly reduced.

556 The Anti Corruption Commission (the predecessor to the CCC) was not above paying for information. The Kennedy Final Report (2004) reveals that police officer codenamed L5 offered information to the ACC in return for payment, and that he refused to proceed unless payments were made. He acknowledged that the ACC could not pay rewards for information, but his request for money was nevertheless made, couched in references to his inability to effectively continue to assist the ACC because of his disquiet mind and inability to take time off work, both of which related to financial difficulties. He continued to provide information following payment of only \$7,882.80, and apparently he did not press the ACC for further payment.

557 If the CCC was given the jurisdiction to engage in organised crime investigations, the CCC would seek to cultivate their own informants. The obvious point must be made that there is an ever-present risk of CCC officers becoming corrupt when seeking to cultivate and handle informants.

558 Accordingly there will be an increased risk that CCC officers will become corrupt, or succumb to the temptations of the organised crime lifestyle, or become empathetic to the informants they are associating with.

559 The obvious point to be made is if such corruption occurs, the reputation of the CCC as an integrity agency will suffer.

³⁰⁰ Kennedy Royal Commission Final Report, Vol 2, p 42.

³⁰¹ The Kennedy Royal Commission Final Report, Vol 1, at pages 554 to 558 made note of Operation Red Emperor which was initiated by WA Police in 1997. The objective of Operation Red Emperor was to infiltrate an alleged major organized crime group through the use of an under cover operative and an informant in order to conduct controlled purchases of illicit drugs from the group. The informant failed during a period of two and a half years to obtain admissible evidence against the principal target.

- 560 The obvious point must also be how the CCC could seek to put its misconduct hat on and assess the propriety of WA Police dealings with informants, when it itself will be an active user of informants.
- 561 What if the WA Police wanted to cultivate a low level drug dealer into providing information that would assist in revealing the main players in a drug importation cartel? The WA Police approach the CCC and put the following proposition: The drug dealer said he would be prepared to provide the information if he was paid \$20,000 – would the CCC contribute to a payment?
- 562 How could the CCC possibly respond? As a bastion of integrity it should reject both proposals, but wearing its crime fighting hat, the proposal may well be a sensible one. As demonstrated by the Anti Corruption Commission’s payment to an informant of \$7882.80, payments can be structured as legitimate, so should the CCC acquiesce to such a proposal if to do so would yield valuable information?
- 563 The conflict for the CCC is obvious.
- 564 The following points can be made:
- there is a grey area of police operations which involves police officers forming relationships and agreements with criminals;
 - the police sometimes operate in this grey area when combating organised crime;
 - some police officers have been corrupted as a result;
 - the CCC, as a bastion of integrity, must not operate in this grey area;
 - however, if the CCC does obtain a jurisdiction to conduct organised crime investigations, it will by necessity have to operate in this grey area itself.
- 565 The Committee makes the following finding:

Finding 12

In conferring a crime fighting role on the CCC it is inevitable that the CCC will feel that it has a stake in the operational success of an organised crime investigation. The CCC will be unable to bring a truly independent, dispassionate view as to the propriety of its own officers or those of the WA Police engaged in that operation.

- 566 On the flipside, it is equally conceivable that the CCC will undertake a joint operation with the WA Police with an eye firmly on its misconduct function, and that if any misconduct of a public officer is uncovered during the course of a joint investigation, then disagreement may break out

between the two agencies as to what the priorities of the investigation should be. The CCC Commissioner gave a recent example in its misconduct investigation of officers of the Department of Planning and Infrastructure. The WA Police, who were conducting parallel inquiries, considered they had enough evidence to charge its targets, and wanted to go overt and charge their targets. The CCC however wanted to continue to remain in the covert stage of the investigation as it believed that more persons were involved. Ultimately the CCC Commissioner issued an authority under s 42 of the CCC Act to direct the WA Police which had the effect of preventing the WA Police from proceeding to the overt stage of its investigation.

567 The CCC Commissioner has indicated to the Committee that the CCC would enter into a joint organised crime investigation with one eye firmly on the possibility of gathering evidence against corrupt police officers. The CCC Commissioner said:

*...it is certainly my view, and it would be the Commission's view, that there is a necessary link between organised crime and public officers. Organised crime cannot succeed without subverting public officers – not just police officers but others. One of the benefits the Commission sees in having a capacity to investigate organised crime itself – not the only benefit but one of them – would enable us to approach the problem from the other way. ... If we had a capacity to investigate organised crime, there would be plenty of targets out there ... and who might well lead us back to police officers or other public officers with whom they are engaging, which we cannot get to from the other side, so there is a complementarity to our misconduct function in that respect...*³⁰²

568 The potential complication of the CCC exercising a dual role can be examined by the following hypothetical. The CCC uncovers, simultaneously, evidence that could lead to the conviction of an organised crime figure, and evidence that could lead to the conviction of a corrupt police officer, but to pursue one line of inquiry would jeopardise the chances of conviction on the other. Which hat would the CCC wear – the organised crime fighter's hat, or the corruption watchdog hat? It seems from the CCC Commissioner's comments that the corrupt police officer would be pursued. However, as Operation Red Emperor illustrated, police may well assess that it was preferable for the corrupt police officer to remain in place, with no action to be taken, for fear that if the corrupt police officer was disciplined the ongoing police operation would be compromised.

569 The possible conflict of operational objectives and the need to root out corrupt police officers was made apparent in the Kennedy Royal Commission Final Report which reviewed the actions of police officer Shadgett. Chapter 13.3 makes for compelling reading and highlighted the fact that Shadgett, who despite having the worst disciplinary record of any serving police officer, and having been suspected as early as 1987, disseminated confidential police information without sanction because of a concern that ongoing operations might be compromised.

570 In 1987, during a joint operation between the WA Police and the Australian Federal Police into large scale heroin importation and distribution, Shadgett was regularly recorded on a listening device speaking with targets of the investigation and often heard to be "indiscreet" in relation to

³⁰² Len Roberts-Smith QC, CCC Commissioner, *Transcript of Evidence*, 11 November 2009, p 10.

knowledge he obtained in the course of his employment. Internal Affairs files record that no action was taken against Shadgett at that time for “operational reasons.”³⁰³

571 Commissioner Kennedy said:

- there are competing considerations between internal inquiries and criminal operations;
- it must be accepted that, on occasions, there may be legitimate reasons why internal investigations should yield to operational considerations;
- however, in such circumstances, procedures and criteria should be applied for decisions to be made. Relevant matters to take into account might include:
 - the seriousness of the alleged corrupt conduct;
 - the risk of the conduct continuing or spreading to others;
 - the nature and extent to which operational matters might be affected; and
 - the viability of other forms of investigation that would not jeopardize operational matters
- if an internal investigation is to be delayed or deferred in response to criminal investigations, it nevertheless should be proactively monitored;
- no formal guidelines or procedures are in place to deal with police officers suspected of corrupt or criminal conduct in situations where such actions might impact upon police operations;
- it is desirable to set out criteria that will guide decision making in these matters.³⁰⁴

572 The Committee makes the following finding:

Finding 13

There are competing considerations between misconduct inquiries and organised crime operations. In conferring a crime fighting role on the CCC, the CCC will be unable to bring a truly independent and dispassionate view as to when a misconduct investigation should yield to the operational considerations of an organised crime investigation.

³⁰³ Kennedy Royal Commission Final Report, Vol 1, p 383.

³⁰⁴ Kennedy Royal Commission Final Report, Vol 1, pp 388-389.

Oversight issues

573 The CCC contends that as it already self authorises the use of Part 6 Powers in its misconduct function, the ability of the CCC to self authorise the use of Part 6 Powers to combat organised crime investigations is an unremarkable proposition. The CCC emphasises the magnitude and gravity of some of its misconduct investigations, suggesting that they would rival the magnitude and gravity of organised crime investigations. The CCC also emphasise that the use of Part 6 Powers in its misconduct function is oversights by the Parliamentary Inspector, and that the Parliamentary Inspector would continue to oversight the CCC should it start to use Part 6 Powers in any organised crime investigation.

574 The WA Police share the CCC's view that the ability of the Parliamentary Inspector to oversight the CCC is a sufficient safeguard against any concern that the CCC may abuse Part 6 Powers in combating organised crime. Assistant WA Police Commissioner Anticich said:

*In the misconduct realm, the CCC issues those powers in its own right by the hand of the commissioner and there is an oversight that relates to the parliamentary inspector. I see, then, that there would be no lessening of that capability nor any weakening of the actual oversight provisions in the organised crime model. That is my view.*³⁰⁵

575 The Parliamentary Inspector is a part time position. He has one full time employee, a senior lawyer. The Parliamentary Inspector has advised the Committee that his current level of resourcing, and the fact that his appointment is part time, would be insufficient to oversight the CCC's involvement in organised crime investigations, let alone any possible oversight of WA Police involvement in an organised crime investigation with the CCC.

576 Deputy WA Police Commissioner Dawson was asked if the CCC and the WA Police are both investigating organised crime, who then will oversee the use of Exceptional Powers in a joint investigation involving both organisations? Mr Dawson did not comment specifically on whether the WA Police would accept oversight of organised crime investigations by the Parliamentary Inspector, but acknowledged that the oversight role of the Parliamentary Inspector would need to increase and that there would be resourcing implications. The following exchange took place:

The Chairman: *Acting commissioner, can I move to the issue of cost neutrality? It has been suggested that the necessary reforms can be done on a cost-neutral basis. The committee has grave concerns about that, for a number of reasons. Firstly, I just want to know whether, if the CCC and Western Australia Police are jointly involved in an organised crime investigation, the parliamentary inspector would have some role in overseeing that. At the moment, the CCC has oversight or jurisdiction with regard to the approval of extraordinary powers to Western Australia Police, so there is that check and balance for the Western Australian public with regard to any suggested infringement on their civil liberties. If the CCC and Western Australia Police are both investigating organised crime, who then oversees the use of the extraordinary powers in one of those joint investigations?*

³⁰⁵ Nick Anticich, Assistant WA Police Commissioner (Specialist Crime), *Transcript of Evidence*, 31 March 2010, p 5.

Mr Dawson: The role of the parliamentary inspector, as it is presently structured, is confined to the activities of the CCC. The issue you raised is one of the very first issues that was discussed between both Western Australia Police and the CCC. I have no difficulty in restating here that that was a point that was raised by WA Police with the CCC in terms of that oversight where the CCC is itself involved in an activity where, if it is done jointly with WA Police, it brings the age-old question of who polices the police. That is the function of the parliamentary inspector. If the activities were jointly conducted, I would think that unless the legislation was drafted in such a manner that the parliamentary inspector would have an oversight role in terms of anything that involved a public officer from the CCC being involved, the parliamentary inspector would have primacy in actually overseeing that. I would think that that would bring with it some additional resource implications for the parliamentary inspector.

The Chairman: I could not agree more. Does that then mean that this cost neutrality is a myth?

Mr Dawson: It would depend on the capability of the parliamentary inspector. I do see—unless Mr Anticich has some other information to provide—that the CCC’s capability to investigate itself will, of course, be problematic in terms of what is its original remit and function. Unless there is some other intent provided by the Parliament, I think it would naturally fall to the parliamentary inspector to do that.³⁰⁶

- 577 The Committee is concerned that if the CCC were to embark on undertaking organised crime investigations, the Office of the Parliamentary Inspector, with its current level of resourcing and the part time nature of the office, will be unable to undertake adequate oversight of the CCC.
- 578 The Committee is concerned that if the CCC were to embark on undertaking organised crime investigations, the Committee, with its current level of resourcing will be unable to undertake adequate oversight of the CCC and the Parliamentary Inspector.
- 579 The Committee makes the following findings:

Finding 14

If the CCC is to conduct organised crime investigations, the Office of the Parliamentary Inspector, with its current level of resourcing and the part time nature of the office, will be unable to undertake adequate oversight of the CCC.

³⁰⁶ Transcript of Evidence, 31 March 2010, pp 4-5.

Finding 15

If the CCC is to conduct organised crime investigations, the Committee, with its current level of resourcing, will be unable to undertake adequate oversight of the CCC and the Parliamentary Inspector.

Weakening of checks and balances

580 In 2000 the then Attorney General Hon Jim McGinty MLA said:

*If one is to invest wide-ranging powers with enforcement agencies such as the Police Service, there is a duty to ensure the integrity of the agency and that it is free from corruption.*³⁰⁷

581 The strength of the CCC Act is its checks and balances, and the clear demarcation of the role of the CCC. The Reference Group Model, in conjunction with the proposed tranches of legislative reform will confer upon the WA Police Exceptional Powers directly, and will eradicate these checks and balances and will blur the role of the CCC. The WA Police will no longer have to apply to the CCC to access the Exceptional Powers.

582 The Committee is concerned by any move to confer upon the WA Police the jurisdiction to self authorise the use of any of the Exceptional Powers in Part 4 of the CCC Act. In particular, the Committee has grave concerns as to the state of human rights in Western Australia if the WA Police were able to self-authorise coercive hearings.

583 As to the conferring on the WA Police the powers of assumed identities and controlled operations the Committee notes that the WA Police can already engage in certain controlled operations without the need to apply to the CCC. The WA Police frequently use the provisions of the *Misuse of Drugs Act 1981* to gather evidence against drug suppliers by having undercover operatives purchase drugs. It would seem implicit that undercover police operatives would have the ability to assume identities to enable such sting operations to succeed, although the *Misuse of Drugs Act 1981* does not expressly empower the WA Police to assume identities. Under the *Prostitution Act 2000* however, there is an express power of the police to assume identities.

584 Within existing powers, the WA Police have engaged in elaborate sting operations, such as where undercover operatives posed as an organised crime gang, and staged mock robberies and extortions, to impress and deceive suspects into making admissions of guilt on cold case crimes. No authority was required from the CCC because the robberies and extortions were fake and no criminal laws were broken.

³⁰⁷ Hon Jim McGinty MLA, Western Australia, Legislative Assembly, *Parliamentary Debates*, 9 August 2000, p 112.

- 585 It is where the WA Police may seek to sell drugs, as opposed to buy drugs, or engage in real crimes, as opposed to pretend crimes, that it is imperative that there be in place the necessary checks and balances to minimise the possibility of public harm, and to afford the opportunity to an independent and objective body to consider the proposal from the perspective of the public interest.
- 586 The Committee hastens to add that it is not aware of any operations conducted by the WA Police which have involved or proposed the sale of drugs, or the commissioning of offences by the WA Police. The CCC has confirmed that it has received no applications of that type from the WA Police.
- 587 Nevertheless it can readily be envisaged that if the WA Police were given access to such powers direct, they will use them. One need only look to the example of how it came to pass that the NSW Crime Commission self-authorized the sale of 6 kg of cocaine (with no expectation that the drugs would be recovered) to appreciate the dangers of concentrating power in a law enforcement agency without meaningful oversight. The facts are as follows.
- 588 The NSW Crime Commissioner Phil Bradley approved Operation Mocha and issued six authorisations between 8 February 2005 and 17 March 2005 for an informant (**Tom**) to sell cocaine to alleged drug dealers in exchange for immunity from prosecution.
- 589 Pursuant to three of the authorisations Tom sold a total of 2.75 kilograms of cocaine to a café proprietor, Gilbert Gedeon, and one kilogram of cocaine to David Dowe. None of this cocaine was ever recovered by any law enforcement officer.³⁰⁸
- 590 Under the *Law Enforcement (Controlled Operations) Act 1997* (NSW), a controlled operation could not be authorised if it was likely to seriously endanger the health or safety of persons. Following their arrest, Gedeon and Dowe argued that the controlled operation was illegal, as it was likely to result in cocaine being introduced onto the streets, and thereby endanger the health of end users. The High Court agreed. In its unanimous judgment³⁰⁹ the High Court said that controlled operations that involved the selling of large quantities of cocaine to users was conduct likely to seriously endanger the health or safety of those people and should not have been authorised by the NSW Crime Commission.
- 591 Remarkably, the NSW Crime Commission and other New South Wales senior law enforcement officers, knew, when planning Operation Mocca, that it was unlikely that the cocaine would be recovered because the cocaine would be sold on to end users. The primary judge accepted the evidence from a senior officer of the NSW Crime Commission that it was a foreseeable consequence that between 70,000 and 100,000 discrete dosage units of the cocaine would reach the streets as a result of the controlled operations.

³⁰⁸ *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43, per Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ at [14].

³⁰⁹ *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43.

592 Mark Standen, the NSW Crime Commission officer in charge of Operation Mocha is reported to have said, in response to a question about how he addressed the health concerns of the controlled operation:

*There are no recorded deaths from cocaine use, which is one of the things we researched.*³¹⁰

593 In the High Court, counsel for the NSW Crime Commission was asked:

Is the position of the [Commission] in this Court that it wishes to contend that delivery of six kilograms of cocaine to a variety of end users is not likely to seriously endanger the health or safety of any end user? Is that the position of the [Commission]?

594 Counsel responded:

We submit that it will not necessarily do so...

595 The High Court disagreed:

*A reasonable person in the position of the defendant would have foreseen that the conduct of the activities the subject of the Authorities would involve a risk of seriously endangering the health of some at least of the numerous class of end purchasers of the cocaine.*³¹¹

596 It is imperative that controlled operations of this type are subject to rigorous oversight by an independent body.

597 It must be appreciated that under proposed reforms it is not only the WA Police who may come up with these ideas, but the CCC itself. Who then will prevent the CCC from self-authorising controlled operations involving drugs, weapons and other organised crime activities?

598 The CCC contends that:

- it already confers to itself Part 6 Powers in performance of its misconduct function; and
- the ability of the CCC to confer to itself Part 6 Powers to combat organised crime investigations is an unremarkable proposition.

599 The CCC emphasises the magnitude and gravity of some of its misconduct investigations, suggesting that they would rival the magnitude and gravity of organised crime investigations. The CCC also emphasise that the use of Part 6 Powers in its misconduct function is oversighted by the Parliamentary Inspector, and that the Parliamentary Inspector would continue to oversight the CCC should it start to use Part 6 Powers in organised crime investigations. It is to be noted that under the CCC Act at present, the CCC have the power to self authorise controlled operations in

³¹⁰ 'The cocaine, the dealer and the green light', *The Sydney Morning Herald*, 7 June 2008. This story was found at <http://www.smh.com.au/articles/2008/06/06/1212259115427.html> on 10 February 2010.

³¹¹ *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43, per Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ at [57].

the exercise of its misconduct function, and there is no requirement for the CCC to seek independent authorisation.

600 It is with the NSW Crime Commission example in mind that the Committee can say that there is a significant distinction between the average misconduct investigation and the average organised crime investigation. Clearly the ability of a controlled operation in an organised crime investigation to cause harm to the public, and major damage to the reputation to the authorising agency, is of a magnitude greater than the potential risks associated with a controlled operation in a misconduct investigation.

601 It is the firm view of the Committee that should the CCC be granted an enhanced organised crime jurisdiction, together with a commensurate ability to engage in controlled operations, there will be a clear need for checks and balances to be inserted in the legislation to require the CCC to seek, and obtain, independent authorisation, to engage in any controlled operations that may endanger public health or safety, such as the sale of illicit drugs.

602 The Committee makes the following findings:

Finding 16

If the WA Police are given the power to self-authorise the use of Exceptional Powers beyond that which presently exists, this will lead to an unacceptable and unnecessary erosion of civil liberties in Western Australia, and would increase the risk of harm to the public.

Finding 17

Should the CCC be granted an enhanced organised crime function, together with the power to engage in controlled operations, there is a clear need for there to be checks and balances inserted in the legislation to require the CCC to seek, and obtain, independent authorisation to engage in any controlled operations, such as the sale of illicit drugs, that may endanger public health or safety.


Committee's conclusions and recommendations

603 It is the Committee's firm view, after the benefit of reviewing the available evidence, that the CCC's crime fighting role (as distinct from its corruption fighting role) is best left to its present function under the CCC Act, which is to confer Exceptional Powers upon the WA Police to fight organised crime.

- 604 In the current political climate of affording greater powers to the WA Police, the interests of the community are best served by having the CCC remain a strong and authentically independent watchdog of the WA Police.
- 605 The CCC's most important function is to ensure that corruption in the WA Police is not allowed to flourish and propagate. The CCC can only effectively discharge this obligation if it remains authentically independent from the WA Police and maintains its reputation for integrity. The CCC's independence will be compromised and its integrity threatened if it is permitted to engage in joint operations with the WA Police to combat organised crime.
- 606 The Committee believes it would be a mistake for the CCC to be given an expanded jurisdiction to fight organised crime along with the WA Police. The CCC is, and is perceived to be, the bastion of integrity in the Western Australian community. As a corruption fighter it is proving second to none. This is in no small measure due to the efforts of the dedicated work of the CCC Commissioner and his staff.
- 607 The Committee therefore makes the following recommendation:

Recommendation 6

The CCC should not be granted an enhanced serious and organised crime jurisdiction.



HON NICK GOIRAN, MLC
CHAIRMAN

APPENDIX ONE

HOW THE WA POLICE COMBAT ORGANISED CRIME

Introduction

608 The Committee sought to inform itself as to the state of organised crime in Western Australia. The Committee reasoned that it could not advise Parliament as to how the CCC could best work with the WA Police to combat organised crime, if it did not identify the scope of the problem of organised crime in Western Australia and form an assessment as to how well the WA Police were addressing the problem.

609 The Committee found it difficult to obtain empirical data. WA Police Commissioner O'Callaghan informed the Committee on 23 June 2010:

*But the problem with actually giving you empirical data is that most of that data is held as covert intelligence material that I cannot share with you.*³¹²

610 WA Police Commissioner O'Callaghan said:

*You could throw as many resources at organised crime as you liked, and you would still have more to do. There will never be enough to combat it.*³¹³

611 Assistant Commissioner of Police (Specialist Crime), Mr Nick Anticich, spoke of a 'tsunami' of organised crime:

*Right now, to use an analogy, we are feeling the ripples of a tsunami in relation to serious and organised crime that will hit this state. It is happening now. The longer we take to react and put in place the strategies that we hope to address this with and the resources needed to tackle it, the greater the community of Western Australia will suffer.*³¹⁴

612 Detective Superintendent Charlie Carver, head of the Serious and Organised Crime Division of the WA Police gave this warning:

... one thing is certain—the threat is not likely to go away in the near future. I can certainly predict the threat and harm that serious organised crime brings will increase

³¹² Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 June 2010, p 19.

³¹³ Karl O'Callaghan, WA Police Commissioner, *Transcript of Evidence*, 23 June 2010, p 19.

³¹⁴ Nick Anticich, Assistant Commissioner of WA Police (Specialist Crime), *Transcript of Evidence*, 24 March 2010, p 20.

*significantly, and quickly, as Western Australians continue to prosper. We should not underestimate the gravity of this threat.*³¹⁵

- 613 The Commonwealth Parliamentary Joint Committee on the Australian Crime Commission (Cth PJC ACC) tabled a report in August 2009 as to its Inquiry into the legislative arrangements to outlaw serious and organised crime groups. During the course of the inquiry the Cth PJC ACC sought on several occasions to quantify criminal group membership in Australia. The committee was informed that data was not, as a matter of course, collected in regard to criminal group membership, and that Australia's federated law enforcement landscape further restricted the collection and consolidation of this data to build a national picture. The Cth PJC ACC noted in its report that need to quantify accurately the extent of organised crime, and in particular, to quantify the numbers of criminal groups and those individuals involved is critical. In quantifying the size of the problem, to develop a national picture of criminal groups and group membership, legislation and policy can be accurately developed, and resources appropriately allocated. The Committee accordingly recommended:

*The committee recommends that the ACC work with its law enforcement partners to enhance data collection on criminal groups and criminal group membership, in order to quantify and develop an accurate national picture of organised crime groups within Australia.*³¹⁶

- 614 The Committee endorses the recommendation of the Cth PJC ACC for more resources to be committed to gathering more meaningful data on organised crime, to better inform law enforcement agencies and policy decision makers.

A growing threat to Western Australia

- 615 Detective Superintendent Carver advised that Western Australia's strong economy was attracting organised crime:

Western Australia's strong economic position provides an attractive market for organised crime groups. Their primary targets are Western Australians with a high level of disposable income who are likely to engage in experimentation and drug use....

*The high illicit drug price in WA is indicative of a market in which demand and affordability exceed supply. WA is a prime market place for the OCGs [organised crime gangs] to maximise their profits.*³¹⁷

³¹⁵ Charlie Carver, Detective Superintendent, Serious and Organised Crime, WA Police, *Transcript of Evidence*, 2 August 2010, p 13.

³¹⁶ Commonwealth Parliamentary Joint Committee on the Australian Crime Commission, Report on its Inquiry into legislative amendments to outlaw serious and organised crime groups, August 2009, p 21.

³¹⁷ Charlie Carver, Detective Superintendent, Serious and Organised Crime, WA Police, *Transcript of Evidence*, 2 August 2010, p 5.

616 Clandestine drug laboratories are being detected in ever increasing numbers in Western Australia. Of particular concern is the risk posed by the hazardous, and potentially lethal chemicals used and the potential for explosions to occur in the manufacturing process. Detective Superintendent Carver said:

*The recently released Australian Crime Commission illicit drug report pointed to a generally higher drug price and purity in WA compared with other states. In addition, WA saw a dramatic increase, 463 per cent, in clandestine illicit drug laboratories across the state between 2008–09. We are on track to hit the same amount this year. Possibly symptomatic of local economic factors, WA stands out in a number of areas—this is concerning—including the highest non-crystal methyl amphetamine per gram price and purity in the country. MDMA or ecstasy has the lowest price per tablet. Heroin per ounce is the highest price. There has been an 80 per cent increase in heroin seizures; a 370 per cent increase in heroin weight seizures. Cocaine weight seized increased by 248 per cent in the same period. We have the third highest number of clandestine laboratories detected in Australia and of the 67 most volatile labs detected in Australia 64 were found in Western Australia. That is a major concern for us.*³¹⁸

617 Extortion offences also continue to rise. Detective Superintendent Carver said:

*We have seen a continuing rise in extortion offences. Reported extortion offences rose from 26 in 2008 to 34 in 2009. So far, in 2010, we have had 22 extortion offences reported. There is an organised crime flavour to these extortion offences; some of which targeted the construction, mining and market sectors. The reporting and investigation of these matters is proving problematic. There are issues in relation to ongoing threats towards witnesses; ensuring safety of complainants; and a potential loss of earnings by individuals and companies who report such matters due to adverse media coverage. Anecdotal information suggests that most extortions are not reported to police. I also see this as an ongoing issue and a future use of the CCC coercive powers and hearings.*³¹⁹

³¹⁸ Charlie Carver, Detective Superintendent, Serious and Organised Crime, WA Police, *Transcript of Evidence*, 2 August 2010, p 5.

