



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

**REPORT ON THE RELATIONSHIP BETWEEN  
THE PARLIAMENTARY INSPECTOR AND  
THE COMMISSIONER OF THE CORRUPTION  
AND CRIME COMMISSION**

**Report No. 2  
in the 38<sup>th</sup> Parliament**

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Joint Standing Committee on the Corruption and Crime Commission

Report on the Relationship Between the Parliamentary Inspector and the Commissioner of the Corruption and Crime Commission

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**REPORT ON THE RELATIONSHIP BETWEEN  
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AND CRIME COMMISSION**

**Report No. 2**

Presented by:

**Hon Ray Halligan, MLC and John Hyde, MLA**

Laid on the Table of the Legislative Council and Legislative Assembly  
on 19 March 2009



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## COMMITTEE'S FUNCTIONS AND POWERS

On 25 November 2008 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission of the 38<sup>th</sup> Parliament of Western Australia ('the Committee').

The Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 288-292 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Committee to -

- (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.



## **INQUIRY TERMS OF REFERENCE**

The terms of reference for the Inquiry are to inquire into the respective functions, powers and responsibilities of:

- (1) the Corruption and Crime Commission (and its Commissioner); and
- (2) the Parliamentary Inspector,

as they pertain to each other.



## CHAIRMAN'S FOREWORD

In 2007 and 2008, five reports prepared by Mr Malcolm McCusker AO QC, the Parliamentary Inspector of the Corruption and Crime Commission of Western Australia ('the Parliamentary Inspector') were tabled in Parliament which were critical of investigations undertaken by the Corruption and Crime Commission ('the CCC'), and the expressions of opinion by the CCC that certain individuals had engaged in misconduct ('Misconduct Opinions').

Mr McCusker's reports gave rise to a dispute between the Commissioner of the Corruption and Crime Commission of Western Australia ('the Commissioner') and Mr McCusker as to whether the Parliamentary Inspector could:

- critically review Misconduct Opinions reached by the CCC; and
- table directly with Parliament a report which contained this critical review.

At the height of the dispute, the Commissioner commenced two sets of proceedings in the Supreme Court of Western Australia in December 2008 seeking a declaration as to the legality of Mr McCusker's actions in tabling such a report with Parliament.<sup>1</sup>

The litigation was discontinued on 6 February 2009, following a day-long workshop held between the Commissioner, Mr McCusker and the new Parliamentary Inspector, Mr Christopher Steytler QC, hosted by the Committee on 4 February 2009.

The dispute has raised many important issues as to the functions, powers and responsibilities of the CCC and the Parliamentary Inspector as they pertain to each other. The Committee views that it is inevitable that issues of this nature will arise with new legislation such as the *Corruption and Crime Commission Act 2003* ('the CCC Act'). A similar dispute occurred in Queensland between the Criminal Justice Commission and the Parliamentary Criminal Justice Commissioner.<sup>2</sup>

The purpose of this Report is to inform Parliament of the progress of the Committee's consideration of these issues to date. In this regard I would like to express my gratitude to the former Committee, upon whose work a substantial portion of this Report is based.

It should be noted that despite, at times, the potentially divisive nature of the dispute, several positive outcomes have eventuated.

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<sup>1</sup> *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex Parte Corruption and Crime Commission*, Supreme Court proceedings CIV 2776 of 2008 (commenced on 18 December 2008 and discontinued on 23 December 2008) and *Corruption and Crime Commission of Western Australia v Malcolm James McCusker AO QC, The Parliamentary Inspector of the Corruption and Crime Commission of Western Australia*, Supreme Court proceedings CIV 2832 of 2008 (commenced on 29 December 2008 and discontinued on 6 February 2009).

<sup>2</sup> *Criminal Justice Commission and Ors v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8; *re Criminal Justice Commission* [2000] 1 Qd R 581.

**First** the CCC has reaffirmed:

- its position that the role of the Parliamentary Inspector in monitoring its operations is absolutely essential to the effective operation of the legislative scheme. This includes the audit of the CCC's activities in terms of its compliance with State laws;
- that without such external and independent oversight to scrutinise the performance of the CCC's functions, community and Parliamentary confidence in the appropriateness and integrity of its processes, and consequently those of the public sector, would be severely diminished; and
- that it welcomes any recommendations from the Parliamentary Inspector for improvements to its efficiency and effectiveness appropriate to this role.<sup>3</sup>

**Second** since commencing in the office in June 2007, the Commissioner, the Hon Len Roberts-Smith RFD QC, has reviewed various aspects of the CCC's practices, and where appropriate, refined them. The Commissioner's attention in this capacity has been particularly focused on improving processes concerning the CCC's interaction with witnesses and those subjects of an investigation, both during continuing investigations and at their conclusion and reporting stage.

**Third** the Commissioner has implemented a number of enhancements to CCC practices for both external and internal purposes. Externally, these are aimed at increasing clarity for witnesses of their rights and obligations in regard to investigations and the CCC Act. Internally, this refinement has resulted in more robust, transparent and reviewable practices in performing the CCC's functions and improving the quality of CCC reports.

The Committee notes the CCC's commitment to the continuous improvement of its practices and procedures, assisted by the oversight of the Parliamentary Inspector and looks forward to the continuation of the constructive dialogue between the Commissioner and the new Parliamentary Inspector.



HON RAY HALLIGAN, MLC  
Chairman

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<sup>3</sup> Corruption and Crime Commission, *Briefing Paper For The Joint Standing Committee On The Corruption And Crime Commission On Internal Process Improvements Made By The Commission*, 23 June 2008.



## ABBREVIATIONS AND ACRONYMS

“Acting Parliamentary Inspector”	Acting Parliamentary Inspector of the Corruption and Crime Commission of Western Australia
“Administrative Matter Report”	report of the Corruption and Crime Commission entitled <i>Report on an Administrative Matter relating to the Functions of the Commission</i> , transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 14 March 2008 (Legislative Assembly Tabled Paper No. 3690)
“Allen Report”	report of the Parliamentary Inspector entitled <i>Report on the Corruption and Crime Commission's Investigation and Finding of “Misconduct” by Mr Michael Allen</i> , dated 7 March 2008 and tabled in the Legislative Assembly on 11 March 2008 (Tabled Paper No. 3654)
“CCC”	Corruption and Crime Commission of Western Australia
“CCC Act”	<i>Corruption and Crime Commission Act 2003</i> (WA)
“CCC Lee Report”	report of the Corruption and Crime Commission entitled <i>Report on the Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of City of Cockburn</i> , transmitted to the Clerks of the Legislative Assembly and the Legislative Council on 26 September 2008 and tabled in the Legislative Assembly on 6 November 2008 (Tabled Paper No. 19)
“CM Act”	<i>Crime and Misconduct Act 2001</i> (Qld)
“Commissioner”	Commissioner of the Corruption and Crime Commission of Western Australia
“Committee”	Joint Standing Committee on the Corruption and Crime Commission of the 38 <sup>th</sup> Parliament of Western Australia
“Commonwealth Interception Act”	<i>Telecommunications (Interception and Access) Act (1979)</i> (C’th)
“First D’Orazio Report”	report of the Parliamentary Inspector entitled <i>Report made pursuant to section 199 of the CCC Act on the Parliamentary Inspector's Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission (“The Commission”) Concerning Mr John D’Orazio</i> , which appears at Appendix Two to Report No. 28 of the Joint Standing Committee on the Corruption and Crime Commission of the 37 <sup>th</sup> Parliament of Western Australia entitled <i>Parliamentary Inspectors Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission Concerning Mr John D’Orazio</i> , tabled in the Legislative Assembly on 18 July 2007 (Tabled Paper No. 2860)
“former Committee”	Joint Standing Committee on the Corruption and Crime Commission of the 37 <sup>th</sup> Parliament of Western Australia

“Frewer Report”	report of the Parliamentary Inspector entitled <i>Report on the Corruption and Crime Commission's Findings of “Misconduct” by Mr Paul Frewer</i> , dated and transmitted to the Clerks of the Legislative Assembly and Legislative Council on 8 February 2008 and tabled in the Legislative Assembly on 26 February 2008 (Tabled Paper No. 3514)
“Gail Archer Report”	report of Gail Archer SC entitled <i>Review of the Corruption and Crime Commission Act 2003</i> , tabled in the Legislative Assembly on 18 March 2008 (Tabled Paper No. 3707) and prepared pursuant to section 226 of the <i>Corruption and Crime Commission Act 2003</i>
“Inquiry into the CCC”	inquiry initiated by the Parliamentary Inspector into the Corruption and Crime Commission on 6 June 2008 pursuant to section 197(1) of the <i>Corruption and Crime Commission Act 2003</i>
“Lee Report”	report of the Parliamentary Inspector entitled <i>Report on the Corruption and Crime Commission's Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn Dated 26 September 2008</i> , dated and transmitted to the Clerks of the Legislative Assembly and Legislative Council on 24 December 2008 (Legislative Assembly Tabled Paper No. 525)
“Minniti Report”	report of the Corruption and Crime Commission entitled <i>Report on an Investigation into Inappropriate Associations between Western Australia Police Officers and Pasquale Minniti</i> , transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 14 December 2007 and tabled in the Legislative Assembly on 21 December 2007 (Tabled Paper No. 3504)
“Misconduct Opinion”	an expression of an opinion by the Corruption and Crime Commission that a person has engaged in ‘misconduct’ as that term is defined in the <i>Corruption and Crime Commission Act 2003</i>
“Mr Martin”	Mr Ken Martin QC, Acting Parliamentary Inspector
“Mr Martin’s report”	Mr Martin’s report dated 3 November 2008 containing his conclusions and recommendations concerning the Inquiry into the CCC
“Mr McCusker”	Mr Malcolm McCusker AO QC, Parliamentary Inspector (2004 - 2008)
“Parliamentary Inspector”	Parliamentary Inspector of the Corruption and Crime Commission of Western Australia
“PCMC”	Parliamentary Crime and Misconduct Committee of the Legislative Assembly (Qld)
“Parliamentary Commissioner”	Parliamentary Crime and Misconduct Commissioner (Qld)
“Second D’Orazio Report”	report prepared by the Parliamentary Inspector entitled <i>Report on the Corruption and Crime Commission’s Opinion of “Inappropriate Conduct” by Mr John D’Orazio</i> , transmitted to the Clerks of the

Legislative Assembly and Legislative Council on 7 April 2008  
(Legislative Assembly Tabled Paper No. 3765)

“Smiths Beach Report”

report of the Corruption and Crime Commission entitled *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, dated and transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 5 October 2007 and tabled in the Legislative Assembly on 16 October 2007 (Tabled Paper No. 3261)

“Workshop”

closed hearing of the Committee on 4 February 2009 attended by the Hon Len Roberts-Smith RFD QC, Commissioner; Mr Christopher Steytler QC, Parliamentary Inspector; Mr Malcolm McCusker AO QC, former Parliamentary Inspector; Mr Ken Martin QC, Acting Parliamentary Inspector; Ms Gail Archer SC, Acting Commissioner; and Mr Murray Alder, Principal Legal Officer of the Office of the Parliamentary Inspector



## EXECUTIVE SUMMARY

Chapter 1 contains a chronology of the events giving rise to the dispute between the CCC and the Parliamentary Inspector, Mr McCusker QC.

The dispute culminated in the CCC commencing two sets of Court proceedings against Mr McCusker in December 2008. In the first proceedings the CCC sought an injunction preventing Mr McCusker from tabling a report directly in Parliament which was critical of the CCC.<sup>4</sup> Chief Justice Martin refused to grant an injunction, but noted that subject to the important qualifications that he had not heard from Mr McCusker, and the doubts that he had as to the jurisdiction of the court to entertain the proceedings, the CCC had raised seriously arguable issues concerning:

- excess of jurisdiction, in terms of the functions of the Parliamentary Inspector;
- the nature of the report which the Parliamentary Inspector proposed to table; and
- possible contravention of section 205 of the CCC Act by the Parliamentary Inspector.<sup>5</sup>

These proceedings were discontinued to be replaced by new proceedings in which the CCC sought declarations as to the legality of the conduct of the Parliamentary Inspector in tabling his report directly in Parliament.<sup>6</sup>

The chronology refers to the role of the Committee in convening a day-long workshop on 4 February 2009 which was attended by all relevant parties, following which the proceedings were discontinued and an agreement reached by the new Parliamentary Inspector, Mr Christopher Steytler QC, and the Commissioner as to how to address differences in principle.

Chapter 2 analyses the arguments submitted by Mr McCusker and the Commissioner on the complex issue of the scope of the Parliamentary Inspector's power to critically review a CCC Misconduct Opinion. No final position is expressed by the Committee, in deference to the agreement reached at the workshop which was to allow the new Parliamentary Inspector and the Commissioner a period of six months to report back to the Committee.

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<sup>4</sup> *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex Parte Corruption and Crime Commission*, Supreme Court proceedings CIV 2776 of 2008 (commenced on 18 December 2008 and discontinued on 23 December 2008).

<sup>5</sup> *Re Parliamentary Inspector of the Corruption and Crime Commission; ex parte Corruption and Crime Commission* [2008] WASC 305 (Western Australian Supreme Court, Martin CJ, 18 December 2008), paragraphs 31-32.

<sup>6</sup> *Corruption and Crime Commission of Western Australia v Malcolm James McCusker AO QC, The Parliamentary Inspector of the Corruption and Crime Commission of Western Australia*, Supreme Court proceedings CIV 2832 of 2008 (commenced on 29 December 2008 and discontinued on 6 February 2009).

Chapter 3 considers the legal and policy arguments as to whether the Parliamentary Inspector should be permitted to table his reports direct in Parliament, or, as is the case in Queensland, with the Committee.

Upon consideration of these arguments, the Committee makes a recommendation (Hon Ken Travers, MLC, dissenting) that the Parliamentary Inspector should be required to table his reports with the Committee, accompanied by a recommendation by the Parliamentary Inspector as to whether it is in the public interest to be tabled in Parliament.

Chapter 4 contains a discussion of a number of other issues raised in the context of the dispute between the Commissioner and Mr McCusker. The issues canvassed in this Chapter do not represent the totality of all of the issues and are raised for the attention of Parliament.

## RECOMMENDATIONS

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### **Recommendation 1**

The Committee recommends that in any report prepared by the Parliamentary Inspector that is critical of the CCC, the Parliamentary Inspector include in his report all CCC submissions as to the Parliamentary Inspector's adverse comments and that the CCC not use section 85 of the CCC Act to table Administrative Matter Reports as a method of replying to the Parliamentary Inspector's adverse comments, and that if necessary section 85 of the CCC Act be amended to clarify this.

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### **Recommendation 2**

The CCC Act should be amended so that the Parliamentary Inspector is required to table his reports through the Committee, accompanied by a recommendation by the Parliamentary Inspector as to whether it is in the public interest to be tabled publicly in Parliament.

If the Committee has not tabled the Parliamentary Inspector's report in Parliament within 30 days, then, if the Parliamentary Inspector is of the belief that it is in the public interest to do so, the Parliamentary Inspector can proceed to table his report direct with Parliament without further consultation with the Committee.

The Hon Ken Travers, MLC dissented (see section 3.18)

**Recommendation 3.1**

The operation of section 200 of the CCC Act should be extended beyond its current application to encompass situations where the Parliamentary Inspector intends to express an opinion that is adverse to a person or a body (including the CCC) and is likely to be made public, or in correspondence with a complainant. In such situations the Parliamentary Inspector should be required to provide a draft of the intended adverse opinion to that person or body, so as to afford that person or body a reasonable opportunity to make representations concerning the intended actions of the Parliamentary Inspector.

**Recommendation 3.2**

The CCC Act should be amended so that if Parliamentary Inspector intends to express an opinion that is adverse to a person or a body (including the CCC) and is likely to be made public, or in correspondence with a complainant, then the Parliamentary Inspector be required to provide the Committee with an advance draft copy of such an intended opinion, so as to afford the Committee a reasonable opportunity to consider the Parliamentary Inspector's intended actions.

