



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

**CORRUPTION RISKS OF CONTROLLED
OPERATIONS AND INFORMANTS**

**Report No. 15
in the 38th Parliament**

2011

Published by the Legislative Assembly, Parliament of Western Australia, Perth, June 2011.



Joint Standing Committee on the Corruption and Crime Commission

Corruption Risks of Controlled Operations and Informants

ISBN: 978-1-921865-11-4

(Series: Western Australia. Parliament. Legislative Assembly. Committees.
Joint Standing Committee on the Corruption and Crime Commission. Report 15)

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Report No. 15

Presented by:

Hon Nick Goiran, MLC and John Hyde, MLA

Laid on the Table of the Legislative Assembly on 16 June 2011

Laid on the Table of the Legislative Council on 21 June 2011

COMMITTEE MEMBERS

Chairman	Hon Nick Goiran, BCom, LLB, MLC Member for the South Metropolitan Region
Deputy Chairman	John Hyde, BA, DipEd, JP, MLA Member for Perth
Members	Frank Alban, MLA Member for Swan Hills Hon Matt Benson-Lidholm, BA, DipEd, JP, MLC Member for Agricultural Region

COMMITTEE STAFF

Principal Research Officers	Scott Nalder, BJuris (Hons), LLB, BCL (Oxon) Dawn Dickinson, BSc (Hons) MURP
Research Officer	Michael Burton, BEc, BA (Hons)

COMMITTEE ADDRESS

Joint Standing Committee on the Corruption and Crime Commission
Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Tel: (08) 9222 7494
Fax: (08) 9222 7804
Email: jscccc@parliament.wa.gov.au
Website: www.parliament.wa.gov.au/jscccc

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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

Having spent the majority of 2010 engaged in its inquiry into how the CCC and the WA Police could best work together to combat organised crime, the Joint Standing Committee on the Corruption and Crime Commission tabled its associated report on 9 September 2010. In that report, the Committee recommended that the CCC's jurisdiction should not be increased to allow it to directly investigate organised crime, as any such extension of its jurisdiction would compromise the authentic independence of the CCC with respect to the WA Police, and therefore the CCC's important police oversight role.

In the course of conducting that inquiry, the Committee learned that the investigation of organised crime necessitates the use of controlled operations and informants - practices for which there exist significant inherent corruption risks, and risks to public safety.

Accordingly, and under the assumption that the Government still intended to pursue a significant change in the focus of the CCC, the Committee set out to familiarise itself with the best practices for managing the risks inherent to the use of informants and controlled operations. To this end, the Committee visited a number of key law enforcement and anti-corruption agencies in Victoria and New South Wales in November 2010.

The general consensus was that the use of controlled operations, for which in each jurisdiction there exists prescriptive legislation, is not perceived to be a high risk area of corruption, essentially owing to the tight controls demanded by the legislation.

As to the handling of informants, the practices adopted by the agencies visited were many and varied, including occasions in which there was a diversity of approach within an individual agency. There was no single best methodology for managing the risks associated with the handling of informants.

Armed with this information, the Committee then convened hearings and consulted with the WA Police and the CCC to see if corruption risks were being appropriately managed.

The WA Police and the CCC reassured the Committee that their practices in managing the risks associated with the use of controlled operations and informants were painstaking and thorough. The CCC was not, however, able to vouch for the assertions of the WA Police in this regard, as these areas of activity had not been the subject of any investigation or analysis by the CCC.

The Committee is concerned that the CCC, in its seven-year operational history, has not demonstrated a proactive level of oversight into how the WA Police manages the risks inherent to the handling of informants, or the deployment of undercover officers in policing drugs and prostitution, and instead has adopted a reactive approach wherein it responds to allegations of misconduct. Having given significant consideration to the demonstrated approach of the CCC, the Committee has formed the view that there would be significant benefits for Western Australian society if the CCC were to build up an informed view as to how the WA Police operate in these

areas. The CCC would then be better positioned to contribute to the goal of continually enhancing the work and capacity of the WA Police.

On 19 May 2011, as this report was being finalised, the Government's response to the Committee's 9 September 2010 report was provided to the Committee and tabled by Hon Christian Porter MLA, Treasurer and Attorney General. This response makes it clear that it remains the intent of the Government to pursue a significant change in the focus of the CCC, by introducing a Bill that will confer on the CCC an organised crime investigative function.

The pronounced intent of the Government notwithstanding, this inquiry has strengthened the Committee's belief that the push for the CCC to take on an enhanced organised crime jurisdiction is, at best, premature. The CCC's priority should be on improving its oversight of the WA Police, and the Committee believes that there is significantly more that the CCC should be doing in this regard. The CCC's most important function is to ensure that the work and role of the WA Police is not hampered by corruption; this obligation can only be effectively discharged if the CCC remains authentically independent from the WA Police and maintains its reputation for integrity. The Committee is gravely concerned that any push for the CCC to acquire an additional or revised jurisdiction will only serve to diminish the CCC's capacity and resolve to oversight the WA Police.

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

HON NICK GOIRAN, MLC
CHAIRMAN

FINDINGS

Finding 1 (page 3)

The definition of organised crime, and the criteria that must be satisfied in order for the CCC Commissioner to grant an application for access by the WA Police to the suite of exceptional powers under Part 4 of the *Corruption and Crime Commission Act 2003*, are counter-productive to the objectives of the Act.

Finding 2 (page 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 3 (page 16)

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.

Finding 4 (page 17)

The CCC has not been proactive in overseeing the use by the WA Police of controlled operations under the provisions of the *Prostitution Act 2000* or the *Misuse of Drugs Act 1981*.

Finding 5 (page 27)

The CCC has not been proactive in mitigating the corruption risks inherent to the handling of informants by the WA Police.

Finding 6 (page 28)

The CCC is proactive in developing, updating and implementing robust internal policies and procedures for mitigating risks inherent to its own investigations.

Finding 7 (page 36)

The CCC has undertaken to conduct a corruption prevention review of the operational activities, policies and processes of the WA Police in relation to the *Prostitution Act 2000*.

Finding 8 (page 36)

The CCC has undertaken to conduct a corruption prevention review of the operational activities, policies and processes of the WA Police in relation to the *Misuse of Drugs Act 1981*.

RECOMMENDATIONS

Recommendation 1 (page 3)

The *Corruption and Crime Commission Act 2003* should be amended by expanding the definition of “organised crime” and widening the criteria by which the WA Police can seek access to the suite of exceptional powers under Part 4 of the Act. This will accommodate the concerns of the WA Police and the CCC that the present definition is unduly restrictive and prevents the WA Police from accessing these exceptional powers.

Recommendation 2 (page 32)

Section 7A of the *Corruption and Crime Commission Act 2003* should be amended so as to read:

7A. Act’s purposes

The main purposes of this Act are –

- (a) to aid the efforts of the WA Police to combat and reduce the incidence of organised crime; and*
- (b) to improve continuously the integrity of the Western Australian public sector, and in particular the WA Police.*

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 CORRUPTION RISKS OF CONTROLLED OPERATIONS

Controlled operations

- 1 Controlled operations are law enforcement activities that would otherwise be illegal, but which are sanctioned by legislation. The purchase of drugs by an undercover police officer is a classic example. Controlled operations legislation in Australian jurisdictions became widespread in response to the High Court decision of *Ridgeway*,¹ in which an undercover operation of Customs was declared illegal by the High Court.
- 2 The ability to conduct controlled operations is widely regarded as a vital tool in the fight against organised crime. At present, however, the legislative regimen that permits the WA Police to conduct controlled operations is quite limited. This framework is set out below.

Conferral of exceptional powers onto the WA Police by the CCC

- 3 One objective of the *Corruption and Crime Commission Act 2003* is to combat and reduce the incidence of organised crime. The Act achieves this objective by allowing 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.
- 4 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;²
 - the conduct of controlled operations by police officers;³
 - powers of search and entry without a warrant;⁴
 - powers to stop, detain and search a person or conveyance without a warrant;⁵
 - the acquisition and use of assumed identities by a police officer;⁶ and

¹ *Ridgeway v R* (1995) 184 CLR 19.

² *Corruption and Crime Commission Act 2003*, s 48, s 49 and s 50.

³ *Op. cit.*, s 64.

⁴ *Op. cit.*, s 52.

⁵ *Op. cit.*, s 53.

⁶ *Op. cit.*, s 60.

- the conduct of integrity testing programs.⁷

5 To grant any such application, however, the Act requires that the CCC Commissioner satisfy her or himself that:

...there are reasonable grounds for suspecting that a section 5 offence⁸ has been, or is being, committed... (emphasis added)⁹

6 With respect to the CCC's organised crime function, the CCC Act is unnecessary and unhelpfully restrictive as a result of this stipulation. More than any other factor it has been this wording that has restricted the ability of the WA Police to apply to the CCC for access to the suite of exceptional powers over the duration of the CCC's seven-year existence.

7 This was again emphasised to the Committee during an *in camera* hearing attended by Assistant Commissioner Nick Anticich and Commander Murray Smalpage of the WA Police, at which the following exchange took place:

The CHAIRMAN: Assistant Commissioner, I want to pick up on that issue of the grants of authority that have been agreed to by the CCC. You mentioned that, as this committee is aware, there have been a number of applications made and granted, but then there has not actually been the use by the WA Police of the powers under that provision. Why is that?

Mr Anticich: Well, there are a couple of reasons. In essence, as has been the subject of much discourse and inquiry, the current framework and definition of organised crime in the current CCC act unfortunately is limited to —

The CHAIRMAN: It is too narrow.

Mr Anticich: It is too narrow and it is an incident that has occurred, so there is no proactivity or the ability to move into the future with it. So, straightaway we are limited with the application. Unless we can link our controlled operation to the investigation of a past event, it is difficult. So, straightaway there is a fundamental flaw in the structure and the ability to use it. That is one—most probably it is the major stumbling block.

[...]

The CHAIRMAN: Assistant Commissioner, would it be fair to say that if the government did nothing else but at least widen that definition under the act so that your organisation

⁷ *Op. cit.*, s 64. 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. 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 begins with 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.

⁸ “a Schedule 1 offence committed in the course of organised crime.”

⁹ *Corruption and Crime Commission Act 2003*, s 46.

would be able to apply for the use of the extraordinary powers more readily, that that would be a significant assistance to you in your fight against organised crime?