³¹⁹ Charlie Carver, Detective Superintendent, Serious and Organised Crime, WA Police, *Transcript of Evidence*, 2 August 2010, p 5.

Drug trafficking and manufacture

618 Illicit trading in amphetamine-type stimulants (ATS) is the number one organised crime activity in Australia and remains a priority concern for law enforcement in Western Australia.³²⁰ In 1996 a Supreme Court judge said:

*Amphetamine trafficking is now recognised by the court to be in the higher range of seriousness in the scale of drug trafficking offences... The major sentencing considerations for offences of trafficking in dangerous drugs of addiction such as amphetamines, cocaine and heroin are general and personal deterrence, the major objective being to stop people doing it. It is quite obvious to anyone concerned with criminal justice administration that trafficking in amphetamines is rife in this State and part of its tragedy is that very young people in the community are being exposed to it. This has caused wide-spread community concern.*³²¹

619 In 2008 the Ministerial Council on Drug Strategy said that there was limited research on the efficacy of law enforcement on ATS markets in Australia³²² and recommended that investment be made in the following areas of research so as to “enhance responses to ATS related problems”:

- a better understanding of the “precursor market” for chemicals that are used to manufacture ATS;
- a better understanding of the factors that influence production, price and purity of ATS and the relationship of these to ATS use and related problems;
- enhanced evidence base for law enforcement strategies; and
- identifying the factors that contribute to effective and sustained impact of law enforcement.

620 In the 2009-10 WA Budget Statements, a significant issue impacting the WA Police was stated to be the:

*increasing number of traffickers and established crime networks dealing in amphetamine type stimulants in both Metropolitan and Regional Western Australia.*³²³

621 Unlike cocaine and heroin, amphetamines are both domestically manufactured and imported. They can be imported in their finished form or as precursor chemicals which are processed further.³²⁴ Most of the amphetamines in Australia are supplied locally from clandestine laboratories.³²⁵

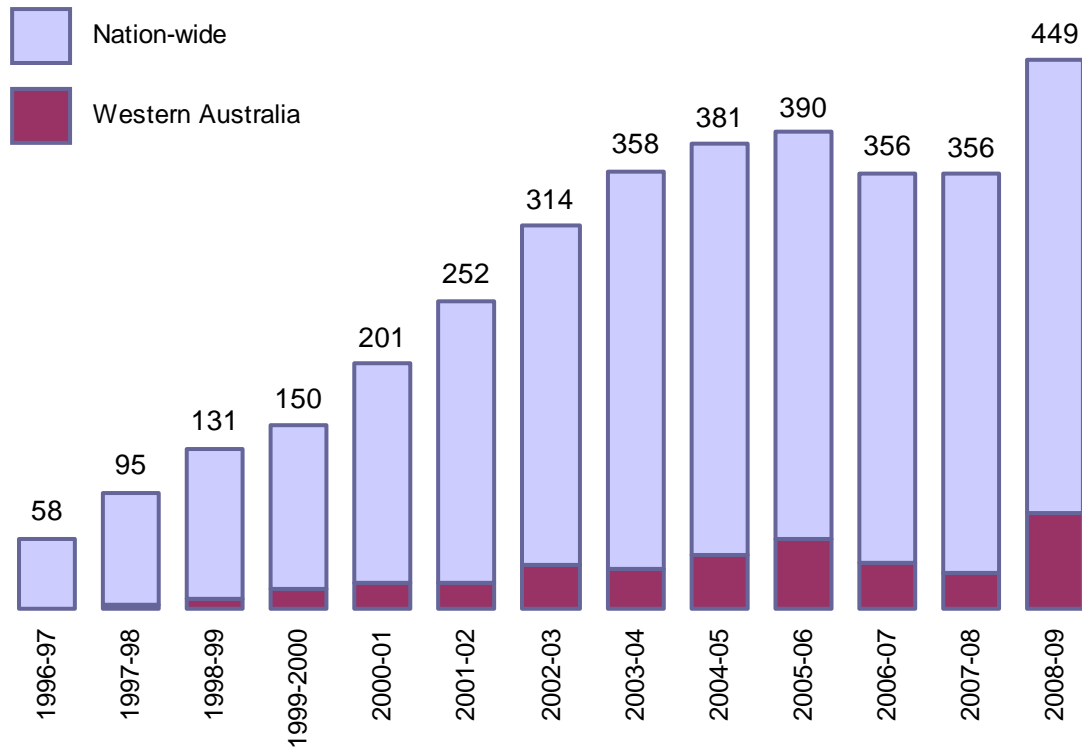
³²⁰ Australian Crime Commission, *Organised Crime in Australia*, 2009, p 7.

³²¹ Anderson J in *R v Bellissimo* (1996) 84 A Crim 465 at 471.

³²² *National Amphetamine-Type Stimulant Strategy 2008-2011*, p 38, accessed at <http://www.health.gov.au/internet/drugstrategy/Publishing.nsf/content/ATS-strategy-08> on 28 January 2010.

³²³ Government of Western Australia, *2009-10 Budget Statements*, Budget Paper No.2, Vol 2, p. 563.

**Total clandestine laboratory detections:
1996-97 to 2007-08**



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³²⁴ Australian Crime Commission 2009 Report, *Organised Crime in Australia*, p 7. In November 2000, the former Queensland Crime Commission pointed to the amphetamine market as the highest risk crime market in Queensland (Queensland Crime Commission, *The amphetamine market in Queensland*, Crime Bulletin no. 2, Brisbane, 2000) see also Crime and Misconduct Commission Bulletin Series Number 4, April 2002, *The Illicit Market for ADHD Prescription Drugs in Queensland*, accessed at www.cmc.qld.gov.au/data/portal/00000005/content/63420001125986217865.pdf on 22 January 2010.

³²⁵ Australian Crime Commission, *Illicit Drug Data Report 2005-2006*, Chapter "Amphetamines" pages 11 accessed at www.crimecommission.gov.au/publications/iddr/_files/2005_06/iddr_0506_amphetamines.pdf on 20 January 2010. See also Crime and Misconduct Commission Crime Bulletin No. 6, *Organised crime markets in Queensland: a strategic assessment*, p 11 accessed at www.cmc.qld.gov.au/data/portal/00000005/content/56473001141598820222.pdf on 22 January 2010.

³²⁶ Data extracted from Australian Crime Commission, *Illicit Drug Data Report 2005-2006*, Chapter "Amphetamines" page 17, and Australian Crime Commission, *Illicit Drug Data Report 2008-2009*, page 94.

Number of clandestine laboratory detections, by state and territory, 1996-97 to 2007-08									
	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Total
1996-97	-	-	-	-	-	-	-	-	58
1997-98	19	9	55	7	3	2	0	0	95
1998-99	20	4	83	12	8	0	2	2	131
1999-2000	20	18	79	14	17	0	1	1	150
2000-01	42	32	77	24	22	1	3	0	201
2001-02	32	24	138	32	22	3	1	0	252
2002-03	47	19	171	34	36	2	3	2	314
2003-04	61	20	189	48	33	1	6	0	358
2004-05	45	31	209	25	44	3	21	3	381
2005-06	55	47	161	50	58	5	12	2	390
2006-07	49	72	132	51	37	9	1	5	356
2007-08	51	76	121	69	30	2	1	6	356
2008-09	67	84	148	65	78	0	7	0	449

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622 In Western Australia crime networks have relied on a smaller number of large clandestine labs that have had the capacity to produce significant quantities of amphetamine. Western Australia labs arguably produce more amphetamine than Queensland.³²⁸

³²⁷ Table extracted from Australian Crime Commission, *Illicit Drug Data Report 2005-2006*, Chapter "Amphetamines" page 18, and Australian Crime Commission, *Illicit Drug Data Report 2008-2009*, page 94. State-specific data was first compiled for 1997-98.

³²⁸ Crime and Misconduct Commission Crime Bulletin No. 6, *Organised crime markets in Queensland: a strategic assessment*, p 12 accessed at www.cmc.qld.gov.au/data/portal/00000005/content/56473001141598820222.pdf on 22 January 2010.

Other forms of organised crime

623 Organised crime in Western Australia is not limited to drugs. The WA Police are experiencing organised criminal activity across four broad categories.³²⁹

<p>Illicit commodities</p> <p>Cocaine</p> <p>Amphetamine-type stimulants</p> <p>Precursors</p> <p>Heroin</p> <p>Cannabis</p> <p>Pharmaceuticals and performance and image enhancing drugs</p> <p>Anaesthetics and tryptamines</p> <p>Counterfeit goods</p> <p>Firearms</p>	<p>Crime in the Mainstream Economy</p> <p>Insurance fraud</p> <p>Welfare fraud</p> <p>Revenue and taxation fraud</p> <p>Superannuation and investment fraud</p> <p>Card fraud</p>
<p>Crimes against the Person</p> <p>Extortion and kidnapping</p> <p>Violence</p> <p>Child sex offences</p> <p>Sexual servitude</p> <p>People trafficking</p> <p>Unauthorised maritime arrivals</p>	<p>Key enablers</p> <p>Identity crime</p> <p>Money laundering</p> <p>High tech crime</p> <p>Public sector corruption</p> <p>Legislative weaknesses</p>

³²⁹ WA Police, 'Serious Organised Crime Strategy' (draft brochure) provided by Detective Superintendent Carver to the Committee on 2 August 2010, p 6.

Police methodologies

Combating organised crime is a high priority for the WA Police

624 Detective Superintendent Carver provided the Committee with a draft document entitled *Serious Organised Crime Strategy*. It is anticipated that this will be made public by the WA Police in the near future. The strategy talks of Established Criminal Networks and contains a statement of the applicable principles that the WA Police are and will be using in combating organised crime matters.

625 Assistant Commissioner of Police (Specialist Crime), Mr Nick Anticich, said to the Committee in closed hearing:

*organised crime presents a number of challenges for WA Police service, and those challenges continue to grow ... I do not think we will ever totally get rid of it. It is a case of perpetually attacking it and, where possible, contributing to creating a hostile environment in which it is difficult for organised crime to operate.*³³⁰

626 Drug trafficking and manufacture is the number one activity undertaken by organised crime syndicates in Western Australia. Law enforcement faces challenges in identifying and disrupting illicit drug distribution networks, as the drugs tend to be distributed between trusted individuals within closed circles.³³¹ Deputy WA Police Commissioner Dawson was asked by the Committee what priority he placed on policing organised crime in the overall scheme of law enforcement. In responding Mr Dawson highlighted the devastating impact of drugs on society:

The priority of organised crime is very, very high for a number of obvious reasons, the first one being that, in the space of illicit substances primarily, the use of amphetamines, cocaine and other like drugs has such a deleterious impact on society that they are the main drivers behind, for instance, home burglaries. Where we once had a burglary generated by pure theft—a person coveting something else and wanting to actually make some money—we increasingly have a proportion of criminal offences occurring out of the need to satisfy their appetite for drugs. That is why serious and organised crime has such primacy in terms of us trying to interdict as much as we can the volume of drugs because it has such a broad impact, not just on offences such as home burglaries, but indeed for very serious offences against the person, from homicide through to grievous bodily harm, where people are affected by substances. Of concern to us, and indeed it should be for every Western Australian, is that the surveys we conduct of prisoners through the East Perth watch-house have routinely over the past few years recorded Western Australian persons in custody as having a higher incidence of use of amphetamines, for instance, than any other watch-house or lock-up in the country. That is and should be of concern to

³³⁰ Nick Anticich, Assistant WA Police Commissioner (Specialist Crime), *Transcript of Evidence*, 24 March 2010, p2.

³³¹ Australian Crime Commission, *Organised Crime in Australia*, 2009, p 7.

*all Western Australians. That is why we give it very high primacy because we know that that is a high ingredient in many patterns of crime.*³³²

627 The WA Police focus in relation to organised crime is the identification and investigation of established criminal networks. A key priority is to target the financial structure and asset base of these groups, and dismantling them through multi-faceted and multi-agency operations. Within the WA Police, the Serious and Organised Crime Division has responsibility for reducing the impact of organised crime on the people of Western Australia. This division employs contemporary law enforcement techniques based on disruption and deterrence strategies.³³³

628 Organised criminal activity that is targeted includes:

- Drug trafficking;
- Drug manufacturing;
- Chemical diversion; and
- Firearms trafficking.³³⁴

629 What can be said, as revealed by the WA Police to the Committee, is that:

- the WA Police have a number of high priority targets that they know or suspect are carrying out activities that over time will be sufficiently repetitive and systemic so as to bear the hallmarks of organised crime;
- while some targets may be resident in Western Australia, many have very strong links with groups in Sydney, Melbourne and other capital cities;
- outlaw motorcycle groups are predominantly the main distributors of illicit drugs in Western Australia; and
- there are also a number of ethnic-based groups that have networks which they use to carry out unlawful conduct.

³³² Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 8.

³³³ WA Police, *Annual Report 09*, September 2009, p 24.

³³⁴ WA Police, *Annual Report 09*, September 2009, p 24.

630 On 3 April 2010 *The West Australian* newspaper published an article “Police tail crime world’s worst” in which it was reported that:

- Assistant Police Commissioner Nick Anticich had an interview with *The West Australian* newspaper.
- Mr Anticich disclosed that after six months of intensive intelligence gathering the WA Police had formulated a new plan, in which they would be targeting 50 individuals and groups who are having the “biggest impact” in crime circles.
- The WA Police have charged six individuals and 18 gang or syndicate members on the list. The charges included high-level drug trafficking, armed robbery, kidnapping, threats to kill, extortion, grievous bodily harm and discharging a firearm to cause fear.
- Mr Anticich said that police had recently drawn up the list but could not name the individuals or groups on it for legal reasons. Mr Anticich is reported as saying “We can’t name these people legally but we’re happy for them to know that they are on the list and that we are coming for them.”
- Apart from featuring prominent members of WA’s underworld – biekie gangs, organised crime figures and drug syndicates, the list included enforcers and the low-profile criminals underwriting the drug trade.
- The list also featured many ‘enablers’ – seemingly legitimate businessmen who lent their financial expertise to crime networks. These men, who generally had no recent criminal convictions, helped to fund organised crime networks or manage their assets and investments.³³⁵

WA Police operations with other law enforcement agencies

631 WA Police investigators work closely with the Australian Crime Commission, Australian Federal Police, Corruption and Crime Commission and other State agencies to ensure action is taken against high-level criminals at a State, national and international level. Mr Jim Migro, Detective Superintendent, formerly of the Serious and Organised Crime Division WA Police informed the Committee in closed hearing that WA Police works very well with Federal law enforcement agencies and other State law enforcement agencies linked in through the Australian Crime Commission. Mr Migro also informed the Committee that there is a Joint Operations Management Group (JOMG) in place in Western Australia, the members of which include other law enforcement agencies in Western Australia, including the CCC. JOMG looks at all serious and organised crime investigations in Western Australia.

³³⁵ Police tail crime world’s worst’, *The West Australian* newspaper, 3 April 2010.

632 Detective Superintendent Carver stressed to the Committee the importance of the WA Police's strategic partnerships with other law enforcement agencies in Australia. Detective Superintendent Carver said that the WA Police is now experiencing a greater level of cooperation and collaboration with partner law enforcement agencies including those in the eastern states as part of a national push to deal with organised crime. Secondment arrangements have been finalised with one agency in Victoria and are about to be replicated in another jurisdiction. These arrangements will see WA Police officers embedded within those organisations. Reciprocal arrangements are being negotiated with other agencies in the eastern states for them to be seconded to the WA Police. The WA Police currently have investigators attached to the Australian Federal Police and the Australian Crime Commission in Perth, operating in areas such as advanced technology, online child exploitation and organised crime areas. In the very near future a joint standing task force to target organised crime will be formed involving officers from customs, Australian Federal Police, the WA Police and the Australian Crime Commission and potentially other agencies.³³⁶

Rotation policy of police officers working in the Serious and Organised Crime Division of the WA Police

633 The WA Police informed the Committee that police personnel who are assigned to the Serious and Organised Crime Division are expected to commit for a minimum of two years, with a maximum of five years tenure. This is said to strike a balance between retaining operational experience, yet ensuring the integrity of the Serious and Organised Crime Division by rotating personnel out of the Division after five years, to prevent complacency and opportunities for entrenched corruption to arise.

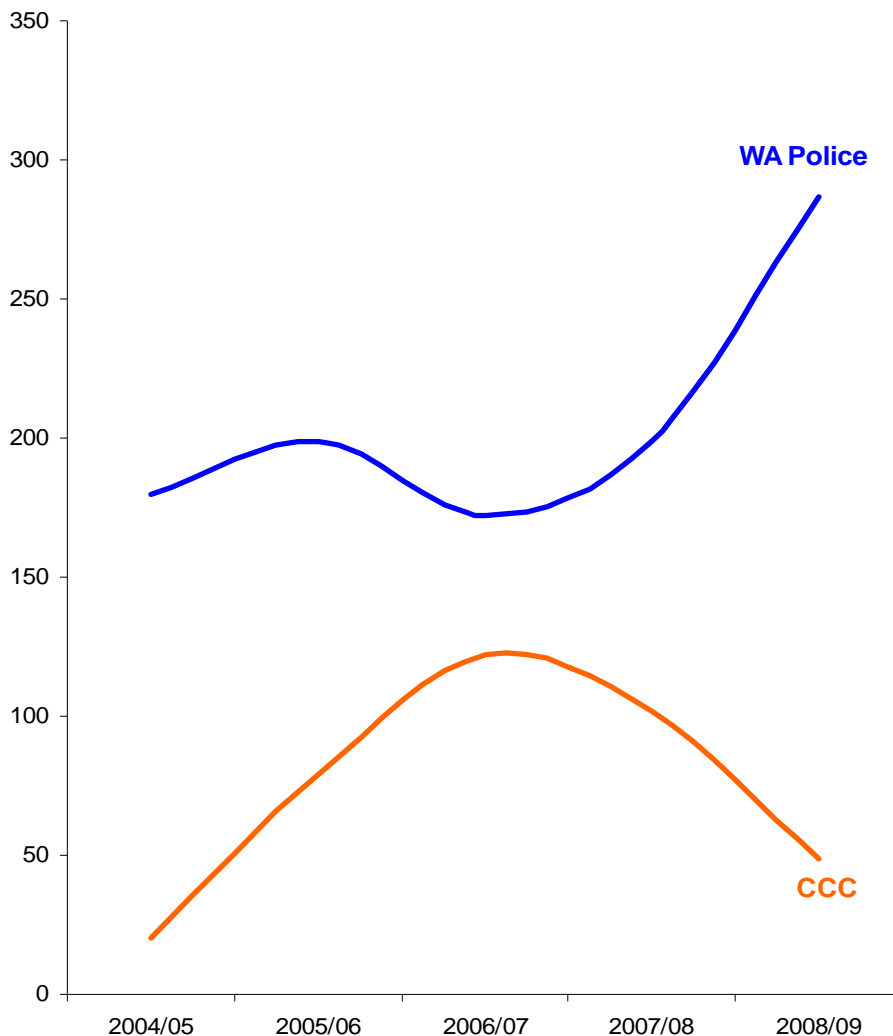
634 In comparison, the Hong Kong Police Force places a premium of integrity over operational efficiency in their Anti-Triad Squad, where police officers are rotated out after a maximum of two years, and with respect to their Anti-Vice Squad, police officers are rotated out after a maximum of eighteen months.

³³⁶ Charlie Carver, Detective Superintendent, Serious and Organised Crime, WA Police, *Transcript of Evidence*, 2 August 2010, p 10.

Telephone interception

635 The WA Police have, since 1997,³³⁷ been able to and regularly do intercept telephone communications pursuant to judicial warrants to gather intelligence and evidence. The legal authority to intercept telephone communications is governed by the Commonwealth and is regulated by the *Telecommunications (Interception) Act 1979* (Cth) (the Commonwealth Act). The following graph shows the number of applications made by the CCC and the WA Police since 2004:

Telephone intercept warrant applications



³³⁷ On 11 July 1997 the Commonwealth Attorney General, Darryl Williams, authorised WA Police to be an eligible agency under the *Telecommunications (Interception) Act 1979* (Cth).

- 636 The Ombudsman conducts annual audits of telephone intercepts conducted by the WA Police.
- 637 The CCC has the jurisdiction to investigate telephone intercepts conducted by the WA Police in the exercise of the CCC's misconduct function. For example, if the CCC had reason to believe that the WA Police were intercepting phone calls for an ulterior purpose, or were concocting grounds upon which to obtain a judicial warrant to intercept telephone communications, it could investigate the WA Police.
- 638 Rick Scupham, Detective Inspector, WA Police informed the Committee on 25 October 2006 that:
- ...the evidence deduced from telephone intercepts is of such a high quality that the rate of pleas of guilty is higher...*³³⁸
- 639 There are some suggestions that the effectiveness of telephone intercepts is being diminished by the development of new communication channels, the use of hand-held devices, higher levels of encryption, increased use of voice over internet protocols and criminal business models which feature social networking and the use of peer to peer networks.³³⁹

Covert operations

- 640 The WA Police do not need access to the Exceptional Powers under the CCC Act to undertake covert operations with respect to illicit drug investigations and prostitution. The *Misuse of Drugs Act 1981* permits the WA Police Commissioner to authorise any person (not just a police officer) to act as an undercover officer, and while that person's authority is in place, that undercover operative can acquire and have in his possession a prohibited drug or prohibited plant for the purpose of detecting the commission of an offence.³⁴⁰ Furthermore, the undercover agent has a limited immunity from prosecution.³⁴¹ The Minister for Police is entitled to request the WA Police Commissioner to provide a written report setting out the particulars of the activities of undercover officers authorised under the Act.³⁴²
- 641 There is a similar ability for the WA Police to engage undercover officers in relation to prostitution investigations. Section 35 of the *Prostitution Act 2000* (WA) permits the WA Police Commissioner to authorise a police officer to act as an undercover officer, and to do anything specified in the authorisation given by the WA Police Commissioner for the purpose of detecting the commission of an offence.³⁴³ As long as the undercover officer acts within the scope of his or

³³⁸ Rick Scupham, Detective Inspector, WA Police, *Transcript of Evidence*, 25 October 2006, p 6.

³³⁹ Roger Beale AO, *New Realities: National Policing in the 21st Century Federal Audit of Police Capabilities*, 30 June 2009, Report to Minister for Home Affairs, The Hon Brendan O'Connor MP, p 12.

³⁴⁰ *Misuse of Drugs Act 1981* (WA), s 31(2).

³⁴¹ *Misuse of Drugs Act 1981* (WA), s 31(3).

³⁴² *Misuse of Drugs Act 1981* (WA), s 31(7).

³⁴³ *Prostitution Act 2000* (WA), s 35(4).

her authority, the undercover officer does not commit an offence and is not liable as a party to an offence committed by another person.³⁴⁴ The Minister for Police is entitled to request the WA Police Commissioner to provide a written report setting out the particulars of the activities of undercover officers authorised under the Act.³⁴⁵ The Act further provides that the identity or purpose of an undercover officer may, for the time being, be concealed or misrepresented for the purpose of detecting the commission of an offence.

State Intelligence Services Covert Operations Tasking and Co-ordination Group

- 642 The State Intelligence Division of the WA Police provides an intelligence gathering, recording and dissemination service to the WA Police, offering support and assistance to diverse police operations within the State and throughout Australia. State Intelligence evaluates, analyses and distributes all available criminal intelligence information using a comprehensive data management system and by conducting relevant research through its extensive information network and covert intelligence facilities.
- 643 The State Intelligence Division comprises of units such as Covert Operations Unit, Policing Unit, Crime Stoppers Unit, Information Services Unit, Intelligence Training, State Intelligence Performance, Telecom Intercept Unit and Intelligence Systems.³⁴⁶
- 644 The WA Police regularly undertake secret and confidential operations (covert operations) for the purpose of obtaining information about criminal activity. An example of a covert operation is an operation approved by the State Intelligence Services Covert Operations Tasking and Co-ordination Group to infiltrate an organised crime syndicate in order to obtain information about drug trafficking. In this case, an undercover officer, who could be supported by physical and electronic surveillance, would be placed within the syndicate in order to achieve this outcome. This operation would be for the purpose of obtaining information about criminal activity. It would

³⁴⁴ *Prostitution Act 2000* (WA), s 35(5)(a).

³⁴⁵ *Misuse of Drugs Act 1981* (WA), s 31(6).

³⁴⁶ <http://www.stepforward.wa.gov.au/work/intelligence.php>, accessed on 11 March 2010.

also include the risk of imminent and serious injury or harm to the undercover officer, due to the type of people likely to be involved in the criminal activity and the criminal activity itself.³⁴⁷

645 Within the WA Police, covert operations are generally restricted to suitably qualified and authorised staff who maintain and use covert identities, as recognised within the WA Police's Covert Management Manual. Traditionally, these areas within the WA Police are limited to the Internal Affairs Unit (Covert Services) and State Intelligence Services (Undercover Police Unit and Covert Operations Unit).³⁴⁸ Nevertheless, it may be necessary for other police operational or support units to engage in covert operations.³⁴⁹

Examples of successful covert operations undertaken by the WA Police in drug investigations

646 The WA Police frequently use undercover police officers to gather evidence on drug traffickers. Typically the undercover officer will pose as an interested purchaser of drugs. Through covert surveillance, conversations between the undercover officer and the drug dealer are recorded, and arrests made at the point in time the drugs and money are exchanged. Sometimes a number of drug deals of ever increasing amounts are transacted before the arrests are made, which leads to multiple counts of drug trafficking. On occasion, the final drug transaction is for an amount of money so large that it cannot be financed by the WA Police, and convictions are secured on the basis of the evidence of the agreement to enter into the transaction, and not the completion of the transaction itself.

