



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

**CORRUPTION AND CRIME
COMMISSION'S RESPONSE TO THE
SELECT COMMITTEE INTO THE POLICE
RAID ON THE SUNDAY TIMES REPORT
NO 1**

**Report No. 4
in the 38th Parliament**

2009

Published by the Legislative Assembly, Parliament of Western Australia, Perth, June 2009.

Printed by the Government Printer, State Law Publisher, Western Australia.



Joint Standing Committee on the Corruption and Crime Commission

Corruption and Crime Commission's Response to the Select Committee Into the Police Raid on the Sunday Times Report No 1

ISBN: 978-1-921355-60-8

(Series: Western Australia. Parliament. Legislative Assembly. Committees.
Joint Standing Committee on the Corruption and Crime Commission. Report 4)

328.365

99-0

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NO 1**

Report No. 4

Presented by:

Mr John Hyde, MLA and Mr Nick Goiran, MLC

Laid on the Table of the Legislative Assembly on 18 June 2009 and the Legislative
Council on 23 June 2009

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

It is the function of the Joint Standing Committee to -

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

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

CHAIRMAN'S FOREWORD AND EXECUTIVE SUMMARY

On 9 April 2009 the Legislative Council Select Committee Into the Police Raid on the Sunday Times tabled its report with Parliament. The report was entitled *Report No 1 of the Select Committee Into the Police Raid on the Sunday Times* ('the Report').

The Report contained several findings and recommendations concerning the Corruption and Crime Commission ('the Commission').

The Committee requested the Commission to respond to the Report.

On 2 June 2009 the Commission provided its written response to the Committee and discussed the report with the Committee on 17 June 2009.

The Committee has resolved to table the Commission's response, and it appears as Appendix 1.



MR JOHN HYDE, MLA
CHAIRMAN

APPENDIX ONE

**CORRUPTION AND CRIME COMMISSION'S RESPONSE TO THE
SELECT COMMITTEE INTO THE POLICE RAID ON THE SUNDAY TIMES
REPORT NO 1**



CORRUPTION AND CRIME COMMISSION

Your Ref:
Our Ref: 2131:AG

2 June 2009

Mr John Hyde MLA
Deputy Chairman
Joint Standing Committee
on the Corruption and Crime Commission
Floor 1, 11 Harvest Terrace
WEST PERTH WA 6005

Dear Mr Hyde

SELECT COMMITTEE INTO THE POLICE RAID ON THE SUNDAY TIMES

I refer to the letter dated 11 May 2009 from the Hon Ray Halligan MLC in which he raised issues pertaining to *Report 1* of the *Select Committee Into the Police Raid on the Sunday Times* (the Report), which was tabled on 9 April 2009.

In this letter, the JSCCCC (the Committee) sought the Commission's response to the Report's 'allegations, findings and recommendations' in order that the Committee be informed of the Commission's view on the salient issues raised in the Report, including any concerns it may have with the Report's content, such as its balance or addressing any errors it may contain.

Similarly to your letter, the Commission has received a request from the Department of the Premier and Cabinet to respond to the Report's recommendations 3 and 4 for inclusion in the whole of Government response to the Report, pursuant to Standing Order 337 or the Legislative Council Standing Orders.

However, the Commission believes reporting through the Committee to be the appropriate mechanism to respond to the Report and welcomes the opportunity to address these issues that has been afforded by your request.

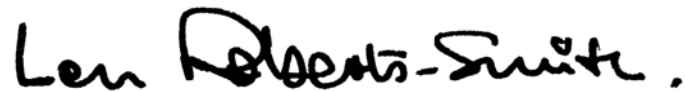
On this basis, the Commission intends to inform the Department of Premier and Cabinet of its intent to respond only through the Committee, in its natural oversight function of the Commission on behalf of the Parliament, therefore allowing the Committee to respond to the Parliament as it sees fit.