Mr Anticich: Absolutely. It is most probably a critical aspect of that particular aspect of it.¹⁰

- 8 The reasoning for this is not complex: simply, by the time an organised crime event **has been**, or **is being** committed, it is far too late for all but the coercive hearings power to be of any use. The suite of exceptional powers represents a recognition that organised crime, which by its very nature is a planned contravention of the law, requires proactive law enforcement; requiring proof that an organised crime event has taken place effectively makes a mockery of this recognition.
- 9 The Committee has also recommended previously that the definition of organised crime also needs to be expanded to accommodate the concerns of the WA Police and the CCC, as it is unduly restrictive and prevents the WA Police from adequately accessing and employing the suite of exceptional powers in the fight against organised crime.
- 10 The Committee strongly believes in the need to amend the definition of organised crime within the CCC Act. Amending this definition, so as to widen the circumstances under which the WA Police Commissioner can apply to the CCC Commissioner to enable access to the suite of exceptional powers by the WA Police, would significantly enhance the ability of the CCC to contribute to the fight against organised crime. This outcome could be achieved without requiring any increase in the powers, capacity or jurisdiction of the CCC. Accordingly, the Committee makes the following finding and recommendation:

Finding 1

The definition of organised crime, and the criteria that must be satisfied in order for the CCC Commissioner to grant an application for access by the WA Police to the suite of exceptional powers under Part 4 of the *Corruption and Crime Commission Act 2003* are counter-productive to the objectives of the Act.

Recommendation 1

The *Corruption and Crime Commission Act 2003* should be amended by expanding the definition of “organised crime” and widening the criteria by which the WA Police can seek access to the suite of exceptional powers under Part 4 of the Act. This will accommodate the concerns of the WA Police and the CCC that the present definition is unduly restrictive and prevents the WA Police from accessing these exceptional powers.

¹⁰ Nick Anticich, Assistant Commissioner (Specialist Crime), and Commander Murray Smalpage, Director (Intelligence), WA Police, *Transcript of Evidence (in-camera)*, 16 March 2011, pp 7-8.

Use of undercover officers and assumed identities by WA Police

- 11 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 officer can acquire and have in his or her possession a prohibited drug or prohibited plant for the purpose of detecting the commission of an offence.¹¹ Furthermore, the undercover agent has limited immunity from prosecution.¹² 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.¹³
- 12 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* 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.¹⁴ 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.¹⁵ 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.¹⁶ 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.
- 13 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 officers purchase drugs. It would seem implicit that undercover police officers 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 for the police to assume identities.
- 14 Within existing powers, the WA Police have engaged in elaborate sting operations, such as where undercover officers 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.

¹¹ *Misuse of Drugs Act 1981* (WA), s 31(2)

¹² *Op. cit.*, s 31(3)

¹³ *Op. cit.*, s 31(7)

¹⁴ *Prostitution Act 2000* (WA), s 35(4)

¹⁵ *Op. cit.*, s 35(5)(a)

¹⁶ *Misuse of Drugs Act 1981* (WA), s 31(6)

- ¹⁵ 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.
- ¹⁶ The CCC has confirmed that it has received no applications involving or proposing the sale of drugs by officers of the WA Police.¹⁷

Controlled operations and integrity testing by the CCC

- ¹⁷ In the Committee's report on *How The CCC Can Best Work Together With The WA Police To Combat Organised Crime*, it was stated that:

The CCC uses undercover officers in its misconduct function.

*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.*¹⁸

- ¹⁸ The CCC advised the Committee after the tabling of this report that the CCC does not use undercover officers in its misconduct function. Rather it was correct to say that the CCC has utilised the controlled operations power in the CCC Act thirteen times, and the integrity testing power in the CCC Act thirty-three times in its operational history.¹⁹
- ¹⁹ The common feature of controlled operations and integrity testing conducted by the CCC under the CCC Act is that a CCC officer who participates in such activity is excused from criminal responsibility if the activity is otherwise a criminal offence. The CCC made it clear to the Committee that it does not, in undertaking its misconduct function, conduct a protracted infiltration of an organisation, which could be the inference drawn from the Committee's use of the phrase "undercover officers."²⁰

¹⁷ Karl O'Callaghan, Commissioner, WA Police *Letter to the Joint Standing Committee on the Corruption and Crime Commission*, 7 February 2011; and Mike Silverstone, Executive Director, Robert Sutton, Acting Director (Operations), and Tony Warwick, Senior Investigator, Corruption and Crime Commission, *Transcript of Evidence*, 23 February 2011, p 9.

¹⁸ 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*, 9 September 2010, p 175.

¹⁹ Mike Silverstone, Executive Director, Corruption and Crime Commission, *Submission to the Joint Standing Committee on the Corruption and Crime Commission* 6 April 2011, p 2.

²⁰ *Ibid.*

The CCC's oversight role with respect to exceptional powers

20 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. As has been highlighted, 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 a number of serious offences set out in a schedule to the CCC Act has been, or is being, committed in the course of organised crime,²¹ which is defined by the CCC Act as:

*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.*²²

21 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.

22 Once the CCC has made an exceptional powers finding, the exceptional powers then become available to the WA Police.

23 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;²³

²¹ *Corruption and Crime Commission Act 2003*, s 5 and s 46.

²² *Op. cit.*, s 3.

²³ *Op. cit.*, s 58.

- the CCC may direct the WA Police Commissioner or any other person to give the CCC details of the exercise of an exceptional power;²⁴
- 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 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;²⁵ 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.²⁶

Corruption risks of controlled operations

²⁴ Controlled operations, and those law-enforcement officers who participate in them, are at a high risk of becoming corrupted, for a raft of reasons.

²⁵ In *S v State of New South Wales*²⁷ 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 officer, 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.

²⁶ Her evidence gives some insight as to the moral and ethical dilemmas faced by undercover officer. 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 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.*²⁸

²⁴ *Op. cit.*, s 59.

²⁵ *Op. cit.*, s 61, s 64 and s 65.

²⁶ *Op. cit.*, s 62 and s 66.

²⁷ *S v State of New South Wales* [2008] NSWSC 933.

²⁸ *Op. cit.*, at [28].

27 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.²⁹

28 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,”³⁰ 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.

29 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 officers face in covert operations.

30 S spoke of the pressures of being an undercover officer:

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.³¹

31 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

²⁹ *Op. cit.*, at [30].

³⁰ *Op. cit.*, at [51].

³¹ *Op. cit.*, at [107].

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 is 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.³²

³² In giving consideration to these facts, it is clear 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 undercover officers becoming empathetic to the criminals they are associating with, and having clouded judgment as a result.

³³ In a similar vein, the fact that undercover officer must work in close proximity with criminal targets also greatly increases the risk of “process corruption.” Maurice Punch, a professor in the Mannheim Centre for Criminology at the London School of Economics and Political Science, has defined process corruption as “the use by police of illicit means (such as false testimony) to achieve organisationally and socially approved ends.”³³ In the case of an undercover officer, the close working proximity to criminal targets can engender feelings of hostility toward these targets, which then increases the risk of process corruption.

³⁴ The obvious point to be made is that if such corruption or misconduct were to be perpetrated by a CCC officer, the reputation of the CCC as an integrity agency will suffer.

The WA Judiciary’s attitude to controlled operations

³⁵ 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 of the Corruption and Crime Commission) sounded a warning in *R v Gurka* (2001),³⁴ 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:

³² *Ibid.*

³³ Maurice Punch, ‘Police corruption and its prevention’, *European Journal on Criminal Policy and Research*, Vol. 8, 2000, p 304.

³⁴ *R v Gurka* (2001) 120 A Crim R 407.

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.³⁵

36 Clearly 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.

37 If this were to occur, the CCC will no longer be able to oversee the actions of WA Police officers engaged in controlled operations involving illicit substances (for example) from a truly objective standpoint. The ability to deploy undercover officers in controlled operations represents a significant granting of trust and power into the hands of the WA Police on behalf of the citizens of Western Australia; this ability would therefore appear to carry with it a high risk of misconduct. It is therefore imperative that the CCC closely monitor the use of undercover officers by the WA Police from an independent perspective.

Examples of successful covert operations undertaken by the WA Police in drug investigations

38 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 target are recorded; the intention is usually that arrests be made at the point in time when 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 occasions, 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.

39 The following cases are examples of where evidence of drug deals with undercover police officers has been used to convict drug dealers in Western Australia:

Watson v The Queen (2000)³⁶ Police Drug Squad Operation Silvertail targeted Mr Watson by having a female police undercover officer pose as a potential purchaser of trafficable quantities of heroin. The operation was a complete success, leading to

³⁵ *Ibid.*

³⁶ *Watson v The Queen* [2000] WASCA 119.

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)³⁷ 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)³⁸ Koushappis unsuccessfully sought to appeal his sentence of six years imprisonment for two counts of selling heroin and one count of possession of 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.³⁹

Leonard v R (1999)⁴⁰ Leonard sought to appeal a sentence of five 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'⁴¹ 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)⁴² Gurka unsuccessfully sought to appeal his sentence of eight 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 \$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).

³⁷ *Tsagaris v R*, unreported, Court of Criminal Appeal, Supreme Court of Western Australia; Library No 980721; 14 December 1998.

³⁸ *Koushappis v R* [2001] WASCA 18.

³⁹ A fold is a small paper fold containing one deal of a drug.

⁴⁰ *Leonard v R* (1999) unreported Court of Criminal Appeal, Supreme Court of Western Australia; Library No 990152; 29 March 1999.

⁴¹ According to Roberts-Smith J in *Le v The Queen* [2004] WASCA 214 at [104].

⁴² *R v Gurka* (2001) 120 A Crim R 407

Le v The Queen (2004)⁴³ Le unsuccessfully sought to appeal against his conviction of nine years and three 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

Operation Mocha

- 40 NSW Crime Commissioner Phillip 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.
- 41 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.⁴⁴
- 42 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 judgment⁴⁵ 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.
- 43 The NSW Crime Commission and other New South Wales senior law enforcement officers knew, when planning Operation Mocca, that as the cocaine would be on-sold to end users, it was unlikely to ever be recovered. 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.

⁴³ *Le v The Queen* [2004] WASCA 214.