³⁴⁷ Guidance Note, '*Covert operations*' and '*dangerous operations*' in the *Western Australian Police Service*, Commission for Occupational Safety and Health, June 2004, accessed at http://www.docep.wa.gov.au/workSafe/PDF/Guidance_notes/Guide_WA_Police.pdf on 11 March 2010, p 9. Under the Occupational Safety and Health Act 1984 (WA), a person can refuse to undertake work when they believe, on reasonable ground, that to continue to work would expose them or any other person to a risk of imminent and serious injury or harm to their health. However, section 4A of the Act excluded a police officer, special constables and aboriginal aides from refusing to work where that refusal could adversely or could reasonably be expected to affect adversely, a covert operation. It is to be noted that certain CCC officers have been accorded the status of special constables. WorkSafe inspectors cannot issue a prohibition notice during a covert operation if to do so would adversely affect, or reasonably be expected to affect adversely the covert operation. There is nothing to prevent a WorkSafe inspector from investigating a current cover operation and making recommendations or making findings that: the covert operation could have been conducted in an alternative manner which would have reduced the risk; the officers were inadequately trained; inexperienced officers were employed for the operation; or inadequate support was provided.

³⁴⁸ Guidance Note, '*Covert operations*' and '*dangerous operations*' in the *Western Australian Police Service*, Commission for Occupational Safety and Health, June 2004, accessed at http://www.docep.wa.gov.au/workSafe/PDF/Guidance_notes/Guide_WA_Police.pdf on 11 March 2010, p 9.

³⁴⁹ Covert operations are not limited to organised crime investigations. In a district policing environment, undercover police officers may try to infiltrate suspected groups associated with the commission of burglary offences. See Guidance Note, '*Covert operations*' and '*dangerous operations*' in the *Western Australian Police Service*, Commission for Occupational Safety and Health, June 2004, accessed at http://www.docep.wa.gov.au/workSafe/PDF/Guidance_notes/Guide_WA_Police.pdf on 11 March 2010, p 9.

647 The following cases are examples of where the evidence of drug deals with undercover police officers has been used to convict drug dealers in Western Australia:

Watson v The Queen (2000)³⁵⁰ Police Drug Squad Operation Silvertail targeted Mr Watson by having a female police under cover operative pose as a potential purchaser of trafficable quantities of heroin. The operation was a complete success, leading to convictions on several counts and a jail sentence of 15 years. In the course of the operation, the undercover officer bought drugs for ever increasing amounts, handing over \$100, \$750, \$1,200, \$5,100 and \$17,000. With respect to the final transaction, the \$17,000 was coated in anthracene powder, which is a powder made up by the Chemistry Centre and given to the forensic branch of the WA Police. Notes that have been in contact with the powder can be detected under ultra violet light. The \$17,000 was recovered by the WA Police following the arrest phase of the operation.

Tsagaris v R (1998)³⁵¹ Tsagaris unsuccessfully sought to appeal his sentence of 14 years imprisonment for trafficking in heroin. The primary evidence of the prosecution was from an undercover police officer to whom Tsagaris had sold, or offered to sell the drugs. The appeal failed.

Koushappis v R (2001)³⁵² Koushappis unsuccessfully sought to appeal his sentence of 6 years imprisonment for two counts of selling heroin and one count of possession heroin with intent. The first count involved 0.04 grams of heroin (56% purity) and the second count of 0.05 grams of heroin (53% purity). From these sales Koushappis received \$300. They were made to an undercover police officer at Koushappis' home. The third count arose out of a search of his home in the course of which he was found endeavouring to flush down the toilet 23 folds of heroin.³⁵³

Leonard v R (1999)³⁵⁴ Leonard sought to appeal a sentence of 5 years imprisonment imposed in respect of one count of selling or supplying 22.4 grams of methamphetamine (8.5% pure). The sale was to undercover police officers 'who had gone to some pains to ingratiate themselves'³⁵⁵ with Leonard. Leonard sought to argue that the sentence should be reduced because the undercover officers had invited or encouraged the commission of the offence. The appeal failed with the Court of Appeal characterising the conduct of the undercover officers as merely giving Leonard the opportunity to do what he was already disposed to do.

R v Gurka (2001)³⁵⁶ Gurka unsuccessfully sought to appeal his sentence of 8 years imprisonment for two charges of selling heroin to an undercover police officer and one

³⁵⁰ *Watson v The Queen* [2000] WASCA 119.

³⁵¹ *Tsagaris v R*, unreported, Court of Criminal Appeal, Supreme Court of Western Australia,; Library No 980721; 14 December 1998.

³⁵² *Koushappis v R* [2001] WASCA 18.

³⁵³ A fold is a small paper fold containing one deal of a drug.

³⁵⁴ *Leonard v R* (1999) unreported Court of Criminal Appeal, Supreme Court of Western Australia; Library No 990152; 29 March 1999.

³⁵⁵ According to Roberts-Smith J in *Le v The Queen* [2004] WASCA 214 at [104].

³⁵⁶ *R v Gurka* (2001) 120 A Crim R 407

charge of possessing heroin with intent to sell or supply. The first sale was of 6.93 grams (48% purity) for which \$2,400 was paid. The second sale was of 3.3 grams (40% purity) for which \$1300 was paid. With respect to the attempted third sale, \$10,000 was to have been paid for 27.6 grams (76% purity).

Le v The Queen (2004)³⁵⁷ Le unsuccessfully sought to appeal against his conviction of 9 years and 3 months imprisonment. On 31 March 2003, Le sold 6.94 grams of methamphetamine (81% pure) to an undercover officer for \$2,300. On the same day, Le sold 4.7 grams of heroin (22% pure) to the undercover officer for \$250. On 3 April 2003 Le sold 55.95 grams of heroin (19% pure) to the undercover officer. The judgment does not reveal how much the undercover officer paid Le. At the same place Le sold 27.9 grams of methamphetamine (83% pure) to the undercover officer for \$7000. On 16 April 2003 Le offered to sell 12 ounces of heroin to the undercover officer for \$10,000 per ounce, a quantity of \$120,000. Le also asked to be paid \$2,000 on top of the purchase price for the delivery of the heroin. The sale did not proceed. Le was tipped off about the identity of the undercover officer. In his video record of interview, however, Le said that he could not obtain such a large amount of heroin at that time and that was the reason why the sale did not proceed.

Bikies

They are not a social club. They are not good-old boys who just go out and hop on Harleys and ride around. They are organised crime. There isn't just one or two people in these clubs who have committed crimes independently. We are saying that good percentages of these clubs' members have been charged with offences and some of them very significant.

(2010) Detective Superintendent Jim Migro, head of WA Police Gang Crime Squad.³⁵⁸

⁶⁴⁸ In closed hearing with the WA Police on 23 September 2009, Deputy WA Police Commissioner Dawson said:

*... with bikies we can say the outlaw motorcycle groups are predominately the main distributors of illicit drugs in Western Australia. It is common right across Australia that the bikie groups are the main distributors of illicit drugs.*³⁵⁹

³⁵⁷ *Le v The Queen* [2004] WASCA 214.

³⁵⁸ As reported in 'Bikie crime claims point to a turf war', *The Sunday Times* newspaper, 7 March 2010, p 5.

³⁵⁹ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 23 September 2009, p 5.

649 Mr Dawson's statement is amply supported by publicly available information and statements by law enforcement agencies. The Alcohol and Drug Coordination Unit, WA Police Service said in 2007:

*The diversion of precursor chemicals for the manufacture of amphetamines and the extent of supply, distribution and sale of finished amphetamine suggest a significant level of involvement by organised crime and established criminal networks.*³⁶⁰

650 The Australian Crime Commission in 2006 commented that a strong prevalence of outlaw motorcycle gang (OMCG) involvement in the ATS market has been identified, particularly with small and versatile laboratories.³⁶¹

651 On 7 March 2010 *The Sunday Times* newspaper published a series of articles on bikies. *The Sunday Times* newspaper claimed to have obtained an extensive police dossier. The article contained the following information.

652 There are eight bikie gangs operating in Western Australia:

- Rebels;
- Coffin Cheaters;
- Club Deroes;
- Gypsy Jokers;
- God's Garbage;
- Outlaws;
- Finks; and
- Comancheros WA (established early 2010).

³⁶⁰ WA *Illicit Amphetamine Summit July 2007 Background paper*, p15 and p18. Paper accessed at www.dao.health.wa.gov.au/AboutDAO/PolicyStrategyandInformation/WestAustralianIllicitAmphetamineSummit/tabid/223/Default.aspx on 25 January 2010.

³⁶¹ Australian Crime Commission, *Illicit Drug Data Report 2005-2006*, Chapter "Amphetamines" p 14 accessed at www.crimecommission.gov.au/publications/iddr/_files/2005_06/iddr_0506_amphetamines.pdf on 20 January 2010. See also Crime and Misconduct Commission Crime Bulletin No. 6: *Organised crime markets in Queensland: a strategic assessment*, p 11 accessed at www.cmc.qld.gov.au/data/portal/00000005/content/56473001141598820222.pdf on 22 January 2010.

Gang Crime Squad charges against patched members of WA outlaw motorcycle gangs between January 2008 and December 2009															
	No. of members	Members charged	Drugs	Weapons	Assaults	Robbery and extortion	Theft	Abductions	Deception	Sexual assault	Public order	Dangerous acts	Traffic offences	Other	
Rebels	46	28	28	23	15	11	18	5	5	1			74	15	180
Coffin Cheaters	51	26	19	18	9	4	5						14	12	69
Club Deroes	51	17	17	6	6	2	1	2		8	8	6	26	9	82
Gypsy Jokers	56	28	15	12	13	1	3				4	5	45	5	98
God's Garbage	51	19	14	17	4	2	5	1	5			4	29	5	81
Outlaws	25	11	4		1						4		17		26
Finks	13	6	3	5	1	5		2				1	6	2	23
	293	135	100	81	49	25	32	10	10	9	16	16	211	48	607

362

653 The last row of the table above sets out the comparable numbers of indictments processed by the District Court in the period January 2009 to December 2009.

³⁶² Source: WA Police Gang Crime Squad. Data does not include charges against bkie gang nominees or associates. Comancheros WA was established in early 2010 and are not included in these statistics. Police say that there are 257 active patched bikies currently in WA, but membership data provided by WA Police shows there are 293 bikies affiliated with the clubs.

Proposed anti-association laws

654 The State Government has flagged its intention to introduce anti-association legislation into Parliament. On 18 June 2009, the Minister for Police, Hon Rob Johnson MLA informed the Legislative Assembly that he and the Attorney General were working on proposed legislation for submission to Cabinet whereby:

*the Commissioner of Police has the authority to be able to go to a Supreme Court judge to obtain what is known as a declaration, which means that a criminal or an organised gang can be declared as such. If the judge grants a declaration of that nature, it will give the Commissioner of Police the authority to prohibit or put prohibition orders in place to stop that organised gang member or that organised gang from associating with other known criminals or any other individual who the Commissioner of Police decides should be covered by the order. It will also cover situations in which gang members will be prohibited from going to certain public events when it is considered that they will be a danger to the public.*³⁶³

655 Six of the eight bikie gangs, excluding the Comancheros and Finks, along with Veterans Motorcycle Club, have banded together to form the WA chapter of the United Motorcycle Council (UMCWA) to fight the proposed laws, which they say are an undemocratic crackdown on their right to associate with each other. The member clubs of the UMCWA are:

- Club Deroes;
- Coffin Cheaters;
- Gypsy Jokers;
- God's Garbage;
- Outlaws;
- Rebels; and
- Veterans Motorcycle Club.³⁶⁴

656 Interestingly, the CCC Commissioner Roberts-Smith, is not in favour of the proposed anti-association laws. On 4 July 2008, CCC Commissioner Roberts-Smith, gave evidence before the Commonwealth Parliamentary Joint Committee on the Australian Crime Commission which was conducting an inquiry as to possible legislative arrangements to outlaw serious and organised crime groups.

³⁶³ Hon Rob Johnson MLA, Minister for Police, Western Australia, Legislative Assembly, *Parliamentary Debates*, 18 June 2009, p 5267.

³⁶⁴ UMCWA website, http://www.umcwa.org/index.php?option=com_content&view=article&id=8&Itemid=10, accessed on 16 March 2010.

657 CCC Commissioner Roberts-Smith's central thesis was that he was not in favour of legislation outlawing membership of serious and organised crime groups, that law enforcement agencies already have sufficient legislative powers to tackle organised crime, and that the challenge was to ensure that the law enforcement agencies were adequately resourced to use the existing powers at their disposal.³⁶⁵

Operation Jupiter

658 In late 2007 after the Coffin Cheaters' Bayswater clubhouse was firebombed the WA Police commenced Operation Jupiter, a police venture to combat the criminal activities of bikies. From January 2008 to March 2009, Operation Jupiter has apprehended 834 people and laid 1841 charges. Of the apprehensions, 304 were bikie members, nominees or associates. Operation Jupiter police officers have seized 71 firearms, over 5,000 rounds of ammunition, 7.1 kg of amphetamines and 58.3 kg of cannabis. Assets to the value of \$10 million have been seized or frozen with \$1.18 million in cash and the rest being real estate, motor vehicles, motorcycles and boats.³⁶⁶

659 Assistant Commissioner Wayne Gregson said:

*Operation Jupiter has given us an improved picture of the level and structure of criminality within these groups — their businesses and shelf companies... We'll continue to build on that.*³⁶⁷

660 As noted in Chapter 2, since the commencement of Operation Jupiter, the WA Police Commissioner has made seven applications for Exceptional Powers Findings resulting in 29 coercive hearings being held in relation to Operation Jupiter.³⁶⁸

661 Of 268 known members of the seven outlaw motorcycle clubs operating in Western Australia, 193 have criminal convictions, ranging from traffic offences to kidnapping and murder.³⁶⁹

³⁶⁵ Len Roberts-Smith QC, CCC Commissioner, Commonwealth Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into Legislative Amendments to Outlaw Serious and Organised Crime Groups, Perth, 4 July 2008.

³⁶⁶ 'Bike crackdown 'saved WA \$56m''. *ABC News Online*, 23 June 2009; 'New campaign to target WA's outlaw bikie gangs, Ministerial Statement', Hon Rob Johnson MLA, 7 June 2009; 'Police say WA bikies not part of national feud', 27 March 2009, *Perth Now* website accessed at www.perthnow.com.au/news/wa-not-joining-bikie-war/story-0-1225698123215 on 4 February 2010.

³⁶⁷ 'Anti-bikie unit may be permanent force', *The West Australian* newspaper website, 28 March 2009, accessed at <http://backend.thewest.com.au/default.aspx?MenuID=77&ContentID=132752> on 4 February 2010.

³⁶⁸ In late 2007 after the Coffin Cheaters' Bayswater clubhouse was firebombed, WA Police commenced Operation Jupiter, a police venture to combat the criminal activities of bikies.

³⁶⁹ 'More criminals in WA's bikie gangs than in many prisons', *The West Australian* newspaper website, accessed at <http://backend.thewest.com.au/default.aspx?MenuID=77&ContentID=140737>.

Ethnic based groups

662 In closed hearing with the WA Police on 23 September 2009, Deputy WA Police Commissioner Dawson said:

*... there are a number of ethnic-based groups-be they Middle Eastern and/or Asian crime groups – that also have a network which, quite frankly, they optimally use. They will intentionally spread their assets and networks across borders in order to frustrate law enforcement.*³⁷⁰

Funding of the WA Police

663 The 2009-10 Budget for Western Australia allocated \$911,512,000 to the WA Police for the delivery of the following services:

Intelligence and Protective Services	\$65,108,000
Crime Prevention and Public Order	\$72,637,000
Community Support (non-offence incidents)	\$74,838,000
Emergency Management and Coordination	\$35,443,000
Response to and Investigation of Offences	\$391,185,000
Services to the Judicial Process	\$96,454,000
Traffic Law Enforcement and Management	\$194,190,000
Implementation of the State Crime Prevention Strategy	\$7,930,000

664 The 2009-10 Budget allocated \$65,108,000 for Intelligence and Protective Services, which are described as:

Incorporating a range of specialist criminal intelligence analysis techniques and partnerships to target offenders and crime hot spots in order to ensure safety in the community, prevent and reduce crime. Activities undertaken include:

³⁷⁰ 'Anti-bikie unit may be permanent force', *The West Australian* newspaper website, 28 March 2009, accessed at <http://backend.thewest.com.au/default.aspx?MenuID=77&ContentID=132752> on 4 February 2010.

- *using criminal intelligence analysis techniques to develop effective policing strategies to target offenders and crime hotspots;*
- *providing specialist protective and security services to international and other protective persons, assets and infrastructure;*
- *airport security and witness protection; and*
- *participating in crisis situations.*³⁷¹

665 A recent review and restructure of the Serious and Organised Crime Division of the WA Police has realigned its priorities to focus on unexplained wealth investigations, as well as declared drug traffickers. The expected result is the disruption and dismantling of organised crime activities through the investigation and confiscation of their financial base. In November 2008, the Attorney General and the Minister for Police signed a memorandum of understanding to allow for \$1.15 million per annum of monies collected under the *Criminal Property Confiscation Act 2000* to be allocated to the WA Police for use in combating organised crime in WA. In addition, where the total value of funds in a calendar year exceeds \$9 million, 30 cents in every dollar will be allocated for use by the WA Police.³⁷²

666 The *Criminal Property Confiscation Act 2000* is a potent instrument in the forfeiture of property obtained through criminal activity and it is the intent of the WA Police to further the application of this legislation.³⁷³

³⁷¹ Government of Western Australia, *2009-10 Budget Statements*, Budget Paper No.2, Vol 2, p. 566.

³⁷² WA Police, *Annual Report 09*, September 2009, p 24.

³⁷³ WA Police, *Annual Report 09*, September 2009, p 24.

APPENDIX TWO

THE WA POLICE AND CORRUPTION

Corrupt: c.1300, from the Latin corruptus, pp. of corrumpere "to destroy, spoil, bribe," from com- + rup-, pp. of rumpere "to break."

In all institutions from which the cold wind of open criticism is excluded, an innocent corruption begins to grow like a mushroom.- Friedrich Nietzsche.

The reality is that organised crime has been, and will continue to be, a corruption threat to police. – CCC submission to the Committee.³⁷⁴

Introduction

667 The Kennedy Royal Commission revealed that less than ten years ago there was major corruption in the WA Police. Since the inception of the CCC in 2004, there have been no major revelations of endemic police corruption in Western Australia. In Queensland, however, where the now CMC took on an organised crime function in conjunction with the QPS, allegations of systemic police corruption continue to surface with the major revelation in early February 2010 that the CMC were once again investigating alleged links between several QPS officers and organised crime.³⁷⁵ In that context, the Committee believes it is important to explore the nature of police corruption and to re-visit the depth of police corruption revealed by the Kennedy Royal Commission. This underpins the decision to establish the CCC without a full organised crime function.

³⁷⁴ CCC submission dated 24 July 2007, p 29.

³⁷⁵ Annie Guest, 'Bligh rejects corruption rife in Qld police', *ABC News*, 5 February 2010. Available at: <http://www.abc.net.au/news/stories/2010/02/04/2810126.htm> (accessed 12 May 2010).

Police corruption – A troubling phenomenon

- 668 It is an unfortunate fact that the private interests of public servants sometimes override the goal of serving the public interest. In a broad sense, the phenomenon that is public sector corruption refers to any situation in which a public servant misuses the public powers available in order to affect, or to attempt to affect, personal or organisational gain. This troubling phenomenon strikes at the very heart of governance, and its existence poses a major challenge to societies worldwide.
- 669 In Western Australia, it is the role of the CCC to account for and combat corruption in the public sector. In essence, the CCC does this by educating and motivating public servants to act in the public interest, and by investigating allegations that the public interest is not being served in some particular instance. In its 2008-09 *Annual Report*, the CCC received 3,205 such allegations. Of these, 1,274 – or 40% of all allegations received by the CCC – were made against officers of the WA Police.³⁷⁶
- 670 As at June 2009, a total of 147,124 individuals were employed within the Western Australian public sector in some capacity.³⁷⁷ 8,339 (or approximately 6%) of these were working with the WA Police.

A difficult profession

- 671 Police provide the public they serve with the enforcement of law and order in society. It is clear, therefore, that police corruption poses an especially serious challenge for any society: as the most visible arm of any government, police officers are expected to not only uphold, but indeed to exemplify, the law. Yet, as has been observed, “Law enforcement, by its very nature, attracts illicit forms of attempted influence against prosecution.”³⁷⁸ That is, the role of enforcing law and order in society puts police squarely in the sights of those who would rather that law and order not be enforced.
- 672 In giving due consideration to this observation, it bears contemplation that the specific role of the officers of any police force is to *monitor* the society they serve, and to *report* suspected violations of that society’s laws to prosecutorial authorities. Clearly, if a citizen is observed transgressing some law by a police officer, the citizen would prefer the police officer to not report her or his behaviour to the prosecuting authority, and accordingly the citizen might make enquiries as to

³⁷⁶ CCC, *Annual Report 2008-09*, p 28.

³⁷⁷ Public Sector Commission, ‘Western Australian Public Sector Workforce Report (June 2009)’, 2009. Available at: <http://www.publicsector.wa.gov.au/SiteCollectionDocuments/Workforce%20Report%20-%20June%20Quarter%202009.pdf>. Accessed on 18 February 2010.

³⁷⁸ Tim Prenzler, ‘Civilian oversight of police’, *The British Journal of Criminology*, Vol. 40, 2000, p 659.

what she or he might be able to do to make a charge go away. As Tim Newburn³⁷⁹ notes, “those who are most interested in corrupting police officers may well have little to lose and a lot to gain from bribery and other forms of illegality.”³⁸⁰ Simultaneously, police agencies in Australia and abroad often find themselves under immense societal and political pressure to achieve what can be incredibly difficult outcomes – and with limited resources. This has led Maurice Punch³⁸¹ to observe that “corruption and police misconduct are persistent and constantly recurring hazards generated by the organisation itself.”³⁸² Policing is a difficult profession, and dealing with the phenomenon of police corruption is a profoundly difficult proposition. Indeed, at the most basic level, it has proven quite difficult for those engaged in the realm of police studies to adequately formulate a satisfactory definition of what exactly constitutes the phenomenon.

What constitutes police corruption?

673 In Western Australia, Section 83 of the *Criminal Code* defines corruption as occurring when:

Any public officer who, without lawful authority or a reasonable excuse —

- (a) *acts upon any knowledge or information obtained by reason of his office or employment;*
- (b) *acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or*
- (c) *acts corruptly in the performance or discharge of the functions of his office or employment,*

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person.

674 At its core, police corruption necessarily involves an abuse of position. The level of power granted to police officers in Australia and abroad can generally be seen as a direct function of the trust placed in them by the citizens they serve; according to Carl Klockars,³⁸³ police corruption is the

³⁷⁹ Tim Newburn is President of the British Society of Criminology, Director of the Mannheim Centre for Criminology and Professor of Criminology and Social Policy at the London School of Economics and Political Science.

³⁸⁰ Tim Newburn, ‘Understanding and preventing police corruption: lessons from the literature’, *Police Research Series, Research Development Statistics*, Vol. 110, 1999, p 21.

³⁸¹ Maurice Punch is a professor in the Mannheim Centre for Criminology at the London School of Economics and Political Science.

³⁸² Maurice Punch, ‘Police corruption and its prevention’, *European Journal on Criminal Policy and Research*, Vol. 8, 2000, p 301.

³⁸³ Carl Klockars is a Professor of Criminal Justice and Sociology at the University of Delaware.

corruption of this trust.³⁸⁴ Drawing upon Klockars' observation, Newburn demonstrates that the corruption of this trust can occur in a multitude of ways, and therefore that any attempt to define conduct that constitutes police corruption must focus upon three factors: the *means*, the *ends* and the *motivation* behind the conduct.

675 This leads Klockars to favour the definition of police corruption provided by John Kleinig³⁸⁵ in 1996:

*Police officers act corruptly when, in exercising or failing to exercise their authority, they act with the primary intention of furthering private or departmental/divisional advantage.*³⁸⁶

676 Police act corruptly when they fail to perform their duties, or when they perform their duties in a particular manner, with the intent of realising some benefit either personally, or else for their colleagues, or for themselves and their colleagues together. As such, a very wide range of activities can each equally be considered as examples of police corruption.

677 In qualifying what exactly does constitute police corruption, however, it is useful to recognise that not all corrupt behaviour is equally nefarious. This recognition was famously explored back in 1974 by Julian Roebuck³⁸⁷ and Thomas Barker³⁸⁸ in their study *A typology of police corruption*. Roebuck and Barker identified eight categories of police corruption, to which Punch added a ninth in 1985:

³⁸⁴ Carl Klockars, 'The Dirty Harry problem', in F.A. Elliston and M. Feldberg (eds.), *Moral Issues in Police Work*, Rowan and Allanheld, New Jersey, 1985.

³⁸⁵ John Kleinig is a professor at the Centre for Applied Philosophy & Public Ethics, Charles Sturt University, and at the Department of Law & Police Science in the John Jay College of Criminal Justice at the City University of New York.

³⁸⁶ John Kleinig, *The Ethics of Policing*, Cambridge University Press, Cambridge, 1996.

³⁸⁷ Julian Roebuck is a Research Professor in the Criminal Justice Institute at Clark Atlanta University.

³⁸⁸ Thomas Barker is a sociologist and author of several books concerning law enforcement.