Accordingly, I will address the Commission's view of the Select Committee's individual findings and recommendations in the enclosed attachment entitled,

Corruption and Crime Commission's Response to the Select Committee into the Police Raid on the Sunday Times Report No 1.

As always, the Commission remains available at the Committee's disposal to respond to any further enquiries regarding this or any other matter at its convenience.

Yours faithfully

A handwritten signature in black ink that reads "Len Roberts-Smith." The signature is written in a cursive, slightly slanted style.

The Hon L W Roberts-Smith RFD QC
COMMISSIONER

encl.

CORRUPTION AND CRIME COMMISSION'S RESPONSE TO THE SELECT COMMITTEE INTO THE POLICE RAID ON THE SUNDAY TIMES REPORT NO 1

FINDING 3

The Committee finds that it would have been prudent for the Corruption and Crime Commission of Western Australia to have obtained from the Department of the Premier and Cabinet a copy of the alleged leaked Cabinet document, so that it would have been in a better position to form an opinion as to whether an investigation should be conducted.

COMMISSION'S RESPONSE

1. The Commission is of the view that possession of a copy of the 'leaked' document would not have affected the outcome of the complaint assessment process it performed for this particular matter, nor caused it to be '*in a better position*' to form its initial opinion. The Commission already had in its possession adequate information to enable it to assess the notification and form an initial opinion as to whether misconduct:
 - had or may have occurred;
 - was or may have been occurring;
 - was occurring or may have been about to occur; or
 - was likely to occur.¹
2. It was not necessary to obtain a copy of the 'leaked' document because there was sufficient other information provided in the four-page, detailed notification received from the Department of the Premier and Cabinet (the Department) that identified:
 - the document in question;
 - those persons who had access to the document; and
 - that the document had been released without authority.
3. There were several versions of the 'leaked' document, any of which could potentially have been that which was in question. As the Commission was already satisfactorily informed of the 'leaked' material, physical possession of a copy of one or all of these document versions would not have altered the Commission's assessment, as the salient facts were already in its possession. The question of which version was leaked, rested within the realm of the investigation, not the complaint assessment process.
4. The information contained within the Department's notification, when further augmented through enquiries made of the Department by the Commission's case officer, permitted the Commission to adequately and appropriately assess the allegation and form an initial opinion about the alleged misconduct. That is

¹ Refer section 22(1) *Corruption and Crime Commission Act 2003*

to say, the Commission had possession of sufficient materials and information to progress the matter through to its next stage, the formal referral to WA Police for investigation, noting that this police investigation had already been initiated.

5. The Select Committee's finding states that possession of a copy of the document would put the Commission '*in a better position to form an opinion as to whether an investigation should be conducted*'. In the direct sense, this finding is redundant when it is considered that WA Police had already determined to conduct an investigation and it was already allocated to an investigator at the time the Commission's assessment was conducted.
6. During an investigation process, a copy of the document or documents might naturally be sought by the investigating agency as part of its investigation; however the Commission was not, in itself, investigating the matter as this had become the responsibility of WA Police. If the Commission had determined to conduct the investigation itself, it would have sought to obtain such a copy, but this was not a requirement of the allegation assessment process, which is an activity discrete from the investigation and intended to determine if an investigation, or other action, is required.

FINDING 5

The Committee finds that the Corruption and Crime Commission of Western Australia did not assess the complaint received from the Department of the Premier and Cabinet with appropriate rigour, and simply passed the responsibility for the investigation on to the Western Australia Police despite the Corruption and Crime Commission's own previously published misgivings about the value of investigations of offences under s 81 of The Criminal Code.