The Hon Ken Travers, MLC dissented to Recommendation 3.2 (see section 3.20)



## **MINISTERIAL RESPONSE**

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Committee directs that the Premier 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 CHRONOLOGY

### 1.1 Introduction

Mr Malcolm McCusker AO QC was the inaugural Parliamentary Inspector of the Corruption and Crime Commission ('Parliamentary Inspector').

His tenure as Parliamentary Inspector was from 1 January 2004 to 31 December 2008.

During his tenure as Parliamentary Inspector, Mr McCusker prepared five reports which were critical of certain actions of the CCC.

The five reports are:

- *Report made pursuant to section 199 of the CCC Act on the Parliamentary Inspector's Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission ("The Commission") Concerning Mr John D'Orazio* ('First D'Orazio Report'), tabled in Parliament on 18 July 2007;<sup>7</sup>
- *Report on the Corruption and Crime Commission's Opinion of "Inappropriate Conduct" by Mr John D'Orazio* ('Second D'Orazio Report'), deemed tabled in Parliament on 7 April 2008;<sup>8</sup>
- *Report on the Corruption and Crime Commission's Findings of "Misconduct" by Mr Paul Frewer* ('Frewer Report'), tabled in Parliament on 26 February 2008;<sup>9</sup>
- *Report on the Corruption and Crime Commission's Investigation and Finding of "Misconduct" by Mr Michael Allen* ('Allen Report'), tabled in Parliament on 11 March 2008;<sup>10</sup> and

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<sup>7</sup> Parliamentary Inspector, *Report made pursuant to section 199 of the CCC Act on the Parliamentary Inspector's Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission ("The Commission") Concerning Mr John D'Orazio*, which appears at Appendix Two to Report No. 28 of the Joint Standing Committee on the Corruption and Crime Commission of the 37<sup>th</sup> Parliament of Western Australia entitled *Parliamentary Inspectors Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission Concerning Mr John D'Orazio*, tabled in the Legislative Assembly on 18 July 2007 (Tabled Paper No. 2860).

<sup>8</sup> Parliamentary Inspector, *Report on the Corruption and Crime Commission's Opinion of "Inappropriate Conduct" by Mr John D'Orazio*, transmitted to the Clerks of the Legislative Assembly and Legislative Council on 7 April 2008 (Legislative Assembly Tabled Paper No. 3765).

<sup>9</sup> Parliamentary Inspector, *Report on the Corruption and Crime Commission's Findings of "Misconduct" by Mr Paul Frewer*, dated and transmitted to the Clerks of the Legislative Assembly and Legislative Council on 8 February 2008 and tabled in the Legislative Assembly on 26 February 2008 (Tabled Paper No. 3514).

<sup>10</sup> Parliamentary Inspector, *Report on the Corruption and Crime Commission's Investigation and Finding of "Misconduct" by Mr Michael Allen*, dated 7 March 2008 and tabled in the Legislative Assembly on 11 March 2008 (Tabled Paper No. 3654).

- *Report on the Corruption and Crime Commission's Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn Dated 26 September 2008* ('Lee Report'), deemed tabled in Parliament on 24 December 2008.<sup>11</sup>

In addition to the above, Mr McCusker prepared a draft paper in April 2008 concerning the probity of certain allegations put to Hon Anthony McRae at a public hearing conducted by the CCC on 22 February 2007.<sup>12</sup>

## 1.2 The D'Orazio Reports

The First D'Orazio Report and the Second D'Orazio Report arose out of complaints made by Mr John D'Orazio, MLA<sup>13</sup> to Mr McCusker concerning the CCC's investigation and expression of opinion by the CCC that Mr D'Orazio had engaged in 'inappropriate conduct'.

A description of the CCC's investigation and the expression of opinion of 'inappropriate conduct' are contained in a report of the CCC entitled *Report on an Investigation into Inappropriate Associations between Western Australia Police Officers and Pasquale Minniti* ('Minniti Report') which was tabled in Parliament on 21 December 2007.<sup>14</sup>

In the First D'Orazio Report, Mr McCusker made findings and recommendations resulting from his review and inquiry of the actions of the CCC, and others, in regard to:

- the practice of the CCC in providing an 'embargoed copy' of its report to the Premier and Leader of the Opposition prior to tabling;
- the leaking to the media of an embargoed copy of the report;

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<sup>11</sup> Parliamentary Inspector, *Report on the Corruption and Crime Commission's Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of the City of Cockburn Dated 26 September 2008*, dated and transmitted to the Clerks of the Legislative Assembly and Legislative Council on 24 December 2008 (Legislative Assembly Tabled Paper No. 525).

<sup>12</sup> This draft paper has not been published or tabled by Mr McCusker, and appears as Appendix 1 to the Corruption and Crime Commission's report, *Investigation of Alleged Public Sector Misconduct in Connection with the Activities of Lobbyists and Other Persons: The Hon Anthony David McRae MLA and Mr Rewi Edward Lyall*, which was tabled in Parliament on 21 November 2008 (Legislative Assembly Tabled Paper No. 415).

<sup>13</sup> A Member of Parliament is a "public officer" for the purposes of the *Corruption and Crime Commission Act 2003*. An issue has arisen as to whether the activities of Mr D'Orazio were activities undertaken by Mr D'Orazio in his private capacity or in his capacity as a Member of Parliament. This issue is not the focus of this report.

<sup>14</sup> The First D'Orazio Report contains a description of an inquiry undertaken by the Parliamentary Inspector into the leaking of a copy of the Minniti Report to the media in June 2007. The Corruption and Crime Commission subsequently deferred the tabling of the Minniti Report to December 2007.

- whether the CCC had complied with section 86 of the CCC Act<sup>15</sup> in its dealings with Mr D’Orazio; and
- whether the CCC had jurisdiction to form an opinion that Mr D’Orazio had engaged in “inappropriate conduct”, a term that is not contained in the CCC Act.

In the Second D’Orazio Report, Mr McCusker repeated his view expressed in the First D’Orazio Report that the CCC lacked the power or jurisdiction to express the opinion that Mr D’Orazio’s conduct amounted to “inappropriate conduct”. In addition Mr McCusker said that there was “no reasonable basis” for the CCC coming to that conclusion (that the conduct of Mr D’Orazio was inappropriate) and that such a conclusion was “not reasonably open, on the evidence”.

In addition, Mr McCusker expressed the view that the CCC had fallen into error because the CCC had failed, in the Minniti Report, to state the objective criteria against which the CCC formed the opinion of ‘inappropriate conduct’. Thus, according to Mr McCusker, the CCC had committed a jurisdictional error on the principles espoused in the New South Wales Court of Appeal Supreme Court decision of *Greiner v ICAC* (1992) 28 NSWLR 125.

### 1.3 Frewer Report and Allen Report

The Frewer Report and the Allen Report arose out of complaints made to Mr McCusker by two public servants, Mr Paul Frewer and Mr Mike Allen, concerning the CCC’s investigation and expression of opinion by the CCC that Mr Frewer and Mr Allen had engaged in misconduct.

A description of the CCC’s investigation and its expressions of opinion of misconduct are contained in a report of the CCC entitled *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (‘Smiths Beach Report’) which was tabled in Parliament on 16 October 2007.<sup>16</sup>

In the Frewer Report and the Allen Report, Mr McCusker was critical of the CCC’s investigations into these two public officers.

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<sup>15</sup> Section 86 of the *Corruption and Crime Commission Act 2003* provides: “Before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.”

<sup>16</sup> Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, dated and transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 5 October 2007 and tabled in the Legislative Assembly on 16 October 2007 (Tabled Paper No. 3261).

In the Frewer Report, Mr McCusker expressed the view that the CCC's opinion that Mr Frewer failed to act impartially, and with integrity, was "in error" and recommended that the CCC publicly acknowledge this.<sup>17</sup>

Mr McCusker also expressed the view that the CCC had breached section 86 of the CCC Act in that the CCC had failed to afford Mr Frewer a reasonable opportunity to make representations to the CCC regarding certain adverse matters concerning Mr Frewer that appeared in the Smiths Beach Report.<sup>18</sup>

In the Allen Report, Mr McCusker expressed the view that the CCC was "in error in finding that Mr Allen was guilty of misconduct",<sup>19</sup> and should withdraw not only the opinion of misconduct by Mr Allen as expressed in the Smiths Beach Report (which the CCC withdrew on 13 February 2008) but also its substituted opinion of misconduct dated 13 February 2008.<sup>20</sup>

Mr McCusker also asserted that the CCC had breached section 86 of the CCC Act in that the notice which it gave to Mr Allen, of proposed "adverse comment", in reply to which he made representations to the CCC, was substantially different from the basis for the opinion stated in the Smiths Beach Report, of which no notice was given to him.<sup>21</sup>

#### **1.4 Government's response to the Frewer Report and Allen Report**

After the tabling of the Frewer Report and the Allen Report, Hon Alan Carpenter, MLA, the then Premier of Western Australia, said in the Legislative Assembly on 11 March 2008:

*I believe we are seeing the legislation working, as it relates to the role of the parliamentary inspector. It was never conceived that the parliamentary inspector would simply give a tick of approval to every review conducted of the CCC's activities or findings. However, the parliamentary inspector's reports have also given rise to a question: what is the mechanism to resolve disagreements between the parliamentary inspector and the CCC when such disagreements occur? The government believes that the best body to assess and provide recommendations on this issue is the Joint Standing*

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<sup>17</sup> Parliamentary Inspector, *Report on the Corruption and Crime Commission's Findings of "Misconduct" by Mr Paul Frewer*, dated and transmitted to the Clerks of the Legislative Assembly and Legislative Council on 8 February 2008 and tabled in the Legislative Assembly on 26 February 2008 (Tabled Paper No. 3514), p 21, para 49.

<sup>18</sup> *ibid*, p 4, para 6.

<sup>19</sup> Parliamentary Inspector, *Report on the Corruption and Crime Commission's Investigation and Finding of "Misconduct" by Mr Michael Allen*, dated 7 March 2008 and tabled in the Legislative Assembly on 11 March 2008 (Tabled Paper No. 3654), p 6, para 24.

<sup>20</sup> *ibid*, p 6, para 24.

<sup>21</sup> *ibid*, p 6, para 16.

*Committee on the Corruption and Crime Commission—a bipartisan committee drawn from both houses of Parliament.*<sup>22</sup>

## 1.5 CCC’s response to the Frewer Report and the Allen Report

In response to the criticism levelled at the CCC by Mr McCusker in the Frewer Report and the Allen Report, the CCC tabled its own report in Parliament on 14 March 2008 entitled *Report on an Administrative Matter relating to the Functions of the Commission* (‘Administrative Matter Report’).<sup>23</sup>

In the Administrative Matter Report, the CCC sought to justify its Misconduct Opinions against Mr Allen and Mr Frewer. The report also asserted that Mr McCusker had engaged in an “evidentiary review” of the Smiths Beach Report and that an evidentiary review was beyond the functions and powers of the Parliamentary Inspector.

## 1.6 Request by the then Government to the former Committee

After the tabling of the CCC’s Administrative Matter Report, the then Attorney General, Hon Jim McGinty, MLA said in the Legislative Assembly on 18 March 2008:

*The government has resolved to seek advice from the Joint Standing Committee on the Corruption and Crime Commission on ... the mechanism, if any, to resolve any impasse between the CCC and the Parliamentary Inspector of the Corruption and Crime Commission.*<sup>24</sup>

By letter dated 16 April 2008 the then Premier requested the former Committee to report to Parliament on whether there should be a mechanism to resolve disagreements between the Commissioner and the Parliamentary Inspector.

## 1.7 Mr McCusker’s correspondence regarding the CCC’s investigation into Hon Anthony McRae, MLA

By letter dated 27 June 2007, Mr McCusker wrote to the CCC advising that he had received a complaint from Hon Anthony McRae, MLA regarding a number of issues related to a public hearing to which Mr McRae had been summonsed to appear before the CCC on 22 February 2007.

<sup>22</sup> Hon Alan Carpenter, MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 March 2008, pp 626-627.

<sup>23</sup> Corruption and Crime Commission, *Report on an Administrative Matter relating to the Functions of the Commission*, transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 14 March 2008 (Legislative Assembly Tabled Paper No. 3690).

<sup>24</sup> Hon Jim McGinty, MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2008, p 1040.

Mr McCusker requested copies of transcripts of certain intercepted telephone conversations and details of the justification and reasons underlying the decision that Mr McRae should attend a public hearing.

The CCC provided the requested materials and information in subsequent correspondence.

By letter dated 8 April 2008 Mr McCusker advised that he had received a copy of a letter to the CCC from Mr McRae's lawyers dated 3 April 2008. He canvassed a number of the issues raised by them, including their submission that the CCC should report directly, specifically and separately on the investigation relating to Mr McRae.

At that stage the CCC had already decided to report separately in respect of Mr McRae, and so advised Mr McCusker.

By letter dated 11 April 2008 Mr McCusker again wrote to the CCC, having received a further communication from Mr McRae's lawyers, raising a complaint which he suggested it:

*...would be useful for the Commission to consider, before finalising its report, particularly one in which it may be proposed to find "serious misconduct" by Mr McRae.*

Mr McCusker added that before finalising its report the CCC "may find it helpful" to consider the matters which he had set out in a draft paper enclosed with his letter.

The draft paper<sup>25</sup> expressed a number of "tentative conclusions" concerning the manner in which allegations had been put to Mr McRae in the public hearing. In particular, there was a suggestion by Mr McCusker that the CCC should have undertaken investigations to verify a particular fact before putting certain allegations to Mr McRae.

## **1.8 Mr McCusker initiates an inquiry into the CCC**

On 6 June 2008 by written notice to the Commissioner, Mr McCusker, pursuant to section 197(1) of the CCC Act,<sup>26</sup> initiated an inquiry ('Inquiry into the CCC') into matters associated with the Smiths Beach investigation. In conducting such an inquiry the Parliamentary Inspector has the powers, protections and immunities of a Royal Commission.<sup>27</sup>

This was the third time that the Parliamentary Inspector had initiated an inquiry into the CCC using section 197(1) of the CCC Act. The first was in August 2005 concerning Acting

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<sup>25</sup> The letter dated 11 April 2008 and the enclosed draft paper are at Appendix 1 to the CCC's report entitled *Investigation of Alleged Public Sector Misconduct in Connection with the Activities of Lobbyists and Other Persons: The Hon Anthony David McRae MLA and Mr Rewi Edward Lyall*, which was transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 21 November 2008 and deemed tabled on that date (Legislative Assembly Tabled Paper No. 415).

<sup>26</sup> Section 197 (1) of the *Corruption and Crime Commission Act 2003* provides: "For the purposes of the Parliamentary Inspector's functions, the Parliamentary Inspector may make or hold an inquiry".

<sup>27</sup> Section 197(2) of the *Corruption and Crime Commission Act 2003*.



Commissioner Moira Rayner, which resulted in Mr McCusker preparing a report which was publicly released by the former Committee on 26 August 2005.<sup>28</sup> The second was in July 2007 concerning the CCC's investigation of Mr John D'Orazio MLA, which resulted in Mr McCusker preparing the First D'Orazio Report which was tabled in Parliament on 18 July 2007.<sup>29</sup>

Having initiated the Inquiry into the CCC, Mr McCusker, as Parliamentary Inspector, issued a declaration, also on 6 June 2008, to the effect that by reason of potential conflict of interest, he was unable to act further. The Acting Parliamentary Inspector, Mr Ken Martin QC, assessed that act of the Parliamentary Inspector as a declaration, made for the purposes of section 195(3) of the CCC Act which provides:

*The Parliamentary Inspector may declare himself or herself unable to act in respect of a particular matter by reason of an actual or potential conflict of interest.*

By reason of the Parliamentary Inspector's declaration, Mr Martin, as the Acting Parliamentary Inspector, became jurisdictionally empowered as regards the matters the subject of the Inquiry into the CCC.

## 1.9 Mr Martin conducts the Inquiry into the CCC

Mr Martin, as Acting Parliamentary Inspector, requested information and documents from the CCC. In particular Mr Martin was provided by the CCC with copies of materials, including affidavits sworn by an officer of the CCC, used by the CCC to obtain warrants for the interception of telecommunication services under the *Telecommunications (Interception and Access) Act (1979)* (C'th) ('the Commonwealth Interception Act').