Types and dimensions of police corruption	
Type	Dimensions
1. Corruption of Authority	When officers receive some form of material gain by virtue of their position without violating the law <i>per se</i> (e.g. free drinks, meals, services).
2. 'Kickbacks'	Receipt of goods, services or money for referring business to particular individuals or companies.
3. Opportunistic theft	Stealing from arrestees ('rolling'), from traffic accident victims, crime victims, and the bodies or property of dead citizens.
4. 'Shakedowns'	Acceptance of a bribe for not following through a criminal violation – not making an arrest, filing a complaint or impounding property.
5. Protection of illegal activities	Police protection of those engaged in illegal activities (prostitution, drugs, pornography) enabling the business to continue to operate.
6. 'The fix'	Undermining of criminal investigations or proceedings, or the 'losing' of traffic tickets.
7. Direct criminal activities	A police officer commits a crime against person or property for personal gain 'in clear violation' of both departmental norms and criminal law.
8. Internal payoffs	Prerogatives available to police officers (holidays, shift allocations, promotion) are bought, bartered and sold.
9. 'Flaking' or 'padding'	Planting of or adding to evidence (particularly but not exclusively in drugs cases).

678 Particularly striking is that the typology of police corruption includes actions that are both traditionally regarded as being corrupt (such as 'shakedowns', in which an external party is able to buy their way out of having their transgressions referred to the prosecuting authorities), and those that are less widely considered to exemplify police corruption (such as accepting gratuities from local restaurants).

679 Punch also offers a scale of what he refers to as ‘police deviance’:

The scale of police deviant behaviour	
Type	Dimensions
1. Misconduct	Occupational deviance that breaks departmental rules and procedures.
2. Straightforward corruption	At the request of an external party, something is done or not done in exchange for some sort of reward.
3. Strategic corruption	A standing agreement between a police officer (or officers) and an external, organised criminal party to mutually accommodate one another.
4. Predatory corruption	The ongoing stimulation of crime by police, again with respect to an external organised criminal party.
5. ‘Noble cause’ or process corruption	The use by police of illicit means (such as false testimony) to achieve organisationally and socially approved ends. The motivation for corruption in this instance is often the strength of public opinion.
6. Police crime	Crimes committed by police in uniform, without the presence of any external party. Observed most often in police investigations of crimes committed against other police officers.
7. State-related police crime	Crimes committed by police officers at the behest of governments and for political purposes.

680 Punch notes that, if one is to scan and consider the behaviours listed in these typologies:

*... it is plain that we are no longer dealing with individuals seeking solely personal gain (so called ‘bad apples’) but with group behaviour rooted in established arrangements and/or extreme practises that have to be located within the structure and culture of police work and the police organisation. Police officers have to be initiated into these practises, rationalisations have to be produced to accept them, supervisors have to collude or turn a blind eye, and organisations have either in some way to condone or encourage these activities – or else fail to tackle them.*³⁸⁹

681 Police corruption, therefore, must realistically be regarded as a negative externality created as a result of equipping police officers with the requisite powers for performing the role of enforcing law and order in society.

³⁸⁹ Maurice Punch, ‘Police corruption and its prevention’, *European Journal on Criminal Policy and Research*, Vol. 8, 2000, p 304.

Bad apples in an otherwise clean barrel?

- 682 Police corruption is, therefore, not new: as has been observed, corruption “has been part of policing for as long as we have had policing.”³⁹⁰ In Australia, this has been demonstrated repeatedly, most recently and clearly in the Reports of the Fitzgerald and Kennedy Royal Commissions. When confronted with evidence of corrupt behaviour within their ranks, police agencies will invariably claim that the problems identified are limited to a small number of officers, and that these ‘bad apples’ are not representative of the police agency as a whole; that once they have been weeded out, the problem of police corruption will have been solved.
- 683 It is in 2010, however, an accepted tenet of police studies that police corruption arises out of human nature. In essence, all human beings are corruptible, and police work places police officers in extremely close proximity to corrupting influences. The ‘bad apple’ theory serves only to obscure the fact that police corruption has proven to be both a universal and recurring problem. Though it is unsavoury to say, as a phenomenon it cannot be ‘weeded out’ of a police force with sudden repressive measures; rather, it must be subjected to constant and sceptical vigilance.
- 684 As Punch observes, “there have been [police corruption] scandals in the USA, France, Spain, Britain, Belgium, Germany, Australia and the Netherlands... [and] in the New York Police Department [alone] a scandal has occurred almost every 20 years – in 1895, 1913, 1932, 1954, 1973 and 1994.”³⁹¹ The contention that bad apples periodically appear in otherwise clean barrels is, on the basis of this evidence, both incorrect and – perhaps more pointedly – disrespectful of police and the stresses that the role places upon police officers.

³⁹⁰ Tim Newburn, ‘Understanding and preventing police corruption: lessons from the literature’, *Police Research Series, Research Development Statistics*, Vol. 110, 1999, p 45.

³⁹¹ Maurice Punch, ‘Police corruption and its prevention’, *European Journal on Criminal Policy and Research*, Vol. 8, 2000, p 306.

What causes police corruption?

685

It is human nature, combined with the very nature of police work, that leads to at least some degree of intermittent corruption within any police force. In examining this, Newburn identified seven ‘constant factors’ pertaining to police work that makes policing a profession that is inherently susceptible to corruption:

Causal factors affecting the development of corrupt practises	
Discretion	Police officers have the freedom to decide what particular laws to enforce at what particular times.
Low managerial visibility	A great deal of police work is done ‘out in the field’ – away from the influence of direct supervision.
Low public visibility	Much of what police officers do is not witnessed by members of the public.
Peer group secrecy	‘Police culture’ is characterised by a high degree of internal solidarity and secrecy.
Managerial secrecy	Police managers have generally worked their way up from the ‘beat’ and share many of the values of those they manage.
Status problems	Police officers are sometimes said to be poorly paid relative to their powers.
Proximity to lawbreakers / temptation	Police officers inevitably come into contact with a wide variety of people who have an interest in police not doing what they have a duty to do. Such people may have access to considerable resources.
Community structure	The manner in which a particular community regards its police force.
Corruption controls	The manner and method by which corrupt behaviour by police officers is combated and dealt with.

686

Discretion: Newburn observes that, while there exists a “legalistic presupposition that the purpose of police organisations is to enforce all laws,” and thus to charge offenders immediately upon the committing of any offence, “not only is this impractical, but ‘clients’ of police organisations will

tend to the view that it is appropriate for there to be priorities in enforcement practises.”³⁹² It would, for example, be plainly ridiculous for an officer within an undercover police operation targeting suspected organised criminal activity to arrest and charge a suspect being covertly followed, thereby compromising the investigation, if she or he was observed to jaywalk at an intersection. The ability of police officers to prioritise the discharge of their duties does, however, give rise to the opportunity for decisions as to whether or not to enforce a particular law at a given time to be influenced not by professional judgement, but rather by considerations of personal or professional gain.

687 **Low managerial visibility:** police work is inherently difficult to administer: by necessity, police officers must often work independently of direct supervision, which gives rise the opportunity to resist or ignore guidelines, policies or even laws.

688 **Low public visibility:** in recent times, the work (good and bad) done by police officers, particularly in situations of conflict, has come under intense public scrutiny as a result of a proliferation of mobile and fixed devices that are able to capture video footage of events (where previously this was not possible). This increased scrutiny has brought public opinion to bear upon a wider range of police actions than has ever previously been the case, and it is clear that the court of public opinion is a significant factor in ensuring that police act in the public interest at all times.

689 Simultaneously, however, a great deal of work done by police officers remains visible to only a very limited number of people. Police have considerable and frequent access to what Newburn describes as “private spaces”: premises that have been burgled, buildings in which large quantities of illicit substances have been discovered – any building in which a crime has or may have been committed will be closed to public access while evidence is collected by police officers. Again, this represents an opportunity unique to police officers for transgressing laws – for example by pocketing ill-gotten monies following a raid, or by destroying (or even planting) evidence – without detection.

690 **Peer group secrecy:** the strong bonds of loyalty and secrecy between police officers was perhaps best described in the Final Report of the 1997 Royal Commission into the New South Wales Police Force, conducted by Commissioner James Roland Wood:

*The strength of the code of silence was evident during the Commission hearings. Almost without exception officers approached by the Commission initially denied ever witnessing or engaging in any form of corrupt activity. Even with an undertaking that police would not be disciplined for failing to report certain forms of corruption, the offer of amnesty and the availability of protection against self-incrimination, officer after officer maintained this stand until presented with irrefutable evidence to the contrary. Each knew the truth, yet the strength of the code, and the blind hope that no one would break it, prevailed.*³⁹³

³⁹² Tim Newburn, ‘Understanding and preventing police corruption: lessons from the literature’, *Police Research Series, Research Development Statistics*, Vol. 110, 1999, p16.

³⁹³ The Hon JRT Wood, *Final Report of the Royal Commission into the New South Wales Police Force*, Volume 1, 1997, p 155 at paragraph 6.14.

691 Over time police officers, like all human beings, develop a rapport with their colleagues, and as such become increasingly likely to help their colleagues conceal negative behaviour by at the very least failing to report it. As evidenced above, however, police officers tend to develop particularly strong relationships with fellow police officers, owing to the fact that the unique nature of the job of a police officer is almost certainly only able to be fully appreciated by those who are engaged in it.

692 **Managerial secrecy:** while there exists a significant disparity between work done by lower and higher-level police officers, it is quite often the case that police supervisors have worked their way ‘up from the beat’ over the course of a career in policing. More so than many other professions, it is often the case that police sergeants, superintendents and commissioners began their careers as constables, and as such have an intimate familiarity with the demands of the role performed by those that they are charged with managing. The effect of this is the creation of fierce internal loyalty. While this loyalty (and the internal respect it generates) is very often a terrific boon to police forces worldwide, the 1994 Mollen Royal Commission into the New York Police Department revealed a striking counterpoint: corruption was able to flourish within this police department because, among other things, “of wilfully blind supervisors who fear the consequences of a corruption scandal more than corruption itself.”³⁹⁴

693 **Status problems:** it is often contended, as was put to the Committee in Hong Kong, that sufficient remuneration for police officers is a factor in helping to suppress police corruption:

Mr F.A. Alban: It was mentioned somewhere that you are better paid now and that no longer leads to corruption. That had a big impact.

Mr David Fremaux, Chief Inspector, Hong Kong Police Force: Yes, I think so.

Mr Vincent Wong-Fook-Chuen, Assistant Commissioner, Hong Kong Police Force: Yes.

Mr F.A. Alban: That is part of it as well?

Mr Fremaux: That underlies it. There is no doubt that the ICAC and a lot that we have done inside the police force has had a big impact on that. But I think another one was bringing up the pay.

Mr F.A. Alban: You have got more to lose if you lose your job?

Mr Wong-Fook-Chuen: It is not just pay but conditions of service; it is the package as a whole.

Mr J.N. Hyde: Pension?

Mr Fremaux: It is a big issue if governments do decide to improve the conditions of their police service; it will clean them up. But if you start cutting back on it later on, you obviously run the risk of going back to what it was. A lot of it comes back to money.

³⁹⁴ Mollen Commission, *Report of the Commission to Investigate Allegations of Police Corruption and the Anti-corruption Procedures of the Police Department*, City of New York, New York, 1994, p 1.

Underlying that have been those conditions of service and improving the pay. As I said, in the mid-90s we moved into this service-oriented culture. We brought in force values, the main one being integrity and honesty. Number three is “Living the values”. These are a series of programs that the force has run since the mid-90s, basically every couple of years. They are workshops attended by everyone in the police force to inculcate these values throughout the police force and to get people thinking about them. There are some very good video presentations that are done with real-life scenarios—that sort of thing. Everyone sees these, right from constable up to assistant commissioner, I believe. That “Living the values” program was about inculcating these force values. Obviously that was something very new when it was brought into the police force. We have now lived with them for the last 13 or 14 years.³⁹⁵

694 **Proximity to lawbreakers / temptation:** perhaps the most significant of all corrupting influences is the nature of the work done by police sees police officers associating by necessity and on a daily basis with those who have broken the law in some way. Consider the following observation of Herman Goldstein:³⁹⁶

The average officer – especially – in large cities – sees the worst side of humanity. He is exposed to a steady diet of wrongdoing. He becomes intimately familiar with the ways people prey on one another. In the course of this intensive exposure he discovers that dishonesty and corruption are not restricted to those the community sees as criminal. He sees many individuals of good reputation engaging in practices equally dishonest and corrupt... it is not unusual for him to develop a cynical attitude in which he views corruption as a game in which every person is out to get his share.³⁹⁷

695 Of particular significance in this respect is the policing of organised criminal activity. By its very name it is clear that organised crime is perpetrated by those who regard societal convention with contempt; to engage in organised criminal activity is to demonstrate flagrant disregard for the laws by which a society is held together. The decision to engage in a lifestyle that revolves around criminal activity is a corruption of the social contract.

696 Police officers who are tasked with the responsibility of combating organised crime are thus charged with the responsibility of investigating individuals who have little or no respect for rules and regulations. Being in placed in such close proximity to individuals significantly increases the chance that an officer will become corrupted for a number of reasons.

697 First and foremost, as Newburn notes, “those who are most interested in corrupting police officers may well have little to lose and a lot to gain from bribery and other forms of illegality, and they may also have access to substantial sums of money or other benefits.”³⁹⁸ To the extent that bribery does occur, however, it is likely to be limited, in light of the fact that police departments

³⁹⁵ *Transcript of Meeting*, 11 December 2009, p 6.

³⁹⁶ Herman Goldstein is Professor Emeritus at the University of Wisconsin-Madison Law School.

³⁹⁷ Herman Goldstein, *Police Corruption: A perspective on its nature and control*, Police Foundation, Washington D.C., 1975, p 25.

³⁹⁸ Tim Newburn, ‘Understanding and preventing police corruption: lessons from the literature’, *Police Research Series, Research Development Statistics*, Vol. 110, 1999, p 21.

worldwide have introduced measures aimed at curbing the possibility of bribery from suspected criminals. Indeed, as was put to the Committee by Deputy WA Police Commissioner Dawson:

Mr Dawson: I would temper that by saying that while I am happy to provide specific numbers of complaints to give you a better understanding of the environment in which we work, the last time I was briefed on this we had very, very few complaints from serious and organised crime investigations. We once used to, some 10 years ago, but because of the standard operating procedures in place—for instance, the use of video recorders, camcorders—every drug that is seized and every amount of money that is seized is the subject of audiovisual recording. All drugs are weighed in a special room with scales. The oversight mechanism is there internally and those that are available to oversight bodies are far more stringent. In fact, ours were the tightest—I believe they are still the tightest—in Australia. We do not permit our officers to count money or weigh drugs or, in fact, carry out the actual execution of search warrants; it is all done with recorded mechanisms.³⁹⁹

698 A more serious possibility is the fact that those charged with the responsibility of curbing organised criminal activity often find themselves in close proximity to a system marked by moral bankruptcy. Punch explores the idea that relationships within investigations of organised crime are of critical importance:

The relationship with, and attitudes to, organised crime are of pivotal significance. When the relations are close and cosy, police officers can come to share the world-view of criminals. This can readily happen in informant-handler relationships and undercover work. When the relationship is adversarial and combative it can foster either noble-cause corruption or else tackling [criminals] by ripping them off.⁴⁰⁰

699 Of course, relationships need be neither ‘close and cosy’ nor ‘adversarial and combative’ to have a profound effect. Police officers may easily become seduced by the lifestyle of organised criminals; conversely, they often do become cynical with respect to the perceived effectiveness of their role in the law enforcement process, particularly when they are unable to prove beyond reasonable doubt something that they know to be true within the confines of the judicial system.

700 Left unchecked, cynicism of this nature is potentially very damaging to any police force, as it often leads to process corruption, whereby protocols pertaining to the work of police are ignored in favour of ‘getting the job done’. In addition, when criminal acts are not brought to justice, the poisonous nature of cynicism is compounded.

701 **Community structure:** the manner in which a community perceives and respects its police officers can also have a profound effect upon the stimulus of corrupt police behaviour. When it was reported in February 2010, for example, that off-duty police officers were allegedly enjoying free hospitality in various Gold and Sunshine Coast hotels, the overwhelming community response was that of support for the police, born of empathy for a role that clearly many

³⁹⁹ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 6.

⁴⁰⁰ Maurice Punch, ‘Police corruption and its prevention’, *European Journal on Criminal Policy and Research*, Vol. 8, 2000, p 315.

Australians regard as being profoundly difficult.⁴⁰¹ When questionable police conduct is tacitly approved by society, it becomes increasingly difficult to promote a message that police corruption will not be tolerated.

702 Newburn also notes that the relative political environment and political culture has both direct and indirect influence upon the level of police corruption. In 1978, Lawrence Sherman⁴⁰² went as far as to claim that “capture by the political environment is probably the leading explanation of why police departments become corrupt.”⁴⁰³ The degree to which the legislature and the executive are separate and distinct is crucial: if elected officials are able to directly and individually influence police policy, this can stimulate police corruption. When an elected official seeks to generate political currency by making statements regarding policing methods, it is important that the police are not unduly influenced.

703 **Corruption controls:** the manner in which police corruption is combated and dealt with is a major factor in the level of corruption within any police force. While traditionally the role of combating and dealing with police corruption has been an internal function of the police, in 2010 this factor essentially amounts to whether or not a police department is overseen by an independent anti-corruption authority, such as the CCC.

704 This is for two broad reasons. On the one hand, the presence of an independent anti-corruption authority is necessary for encouraging both private citizens and police officers to come forward with their complaints and allegations, in the knowledge that they will be dealt with appropriately. Simultaneously, it is important that the anti-corruption authority is able to judge every allegation impartially. Plainly, for the reasons outlined previously, it is impossible for police officers to judge the actions of fellow police officers – even police officers with whom they have never previously had any contact – in such a manner.

Drug-related police corruption

705 In 1979, Manning and Redlinger investigated the phenomenon that they would term the “invitational edge of corruption,” concluding that officers working in drug-related cases “are more often placed upon an invitational edge of corruption,” than any other police officers.⁴⁰⁴ In speaking of an ‘invitational edge,’ Manning and Redlinger were referring to several causal factors of police corruption that are amplified significantly by the realities of policing the market for illegal substances.

⁴⁰¹ ‘Sunshine Coast police in alleged drinks rorts’, *Courier Mail online*, 11 February 2010. Available at: <http://www.news.com.au/couriermail/story/0,23739,26701562-3102,00.html>. Accessed on 11 February 2010.

⁴⁰² Lawrence Sherman is the Director of the Jerry Lee Center of Criminology, a body of the Australian Research Council.

⁴⁰³ Lawrence Sherman, *Scandal and Reform: Controlling police corruption*, University of California Press, Berkeley, 1978, p 32.

⁴⁰⁴ P.K. Manning and L.J. Redlinger, ‘Invitational Edges’, in Klockars (ed.), *Thinking About Police*, Edward Arnold, London, 1979.

706 The causal factors of police corruption are present in all forms of police work – albeit in varying degrees. Different factors are more or less present depending upon the type of police work being undertaken. Traffic police, for example, by necessity tend to work without direct managerial supervision; their public visibility, on the other hand, is relatively high. As the type of work being undertaken by police officers leaves the officers more open to the influence of a greater number of the causal factors, it is said that police move ever closer to this invitational edge of corruption. As the invitational edge draws nearer, the probability that corrupt practises will occur increases.

707 In the case of policing the market for illegal drugs, almost every single causal factor of police corruption is present, and present to a significant degree. As has been variously pointed out, drug law enforcement is characteristically prone to corruption:

- it is usually secretive, duplicitous and quasi-legal;
- the use of informants is widespread;
- it is extremely difficult to regulate;
- the ‘war on drugs’ rhetoric often increases pressure for results;
- securing sufficient evidence to convict is often difficult (and the temptation to engage in process corruption is great);
- officers may be required to buy or even (in prolonged undercover operations) use drugs in the course of their work; and
- very large sums of money may be available to the corrupt officer.

708 It is an unfortunate fact of human nature that human beings are inherently corruptible. When faced with temptation, the likelihood that poor decisions will be made increases. In requiring our police officers to enforce law and order in Western Australia, we ask them to confront temptation – and frustration – on a daily basis.

709 To demonstrate the reality of police corruption in Western Australia, it is useful to re-visit the history of this phenomenon in this state.

Kennedy Royal Commission

710 By a commission dated 12 December 2001 the Honourable Geoffrey Kennedy AO QC was appointed to be a Royal Commission to inquire into and report on whether since 1 January 1985, there has been corrupt conduct or criminal conduct by any Western Australian police officer.

711 Commissioner Kennedy in his Executive Summary to the Final Report presented on 30 January 2004 noted that human nature being what it is, there is an element of inevitability about corruption

in law enforcement agencies, and there is no reason to presume that the position in Western Australia since 1 January 1985 was any different to what had been uncovered by several inquiries into the conduct of police officers in other jurisdictions in Australia and overseas, namely that there was a consistent pattern of corrupt or criminal conduct by police officers, and particularly by detectives.⁴⁰⁵

712 Commissioner Kennedy said:

*... police corruption is an inevitable and universal characteristic of a police service. It is never likely to be entirely eliminated.*⁴⁰⁶

713 Commissioner Kennedy found there to exist within the police service:

*... the full range of corrupt or criminal conduct from stealing to assaults, perjury, drug dealing and the improper disclosure of confidential information.*⁴⁰⁷

714 Commissioner Kennedy did not purport to state that his report contained the totality of misconduct or criminality engaged in by police officers. He was at pains to point out that investigating police corruption is a challenging and time and resource consuming task and that it was not possible for the Royal Commission to have investigated every allegation of misconduct that was brought to the attention of the Royal Commission.⁴⁰⁸

715 Nevertheless, what Commissioner Kennedy was able to investigate and report on paints a most alarming picture of the state of corruption within the WA Police with many incidences of corrupt conduct within the WA Police over the period covered by the report, which was from 1 January 1985 to the most recent incidence occurring in 2003.⁴⁰⁹

Incidents of misconduct and criminality found to have existed within WA Police

716 While Commissioner Kennedy said:

It is true that the conduct occurred some years ago and undoubtedly the culture of the Police Service has come a long way since then.

the Commissioner sounded this warning:

⁴⁰⁵ Kennedy Royal Commission Final Report, Vol, p 1.

⁴⁰⁶ Kennedy Royal Commission Final Report, Vol 1, p 56.

⁴⁰⁷ Kennedy Royal Commission Final Report, Vol 1, p 1.

⁴⁰⁸ Kennedy Royal Commission Final Report, Vol 1, p 2.

⁴⁰⁹ Kennedy Royal Commission Final Report, Vol 1, p 304.

but unfortunately a number of the officers referred to in the evidence continue to serve in the Police Service. From the evidence described in other Chapters of this Report, it will be seen that in some areas of the WAPS the same attitude continued until the present time.

- 717 The Royal Commission had the advantage of not being bound by the rules of evidence. Despite the evidence presented, it is unlikely that there will be many successful prosecutions because of the need by other agencies, in those matters, to follow the rules of evidence. The fact that officers denied most of the allegations, notwithstanding the cogent evidence against them in many cases, is a further note of concern.⁴¹⁰
- 718 From the Committee's perspective, the following recitation of misconduct and criminality revealed by Commissioner Kennedy also serves a threefold purpose:
- firstly, it will hopefully remind Parliament of the dire state of corruption the WA Police were allowed to descend to, without the presence of a strong corruption fighter;
 - secondly, it will alert Parliament to the danger in allowing the CCC to be an active participant in joint operations with the WA Police; and
 - thirdly, it will hopefully reinforce the view that the best way the CCC can assist the fight against organised crime is to remain an ever vigilant watcher of the WA Police.

Assaults by police

- 719 L8, L5 and L4 gave evidence that they had each assaulted suspects.⁴¹¹ L5 estimated that he was involved in between 20 and 50 assaults, involving a "clip across the ear", slaps and sometimes punches. On a couple of occasions, he lost control of the situation and found himself "wrestling on the floor with somebody, punching and kicking."⁴¹²
- 720 L5 gave evidence in criminal trials on several occasions in which the accused truthfully alleged that he had been assaulted by police. When questioned under oath in respect of such allegations, L5 and other police officers routinely denied any assault.⁴¹³
- 721 While stationed at the Break and Enter Squad, L8 interviewed a suspect and during the interview, he hit the suspect a couple of times on the side of the head and punched him two or three times in the stomach.⁴¹⁴

⁴¹⁰ Kennedy Royal Commission Final Report, Vol 1, p 173.

⁴¹¹ Kennedy Royal Commission Final Report, Vol 1, p 89.

⁴¹² Kennedy Royal Commission Final Report, Vol 1, p 89.

⁴¹³ Kennedy Royal Commission Final Report, Vol 1, p 90.

⁴¹⁴ Kennedy Royal Commission Final Report, Vol 1, p 92.

- 722 The evidence was persuasive that a suspect was assaulted by Break and Enter officers at Scarborough CIB on 26 June 1984.⁴¹⁵
- 723 Commissioner Kennedy appears to accept that an assault was committed on a young male suspect at the Morley CIB by a police officer in order to secure a confession.⁴¹⁶
- 724 Commissioner Kennedy appears to accept that at around midnight on 15 June 1989, an assault was committed on a male suspect by two detectives of the Perth Break and Enter Squad⁴¹⁷ in order to secure a confession.⁴¹⁸
- 725 Commissioner Kennedy appears to accept that an “incident” occurred when L1 was stationed at the General Crime Squad (which later became City CIB) which caused Commissioner Kennedy to comment “whether or not the two officers concerned were correctly identified by L1, the incident shows in the clearest terms, and consistent with the evidence of L5 and L8, that there was widespread acceptance by detectives of assaults committed on suspects.”⁴¹⁹
- 726 Commissioner Kennedy appears to accept that a male suspect was assaulted “in some manner” by a detective from Claremont CIB.⁴²⁰
- 727 L4 gave evidence that he had purchased a “stun gun” in the USA and that on 20 May 1988 in the Wanneroo CIB he had shocked a suspect twice on his back.⁴²¹
- 728 Commissioner Kennedy said that “[i]t is difficult to resist the contention” that a cattle prod was used at Claremont CIB during the questioning of a suspect on 13 August 1990.⁴²²
- 729 Commissioner Kennedy concluded “There was evidence of assaults of suspects at various squads and offices. The assaults varied in severity but severe assaults seem uncommon.”⁴²³

⁴¹⁵ Kennedy Royal Commission Final Report, Vol 1, pp 90-92.