⁴⁴ *Gedeon and Dowe v Commissioner of the New South Wales Crime Commission* [2008] HCA 43, per Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ at [14].

⁴⁵ *Ibid.*

44 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.*⁴⁶

45 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]?

to which Counsel responded:

We submit that it will not necessarily do so...

46 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.*⁴⁷

CCC oversight of controlled operations conducted by the WA Police

47 As demonstrated, the WA Police are at present somewhat constrained in their ability to carry out controlled operations. In a letter to the Committee, the WA Police Commissioner stated:

There are provisions available to police under the Corruption and Crime Commission Act 2003 which are limited to the investigation of 'organised crime' as defined by that Act and can only be granted following an "exceptional powers" finding of the Commission. To date, WA Police has sought and been granted six exceptional powers findings. In five matters, controlled operations were sought and granted pursuant to the Act however on no occasion has the controlled operations provision been used by police.

*WA Police have participated in a number of controlled operations in conjunction with federal law enforcement agencies that do have such powers. In such instances, the federal agency has the lead and maintains oversight of the use of those powers. WA Police generally participate in support of such operations albeit that they may have been generated by information and intelligence gathered by the WA Police.*⁴⁸

48 In considering these facts, the Commissioner further informed the Committee that:

⁴⁶ Kate McClymont and Deborah Snow, "The cocaine, the dealer and the green light," *The Sydney Morning Herald*, 7 June 2008. Accessed on 10 April 2011 at <<http://www.smh.com.au/articles/2008/06/06/1212259115427.html>>

⁴⁷ *Gedeon and Dowe v Commissioner of the New South Wales Crime Commission* [2008] HCA 43, per Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ at [57].

⁴⁸ Karl O'Callaghan, Commissioner, WA Police *Letter to the Joint Standing Committee on the Corruption and Crime Commission*, 7 February 2011.

...there is little that can be said in relation to how WA Police assess the risk to public safety when considering proposed controlled operations, given our inability to engage in such practices directly...⁴⁹

- 49 It must be remembered, however, that while it may indeed be the case that the capacity of the WA Police to conduct controlled operations is limited, the WA Police frequently use the provisions of the *Misuse of Drugs Act 1981* to gather evidence against drug suppliers, and the provisions of the *Prostitution Act 2000* to aid criminal investigations of alleged prostitution.
- 50 In hearings attended by senior officers of both the CCC and the WA Police, the Committee queried the level of oversight being exercised by the CCC with regards to the use of controlled operations conducted by the WA Police under the provisions of either the *Misuse of Drugs Act 1981* or the *Prostitution Act 2000*. At a hearing convened on 23 February 2011 attended by three senior CCC officers including Executive Director Mike Silverstone, the following exchange took place:

Mr J.N. HYDE: *For your other role—the oversight of police—how much work, or what proportion of your oversight is concerned with overseeing the police’s controlled operations and their management of informants; and, what familiarity have you got with their administrative operations in those fields? Also, have you any comments to make on any trends in terms of oversight of those activities by the police?*

Mr Silverstone: *I think in respect of controlled operations, the police are under the exceptional powers regime; they may make application to the commission for an exceptional powers finding. Often, when they make those applications, they will specify the powers they wish to engage. My understanding is that they have sought to engage, amongst those powers, a controlled operations power on five occasions. That is in the general application, and then, having done that, they are required, under section 64 of the act, to make a specific application to conduct a controlled application, with very specific detail as to the nature of that.*

Mr J.N. HYDE: *But outside of that, they have the ability, surely, under the Prostitution Act and the Misuse of Drugs Act, to undertake their own controlled operations.*

Mr Silverstone: *In a more limited regard?*

Mr J.N. HYDE: *Yes.*

Mr Silverstone: *We have not looked specifically—there has not been a specific investigation in which we have looked at that, or had cause to look at that.*

Mr J.N. HYDE: *So then in all the oversight that you have undertaken with police, that has not been a problem area, or it has not —*

The CHAIRMAN: *It has not been looked at.*

⁴⁹ *Ibid.*

Mr Silverstone: Well, it has not been looked at because it has not arisen as a problem area.

The CHAIRMAN: It could be a problem area, but we just do not know about it.

Mr Silverstone: Indeed. I might say, Mr Chair, that for the last nine months now the commission has had a project in which it is looking at how it can better proactively look at police misconduct. We are on the verge of engaging in a couple of deliberate strategies in terms of looking at what we regard as high-risk areas. One of those is not that, but we will certainly take that concern on board in terms of looking forward. The other area that we are looking at in terms of this is doing research with the University of Western Australia, to actually better establish a profile of risks in terms of police officers, and the sort of profile that high-risk police officers would have, to enable us, also, to more proactively look at those things.⁵⁰

- 51 The Committee regards it as most unfortunate that the CCC, in its seven-year history, has not been proactive in overseeing the use of controlled operations under the provisions of the *Misuse of Drugs Act 1981* or the *Prostitution Act 2000*. There are significant risks associated with the use of controlled operations, including risks of misconduct and corruption. While the Committee accepts that the CCC is acutely aware of these risks by virtue of its own role and work, as well as the knowledge and experience of its staff, the fact that it has not to date seen fit to engage with the WA Police in a more proactive manner - which the Committee would regard as being appropriate, beneficial and well in accordance with the CCC's police oversight role - is most disappointing.

Committee's views

- 52 It is imperative that controlled operations are subject to rigorous oversight by an independent body.
- 53 Should the CCC be given the jurisdiction to investigate organised crime directly, it will then be in a position to carry out its own controlled operations in a law-enforcement role. If this outcome is to arise, the CCC will no longer be able to objectively oversee the use of controlled operations by the WA Police. Furthermore, there will be no adequate oversight of the CCC's self-authorised controlled operations involving drugs, weapons and other organised crime activities.
- 54 The CCC contends that:
- it already confers to itself exceptional powers in performance of its misconduct function; and
 - the ability of the CCC to confer to itself exceptional powers to combat organised crime investigations is an unremarkable proposition.⁵¹

⁵⁰ Mike Silverstone, Executive Director, Robert Sutton, Acting Director (Operations), and Tony Warwick, Senior Investigator, Corruption and Crime Commission, *Transcript of Evidence*, 23 February 2011, pp. 8-9.

⁵¹ The previous CCC Commissioner, the Honourable Len Roberts-Smith RFD QC, made these points to the Committee during a closed hearing: *Transcript of Evidence*, 31 March 2010, p. 13.

- 55 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 exceptional 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 exceptional 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 the exercise of its misconduct function, and there is no requirement for the CCC to seek independent authorisation.
- 56 It is with the NSW Crime Commission example in mind that the Committee contends that there is a significant distinction between the scope and gravity of an average misconduct investigation and that of an 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 of the authorising agency, is of a magnitude greater than the potential risks associated with a controlled operation in a misconduct investigation.
- 57 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.
- 58 The Committee re-asserts the following findings:

Finding 2

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 3

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.

- 59 Of further concern to the Committee is the fact that there is no proactive external oversight of the controlled operations currently being carried out by the WA Police under the provisions of the *Misuse of Drugs Act 1981* and/or the *Prostitution Act 2000*. Though the Committee is cognisant of the fact that any controlled operations permitted by these Acts are necessarily limited in scope, the

Committee believes that there are significant risks associated with even the most simplistic of controlled operations, as any controlled operation involves conduct and/or actions that would otherwise be in breach of the law.

- 60 The Committee has consulted with senior officers of the WA Police and is confident that there does exist a range of robust internal accountability mechanisms that mitigate the risks involved with a WA Police controlled operation. This situation, however, still falls short of the expectations of the Committee, giving mind to the fact that the CCC is an external oversight agency. The Committee therefore makes the following finding:

Finding 4

The CCC has not been proactive in overseeing the use by the WA Police of controlled operations under the provisions of the *Prostitution Act 2000* or the *Misuse of Drugs Act 1981*.

- 61 The Committee is strongly of the view that the CCC should be taking a more proactive approach to its role in overseeing the use of controlled operations by the WA Police, in light of the risks associated with these activities.

CHAPTER 2 CORRUPTION RISKS OF INFORMANTS

The handling of informants

- 62 In the various consultations that the Committee has had with senior law enforcement and anti-corruption officials from Western Australia, New South Wales and Victoria in aid of this inquiry, the handling of informants⁵² was unanimously nominated as one of the highest-risk areas of police work. Put simply, informants pose a significant corruption risk to any law-enforcement agency. Couching this reality in such simple terms, however, significantly distorts the magnitude of this risk as, in this context, ‘corruption’ is far from a simple concept.
- 63 The Committee has reported previously on its understanding of the phenomenon of police corruption.⁵³ Suffice it to say here that the Committee considers police corruption to represent a wide array of police behaviour, all of which differs from the expected role of a police officer within society. At one end of the spectrum of this behaviour would be a police officer who, as a consequence of working in close proximity to an informant, becomes involved in criminal acts in some form of ‘partnership’ with the informant. A police officer who, again as a consequence of working with an informant, subverts proper police procedure in order to more quickly or more certainly achieve agency goals (such as a conviction or a clearance) would represent behaviour at the other end of this spectrum.
- 64 As stated, it is effectively impossible for someone who is not and has never been a police officer to fully appreciate the pressures that bear upon police officers in their everyday duties. The Committee believes, however, that the risk of police corruption inherent to the practice of using informants is a phenomenon that can clearly be comprehended by anyone - because this risk is a function of the fact that police officers are human beings.
- 65 Informants who provide valuable information to police officers are able to provide this information by virtue of their own close proximity to (and indeed, usually their direct involvement in) criminal acts. It is therefore the case that the most significant of all corrupting influences is the fact that the very nature of police work 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:⁵⁴

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

⁵² While the nomenclature for persons who provide information to law-enforcement agencies is varied and constantly evolving, the Committee will use the term “informant” for the sake of convenience.

⁵³ See Appendix Two of Report 10 of the 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*, 9 September 2010.

⁵⁴ Herman Goldstein is Professor Emeritus at the University of Wisconsin-Madison Law School.

*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.*⁵⁵

66 This statement becomes all the more profound when considered against the fact that, in employing informants, police officers are relying on information that is provided purely out of self-interest.

67 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.

68 Police officers who devote themselves to the fight against organised crime are thus charged with the responsibility of investigating individuals who have little or no respect for rules and regulations. Being placed in such close proximity to individuals significantly increases the chance that an officer will become corrupted for a number of reasons.