Mr Martin also summonsed six CCC officers before a closed hearing (as required by section 197(4) of the CCC Act) to receive their evidence. Each CCC officer duly attended and gave evidence over the course of three days in June 2008.

## 1.10 Work of the former Committee

The Joint Standing Committee on the Corruption and Crime Commission of the 37<sup>th</sup> Parliament ('the former Committee') was actively involved in facilitating a resolution of the issues in dispute between Mr McCusker and the Commissioner. A number of closed session evidence hearings were held and the former Committee circulated a discussion paper to the Parliamentary Inspector

<sup>28</sup> Joint Standing Committee on the Corruption and Crime Commission of the 37<sup>th</sup> Parliament of Western Australia, public hearing, 26 August 2005.

<sup>29</sup> The Parliamentary Inspector's report entitled *Report made pursuant to section 199 of the CCC Act on the Parliamentary Inspector's Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission ("The Commission") Concerning Mr John D'Orazio*, appears at Appendix Two to Report No. 28 of the Joint Standing Committee on the Corruption and Crime Commission of the 37<sup>th</sup> Parliament of Western Australia entitled *Parliamentary Inspectors Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission Concerning Mr John D'Orazio*, tabled in the Legislative Assembly on 18 July 2007 (Tabled Paper No. 2860).

and the Commissioner setting out its preliminary views. A day-long workshop was scheduled to be hosted by the former Committee and attended by Mr McCusker and the Commissioner. However, before the workshop could be held the former Committee ceased to exist, along with the other Legislative Assembly standing and joint standing committees, when the Legislative Assembly was prorogued and dissolved at 4.00pm on Thursday, 7 August 2008.

### **1.11 CCC Report on Stephen Lee**

On 26 September 2008, as neither House of Parliament was sitting, the CCC transmitted a copy of its report entitled *Report on the Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of City of Cockburn* ('CCC Lee Report') to the Clerk of the Legislative Council and the Clerk of the Legislative Assembly. Under section 93(3) of the CCC Act the CCC Lee Report is to be regarded as having been laid before each House.

At the relevant times under consideration in the CCC Lee Report, Mr Lee was the Mayor of the City of Cockburn. Mr Lee also served as a councillor to the City of Cockburn since May 1991, and was elected Mayor in December 2000. Mr Lee was re-elected as Mayor in May 2005.

The CCC Lee Report examined the funding of Mr Lee's election campaign for re-election at the Local Government Elections held in May 2005, particularly the donations received from an entity known as Port Coogee Now and a public relations firm called Riley Mathewson Public Relations.

The CCC Lee Report also examined the relationship between Mr Lee and Australand Holdings Limited ('Australand'), the developer of Port Coogee, and, in particular, any financial contribution by Australand in relation to Mr Lee's election campaign. The report also examined Mr Lee's role in relation to some matters before Council involving Australand and the Port Coogee development.

In the CCC Lee Report the CCC expressed five Misconduct Opinions against Mr Lee.

Despite the fact that the CCC formed an opinion that Mr Lee engaged in misconduct, the CCC made no recommendation that the Department of Local Government and Regional Development give consideration to the taking of disciplinary action against Mr Lee. This is because prior to 21 August 2007 there was no legislative mechanism for disciplinary action against an individual council member.

### **1.12 Cox v CCC [2008] WASCA 199**

In the Smiths Beach Report, the CCC had also expressed a Misconduct Opinion adverse to Dr Walter Cox, who was, at the time, the Chairman of the Environmental Protection Agency. Dr Cox commenced proceedings in the Supreme Court arguing that the CCC had exceeded its jurisdiction in making the Misconduct Opinion. Under the CCC Act there is no right of appeal from a Misconduct Opinion (or indeed from any decision or activity undertaken by the CCC). Instead, the application commenced by Dr Cox was not in the form of an appeal, but rather an application to the Supreme Court to undertake a judicial review of the Smiths Beach Report.

On 6 October 2008 the Western Australian Court of Appeal of the Supreme Court comprising Martin CJ, Steytler P and McLure JA handed down its decision in *Cox v CCC* [2008] WASCA 199.

The Court of Appeal dismissed Dr Cox's application to quash certain aspects of the Smiths Beach Report that pertained to Dr Cox.

### 1.13 Mr Lee's complaint to the Parliamentary Inspector

Following publication of the CCC Lee Report, Mr Lee came under substantial pressure to resign as Mayor of Cockburn.

On 7 October 2008 the Minister for Local Government made the following commentary in an issued media statement:

*Minister announces decision of City of Cockburn Mayor to stand down*

*Local Government Minister John Castrilli has welcomed the decision of Stephen Lee, City of Cockburn Mayor, to stand down from all positions, including the Mayoralty from Wednesday, October 8, 2008.*

*"In a letter to me today, Mr Lee has agreed to lodge a complaint immediately with the Parliamentary Inspector to request a review of the CCC report that concluded **findings of misconduct**<sup>30</sup> by him as an elected member of the City of Cockburn," Mr Castrilli said.*

*"Mr Lee's decision to stand down and stand aside as Mayor allows him to pursue his rights of 'natural justice'.*

*"Importantly, the concerned Cockburn community can be assured that Mr Lee's hands have been effectively removed from the levers of power pending any investigation by the Parliamentary Inspector.*

*"Stephen Lee has advised me in writing that if the Parliamentary Inspector validates the **findings\*** of the CCC report or determines that no further report or review is required, that he will resign as Mayor immediately."*

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<sup>30</sup> The reference to "findings of misconduct" is a misnomer. The Corruption and Crime Commission only has the power to make assessments and form opinions as to whether a public officer has engaged in misconduct. The Corruption and Crime Commission is not a Court and therefore does not have the power to make a binding legal determination that a person has engaged in criminal conduct or has committed a disciplinary offence. A legal determination of guilt or innocence by a Court affects the legal position of the individual, whereas an opinion of misconduct by the Corruption and Crime Commission does not. This is made explicit in section 23 of the *Corruption and Crime Commission Act 2003*. This is not to say that the Corruption and Crime Commission's opinions are a trivial matter. They are expressed both under the authority, and in accordance with, the *Corruption and Crime Commission Act 2003*. The publication of such an opinion, or even an adverse assessment not amounting to misconduct, may therefore have serious consequences for the individual and his/her reputation.

*The Minister said no further action would be taken on the matter while Mr Lee's request for a review was considered by the Parliamentary Inspector.<sup>31</sup>*

(\* emphasis added, see footnote 30)

On 7 October 2008 ABC News reported the following in its online news service:

***Cockburn mayor agrees to resign if CCC findings\* upheld***

*The Local Government Minister John Castrilli has suspended any action against the Mayor of Cockburn, Stephen Lee, after he agreed to resign if the misconduct **findings\*** against him are upheld.*

*Mr Castrilli says he has been told by Mr Lee that he will be lodging a complaint with the Parliamentary Inspector, Malcolm McCusker, immediately over the **findings\*** against him by the Corruption and Crime Commission (CCC).*

*The CCC made five misconduct **findings\*** against Mr Lee, but until now, he has refused to resign.*

*Mr Castrilli says Mr Lee will stand down from the Council tomorrow, but has agreed to resign if Mr McCusker supports the CCC's **findings\***, or if he rules that another review is not necessary.*

*Mr Lee is on paid leave.*

*Mr McCusker says he is obliged to consider any complaint that is lodged with him.*

(\* emphasis added, see footnote 30)

Mr Lee subsequently lodged a complaint with Mr McCusker.

## **1.14 Mr Martin completes his Inquiry into the CCC**

Mr Martin prepared a report ('Mr Martin's report') dated 3 November 2008 containing his conclusions and recommendations concerning the Inquiry into the CCC.

A copy of Mr Martin's report was made available to the CCC on, or about, 3 November 2008.

## **1.15 Establishment of the new Committee and undertaking of a formal inquiry.**

The current Joint Standing Committee on the Corruption and Crime Commission of the 38<sup>th</sup> Parliament ('the Committee') was established on 25 November 2008.

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<sup>31</sup> Hon John Castrilli, MLA, Minister for Local Government, *Minister announces decision of City of Cockburn Mayor to stand down*, Ministerial Media Statement, 7 October 2008.

On 4 December 2008 the Committee resolved to continue the work of the former Committee and resolved to hold a formal inquiry into the functions, powers and responsibilities of the CCC (and its Commissioner) and the Parliamentary Inspector as they pertain to each other.

On 16 December 2008 the Committee wrote to the Commissioner and Mr McCusker inviting them to attend a day long workshop on 4 February 2009.

### **1.16 Mr McCusker prepares a draft report concerning Mr Lee**

In December 2008 the Parliamentary Inspector prepared a draft report of the CCC Lee Report and provided a copy of his draft report to the CCC. Mr McCusker made known to the CCC his intention to table the report. The Committee surmises that the draft report was provided to the CCC by Mr McCusker in order to comply with his obligations under section 200 of the CCC Act which provides:

*Before reporting any matters adverse to a person or body in a report under section 199, the Parliamentary Inspector must give the person or body a reasonable opportunity to make representations to the Parliamentary Inspector concerning those matters.*

### **1.17 CCC seeks to prevent Mr McCusker from tabling his report**

On 18 December 2008 the CCC made an urgent ex parte application to the Supreme Court of Western Australia seeking an injunction to restrain Mr McCusker from presenting or tabling the proposed report.<sup>32</sup>

The application was made without informing Mr McCusker or the Committee.

The application was heard before the Chief Justice of the Supreme Court, Martin CJ on 18 December 2008. His judgment<sup>33</sup> records that the application was supported by affidavits tendered by the CCC and that the affidavits deposed that:

- following publication of the CCC Lee Report, Mr Lee or solicitors acting on his behalf drew certain matters to the attention of Mr McCusker, after which he conducted an investigation into those matters;
- at about 4.00 pm on 15 December 2008, the CCC was advised that there was a document ready for collection from the offices of the Parliamentary Inspector. That document was collected and delivered to the CCC. The document enclosed within it a draft executive summary of a report that Mr McCusker indicated was his intention to publish by tabling before Parliament on Friday, 19 December 2008;

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<sup>32</sup> *Re Parliamentary Inspector of the Corruption and Crime Commission; Ex Parte Corruption and Crime Commission*, Supreme Court proceedings CIV 2776 of 2008.

<sup>33</sup> *Re Parliamentary Inspector of the Corruption and Crime Commission; ex parte Corruption and Crime Commission* [2008] WASC 305 (Western Australian Supreme Court, Martin CJ, 18 December 2008).

- at about 12.45 pm on 17 December 2008, the CCC received another telephone call from the Parliamentary Inspector's office to advise that a document was ready for collection. It was collected shortly thereafter and that document enclosed a copy of the draft report prepared by Mr McCusker and which was entitled "Report on the Corruption and Crime Commission's Report dated 26 September 2008 Concerning Mr Stephen Lee";
- later that afternoon, the CCC wrote to Mr McCusker requiring further time within which to respond to Mr McCusker's report. Mr McCusker responded to that letter by a letter which was received at 12.42 pm on 18 December 2008; and
- in that letter Mr McCusker expressed the view that adequate time had been provided to the CCC to respond to the matters raised in the draft report. The letter concluded by observing that Mr McCusker was not prepared to delay the tabling of his report any later than 4.00 pm on Tuesday, 23 December 2008.

The injunction sought was in aid of an application for a writ of prohibition and a declaration that it would be unlawful and outside the powers of the Parliamentary Inspector to table a report in Parliament in terms of the proposed draft report forwarded to the CCC under cover of Mr McCusker's letter dated 17 December 2008.

The CCC alleged that:

- the proposed report contained errors of law and fact and also contains conclusions that were manifestly unreasonable;
- Mr McCusker had taken irrelevant considerations into account;
- Mr McCusker, in preparing his draft report, had gone beyond his powers and in particular the functions imposed upon the Parliamentary Inspector by section 196 of the CCC Act and the authority to report upon the exercise of those powers conferred by section 199 of the CCC Act when read with section 205 of the CCC Act;<sup>34</sup> and
- Mr McCusker had denied the CCC procedural fairness because of his failure to provide the CCC with a reasonable opportunity to make representations concerning matters within the report that are said to be adverse to it. This was said to contravene section 200 of the CCC Act.

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<sup>34</sup>

Section 205 of the *Corruption and Crime Commission Act 2003* provides that reports by the Parliamentary Inspector must not include certain matters including information that may reveal the identity of a person who has been or is reasonably likely to be investigated by the Corruption and Crime Commission or information that may indicate that a particular investigation has been or is likely to be undertaken by the Corruption and Crime Commission.

Martin CJ dismissed the application to restrain Mr McCusker from tabling his report.<sup>35</sup> Martin CJ made the following points in favour of deciding not to award the injunction:

- there was no justifiable reason for the CCC not to have informed Mr McCusker of the urgent application. For that reason alone, the Court did not grant the injunction;
- the Parliamentary Inspector is an officer of Parliament. The power which he purports to exercise and which the CCC would seek to restrain him from exercising is a power to report to Parliament. That raises serious questions as to the justiciability of the proceedings and a serious question as to whether these proceedings are within the jurisdiction of the Court, and, indeed, as to whether the commencement of the proceedings is, of itself, a contempt of Parliament;
- the appointment of Mr McCusker expired on 31 December 2008. It was reasonable to infer that any acting Parliamentary Inspector or replacement for Mr McCusker would require some considerable time to get to the point where they could have the same degree of confidence in the draft report as Mr McCusker presently enjoys; and
- Mr McCusker's proposed report would go some way towards addressing and perhaps restoring to some extent the reputation of Mr Lee in the light of the previously published report of the CCC. The injunction sought by the CCC would have an adverse impact upon Mr Lee. Mr Lee had not been served with notice of the proceedings, nor has he been given any opportunity to be heard in relation to them, nor had any undertaking as to damages proffered in order to protect Mr Lee from the adverse consequences of any order that the court might make.

Martin CJ did note that, subject to the important qualifications that he had not heard from Mr McCusker, and the doubts that he had as to the jurisdiction of the Court to entertain the proceedings, that the CCC had raised "seriously arguable issues" with respect to:

- excess of jurisdiction, in terms of the functions of the Parliamentary Inspector;
- the nature of the report which he proposed to table; and
- possible contravention of section 205 of the CCC Act.<sup>36</sup>

### **1.18 Mr McCusker tables his report concerning Mr Lee**

Mr McCusker tabled his report on Mr Lee entitled *Report on the Corruption and Crime Commission's Investigation of Alleged Misconduct Concerning Mr Stephen Lee, Mayor of the City Of Cockburn Dated 26 September 2008* ('Lee Report') on 24 December 2008 via the mechanism

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<sup>35</sup> *Re Parliamentary Inspector of the Corruption and Crime Commission; ex parte Corruption and Crime Commission* [2008] WASC 305 (Western Australian Supreme Court, Martin CJ, 18 December 2008).

<sup>36</sup> *ibid*, paragraphs 31-32.

provided by section 206 of the CCC Act (transmitting a copy of his report to the Clerk of each House of Parliament).

### **1.19 Committee tables Report No.1**

On the same day, 24 December 2008, the Committee tabled its Report No.1 with Parliament, reporting on the above, and advising that the Committee would consider as part of the Inquiry the implications of the Court action that the CCC has initiated against Mr McCusker on the ongoing relationship of the CCC and the Parliamentary Inspector.

### **1.20 CCC discontinues CIV 2776 of 2008 and commences fresh proceedings CIV 2832 of 2008**

On 23 December 2008 the CCC discontinued CIV 2776 of 2008 and on 29 December 2008 the CCC commenced fresh proceedings with the Supreme Court CIV 2832 of 2008 entitled *Corruption and Crime Commission of Western Australia v Malcolm James McCusker AO QC, The Parliamentary Inspector of the Corruption and Crime Commission of Western Australia*.

In CIV 2832 of 2008, the CCC sought declarations that:

- it was unlawful, and outside the functions and powers of the Parliamentary Inspector for Mr McCusker to table his Lee Report in Parliament;
- the tabling of the Lee Report involved a breach of section 200 of the CCC Act and a denial of procedural fairness such that the Lee Report was outside the statutory functions and powers of the Parliamentary Inspector, and a nullity; and
- the tabling of the Lee Report involved a breach of section 205 of the CCC Act and was not a report that could be tabled under sections 195(1)(e) and section 199 of the CCC Act.