⁴¹⁶ Kennedy Royal Commission Final Report, Vol 1, pp 92-93. At p 93 Commissioner Kenney notes “*This incident shows not only that some officers engaged in physical violence to secure admissions from suspects, but also that some more senior officers could be relied upon not to report knowledge of assaults and, in some cases, to shield other officers from allegations of assault.*”

⁴¹⁷ LS26 and LS27.

⁴¹⁸ Kennedy Royal Commission Final Report, Vol 1, pp 93-94.

⁴¹⁹ Kennedy Royal Commission Final Report, Vol 1, p 95.

⁴²⁰ According to L1, the detective “whacked him across the back of the head”. According to the suspect, he was “head butted”. See Kennedy Royal Commission Final Report, Vol 1, p 95.

⁴²¹ Kennedy Royal Commission Final Report, Vol 1, pp 123-124.

⁴²² Kennedy Royal Commission Final Report, Vol 1, p 127.

⁴²³ Kennedy Royal Commission Final Report, Vol 1, p 96.

Extortion by police

- 730 In 1985, Observation City was under construction at Scarborough by Multiplex Constructions, a company associated with Mr John Roberts. On 29 August 1985, an explosion occurred at the construction site and officers from Scarborough CIB investigated. Some time later, an anonymous telephone caller made a threat to the personal safety of Roberts and his family. The threat was reported to police and conveyed to Scarborough CIB. The police officer codenamed LS11 who was the OIC of Scarborough CIB discussed the threat with Roberts. They came to an arrangement under which the officers from Scarborough CIB conducted security work for Roberts at his residence. Roberts made payments for the work to LS11. The police officer codenamed L5 gave evidence that he made the anonymous threatening telephone call and that the purpose in doing so was to obtain paid security work.⁴²⁴

Police trafficking in drugs

- 731 Commissioner Kennedy appears to accept that there was cogent evidence supporting the allegation that in the period 1998 to 1999, detectives in Kalgoorlie were engaged in drug trafficking involving the attempted sale of morphine tablets and attempted purchase of a substantial quantity of ecstasy.⁴²⁵

Improper associations by police with suspects

- 732 Commissioner Kennedy said that a meeting took place on 11 September 2001 at Rosie O'Grady's Tavern and later, at the Sorrento Restaurant, Northbridge. In attendance were a number of Perth detectives, a Victorian police officer and an organized crime figure. This meeting took place after a wake held for a prominent Western Australian police officer. In the months following, intercepted telephone conversations recorded the Perth detectives and the Victorian police officer discussing the crime figure, and an intercepted telephone conversation was recorded between the Victorian police officer and a notorious former New South Wales police officer who had been convicted of corruption related offences. Additional calls were recorded of conversations between an ex-detective from Perth and the Victorian officer concerning the activities of known criminals in Kalgoorlie. When the detectives were pressed to explain these associations, they admitted that they were aware that the organized crime figure had been the subject of past police operations and might have been the subject of a current operation. Explanations offered for this behaviour included that no concerns were held about socializing with the crime figure as the particular detective was not operationally active at the time the meeting took place. It was also stated that

⁴²⁴ Kennedy Royal Commission Final Report, Vol 1, p 114.

⁴²⁵ Kennedy Royal Commission Final Report, Vol 1, pp 272-279.

drinking with convicted criminals had “been going on for years” and happened “many, many times.”⁴²⁶

733 Commissioner Kennedy said that officers from the Kalgoorlie Police Station frequented the Foundry Hotel, notwithstanding that during this time the Club Deroes OMCG used the hotel as their clubhouse.⁴²⁷

734 Commissioner Kennedy said that in July 2000, while suspended from WAPS, one of the detectives acted as the director of Headframe Services Pty Ltd (“Headframe”), which was the registered proprietor and the licensee of the TAB in the Foundry Hotel. The detective resigned from Headframe six months later, and was replaced by his wife as director.⁴²⁸

735 Commissioner Kennedy said that at various stages, two known criminals acquired shareholdings in the Foundry Hotel, concurrently with interests held by Headframe. One of the detectives gave evidence that while on duty in Kalgoorlie he had no concerns about drinking at the Foundry Hotel, and further stated that he had no concerns about entering into a business relationship with the two criminals once he had resigned from WAPS, notwithstanding that he was a member of WAPS when these relationships were formed.⁴²⁹ Commissioner Kennedy concluded:

Throughout all of the matters examined, there was no sign of effective management or leadership of the detectives concerned. They seemed to come and go as they pleased. They flouted or ignored departmental procedures with little risk of detection or reprimand. They associated with criminals socially, and were amenable to being contacted whenever the criminals felt the need. This attitude was not at all uncommon in relation to plain clothes police officers, who regarded themselves as an elite group, exempt from the same constraints as other members of WAPS.⁴³⁰

736 Commissioner Kennedy said that evidence “clearly indicates” that a senior constable, codenamed N6, in 2003 attempted to take advantage of his relationship with a person involved in the adult entertainment industry to procure prostitutes without fee or at discounted prices.⁴³¹

737 In 1992, Senior Sergeant Jeffrey Noye was charged with the responsibility of undertaking an investigation into the theft of diamonds from Argyle Diamonds Pty Ltd (“Argyle”).⁴³² The main suspect was Mr Lindsay Roddan, who was ultimately convicted. Noye concedes that during the course of his investigation he met with Roddan on six or seven occasions at cafes or restaurants.⁴³³

⁴²⁶ Kennedy Royal Commission Final Report, Vol 1, pp 282-283.

⁴²⁷ Kennedy Royal Commission Final Report, Vol 1, p 283.

⁴²⁸ Kennedy Royal Commission Final Report, Vol 1, p 283.

⁴²⁹ Kennedy Royal Commission Final Report, Vol 1, p 283.

⁴³⁰ Kennedy Royal Commission Final Report, Vol 1, p 285.

⁴³¹ Kennedy Royal Commission Final Report, Vol 1, p 319.

⁴³² Kennedy Royal Commission Final Report, Vol 1, p 39

⁴³³ Kennedy Royal Commission Final Report, Vol 1, p 462.

On 16 September 1992 Noye produced a report that was strongly supportive of Roddan.⁴³⁴ Commissioner Kennedy said that the fact, circumstances and number of these meetings had the potential to be seen as compromising the investigation.⁴³⁵ Noye also passed to Roddan photocopies of scientific tests that had been carried out by Argyle, and later at the request of the police.⁴³⁶ Commissioner Kennedy said that there was no credible explanation for this.⁴³⁷ Commissioner Kennedy concluded that the evidence suggests that Noye formed an improper relationship with Roddan and that this resulted in the investigation being compromised.⁴³⁸

Fabrication of confessions by police

- 738 Verballing is described in the Final Report as the “false attribution of a confession or admission to a suspect. On evidence before the Royal Commission, the practice of verballing ranged in degree between the fabrication of an entire record of interview or statement, in which a full confession is made, to a subtle change of words to cast greater suspicion on a suspect.”⁴³⁹
- 739 The police officer codenamed L5 admitted to having “verballed” suspects between twenty and seventy times, and to lying at trials in support of verbals.⁴⁴⁰
- 740 The police officer codenamed L1 fabricated direct admissions of guilt and made subtle, but incriminating, changes to records of interview. Sometimes, when an accused unexpectedly pleaded not guilty, L1 had to extensively fabricate notes because only a few rough notes, or none, had been taken at the time. L1 estimated that he verballed suspects, to varying degrees, on about 70 per cent of the occasions in which he participated at interview. Although he could not recall a specific example, L1 said that he gave false evidence in court in support of verbals on many occasions.⁴⁴¹
- 741 The police officer codenamed L8 admitted that he had verballed suspects in order to obtain convictions.⁴⁴²
- 742 Anthony Lewandowski was a detective in 1982 and was then involved in the investigation of a theft of gold from the Perth Mint. In 2002, Lewandowski swore an affidavit in which he admitted that he and Detective Sergeant Don Hancock had verballed Raymond, Peter and Brian

⁴³⁴ Kennedy Royal Commission Final Report, Vol 1, p 396.

⁴³⁵ Kennedy Royal Commission Final Report, Vol 1, p 464.

⁴³⁶ Kennedy Royal Commission Final Report, Vol 1, p 465.

⁴³⁷ Kennedy Royal Commission Final Report, Vol 1, p 466.

⁴³⁸ Kennedy Royal Commission Final Report, Vol 1, p 491.

⁴³⁹ Kennedy Royal Commission Final Report, Vol 1, p 97.

⁴⁴⁰ Kennedy Royal Commission Final Report, Vol 1, p 97.

⁴⁴¹ Kennedy Royal Commission Final Report, Vol 1, p 99.

⁴⁴² Kennedy Royal Commission Final Report, Vol 1, p 100.

Mickelberg, and that the two detectives gave perjured evidence in support of the verbals at trial and at several subsequent appeals.⁴⁴³

743 It is “highly probable” that two WAPS officers in charge of the investigation and the extradition of a suspect from the United States to Western Australia in September 1989 gave false evidence of incriminating statements.⁴⁴⁴

744 On 9 September 1994 three police officers were convicted of giving false evidence in a criminal trial.⁴⁴⁵

745 Commissioner Kennedy concluded:

It is clear on the evidence that verballing was practised by some members of WAPS CIB in the period under investigation by the Royal Commission. In the light of that evidence, it is difficult to resist the conclusion that, before the introduction of videotaped recording, verballing was a widespread tactic in the CIB. There was less evidence of the practice after the introduction of videotaped recording, and some evidence that the practice thereafter declined substantially, but not to the point that it should be assumed that the practice passed into history.⁴⁴⁶

Forging of search warrants by police

746 Commissioner Kennedy said that there is little doubt from the evidence of police officers codenamed L5 and L6 that search warrants were forged, obtained by misleading Justices of the Peace and used for improper searches and to legitimise improper searches.⁴⁴⁷

⁴⁴³ Kennedy Royal Commission Final Report, Vol 1, p 100.

⁴⁴⁴ Kennedy Royal Commission Final Report, Vol 1, p 189.

⁴⁴⁵ Kennedy Royal Commission Final Report, Vol 1, p 545. The police officers’ subsequent appeal against their conviction was dismissed by the Court of Criminal Appeal on 27 February 1995 – see Kennedy Royal Commission Final Report, Vol 1, p 546.

⁴⁴⁶ Kennedy Royal Commission Final Report, Vol 1, p 101.

⁴⁴⁷ Kennedy Royal Commission Final Report, Vol 1, p 83.

Thefts by police

- 747 Commissioner Kennedy accepted that the Break and Enter Squad had an arrangement with a private business under which officers delivered to the business unwanted safes and safe parts recovered by officers during investigations. The business paid officers for these items and those payments were placed in the Break and Enter Squad social fund. Since the safes and parts of safes were never the property of the officers concerned, their private sale by officers was unlawful and ought not have been sanctioned by the officer in charge.⁴⁴⁸
- 748 Commissioner Kennedy appears to accept that a detective⁴⁴⁹ stole a camera from L7's desk in the Break and Enter Squad Office. The camera had been seized by the Break and Enter Squad Officer following execution of a search warrant on a jeweller's premises.⁴⁵⁰
- 749 A police officer, codenamed L1, stole:
- coins from a money box that had been recovered by the City CIB;⁴⁵¹ and
 - cartons of cigarettes from the boot of a stolen vehicle recovered by police.⁴⁵²
- 750 In about 1988, a police officer,⁴⁵³ from the City CIB, gave evidence that he received stolen clothing that had been recovered by police.⁴⁵⁴
- 751 A police officer, codenamed L5, stole:
- Some goggles, a snorkel, flippers and perhaps some liquor on 15 January 1985 from a residential unit searched by detectives of the Scarborough CIB.⁴⁵⁵
 - A household item and a watch in or about March 1992 which had been recovered, along with other items of jewellery, by Claremont CIB from burglaries of premises in the Claremont and Mosman Park areas. L5 gave evidence, which the Commissioner Kennedy found "generally persuasive", that before the stolen property was returned to its owners, some of the items were spread out on a table in the Claremont CIB, and detectives at the

⁴⁴⁸ Kennedy Royal Commission Final Report, Vol 1, p 84.

⁴⁴⁹ Codenamed LS1.

⁴⁵⁰ Kennedy Royal Commission Final Report, Vol 1, pp 85-86.

⁴⁵¹ Kennedy Royal Commission Final Report, Vol 1, p 86. L1 alleged that a senior detective in the City CIB stole half of the money and that he (L1) stole the other half.

⁴⁵² Kennedy Royal Commission Final Report, Vol 1, p 87. L1 alleged that other detectives in the Claremont CIB shared in stealing the cartons of cigarettes. The other officers denied the allegations ((Kennedy Royal Commission Final Report, Vol 1, p 87).

⁴⁵³ Codenamed T2.

⁴⁵⁴ Kennedy Royal Commission Final Report, Vol 1, p 86.

⁴⁵⁵ Kennedy Royal Commission Final Report, Vol 1, p 108.

Claremont CIB each took something from the table. L5 said that occasion was referred to as a “lucky dip.”⁴⁵⁶

- Japanese Yen recovered from a home burglary on 26 January 1993 by Scarborough CIB. L5 converted small amounts of the Yen to Australian currency on a number of different occasions at the Burswood Casino and Perth International Airport. The amounts converted totalled approximately \$4000.⁴⁵⁷ Commissioner Kennedy said that the evidence was persuasive that the converted currency was shared between other officers who were based, or had recently been based, at Scarborough CIB.⁴⁵⁸
- Money seized in a search of a suspect’s home by Mt Hawthorn CIB on 21 September 1993. L5 was then acting in the role of OIC of Mt Hawthorn CIB. Commissioner Kennedy appears to accept the evidence of L5 that other officers of the Mt Hawthorn CIB were involved in this theft.⁴⁵⁹

752 Commissioner Kennedy appears to accept the evidence of L5 and L6 that officers stationed at the Scarborough CIB and officers of the Drug Squad stole property seized from a suspect’s house on 18 November 1992.⁴⁶⁰

753 A police officer, codenamed L6, stole compact discs seized during a Drug Squad search of a residential home.⁴⁶¹

754 A police officer, codenamed L8 stole:

- Kitchen utensils and a tent that had been seized by the police from a residential unit on 9 January 1991.⁴⁶²
- \$100 from a citizen on 20 November 1991.⁴⁶³

⁴⁵⁶ Kennedy Royal Commission Final Report, Vol 1, pp 155-156.

⁴⁵⁷ Kennedy Royal Commission Final Report, Vol 1, p 167.

⁴⁵⁸ Kennedy Royal Commission Final Report, Vol 1, p 168.

⁴⁵⁹ Kennedy Royal Commission Final Report, Vol 1, p 171. “It was suggested that L5 acted alone in stealing the money. On other occasions when L5 was the principal offender, however, he has said so in his evidence. In this matter there is no apparent reason why he would alter his approach in this case.”

⁴⁶⁰ Kennedy Royal Commission Final Report, Vol 1, p 167 “L5’s evidence was that officers stole property seized during the search. L6 was clear that the quantity of property stored at Scarborough CIB “virtually halved” over a day or so because officers took items of property. It is improbable that two of the detectives at Scarborough CIB at the same time gave similar false or mistaken evidence on the issue.”

⁴⁶¹ Kennedy Royal Commission Final Report, Vol 1, p 87. It is not stated whether this finding is based on an admission by L6.

⁴⁶² L8 gave evidence following the seizure of a large number of items of property from a residential unit on 9 January 1991, that he *appropriated kitchen utensils for use at the Scarborough CIB offices* and that he *took a tent* (Kennedy Royal Commission Final Report, Vol 1, p 88). L8 also alleged that other officers appropriated the kitchen utensils (Kennedy Royal Commission Final Report, Vol 1, p 88).

APPENDIX TWO

- \$50 from a suspect's wallet in about 1993.⁴⁶⁴
- Banknotes which had been concealed by a suspect in false beer cans in a plastic container in a self storage unit. L8 also gave evidence that other officers of the Scarborough CIB had taken shares of the banknotes. In this regard Commissioner Kennedy said that there was "little likelihood" that the evidence of L8 was false.⁴⁶⁵

755 Commissioner Kennedy appears to accept that following the recovery of bags of coins after a break and enter of a business on 8 May 1991, Scarborough CIB detectives stole approximately fifteen or twenty dollars each before returning the money to the business.⁴⁶⁶

756 Commissioner Kennedy appears to accept the evidence of L5 that when he returned from leave to the Scarborough CIB in 1985, he had a conversation with LS12, where LS12 asked him if he (L5) had received his share of some money stolen by police in his absence.⁴⁶⁷

757 Commissioner Kennedy appears to accept evidence of L5 that on 20 June 1987, A detective sergeant of the Major Crime Squad handed L5 some money and that when L5 asked where the money had come from, the detective sergeant said that it had been recovered from the glove box of a suspect's car.⁴⁶⁸

758 Commissioner Kennedy appears to accept the evidence of a whistleblower police officer, codenamed L7⁴⁶⁹ who filed a report with Internal Affairs in or about September 1987 concerning his suspicions that officers of the Break and Enter Squad had stolen \$1500 out of monies recovered from a theft of a business in September 1987.⁴⁷⁰

759 Commissioner Kennedy appears to accept the evidence of L8, who is described as a witness of truth, that a police officer, codenamed LS15 had told L8 that during a search of a house in Lansdale on 28 June 1990, LS15 had found money in the freezer section of the refrigerator and had put the money into the social club fund to be shared with others at Scarborough CIB.⁴⁷¹

⁴⁶³ Commissioner Kennedy appears to accept that L8 stole \$100 in the following circumstances – *on 20 November 1991, officers from Scarborough CIB executed a search warrant and located a quantity of cannabis and amphetamine. Two males were arrested in respect of the drugs located. L8 questioned a third male who arrived with \$100 to purchase drugs on behalf of another person. L8 decided not to charge him, but took possession of the money and told him '[y]ou've just been fined'. L8 added the \$100 to the social club fund tin at Scarborough CIB.* (Kennedy Royal Commission Final Report, Vol 1, p 88.)

⁴⁶⁴ Kennedy Royal Commission Final Report, Vol 1, pp 88-89.

⁴⁶⁵ Kennedy Royal Commission Final Report, Vol 1, p 158.

⁴⁶⁶ Kennedy Royal Commission Final Report, Vol 1, p 88.

⁴⁶⁷ Kennedy Royal Commission Final Report, Vol 1, pp 115-116.

⁴⁶⁸ Kennedy Royal Commission Final Report, Vol 1, p 117.

⁴⁶⁹ L7 was a police officer working in the Midland CIB and described by Commissioner Kennedy as having a "principled approach." See Kennedy Royal Commission Final Report, Vol 1, p 120.

⁴⁷⁰ Kennedy Royal Commission Final Report, Vol 1, p 118-121.

⁴⁷¹ Kennedy Royal Commission Final Report, Vol 1, p 123.

- 760 Commissioner Kennedy appears to accept the evidence of G1, a convicted drug dealer, who said that a detective sergeant and a South Hedland OIC stole \$36,000 from the drug dealer's house in 18 August 1994.⁴⁷²
- 761 Commissioner Kennedy appears to accept that there was evidence supportive of the allegation that detectives from the Brentwood Detectives Office stole drugs, money and property from suspects in the period 1997 to 1998.⁴⁷³
- 762 A detective sergeant, codenamed T2, was a chronic gambler,⁴⁷⁴ who attended the Burswood Casino almost daily. T2 admitted that on or about 9 January 2000 he with an accomplice stole a substantial amount of money from a self storage unit in Maylands leased by a drug trafficker and that he received \$48,000 as his share.⁴⁷⁵
- 763 T2, while with the Major Fraud Squad, was assigned to investigating a scam which left a bank defrauded of over \$3 million. A person of interest who was suspected of receiving \$1.5 million of these monies was approached by T2, and on or about 23 August 2001 T2 received and pocketed \$40,000 in cash from the person of interest, under the ruse of putting this money into a police trust account pending the outcome of the investigation.⁴⁷⁶

Smoking of cannabis by police

- 764 Commissioner Kennedy appears to accept evidence by L5, L6 and L8 that police officers smoked cannabis at Scarborough CIB, and that cannabis was stored on the Scarborough CIB premises for this purpose.⁴⁷⁷
- 765 Commissioner Kennedy appears to accept evidence by L5 that in July 1979 a senior member of the Drug Squad stole some cannabis plants from a large cannabis crop site which was under police surveillance.⁴⁷⁸

⁴⁷² Kennedy Royal Commission Final Report, Vol 1, p 218.

⁴⁷³ Kennedy Royal Commission Final Report, Vol 1, pp 261-272.

⁴⁷⁴ Kennedy Royal Commission Final Report, Vol 1, p 309.

⁴⁷⁵ Kennedy Royal Commission Final Report, Vol 1, p 289. On 28 June 2008 *The West Australian* newspaper ran an article headed 'Drug cash trail is a case of who dares wins' which reported "Bent copper and prolific gambler Gary Mervyn Fagg ... did go to jail for helping Mr Bridge pinch cash from storage units on two occasions." On 6 October 2005 the following article appeared on the *ABC news* website "A 47-year-old former police officer in Western Australia has been jailed for almost five years after pleading guilty to corruption and burglary charges. Gary Mervyn Fagg is the first person to be jailed over charges arising from WA Police Royal Commission. The former detective today pleaded guilty in the District Court in Perth to seven counts of corruption and one count of aggravated burglary. Fagg was filmed stealing \$10,000 from a Belmont storage unit in January 2003, in a sting operation set up by the royal commission. He also admitted corruptly obtaining more than \$21,000 from a businessman he was investigating."

⁴⁷⁶ Kennedy Royal Commission Final Report, Vol 1, p 295.

⁴⁷⁷ Kennedy Royal Commission Final Report, Vol 1, p 103.

Acceptance of reward by police from victims of crime

766 Pursuant to an arrangement entered into between a police officer of the Claremont CIB codenamed LS39, and a victim of crime on 5 September 1990, the victim of crime made two payments as a reward for the police returning to him property which had been stolen from him. On the evidence that the money paid by the victim was the value of the gold recovered, the first payment, probably of about \$11,800 was shared between seven police officers (codenamed L1, LS31, LS36, LS37, LS38, LS39 and LS40). The second payment, probably about \$11,000 was shared between those officers and a police officer codenamed LS16. In total, on that evidence, officers other than LS16 received over \$3,000 each.⁴⁷⁹

Provision of private security services by police

767 Commissioner Kennedy appears to accept evidence by L5 that he saw burnt, damp money in the possession of officers at the Break and Enter Squad following a break and enter of a business premises on 1 July 1984. This money was never accounted for.⁴⁸⁰

768 Scarborough CIB performed security work for Mr John Roberts in 1987.⁴⁸¹

769 Officers of the Scarborough CIB escorted personnel from two local hotels to conduct the hotels' banking in return for cartons of beer, free drinks, free meals, and a night's free accommodation for two people once a week.⁴⁸²

770 Some detectives at Scarborough CIB also performed security work at a rugby veterans' function held on 26 May 1991.⁴⁸³

771 Officers from Claremont CIB performed security work at a birthday party for a well-known Perth businessman on 8 June 1991. Soon after the party a pharmacist alleged that the businessman's wife was involved in the attempted uttering of a forged prescription. L1 said it was clear to him that LS16 was trying to ensure that the wife was not charged. LS16 denied that, and maintained that the investigation was filed but not written off. Commissioner Kennedy noted "Whether one prefers the evidence of L1 or L16, the potential for compromise in the circumstances that arose at Claremont CIB is obvious."⁴⁸⁴

⁴⁷⁸ Kennedy Royal Commission Final Report, Vol 1, pp 103-105.

⁴⁷⁹ Kennedy Royal Commission Final Report, Vol 1, p 139

⁴⁸⁰ Kennedy Royal Commission Final Report, Vol 1, p 107.

⁴⁸¹ Kennedy Royal Commission Final Report, Vol 1, p 110.

⁴⁸² Kennedy Royal Commission Final Report, Vol 1, p 111.

⁴⁸³ Kennedy Royal Commission Final Report, Vol 1, p 112.

⁴⁸⁴ Kennedy Royal Commission Final Report, Vol 1, p 113.

- 772 16 members of WAPS, the majority of whom were based at the Kalgoorlie Police Station, provided escort and security services for reward to three mine sites in Kalgoorlie in 1997 and 1998.⁴⁸⁵
- 773 In 2000 detectives providing consultancy services to a company called Linencare Australia (“Linencare”), which supplied linen to public hospitals in Western Australia. The detectives formed a business called Exclusive Consultancy Services (“Exclusive Consultancy”) and were engaged by Linencare to prevent stock loss. As part of this engagement the detectives were responsible for investigating the loss of linen, which included monitoring the movements of linen. Evidence was given by the former managing director of Linencare that the detectives were engaged in investigatory work, but were also responsible for educating and training clients of Linencare in loss prevention. Invoices, tax returns and corporate documents were tendered that indicated that work on behalf of Linencare was conducted while the detectives should have been on duty.⁴⁸⁶

Inadequate handling of complaints by Internal Affairs

- 774 There are indications that the Internal Affairs Unit of the WA Police “has been under resourced and has lacked expertise and commitment.”⁴⁸⁷
- 775 Police officer L7⁴⁸⁸ filed a report with Internal Affairs in or about September 1987 concerning his suspicions that officers of the Break and Enter Squad had stolen \$1,500 out of monies recovered from a theft of a business. The subsequent investigation by Internal Affairs (which was later shelved) was labelled by Commissioner Kennedy as “one of a series of inadequate investigations by the IAU that came to the attention of the Royal Commission.”⁴⁸⁹
- 776 In February 1992, a suspect’s girlfriend made a complaint to the Ombudsman that police officers of the Scarborough CIB had removed approximately \$6,000 in bank notes that had been concealed in a self storage unit that was searched by the police. The complaint to the Ombudsman was referred to police and L4⁴⁹⁰ commenced an investigation. L8 gave evidence that he paid L4 \$300 to ensure that L4 did not reveal that L4 and other officers of the Scarborough CIB had stolen the

⁴⁸⁵ Kennedy Royal Commission Final Report, Vol 1, p 284

⁴⁸⁶ Kennedy Royal Commission Final Report, Vol 1, p 284.