69 First and foremost, as Tim Newburn⁵⁶ 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.”⁵⁷ To the extent that bribery does occur, however, it is likely to be limited, in light of the fact that police departments worldwide have introduced measures aimed at curbing the possibility of bribery from suspected criminals. As explained to the Committee by Deputy WA Police Commissioner Chris 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.*⁵⁸

70 A more serious possibility is the fact that those charged with the responsibility of curbing organised criminal activity will find themselves in close proximity to a system marked by moral

⁵⁵ Herman Goldstein, *Police Corruption: A perspective on its nature and control*, Police Foundation, Washington D.C., 1975, p 25.

⁵⁶ 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.

⁵⁷ Tim Newburn, ‘Understanding and preventing police corruption: lessons from the literature’, *Police Research Series, Research Development Statistics*, Vol. 110, 1999, p 21.

⁵⁸ Chris Dawson, Deputy WA Police Commissioner, *Transcript of Evidence*, 31 March 2010, p 6.

bankruptcy. In cultivating informants, they will be asked to form relationships with people who have existed within the logic of these systems for considerable periods of time. Maurice 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.⁵⁹

- 71 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.
- 72 If one accepts that any deviation from the expected role of a police officer within society to represent some form of police corruption, it is clear that the use of informants – and indeed, the need for police officers to form relationships with informants – is a methodology underpinned by significant risk.

Insiders and outsiders

- 73 It must be appreciated that not all informants carry with them the same level of risk, and indeed, not all informants are handled (or even referred to by law enforcement officials) the same. In an article published within *The British Journal of Sociology*, Steven Greer⁶⁰ sets out a useful sociological model of four different categories of informants, by dichotomising these individuals first according to whether they are “insiders” or “outsiders” relative to the crime/s for which they provide information, and then according to their witnessing to either single or multiple criminal events.⁶¹ The Committee regards this model to be useful for considering the use of informants by police, insofar as each category within the model offered by Greer poses a different risk to police and police officers.
- 74 In establishing his first dichotomy of police informants, Greer categorises these individuals as either “outsiders” or “insiders.” Outsiders, according to Greer, are informants who “are not directly involved in the activities they report to the police but merely observe them from the ‘outside’.”⁶² From the evidence that the Committee has heard, neither the WA Police nor any of their Australian counterparts would likely classify outsiders as informants. The Committee

⁵⁹ Maurice Punch, ‘Police corruption and its prevention’, *European Journal on Criminal Policy and Research*, Vol. 8, 2000, p 315.

⁶⁰ Steven Greer is a Professor of Law at the University of Bristol.

⁶¹ Steven Greer, “Towards a sociological model of the police informant,” *The British Journal of Sociology* (Vol. 46 No. 3, Sept 1995), p 510.

⁶² *Op. cit.*, p 511.

believes, however, that it is nonetheless useful to consider outsiders as being a type of informant, if for no other reason than to establish some appreciation of the risks associated with their “insider” counterparts.

- 75 Having classified persons who provide information that they have witnessed but not been directly involved in as outsiders, Greer then further divides these persons in accordance with whether they provide information pertaining to one crime, or to many. In so doing, Greer establishes two categories of outsider: “casual observers,” and “snoops.” Casual observers are perhaps best thought of as persons who, having witnessed a criminal event, provide information to police out of social responsibility; persons who, in the Western Australian context, would contact Crime Stoppers. Snoops, on the other hand, are persons who supply information to police about a number of incidents; as Greer observes, these incidents will usually follow some pattern, such as drug dealing or prostitution offences. Snoops may find motivation in their sense of social responsibility, though normally it would be more likely for their information to be provided on the basis of some form of external motivation, be it paltry financial rewards, revenge against rivals, or the exercise of police discretion with respect to their own (perhaps minor) criminal indiscretions.⁶³
- 76 Outsiders, in Greer’s estimation, do not pose any great level of risk to police: whatever their motivation for doing so, they are simply providing information in relation to an event that they have witnessed. More risky and potentially sinister are “insiders:” informants who provide information pertaining to crimes that they themselves have been party to. Insiders are also classified in accordance with their ability to provide information pertaining to one criminal event, or to several. Greer refers to the insiders in the former category as “one-off accomplice witnesses,” and the later as “informers.”
- 77 One-off accomplice witnesses generally find themselves motivated to provide information about their criminal associates to police once they have been arrested and find themselves facing the prospect of judicial punishment. This motivation, as Greer notes, may arise out of “genuine contrition, the hope of striking a bargain with the prosecuting authorities... revenge against fellow accomplices, or a configuration of all three.”⁶⁴ This type of police informant, insofar as they are already facing prosecution, is also low in risk: whatever their motivation might be, any reward for providing information is clearly going to be contingent upon the usefulness of that information.
- 78 What Greer refers to as informers - persons who provide ongoing information to police about a series of criminal activities to which they are party - represent the high-risk category of police informant. It is not difficult to comprehend the risks associated with informers: they are criminals who provide information to police about the actions, and indeed the future intentions, of their criminal colleagues. Their motivation for doing so is a function of a complex set of variables: they might seek financial reward for information; they may be driven by the prospect of avoiding prosecution for their own criminal acts; their actions might be attributable to contempt for or the desire to seek revenge against their criminal colleagues; they may even be driven by a sense of camaraderie with their police handlers.

⁶³ *Op. cit.*, p 512.

⁶⁴ *Ibid.*

79 The fact that there exists a multitude of motivating factors that might drive an informer to provide information - that is, their unpredictability - is perhaps the key reason why informants in this category pose such a risk to police. Information provided by a covert human source may well be completely bogus. Perhaps the greatest risk associated with this type of informant, however, is the risk that they pose to the role performed by police officers who through duty find themselves associating with them. As noted, it is through these associations that police officers - as fallible human beings - may find themselves faced with tremendously difficult ethical dilemmas.

Use of informants by the WA Police

80 The WA Police regularly use informants.⁶⁵ Informants are and have long been the most valuable tool available to successfully target upper echelon drug distributors: this fact was captured perhaps most succinctly in a 1972 study of the strategies of narcotics law enforcement by Jeri Siebert and G Thomas Gitchhoff in which they stated that “informers play such a vital role in this area of law enforcement that narcotics police cannot operate without them.”⁶⁶ Without their assistance at the early stages of an investigation, successful prosecutions would be almost impossible.

81 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 handler must therefore 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.

82 It can readily be appreciated that in this grey area of cultivating informants corruption and misconduct can arise. It would be easy for the police officer to become so immersed in the relationship and consumed by a desire to exact justice that the police officer will engage in conduct that, to her or him, is perfectly explicable, legitimate and noble; to the independent outsider, however, this conduct may clearly be corrupt. Equally, in this grey area, there lies the potential for spectacular results to be achieved in uncovering organised criminal activity.

83 Police decisions not to charge largely determine the outer limits of law enforcement. These police decisions - unlike their decisions to charge, which thereby invoke the criminal process - are generally of extremely low visibility and consequently are seldom the subject of review.⁶⁷

⁶⁵ As evidenced by the existence of a dedicated unit tasked with the responsibility of managing what are referred to as “covert human intelligence sources.” Nick Anticich, Assistant Commissioner (Specialist Crime), and Commander Murray Smalpage, Director (Intelligence), WA Police, *Transcript of Evidence (in-camera)*, 16 March 2011, p 4.

⁶⁶ J Siebert and G Gitchhoff, “The Strategy of Narcotics Law Enforcement: Its Implications and Effects,” *Journal of Drug Issues*, Volume 2, 1972.

⁶⁷ 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.

- 84 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.
- 85 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 specifically, 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 officer?
- 86 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.
- 87 There also may be delicate questions of timing. The police may receive information as to a large cannabis crop in a remote locality. Twenty-four 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.
- 88 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.
- 89 It can also be readily appreciated that in exercising discretion in this manner, criminal activity may well occur 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.

⁹⁰ 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.⁶⁸ Commissioner Kennedy did not go so far as to label the entering into of such an agreement between the police and a potential informant as misconduct.

⁹¹ 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.⁶⁹
- The use of informants has proved to be of doubtful value.⁷⁰ 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 utilise the services of informants, to the point that the practice of using informants has been significantly reduced.

⁹² 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.

⁶⁸ Kennedy Royal Commission Final Report, Vol 1, pp 200-201, 240-242, 271.

⁶⁹ Kennedy Royal Commission Final Report, Vol 2, p 42.

⁷⁰ 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 organised crime group through the use of an undercover officer 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.

- 93 If the CCC was given the jurisdiction to engage in organised crime investigations, the CCC could seek to cultivate their own informants with familiarity with the crimes being investigated.⁷¹ There would then be an ever-present risk of CCC officers becoming corrupt when seeking to cultivate and handle informants who are or were criminals. Accordingly there would be an increased risk that CCC officers will become corrupted, or succumb to the temptations of the organised crime lifestyle, or become empathetic to the informants they are associating with.
- 94 If such corruption were to occur, the reputation of the CCC as an integrity agency would suffer immensely. Furthermore, the CCC would no longer be in a position to objectively oversee the propriety of dealings with informants by the WA Police.
- 95 Of perhaps greater concern to the Committee, however, is the apparent lack of CCC oversight on the handling of informants by the WA Police at present. In the course of this inquiry, the WA Police have informed the Committee that their policies and procedures for managing and mitigating the risk inherent to the handling of informants is robust and in line with the highest world standards, and that this represents a significant improvement relative to the practices of the past:

Mr Anticich: ...Over the last 10 years I think here in Australia and internationally, we have seen the emergence of very structured, very controlled procedures and policies around these covert human intelligence sources...

[...]

Cmdr Smalpage: ...From my experience, I am comfortable that compared with where we were, say, 10 years ago, this is international best practice. Some operatives that operate within Western Australia are recognised national experts on this matter now and have been to Switzerland—have travelled extensively internationally to look at what is best practice worldwide...⁷²

- 96 The Committee found the evidence presented on 16 March 2011 by Assistant Commissioner Anticich and Commander Smalpage to be very informative, and the Committee was greatly encouraged by their professionalism and the obvious passion that these two senior officers have for their roles. The Committee remains acutely conscious, however, of the significant inherent risks in the handling of informants by police officers.