COMMISSION'S RESPONSE

7. The Commission believes that the Select Committee's finding is not justified. The Commission's file amply demonstrates that the matter was the subject of detailed consideration.
8. The Commission did not '*simply [pass] responsibility*' on to WA Police. Indeed, the assessment process included conducting preliminary inquiries involving consultation with the Department, as the notifying agency. For example, in addition to considering the information provided in the notification, the case officer spoke with the appropriate Department officer to obtain further information about one of the officers named in the notification. The case officer also confirmed with that Department officer that the matter had been referred to WA Police, before contacting the police to confirm that they had received, and had assigned, the allegation for investigation.
9. In addition to this, the case officer discussed the matter with the Commission's Senior Review and Assessment Officer before finalising the assessment. This discussion included that the Commission had previously investigated a similar

- allegation, but that the investigation was unable to identify the officer responsible. It also covered the difficulties faced in such investigations.
10. Nonetheless, given the nature of the allegations and that the Commission had previously investigated a similar matter, it was referred internally to the Commission's Tasking and Coordination Group for its consideration as a potential candidate for investigation by the Commission.
 11. The Tasking and Coordination Group then assessed the matter in regard to the resources available and competing investigative priorities through its Case Categorisation and Prioritisation Model. On the basis of this second-tier assessment, importantly placing significant weight on the fact that that WA Police had already assigned the investigation to one of its officers, the Tasking and Coordination Group determined that WA Police should retain the matter in order to complete its investigation, which would later be reviewed by the Commission in accordance with its standard practice pursuant to the CCC Act.
 12. The application of these processes during the Commission's consideration of the allegation demonstrates that the Commission did assess the complaint with appropriate rigour, and the suggestion that it '*simply passed the responsibility*' on to WA Police is based on a misunderstanding of the process and overlooks the fact that the matter was already with WA Police and that WA Police had already commenced an investigation.
 13. It should be noted that the Commission consistently assesses well over 2,000 allegations per year and that the vast majority of these are referred to independent agencies or appropriate authorities for investigation, that is, they are not investigated by the Commission itself. In these cases, the Commission reviews the investigations once they are completed by those agencies and authorities.

FINDING 6

The Committee finds that the role of the Department of Treasury and Finance and its internal processes for managing confidential information has not been adequately addressed. The Committee is of the view that the Corruption and Crime Commission of Western Australia should have also referred the complaint to the Department of Treasury and Finance, as it did to the Department of the Premier and Cabinet, for investigation under s 33 of the Corruption and Crime Commission Act 2003.

COMMISSION'S RESPONSE

14. In this two-part finding, the Select Committee raises two separate issues, the first of which, while related to the second, would not be resolved by the action it proposes in the second.
15. The first part of the Select Committee's finding concerns DTF's internal processes for managing confidential information, stating that these have not

been adequately addressed. In regard to this finding, a detailed assessment of DTF's '*internal processes for managing confidential information*' would not normally occur as part of the investigation in question, which instead was focussed on the identification of the source of a particular 'leaked' document. However, if it was identified that the leak came from DTF and that its processes for handling confidential information were a contributing factor, the Commission would consider assessing the adequacy of those processes with DTF.

16. On occasions the Commission might conduct such an assessment itself. However, in normal circumstances, such an assessment would take the form of an internal review, which would be the responsibility for DTF to address itself as part of its general governance processes.
17. The exception to this is when a broader or major thematic inquiry or specifically targeted review is conducted by the Commission or other independent agency.² The current focus of the Commission's organisational review team is the effectiveness of the misconduct handling mechanisms of some other agencies and for which the DTF's management of confidential information falls well outside of the scope. However, the Commission remains available in its capacity '*to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector*'³ as its priorities and resources permit and it continues to liaise and cooperate with DTF as part of its general business functions.
18. In regard to the second part of the finding, in forming its initial section 33 CCC Act decision, the Commission determined that it was unnecessary to refer the matter to the Department of Treasury and Finance (DTF) at that stage. By letter of 28 March 2008, the Commission advised the Under Treasurer that, because there were only four DTF officers who had access to the leaked information, the Commission did not intend to refer the matter to him for investigation '*at this time*'.
19. This did not prevent the Commission from making such a referral to DTF at some further point if the investigations already in train by WA Police and the Department indicated that a DTF officer may have been responsible for the leak. In fact, that may have been an appropriate course of action under those circumstances.
20. However, as present circumstances prevail, the Commission has received no information which promotes the contention that it should now refer the matter to DTF for investigation. The WA Police investigation, in particular, has already applied significant public resources in pursuing its enquiries and the Commission doesn't see how DTF could either economically or effectively add value in progressing the matter any further at this stage.