### **1.21 Cessation of Mr McCusker as Parliamentary Inspector**

Mr McCusker's five year tenure as the inaugural Parliamentary Inspector came to an end on 31 December 2008.

### **1.22 Acting Parliamentary Inspector**

Under the terms of his appointment Mr Ken Martin QC, the Acting Parliamentary Inspector, occupied the position of Parliamentary Inspector from 1 January 2009 until Mr Christopher Steytler QC was appointed as the new Parliamentary Inspector on 1 February 2009.



### 1.23 Approach of the Committee

By letter dated 8 January 2009 to the Presiding Officers of each House of Parliament and to the Commissioner and the Acting Parliamentary Inspector, the Committee wrote:

*The Committee advises:*

1. *it respects the CCC's right to apply to the Supreme Court. Martin CJ has expressed the view that there are "seriously arguable issues" as to whether Mr McCusker has exceeded the powers of the Parliamentary Inspector under the CCC Act with respect to the PI Lee Report;*
2. *nevertheless the Committee is concerned as to:*
  - *the detrimental impact the proceedings will have on the public perception of the CCC and the Parliamentary Inspector;*
  - *the cost of the proceedings; and*
  - *the time and resources that will need to be taken by the Commissioner and the Parliamentary Inspector in dealing with the proceedings*
3. *the Committee will not be seeking legal advice as to whether or not the issues raised by CIV 2832 of 2008, are justiciable;*
4. *both Houses of Parliament should respond as they see fit concerning the issue of justiciability raised by CIV 2832 of 2008;*
5. *that should CIV 2382 of 2008 proceed to judgment, such a judgment will be confined to the facts concerning the PI Lee Report and that it will be of limited assistance to the Committee in resolving the broad range of issues that are currently being considered;*
6. *it will be most productive if it seeks to develop consensus on the respective functions powers and responsibilities of the CCC and the Parliamentary Inspector and propose any policy changes needed to implement this consensus.*

### 1.24 Appointment of Mr Christopher Steytler QC as the new Parliamentary Inspector

On 8 January 2009, the Committee met with the Premier's preferred candidate for appointment as Parliamentary Inspector, Mr Christopher Steytler QC. Following this meeting, the Committee

conveyed to the Premier that Mr Steytler had the support of the majority of the Committee and bipartisan support.<sup>37</sup>

On 28 January 2009 the Premier announced the appointment of Mr Steytler as the new Parliamentary Inspector. His appointment is for five years and commenced on 1 February 2009.

Mr Steytler is the former President of the Court of Appeal of the Supreme Court of Western Australia.

## **1.25 Committee receives an abridged version of Mr Martin's report**

The Committee received an abridged version of Mr Martin's report (with the annexures removed) on 19 January 2009.

On 13 February 2009 the Committee issued a press release noting as follows:

*The Acting Parliamentary Inspector, Mr Ken Martin QC has provided a report to the Committee concerning his Inquiry into the Smiths Beach Investigation.*

*The report provided to the Committee did not contain a number of annexures which were of an operationally sensitive nature. The Committee accepted that this was appropriate.*

*Mr Martin advised the Committee that the report was highly confidential.*

*The Committee requested Mr Martin to provide a synopsis of his report for public dissemination.*

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<sup>37</sup> Section 189 of the CCC Act provides:

- (1) *The Parliamentary Inspector is to be appointed on the recommendation of the Premier by the Governor by commission under the Public Seal of the State.*
- (2) *Except in the case of the first appointment, the Premier is to recommend the appointment of a person —*
  - (a) *whose name is on a list of 3 persons eligible for appointment that is submitted to the Premier by the nominating committee; and*
  - (b) *who, if there is a Standing Committee, has the support of the majority of the Standing Committee and bipartisan support.*
- (3) *The Parliamentary Inspector is to hold office in accordance with this Act.*

Attached to the press release was Mr Martin's synopsis of his report which is reproduced below

### **SYNOPSIS**

*In June 2008 the Acting Parliamentary Inspector of the Corruption and Crime Commission, Mr Ken Martin QC, conducted an Inquiry into aspects of the Corruption and Crime Commission's Smiths Beach Investigation under s 197(1) of the Corruption and Crime Commission Act 2003. There were seven terms of reference, including an allegation of misconduct against a senior investigator.*

*The Acting Parliamentary Inspector found that there was no misconduct.*

*Mr Martin said that the terms of reference which were "of dominant significance" to his report were three which concerned the "procedures" used by the Commission in its applications for, and the obtaining of, telecommunications interception and surveillance device warrants. Those three terms of reference required the Acting Parliamentary Inspector to examine:*

- (5) The Commission procedures used in the application and obtaining of warrants under the Telecommunication (Interception and Access) Act 1979 and the Surveillance Devices Act 1998, in the Smith's Beach investigation.*
- (6) The evidence contained in the affidavits in support of the applications for those warrants.*
- (7) Whether information obtained by virtue of those warrants issued under the Telecommunication (Interception and Access) Act 1979 and the Surveillance Devices Act 1998 in the Smith's Beach Investigation was used by the Commission for any purpose other than the Smith's Beach Investigation.*

*The only circumstance in which the Commonwealth legislation allows the Parliamentary Inspector to access the Commission's telecommunication warrants, applications and affidavits, is when conducting a formal inquiry under the CCC Act. The Commission accordingly gave Mr Martin complete access to materials of that kind required by him.*

*Mr Martin found that the TI applications were properly and honestly founded in law and supported by the evidentiary materials available. He did recommend supporting affidavits in future be more clearly expressed, especially as to whether the reasonable suspicion was in respect to an offence that had been committed, or was in respect to an offence that would be committed in the future.*

*The Commission has accepted and implemented his recommendations.*

*Mr Martin wrote:*

*"As to Term of Reference 7, regarding the use of information obtained by virtue of warrants for a purpose or purposes other than the Smiths Beach investigation, the course of this inquiry did not, in my assessment, reveal any credible evidence sustaining a concern in that quarter. Nor did I apprehend counsel assisting the*

*inquiry to be submitting in his concluding written submissions that any matter had emerged in the course of the inquiry, sustaining such a concern”.*

*Mr Martin stated his overall position in these words:*

*“I find myself, at conclusion of my inquiry, in a position where I did not see it appropriate to suggest any adverse findings of misconduct as against the CCC, or its officers. I do propose however to make some observations bearing upon the “appropriateness” of the content of the affidavits of Mr Ingham as used by the CCC, to obtain the compulsive warrants referred to. My observations are however only in the nature of recommendations by me to the CCC, directed towards hopefully, improving for the future, an overall “appropriateness” of its procedures – in the CCC going about the obtaining of such compulsive warrants. I emphasise that my observations are made by way of intended assistance only, and they carry no pejorative connotations against the CCC, or any of its officers. Moreover, I could not and do not seek to bind the CCC to implementing any of my recommendations. Obviously, the CCC will determine these matters for itself. Nevertheless, it is my intention that the CCC receive my report in the aim of this statutory office providing potential assistance, as to the CCC’s procedures”.*

*The Commission has accepted Mr Martin’s recommendations in that spirit, and has implemented them.*

## **1.26 Workshop on 4 February 2009**

On 4 February 2009 the Committee hosted a day long workshop (“the Workshop”) attended by:

- the Hon Len Roberts-Smith RFD QC, Commissioner;
- Mr Christopher Steytler QC, Parliamentary Inspector;
- Mr Malcolm McCusker AO QC, former Parliamentary Inspector;
- Mr Ken Martin QC, Acting Parliamentary Inspector;
- Ms Gail Archer SC, Acting Commissioner;<sup>38</sup> and
- Mr Murray Alder, Principal Legal Officer of the Office of the Parliamentary Inspector.

At the conclusion of the Workshop the Committee issued a media release which referred to the holding of the Workshop. The media release noted:

<sup>38</sup>

In February 2008 Ms Archer completed a review of the *Corruption and Crime Commission Act 2003*, contemplated by section 226 of the *Corruption and Crime Commission Act 2003*. Her report entitled *Review of the Corruption and Crime Commission Act 2003* was tabled in Parliament on 18 March 2008 by the then Attorney General, Hon Jim McGinty, MLA. (Legislative Assembly Tabled Paper No. 3707).

*The Commissioner and the Parliamentary Inspector, with the support of all participants, including the former Parliamentary Inspector Mr Malcolm McCusker AO QC, have agreed on a **process** to address the respective functions and powers of the Commission and the Office of the Parliamentary Inspector.*

*Both have confidence that they will be able to arrive at a successful outcome.*

*As a reflection of this confidence, and notwithstanding the Commission considers the proceedings are justiciable by the Supreme Court and have good prospects of success, the Commissioner has decided to discontinue CIV 2832 of 2008.*

*The above was as a result of a day long closed hearing of the Committee and therefore cannot be the subject of further comment.*

*The Committee thanks all the participants for their constructive contribution to this process.*

*The Committee looks forward to working with the Commissioner and the Parliamentary Inspector over the coming months.*

(emphasis added)

## **1.27 Agreed process going forward**

As can be seen the media release refers to a “process” to be undertaken by the Commissioner and the Parliamentary Inspector to address their respective functions and powers.

On 27 February 2009 the Committee received a letter from the Parliamentary Inspector indicating that on 24 February 2009 the following agreement had been reached between the Commissioner and the Parliamentary Inspector as to the process to be undertaken:

*The Hon Len Roberts-Smith, QC, Commissioner of the Corruption and Crime Commission, and Mr Christopher Steytler, QC, Parliamentary Inspector of the Corruption and Crime Commission, with the support of the Joint Standing Committee, have agreed that:*

1. *over the ensuing six months they will, in their dealings with each other, identify any issues of principle on which they differ concerning their respective functions and powers;*
2. *at the conclusion of that period, or sooner, they will:*
  - (a) *discuss any differences of principle and their practical consequences;*
  - (b) *endeavour to agree upon the issues, if any, in respect of which legislative reform is required, and*
    - (i) *place before the Joint Standing Committee agreed suggestions for legislative reform, or*

- (ii) *if no agreement can be reached in the form of any required amendments, place before the Joint Standing Committee their respective suggestions for legislative reform for consideration by the Joint Standing Committee and, ultimately, Parliament.*

## **1.28 Discontinuance of CIV 2832 of 2008**

As indicated in the media release issued by the Committee, following the Workshop on 4 February 2009, CIV 2832 of 2008 was discontinued on 6 February 2009.

## **CHAPTER 2 TO WHAT EXTENT CAN THE PARLIAMENTARY INSPECTOR REVIEW A MISCONDUCT OPINION OF THE CCC?**

### **2.1 Introduction**

If every time there was a disagreement between the CCC and the Parliamentary Inspector as to the operation of the CCC Act the parties had to resort to litigation to settle their differences, the public would rapidly lose confidence in both the CCC and the Parliamentary Inspector, and this Committee would be remiss in allowing such a situation to allow itself to perpetuate.

One issue that was the subject of substantial debate between Mr McCusker and the Commissioner was the ability of the Parliamentary Inspector to critically review Misconduct Opinions reached by the CCC.

The Workshop achieved the result that Commissioner and the Parliamentary Inspector agreed on a process whereby differences of opinion could be addressed in an orderly manner without the spectre of litigation.

The Committee is of the view that a solution must be found that is workable for both the CCC and the Parliamentary Inspector, and at the same time achieve the objectives of the CCC Act.

The Committee anticipates that in the next six months the Commissioner and the Parliamentary Inspector will report back to the Committee with an update as to how their deliberations are proceeding and whether they have any joint recommendations as to possible amendments to the CCC Act, or whether their differences (if any) can be addressed by administrative arrangements between the two parties.

Upon receipt of the joint recommendations (if any) of the Parliamentary Inspector and the Commissioner, the Committee will review the recommendations to ensure that the objectives of the CCC Act are fulfilled.

The Committee is of the view that it would be inconsistent with the agreement reached at the Workshop (which was to allow the new Parliamentary Inspector and the Commissioner a period of six months to see if they can come to a working arrangement) for the Committee to express its concluded view as to how differences of principle can be resolved.

However the Committee considers it important for Parliament to be appraised of the arguments presented to the Committee to date by Mr McCusker and the Commissioner, together with an indication of the Committee's preliminary view as to the preferred position from a policy perspective.

Accordingly, set out below is the Committee's analysis of the ability of the Parliamentary Inspector to critically review Misconduct Opinions reached by the CCC, with the important caveat that no concluded position has been reached by the Committee.

## 2.2 Functions and powers of the Parliamentary Inspector

The office of the Parliamentary Inspector was established to ensure accountability of the CCC. The CCC Act confers ‘functions’ and ‘powers’ on the Parliamentary Inspector to fulfil that role.

The Parliamentary Inspector has the following functions under section 195 of the CCC Act:

- to audit the operation of the CCC Act;
- to audit the operations the CCC for the purposes of monitoring compliance with the laws of the State;
- to audit any operation carried out pursuant to the powers conferred or made available by the CCC Act;
- to assess the effectiveness and appropriateness of the CCC’s procedures;
- to make recommendations to the CCC; and
- to report and made recommendations to either House of Parliament and the Committee.

The Parliamentary Inspector has significant powers under section 196 of the CCC Act to enable him to perform his functions. Powers relevant to the audit function are:

- the Parliamentary Inspector may investigate any aspect of the CCC’s operations or any conduct of officers of the CCC;
- the Parliamentary Inspector is entitled to full access to the records of the CCC and to take or have copies made of any of them; and
- the Parliamentary Inspector may require officers of the CCC to provide information or attend before the Parliamentary Inspector.

## 2.3 Mr McCusker’s first articulation of the scope of power of the Parliamentary Inspector to review Misconduct Opinions

Mr McCusker has asserted that:

- the Parliamentary Inspector can review the “adequacy” of an investigation undertaken by the CCC and if an investigation is “inadequate” and that “inadequacy” “flows through” to a Misconduct Opinion such as to render the Misconduct Opinion “false” or “wrong” then he can report these matters to Parliament; and
- even if there hasn’t been an “inadequacy” of an investigation, the Parliamentary Inspector can still express a view that it is not arguable that the Misconduct Opinion was open on the evidence available.<sup>39</sup>

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<sup>39</sup> Malcolm McCusker, Parliamentary Inspector, *Transcript of Evidence*, closed hearing, 27 February 2008, session two, p 3.



Mr McCusker gave evidence before the former Committee that in his view the source of the power to do the above was to be found in section 195(1)(cc) of the CCC Act which provides that the Parliamentary Inspector has the function to “audit any operation carried out pursuant to the powers conferred or made available by this Act”. On 17 March 2008 Mr McCusker said:

*If I may add to that, it may really come down to this: on some matters raised by the parliamentary inspector, the commission may say, “That is going beyond your power or your function because it’s not part of your function to simply look at the same evidence that we looked at and reach a different conclusion.” That may well be so if the conclusion reached by the commission is at least reasonably open on that evidence, but as I said earlier, that is not what I have done in this case. I have looked at the entire investigation and audited that investigation and the follow-through, which is the report. I do not see how that could be said to be outside the functions of the parliamentary inspector, particularly those set out under section 195(1)(cc).<sup>40</sup>*

On 27 February 2008 Mr McCusker said to the former Committee.

*I have taken the view that part of my audit function includes the review, examination and ultimately—possibly—reporting on investigations conducted by the CCC and on any reports the CCC may make as a result of that investigation.<sup>41</sup>*

It is not clear from the above passage whether Mr McCusker’s reference to “audit function” is a reference only to section 195(1)(cc) of the CCC Act, or was meant as a shorthand expression to the following functions of the Parliamentary Inspector in section 195 which contain the word “audit”:

- to audit the operation of the CCC Act - section 195(aa);
- to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State - section 195(a); and
- to audit any operation carried out pursuant to the powers conferred or made available by this Act - section 195(cc).

## 2.4 Equating “audit” with “review”

The Committee notes that there is no express reference to ‘review’ in the audit provisions of section 195 of the CCC Act.