⁴⁸⁷ Kennedy Royal Commission Final Report, Vol 1, p 13.

⁴⁸⁸ L7 was a police officer working in the Midland CIB and described by Commissioner Kennedy as having a “principled approach.” See Kennedy Royal Commission Final Report, Vol 1, p 120.

⁴⁸⁹ Kennedy Royal Commission Final Report, Vol 1, p 121.

⁴⁹⁰ The Royal Commission’s inquiry into an investigation by the Wanneroo CIB, led investigators to interview the former officer in charge of the Wanneroo CIB. He agreed to give evidence about one particular matter, and subsequently did so under the code-name “L4”.

money. Commissioner Kennedy says there is “persuasive support” for the truth of L8’s evidence that the money was paid to L4.⁴⁹¹

777 In 1995 a drug dealer, who was in Perth Central Law Courts for sentencing, spoke to a sergeant, to whom he was related and trusted, about his allegation that a detective sergeant and another detective had come to his house to conduct a search and had stolen a sum of \$2,500. The sergeant immediately contacted Internal Affairs with the allegation. Commissioner Kennedy was critical of the manner in which the subsequent investigation by Internal Affairs was handled, noting that Internal Affairs did not even interview the drug dealer.⁴⁹²

778 On or about 29 February 2000 the Internal Affairs became aware of an allegation relating to the alleged theft by the same detective sergeant of a sum of \$36,000 from a suspect. Commissioner Kennedy criticised the investigation as Internal Affairs overlooked the significance of the earlier complaint in 1995, which had it been taken into account, had the potential to reveal a pattern of behaviour of the detective sergeant.⁴⁹³

779 Commissioner Kennedy was critical of Internal Affairs handling of allegations of misconduct against a police officer, codenamed N6. According to Commissioner Kennedy, by any criteria N6 was a high-risk officer and it would have been apparent to the most casual observer that he had a significant gambling problem. The most superficial investigation would quickly have revealed N6 was a person of such character that he had no place in the police service. Yet despite Internal Affairs being aware of concerns about N6’s conduct since April 1997, no in-depth inquiry was ever held.⁴⁹⁴

780 Commissioner Kennedy was critical of Internal Affairs handling of allegations of misconduct against police officer Shadgett. Notwithstanding:⁴⁹⁵

- in 1987, during a joint operation between the WA Police and the Australian Federal Police into large scale heroin importation and distribution, Shadgett was regularly recorded on a listening device speaking with targets of the investigation and often heard to be “indiscreet” in relation to knowledge he obtained in the course of his employment. Internal Affairs files record that no action was taken against Shadgett at that time for “operational reasons.”;
- in July 1992 the Internal Affairs received information that a target in a drug operation had access to records from the police computer and the target’s source was suspected to be Shadgett;

⁴⁹¹ Kennedy Royal Commission Final Report, Vol 1, p 160.

⁴⁹² Kennedy Royal Commission Final Report, Vol 1, p 224.

⁴⁹³ Kennedy Royal Commission Final Report, Vol 1, p 225.

⁴⁹⁴ Kennedy Royal Commission Final Report, Vol 1, p 326.

⁴⁹⁵ Kennedy Royal Commission Final Report, Vol 1, pp 382-384.

- on 19 January 1993 the Bureau of Criminal Intelligence⁴⁹⁶ received intelligence from the National Crime Authority regarding intercepted telephone conversations between P2 and Shadgett in December 1992;
- in June 1994 further information was received from the National Crime Authority that a known drug dealer and associate of P2 had telephoned Shadgett at this home, possibly to obtain confidential police information;
- on 28 April 1995 information was received that a male person on work release from the Albany Regional Prison was apparently living with Shadgett;
- during 18 to 26 May 1995, a number of phone calls were made between P2, P3 and Police Officer Shadgett;⁴⁹⁷
- Shadgett unlawfully accessed the vehicle registration details and the name of the covert identity assigned to Petrelis on 18, 19 and 24 May 1995;⁴⁹⁸
- the probability that Shadgett also interrogated the offence report filed by Clay;⁴⁹⁹
- the clear evidence that Shadgett disclosed to P2 and P3 the name of “Andrew Parker” of [address in Mandurah], the vehicle registration number in a manner that suggested that “Parker” was in some way covertly involved in law enforcement; and
- the probability that Shadgett disclosed to P3 that the vehicle had a connection to a police officer with the name “Clay”;⁵⁰⁰
- on 26 May 1995, the Australian Federal Police communicated intercepted telephone conversations between Shadgett and P2 of 6 November 1994;
- on 14 June 1995, the National Crime Authority formally disseminated two information reports to the Internal Affairs. The information reports contained summaries of intercepted telephone conversations in relation to Petrelis, as well as other intelligence;
- the death of Petrelis on 11 September 1995;
- allegations that in October 1996 that Shadgett had personally threatened a Regional Commander; and
- the fact that Shadgett had the worst disciplinary record of any then serving police officer.

⁴⁹⁶ Now the State Intelligence Service of the WA Police.

⁴⁹⁷ Kennedy Royal Commission Final Report, Vol 1, pp 374-375.

⁴⁹⁸ Kennedy Royal Commission Final Report, Vol 1, p 381.

⁴⁹⁹ Kennedy Royal Commission Final Report, Vol 1, p 381.

⁵⁰⁰ Kennedy Royal Commission Final Report, Vol 1, p 381.

781 Shadgett was allowed to retire on medical grounds on 6 July 2000, whereupon he received a letter from the Director of Human Resources stating that the “Commissioner of Police acknowledges your faithful service to the community of Western Australia of the past 29 years and expresses regret that your medical condition has necessitated your early retirement.”⁵⁰¹ According to Commissioner Kennedy, Shadgett posed “a real and continuing risk to police investigations and the safety of other officers and witnesses by his persistent conduct in releasing confidential information”, Commissioner Kennedy said that the WAPS failed to take appropriate and timely disciplinary action in respect of Shadgett.⁵⁰²

Attempt by police officer to destroy evidence of misconduct by police

782 Commissioner Kennedy appears to accept that an improper attempt was made by a serving police officer in or about July 2002 to remove a journal from police records. The journal contained details of the activities of a former detective sergeant who was OIC of the Karratha Detectives and who had since retired from the WAPS. The former detective sergeant was under investigation by the Anti Corruption Commission. The serving police officer was a friend of the retired police officer.⁵⁰³ Commissioner Kennedy noted:

*Significantly, an attempt to destroy evidence of past conduct indicates how that conduct and the influence of former officers may impact adversely upon contemporary circumstances. It should not be assumed that, because allegations are “historical”, and the subject has left the police service, that the problem has been solved and the risks nullified. Past corrupt activity may cast a long shadow and may expose currently serving officers to risks such as those revealed here.*⁵⁰⁴

⁵⁰¹ Commissioner Kennedy described this letter as unintentionally ironic and clearly inappropriate – Kennedy Royal Commission Final Report, Vol 1, p 388.

⁵⁰² Kennedy Royal Commission Final Report, Vol 1, p 388.

⁵⁰³ Kennedy Royal Commission Final Report, Vol 1, p 212.

⁵⁰⁴ Kennedy Royal Commission Final Report, Vol 1, pp 212-3. Commissioner Kennedy appears to accept the evidence of G1, a convicted drug dealer who said that the former detective sergeant and a former South Hedland OIC stole \$36,000 from the drug dealer’s house in 18 August 1994. Commissioner Kennedy said that *a possible inference is capable of being drawn* from the attempted destruction of the journal that the former detective sergeant *had a realization of what the journals may lead investigators to by way of corrupt or criminal conduct on his part, and that this realization related to G1 and the theft of the cash.* Kennedy Royal Commission Final Report, Vol 1, p 218

Tender by police officer of money to a senior police officer

783 L3, a police officer stationed at the Drug Squad between 1994 and 1996 as the OIC, was approached by LS3, a less senior police officer, who offered to L3 a \$100 note with no legitimate reason for the offer of the money. LS3 agreed that he had offered L3 \$50 or \$100 but claimed that he did it to test L3's integrity. Commissioner Kennedy found L3's explanation to be "extraordinary".⁵⁰⁵

Unauthorised access and disclosure of WA Police database information

784 With respect to police officer Murray John Shadgett, Commissioner Kennedy said:

- between 1992 and 1995, Shadgett accessed and disclosed confidential police information to an individual codenamed P2, at a time when P2 was the subject of concerted investigations by law enforcement agencies. Intercepted telephone calls of conversations reveal that Shadgett disclosed name and registration details of cars, and the names of criminal suspects and information relating to the strength of the evidence in a criminal prosecution of a person associated with P2;
- there is credible evidence that he accessed, without authorisation, the vehicle registration details and the name "Andrew Parker", which was the covert identity assigned to protected witness Andrew Petrelis;
- there is clear evidence that the name "Andrew Parker", the vehicle registration number of Petrelis's vehicle, and the name "Clay"⁵⁰⁶ were disclosed by Shadgett to P2 and a drug dealer code named P3.⁵⁰⁷

785 With respect to police officer Kevin Davy, in May 1995, when Davy was a first class constable at the Police Operations Centre, he unlawfully accessed the police computer system to access the names "Thomas Clay, the registration number of Petrelis' vehicle and the name "Andrew Parker.", and disclosed this information.⁵⁰⁸

⁵⁰⁵ Kennedy Royal Commission Final Report, Vol 1, p 172.

⁵⁰⁶ Thomas Peter Clay was the name of the case officer from the Witness Protection Unit assigned to Petrelis. His name appeared on an offence report on the police computer system in relation to Petrelis' vehicle, which had been broken into between 9.00 pm on 4 May 1995 and 7.00 am on 5 May 1995 from outside Petrelis' parents' home. Petrelis reported the matter to Clay, who completed an offence report and recorded "Thomas Peter Clay, police officer", as the complainant. see Kennedy Royal Commission Final Report, Vol 1, p 376.

⁵⁰⁷ Kennedy Royal Commission Final Report, Vol 1, p 381.

⁵⁰⁸ Kennedy Royal Commission Final Report, Vol 1, p 382.

- 786 The Kennedy Royal Commission was told a male police officer stalked a female colleague by looking up her personal details on computer 18 times over six months. In all, he made 84 unauthorised accesses of data on mainly female colleagues and female public service staff. He was reprimanded and recommended for counselling in preference to prosecution.⁵⁰⁹
- 787 In October 1999 a constable released information to an associate of Coffin Cheater bikie Mark Raymond Hinchcliffe. He was not prosecuted.⁵¹⁰
- 788 In 2000 a police officer went to work while on sick and annual leave and ran 287 name and vehicle checks. An internal inquiry did not establish whether he was passing information to his girlfriend who worked for a debt collection agency.⁵¹¹
- 789 On 25 August 2006 Sergeant X confessed in a CCC public hearing to accessing a Police database on “probably” 10 occasions and providing information derived from the searches to Pasquale Minniti. In that hearing Sergeant X agreed that he had a phone conversation with Minniti in which he disclosed to Minniti the address of A, the type of vehicle that A drove, and the fact that A was a “cleanskin” (i.e. that the person did not have a criminal record). In the public hearing Sergeant X was played the audio of an intercepted phone call that Minniti made to a third person 20 minutes after the original phone call, and Sergeant X agreed that by releasing A’s details to Minniti he potentially put A in “some precarious position”. Sergeant X in the public hearing said:
- [I] deeply regret the damage that I feel I've caused to the image and integrity of the West Australian Police. I'm truly ashamed for my actions and although there is absolutely no excuse for what I have done.*⁵¹²
- 790 On 25 August 2006 Sergeant Y confessed in a CCC public hearing to entering the registration number of a vehicle provided to him by Minniti into a Police database and then providing Minniti with details as to the name and address of the owner of the vehicle in contravention of WA Police policy.⁵¹³

⁵⁰⁹ ‘Police files open to abuse’, *The West Australian* newspaper, 27 January 2003, p 9.

⁵¹⁰ ‘Police files open to abuse’, *The West Australian* newspaper, 27 January 2003, p 9.

⁵¹¹ ‘Police files open to abuse’, *The West Australian* newspaper, 27 January 2003, p 9.

⁵¹² Public hearing of CCC, 25 August 2006, transcript accessed at <http://www.ccc.wa.gov.au/files/transcripts/Public%20Hearing%2020060825%20%28SUP%29.pdf> on 4 March 2010.

⁵¹³ Public hearing of CCC, 25 August 2006, transcript accessed at <http://www.ccc.wa.gov.au/files/transcripts/Public%20Hearing%2020060825%20%28SUP%29.pdf> on 4 March 2010.

False travel claims

791 In 2002 a police officer was convicted of making false travel claims.⁵¹⁴

⁵¹⁴ Transcript of report on *The 7.30 Report*, ABC TV, 28 March 2002:

Mick O'Donnell (ABC journalist): Has the Anti-Corruption Commission ever initiated an investigation of police which has led to a successful prosecution?

Terry O'Connor: (Commissioner of the Anti-Corruption Commission): Yes.

Mick O'Donnell: On numerous occasions, one occasion?

Terry O'Connor: A police officer who has been referred following a preliminary hearing for trial on certain charges and another police officer was convicted. Well, he's now left the police service but he was convicted earlier in the year of making false travel claims and other matters.

APPENDIX THREE

LESSONS TO BE LEARNED FROM THE QUEENSLAND CRIME AND MISCONDUCT COMMISSION

Introduction

792 The CCC considers the Queensland Crime and Misconduct Commission (CMC), which has a dual misconduct function and crime function, as an excellent example of how an integrity agency can also have a crime fighting capacity.

793 The CCC considers Queensland, with its “relatively similar cultural, economic and political contexts” as an “appropriate analogue for Western Australia.”⁵¹⁵

794 In March 2010, the former Chairperson of the CMC, Mr Robert Needham, on invitation by the CCC, gave a presentation to the CCC on the CMC’s experiences in combating organised crime.

795 The Committee was very interested in gathering evidence as to how the CMC combated organised crime, and whether there were any problems experienced by the CMC and the Queensland Police Service in working together to combat organised crime.

796 The Committee took evidence from Mr Robert Needham and from former Queensland Police Superintendent, Felix Grayson, who was at his retirement in 2009, the most senior police officer working in the CMC. The Committee also received a submission from the Queensland Police Service.

797 The evidence, particularly from Mr Grayson alerted the Committee to a number of serious problems that exist with the Queensland model, which hereto have not come to light.

Differences between Queensland and Western Australia

798 The evidence also highlighted a number of fundamental differences between Queensland and Western Australia, namely:

- In Queensland, the CMC is responsible for proceeds of crime investigations. In Western Australia the WA Police and the Director of Public Prosecutions are responsible for proceeds of crime investigations.

⁵¹⁵ Chris Shanahan SC, CCC Acting Commissioner, letter dated 16 April 2010, p 5.

- In Queensland the CMC is responsible for witness protection. The WA Police is responsible for witness protection.
- In Queensland, the QPS only gained the power to intercept telephone communications in late 2009. The WA Police have had the ability to intercept telephone communications since 1997.⁵¹⁶
- In Queensland, the CMC is not authentically independent of the QPS, as it is staffed by a high percentage of QPS secondees, whereas the CCC is at present authentically independent of the WA Police.

History of the CMC

799 The Queensland Crime and Misconduct Commission (CMC) came into existence on 1 January 2002 when the Criminal Justice Commission (CJC) and the Queensland Crime Commission (QCC) merged to form the new organisation.

800 The CJC had been established by the *Criminal Justice Act 1989*, to help restore confidence in public institutions after the revelations of the 1987–89 Fitzgerald Inquiry into police corruption.

801 For several years, in addition to investigating police and public sector misconduct, the CJC worked with the police to investigate organised and major crime. In 1997 this crime function was taken over by the newly formed QCC, under the *Crime Commission Act 1997*; the QCC was also given the task of investigating paedophilia. Mr Grayson explained:

*There was a decision made at the time to take the crime and investigation role off the CJC. It was seen to be ineffective and expensive. They set up a Queensland Crime Commission. In my view and, I think, in the view of quite a number of other people, the Queensland Crime Commission was very effective. It, too, worked in partnership with the Queensland Police Service out of necessity. It was only a relatively small organisation, having access obviously to the extraordinary powers. It worked very much the same way as the CMC does now or the CJC did. It was a stand-alone body. It did not have that stigma attached to it that the CJC or the CMC had. To some extent, the Queensland Police Service was happier to work with the Queensland Crime Commission, although they did see it as a secondary law enforcement agency in the state and there was a little bit of apprehension about that by the state police at the time. But certainly the relationship worked well. There were the joint operations that were run, but there was a greater tendency for the Queensland Police Service at the time to share information and resources.*⁵¹⁷

⁵¹⁶ On 11 July 1997 the Commonwealth Attorney General, Darryl Williams, authorised WA Police to be an eligible agency under the *Telecommunications (Interception) Act 1979* (Cth).

⁵¹⁷ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 6.

802 In 2001 the Queensland Government decided to amalgamate these two commissions and form a single body to fight major crime and public sector misconduct — the Crime and Misconduct Commission. The legislation under which the new body was created was the *Crime and Misconduct Act 2001* (CMC Act). Mr Grayson explained:

The problem for the Queensland Crime Commission, though, was that it lacked resources and relied heavily on the Queensland Police Service for surveillance, for instance. It did not have its own surveillance teams. [...] There were advantages in the amalgamation between the QCC and the CJC back into what is now the CMC in that the crime arm of the CMC now enjoys access to the resources that they did not have before, predominantly surveillance and technical support. You really do need those sorts of resources on tap, because if you rely on the state service, you are always going to be second cab off the rank, so to speak....

*Certainly; it [the CMC] reverted virtually to what it was before, the CJC, with the same mandate.*⁵¹⁸

Functions of the CMC

Misconduct function – Raising public sector integrity

803 The CMC has a misconduct function to continuously improve the integrity of, and to reduce the incidence of misconduct in, the Queensland public sector. Within its misconduct function a large part of the CMC's operations are devoted to overseeing the Queensland Police Service (QPS), and investigating allegations of misconduct against QPS officers.

Crime function

804 The CMC has a crime function in which it is authorised, by way of references from the Crime Reference Committee, a six-member group set up under the CMC Act, to combat major crime. Major crime encompasses organised crime, drug trafficking and violence engaged in by members of (generally identified) motorcycle gangs and their associates, terrorism, paedophilia and other serious crimes such as murder and arson. In addition to specific references from the Crime Reference Committee, the CMC also has the jurisdiction to investigate major crime which falls within certain general 'umbrella' referrals which allow the CMC to investigate matters without further referral from the Crime Reference Committee. These are:

- Freshnet, which relates to established criminal networks
- Gatekeeper, which relates to money laundering

⁵¹⁸ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 6.

- a counter-terrorism referral, which enables the CMC to respond rapidly to investigative requirements connected with suspected or actual organised terrorist activity.⁵¹⁹

805 Generally speaking, the Crime Reference Committee must make an assessment, cognisant of the very wide powers that the CMC has at its disposal, that it is in the public interest for a major crime matter to be referred to the CMC, and that the QPS is not able to adequately investigate the matter without the CMC's assistance.

Operations with the QPS

806 Under the CMC Act there are a number of ways the CMC can undertake a major crime investigation with the involvement of the QPS.

- the Crime Reference Committee may dictate how the major crime investigation is to be divided up between the QPS and the CMC. Under the CMC Act the Crime Reference Committee can direct that a police taskforce be formed to 'help' the CMC carry out a crime investigation, and that the taskforce is to be under the control and direction of the QPS Commissioner.⁵²⁰
- the CMC can liaise with and exchange information with the QPS (or any other law enforcement or prosecuting agency).⁵²¹
- the CMC can enter into operational agreements with the QPS (or any other law enforcement or prosecuting agency).⁵²²

807 The CMC also has the ability, under its umbrella referrals, to investigate organised crime independently of the QPS.

Hearings with Robert Needham

808 Mr Robert Needham was the Chairperson of the Queensland Crime and Misconduct Commission (CMC) from January 2005 to December 2009.

809 The Committee has met with Mr Needham on two occasions. The first was in February 2009, when the Committee attended the Australian Public Sector Anti-Commission Conference in

⁵¹⁹ CMC website: www.cmc.qld.gov.au/asp/index.asp?pgid=10751&cid=5298&id=168.

⁵²⁰ CMC Act, s 312.

⁵²¹ CMC Act, s 26.

⁵²² CMC Act, s 32 (3).

Brisbane. Mr Needham was then the Chairperson. The Committee took the opportunity to have a meeting with Mr Needham and asked Mr Needham a number of questions on how the CMC interrelated with the Queensland Police Service (QPS) and the extent to which the CMC and QPS engaged in joint operations. Also in attendance was Mr Chris Keen, Director of Intelligence, CMC.

810 Mr Needham's tenure as Chairperson of the CMC ended in December 2009. The Committee then met with Mr Needham a second time in March 2010.

811 In both meetings the Committee was interested to learn how the CMC reconciled its dual role, maintained divisions between its misconduct area and crime area, and whether there were any lessons the CMC model may have for WA.

Summary of Mr Needham's views

812 Overall Mr Needham was in favour of the dual corruption and crime fighting role of the CMC. The CMC had been able to establish clear lines of demarcation between its crime and misconduct areas and had a philosophy which was directed to fostering a partnership with the Queensland Police. To date there has been no indication that the merger had adversely affected the working relationship with Queensland Police (although it was acknowledged that this might be attributable to the CMC's policy of employing Queensland Police officers) He nevertheless said that it had taken a long time for the CMC and the QPS to cohesively work together, and had a number of valuable points to make, which are set out below.

Tension between the CMC and the QPS

813 Mr Needham acknowledged that there was a tension between the CMC's role as crime fighter, and CMC's role as corruption fighter:

*... with individual police officers we are seen as the bogeyman because we investigate complaints against them and we are not particularly liked because of that. So, there is that tension ...*⁵²³

Gaining QPS acceptance

814 Mr Needham emphasised that the successful relationship between the QPS and the CMC did not occur overnight, and that considerable time and effort is needed to cultivate a strong working

⁵²³ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, pp 4-5.

relationship between police and a corruption fighter such as the CMC. Cultural differences will always exist, but they can be minimised.

High proportion of CMC staff seconded from the QPS

- 815 Over a quarter of CMC's staff comprise serving QPS officers (82 out of a 315). All of the CMC's surveillance officers are serving QPS officers. All of CMC's technical officers (being the operatives who install listening devices) bar one are serving QPS officers.
- 816 While the head of the CMC's crime fighting area is a civilian lawyer, the next senior position in the CMC's crime fighting unit is a serving chief superintendent of the Queensland Police Service. The chief superintendent liaises directly with the chief superintendent in the State Crime Operations Command of the QPS. Most of the interaction between the QPS and the CMC's crime fighting unit occurs by way of this liaison, as well as direct communications between QPS officers on the one hand and serving QPS police officers in the Queensland crime fighting unit on the other.
- 817 Mr Needham indicated that were it not for the presence of serving QPS officers in CMC's crime fighting unit, the CMC would not be accepted as a working partner by the QPS. Mr Needham said:

But if you were looking at the idea of the CCC doing the sort of work that we are doing, I think it would not be well accepted by WA Police at all when there are more civilians within the CCC. In our crime area, they are working in with mainly the police here and with civilians as well because it is headed up by a civilian, but we have a chief superintendent of the Queensland Police Service as the head police officer in our crime area. He liaises straight back into the QPS [Queensland Police Service] with the chief superintendent in the state crime operations command. If we did not have that sort of situation ... we would not be looked at by the Queensland Police Service.⁵²⁴

... quite frankly, if they do not have police officers in the CCC, I do not know that there will ever be good cooperation in investigating together organised crime. You might get it in the use of the CCC's hearing powers ...⁵²⁵

Circumstances where the CMC requests QPS assistance

- 818 In practice, when the CMC's intelligence identifies a likely target, the QPS will normally be called in to undertake a joint operation with the CMC to gather sufficient evidence to support a prosecution of the target. This is largely due to the fact that the actual size of an investigation unit

⁵²⁴ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, p 16.

⁵²⁵ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, pp 20-21.

within the CMC is small, comprising six persons – three investigators, a financial investigator, an intelligence analyst and a lawyer. In a big organised crime matter these resources are insufficient and hence the QPS is called in, albeit reluctantly. Mr Needham said:

*The QPS is happy to use us; they are not happy for us to use them, of course, but they will use us where they see it suits them and that is human nature.*⁵²⁶

QPS utilise CMC's expertise in financial investigation

- 819 The CMC, in addition to its misconduct function, crime function and witness protection function, also has the responsibility of enforcing the Queensland proceeds of crime legislation. The CMC does all of the investigative work, tracing of assets, and preparation of briefs for the Director of Public Prosecution, and appearing as witnesses to evidence. The CMC has the power, without the need for judicial warrant, to issue notices to persons and institutions such as banks in order to trace monies.
- 820 The CMC has accordingly developed a significant financial investigation capacity which exceeded that of the QPS, and the QPS, while they have their own financial investigation capacity, sometimes seeks assistance from the CMC. The approach of the CMC is also different to the QPS. The CMC uses its financial investigators to identify people and money laundering activity up front, and then mounts an investigation, whereas usually with the QPS it is the other way around, with the QPS using their financial investigators after the main investigation.