² The Commission notes the Select Committee refers to its report, 'Protecting Personal Data in the Public Sector', tabled in Parliament in September 2005.

³ Refer s7A(b) of the CCC Act

FINDING 7

The Committee finds that the Corruption and Crime Commission of Western Australia expressed to the Western Australia Police a narrow interpretation of Part 4 of the Corruption and Crime Commission Act 2003 (that is, those sections dealing with organised crime and the conferral of exceptional powers on police officers), and did not take into account the type of joint Corruption and Crime Commission-Western Australia Police investigations using the Corruption and Crime Commission's general powers as envisaged by s 33(1)(b) of that Act.

COMMISSION'S RESPONSE

21. The structure of this finding, implying a correlation of its two parts, suggests a miscomprehension of the functions of the Commission in regard to its investigative role. If it appears to the Select Committee that the Commission has a '*narrow interpretation*' of its Part 4 CCC Act exceptional powers, this is because that interpretation corresponds directly and coherently with the narrow parameters established by the legislation.
22. Section 18 of the CCC Act establishes the *misconduct function*. This is the part of the CCC Act that deals with allegations of public officer misconduct and is the capacity in which the Commission assesses allegations and may, among other decisions, refer them for investigation to appropriate authorities for investigation, or alternatively, investigate them itself. There is no provision under the CCC Act for the Commission to access the exceptional powers available under Part 4 for misconduct investigations. The only exception to this circumstance could potentially be where a public officer misconduct investigation links with a WA Police organised crime investigation; otherwise, the legislation is clear. No such link was identified during this investigation.
23. Part 4 of the CCC Act relates to the CCC Act's *organised crime functions*, established under section 21. Part 4 does not permit the Commission to exercise or authorise section 4 powers at will. It requires the receipt, consideration and authorisation of an application from the Commissioner of Police and, importantly, that application must be in regard to an organised crime investigation.
24. In the matter at hand, the investigation into the leaked document was not an organised crime investigation and, therefore appropriately, neither the WA Police nor the Commission considered the use of Part 4 exceptional powers.
25. However, the Commission did consider the opportunity of conducting a joint misconduct function investigation with WA Police pursuant to section 33(1)(b). In coming to its decision, the facts that WA Police had already received a contemporaneous referral from the Department in relation to the allegation, and had consequently commenced the investigation, factored prominently in the Commission's considerations.

26. Contrary to the second part of this finding, it is clear from the evidence referred to in the Select Committee Report itself, that the Commission quite specifically did take into account the use of its general powers in a joint WA Police/Commission investigation. The Commission's firm position was that the use of its powers would have been neither necessary nor apt. The following references indicate this –

- Select Committee Report p.70, referring to the evidence of Mr Anticich, Director of Operations, producing a file note by a Commission officer which stated in part –

Therefore, if we were to conduct a hearing, we would need to take over the investigation. In any event, I advised that conducting a hearing for the sole or dominant purpose of compelling a journalist to reveal their source is not considered an appropriate use of the Commission's hearing powers.

(Although this officer was not correct in saying the Commission would have to “take over” the investigation, the rest of what he said certainly was correct.)

- Select Committee Report, p.72, setting out the evidence of Mr Trevor Wynn, Manager Investigations, recounting his conversation with Detective Inspector Albrecht –

I indicated to Albrecht [sic] that for the Commission to call in a journalist for the predominant purpose of revealing a source, which of course goes against the very fabric of the journalists code of conduct, whilst we wouldn't completely rule it out, the circumstances would have to be very serious and grave, as there were a number of flow on effects such as whistle blowers losing confidence in confidentiality with journalists etc.