In a letter to the CCC dated 5 February 2008, Mr McCusker provides the following justification for equating “audit” with “review”:

*The relevant (and applicable) definition [of audit] (see the New Shorter Oxford Dictionary) is a “hearing, an enquiry, a methodical and detailed review ... a searching examination.*

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<sup>40</sup> Malcolm McCusker, Parliamentary Inspector, *Transcript of Evidence*, closed hearing, 17 March 2008, session three, p 10.

<sup>41</sup> Malcolm McCusker, Parliamentary Inspector, *Transcript of Evidence*, closed hearing, 27 February 2008, p 3.

## 2.5 David Grace opinion

A second string to Mr McCusker's bow was added when Mr John Quigley, MLA commissioned a legal opinion from David Grace QC which was provided gratis to Mr McCusker, and which was subsequently provided to the former Committee.

Mr Grace, in his opinion dated 1 April 2008, opined as follows:

*In my opinion there can be little doubt that the Parliamentary Inspector was intended to have, and has, the power to audit reports and that the Frewer Report was within the jurisdiction of the Parliamentary Inspector pursuant to Division 2 generally, and sections 195 and 196 specifically, of the Act. The manner of the exercise of the powers by the Parliamentary Inspector in relation to the Frewer Report clearly fell within the parameters contemplated by the Attorney in the second reading speech referred to above. However, the audit power<sup>42</sup> of the Parliamentary Inspector is not an unconstrained power to review, akin to appellate review. A close analogy is with powers of administrative review<sup>43</sup>, although the analogy is not perfect because the Parliamentary Inspector does not have the power to quash decisions of the Commission, only to report to Parliament about them. Principles of administrative review involve considering whether a decision maker has*

- (1) *taken into account irrelevant considerations;*
- (2) *failed to take into account relevant considerations;*
- (3) *denied to any person against whom an adverse finding is made principles of natural justice preserved by the Act;*
- (4) *reached a decision which no reasonable decision maker could possibly reach;*
- (5) *made errors as to his jurisdiction or errors of law.*

The relevant passage of the then Attorney-General's second reading speech referred to in Mr Grace's opinion is reproduced below:

*A greater degree of accountability is achieved through the role of the inspector, which is extremely powerful. The inspector has completely unfettered access to all CCC information, including operational matters and, for the purpose of his or her inquiries, all the powers, protections and immunities of a royal commission. In addition to having a reporting function, the parliamentary inspector will have responsibility for auditing the operations of the CCC and assessing the effectiveness and appropriateness of the CCC's procedures. In the overall context of the legislation, this office of the parliamentary*

<sup>42</sup> Mr Grace uses the phrase "audit power" as a shorthand expression for the following functions of the Parliamentary Inspector:

- to audit the operation of the *Corruption and Crime Commission Act 2003*- section 195(aa);
- to audit the operations of the Corruption and Crime Commission for the purpose of monitoring compliance with the laws of the State - section 195(a); and
- to audit any operation carried out pursuant to the powers conferred or made available by the *Corruption and Crime Commission Act 2003* - section 195(cc).

<sup>43</sup> The phrase "administrative review" is undoubtedly meant to be a shorthand reference to "judicial review of administrative action". In some text books "administrative review" is equated with a merits review of administrative action, and this is clearly not the sense in which Mr Grace seeks to convey.

*inspector provides an important balance in relation to the CCC's extensive powers. Its presence will give Western Australians an additional reason to have confidence in the CCC by ensuring that the CCC's operations and exercise of powers conform to, and are conducted in accordance with, basic principles underlying the law.*<sup>44</sup>

Mr McCusker said "Mr Grace QC has correctly stated the position regarding the extent of the powers of the Parliamentary Inspector."<sup>45</sup>

## 2.6 Legal opinion proffered by the CCC

On 18 March 2008 the CCC proffered to the former Committee a legal opinion of Messrs Peter Hanks QC and Peter Quinlan ('Hanks and Quinlan opinion') in support of the CCC's position.

The following points are made in the Hanks and Quinlan opinion:

- there is no express conferral on the Parliamentary Inspector of the function of "reviewing" any assessment or opinion of the CCC and that such an omission is significant for the interpretation of the CCC Act as whole, given that it would have been a simple matter for the Parliament to include such an express function;
- paragraphs (aa), (a) and (cc) of section 195(1) provide for the Parliamentary Inspector to conduct "audits". The word "audit" should be given a broad meaning. The Shorter Oxford Dictionary defines audit to include:
  - ... a methodical and detailed review...
- whilst "audit" involves a "methodical and detailed review", it is relevant that, when used in section 195(1)(aa), (a) and (cc), the word "audit" is qualified. That is, the "audit" functions are:
  - "to audit the operation of the CCC Act": section 195(1)(aa);
  - "to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State": section 195(1)(a); and
  - "to audit any operation carried out pursuant to the powers conferred or made available by this Act": section 195(1)(cc).
- the words underlined are words of limitation and, consistent with the intention of Parliament, they must be given some meaning;
- the function directed to the CCC's operations, conferred by section 195(1)(a), is concerned with ensuring that the CCC exercises its powers lawfully and in accordance with basic legal principles such as procedural fairness;

<sup>44</sup> Hon Jim McGinty, MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 May 2003, p 7862.

<sup>45</sup> Malcolm McCusker, letter to the former Committee dated 4 April 2008 enclosing *Commentary on a Report of the Corruption and Crime Commission on "An Administrative Matter Relating To The Functions Of The Commission"*, p 19.

- section 195(1)(cc) is directed to the audit of exceptional powers made available under Part 4 of the CCC Act (which are concerned with organised crime, and not the misconduct function of the CCC);
- section 195(1)(c) (which authorises the Parliamentary Inspector "to assess the effectiveness and appropriateness of the Commission's procedures") is concerned with procedures, although the Parliamentary Inspector is not confined to the lawfulness of such procedures but may also assess their appropriateness;
- in some cases the manner of exercise of the CCC's powers may affect the outcome of a particular investigation. A failure to consider relevant evidence, or a failure to accord procedural fairness to a person, may lead to the CCC forming an opinion that would not have been formed had the failure not occurred. In such a case, a proper "audit" of the CCC's operations may:
  - require detailed attention to be given to the particular circumstances of an investigation; and
  - affect the opinions formed by the CCC;
- to that extent, the Parliamentary Inspector's audit of the CCC's operations and an assessment of its procedures might involve a consideration of particular conclusions reached by the CCC, and may lead the Parliamentary Inspector to recommend to the CCC that it change its opinion or withdraw its recommendation;
- it is not a function of the Parliamentary Inspector to substitute his own opinion for the CCC's opinion in relation to a matter within the CCC's misconduct function;
- the identification of material not considered by the CCC, and the reasons for that omission, were matters properly falling within the Parliamentary Inspector's functions;
- however, the further step taken by the Parliamentary Inspector of expressing a different view as to the ultimate conclusion on the evidence, was not part of the Parliamentary Inspector's functions;
- the distinction may be illustrated by reference to paragraph 5 of the Executive Summary of the Frewer Report, which referred to the following matters as leading to the CCC's opinion of "misconduct":
  - (a) a failure to check for accuracy the Minutes of the May 2006 meeting against the tape-recording of that meeting, which was in the CCC's possession;
  - (b) its failure to consider whether what Mr Frewer did say, at the outset of the meeting, was a sufficient report of lobbying;
  - (c) its failure to ascertain precisely what were the terms of the resolution of the South West Region Planning Committee ('SWRPC') to record "lobbying", and the views of the SWRPC members as to whether Mr Frewer's statement was adequate;
  - (d) its mistaken view that a failure to report "lobbying" would be failure to act "impartially" or with "integrity"; and

- (e) its mistaken view that if a public officer, who has been “lobbied” by someone, subsequently makes a decision or votes in a way which coincides with the wishes of the lobbyist, it follows that the public officer has acted “at the request of” the lobbyist, and not with integrity or impartiality;
- identification by the Parliamentary Inspector of the matters referred to in paragraphs (a) to (c) are matters that fall within the Parliamentary Inspector's “audit” functions. However, the matters in paragraphs (d) and (e) do not: the matters raised in those paragraphs simply reflect a difference of view on the part of the Parliamentary Inspector on the evaluation of the evidence and the relevant standard to be applied in the application of the definition of “misconduct” under the CCC Act. Those are not matters to which the Parliamentary Inspector's functions extend; and
- if the Parliamentary Inspector's “audit” reveals some deficiency in the procedures followed by the CCC (including a failure to obtain or consider certain evidence), it is properly part of the Parliamentary Inspector's functions to refer that deficiency to the CCC. It would also be a proper discharge of the Parliamentary Inspector's functions in such a case to recommend to the CCC that it reconsider its opinion.

At this point the Committee makes the following observations of the Hanks and Quinlan opinion:

- the Hanks and Quinlan opinion and Mr McCusker are in agreement that “audit” can be equated with “methodical review”.

## 2.7 Meaning of “evidentiary review”

In addition to the concepts of “judicial review” and “merits review” there is an additional concept of “evidentiary review” referred to in the Administrative Matter Report tabled by the CCC.<sup>46</sup>

The Administrative Matter Report states:

*[the CCC] does not accept that the Parliamentary Inspector has nor should have a role in terms of conducting evidentiary reviews of the Commission's reports, particularly their assessment of evidence and the resultant opinions and recommendations.*<sup>47</sup>

And at pages 50 - 51:

*However, the approach taken by the Parliamentary Inspector in relation to the Commission's opinions about Messrs Frewer and Allen in the Smiths Beach Report has created a substantial difficulty which the CCC Act has no mechanism to resolve. In the Commission's view, that is because the Legislature never intended nor contemplated that the functions of the Parliamentary Inspector would extend to substituting his own assessment of the evidence, opinions and recommendations for those of the Commission.*

<sup>46</sup> Corruption and Crime Commission, *Report on an Administrative Matter relating to the Functions of the Commission*, transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 14 March 2008 (Legislative Assembly Tabled Paper No. 3690).

<sup>47</sup> *ibid*, pp 1-2.

### ***The Functions of the Parliamentary Inspector***

*It is the Commission's view that the Legislature never intended this situation to arise. And it could not arise, unless the functions and powers of the Parliamentary Inspector extended to undertaking an evidentiary review of Commission reports and making recommendations to the Commission based on his own evaluation of the evidence and other materials.<sup>48</sup>*

The expression “evidentiary review” is not a term of art, or a term that carries with it any special meaning (as opposed to “judicial review” and “merits review” which are terms commonly used by lawyers). The Committee understands the CCC’s reference to “evidentiary review” in its Administrative Matter Report to simply mean a review of the evidence.

The Administrative Matter Report gives the impression that the CCC is of the view that there is a blanket prohibition on the Parliamentary Inspector reviewing the evidence upon which the CCC has based its Misconduct Opinion. If this is the CCC’s contention, the Committee would not support it.

Even in the case of judicial review it is often necessary, and permissible, for the reviewer to conduct a review of the evidence in order to discern whether certain grounds of judicial review have been made out. For example, the following grounds of judicial review involve, by their very nature, an examination by the reviewer of the evidence that was before the initial decision maker:

- has the decision maker taken into account irrelevant considerations?
- has the decision maker failed to take into account relevant considerations? and
- has the decision maker made a decision which no reasonable decision maker could possibly have reached?

Accordingly, the Committee considers the mere labelling of the actions of the Parliamentary Inspector as an “evidentiary review” is not of itself reason to assert that the Parliamentary Inspector has exceeded his jurisdiction.

## **2.8 Mr McCusker’s second articulation of the scope of power to review Misconduct Opinions**

In his Lee Report, dated 24 December 2008, Mr McCusker states:

*I do not have a statutory power to “reverse” or set aside an opinion expressed by the CCC or to substitute mine. This report does not do that. It is confined to a consideration of the process by which the opinions in the Report were reached, and whether it was appropriate.*

Necessarily implicit in this statement is that Mr McCusker is of the view that the Parliamentary Inspector has the power to consider the “process” by which Misconduct Opinions are reached, and whether such process is “appropriate”.

The Committee takes the view that in making such a statement, Mr McCusker is purporting to rely on section 195(1)(c) of the CCC Act which provides that it is one of the Parliamentary Inspector’s functions “to assess the effectiveness and appropriateness of the Commission’s procedures”.

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<sup>48</sup> *ibid*, pp 30 - 31.

The Committee notes that the Hanks and Quinlan opinion makes the following observations:

- section 195(1)(c) is concerned with procedures, although the Parliamentary Inspector is “not confined to the lawfulness of such procedures but may also assess their appropriateness”;
- a deficiency in “procedures” followed by the CCC includes “a failure to obtain or consider certain evidence”; and
- an “assessment of its procedures” might involve “a consideration of particular conclusions reached by the CCC, and may lead the Parliamentary Inspector to recommend to the CCC that it change its opinion or withdraw its recommendation”.

The above observations can be contrasted with the CCC’s own submissions made to Mr McCusker concerning Mr McCusker’s purported reliance on section 195(1)(c) as the foundation for his Lee Report. The CCC submitted:

[40] *The only other possible function is that to assess the effectiveness and appropriateness of the Commission’s procedures (s.195(1)(c)). It appears from paragraphs [9] and [10] of the proposed report, that this is the statutory basis which is relied upon to conduct this exercise and present the proposed report.*

[41] *In the Commission’s view, s.195(1)(c) gives no authority for what is being done here.*

[42] *“Procedure” is defined in the Shorter Oxford English Dictionary as:*

*“1. The fact or manner of proceeding; a system of proceeding; conduct; behaviour; spec (a) law the formal steps to be taken in a legal action; the mode of conducting judicial proceedings; (b) politics the mode of conducting business in Parliament.”*

[43] *The Macquarie Dictionary 7 defines “procedure” as:*

*“noun 1. The act or manner of proceeding in any action or process; conduct. 2. a particular course or mode of action. 3. mode of conducting legal, parliamentary, or other business especially litigation and judicial proceedings”.*

[44] *What s.195(1)(c) is directed to is a function of assessing the effectiveness and appropriateness of the Commission’s procedures in the sense of instructions, standard operating procedures, general directives or the like, prescribing the mode of conduct of its business, investigations and examinations.*

[45] *The “process” of reasoning, or “process” by which the Commission has expressed itself, or by which its opinions were reached, in a particular report, do not sit within any ordinary meaning of the word “procedures” in the context of s.195 of the CCC Act.*

[46] *The Commission believes the proposed report, and the exercise leading to it, have no lawful foundation in the functions or powers of the Parliamentary Inspector. In the Commission’s contention, they are beyond statutory power and the proposed report is not one that can lawfully be tabled, in the exercise of the Parliamentary Inspector’s statutory functions or powers.*

## 2.9 The “adequacy” of a CCC investigation

As referred to previously, Mr McCusker considers that the Parliamentary Inspector has the ability to review the “adequacy” of a CCC investigation. Mr McCusker is of the view that if there has been an “inadequacy” in the handling of an investigation which has tainted the Misconduct Opinion to the point where it is unsound, Mr McCusker considered it appropriate, if not his obligation, to report this matter to Parliament.

The word “adequacy” is not a term of law and does not appear in the CCC Act. The word “adequacy” does not appear to be used by Mr McCusker as connoting any particular legal standard (such as negligence) and does not appear to be used by Mr McCusker as an equivalent to “unlawful” or “illegal”.

The Committee considers that the Parliamentary Inspector should have considerable flexibility in deciding which aspects, and for what purposes, he wishes to review an investigation of the CCC. In this respect the Committee considers that the Parliamentary Inspector should have the power to review the “adequacy” of a CCC investigation, with the word ‘adequacy’ open to a plain English understanding so as to enable the Parliamentary Inspector to express his views as to whether:

- the CCC has acted fraudulently (bad faith);
- the CCC has failed to afford natural justice or has acted in excess of its jurisdiction (illegality);
- the CCC has not acted up to the standards of a competent CCC (negligence);
- the CCC has made errors of fact, or the CCC’s reasoning is illogical (irrationality); and
- whether there is room for improvement to achieve best practice.