QPS value CMC's ability to conduct coercive hearings

- 821 The QPS are increasingly requesting the CMC to conduct coercive hearings. Under the CMC Act, the QPS Police must channel the request through the Crime Reference Committee, unless the matter falls within an umbrella reference already granted to the CMC.
- 822 Initially the QPS requested the CMC to conduct coercive hearings in “cold case” murders, where the QPS has exhausted all avenues of investigation open to them. Now the QPS are utilising coercive hearings in the early stages of an investigation to unlock information which enables them to progress to the next level of the investigation.

⁵²⁶ Robert Needham, CMC Chairperson, *Transcript of Meeting*, 26 February 2009, p 21.

CMC conducts long term investigations

823 QPS, as with other police forces, have limited resources and must prioritise objectives. A significant amount of QPS work is reactive policing, whereas the CMC have the 'luxury' of small dedicated teams that can be used on medium to long term investigations (12-18 months) which can deeply penetrate crime networks and gather evidence.

CMC deals with high level organised crime

824 Mr Needham said that ordinarily the CMC would only become involved in investigating organised crime investigations where there was the prospect of focusing on high level targets, such as the importers or manufacturers of drugs. Where intelligence gathered by CMC indicated that high level criminal activity was not involved, the intelligence would be passed to the QPS, for them to pursue.

Firewalls and conflicts

825 Mr Needham said that he was not aware of any leaking of information by serving QPS officers on the CMC staff back to their compatriots in the QPS.

826 There are only a select handful of people who sit on both the management committee of the crime area of the CMC and the misconduct area of the CMC. It is their job to ensure that the appropriate people on each side of the divide are informed on a need to know basis, so as to prevent doubling up, and compromising each others operations. Potential conflicts are not common, but they have arisen. To date the structures put in place have worked, with possible problems being identified in advance and strategies put in place to deal with these problems.

Queensland Police Service

827 The Committee received a submission from the QPS. The QPS said joint investigative undertakings with the CMC focusing on organised crime in Queensland have worked well. The joint agency arrangement was said to have been especially successful during investigations of serious organised crime and homicide related offences, by engaging the special coercive powers and crime confiscations powers administered and used by the CMC.

828 The benefits of joint arrangements were said to include:

- enhanced targeting of organised crime groups through the utilisation of joint investigative and proceeds resources;

- allocation of specific expertise, resources and special powers of each organisation; and
- enhanced information sharing and intelligence development.

829 The Committee notes that the QPS cites the greatest success of joint operations as arising from the CMC's use of coercive hearings and crime confiscation powers. In Western Australia, the WA Police already have access to:

- coercive hearings, via application to the CCC under Part 4 of the CCC Act; and
- crime confiscation powers under the *Criminal Property Confiscation Act 2000* (WA).

Felix Grayson

830 The Committee took evidence from Mr Felix Grayson. Mr Grayson is a Former Assistant Commissioner of the CMC. He was the most senior QPS officer within the CMC.

831 In September 2009 Mr Grayson retired. During his 36 years with the Queensland Police Service he performed various roles, the greater proportion of which involved criminal investigation, including organised crime and official misconduct and corruption.

832 In 1991 he transferred to the Criminal Justice Commission, which had been established to carry on the work of the Fitzgerald inquiry—namely, the investigation of official misconduct and corruption within the Queensland Police Service and other units of public administration. In addition, the CJC was legislated the responsibility of investigating major and organised crime. The CJC's approach to investigating organised crime differed from that of the Queensland Police Service at that time in a number of ways. First, it used multidisciplinary teams, including lawyers, police and civilian investigators, intelligence analysts and financial analysts. Members of other agencies, such as the Australian Taxation Office and the Australian Federal Police, were included if and when required. Second, it was heavily focused on the gathering of intelligence and the development of informants, or human sources as they are now referred to. However, it adopted investigative and intelligence strategies utilised by the FBI. At the time, the Queensland Police Service opposed those strategies. Third, it focused on following the money trail and ultimately restraining the proceeds of crime. Finally, it conducted complex and protracted investigations aimed at identifying and prosecuting all members of criminal networks, a strategy that is resource intensive.

833 The CJC investigated four areas of organised crime—namely, the Italians, the Chinese, the Japanese and outlaw motor cycle gangs. Mr Grayson initially headed the team investigating Italian organised crime, but later became the officer in charge of the joint organised crime task force. That position involved senior-level operational management jointly with the Queensland Police Service and other law enforcement agencies, including the National Crime Authority and the AFP.

- 834 The CJC worked in partnership with the Queensland Police Service through the joint organised crime task force. There was joint management of investigations at a senior level, but the day-to-day management of investigations was run from within the teams that were based at the CJC. This is similar to the way the CMC currently works with the Queensland Police Service.
- 835 In March 1998 the CJC lost its organised crime function to the newly formed Queensland Crime Commission. All current tactical operations then being undertaken by the JOCTF were continued by the QCC. After spending some time with the QCC finalising an investigation, Mr Grayson moved to different roles within the Queensland Police Service for a period of approximately three years.
- 836 In 2001 Mr Grayson transferred to the CJC at the rank of Detective Superintendent within its misconduct investigations directorate. In January 2002 the Queensland government amalgamated the CJC and the Queensland Crime Commission into the Crime and Misconduct Commission.
- 837 In 2003 Mr Grayson took over as Director of Crime Operations at the CMC at the rank of Detective Chief Superintendent. To some extent, that role was similar to that of the officer in charge of the joint organised crime task force in that he was responsible for major and organised crime investigations conducted by the CMC in partnership with the Queensland Police Service and other law enforcement agencies. This role was recognised as being critical to the success of operations as it is the main interface between the CMC and the Queensland Police Service and it is responsible for operational decision making, the negotiation and acquisition of both physical and human resources from the Queensland Police Service to support operations, and solving a range of issues that arise when two or more agencies operate together.
- 838 In January 2007 Mr Grayson was promoted to Assistant Commissioner of the CMC. As assistant commissioner he was the director of witness protection and operation support and the officer in charge of the CMC police group. He sat on the senior executive of both the Queensland Police Service and the CMC. As such, he was able to liaise directly with the chief executive officers of both organisations, thereby enabling him to garner support for operations and resolve issues or problems at the most senior level. This applied equally to misconduct and crime investigations.
- 839 During his 10 years' experience investigating organised crime as part of an oversight body (the Qld CJC and then the CMC) and conducting joint operations with the QPS, Mr Grayson encountered the following issues and difficulties.

Conflict of interest

- 840 The first issue identified by Mr Grayson is a conflict of interest. Mr Grayson said:

I do not believe the investigation of organised crime sits comfortably with an anti-corruption body, particularly when you are relying on the organisation you are overseeing—and at times investigating—for operational support and intelligence. One moment you are seeking assistance and the next you are investigating its members. There

have been occasions on which the very officers who are part of our joint investigations were targeted and prosecuted by us.

The CMC recently conducted a major investigation into aspects of the Queensland Police Service's state crime operation command and its operation and management practices. We were investigating many of the police who worked in command, from where we drew investigative staff and relied on to support our joint operations. The very protracted investigation and subsequent criminal and disciplinary charges did nothing to encourage a spirit of cooperation and support. This was exacerbated by the CMC's release of a public report into the matter. These situations place great strains on your joint investigations, and make it very awkward for your investigations to obtain information and intelligence. A great deal of effort is required to build bridges and maintain workable relationships. To make matters worse, officers working at the CMC were friends of the officers under investigation, thereby creating the possibility of divided loyalties.⁵²⁷

Resentment

841 The second issue identified by Mr Grayson is the resentment of the oversight body by state police. Mr Grayson said:

I strongly assert that this issue presents the biggest issue for the Corruption and Crime Commission should it adopt an organised crime function. The cold, hard fact of the matter is that no organisation likes its oversight body or auditor. This is particularly so with police organisations because they possess a strong culture of solidarity and they tend to close ranks when under investigation.

To a greater or lesser degree resentment was evident during the entire time I worked at the CJC and the CMC, and it manifested at times in the following ways. First, there was a general lack of cooperation and commitment to joint operations. At times Queensland Police Service senior management within crime operations merely paid lip-service to their level of involvement in joint operations insofar as their commitment to resources, both human and physical. Second, there was always difficulty obtaining quality investigators. When investigators were provided, they were sometimes available for only limited periods or were rotated at short notice. This had a detrimental effect on investigations and the development of briefs of evidence. Inevitably, CJC and CMC officers were left to complete the briefs. Finally, state police were often reluctant to share intelligence or human sources. That level of resentment waxes and wanes depending on individual senior and middle managers within the state crime group because they set the tone from the top. Unfortunately, there have been occasions on which the resentment and a lack of cooperation have been condoned and encouraged by senior managers. It also depends on the reputation and credibility your managers and investigators have with

⁵²⁷ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 21.

*investigators working in the Queensland Police Service that you are in partnership with.*⁵²⁸

Operational integrity

842 The third issue identified by Mr Grayson is operational integrity. Mr Grayson said:

*Maintaining operational security can be problematic when there is joint agency management and the day-to-day running of operations. The risks are heightened when you have too much rotation of staff provided by the state police. This is an area in which petty jealousies and resentment can result in the release of operational information—for example, sensitive intelligence and tactical information being passed on to unauthorised personnel or, even worse, informants. I saw this happen on occasions during investigations that I worked on. This not only compromises the operation but also places covert operatives and investigating police at great risk.*⁵²⁹

Resources and competing interests

843 The fourth issue identified by Mr Grayson is resources and competing interests. Mr Grayson said:

In order to effectively dismantle organised crime groups, you need to run complex and protracted investigations that require enormous funding. On top of salaries you have costs of operating surveillance teams, listening devices and other technical equipment, including telephone intercepts. The conduct of investigative hearings in support of the investigation is an additional cost. The availability of resources to joint agencies is finite and often becomes the determining factor as to whether an operation is closed. There have been numerous occasions on which operations could have been more effective if they had not been shut down due to resourcing issues. State police have many competing interests for funding and resources and are very reluctant to go that extra mile.

*The Corruption and Crime Commission would require sufficient funding to conduct stand-alone investigations as the state police have too many competing interests for their budgets and, in all likelihood, pressures would be placed on the Corruption and Crime Commission to close operations prematurely. This would defeat the purpose of the CCC taking on the investigation of organised crime.*⁵³⁰

⁵²⁸ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 4.

⁵²⁹ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 4.

⁵³⁰ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, pp 4-5.

Attraction, retention and reintegration of staff

844 The fifth issue identified by Mr Grayson is the attraction, retention and reintegration of staff. Mr Grayson said:

The acquisition of quality management and investigative staff is critical to the success of operations. For joint operations to succeed, you must have highly experienced and credible investigators of sufficient rank. This has been a significant problem for the CJC and CMC. Because crime sits within an oversight body, there is a limited gene pool within the Queensland Police Service from which to draw. This is due to the fact that many police are hesitant to move to the CMC because of the stigma that is attached to that organisation and the possible detriment it may cause to their careers with respect to promotion. The CMC has been successful in recruiting many excellent staff, but there have been instances in which they have been overlooked for promotion in or had difficulty returning to the QPS.⁵³¹

Competition between the misconduct unit and the crime unit within the CMC

845 Mr Grayson pointed out that there were undercurrents and, at times, petty jealousies internally within the CMC expressed by the misconduct unit, when the crime unit received the lion's share of the CMC's finite resources. Mr Grayson said:

All of that makes it harder to operate and, I guess, it creates frustrations and, at times, ill-feeling among some of the staff and maybe even some of the management insofar as "Why do you want to do that?", "Why do you get all the resources?" "Why does crime seem to get the lion's share of surveillance and technical resources when there are serious misconduct investigations being conducted?" That also places an awkward strain on an organisation that does both functions.⁵³²

Witness protection

846 Mr Grayson pointed to the fact that in Queensland, the CMC is responsible for witness protection and that in Western Australia, the WA Police are responsible for witness protection. He foreshadowed, as a "secondary issue", the complications that may arise if the CCC were to conduct an organised crime investigation independent of the WA Police, and then to have a need to place a witness in a witness protection program. The WA Police, under current legislation, would have to be informed. That could possibly have some effect on the integrity of the CCC's operations.

⁵³¹ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 5.

⁵³² Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 6.

Summary

847 Mr Grayson concluded by saying:

In conclusion, the fight against major and organised crime crosses jurisdictional boundaries and requires a multi-agency approach to its investigation. It relies on the gathering and sharing of intelligence and human sources. In my experience you can rarely identify the entire network of organised crime groups without using overt and covert investigative methods and by accessing the extraordinary powers of organisations such as the CCC, ACC and CMC. The success of joint task forces and operations depends on trust and respect amongst its members and between the agencies involved. It is my contention that this has been and always will be difficult if the joint agency task force sits within an anti-corruption body, or what has often been referred to as a schizophrenic organisation, such as the CMC.

While the CJC and CMC have had many successes over the years, the abovementioned issues have been unnecessary distractions that have prolonged operations and/or wasted time and resources; alternatively, they have caused investigations to be terminated prematurely, thereby attaining results that could have been far better.⁵³³

848 Mr Grayson has approved the following as representing his view:

I would advise WA Parliament not to permit the CCC to conduct joint operations with the police, but to enhance the police access to extraordinary powers by the CCC. Such an emphasis would facilitate the greatest incidence of the CCC and the police working together rather than in competition with each other.

If [WA Police] are able to access extraordinary powers more easily and have the resources to conduct investigations, that is the way to go.⁵³⁴

⁵³³ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 5.

⁵³⁴ Felix Grayson, former Assistant Commissioner of the CMC, *Transcript of Evidence*, 3 March 2010, p 17.

APPENDIX FOUR

LESSONS LEARNT FROM HONG KONG

Introduction

849 Instrumental in the formulation of the Committee's views was the Committee's investigative travel to Hong Kong in December 2009, where the Committee gathered evidence from:

- the Hong Kong Independent Commission Against Corruption (**Hong Kong ICAC**);
- the Chairman of the Operations Review Committee of Hong Kong ICAC;
- the Hong Kong Police Force (**HKPF**);
- the Legislative Council of Hong Kong, Panel on Security (**Panel on Security**);⁵³⁵
- the Asian Human Rights Commission; and
- Professor Harold Traver.⁵³⁶

850 Notwithstanding the wide range of viewpoints and agendas represented by the above entities, a dominant theme emerged that Hong Kong ICAC's success as a corruption fighter was due to its integrity and independence and the resultant high level of public confidence in Hong Kong ICAC. The majority of interviewees advised against the proposal that the CCC engage in joint operations with the WA Police. Not one interviewee was in favour of the proposal.

851 Hon James To Kun-sun (Panel on Security) said:

*My general advice would be to let the police do their own work and to let ICAC do its own work where possible.*⁵³⁷

⁵³⁵ The Legislative Council of Hong Kong has 18 panels (equivalent to parliamentary committees) that monitor 18 policy areas. The Panel on Security monitors the operation of the HKPF, ICAC, immigration and customs.

⁵³⁶ Professor Traver is Professor of Sociology at Hong Kong Shue Yan University; and has taught for over 30 years at the University of Hong Kong where he founded that university's undergraduate criminal justice and post graduate criminology programs, as well as criminal justice programs in the University of Hong Kong's School of Professional and Continuing Education. He has edited a recent book, *Introduction to Crime, Law and Justice in Hong Kong*, and written articles on law enforcement such as *Controlling Triads And Organized Crime In Hong Kong*. He also teaches post graduate corruption studies at the Hong Kong University School of Professional and Continuing Education. Many of his students have gone on to be officers of Hong Kong ICAC.

⁵³⁷ Hon James To Kun-sun, Deputy Chairman, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 5.

852 Assistant Commissioner Fook-Chuen (HKPF) said:

*I think it confuses society. Actually, you do not know who is doing what if I am a victim of an organised crime syndicate, who should I report to ...*⁵³⁸

853 Professor Traver said:

*It sounds like an extremely bad idea, if you want my view, really. You should actually take the middle “C” out of the CCC and just call it the “Corruption Commission” and forget about the crime. Corruption is a crime and it should focus on corruption. If they only have 150 people in it or 75, it should specialise in one thing and not fuzz it up, as I say, with doing, kind of, organised crime. Obviously, corruption and organised crime are interlinked of course, but stick with the corruption. Empower the police with more power in the area of organised crime; give them more resources... Give the police new powers, if they need them, in terms of organised crime. Give them increased personnel, or whatever you need to do. Do not ever think you are going to eliminate organised crime, because you are not. It is like pulling weeds; it just keeps coming back.*⁵³⁹

History of Hong Kong ICAC

854 In the 1970s corruption was rife in the HKPF. Professor Harold Traver, a resident of Hong Kong since 1971, told the Committee:

*When I came here in 1971 the police were grossly corrupt from the top to bottom. Money would flow into the top – or nearly the top – and then flow down to the constables. This was just the way things were. That money came from triads; it came from drugs; prostitution; gambling, racketeering of all types, and so on. The police and triads were extremely closely linked, to the point that you could not tell one from the other.*⁵⁴⁰

*...I have had police tell me in the, kind of, old days that interrogation was a contact sport.*⁵⁴¹

In the old days, and I am not joking, you called the fire department and you had to pay the fireman so much money to attach the hose to the hydrant. There was a Cantonese expression, a song, about pissing on the fire, and it is a vulgar Cantonese rhyme or song. You had to pay the firemen to put the fire out. If you were in the hospital, and you wanted toilet paper or something to eat, you had to bribe the amah, or the orderly, to give you something, so your relatives had to reach into their pockets, and so on. If you wanted a visa, us foreigners did not do that, but you put \$100, which was a lot of money in those days, in your passport, and you got your visa really quick that way. If a police officer

⁵³⁸ Vincent Wong Fook-Chuen, Assistant Commissioner, HKPF, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 3.

⁵³⁹ Professor Harold Traver, 8 December 2009, *Transcript of Meeting*, Hong Kong, p 11.

⁵⁴⁰ Professor Harold Traver, 8 December 2009, *Transcript of Meeting*, Hong Kong, p 2.

⁵⁴¹ Professor Harold Traver, 8 December 2009, *Transcript of Meeting*, Hong Kong, p 2.

*gives you a ticket, you give him a little money, and he will ignore it, and so on. It was taking money out of their pockets and so on and so forth.*⁵⁴²

855 Professor Traver said that the impetus for the creation of Hong Kong ICAC in 1974 was the defection of four corrupt police officers – two Chinese and two English – Messrs Godber and Hunt in 1971. The matter incensed the Hong Kong public, and Governor Maclehoose moved quickly to establish Hong Kong ICAC, an elite corruption fighting force who aggressively took on the Police force. Hong Kong ICAC enjoyed strong public support. Professor Traver said:

*ICAC comes along and claps its hands and everybody goes “Whoopie – total legitimacy!” It had no trouble with anybody criticising it or anything. People loved it. I guarantee you that. Over the years, things have quietened down, and it deals with much lower levels.*⁵⁴³

856 So aggressive was Hong Kong ICAC’s tactics that in 1976 there was a police riot, and hundreds of police barricaded Hong Kong ICAC staff in their officers and demanded that Hong Kong ICAC back down. This resulted in the Government granting an amnesty in 1977 to all but the most seriously corrupt police officers.

857 Hong Kong ICAC continued to aggressively root out corruption. Its tactics worked. The police-triad link was broken, and Hong Kong ICAC received strong support from the public. At the time of the handover of Hong Kong to China in 1997 there was some talk of the Hong Kong ICAC having done its job so well, that it should be disbanded and the resources passed to the Hong Kong Police. This did not occur, and Professor Traver now considered Hong Kong ICAC to be somewhat of a sacred political cow but for a totally different reason to that which gave rise to its creation.

*In my mind, its position is political now. It serves the function of showing the motherland, China, that we [Hong Kong] are different and special. We still like to view ourselves as special and different. We have the rule of law. We do not tolerate corruption in any branch of government or in the NGO’s either, and if we find corruption, citizens will report it like that, and there will be action on the basis of those reports, and there will be satisfaction. In China, some official rips you off, steals something from you, tears your house down, steals your education records and puts his son in university on your son’s records, and not a thing can be done about it. The anticorruption agency in China is frustrated. It tries to do a good job, but it is just a mess. It is a huge country and a huge mess. We like to present ourselves here as being different and special. The ICAC increasingly brings in people from China and teaches them here, and has joint connections with them and so on. A lot of this justification now is really political – flying the flag.*⁵⁴⁴

858 There was universal acknowledgment by all witnesses interviewed by the Committee that Hong Kong ICAC has been very successful in reducing levels of corruption in Hong Kong from

⁵⁴² Professor Harold Traver, *Transcript of Meeting*, Hong Kong, 8 December 2009, pp 19-20.

⁵⁴³ Professor Harold Traver, *Transcript of Meeting*, Hong Kong, 8 December 2009, p 20.

⁵⁴⁴ Professor Harold Traver, *Transcript of Meeting*, Hong Kong, 8 December 2009, p 20.

endemic proportions in the 1970s to the low levels experienced today. The most senior officer of Hong Kong ICAC that the Committee spoke to was Mr Ng Ping-Kwok, Acting Assistant Director of Operations. Mr Ping-Kwok said:

*In Hong Kong, corruption is nowadays no longer a problem. The tolerance for corruption is towards zero. The 35 years of the ICAC has seen a pretty corrupt situation turn into a pretty healthy situation, in particular within the government sector. Basically, corruption is not accepted in any circumstances.*⁵⁴⁵

Joint operations between Hong Kong ICAC and HKPF

859 When the Committee undertook this Inquiry, it was under the impression that joint operations between Hong Kong ICAC and HKPF were fairly common, and that the Committee could derive valuable insight into how the CCC could work with the WA Police by speaking with officials from Hong Kong. The basis of this belief was Hong Kong ICAC's web site, which devoted a significant section⁵⁴⁶ to spruiking the success of a joint taskforce between Hong Kong ICAC and HKPF which investigated allegations of fraud and corruption in the wake of the collapse of the Overseas Trust Bank (OTB) in 1985. The task force, which was labelled a 'dream team of Hong Kong crime-fighters' worked together for 16 months and led to five convictions, including the three top management positions of the bank, and two persons extradited from the United States. The website noted that building up mutual trust among officers from different work cultures within a short period of time was no easy task. Initial interaction was stilted and awkward as demonstrated by the following transcript reproduced on Hong Kong ICAC's website:

Policeman: Sir, I'm PC 7324

ICAC investigator: Don't call me 'sir', call me by my name! We all address even our chief commander as Tony.

Policeman: Yes, sir!

Hong Kong ICAC investigator: I've told you not to call me 'sir', haven't I?

Policeman: No, sir! You are indeed sir. How can I not call you sir?

Hong Kong ICAC Investigator: -----

860 Hong Kong ICAC Head of Operations Tony Kwok Man-wai, said:

This was the first joint task force between Police and the ICAC. And due to historical reasons, I was initially quite worried whether we could build up mutual trust. In fact, in the beginning, there were some misunderstandings. On one occasion, the ICAC officers

⁵⁴⁵ Ng Ping-Kwok, Acting Assistant Director of Operations, Hong Kong ICAC, *Transcript of Meeting*, Hong Kong, 9 December 2009, p 1.

⁵⁴⁶ http://www.icac.org.hk/new_icac/eng/cases/otb/index.htm

gathered together for a meeting to discuss some ICAC internal matters. That created some concerns from the Police officers. They thought that we were talking about police corruption. In the end, I decided all these meetings should be transparent and open. Every morning I chaired a meeting with all officers present so that the progress could be discussed among all of us. I always ensured in every team, there were an ICAC officer and a police officer present so that they could work together. In a way, we were lucky because in the beginning we were faced with a crisis. This crisis enabled us to work together for the same goal and it worked.⁵⁴⁷

- 861 When the Committee arrived in Hong Kong and began interviewing witnesses, it quickly became apparent that apart from the OTB case, significant joint operations between Hong Kong ICAC and HKPF were few and far between. Reference was made to a joint task force formed in 2001 which operated out of Hong Kong ICAC's head office where HKPF concentrated on the money laundering aspect of the investigation, while Hong Kong ICAC concentrated on bankers being bribed for providing assistance to the money laundering syndicate through various bank accounts. But apart from this 2001 operation, representatives of the HKPF said that joint operations with Hong Kong ICAC were very rare and that there was nothing that Hong Kong ICAC had to offer the HKPF by way of investigative capability.

Hong Kong ICAC jealously guards its intelligence

- 862 It also appears that Hong Kong ICAC jealously guards its intelligence. Hon Kun-sun, Deputy Chairman of the Hong Kong Legislative Council, Panel on Security said:

They [Hong Kong ICAC] are very jealous of disclosing or sharing information or intelligence with other agencies. If they can do it on their own, they will do it on their own. They do not like to have joint operations. But if in some cases they need the statutory power of other agencies or, at least, some intelligence or background information from other agencies, they balance the need between the need for independence against the jealousy of disclosing information on the hand, and the final effectiveness of the operation. They would do that to share the intelligence and do a joint operation. That has been a very clear stance. That is my understanding after 18 or 19 years of continual monitoring of that. I have been here continuously since 1991.⁵⁴⁸

- 863 Hon Cyd Ho, a fellow member of the Panel on Security, agreed that Hong Kong ICAC was very reluctant to volunteer any information to the HKPF.

When it comes to the information to be provided by other organisations, ICAC would be very willing to cooperate because they could tap the other organisations' information,

⁵⁴⁷ Transcript of interview with Tony Kwok Man-wai, ICAC website, located at, http://www.icac.org.hk/new_icac/eng/cases/otb/cooperate.htm on 22 February 2010.

⁵⁴⁸ Hon James To Kun-sun, Deputy Chairman, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 4.