- Select Committee Report, p.73 at [9.14], referring to the evidence of Mr Wynn –

Mr Wynn advised the Committee that it is only in very exceptional circumstances that the CCC would use its powers for the predominant purpose of compelling a journalist to reveal their source.

- Select Committee Report, p.74 at [9.16], –

The Committee notes from the following evidence of the Commissioner of the CCC, Hon Len Roberts-Smith QC, that the CCC is reluctant to use its coercive powers, except as a last resort:

... the commission is very conscious of the need to use them [its powers] only where absolutely

necessary and subject to all appropriate safeguards. We do not resort to the use of the commission's own special powers first-off. We actually use them as a last resort, because we recognise that they potentially infringe ordinary civil rights and human rights, such as privilege against self-incrimination and things of that kind. So we would seek to use them only as a last resort when no other investigative methodology or power would work. That was not the case, for example, with this investigation.

and at p.75 ([9.17]) –

I emphasise that our main reason for not resorting to those powers is that we do recognise that they infringe personal liberties and civil rights, and they are therefore to be used only when absolutely necessary.

27. On the foregoing basis, the Commission appropriately determined its investigative resources were better deployed elsewhere and that it would limit its participation to performing its monitoring and review role. The Commission correctly determined that there would be no advantage of assigning additional resources to a joint-agency investigation with WA Police, and (certainly at that stage) no proper occasion for the use of the Commission's particular powers; a fact that has now been well-highlighted through the events being investigated by the Select Committee.

FINDING 8

The Committee finds that the Corruption and Crime Commission of Western Australia failed to acknowledge that, in most circumstances, a notice to produce documents under the Corruption and Crime Commission Act 2003 can be as effective as a search warrant due to the available penalties for failure to produce the document.

COMMISSION'S RESPONSE

28. While this finding accurately states the Commission's position in regard to a CCC Act section 95 notice (power to obtain documents and other things), there are self-evident reasons as to why the Commission's position is correct and, consequently, the Select Committee's finding is, with respect, misconceived.
29. A section 95 notice is generally served to obtain documents from a compliant and cooperative person. These documents are usually those sought in support of an investigation, such as personnel files or bank records. A notice is served on a person who is then to obtain the requested documents and supply them to the Commission within a designated time-frame.

30. There are limitations in the use of section 95 notices which mean that they are a different investigative tool to a search warrant, despite the suggestion that the penalties that are available '*for failure to produce the document*' make them '*as effective as a search warrant*', '*in most circumstances*'. Generally, section 95 notices are executed on third parties, whether they are individuals or organisations, who are not complicit in the alleged misconduct. Where incriminating documents are sought from persons suspected of misconduct it is the normal practice that a search warrant is used.
31. The circumstances apparently not considered by the finding include when the person served is recalcitrant or obstructive, and is prepared to risk prosecution despite the existence of penalties for one reason or another. Proving non-compliance would, in these circumstances, have been impossible and the probability that the newspaper or the journalist would have provided relevant, incriminating material knowing this is unlikely at best.
32. In the five years of its operation, the Commission has not seen one prosecution for a failure to produce.
33. The Select Committee experienced similar behaviour itself when attempting to direct a witness to identify the source of the leaked document during its hearings. The Commission believes that, on this specific occasion, a section 95 notice would not have achieved any greater success.
34. An inherent weakness in this manner of obtaining documents is that until they are in the Commission's possession, the documents are susceptible to destruction, manipulation alteration or other form of disposal beyond the Commission's power to prevent.
35. Also, while the Commission may serve a notice seeking 'any' relevant documents within the specific boundaries established by the notice, in some circumstances it may not be able to have complete confidence that all such documents will be provided. As there are no search provisions associated with a section 95 notice, the possibility that relevant documents or evidence otherwise unknown to the Commission may not be obtained. It is in this area particularly that the more-intrusive search warrants are clearly a more effective tool. Search warrants also allow the officer to obtain any relevant documents immediately, thereby averting the possibility that they may be altered or destroyed.