⁷¹ The Committee appreciates and endorses the assertion by the CCC in this regard, that “The use of human sources is well recorded throughout history, and their use by Law Enforcement Agencies (LEAs), Intelligence Agencies, and the military has repeatedly demonstrated their use as invaluable.” Mike Silverstone, Executive Director, Corruption and Crime Commission, *Submission to the Joint Standing Committee on the Corruption and Crime Commission* 6 April 2011, p 4.

⁷² Nick Anticich, Assistant Commissioner (Specialist Crime), and Commander Murray Smalpage, Director (Intelligence), WA Police, *Transcript of Evidence (in-camera)*, 16 March 2011, p 4.

- 97 The Committee therefore regards it as most unfortunate that it appears that the CCC has not, in its police oversight role, queried the WA Police as to the specifics of their policies and procedures in managing informant risk.⁷³ The Committee accordingly makes the following finding:

Finding 5

The CCC has not been proactive in mitigating the corruption risks inherent to the handling of informants by the WA Police.

Use of informants by the CCC

- 98 Like the WA Police, and indeed its interstate and international anti-corruption counterparts, the CCC makes use of informants to complement its misconduct investigations. According to the CCC:

*The Commission's position is that the professional and responsible management of human sources is an essential and valuable part of its misconduct investigative process.*⁷⁴

- 99 In aid of this inquiry, the Executive Director of the CCC, Mr Mike Silverstone, appeared before a hearing of the Committee on 23 February 2011, and confirmed to the Committee that:

*...the commission has over a number of years had cause to engage with people with criminal records, people who have criminal associates, and people on the fringes of criminal activities, and they have provided a source of information in respect of misconduct by public officers.*⁷⁵

- 100 Subsequent to this hearing, the Committee asked the CCC to provide answers to a number of specific questions pertaining to the CCC's use of informants and controlled operations. The CCC responded to this request by providing the Committee with a detailed submission.

- 101 In considering this submission, the Committee acknowledged the thorough understanding expressed and explanations offered in relation to a significant range of issues pertaining to the use of informants both by the CCC directly and by law enforcement agencies generally. It is clear that the CCC possesses both vast operational and theoretical appreciation of the risks posed by informants to law enforcement and anti-corruption agencies, as well as the clear and distinct

⁷³ During a closed hearing on 23 February 2011 attended by three senior CCC officers, Committee Deputy Chairman John Hyde sought information on "how much work, or what proportion of your oversight is concerned with overseeing the police's controlled operations and their management of informants." The latter part of this question was not addressed.

⁷⁴ Mike Silverstone, Executive Director, Corruption and Crime Commission, *Submission to the Joint Standing Committee on the Corruption and Crime Commission* 6 April 2011, p 4.

⁷⁵ Mike Silverstone, Executive Director, Robert Sutton, Acting Director (Operations), and Tony Warwick, Senior Investigator, Corruption and Crime Commission, *Transcript of Evidence*, 23 February 2011, p 4.

benefits that can be derived from information provided by informants. The Committee was impressed with the depth of information provided by the CCC in relation to this topic; it is clear that the CCC ensures that its own practices with regard to handling informants is based not only upon its own experiences, but also upon constant monitoring of and liaison with other law enforcement agencies from around the world. Accordingly, the Committee makes the following finding:

Finding 6

The CCC is proactive in developing, updating and implementing robust internal policies and procedures for mitigating risks inherent to its own investigations.

- 102 The Committee commends the CCC in this regard.
- 103 The level of knowledge demonstrated by the CCC in this area also reaffirms the belief of the Committee that the CCC would best be able to enhance the work and capabilities of the WA Police if it were to take a more proactive approach to its police oversight role.

CHAPTER 3 CCC OVERSIGHT OF THE WA POLICE

Education and Prevention

- ¹⁰⁴ Police work and the roles performed by police officers are not topics that lend themselves well to written description. Dr Richard Ward⁷⁶ probably best made this observation more than 40 years ago when he wrote that “Unfortunately, much of the writing that deals with the subject [of the policing role] is woefully inadequate with regard to a true understanding of the police role in contemporary society.”⁷⁷ Notions as to the work performed by police officers are often idealistic or romantic, and are often informed by works of fiction.
- ¹⁰⁵ The Committee does not profess to possess an intimate understanding of the police role. The Committee is, however, in the privileged position of having had consultations with senior police officers from the WA Police, as well as with several of their counterparts from across Australia, regarding the risks associated with the use of controlled operations and the handling of informants.
- ¹⁰⁶ Absolutely fundamental to the recommendations made by the Committee within this report is the belief that the risk of police corruption is a direct function of the nature of the role performed and work done by police officers. The Committee has not heard any evidence to suggest that there is currently, or indeed that there has been recently, any endemic or persistent corruption within the ranks of the WA Police. For want of a better description, the risk that concerns the Committee is that of “spur-of-the-moment” corruption.
- ¹⁰⁷ It is for this reason that the Committee is disappointed that the CCC has not to date taken a more proactive role with respect to the WA Police. The Committee is a staunch supporter of the role performed by the CCC within Western Australian society; there can be no doubt that the CCC does indeed improve the integrity of the Western Australian public sector and helps public sector agencies minimise and manage misconduct.⁷⁸ The CCC does this both through educating the public sector and by investigating allegations of misconduct by public officers. There exists a wealth of evidence to suggest that the CCC carries out these roles extremely well.
- ¹⁰⁸ The Committee strongly believes, however, that there is room for improvement. In particular, the Committee would like to see the CCC engaging more directly and specifically with the WA Police as a unique entity within the public sector – an entity for whom the risks of misconduct and corruption are significantly greater than for the public service generally, owing to the role played by police in society, and the powers commensurate with that role.

⁷⁶ Dr Richard Ward is Professor and Dean of the International Law Enforcement Academy in Roswell, New Mexico.

⁷⁷ Richard H. Ward, “The police role: a case of diversity,” *The Journal of Criminal Law, Criminology, and Police Science* (Vol. 61 No. 4, Dec 1970), p 580.

⁷⁸ Corruption and Crime Commission website. Accessed on 30 March 2011 at <<http://www.ccc.wa.gov.au>>

- 109 The use of informants and controlled operations by the WA Police are high-risk areas of police work. The Committee has formed the view over the course of this inquiry that the risks associated with both of these methodologies should give rise to rigorous CCC oversight.
- 110 It could of course be argued that, owing to an absence of allegations of misconduct associated with the handling of informants by officers of the WA Police, the CCC is right not to have examined this area. The Committee, however, disagrees with this proposition. The risks associated with handling informants in particular are both widely established and indeed acknowledged by the WA Police and the CCC themselves. It is on this basis that the Committee believes that the CCC ought to more proactively engage with officers of the WA Police who might find themselves incident to these risks.
- 111 While numerous definitions of public sector corruption exist, at its heart corruption by public officers represents a misuse of power. As has been mentioned, 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.
- 112 The Committee is confident, and indeed there exists a multitude of evidence to support the view that the CCC performs the role of educating and motivating public servants to act in the public interest extremely well. In the CCC's most recent *Annual Report (2009-10)*, it was noted that:
- During the reporting period, the Commission delivered in excess of 100 education presentations in both the metropolitan area and regional Western Australia. It is gratifying to observe the strong demand from public sector agencies for the delivery of these presentations indicating an ever growing commitment to both recognise and address misconduct risks. There is also a demonstrable commitment at the executive level across the public sector to integrate misconduct resistance strategies within existing strategic planning, corporate governance and operational systems.⁷⁹*
- 113 The Committee has heard evidence that the education seminars conducted by the CCC are regularly oversubscribed, such is their popularity. These seminars represent a proactive approach to the CCC's role in combating public sector corruption, by highlighting to public servants the oftentimes hidden risks inherent to many public service roles.
- 114 By the provisions of the CCC Act, officers of the WA Police are captured by the definitions of *public officer* and/or *public service officer*, as outlined in section 3 of the Act. That is, for the purposes of discharging its functions, the CCC is able to regard officers of the WA Police as being equal to public servants working within any public sector agency.
- 115 The Committee regards this as an anomaly within the Act. It must be recalled that the CCC was created in the wake of the *Kennedy Royal commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer*, which identified a range of corrupt activities that were being or had been perpetrated by officers of the WA Police.

⁷⁹ Corruption and Crime Commission *Annual Report 2009-10* p 2.

116 More pertinently, however, it is clearly inappropriate to consider officers of the WA Police as being, for the purposes of an anti-corruption agency, equivalent to other public servants. In no way does the Committee suggest that WA Police officers are any more or less corrupt or corruptible than any other public servant; rather, the Committee strongly believes that WA Police officers are incident to a far greater corruption risk than their public service brethren, simply by virtue of the significant powers that Western Australian society has vested in its police force.

117 It is acknowledged that section 21A of the CCC Act details the obligations of the WA Police Commissioner with respect to reporting *reviewable police action* to the CCC. *Reviewable police action* is defined in section 3 of the Act as being:

any action taken by a police officer or an employee of the Police Service of the Public Service, that —

(a) is contrary to law;

(b) is unreasonable, unjust, oppressive or improperly discriminatory;

(c) is in accordance with a rule of law, or a provision of an enactment or a practice, that is or may be unreasonable, unjust, oppressive or improperly discriminatory;

(d) is taken in the exercise of a power or a discretion, and is so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations; or

(e) is a decision that is made in the exercise of a power or a discretion and the reasons for the decision are not, but should be, given.⁸⁰

118 This requirement, insofar as it is specific and unique within the Act, means that officers of the WA Police are, or at least should be, subject to a greater level of CCC oversight than any other public servants. The Committee considers this requirement to represent an acknowledgement within the CCC Act that officers of the WA Police, especially in consideration of their ability to use discretion in carrying out their duties, generally possess greater powers than other Western Australian public servants.

119 While the notification requirement of reviewable police actions is beneficial and proper, it is by necessity a reactive regimen. In giving consideration to the significant risks associated with the use of controlled operations and informants, the Committee believes that the WA Police would benefit if the CCC were to take a more proactive approach to their role of oversighting the WA Police, at the very least by way of conducting police-specific education seminars. It is therefore the belief of the Committee that the *Corruption and Crime Commission Act 2003* should be amended so as to emphasise that the oversight of the WA Police by the CCC is specific and unique within the overall CCC role, and that this oversight should be essentially proactive.