The Committee is of the view that Parliament would want to be informed if the Parliamentary Inspector was of view that the CCC had acted:

- in bad faith, irrespective of whether the bad faith was a causal factor in the formation of the Misconduct Opinion;
- illegally, irrespective of whether the bad faith was a causal factor in the formulation of the Misconduct Opinion;
- negligently, if the negligence was a causal factor in the formulation of the Misconduct Opinion;
- irrationally, but only if the irrationality was gross and a dominant cause of the Misconduct Opinion. In other words, had it not been for the irrationality the Misconduct Opinion would not have been reached; or
- short of best practice, but only if there was evidence that the shortcomings were endemic or systematic, and not just confined to an individual investigation.

However the Committee consider it undesirable if the Parliamentary Inspector were to simply express the view that he would have conducted the investigation in a different manner. Such a



view, expressed without reference to any of the above criteria, would be of no assistance to Parliament.

In preparing a report critical of the CCC, the Committee expects the Parliamentary Inspector to make clear that whenever he criticises any aspect of a CCC's investigation, that he makes clear the particular standard he has had regard to when making such a criticism (bad faith, illegality, negligence, irrationality or short of best practice), and that, where possible, objective criteria are set out so that it is obvious to the reader that the Parliamentary Inspector's criticisms are not merely the expression of a personal opinion by the Parliamentary Inspector as to what he thinks should have been done, but rather the highlighting of a short coming of the CCC when assessed against readily understood objective criteria.

For example, if the Parliamentary Inspector is of the view that the CCC should have interviewed a particular witness, the Parliamentary Inspector needs to express the reasons why he holds this belief, and whether he is asserting that the CCC has acted in bad faith in not doing so, or has acted illegally, negligently, irrationally or not up to best practices, and to set out the objective criteria against which his belief can be assessed.

Detailed consideration needs to be given by the Parliamentary Inspector to relevant case law and precedent before the Parliamentary Inspector should express an opinion that negligence and/or illegality has been made out. The Committee would expect that any allegation that there has been a "failure" by the CCC in some aspect of its operations is accompanied by relevant authorities, precedent or other objective criteria.

The Committee is of the view that the process of continuous improvement in the CCC's procedures is largely progressed through detailed examination of the investigative techniques and practices of the CCC by the Parliamentary Inspector. Accordingly, the Committee considers that the Parliamentary Inspector should have the function of being able to review the adequacy of CCC investigations.

The Committee considers that the Parliamentary Inspector should, from a policy perspective, have the flexibility to say whatever he thinks is necessary to provide a full and frank assessment of the adequacy of an investigation.



## **CHAPTER 3 SCOPE OF THE PARLIAMENTARY INSPECTOR'S REPORTING FUNCTION**

### **3.1 Introduction**

The scope of the Parliamentary Inspector's reporting function has been a major issue in dispute between the Commissioner and Mr McCusker.

Whilst it is possible to discern some common ground between the Commissioner and Mr McCusker on the issue as to whether the Parliamentary Inspector should be entitled to conduct a review of the adequacy of a CCC investigation; and (with less confidence) that there is a measure of agreement that the Parliamentary Inspector can express a view as to the legality of a Misconduct Opinion by reference to established grounds of judicial review, their positions diverge markedly on the issue of whether the Parliamentary Inspector is entitled to table his (critical) review in Parliament.

Mr McCusker is of the view that the Parliamentary Inspector is able to table reports critical of the CCC in Parliament. Under the CCC Act the Parliamentary Inspector is able to table certain reports on his own initiative, without any requirement that they be tabled with the Committee. Mr McCusker is of the view that the reports that he did table direct with Parliament were reports of a nature that he was entitled to table on his own initiative.

Mr McCusker tabled four reports direct with Parliament. On another occasion Mr McCusker tabled his report with the former Committee, which then proceeded to table its own report with Mr McCusker's report as an annexure.<sup>49</sup>

The Commissioner has expressed the view is that it is not the function of the Parliamentary Inspector to table reports which critique a CCC investigation or a Misconduct Opinion. The Commissioner has further expressed the view that the appropriate course of action is for the Parliamentary Inspector to provide a private report to the CCC or to only table the report with the Committee and not Parliament.

The Commissioner submits that the Committee should play a role in vetting any reports of the Parliamentary Inspector before they are tabled in Parliament.

The Commissioner has proffered the Hanks and Quinlan opinion in support of his position, which asserts that Parliamentary Inspector does not currently have under the CCC Act the power to comment publicly on the facts, conduct or outcome of any particular CCC investigation.

Mr McCusker has provided his own response to the Hanks and Quinlan opinion.

### **3.2 Hanks and Quinlan opinion - restrictions on the ability of the Parliamentary Inspector to report to Parliament**

As referred to previously, Messrs Hanks and Quinlan opine that in certain circumstances, it may be permissible for the Parliamentary Inspector to consider particular conclusions reached by the

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<sup>49</sup> See section 1.1.

CCC, which may lead the Parliamentary Inspector to recommend to the CCC that it change its opinion or withdraw its recommendation.

However Messrs Hanks and Quinlan consider it to be a “separate and distinct matter” whether the Parliamentary Inspector may report his findings to Parliament. Thus Messrs Hanks and Quinlan envisage certain situations whereby the Parliamentary Inspector may be entitled to review a Misconduct Opinion, but be prohibited from reporting the outcome of his review to Parliament. Messrs Hanks and Quinlan put forward two arguments in support of this position, which are discussed below.

### 3.3 First argument

Firstly, Messrs Hanks and Quinlan contend:

- the reports that may be given to Parliament are set out in section 199(1) of the CCC Act:
  - (1) *The Parliamentary Inspector may at any time prepare a report as to any of the following matters -*
    - (a) *any matters affecting the Commission, including the operational effectiveness and requirements of the Commission;*
    - (b) *any administrative or general policy matter relating to the functions of the Parliamentary Inspector.*
- the language of section 199(1)(a), referring to matters “affecting” the Commission and the words which follow, suggests concern with matters that impact upon the Commission and its operations rather than its reports or opinions formed by the Commission;
- in section 199(1)(a) of the CCC Act, the word “affecting” is used in the context of terms such as “operational effectiveness” and “requirements”. Although those matters are inclusive, rather than exclusive, they suggest that reports will deal with matters of general application and not particular investigations by the Commission.

If this argument were to prevail, it would be contrary to the Committee’s view of the original intent of the CCC Act and amendments should be made to the CCC Act to make it clear that the Parliamentary Inspector should be able to prepare reports on particular investigations undertaken by the CCC.

### 3.4 Second argument - section 205 of the CCC Act

Secondly, Messrs Hanks and Quinlan contend:

- Section 205 of the CCC Act provides:

***Reports not to include certain information***

*Without limiting section 208, a report by the Parliamentary Inspector under this Division must not include -*

- (a) *information that may reveal the identity of a person who has been, is, or is reasonably likely to be investigated by the Commission or has been, is, or is likely to be a witness at an examination or a person who makes an allegation to or provides information to, the Commission;*
  - (b) *information that may indicate that a particular investigation has been, is, or is reasonably likely to be, undertaken by the Commission;*
  - (c) *information that may reveal the identity of a person who has been, is, or is reasonably likely to be investigated by the Police Force or has been, is, or is reasonably likely to be a person who makes an allegation to, or an informant of, the Police Force; or*
  - (d) *information that may indicate that a particular investigation has been, is, or is reasonably likely to be, undertaken by the Police Force.*
- on its face, section 205 requires that a report by the Parliamentary Inspector not refer to particular individuals or particular investigations of the CCC;
  - notwithstanding that the CCC may have made public (such as through a public hearing or a report tabled with Parliament) the fact that a particular investigation has been undertaken or a particular individual has had an adverse Misconduct Opinion made with respect to him, section 205 prevails and prohibits the Parliamentary Inspector from reporting to Parliament if the report contains reference to particular individuals or particular investigations of the CCC.

The Commissioner said in evidence to the former Committee:

*The commission accepts, again I say, that the Parliamentary Inspector can critically review reports by the commission, its assessments and opinions and their evidentiary basis, but the question is when and how that is to be done...that does not mean that he cannot examine them and he cannot raise them with the Committee in private, which then has the option of deciding whether there should be anything publicly said about it.*<sup>50</sup>

The Commissioner raised this argument before the Supreme Court in CIV 2832 of 2008 as a reason why the Lee Report should be declared a nullity. The CCC's originating summons filed on 29 December 2008 provides, inter alia:

*The tabling of the PI's report on 24 December 2008 involved a breach of section 205 of the CCC Act and is not a report that could be tabled under sections 195(1)(e) and 199 of the CCC Act.*

*On grounds that ...*

*Breach of Statutory Prohibition (Section 205)*

*The PI's report contains information which section 205 of the CCC Act expressly stipulates must not be included in a report by the Parliamentary Inspector made under Division 3 of Part 13 of the CCC Act, namely information:*

- (a) *revealing the identity, of person investigated by the Commission and who have been witnesses; and*

<sup>50</sup>

Hon Len Roberts-Smith RFD QC, Commissioner, *Transcript of Evidence*, closed hearing, 19 May 2008 p 9.

- (b) *indicating that a particular investigation has been undertaken by the Commission. It is not a report which may be tabled under sections 195(1)(e) and 199 of the CCC Act.*

The Committee fails to see the merit in this argument. If this argument were to prevail, it would be contrary to the Committee's view of the original intent of the CCC Act and amendments should be made to the CCC Act to make it clear that if the CCC make public a particular investigation or a particular individual under investigation then section 205 should not prevent the Parliamentary inspector from reporting to Parliament on that particular investigation. The operative words of section 205 are "reveal" and "indicate". If the CCC has already disclosed details of a particular investigation or a particular individual under investigation then there is nothing for the Parliamentary Inspector to "reveal" or "indicate".

### **3.5 The CCC's concerns about the scope of the Parliamentary Inspector's reporting function**

In addition to the legal arguments set out above, the CCC has expressed a number of policy concerns about the Parliamentary Inspector having the power to table a report direct with Parliament. The CCC's key policy concerns are that:

- in tabling reports in Parliament the Parliamentary Inspector is, in effect, reporting an opinion in relation to the conduct of individuals. The CCC considers that it is the Commissioner's role, and not the Parliamentary Inspector's, to form such opinions and report on them to Parliament. The CCC is concerned that in tabling reports in Parliament on such reviews, the Parliamentary Inspector is performing a function which is not properly his;
- the possibility of an impasse where the CCC rejects a recommendation of the Parliamentary Inspector that it publicly acknowledge its opinion of misconduct was in error;
- the public perceive that the reports of the Parliamentary Inspector express opinions which overturn the CCC's opinions. The CCC notes that there is no rationale for this, nor for preferring the opinions of the Parliamentary Inspector to that of the CCC;
- there are insufficient checks and balances in place to ensure that the reviews of the Parliamentary Inspector are performed in a balanced and impartial manner; and
- if the purpose of allowing the Parliamentary Inspector to table his reports is to provide individuals with a means of seeking redress, it is unnecessary because aggrieved individuals are already able to seek redress in the Courts.

### **3.6 Ongoing investigations**

The Commissioner has also raised a concern about the Parliamentary Inspector tabling reports into "ongoing" investigations.

The Committee does not propose to comment on the ability of the Parliamentary Inspector to prepare a report into an ongoing investigation of the CCC before the CCC has tabled a report. There may exist exceptional circumstances in which the Parliamentary Inspector is justified in so

doing. The Committee is not prepared to comment in advance of consideration of individual cases as to when it is appropriate for the Parliamentary Inspector to prepare a report into an ongoing investigations suffice to say the Committee expects the Parliamentary Inspector to comply with the CCC Act in this regard.

In addressing the appropriateness of the Parliamentary Inspector in preparing a report into an ongoing investigation the Committee expects the parties will address it on whether the Parliamentary Inspector has or may be interfering in the lawful operations of the CCC as is prohibited by section 198 or is revealing certain information that is prohibited by section 205.

### **3.7 Two inconsistent reports**

The Commissioner contends that it is highly undesirable that there may be two inconsistent reports in the public arena - one authored by the CCC and the other authored by the Parliamentary Inspector.

Mr McCusker counters by arguing that the public, members of Parliament and any relevant Department reading both reports can form their own view as to which report is the most logical and reasoned and form their own views accordingly.

The reader is referred to section 3.17 for the Committee's views in this regard.

### **3.8 Right of reply**

The Commissioner argues that in the event that the Parliamentary Inspector does table a report critical of the CCC, that the CCC should have a right of reply and be able to table a further report.

The Commissioner is concerned that if it does not have a public right of response to a report of the Parliamentary Inspector which is critical of the CCC, public confidence in the CCC will be eroded.

The Commissioner considers that the public is entitled to know if the CCC accepts any criticisms made by the Parliamentary Inspector, and if not, why not. The CCC has illustrated this by reference to the intense public interest generated by the tabling of the Frewer Report and the Allen Report which were critical of the CCC's handling of the Smiths Beach Inquiry .

The Commissioner has expressed the concern that the reports of the Parliamentary Inspector give a misleading impression of the CCC's reasoning in reaching its opinions of misconduct. For example, the CCC contends that Mr McCusker's recitation of the "facts" in the Frewer Report were not, in fact, the facts upon which the CCC relied in arriving at its opinion that Mr Frewer engaged in misconduct, and that the CCC actually relied on additional facts in reaching its conclusions which were not referred to in the Frewer Report.<sup>51</sup>

Relevant to this issue is the assertion by Mr McCusker that the CCC's Administrative Matter Report, which was in the nature of a right of reply to the Frewer Report and the Allen Report, was not authorised by section 85 of the CCC Act.

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<sup>51</sup> Corruption and Crime Commission, *Report on an Administrative Matter relating to the Functions of the Commission*, transmitted to the Speaker of the Legislative Assembly and the President of the Legislative Council on 14 March 2008 (Legislative Assembly Tabled Paper No. 3690), p 19.

The Committee does not propose to comment as to the legality of the CCC's Administrative Matter Report.

From a policy perspective, the Committee is of the view that the CCC should not be afforded a public right of reply to a report tabled by the Parliamentary Inspector otherwise the spectre of a never-ending tit for tat arises.

The Committee recommends that in any report prepared by the Parliamentary Inspector that is critical of the CCC, the Parliamentary Inspector include in his report all CCC submissions as to the Parliamentary Inspector's adverse comments and that the CCC not be able to use section 85 of the CCC Act to table Administrative Matter Reports as a method of replying to the Parliamentary Inspector's adverse comments.

#### **Recommendation 1**

The Committee recommends that in any report prepared by the Parliamentary Inspector that is critical of the CCC, the Parliamentary Inspector include in his report all CCC submissions as to the Parliamentary Inspector's adverse comments and that the CCC not use section 85 of the CCC Act to table Administrative Matter Reports as a method of replying to the Parliamentary Inspector's adverse comments, and that if necessary section 85 of the CCC Act be amended to clarify this.

### **3.9 The Committee's concerns**

The Committee notes that there are significant policy issues that need to be considered. It is concerned with the damage caused to the public standing of both the CCC and the Parliamentary Inspector that can arise from a tabled CCC report that then becomes the subject of a subsequent (negative) Parliamentary Inspector's report.

Both reports are expressions of opinion - one by the Commissioner and one by the Parliamentary Inspector. The CCC cannot (and does not purport) to make findings of criminal conduct or misconduct, and the PI cannot (and does not purport) to make findings of innocence or exoneration.

Nevertheless the distinction between expressing an opinion that misconduct has occurred, and "finding" that misconduct has occurred is, understandably, not a distinction that is readily apparent to the general public.

Furthermore the public perception appears to be that the Parliamentary Inspector is a Court of Appeal from decisions of the CCC. This perception is, unfortunately, fostered by incorrect terminology reported by the media, where the Acting Parliamentary Inspector is quoted as having said words to the effect:



*...Parliament either wanted the office of the Parliamentary Inspector to perform an audit and review role, which effectively has it acting as an appeals court, and fund it accordingly, or it wanted a figurehead position.<sup>52</sup>*

A further example of potentially misleading terminology appeared in the Minister for Local Government's media statement concerning Mr Stephen Lee. The media statement noted:

*Stephen Lee has advised me in writing that if the Parliamentary Inspector **validates the findings of the CCC report** or determines that no further report or review is required, that he will resign as Mayor immediately.<sup>53</sup>*

(emphasis added)

### 3.10 The Queensland model

Between 24 - 27 February 2009 the Committee travelled to Brisbane and met with the following persons to gather information:

- Renee Easton and Stephen Finnimore - Present and former Secretariat of the Parliamentary Crime and Misconduct Committee;<sup>54</sup>
- Robert Needham - Chairperson of the Crime and Misconduct Commission (Queensland);
- Alan McSporran SC - Parliamentary Commissioner (Queensland);
- Paul Freeburn QC - Former Senior Member Misconduct Tribunal (Queensland); and
- Colin Forrest - Public Interest Monitor (Queensland).