*but when it comes to the point that they have to disclose their own operation or details, they are very reluctant.*⁵⁴⁹

Strong working relationship between Hong Kong ICAC and HKPF on integrity matters arising within the HKPF

- ⁸⁶⁴ Notwithstanding the paucity of joint operations between Hong Kong ICAC and HKPF there was nevertheless evidence of a strong working relationship between Hong Kong ICAC and HKPF when it came to addressing integrity issues within the HKPF. Corruption within the HKPF is acknowledged by both Hong Kong ICAC and HKPF to be at historical lows. The percentage of complaints against police had dropped from 45% in 1974, to 9% in 2009. Yet it is acknowledged by HKPF that corruption within HKPF cannot be entirely eradicated. Given the size of the organisation and the powers that police officers have, incidents and allegations of corruption are inevitable. HKPF is the largest employer in Hong Kong with 28,000 police officers, 85,000 civilians and 4,000 auxiliaries.⁵⁵⁰
- ⁸⁶⁵ Long gone are the days when Hong Kong ICAC would arrest an entire police station and public disputes between Hong Kong ICAC and HKPF are now rare. The most recent public falling out between the HKPF and Hong Kong ICAC occurred in 2002 when Hong Kong ICAC arrested 3 police officers and issued a media statement on 18 May 2002, which the HKPF countered with a media statement the following day, alleging that the arrests were unsubstantiated. Since then disagreements between the two agencies have been dealt with high level liaisons between the two agencies.
- ⁸⁶⁶ The HKPF now runs an important committee, called the Force Committee on Integrity Management, which is chaired by a Deputy Commissioner and sits every three months. Every Commissioner ranked officer in the Police Force is a member of this committee, together with their equivalents in the civilian and auxiliary force components of the HK Police. Representatives of Hong Kong ICAC are also members. The FCIM proactively indexes the risk profiles of police officers, assigning an integrity index to individual officers which takes into account the police officer's personal circumstances, to corruption. For example a police officer with unpaid taxes or unpaid debts is assigned a risk indicator label that is closely monitored.

⁵⁴⁹ Hon Cyd Ho, Member, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 4.

⁵⁵⁰ Chief Inspector David Fremaux, HKPF, *Transcript of Meeting*, Hong Kong, 11 December 2009, p 3.

867 Hong Kong ICAC now frequently provides the HKPF with advance notice of Hong Kong ICAC's intention to arrest police officers. The approach is now low key, and the HKPF attribute this to the fact that a close working relationship has developed between Hong Kong ICAC and the internal affairs office of the HKPF. The internal affairs office was said to be:

*... the only window open to ICAC. No matter what ICAC wants from us – investigation, intelligence, everything – it will go through this window.*⁵⁵¹

Integrity management within the HKPF

868 The HKPF gave the Committee a presentation on how integrity issues are addressed internally by the HKPF. Chief Inspector Fremaux (HKPF) said there have been three major stages in the evolution of the HKPF. The first was the setting up of Hong Kong ICAC in 1974, and the subsequent driving out of the most corrupt elements of the HKPF. The second was a drive towards service quality, which came in the mid 1990s. Up until this point in time the HKPF was a paramilitary organisation with little focus on service delivery. There was then a concerted effort, which continues to this day, to inculcate certain values, the top two values being integrity and honesty, into serving police officers. There is also an ongoing emphasis on police officers to “live the values” and strategies in place improve the physical and mental health of police officers.

869 Corruption risks currently being targeted by HKPF are:

- Police officers who have large debts. HKPF policy is to assist officers with debts arising from misfortune, but not arising out of undesirable activity such as gambling and playing the stock market. Police officers are now taught how to manage their finances.
- Police officers who have inappropriate associations with undesirables. Originally the HKPR could only discipline police officers for associating with known criminals or triads. That has now been extended to any person classified by the HKPF as ‘undesirable’. This has been used to discourage police officers associating with former police officers, who may have been good officers during their careers, but now are involved in running businesses such as night clubs.
- Unauthorised access of personal information on police databases.

870 Chief Inspector Fremaux said that such is the priority that the HKPF places on integrity that police officers are rotated out of high risk policing assignments on a regular basis. Police officers are

⁵⁵¹ Vincent Wong Fook-Chuen, Assistant Commissioner, HKPF, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 1. Mr Fook-Chuen later acknowledged that there was another pathway along which communications flowed. This took the form of requests for intelligence, mostly originating from Hong Kong ICAC, to the Criminal Intelligence Bureau of the HKPF. HKPF officers confirmed that occasions where HKPF sought intelligence from Hong Kong ICAC was ‘very, very seldom’. It was represented that ‘99%’ of contact between the two agencies occurred via the IIO and that the requests for intelligence represented only 1% of communications: Vincent Wong Fook-Chuen, Assistant Commissioner, HKPF, *Transcript of Meeting*, Hong Kong, 10 December 2009, pp 20-21.

only able to remain in anti-triad postings for a maximum of 2½ years and in the anti-vice division for a maximum of 12 months.

Point of contention between Hong Kong ICAC and HKPF

- 871 There is an ongoing debate between Hong Kong ICAC and the HKPF as to the appropriateness of Hong Kong ICAC continuing on with its investigations when allegations of corruption had been proved to be baseless.
- 872 Hon Kun-sun (Panel on Security) explained that under the ICAC Prevention of Bribery Ordinance, Hong Kong ICAC can only open up a file when a complaint comes in about alleged corruption. Hong Kong ICAC will vet the case to see whether there is a suspicion of corruption in the complaint. If there is no complaint of corruption, it is not Hong Kong ICAC's job. It could be a job for the police, immigration or customs, but not Hong Kong ICAC. But if there is a suspicion of corruption, Hong Kong ICAC can open a file. Then, under the ordinance, there is a schedule of offences that are closely associated with corruption. Hong Kong ICAC starts with its focus on corruption, but if in the course of the inquiry Hong Kong ICAC uncovers evidence of associated offences then Hong Kong ICAC can still proceed to investigate the associated offence even if the original suspicion of corruption turns out to be baseless. Credit card fraud is an example of where the jurisdictions of Hong Kong ICAC and the Hong Kong Police overlap. If there is a suspicion that a bank officer or a credit card officer or even a restaurant waiter has accepted a bribe from a syndicate that wants the personal information of the credit card holders and Hong Kong ICAC receives a complaint about the alleged corruption of the restaurant waiter, Hong Kong ICAC will investigate. If Hong Kong ICAC has finalised the investigation and finds that no corruption charge should be laid but that there may be another charge, conspiracy to defraud, then charges can be laid by Hong Kong ICAC for a conspiracy to defraud, but not for corruption. If in the preliminary stage they can identify no corruption charge, Hong Kong ICAC will close the file and give the file to the Hong Kong Police.
- 873 While the relevant ordinance permits Hong Kong ICAC to investigate associated offences even if the original allegation of corruption proves to be baseless, the HKPF is sometimes critical of Hong Kong ICAC in not handing the matter over to the HKPF. Hon Kun-sun said:

*Of course, sometimes the police will complain that ICAC takes advantage of the so-called suspicion of corruption and goes too far. ICAC almost finishes the investigation and then proceeds with the non-corruption charges...the police will complain that ICAC overlaps with the work of the police.*⁵⁵²

⁵⁵² Hon James To Kun-sun, Deputy Chairman, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 3.

Integrity and public support is fundamental to Hong Kong ICAC's success

874 In the Committee's view, the level of confidence that the public has in an anti-corruption body such as the CCC is inextricably linked with the public's perception of the integrity of the organisation. This view was held by a number of Hong Kong officials.

875 Hon Kun-sun (Panel on Security) said:

*ICAC has a high reputation and people know its work is about combating corruption. Although people sometimes may misunderstand and give the wrong information to the wrong agency, overall, I would say that ICAC has a quite good, if not an excellent reputation, except for the recent hiccup. People will continue to give information to ICAC, even information that is not within its purview, and ICAC will hand that information to the police. Sometimes it is a clearing house.*⁵⁵³

876 In 1999 Mr Kwok Man-wai (Hong Kong ICAC) said the main reason for Hong Kong ICAC's success was the high degree of support that the public had shown for Hong Kong ICAC:

So how did we do it, turning a place from the one of the most corrupt to one of the least ? There are several factors. First and foremost is the tremendous support that the public has shown for the ICAC. As often said in politics, things have to become worse before it can get better. The ICAC was born because ordinary citizens were fed up with the corruption and the associated injustices, and forced the government to set up a Commission of Inquiry which subsequently led to the establishment of the ICAC. This direct mandate from the people of Hong Kong has since been the driving force sustaining the ICAC operations up till this day.

One of our pledges is that we will never turn away an identified complainant. If he makes a complaint of corruption, we will investigate it, even though he may not be able to substantiate his complaint by evidence. This undertaking is most important, if we wish to win the support of the public in our fight against corruption. In fact, we further pledge that all complainants will be interviewed by our investigators within 48 hours of his initial report by telephone or letter, at any place they prefer. We regard our complainants and witnesses as our "customers" and this is the service standard we promise our customers.

*... Education is particularly important in mobilizing public support which is an absolute success factor in fighting crime.*⁵⁵⁴

⁵⁵³ Hon James To Kun-sun, Deputy Chairman, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 5.

⁵⁵⁴ *The Development of the ICAC Investigative Capability*, speech given by Tony Kwok Man-wai, Head of Operations, ICAC, Hong Kong at ICAC Silver Jubilee Conference, Hong Kong 1999, accessed at www.kwok-manwai.com/Speeches/ICAC_Silver_Jubilee_Conference-Dev_of_ICAC_Inv_cap.html on 22 February 2010.

877 Mr Ng Ping-Kwok (Hong Kong ICAC) emphasised the importance of education:

*In the Hong Kong ICAC we have ... three departments: the operations department, the community relations department and the corruption prevention department. The community relations department is responsible for education; enlisting support from the public and educating the public about the evil of corruption. This is very important. We start off at kindergarten. Thirty-five years ago we started off at kindergartens, primary schools, secondary schools and universities. Nowadays those kids will be thirty-four. They are in influential chairs now. They have been basically brainwashed that corruption is bad. Now we take almost a generation. That is why the tolerance level towards corruption is so low, and that is important.*⁵⁵⁵

878 The Committee was informed by Hong Kong ICAC officers that integrity within ICAC is of paramount importance and that Hong Kong ICAC cannot be seen to have within it corrupt or dishonest officers. Hong Kong ICAC has an internal division that monitors Hong Kong ICAC officers. All Hong Kong ICAC officers are employed on a two and a half year contract and at the end of the contract if the Hong Kong ICAC Commissioner has any doubt about the integrity of the officer, the contract will not be renewed. The Hong Kong ICAC Commissioner also has power to dismiss an officer without giving a reason.

879 In 2002, Mr Man-wai (Hong Kong ICAC) said:

*To have the public confidence and support, Hong Kong ICAC must maintain a clean internal image. In Hong Kong, the ICAC officers are expected to be "whiter than white" and are subject to a stricter code of ethics than their counterparts in the civil service.*⁵⁵⁶

880 Hon Kun-sun (Panel on Security) was asked if he thought that complaints to the CCC against the Police would dry up if it was publicly announced that the CCC was conducting joint operations with Police. Hon Kun-sun responded:

*I think it depends on the image of your CCC, or like ICAC here, because the people know that ICAC will not easily share information, except from necessity, with the police, so the people feel that if they must trust some organisation, they will trust ICAC, especially when they discover some organised crime that has some suspected element of police corruption. They will go to ICAC first. That is why even though ICAC may have a joint operation with the police in Hong Kong, it will not dry up.*⁵⁵⁷

⁵⁵⁵ Ng Ping-Kwok, Acting Assistant Director of Operations, Hong Kong ICAC, *Transcript of Meeting*, Hong Kong, 9 December 2009, p 1.

⁵⁵⁶ *Sharing My 27 years' Experience in Corruption Control in Criminal Justice*, Speech of Mr Tony Kwok Man-wai, Former Head of Operations, ICAC, Hong Kong at the 5th Corruption Control in Criminal Justice Course, UNAFEI, Tokyo, Japan, 2002, accessed at http://www.kwok-manwai.com/Speeches/UNAFEI-Corruption_Control_in_Criminal_Justice.html on 22 February 2010.

⁵⁵⁷ Hon James To Kun-sun, Deputy Chairman, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 8.

881 Hon Ho (Panel on Security) added:

*... perception and credibility has a lot to do with past performance. ICAC did very well in that aspect as far as independence from the other enforcement team goes because it reported directly to the chief executive only and was not co-working with any other. So far, there is, I would say, no case of corruption in ICAC, and that is very important. Public education launched by ICAC itself helped a lot to build up this good image and instil confidence in the public.*⁵⁵⁸

Independence is fundamental to Hong Kong ICAC's success

882 Hon Kun-sun (Panel on Security) said:

First, ICAC must be very independent. That is very important. But on certain areas, if ICAC feels that – without compromising or prejudicing its independence and its monitor work on the police – it is right if ICAC should work together with the police or immigration or customs, it should do that. And they will – so far...

...

*My general advice would be to let the police do their own work and to let ICAC do its own work where possible. Both these organisations will find that in some cases they must join hands and work together. For example, organised crime may not involve corruption. The police would investigate that, but at the same time, for many different reasons, ICAC will receive intelligence alleging that corruption has been involved in police work against organised crime. A strategy may be to leave one gang while tackling another gang. Sometimes they will give information even to us and even to the media about why the police have allowed the blatant sale of heroin by a gang. The police tackle one gang so that another gang can flourish. But let them do their own work according to their best intelligence.*⁵⁵⁹

883 In 1999 Mr Man-wai (Hong Kong ICAC) said that the second key reason for Hong Kong ICAC's success was its operational independence:

The ICAC is an independent agency separated from the rest of the government, which means that we are free from any interference by the government or anybody in conducting our investigation. And this is absolutely essential and absolutely true. In my 24 years' service I have never come across or heard of any undue interference from whatever quarters in our operations. Provided there is reasonable suspicion, we will investigate any person or organization without fear or prejudice. This statutory

⁵⁵⁸ Hon Cyd Ho, Member, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 9.

⁵⁵⁹ Hon James To Kun-sun, Deputy Chairman, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 5.

*obligation is written into our constitution. Nor can anyone order us to stop an investigation. Once it is commenced, it has to go through a full process.*⁵⁶⁰

Triads

- 884 The Committee noted data issued by the Hong Kong Government which indicated that triad-related crime accounted for a very small percentage (5%) of prosecuted criminal activity. When asked about this, Professor Traver's answer was illuminating and highlighted the cultural differences between Hong Kong and Australia.

Organised crime around here blurs so much into ordinary business that you cannot distinguish the two.... it is in the form of respectable businessmen who wear suits and ties and drive expensive cars and do legitimate business. They run hotels, they run restaurants; they run a whole lot of things. They are legitimate businesses, but at the same time they are doing business in China, they are doing business elsewhere, where, in order to do business, you have to wheel and deal with politicians, given them kickbacks, bribes and make all sorts of deals and so on. If you are a businessman you may occasionally have to collect some debts so, you know, you might hire somebody to collect your debts for you, which means you probably have links with triads or gangs – whatever you want to call them – that go around and say, “You owe us money, and I have a lot of tattoos on me and I could hurt you if you don't pay me”. Things like that.

*You cannot distinguish legitimate from illegitimate... sometimes businesspeople and criminals are combined into one thing, or they use each other. That is a common thing here... Believe me, if you are doing business in China, you have to be prepared to be pretty dirty at times, really, in terms of bribery, kickbacks and enforcement of contracts ... You need to have links and ties, and that means giving people money and buying them things and doing things for them. The idea of clean and dirty, sorry, it does not work.*⁵⁶¹

- 885 Professor Traver said that bribes in the private sector were a way of business life in Hong Kong, and were not illegal.

Everybody scratches everybody's back and so on. It is hard to describe. There may not be the same kind of ethical standard in ... China... that you would find in maybe the United States and maybe Australia and so on, where business people are not supposed to give bribes and kickbacks and so on. Here [in Hong Kong] you, as the company director, or the boss, can tell your underlings – people you hire and run, and you can do it in writing if you want – that it is perfectly okay to give bribes and kickbacks in any amount that you want, and to accept them as well if you want, so long as the boss knows what is going on. This is part of doing business. Now, if you do not tell the boss, you are in trouble, but if you tell me, “Okay, boss ... I'm going to do a deal for a business from in China and I'm

⁵⁶⁰ *The Development of the ICAC Investigative Capability*, speech given by Tony Kwok Man-wai, Head of Operations, ICAC, Hong Kong at ICAC Silver Jubilee Conference, Hong Kong 1999, accessed at www.kwok-manwai.com/Speeches/ICAC_Silver_Jubilee_Conference-Dev_of_ICAC_Inv_cap.html on 22 February 2010.

⁵⁶¹ Professor Harold Traver, 8 December 2009, *Transcript of Meeting*, Hong Kong, p 9.

going to need an extra \$US500,000 for gifts”, the boss might say, “Okay: fine. Write that off as a business matter.” It is perfectly legal.⁵⁶²

886 It is, however, illegal for a government agency to engage in bribery or other associated forms of corruption and that the Hong Kong ICAC is particularly feared in this regard. Professor Traver said:

I think the deterrent effect of the ICAC is huge, really. I cannot think of any government official around here, anybody in the police, or anybody in their right mind, who would take any corrupt money. You could not offer me enough to engage in something like that.⁵⁶³

887 As to the policing of triads, Professor Traver said:

Triads usually keep quite a low profile around here. Just this year some time, much to the police’s embarrassment or whatever, somebody walked up to a local triad boss from Tsim Sha Tsui in front of a hotel, and did they shoot him or run him over with a car? I cannot remember which. They killed him in any case. I think they ran him over with a car, but maybe they shot him. It does not matter; he was dead. Then there was a funeral for the triad boss and this brought out all of the elder triad members, kind of my age and a bit younger. They all came out dressed in their proper suits and uniforms and the police were going, “Oh my God, you are publicising yourselves”, and so on.

Basically, what I am saying is: triads run nightclubs, prostitution, illegal gambling, parking of cars is always a problem, and all sorts of other little business activities that help make the world go round. They keep, basically, a low profile. I do not know what the police will tell you. There is some extortion of business firms around here, but that is usually negotiable. It is not like you see on TV with strongarm boys walking in. I am told—I am sure I am right—you can usually negotiate any protection money that they want, “Business is bad this year, there is a recession on; come on, I can’t give you \$500 a month, let’s try \$300 or \$200, will that do?” “Yes, sure, sure, sure.” It is kind of friendly, collegial, cooperative enterprise that goes on.

I have a wonderful video of the police from not too long back in the 1990s: you have a drug dealer on the corner who is kind of triad-like and he is dealing in heroin, so if you want a little packet, he has got it on him and so on and he will give you a little packet and so on. The police know who he is. A police officer walks by and ignores him. He is not breaking the law in the sense of mugging people or causing a problem and he is not blocking the sidewalk, so it is kind of leave them alone and we will leave you alone, but, “If you interfere with our policing, we will interfere with you; but if you don’t interfere with us, we won’t interfere with you.”

Happy, happy family; police-triad link broken, but the police know their limits. Do you want, basically, disorganised crime with a lot of street gangs and thugs running around extorting people and doing bad things, or would you rather that it is properly organised and properly run?

⁵⁶² Professor Harold Traver, 8 December 2009, *Transcript of Meeting*, Hong Kong, pp 9-10.

⁵⁶³ Professor Harold Traver, 8 December 2009, *Transcript of Meeting*, Hong Kong, p 16.

...it is the lesser of two evils.⁵⁶⁴

888 Hon Kun-sun (Panel on Security) described the HKPF's policing of triads in these terms:

*I would say that the police have successfully cornered or contained the triads to only several main areas of activities and even successfully suppressed their expansion. That is the proper description of the situation.*⁵⁶⁵

Low conviction rate not perceived to be a problem

889 In 2009, five police officers were convicted of corruption, three in correctional services and one in the environmental health department. Mr Ping-Kwok (Hong Kong ICAC) was asked if the low number of convictions had given rise to a perception that Hong Kong ICAC was not doing its job.

*No, in fact the public is well aware that even the corruption trend is going down. They accept that there is an input from the various areas of the ICAC and the various government departments, and even for enterprises. They are themselves quite keen on fighting against corruption and maintaining a clean image within their own organisations. That led to a downward trend in complaints, and it is acceptable. Apparently, to some stage, when the complaints reduce, the size of the organisation of the ICAC will have to be reduced, gradually. Look at Singapore. They used to have over 200 people in the CPID, which deals with anticorruption work, and now it is gradually down to 51. What does that mean? That represents that there is not sufficient work for that organisation to support 200 people, so gradually it is being downsized.*⁵⁶⁶

890 The Committee was intrigued by the notion that Hong Kong ICAC would admit the possibility of downsizing its operations due to its success. The Committee did receive evidence however that Hong Kong ICAC has in the last 10 years increased its activity in combating private sector corruption (an unusual jurisdiction that is not found in any corruption fighting commission in Australia), to the point where the majority of Hong Kong ICAC's activity is now focused on the private sector and not government officials.

⁵⁶⁴ Professor Harold Traver, 8 December 2009, *Transcript of Meeting*, Hong Kong, pp 7-8.

⁵⁶⁵ Hon James To Kun-sun, Deputy Chairman, Panel on Security, Legislative Council of Hong Kong, *Transcript of Meeting*, Hong Kong, 10 December 2009, p 14.

⁵⁶⁶ Ng Ping-Kwok, Acting Assistant Director of Operations, Hong Kong ICAC, *Transcript of Meeting*, Hong Kong, 9 December 2009, p 4.

Lessons to be learned from Hong Kong

- 891 The dominant message of the interviewees was that the key to success of a corruption fighting body such as the CCC was to maintain its integrity and independence. Reservations were expressed about permitting the CCC and the WA Police to work side by side in an operational capacity.
- 892 The Committee believes that a fear of the “bad old days” of police corruption in Hong Kong may well have underpinned the comments of the interviewees.
- 893 That being so, it nevertheless confirmed the Committee’s view on what the *raison d’être* of the CCC should be, and that is to provide an effective bulwark against public sector corruption so that our society will never degenerate to the point where Hong Kong found itself in 1974, where police officers kept ledgers on monies received from criminals to look the other way.

APPENDIX FIVE

SUBMISSIONS RECEIVED

Date	Name	Position	Organisation
3 December 2009	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
22 January 2010	Kathy Rynders	Acting Commissioner	Queensland Police Service
29 January 2010	Christopher Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector
8 February 2010	Peter Whowell	Manager Government Relations	Australian Federal Police
9 February 2010	John Lawler APM	Chief Executive Officer	Australian Crime Commission
18 March 2010	Hon Kerry Hickey MP	Chair	Committee on the Office of the Ombudsman and the Police Integrity Commission
14 April 2010	Christopher Shanahan SC	Acting Commissioner	CCC
14 April 2010	Andrew Scipione APM	Commissioner of Police	NSW Police Force
14 June 2010	Karl O'Callaghan APM	Commissioner	WA Police
14 June 2010	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
9 July 2010	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
13 August 2010	Karl O'Callaghan APM	Commissioner	WA Police

APPENDIX SIX**HEARINGS**

Date	Name	Position	Organisation
23 September 2009	Karl O'Callaghan	WA Police Commissioner	WA Police
	Chris Dawson	Deputy WA Police Commissioner	WA Police
	Nick Anticich	Assistant WA Police Commissioner (Specialist Crime)	WA Police
14 October 2009	Robert Cock QC	Special Counsel	Public Sector Commission
11 November 2009	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
	Mike Silverstone	Executive Director	CCC
	Christopher Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector
	Murray Alder	Assistant to the Parliamentary Inspector	Office of the Parliamentary Inspector
25 November 2009	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
	Mike Silverstone	Executive Director	CCC
	Christopher Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector
	Murray Alder	Assistant to the Parliamentary Inspector	Office of the Parliamentary Inspector

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2 December 2009	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
	Tony Warwick	Acting Manager, Corporate Governance and Coordination	CCC
	Christopher Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector
	Murray Alder	Assistant to the Parliamentary Inspector	Office of the Parliamentary Inspector
3 March 2010	Felix Grayson	former Assistant Commissioner	CMC
	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
10 March 2010	Robert Needham	former Chairperson	CMC
24 March 2010	Nick Anticich	Assistant WA Police Commissioner (Specialist Crime)	WA Police
	Jim Migro,	Detective Superintendent, Serious and Organised Crime Division	WA Police
	Dominic Staltari,	Assistant WA Police Commissioner, Professional Standards	WA Police
31 March 2010	Chris Dawson	Deputy WA Police Commissioner (and Acting WA Police Commissioner)	WA Police
	Nick Anticich	Assistant WA Police Commissioner (Specialist Crime)	WA Police
31 March 2010	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
23 June 2010	Len Roberts-Smith RFD QC	CCC Commissioner	CCC
	Karl O'Callaghan	WA Police Commissioner	WA Police
2 August 2010	Charlie Carver	Detective Superintendent Serious and Organised Crime Division	WA Police
	Pete Davies	Acting Detective Inspector Serious and Organised Crime Division	WA Police

APPENDIX SEVEN**BRIEFINGS**

Date	Name	Position	Organisation
26 February 2009	Robert Needham	Chairperson	CMC
	Chris Keen	Director Intelligence	CMC
8 December 2009	Professor Harold Traver		
9 December 2009	Ng Ping-Kwok	Acting Assistant Director of Operations	Hong Kong ICAC
9 December 2009	Michael Sze-Cho-Cheung	Chairman	Operations Review Committee
10 December 2009	Hon James To Kun-sun	Deputy Chairman	Panel on Security, Legislative Council of Hong Kong
	Hon Cyd Ho	Member	Panel on Security, Legislative Council of Hong Kong
10 December 2009	Basil Fernando	Director	Asian Human Rights Commission
	Bijo Francis	Program Officer, South Asia Desk	Asian Human Rights Commission
	Kit Chan	Program Officer	Asian Human Rights Commission
11 December 2009	Vincent Wong Fook-Chuen	Assistant Commissioner	HKPF
	David Fremaux	Chief Inspector	HKPF
26 May 2010	Michael Outram	Executive Director	Australian Crime Commission