⁸⁰ *Corruption and Crime Commission Act 2003*, s 3.

- 120 The Committee is of the belief that the role of oversighting, and thereby enhancing the capacity and capability of, the WA Police should be a core function of the CCC, and explicitly referred to as such within the CCC Act. Accordingly, the Committee makes the following recommendation:

Recommendation 2

Section 7A of the *Corruption and Crime Commission Act 2003* should be amended so as to read:

7A. Act's purposes

The main purposes of this Act are –

- (a) to aid the efforts of the WA Police to combat and reduce the incidence of organised crime; and*
- (b) to improve continuously the integrity of the Western Australian public sector, and in particular the WA Police.*

- 121 It is intended that this amendment would emphasise that the WA Police is the primary agency responsible for investigating organised crime, and further that the CCC's particular focus ought to be its oversight of the WA Police.

CHAPTER 4 THE REPORTING PROCESS

Completion of this inquiry

- 122 In the course of conducting this inquiry, the Committee heard evidence from and exchanged correspondence with both the CCC and the WA Police. A proportion of the knowledge gained by the Committee in this process was (and indeed, is) operationally-sensitive. Some of this evidence and correspondence is either directly quoted or else drawn upon within this report.
- 123 The Committee met on 13 April 2011 and formally resolved to adopt a draft of this report. In this process, the Committee had to carefully assess both the evidence it had gathered, as well as the extent to which it may have been appropriate to publish any of that evidence.
- 124 Subsequent to adopting this draft report, permission was sought from Assistant Commissioner Anticich and Commander Smalpage of the WA Police to publish sections of their *in camera* evidence within the final report. This request was acceded to.
- 125 The Committee then provided copies of this draft report to the WA Police Commissioner, Dr Karl O'Callaghan, and the Acting Commissioners of the CCC, Mr Mark Herron and Ms Michelle Hullet, and offered both the WA Police and the CCC the opportunity to make representations as to the content of the report for the Committee to consider prior to the report being tabled in Parliament.
- 126 Although he had not given evidence to the Committee in support of this inquiry, a copy of the draft report was also provided to the Parliamentary Inspector of the Corruption and Crime Commission, the Honourable Chris Steytler QC. This copy was provided for the purpose of seeking the opinion of the Parliamentary Inspector as to the draft report.
- 127 Representations pertaining to the draft report were received from the WA Police and the CCC as requested; the Parliamentary Inspector also offered his commentary. These representations were considered by the Committee at its meeting on 18 May 2011, and some amendments were then made to the draft report.

Representations made by the CCC

- 128 By way of a letter from the Executive Director, the CCC made a number of representations as to the content, findings and recommendations contained within the draft report.
- 129 The Committee considered the representations made by the CCC, and made amendments to some sections of the report. Furthermore, while the Committee was not persuaded by some of the representations made by the CCC, the Committee respects the views offered by the CCC and believes there to be significant merit in including these views within this report.

130 A number of paragraphs within the CCC's letter contained operational information, and were so marked. This information was disclosed to the Committee for the purposes of assisting its inquiry; further publication of this information would serve no useful purpose.

131 The representations made by the CCC, exclusive of operationally-sensitive material and material that has seen the report now altered, are accordingly reproduced:

Conducting Controlled Operations

Section 119 of the CCC Act, defines a controlled operation as an operation that:

- (a) is conducted, or intended to be conducted, for the purpose of obtaining or facilitating the obtaining of the evidence of misconduct; and*
- (b) involves or may involve a controlled activity. (emphasis added)*

Section 119 further defines a controlled activity as:

an activity for which a person would, but for section 128 [of the CCC Act], be criminally responsible. (emphasis added)

[...]

Sections 121 to 127 of the CCC Act prescribe how such operations may be authorised and the limits that apply when the Commissioner authorises them. (Note that only a person occupying the office of a Commissioner may exercise that authority (see section 185 of the CCC Act)).

Section 122(1)(b) and 130(b) have similar stipulations that constrain what and how controlled operations and controlled activities are conducted. For example, section 130 requires that such activities must not engage in any:

...conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property. (emphasis added)

The report makes much of the risks and consequences of the sale of drugs under the auspices of a controlled operation. Given the stipulations of sections 122 and 130 there would have to be very considerable controls on any controlled operation for the purposes of selling drugs as to virtually render their conduct impractical unless there was absolute confidence that control of the drugs could not be lost. Absent that confidence the operation could not lawfully proceed.

The Commission respectfully suggests that the report give consideration to the real effect the provisions of section 122 and 130 has for the conduct of controlled operations under the CCC Act when drawing its conclusions about the risks associated with them.

[...]

Commission Oversight of WAPOL's Conduct Under the MDA [Misuse of Drugs Act 1981]

The report's Foreword concludes that the Commission has not proactively oversighted WAPOL's "deployment of undercover officers in policing drugs ...".

The Commission acknowledges that any area of policing that engages in even "properly authorised" improper conduct brings with it particular corruption risks.

A number of factors inform the Commission's approach to this risk. Prior to Justice Kennedy's Police Royal Commission, the WA Ombudsman and the Anti-Corruption Commission regularly received and dealt with complaints about WAPOL officers engaged in corrupt conduct and "ripping off" drug dealers and drug users. The Anti-Corruption Commission and the Police Royal Commission investigated a number of drug related matters. Since that time the number of complaints made to the Commission alleging drug related misconduct by WAPOL (aside from recreational use if [sic] drugs by WAPOL officers) has decreased. In the period from 1 January 2006 to 12 May 2011, the Commission has received just 8 allegations concerning missing or stolen drugs involving WAPOL officers.

The Commission regards this decline in reported misconduct as a positive sign especially as it is reinforced by information provided to it by its own informants and in the Commission's dealings with prisoners, who are readily inclined to make such allegations against police.

Consequently, the Commission is broadly confident that it is aware of, and has taken appropriate measures to monitor, the misconduct risks of WAPOL officers of improperly buying, selling and possessing drugs. The Commission is proactive in seeking information about this particularly through its own informant program.

Notwithstanding this confidence, the Commission undertakes to conduct a corruption prevention review of WAPOL's operational activities, policies and processes for purchasing and possessing drugs under the provisions of the MDA.

In addition to the above comments the Commission notes the following for the purposes of accuracy.

- (a) Notwithstanding that WAPOL does not conduct controlled operations other than under the auspices of the CCC Act, under the MDA the purchase and possession of drugs by undercover officers may be authorised. The sale of drugs is not permitted.*
- (b) WAPOL may only conduct controlled operations, if so authorised, under the CCC Act, but any such operation is subject to review by the Commission and the Commission's dealings with such matters subject to scrutiny by the Parliamentary Inspector.*
- (c) The Commission notes that such purchases under the MDA tend to be of quite small quantities acquired over relatively short timeframes. See, for example, the cases cited in the Committee's report.*

- (d) *In the Commission's view, one of the greatest risks to police is their access to and use of so-called "recreational drugs". This activity involves not only breaking the law through the procurement and use of these drugs, but also the "green lighting" of criminal activity. The Commission has continued to support WAPOL's introduction of a random drug testing program.*

Commission Oversight of WAPOL's Conduct Under the Prostitution Act

The report's Foreword concludes that the Commission has not proactively oversights WAPOL's "deployment of undercover officers in policing ...prostitution".

The Commission agrees with this view. It has taken this approach because in its assessment the misconduct risks associated with the very occasional use of undercover officers under the provisions of the Prostitution Act are low. These operations are relatively unsophisticated, of short duration and easily conducted. The absence of allegations of police misconduct in regard to these operations reinforces the Commission's view. In terms of relative risk the Commission has given higher priority to other areas.

Notwithstanding the low level of risk the Commission undertakes to conduct a corruption prevention review of WAPOL's operational activities, policies and processes in relation to the Prostitution Act.⁸¹

132 The Committee makes the following findings:

Finding 7

The CCC has undertaken to conduct a corruption prevention review of the operational activities, policies and processes of the WA Police in relation to the *Prostitution Act 2000*.

Finding 8

The CCC has undertaken to conduct a corruption prevention review of the operational activities, policies and processes of the WA Police in relation to the *Misuse of Drugs Act 1981*.

133 The Committee was reassured by the representations made by the CCC in response to the draft report. In particular, the Committee acknowledges the CCC's undertaking that it would conduct corruption prevention reviews of the operational activities, policies and processes in relation to the *Prostitution Act 2000*, and for purchasing and possessing drugs under the provisions of the *Misuse of Drugs Act 1981*. The Committee regards this as an excellent outcome of the inquiry process. Accordingly, the Committee undertakes to monitor the progress and outcomes of both of these reviews.

⁸¹ Mike Silverstone, Executive Director, Corruption and Crime Commission, *Corruption and Crime Commission Submission in Response to Draft Joint Standing Committee Report No. 15 in the 38th Parliament*, 13 May 2011.