The Committee was interested in obtaining information from the above because Queensland had a similar experience to Western Australia. In 1998 - 1999 there was a breakdown in the relationship between the Queensland Criminal Justice Commission ('CJC') and the Parliamentary Criminal Justice Commissioner, Ms Julie Dicks, which led to litigation between the CJC and Ms Dicks over the role of the Parliamentary Commissioner and allegations that Ms Dicks had failed to observe procedural fairness in preparing a report critical of the CJC.<sup>55</sup>

On 1 January 2002 the Queensland Crime Commission and the CJC were merged under the Crime and Misconduct Act 2001 ('the CM Act') to establish the Crime and Misconduct Commission ('the CMC'). The CM Act also established the Parliamentary Crime and Misconduct Committee ('the PCMC') which is principally responsible for monitoring and reviewing the CMC. The

<sup>52</sup> Thomas, B., 'No need for CCC says agency's new inspector', *West Australian*, 27 December 2008, p 1.

<sup>53</sup> Hon John Castrilli, MLA, Minister for Local Government, *Minister announces decision of City of Cockburn Mayor to stand down*, Ministerial Media Statement, 7 October 2008.

<sup>54</sup> The Committee was scheduled to meet with the Chairperson and members of the PCMC but the calling of an early election in Queensland on 23 February 2009 resulted in the members of the PCMC being unavailable and the Committee met with the Secretariat of the PCMC instead.

<sup>55</sup> *Criminal Justice Commission and Ors v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8; *re Criminal Justice Commission* [2000] 1 Qd R 581.

PCMC is assisted in this role by the Parliamentary Crime and Misconduct Commissioner ('Parliamentary Commissioner').

According to the Gail Archer Report,<sup>56</sup> it was a result of:

- the CJC's significant problems with the Parliamentary Criminal Justice Commissioner; and
- the CMC experiencing difficulties with Parliamentary Commissioners,

that the CM Act was amended to reduce the power of the Parliamentary Commissioner, including taking away the power to hold hearings without the approval of the PCMC. In addition the Parliamentary Commissioner has no power to directly cause a report to be tabled in Parliament.

In addition any direction given by the PCMC to the Parliamentary Commissioner requires the bipartisan support of the PCMC (this requires a majority of the members which does not consist wholly of Government members).

### **3.11 No own motion power**

As matters presently stand in Queensland, the bulk of the functions of the Parliamentary Commissioner can be performed only upon the request of the PCMC. In other words the Parliamentary Commissioner can only act upon direction from the PCMC.

This is to be contrasted with the position in Western Australia where the Parliamentary Inspector can act on his own motion or upon complaints received directly by him.

In Queensland it is the PCMC that undertakes primary responsibility for the handling of complaints against the CMC. The PCMC can determine to ask the Parliamentary Commissioner to investigate and report to the Committee.

If matters of concern come to the attention of the Parliamentary Commissioner, they can be passed to the PCMC recommending action including, if thought appropriate, a possible referral back to the Parliamentary Commissioner for investigation.

In Queensland there has been some debate as to whether the Parliamentary Commissioner should be able to act of his or her own volition in considering complaints or concerns regarding the CMC.

In his evidence before the 5<sup>th</sup> PCMC the then Parliamentary Commissioner, Mr Robert Needham (now the Chairperson of the CMC), observed, in relation to an own motion power:

*That is not a power I have ever sought. This committee is the committee charged with overseeing the CMC. I think it is better for members of the public or any organisation that has a complaint to make about the CMC to make it to this committee as the parliamentary representatives. Then if it is a matter that this committee feels is worth while, you feel you need the assistance of investigation by me, it can be referred on. If a matter came to my attention that I thought should be investigated, then there is no difficulty in me bringing it to the attention of this committee. If it were a matter that I thought should be investigated,*

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<sup>56</sup> Gail Archer SC, *Review of the Corruption and Crime Commission Act 2003*, February 2008, tabled in the Legislative Assembly on 18 March 2008 (Tabled Paper No. 3707) p 207, para 659.

*there is a way I could have that done. I do not feel that my role is constrained in any way because I do not have an own motion or own initiative power.*

*...if at any time a matter did arise or I became aware of a matter that I thought should be looked at, then I would refer it to this committee. Bear in mind that I have an audit power referred to me by the committee which is not referred to me with any time limit. So generally if it were a small matter it would probably come within my audit power. I would be able to look at it in that way. If it were something that came up immediately after I had put in an audit report, then I would refer it to the committee if I felt that I otherwise could not deal with it appropriately.<sup>57</sup>*

The views of the current Parliamentary Commissioner, Mr Alan McSporran SC, accord with that of Mr Needham. Mr McSporran SC advised the Committee that he is appointed as agent of the PCMC and in terms of inquiry and investigation he has no independent power and does whatever is required of him by the PCMC. Mr McSporran reiterated that he, as Parliamentary Commissioner, could not conduct an investigative hearing into the CMC without the consent of the PCMC.<sup>58</sup>

Mr McSporran said that he has worked with two Parliamentary Committees and in his view the model of the Parliamentary Commissioner acting at the direction of the PCMC works well.<sup>59</sup>

Messrs McSporran and Needham told the Committee that on no occasion as Parliamentary Commissioner had they felt limited in their ability to bring matters to the attention of the Parliamentary Committee on issues concerning the CMC.

### **3.12 Reporting to the Committee**

Under the CM Act, the Parliamentary Commissioner has no power to table reports direct with Parliament. Any reports that the Parliamentary Commissioner prepares are submitted to the PCMC.

Under the CCC Act the Parliamentary Inspector is able to table certain reports on his own initiative, without any requirement that they be tabled with the Committee. The Parliamentary Inspector has the choice of either submitting his reports to the Committee, or tabling the reports direct in Parliament. The Committee cannot compel the Parliamentary Inspector to refrain from tabling his reports direct with Parliament. Neither can the Committee insist that the Parliamentary Inspector submit his report to the Committee.

The current Chairperson of the CMC is Mr Robert Needham. He was also formerly the Parliamentary Commissioner. He is therefore in a unique position of having occupied both offices. When the Committee interviewed Mr Needham on 26 February 2009 he advised:

*My recommendation would be that [the Committee] take to yourself the power to table reports rather than leave it to the [Parliamentary] Inspector and quite frankly I like the system whereby all complaints go to the Parliamentary Committee and you deal with them*

<sup>57</sup> Parliamentary Crime and Misconduct Committee (Qld), Report No 64, *Three Year Review of the Crime and Misconduct Commission*, March 2004, pp 115-116.

<sup>58</sup> Alan McSporran SC, Parliamentary Commissioner (Qld), interview with Committee, 26 February 2009, Brisbane.

<sup>59</sup> *ibid.*

*and get the Parliamentary Inspector to assist you in those reports where you require assistance.*<sup>60</sup>

Mr Needham observed that:

*I attended a conference in Perth when you were looking at setting up your new Commission and your committee was looking at the new models and based it on Queensland model with some changes. At that I quite strongly expressed my view consistent with what I said today that my view was that everyone should be accountable - the CMC should be accountable to the Parliamentary Committee. The Parliamentary Committee should be accountable to Parliament and Parliament be accountable to the people of Queensland... But if you set up your Parliamentary Inspector off to the side not accountable to the Parliamentary Committee then you are going away from that model. The Parliamentary Inspector should be accountable to the Parliamentary Committee as to how he or she carries out the role [of Parliamentary Inspector].*<sup>61</sup>

Mr Needham illustrated his view with an example of how the Committee might seek to deal with a report submitted by the Parliamentary Inspector that contained contentious material:

*The Committee could if it wanted to seek an independent advice. If you had the oversight and you sought independent legal advice and the independent advice was contrary to the Parliamentary Inspector's advice then you would have to weigh up what you did with it - do you table this or do you say the situation is such where there is a dispute here that is unresolved and we don't think this should be put out there publicly with the privilege of parliament. You would then be the arbiters. Whereas at the moment there are no arbiters. There is no independent umpire. I personally think that it is very dangerous to have a situation of giving someone parliamentary privilege and yet that they are not accountable to anyone, not even Parliament.*<sup>62</sup>

### 3.13 Parliamentary privilege

Section 323 of the CM Act provides:

*It is declared that a report prepared by the parliamentary commissioner at the request of the parliamentary committee is an act done for the purposes of transacting business of a statutory committee under the Parliament of Queensland Act 2001.*

The effect of the above declaration is that a report prepared by the Parliamentary Commissioner at the request of the PCMC is subject to parliamentary privilege.

Under the CCC Act, there is no equivalent to section 323 of the CM Act.

However section 188(4) of the CCC Act provides:

*The Parliamentary Inspector is an officer of Parliament and is responsible for assisting the Standing Committee in the performance of its functions.*

<sup>60</sup> Robert Needham, Chairperson, Crime And Misconduct Commission (Qld), interview with Committee, 26 February 2009, Brisbane, confirmed by email from the Crime And Misconduct Commission (Qld) to the Committee dated 10 March 2009.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

Mr McCusker was preparing to conduct his defence of CIV 2832 of 2008 on the basis that the issues sought to be ventilated by the CCC were not justiciable on the following grounds:

- they concerned matters that are statutorily and constitutionally committed to Parliament for resolution;
- their determination would require the Court to canvass matters that would involve infringement of article 9 of the Bill of Rights and hence constitute a contempt of Parliament; and
- they are otherwise non-justiciable because of the political and parliamentary nature of the issues arising, such that they are not suitable for resolution, in the first instance at least, by the Supreme Court exercising the judicial power of the State.

The extent to which the Lee Report was subject to parliamentary privilege was not tested in the Supreme Court as CIV 2832 of 2008 was discontinued on 6 February 2009.

### **3.14 Oversight of the Parliamentary Inspector**

When establishing the office of the Parliamentary Inspector it was clearly the intent of Parliament that the Parliamentary Inspector should have significant powers of oversight.

However, as the CCC Act presently stands, the Parliamentary Inspector stands off to one side of the accountability regime, and can exercise his powers to conduct inquiries into the CCC, and to table reports critical of the CCC direct with Parliament, without any real meaningful oversight by either Parliament or the Committee.

Mr Needham raises an important point in relation to parliamentary privilege. The immunity from Court oversight that is attached to parliamentary privilege should be balanced by a corresponding submission to the oversight of Parliament.

An accountability regime enunciated by Mr Needham, translated into the relevant entities in Western Australia, would be as follows:

- the CCC is accountable to the Courts (by way of applications for judicial review) and the Parliamentary Inspector;
- the Parliamentary Inspector is accountable to the Committee;
- the Committee is accountable to Parliament; and
- Parliament is accountable to the people of Western Australia.

### **3.15 Complaint function**

The Committee is not persuaded that the Committee should take over the complaint function that has presently been exercised by the Parliamentary Inspector, as is the case in the Queensland model. The Committee is of the view that the Parliamentary Inspector should continue to be the direct avenue of complaints by persons aggrieved by the actions of the CCC.

### 3.16 Own motion power to initiate an inquiry into the CCC

The Committee has considered whether the Parliamentary Inspector should be able to instigate inquiries or investigations (including formal inquiries under section 197(1) of the CCC Act) into the CCC on his own motion, without any oversight by the Committee or Parliament (in contrast to the Queensland model).<sup>63</sup>

The Committee is of the view that the Parliamentary Inspector's own motion power to instigate and undertake inquiries should remain unfettered, however there should be requirement for the Parliamentary Inspector (discussed below) to table any resulting reports with the Committee, and not direct with Parliament.

Furthermore, the Committee is of the view that the Parliamentary Inspector should liaise with the Committee as to the instigation and progress of any such inquiry. No legislative amendment is required in this regard, as this is a matter that can be achieved by an administrative agreement between the Committee and the Parliamentary Inspector.

### 3.17 Reporting to the Committee

The Committee has considered whether the Parliamentary Inspector should be able to table his reports direct with Parliament without any oversight by the Committee (in contrast to the Queensland model).

The Committee concurs with Mr Needham's view that the Parliamentary Inspector should be required to table his reports with the Committee.

The Committee is of the view that any report tabled with the Committee should be accompanied by a recommendation by the Parliamentary Inspector as to whether it is in the public interest to be tabled with Parliament.

The Committee would then consider the Parliamentary Inspector's report and accompanying recommendation, and, if necessary, liaise further with the Parliamentary Inspector. Should the report be critical of the CCC, the Committee would seek the views of the CCC as to whether its concerns have been appended to the report, and invite the CCC to make submissions as to whether, in the public interest, the report should be tabled with Parliament.

As a further safeguard for transparency, if the Committee is unable or unwilling to deliberate on whether a report should be tabled with Parliament, then the Parliamentary Inspector should be able to table his report directly with Parliament after a period of thirty days has elapsed. Furthermore, if the Committee is not in existence (such as occurs when the Legislative Assembly is dissolved upon the calling of an election), then the current ability of the Parliamentary Inspector to table with the Clerks of the House should be preserved.

The Committee considers that there are several compelling reasons why the CCC Act should be amended in the manner suggested above.

**First** section 188(4) of the CCC Act states that the Parliamentary Inspector is responsible for assisting the Committee in the performance of its functions.

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<sup>63</sup> See section 3.11.

**Second** the Committee will act as a check and balance on the exercise of the Parliamentary Inspector's powers. If the criticisms of the Parliamentary Inspector are contentious, or raise difficult issues as to the scope of the Parliamentary Inspector's powers under the CCC Act, or raise sensitive operational information, the Committee can seek independent advice, and can report to Parliament accordingly.

**Third** the CCC's entitlement to procedural fairness will be preserved. It is anticipated that the Committee, should it receive a report critical of the CCC, will afford the CCC a further opportunity, over and above the obligation already owed by the Parliamentary Inspector to the Commissioner under section 200, to make representations, including representations as to whether and in what form the Parliamentary Inspector's report should be tabled in Parliament.

**Fourth** the prospect of two inconsistent and unresolved reports being in the public arena will be reduced.

**Fifth** the prospects of conflict between the Parliamentary Inspector and the CCC will be diminished.

### **Recommendation 2**

The CCC Act should be amended so that the Parliamentary Inspector is required to table his reports through the Committee, accompanied by a recommendation by the Parliamentary Inspector as to whether it is in the public interest to be tabled publicly in Parliament.

If the Committee has not tabled the Parliamentary Inspector's report in Parliament within 30 days, then, if the Parliamentary Inspector is of the belief that it is in the public interest to do so, the Parliamentary Inspector can proceed to table his report direct with Parliament without further consultation with the Committee.

The Hon Ken Travers, MLC dissented (see section 3.18)

### **3.18 Minority view of Hon Ken Travers, MLC regarding Recommendation 2**

I am unable to agree with the comments in section 3.17 and the Committee's Recommendation 2, for the following reasons.

The Parliamentary Inspector is an independent officer of the Parliament with extensive powers who acts as a balance to the extraordinary powers provided to the CCC. The Committee has an important oversight role to ensure that these two powerful bodies are operating in accordance with the functions, powers and responsibilities granted to them under the CCC Act.

It is important that the views of the Parliamentary Inspector are known to the Parliament and the public. It is equally important for the CCC's response to any opinions of the Parliamentary

Inspector to also be publicly known (see the Committee's recommendation 1 which I fully support).

Any restriction on the ability of the views of the Parliamentary Inspector to be directly communicated to the Parliament may lead to reduced public confidence in the protections provided by the Parliamentary Inspector and a concern that the CCC may abuse its powers.

It could also lead to a perception of political inference.