RECOMMENDATION 3

The Committee recommends that the Corruption and Crime Commission of Western Australia refer the alleged disclosure of confidential Cabinet information to the Department of Treasury and Finance for investigation pursuant to s 33(1)(c) of the Corruption and Crime Commission Act 2003.

COMMISSION'S RESPONSE

36. Section 34 of the CCC Act addresses the '*matters to be considered in deciding who should take action*' in relation to a section 33(1)(a) or (b) decision, that is, a decision for the Commission to either conduct an investigation alone or in cooperation with another agency or authority.
37. When contemplating such a decision the Commission is required to have regard to section 34(2), which covers the issues of the seniority of the public officer to whom the allegation relates, whether it relates to serious misconduct and whether there is a need for an independent investigation by a public authority not connected to the public officer to whom the allegation relates. When assessing the allegation and considering whether to participate in the investigation itself, the Commission:
- did not know the seniority of any public officer to whom the allegation related;
 - suspected that the allegation was one of serious misconduct; and
 - identified WA Police as an appropriate independent investigator, not connected to the public authority or authorities in question.
38. However, most significantly, the predominant reasons for WA Police to conduct the investigation without the Commission's participation was that it had already commenced its investigation and there was no proper occasion for the use of the Commission's particular powers.
39. The findings of the WA Police criminal investigation indicate that no DTF employee is suspected of releasing the information. Therefore, the Commission's decision on further action in regard to the allegation is to '*take no action*', pursuant to section 33(1)(d) of the CCC Act. Consequently, a section 33(1)(c) referral to DTF is both unnecessary and incongruous.

RECOMMENDATION 4

The Committee recommends that the Corruption and Crime Commission of Western Australia ensures that a thorough assessment in accordance with the Corruption and Crime Commission's formal case categorisation and assessment procedures is undertaken in relation to every complaint, even where such complaint is the subject of an investigation commenced by another agency.

COMMISSION'S RESPONSE

40. This is an unrealistic recommendation which perhaps misinterprets the allegation assessment process outlined at sections 32 and 33 of the CCC Act. The Commission is required to, and does, assess all complaints it receives. In the course of this process, some matters are assessed as being candidates for investigation by the Commission pursuant to section 33(1)(a) or 33(1)(b). These matters are referred to the Tasking and Coordination Group, which makes

investigative resource allocation decisions by applying the Case Categorisation and Prioritisation Model.

41. Noting that the Commission receives about 2,500 allegations each year, the vast majority (99%) of these allegations are not investigated by the Commission. They are, in the main, referred back to the 'home agency' for investigation or to an appropriate authority, in this case WA Police, for investigation. That is, in accordance with the obligation of the Commission under section 7B(3) of the CCC Act.⁴ In these cases the Commission continues to have an active role in monitoring the progress of that investigation and then, ultimately, reviewing it and considering if it was adequate. Each of these distinct roles – assessment, monitoring and reviewing – is defined in the CCC Act.
42. Case categorisation and prioritisation is an internal administrative process that helps determine the priority of a matter within the Commission once it has been accepted for investigation. It is also a guide to assessing the seriousness of a matter however, that criterion alone does not determine the decision of the Commission. The reasons a matter is taken on or not for investigation by the Commission are many and varied.
43. The assessment of allegations, along with the monitoring and review of other agencies' investigations, is performed by the Investigations Review and Complaints Assessment Unit. Commission investigations are conducted by its Investigations Unit. While interrelated, both have distinct functions applying different resources.
44. If the Commission was to refer all allegations to the Tasking and Coordination Group, effectively double-handling a very large number of allegations (some 2,500 per annum) of which the large majority are simple matters, it would be inconsistent with the intent of section 32 of the CCC Act, would make the process of assessing complaints very inefficient and would generally be a waste of valuable time and scarce resources.

⁴ 'The Commission is to help public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct' (s. 7B(3) CCC Act).