Representations made by the WA Police Commissioner

- 134 The WA Police Commissioner made a number of representations as to the content, findings and recommendations contained within the draft report. As a consequence, the Committee amended the report after taking into account the concerns expressed by the Police Commissioner.
- 135 The WA Police do not share the concerns expressed by the Committee in relation to the possible expansion of the CCC's jurisdiction; indeed, the WA Police disagree with the conclusion that the Committee has reached on this issue. The Committee, however, is not dissuaded from the view it has formed on this matter: on the evidence that it has considered, the Committee maintains the belief that an expansion in the CCC's jurisdiction to enable it to directly investigate organised crime would by necessity diminish the capacity and resolve of the CCC to oversee the WA Police, and the Committee strongly believes that having the CCC working to ensure that the WA Police remains corruption-free is of paramount importance.
- 136 Conducting this inquiry into the corruption risks of controlled operations and informants has served to strengthen the Committee's view in this regard. While it is clear that these two tools of law enforcement are crucial components of any successful fight against organised crime, it is also clear that both the use of controlled operations and the handling of informants pose significant risks of corruption - corruption that has the capacity to completely undermine the successful investigation of organised crime. The Committee believes that the proper role for the CCC with respect to the WA Police is to mitigate the risk of police corruption in Western Australia. The significance of this contribution by the CCC to the overall fight against organised crime - and indeed, to the capacity and role of the WA Police within Western Australian society - cannot be understated.
- 137 In providing his comments to the Committee, the WA Police Commissioner requested that his letter be included as an appendix to this report. As mentioned, however, having considered the comments of the Commissioner, the Committee has made some amendments to the draft report. As a consequence, some of the comments contained within the letter of the WA Police Commissioner no longer pertain to anything contained within the report, and as such appending the letter of the Commissioner to the report in its entirety may result in some confusion.
- 138 The Committee respects the fact that there exists a diverse array of opinions regarding reforms to the *Corruption and Crime Commission Act 2003* and indeed, the most useful and proper role for the CCC within Western Australian society. Furthermore, the Committee is strongly of the belief that the process of implementing any such reform would benefit immensely from Members of the Western Australian Parliament being able to consider the full extent of these opinions.
- 139 Accordingly, the Committee reproduces those sections of the WA Police Commissioner's letter that still pertain to the report:

Dear Mr Goiran

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION: CORRUPTION RISKS OF CONTROLLED OPERATIONS AND INFORMANTS REPORT NO. 15

I refer to your letter of 2 May 2011 seeking our comments on the abovementioned report. I have discussed this matter with Assistant Commissioner Anticich and advise as follows:

Reports 10 and 15, by the Committee, have continued a focus on maintaining the integrity of the Corruption and Crime Commission (CCC) and not on combating organised crime. Having framed the terms of reference in such a manner there has been little discussion about the rationale for the inclusion of the CCC in the fight against organised crime and in fact more about why they should not.

While Report 15 is about the Corruption Risks of Controlled Operations and Informants, it appears to have been used as a vehicle to continue the Joint Standing Committee on the Corruption and Crime Commission (the “Committee”) campaign to prevent the CCC from engaging in the fight against organised crime and to counter the proposed joint agency organised crime model.

While it is open to the Committee to express these views it could be interpreted that we share the view of the Committee.

WA Police continues to support the belief that the CCC needs to have a significant and enhanced role in the investigation of organised crime. We were party to and participated in a joint agency working group that designed a model supportive of this position. We have given evidence to this effect; however, this fact is rarely, if at all, mentioned in either report.

Based on our knowledge, WA Police Officers have given extensive evidence to support this position, however, only extracts of that evidence have been used in these reports.

Generally the extracts used have given support to the Committee’s position while other significant evidence to counter that position has been excluded.

Unfortunately, it has left the impression the Committee formed a view, well in advance of any evidence being taken and has used the hearings to gather evidence and then harvest that which bolstered its position and view in these public reports.

In the last paragraph of the foreword, you state, “This inquiry has also strengthened the Committee’s belief that the push by the Government for the CCC to take on an enhanced organised crime jurisdiction is, at best, premature.”

The basis, on which the Committee has arrived at this observation, is not apparent from the context of the statement or the report. It would seem to infer that, at some future point in time, the proposed amendments Government seeks would be appropriate, but exactly when and on what that is predicated is not clear.

Corruption and the opportunity for that act, is not limited to police and organised crime. It is evident in all walks of life and professions. The recent history of the CCC in WA has only to be examined as proof of this. Politicians, Members of Parliament, Clerks of the Parliament, Chiefs of Staff, government bureaucrats, lobbyists and, in fact, an Acting Commissioner of the CCC itself, have all been the subject of investigation and prosecution for corrupt actions. In the latter case, this did not involve the investigation of organised crime - it came as a consequence of a misconduct investigation into a public officer. This fact alone makes it nonsense to argue that CCC officers are more susceptible to corruption because they will investigate organised crime, and are vulnerable and susceptible to corruption because of their position and power. That vulnerability exists in their current misconduct role.

I note the report refers to the case of S v State of New South Wales (pages 7-9) to demonstrate the moral and ethical dilemmas faced by an undercover police officer. From this, the following comment is made in the report, "In giving consideration to these facts, it is clear that if the CCC begins to investigate organised crime, the risk of CCC undercover officers becoming corrupt will significantly increase." This proposition, while on its face has some logic, is again indicative of the subjective line taken by the Committee.

This focus on controlled operations and law enforcement officers who participate in them being at a high risk of being corrupted is used to argue that there is a heightened risk of corruption by CCC undercover operatives and, should that occur, then the reputation of the CCC as an integrity agency will suffer.

There are two points to be made. Firstly, it is not envisaged nor is it likely that at any time in the immediate future the CCC would have the capacity to develop, manage and deploy undercover operatives in their own right. I think there is a misconception and lack of understanding in relation to this capacity and the Committee would be well advised to comment on real capability rather than hypothetical scenarios.

Secondly, the impact that is likely to the CCC's reputation as the consequence of corrupt actions by officers has no better exemplar than the prosecution of one of its Acting Commissioners for corrupt actions. This arose from a misconduct investigation, not organised crime, and, while there was reputational damage, it was not fatal to the CCC. The report goes on to make further comment about controlled operations and contains the comment, "Clearly there exists the possibility for an unbridled use of controlled operations to amount to misconduct." The likelihood of 'unbridled' activity in this regard is not possible. It may be of benefit for the Committee to research the current requirements in the use of such powers and more importantly to look at the draft legislation proposed for this State. I am sure that, with this knowledge, the Committee could rest assured that 'unbridled use' is improbable, if not impossible.

Having been privy to the materials in support of the Cabinet Submission, I can also say an important and integral part of the proposal would be the addition of resources to the WA Ombudsman's office to audit and oversee the use of those powers. It appears the Committee has neither spoken to nor referred to this aspect of the proposed legislation. This accountability regime will replicate similar schemes that operate in other states and have successfully operated for many years.

Finding 2 of the report states, “If the WA Police are given 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.”

There are a number of issues arising from this finding in the context of controlled operations. Firstly, Western Australia is one of only two States in Australia without such legislation that enables its Police Service to undertake such operations (of course, excepting those available under an exceptional powers finding with the CCC). Secondly, this finding seems hard to reconcile given that other Commonwealth law enforcement agencies as well as the CCC do engage in those activities in the State of Western Australia. Is the Committee concerned by the erosion of civil liberties in respect of these activities?

There is lengthy discussion at page 10 of the report regarding this aspect. Most of this comment has no basis in fact and is an expressed opinion as to what could or might occur.

The second chapter of the report deals with informants. Much of this is esoteric in nature and draws on material that would appear to be non-Australian-based research. The material that is Western Australian-based is historic and refers to practices in the 1980s and 1990s.

As stated in evidence given by Assistant Commissioner Anticich and Commander Smalpage to the Committee, the handling of informants by WA Police and other LEAs has changed significantly and, “We have seen the emergence of very structured, very controlled procedures and policies around these covert human intelligence sources...”

[...]

It is, I believe, important for the Committee to accurately report on the material and information it has gleaned during the course of its inquiry. It is also important that the WA Police, as a significant stakeholder and contributor, have its views properly and evenly represented. My concern, as expressed earlier, is that the Committee has formed a view or opinion that was obvious in Report 10 that the CCC not be permitted to engage more fully in organised crime investigations and that view has again been conveyed in this report but in a different context. This is an opinion to which WA Police categorically disagrees.

[...]

As you can appreciate, significant effort has been put into addressing the issues about which we have concern. What is at stake is of great importance to the community of Western Australia and while the potential harm of things possibly going wrong has been highlighted in this report, the reasoning behind our support for a new model has been lost.

Organised crime is going through significant growth in our State. It impacts on the lives of West Australians every day either directly or indirectly and cause great harm. In order to address this growing threat, there is a requirement for law enforcement to innovate and adapt. There is a need to attack organised crime using a number of strategies including a multi-agency approach and, importantly, as part of that, exceptional coercive powers. Unlike traditional crime, organised crime is not generally complaint-driven which means

that our ability to detect and deal with this threat is only as good as our capability – the more capability we have the more effective we are.

KARL J O'CALLAGHAN APM
COMMISSIONER OF POLICE
 13 May 2011⁸²

140 The WA Police Commissioner also requested in his letter that a further section of the *in camera* evidence provided by Assistant Commissioner Anticich on 16 March 2011 be included within the report. The Committee has agreed to include the requested section:

Mr Anticich: *If I could, I will just make a further submission. I have read report 10 in relation to how the Corruption and Crime Commission can best work together with Western Australia Police, and I guess it would be proper to say that I do not think the committee supports the proposed framework—the reference group model.*

If possible, I would like to just put on record that WA Police still affirms its belief that that particular model is the way for us to engage with the CCC in serious and organised crime.

We maintain that it is based on, I guess, a broader experience across other jurisdictions in how the model has operated successfully in the past. We understand the risks that the committee highlights in the report about the engagement with organised crime, but to call the CCC away from them in the hope that that will somehow preserve its integrity I think perhaps needs a little more thought. If I could humbly submit, the committee has taken a rather focused view on that particular aspect and has not seen the broader picture. The reality is that tackling serious and organised crime involves a multifaceted, sophisticated approach, engaging all the resources available to government and law enforcement, and to bring in and to be able to engage directly with the Corruption and Crime Commission in the use of the coercive powers and intelligence capacities will add another arrow to the quiver. I hope we do not lose sight of the fact that this is the model, going back to the Moffitt royal commission in the 1970s that said that traditional law enforcement alone could not combat organised crime, that we need access to these powers, and that we need as many of these agencies as we can engage. We go to tax, ASIC, local government, the Department of Health—any agency or organisation that we can engage in this fight, we are happy to go to. We are fairly keen to see this opportunity avail itself. Can I also say, having been part of the working group, that is unique to have brought the Corruption and Crime Commission, the WA Police, the Department of the Premier and Cabinet, the SSO and the DPP around the table, and over a period of some years, negotiated an agreed position and framework. I would suggest that that is largely unique. I am just cautious that, perhaps in the pursuit of this particular aspect—it is important and significant—we do not lose what has been established with a lot of this work, and the position at which we have currently arrived. I just want to put on the record that WA Police still affirms its belief that that is the model, and we are still very supportive of advancing it.⁸³

⁸² Karl O'Callaghan, Commissioner, WA Police, *Joint Standing Committee on the Corruption and Crime Commission: Corruption Risks of Controlled Operations and Informants Report No. 15*, 13 May 2011.

⁸³ Nick Anticich, Assistant Commissioner (Specialist Crime), and Commander Murray Smalpage, Director (Intelligence), WA Police, *Transcript of Evidence (in-camera)*, 16 March 2011, p 15.