The current system works well when there is a strong degree of cooperation, even if not always in agreement, between the Parliamentary Inspector, the CCC and the Committee. It is my view that this cooperation has existed and continues to exist. The Parliamentary Inspector has tabled reports with the Committee in the past rather than directly with Parliament as currently allowed for under the CCC Act. On occasions when the Parliamentary Inspector has believed that it is appropriate to do so, he has tabled his reports direct with Parliament.

A further concern I have with any requirement that the Parliamentary Inspector can only table reports with the Committee is the situation where the Parliamentary Inspector for some reason lacks confidence in a member of the Committee and would not want to give them advance warning of his report prior to the report becoming public.

Finally there are a number of independent Parliamentary officers who report directly to Parliament, such as the Auditor General and the Commissioner for Young People and Children. Many of these officers have parliamentary committees with whom they maintain strong relationships to ensure they are fulfilling the expectations of Parliament. I see no reason for the Parliamentary Inspector to have a restriction place on him that is not placed on other similar officers.

Therefore I cannot support the Committee's recommendation 2 and believe that the provisions in the current CCC Act are adequate.

### **3.19 The Parliamentary Inspector's use of the media and other avenues of disseminating criticism of the CCC**

In addition to the reporting function of the Parliamentary Inspector, there are a number of avenues by which the Parliamentary Inspector may criticise the CCC.

**First** there is the possibility of the Parliamentary Inspector responding to media enquiries.

**Second** there is the possibility of the Parliamentary Inspector making public appearances.

**Third** there is the possibility of the Parliamentary Inspector, in corresponding with a complainant, expressing views critical of the CCC, which may later be disseminated by the complainant.

Section 200 of the CCC Act provides that the Parliamentary Inspector must, before reporting any matters adverse to a person or body in a "report under section 199", give the person or body a reasonably opportunity to make representations to the Parliamentary Inspector concerning those matters.



The Committee is of the view that there is no difference in principle between criticisms contained in a report prepared by the Parliamentary Inspector under section 199, and criticisms contained in the alternative formats described above.

Accordingly the Committee is of the view that the operation of section 200 should be extended beyond its current application to situations where the Parliamentary Inspector intends to express an opinion that is adverse to a person or a body (including the CCC) that is likely to be made public, or in correspondence with a complainant (which has the potential to be made public). In such situations the Parliamentary Inspector should be required to provide a draft of the intended adverse opinion to that person or body, so as to afford that person or body a reasonable opportunity to make representations concerning the intended actions of the Parliamentary Inspector.

### **Recommendation 3.1**

The operation of section 200 of the CCC Act should be extended beyond its current application to encompass situations where the Parliamentary Inspector intends to express an opinion that is adverse to a person or a body (including the CCC) and is likely to be made public, or in correspondence with a complainant. In such situations the Parliamentary Inspector should be required to provide a draft of the intended adverse opinion to that person or body, so as to afford that person or body a reasonable opportunity to make representations concerning the intended actions of the Parliamentary Inspector.

### **Recommendation 3.2**

The CCC Act should be amended so that if Parliamentary Inspector intends to express an opinion that is adverse to a person or a body (including the CCC) and is likely to be made public, or in correspondence with a complainant, then the Parliamentary Inspector be required to provide the Committee with an advance draft copy of such an intended opinion, so as to afford the Committee a reasonable opportunity to consider the Parliamentary Inspector's intended actions.

The Hon Ken Travers, MLC dissented to Recommendation 3.2 (see section 3.20)

## **3.20 Minority view of Hon Ken Travers, MLC regarding Recommendation 2**

I am unable to agree with Recommendation 3.2.

I believe it is important for the Parliamentary Inspector is seen to be an independent officer of the Parliament (see section 3.18). It is my view that mandating that the Parliamentary Inspector must provide all drafts of adverse opinions to the Committee will be seen as interfering with his independence. Further I believe it is important to develop a strong cooperative relationship between the Office of the Parliamentary Inspector and the Committee. I would encourage the Parliamentary Inspector to forward copies of all relevant correspondence (including the draft of the intended adverse opinion) to the Committee for its information, where he believes it is appropriate.

## CHAPTER 4 OTHER ISSUES IN DISPUTE

### 4.1 Introduction

In addition to the issues previously canvassed in this report, a wide variety of additional issues have been brought to the attention of the former Committee and this Committee as to the relationship between the Parliamentary Inspector and the Commissioner.

A number of these issues are canvassed below. They do not represent the totality of all of the issues that have been the subject of debate and represent the Committee's preliminary views only. The issues discussed are complex and require further analysis and input from the relevant parties before a concluded view can be expressed by the Committee.

### 4.2 Should the CCC be able to table a report that contains an opinion that a public officer has engaged in "inappropriate conduct"?

The Gail Archer Report contained a recommendation that the CCC Act be amended to expressly provide that the CCC has the power to report opinions as to conduct that falls short of misconduct.<sup>64</sup>

The former Government did not support such a recommendation.<sup>65</sup>

The Committee notes the CCC has imposed upon itself a moratorium on expressing views on conduct less than misconduct. The Committee notes that this matter will be dealt with by the Parliament as part of its consideration of the Government's response to the Gail Archer Report.

### 4.3 Should the CCC be able to table a report that contains a Misconduct Opinion?

When the Committee met with Robert Needham, the Chairperson of the CMC in Brisbane on 26 February 2009, Mr Needham surmised that one principal cause of the dispute between the Commissioner and Mr McCusker was that under the CCC Act, the CCC had the power to form Misconduct Opinions, whereas under the CM Act, the CMC did not have such a power.

In Queensland, Mr Needham said, the CMC did not express findings or opinions that misconduct occurred in its reports. Rather a CMC report would set out the evidence that had been uncovered by the CMC's investigation, together, if appropriate, with a recommendation that prosecution proceedings or disciplinary action should be considered.

On matters where the evidence was not disputed, the CMC would report on such matters as an unconditioned statement, such as "On 23 May 2005 a Local Government election was held". Mr Needham emphasised that such a statement was not a finding of fact, but rather a shorthand acknowledgement that such a statement was not in dispute. However, to the extent that evidence

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<sup>64</sup> Gail Archer SC, *Review of the Corruption and Crime Commission Act 2003*, February 2008, tabled in the Legislative Assembly on 18 March 2008 (Tabled Paper No. 3707), Recommendation 34, p 196.

<sup>65</sup> Hon Jim McGinty, MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 2008, p 1040.

on a particular matter was contested, Mr Needham said that the CMC report would set out the evidence giving rise to the conflicting versions of events, and, if appropriate, observations by the CMC as to why one version of events may not be as credible as another version. Mr Needham was concerned to ensure that the CMC reports did not usurp the function of the ultimate fact finder, which in the case of a criminal prosecution may be a judge or jury, and in the case of a disciplinary action would be the relevant head of the public service department.

The Committee does not consider it necessary to suggest any restrictions on the ability of the CCC to be able to table reports that contain Misconduct Opinions.

But the Committee would encourage the CCC to consider whether the CMC model should be adopted whereby the evidence uncovered by the CCC is set out, along with, if appropriate, a recommendation that prosecution or disciplinary proceedings be considered by the relevant authorities.

The Committee acknowledges that the CCC has in its more recent reports, contained more detail and explanation for the opinions it has reached.

The Committee agrees that reports should contain more detail, not less, and contain accurate summaries of all the probative evidence (including exculpatory evidence) that the CCC has relied upon or considered in reaching its conclusions and opinions.

#### **4.4 Should the CCC await the outcome of disciplinary proceedings before tabling a report that contains a Misconduct Opinion?**

The Committee intends to consider this matter in more detail in the future.

#### **4.5 Should the CCC have to provide a draft of its report that contains a Misconduct Opinion to the Parliamentary Inspector?**

The Committee is of the view that the CCC should not have to provide a draft of its report to the Parliamentary Inspector.

#### **4.6 To what extent should the Parliamentary Inspector accord natural justice to the CCC and its officers if the Parliamentary Inspector intends to table a report critical of the CCC or its officers?**

The Committee expects the Parliamentary Inspector to observe the requirements of natural justice inherent in section 200 of the CCC Act to the same degree of specificity as the Parliamentary Inspector expects of the CCC in its observance of the requirements of natural justice inherent in section 86 of the CCC Act.

#### **4.7 What is the Committee's view on how assertions of conflict of interest made against the Parliamentary Inspector are to be addressed?**

The Committee is of the view that in addition to the question of whether the Parliamentary Inspector has an actual or potential conflict of interest (see section 195(3) of the CCC Act), it is

appropriate for the Parliamentary Inspector to, in practice, apply a broader test in deciding whether or not to disqualify himself from acting in respect of a particular matter, namely whether a hypothetical fair-minded lay person, properly informed, might *reasonably apprehend* that the Parliamentary Inspector might not bring an impartial mind to making the decision. This broader test evokes the notion that Lord Hewart CJ's well-known dictum that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."<sup>66</sup>

Subject to the above comment, the Committee notes that the CCC is at liberty to raise with the Committee any concerns it may have regarding the standing of the Parliamentary Inspector to address a particular matter and the concerns can be assessed by the Committee on a case by case basis as the need arises.

#### **4.8 Should the Parliamentary Inspector have the power to direct the CCC to withdraw a Misconduct Opinion and apologise?**

Mr McCusker has suggested that the Parliamentary Inspector should be given the power to direct the CCC on certain matters, in particular the power to direct the CCC to withdraw an opinion of misconduct that the Parliamentary Inspector considers to be in error.

This is a very contentious and complex issue. The Committee has received a number of letters from individuals on the issue of the extent of the oversight powers of the Parliamentary Inspector.

The Committee is of the view that Parliament has never contemplated that the Parliamentary Inspector be able to direct the CCC to withdraw its Misconduct Opinion and apologise. As the CCC Act presently stands, the Parliamentary Inspector only has a power to recommend to the CCC, not to direct.

The Parliamentary Inspector's powers to investigate, recommend and report are a counterbalance to the wide range of powers of the CCC to investigate and form opinions as to misconduct and table reports as to misconduct.

If the Parliamentary Inspector was to have a power to direct the CCC to withdraw an opinion of misconduct, the office of the Parliamentary Inspector would become tantamount to a Court of Appeal. This would be a significant alteration to the structure and relationship between the Parliamentary Inspector and the CCC.

The issue of whether the Parliamentary Inspector should have a power to direct the CCC to withdraw its Misconduct Opinion overlaps with the issue of the extent to which the Parliamentary Inspector can review a Misconduct Opinion (discussed in Chapter 2). Accordingly the Committee believes that it would not be appropriate to pursue this issue until it has received the joint recommendations of the Parliamentary Inspector and the Commissioner as discussed at sections 1.27 and 2.1 of this report.

Further, the Committee welcomes the views of Parliament on whether it would like the Committee to consider this issue.

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<sup>66</sup> *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

## **4.9 Should there be an ability of the Commissioner and the Parliamentary Inspector to extend their terms of office to complete outstanding inquiries?**

### **Commissioner**

In the Smiths Beach Inquiry, three Commissioners were involved. First, Commissioner Kevin Hammond presided over the investigation. He then resigned on 31 March 2007. The Smiths Beach Report was then finalised and tabled by Acting Commissioner Neil McKerracher QC. He then resigned in late 2007 to become a Federal Court judge. The task then fell to the current Commissioner Len Roberts-Smith RFD QC to defend the report when it came under criticism from Mr McCusker.

This lack of continuity is of concern to the Committee and it is the Committee's intention to consider whether the CCC Act should be amended to permit a Commissioner or Acting Commissioner to extend their terms of office to enable outstanding reports to be finalised.

### **Parliamentary Inspector**

It is the Committee's view that Mr McCusker was motivated by a desire to have his Lee Report tabled in Parliament before his term as Parliamentary Inspector expired on 31 December 2008.<sup>67</sup> This motive was not improper. One of the reasons Martin CJ gave for refusing the CCC's application for an injunction to restrain Mr McCusker from tabling the report was the fact that the appointment of Mr McCusker expired on 31 December 2008 and that it was reasonable to infer that any acting Parliamentary Inspector or replacement for Mr McCusker would require some considerable time to get to the point where they could have the same degree of confidence in the draft report as Mr McCusker presently enjoyed.<sup>68</sup>

However, the impending deadline of 31 December 2008 no doubt contributed to a compression of timelines that would not ordinarily have been present. The CCC, for its part, has asserted that it was not afforded a reasonable opportunity to respond to the draft Lee Report, as is required by section 200 of the CCC Act.

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<sup>67</sup> Mr McCusker provided a copy of his draft Lee Report to the Corruption and Crime Commission on 17 December 2008, and stated to the Corruption and Crime Commission that he was not prepared to delay the tabling of his report any later than 4.00pm Tuesday, 23 December 2008.

<sup>68</sup> *Re Parliamentary Inspector of the Corruption and Crime Commission; ex parte Corruption and Crime Commission* [2008] WASC 305 (Western Australian Supreme Court, Martin CJ, 18 December 2008), para 36.

It is the Committee's intention to consider whether a situation such as the above could have been avoided if the CCC Act was amended to permit a Parliamentary Inspector or Acting Parliamentary Inspector to extend their terms of office to enable outstanding reports to be finalised and to afford the CCC a reasonable opportunity to respond to any adverse comment.

A handwritten signature in black ink, appearing to read 'Ray Halligan', with a long horizontal stroke extending to the right.

HON RAY HALLIGAN, MLC  
Chairman





# APPENDIX ONE

## HEARINGS

Date	Name	Position	Organisation
27.02.2008	Hon Len Roberts-Smith RFD QC	Commissioner	Corruption and Crime Commission
	Mr Michael Silverstone	Executive Director	Corruption and Crime Commission
	Dr Irene Froyland	Director Corruption Prevention	Corruption and Crime Commission
	Mr Nick Anticich	Director, Operations	Corruption and Crime Commission
	Mr Michael Cashman	Director, Legal Services	Corruption and Crime Commission
	Ms Vanessa Grant	Director, Business Services	Corruption and Crime Commission
	Mr Malcolm McCusker AO QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the Corruption and Crime Commission
	Mr Murray Alder	Principal Legal Officer	Office of the Parliamentary Inspector of the Corruption and Crime Commission
17.03.2008	Hon Len Roberts-Smith RFD QC	Commissioner	Corruption and Crime Commission
	Mr Michael Silverstone	Executive Director	Corruption and Crime Commission
	Mr Malcolm McCusker AO QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the Corruption and Crime Commission
14.05.2008	Mr Malcolm McCusker AO QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the Corruption and Crime Commission

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

	Hon Len Roberts-Smith RFD QC	Commissioner	Corruption and Crime Commission
19.05.2008	Hon Len Roberts-Smith RFD QC	Commissioner	Corruption and Crime Commission
04.02.2009	Hon Len Roberts-Smith RFD QC	Commissioner	Corruption and Crime Commission
	Ms Gail Archer SC	Acting Commissioner	Corruption and Crime Commission
	Mr Christopher Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the Corruption and Crime Commission
	Mr Ken Martin QC	Acting Parliamentary Inspector	Office of the Parliamentary Inspector of the Corruption and Crime Commission
	Mr Murray Alder	Principal Legal Officer	Office of the Parliamentary Inspector of the Corruption and Crime Commission
	Mr Malcolm McCusker AO QC	Former Parliamentary Inspector	

## APPENDIX TWO

### *BRIEFINGS HELD*

<b>Date</b>	<b>Name</b>	<b>Position</b>	<b>Organisation</b>
25.02.2009	Mr Paul Freeburn, QC	Member	Misconduct Tribunal, QLD
26.02.2009	Mr Alan MacSporran SC	Parliamentary Inspector, QLD	Office of Parliamentary Inspector, QLD
	Mr Mitchell Kunde	Legal Officer	Office of Parliamentary Inspector, QLD
	Mr Robert Needham	Chairperson & CEO	Crime and Misconduct Commission, QLD
27.02.2009	Mr Steve Finnimore	Former Research Director	Parliamentary Crime and Misconduct Committee, QLD
	Ms Renee Easten	Acting Research Director	Parliamentary Crime and Misconduct Committee, QLD
	Mr Colin Forrest	Public Interest Monitor, QLD	