141 During the 16 March 2011 hearing, in response to Assistant Commissioner Anticich's submission, the Chairman replied:

The CHAIRMAN: I appreciate that, Assistant Commissioner, but I have to tell you that, as a result of today's hearing, I am even less inclined to proceed with the reference group model because it disturbs me to hear that the CCC does not do any proactive auditing when it comes to the use of controlled operations under the Prostitution Act and the Misuse of Drugs Act. It does not appear that it does anything in regard to the use of covert intelligence sources. As you mentioned, these are high-risk areas, and there needs to be world's best practice implemented. Clearly, we are hearing from you that WA Police is doing that, but the role of the CCC is to make sure that that is happening, and it does not seem to have its eye on the ball at all. I do not know that, as chairman of this particular committee, I can have confidence in allowing the CCC to somehow go and investigate organised crime; as you have indicated, we are swimming in a tsunami of the stuff already. It seems to me that WA Police are doing a magnificent job, I might add, in doing that swimming, but part of that requires the CCC to keep having its eye on the ball, and I do not think it is doing that at the moment. I do not think we can have the confidence that it should be engaged with other things. The other interesting thing is that in our inquiry we discovered that, in order for it to happen properly, it will cost some \$42 million. Interestingly, the police commissioner gave us an excellent submission on how those moneys might be better used, following the hearing we had with Charlie Carver. It seems to me that if the police are lacking in resources to tackle this tsunami, we would be better off giving them the \$42 million or \$50 million than giving it to the watchdog. But I accept that what you have said this morning is the police position, and it is not in any way to denigrate the work that has been done, but I do not know whether it would be correct to think that the committee is likely to resile from its position anytime soon.⁸⁴

Commentary offered by the Parliamentary Inspector

142 In providing his comments regarding the draft report to the Committee, the Parliamentary Inspector emphasised that he had not had the opportunity to research the issues covered within the report. He offered two comments:

I agree with Recommendation 1, which proposes an amendment to the definition of "organised crime" in the Corruption and Crime Commission Act 2003 so as to widen the criteria by which the WA Police can seek access to the exceptional powers under Part 4 of the Act. However, my agreement is predicated on there being rigorous oversight of the use of those powers as is contemplated by s 46 of the Act, amongst other provisions. I have reservations whether this will be provided if, as now seems inevitable, the Commission is to be given the proposed organised crime function. That function will require it to work in co-operation with the WA Police. Moreover, that will sometimes be done in circumstances in which the exceptional powers might be accessed. I will not repeat all that I have already said in that respect.

I agree also with Recommendation 2 [...], for what it might be worth. Commission officers will, no doubt, have the best of present intentions in this regard, even absent an amendment highlighting the importance of oversight of the integrity of WA Police.

⁸⁴ *Ibid.*

However I raise a similar concern to that mentioned in respect of Recommendation 1. Whatever degree of importance might be ascribed by the legislature to the purpose of oversight of the WA Police, there is a real risk that, in time to come, Commission officers will find it difficult to maintain a rigorous degree of oversight in respect of police officers with whom they might be required to work in close co-operation and with whom they might share common objectives.⁸⁵

A vital role

¹⁴³ On 19 May 2011, as this report was being finalised, the Government's response to the Committee's 9 September 2010 report was provided to the Committee and tabled by Hon Christian Porter MLA, Treasurer and Attorney General. This response makes it clear that it remains the intent of the Government to pursue a significant change in the focus of the CCC, by introducing a Bill that will confer on the CCC an organised crime investigative function.

¹⁴⁴ The Committee accepts the fact that its views as to what reforms ought to be made to the *Corruption and Crime Commission Act 2003* are not shared by the Government. The Committee is nonetheless hopeful that the views it has expressed in both reports 10 and 13 will have some positive impact upon any reforms that are made to the function of the CCC.

¹⁴⁵ In considering the response of the Attorney General the Committee noted with interest the statement that "the benefits and cost effectiveness likely to be achieved by enhancing the State's capacity to combat organised crime through such an approach exceed the risks which the Committee sees in enabling the Corruption and Crime Commission to work collaboratively with police." The model by which the CCC and the WA Police would work collaboratively mirrors the model that exists in Queensland, where the Crime and Misconduct Commission investigates both allegations of corruption and organised crime. The Committee has previously stated its view that this model is flawed.

¹⁴⁶ The Committee was therefore interested to read, in an article that appeared in *The Australian* newspaper on 9 May 2011, that the Chairperson of the Crime and Misconduct Commission, Martin Moynihan AO QC, had early in 2010 instigated a review of the organisation's internal governance and corporate practices, and that the resulting report had identified the emergence of an unhelpful "silo mentality between the two arms of the organisation," and revealed that some senior staff were calling for a return to separate crime and misconduct agencies.

¹⁴⁷ Having obtained a copy, The Australian newspaper quoted the consultants' report in saying that:

...the crime and misconduct functions [of the Crime and Misconduct Commission] result in a real dichotomy between the (seconded) police and lawyer cultures existing within those different functional areas.

[...]

⁸⁵ Hon Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, *Corruption Risks of Controlled Operations and Informants - Draft Report No. 15 in the 38th Parliament*, 12 May 2011.

Essentially, while the core crime and misconduct functional areas within the CMC enjoy their own distinctive cultures internally, which ought to be embraced and encouraged, the real cultural issue of concern within the CMC is the fact there is a weak sense of the common goals and interests across the organisation.

[...]

*The result is a dilution of a sense of personal responsibility throughout the organisation.*⁸⁶

148 These sentiments echo what Mr Felix Grayson, former Assistant Commissioner of the Crime and Misconduct Commission in Queensland, said to the Committee during a closed hearing in March 2010. It was largely as a result of the evidence of Mr Grayson that the Committee formed the view that any law enforcement model that would see the WA Police and the CCC investigating organised crime in collaboration would by its very nature be flawed. As Mr Grayson informed the Committee:

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 [the WA Police] are able to access extraordinary powers more easily and have the resources to conduct investigations, that is the way to go.*⁸⁷

149 Nothing that the Committee has learned since hearing from Mr Grayson has dissuaded it from embracing this view.

⁸⁶ Michael McKenna, "Crime and Misconduct watchdog head to leave after just two years," *The Australian*, 9 May 2011, accessed on 20 May 2011e at <<http://www.theaustralian.com.au/national-affairs/crime-and-misconduct-watchdog-head-to-leave-after-just-two-years/story-fn59niix-1226052147432>>

⁸⁷ Felix Grayson, former Assistant Commissioner, Queensland Crime and Misconduct Commission, *Transcript of Evidence*, 3 March 2010, p 17.

150 It is an unfortunate fact that the societal contribution made by anti-corruption agencies is an absolutely vital component of twenty-first century governance. For this reason the Committee has been and will remain a strong supporter of the role performed by the CCC in Western Australia. Of concern, however, this inquiry has shown that the CCC has not been proactive in its oversight of the use by the WA Police of controlled operations; nor has it taken a proactive approach to mitigating the risks associated with the handling of informants by the WA Police. In the course of conducting this inquiry, the Committee has learned that these two activities are high-risk areas of police work. It is to the credit of the CCC that it has already responded to this inquiry by providing two significant undertakings to enhance its oversight of the WA Police. The fact that this inquiry has identified these deficiencies only further highlights the difficulty faced by the CCC in fully discharging its current functions without the burden and distraction of an expanded organised crime role.



HON NICK GOIRAN, MLC
CHAIRMAN

APPENDIX ONE***HEARINGS***

Date	Name	Position	Organisation
23 February 2011	Mr Mike Silverstone	Executive Director	CCC
	Mr Robert Sutton	Acting Director of Operations	
	Mr Tony Warwick	Senior Investigator	
16 March 2011	Mr Nick Anticich	Assistant Commissioner (Specialist Crime)	WA Police
	Cmdr Murray Smalpage	Director (Intelligence)	

APPENDIX TWO

BRIEFINGS

Date	Name	Position	Organisation
1 November 2010	Hon David Ipp	Commissioner	New South Wales Independent Commission Against Corruption
	Ms Therese Hamilton	Deputy Commissioner	
	Mr Michael Symons	Executive Director, Investigations Division	
	Mr Roy Waldon	Solicitor to the Commission and Executive Director Legal	
	Dr Robert Waldersee	Executive Director, Corruption Prevention, Education and Research Division	
1 November 2010	Mr Nick Kaldas	Deputy Commissioner	New South Wales Police Force
	Mr Paul Carey	Assistant Commissioner	
	Mr Dave Hudson	Assistant Commissioner	
2 November 2010	Mr John Pritchard	Commissioner	New South Wales Police Integrity Commission
	Ms Michelle O'Brien	Commission Solicitor and Manager, Legal Services Unit	
	Mr Andy Nattress	Director, Operations	

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

APPENDIX TWO

Date	Name	Position	Organisation
2 November 2010	Mr Phillip Bradley	Commissioner	New South Wales Crime Commission
4 November 2010	Mr Leslie Charles Ross	Special Investigations Monitor	Office of the Special Investigations Monitor Victoria
	Mr Neal Jedwab	Senior Legal Officer	
	Mr Peter Rollinson	Senior Compliance Officer	
	Ms Tracey Sutton	Compliance Officer	
4 November 2010	Mr Paul Jevtovic APM MAICD	Deputy Director, Police Integrity	Office of Police Integrity Victoria
	Ms Vanessa Twigg	Assistant Director, Police Integrity, Strategic Projects, Education and Legal Services	
	Mr John Nolan	Assistant Director, Police Integrity, Operations	
	Mr Mick Sherry	Assistant Director, Police Integrity, Intelligence	
	Mr Greg Carroll	General Counsel	
	Mr Darren Brookes	Manager, Investigations	

Date	Name	Position	Organisation
5 November 2010	Mr Gerry Ryan	Acting Assistant Commissioner	Victoria Police
	Mr David Clayton	Detective Inspector	
	Mr Wayne Amor	Detective Senior Sergeant	
	Mr Stephen Rainey	Detective Acting Sergeant	
	Ms Bronwen Cooke	VPS3	
5 November 2010	Mr George Brouwer	Ombudsman	Ombudsman Victoria
	Mr Ian Killey	General Counsel	