



THIRTY-EIGHTH PARLIAMENT

REPORT 1

**SELECT COMMITTEE INTO THE POLICE RAID
ON THE SUNDAY TIMES**

Presented by Hon George Cash MLC (Chairman)

April 2009

SELECT COMMITTEE INTO THE POLICE RAID ON THE SUNDAY TIMES

Date first appointed:

12 November 2008

Terms of Reference:

- (1) That a select committee of three members is appointed, any two of whom constitute a quorum.
- (2) The committee and the proceedings of the committee are subject to Chapter XXII of Standing Orders and it is to be regarded for all purposes as a committee appointed under that chapter.
- (3) The committee is to inquire into and report on all circumstances surrounding the police raid on “*The Sunday Times*” on 30 April 2008.
- (5) The Select Committee have access to all documents, evidence and other material possessed, obtained, or controlled by the previous Select Committee.
- (4) The committee is to report by 10 March 2009.

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Government Response

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The four-month period commences on the date of tabling.

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FINDINGS AND RECOMMENDATIONS

FINDINGS AND RECOMMENDATIONS

1 Findings and Recommendations are grouped as they appear in the text at the page number indicated:

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Finding 1: The Committee finds that there was no direction given to the Western Australia Police, in relation to its investigation into the alleged leak of confidential Cabinet information to *The Sunday Times*, by any Minister, Parliamentary Secretary or Member of Parliament or their staff.

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Finding 2: The Committee finds that there was no direction given to any public officer, in relation to the alleged leak of confidential Cabinet information to *The Sunday Times*, by any Minister, Parliamentary Secretary, Member of Parliament, or their staff.

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Recommendation 1: The Committee recommends that the Attorney General conduct a review of s 81 of *The Criminal Code*.

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Finding 3: The Committee finds that it would have been prudent for the Corruption and Crime Commission of Western Australia to have obtained from the Department of the Premier and Cabinet a copy of the alleged leaked Cabinet document, so that it would have been in a better position to form an opinion as to whether an investigation should be conducted.

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Finding 4: The Committee finds that the Department of the Premier and Cabinet, inadvertently or otherwise, hampered the Western Australia Police investigation by not informing the Western Australia Police of all relevant information concerning the unauthorised disclosure including that there were five separate versions of the document containing information that was disclosed and the distribution of each version.

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Finding 5: The Committee finds that the Corruption and Crime Commission of Western Australia did not assess the complaint received from the Department of the Premier and Cabinet with appropriate rigour, and simply passed the responsibility for the investigation on to the Western Australia Police despite the Corruption and Crime Commission's own previously published misgivings about the value of investigations of offences under s 81 of *The Criminal Code*.

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Finding 6: The Committee finds that the role of the Department of Treasury and Finance and its internal processes for managing confidential information has not been adequately addressed. The Committee is of the view that the Corruption and Crime Commission of Western Australia should have also referred the complaint to the Department of Treasury and Finance, as it did to the Department of the Premier and Cabinet, for investigation under s 33 of the *Corruption and Crime Commission Act 2003*.

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Finding 7: The Committee finds that the Corruption and Crime Commission of Western Australia expressed to the Western Australia Police a narrow interpretation of Part 4 of the *Corruption and Crime Commission Act 2003* (that is, those sections dealing with organised crime and the conferral of exceptional powers on police officers), and did not take into account the type of joint Corruption and Crime Commission-Western Australia Police investigations using the Corruption and Crime Commission's general powers as envisaged by s 33(1)(b) of that Act.

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Finding 8: The Committee finds that the Corruption and Crime Commission of Western Australia failed to acknowledge that, in most circumstances, a notice to produce documents under the *Corruption and Crime Commission Act 2003* can be as effective as a search warrant due to the available penalties for failure to produce the document.

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Finding 9: Notwithstanding the Committee's concerns with the Corruption and Crime Commission of Western Australia's referral of the matter to the Western Australia Police in this instance, the Committee finds that it was proper for the Western Australia Police to investigate the allegation of a Cabinet leak, given that it was an offence under s 81 of *The Criminal Code*. The Committee believes, however, that alternative methods of investigation should have been employed before resorting to a search warrant, having regard to resource requirements and other Western Australia Police priorities.

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Finding 10: The Committee finds that in the execution of the search warrant on the offices of *The Sunday Times*, the Western Australia Police officers at the scene demonstrated professionalism, courtesy and restraint.

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Finding 11: The Committee finds that there was an inappropriate and disproportionate allocation of resources by the Western Australia Police for a relatively standard search of an office building.

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Recommendation 2: The Committee recommends that the Department of the Premier and Cabinet and the Department of Treasury and Finance further review their procedures and systems for handling confidential documents, and in particular with respect to informal consultation on drafts of confidential documents.

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Recommendation 3: The Committee recommends that the Corruption and Crime Commission of Western Australia refer the alleged disclosure of confidential Cabinet information to the Department of Treasury and Finance for investigation pursuant to s 33(1)(c) of the *Corruption and Crime Commission Act 2003*.

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Recommendation 4: The Committee recommends that the Corruption and Crime Commission of Western Australia ensures that a thorough assessment in accordance with the Corruption and Crime Commission's formal case categorisation and assessment procedures is undertaken in relation to every complaint, even where such complaint is the subject of an investigation commenced by another agency.

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Recommendation 5: The Committee recommends that the Attorney General continue to pursue the introduction of shield laws for journalists.

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Recommendation 6: The Committee recommends that, in accordance with s 7 of the *Parliamentary Privileges Act 1891*, the Legislative Council excuse the answering of the question asked of Mr Paul Lampathakis by the Committee as set out in paragraph 14.9 of this report.

CHAPTER 1

REFERENCE AND ISSUES FOR INQUIRY

- 1.1 On 14 May 2008 the Legislative Council established the Select Committee into the Police Raid on *The Sunday Times* (**Committee**) with the following general terms of reference:

... *The committee is to inquire into and report on all the circumstances surrounding the police raid on the Sunday Times on 30 April 2008.*¹

- 1.2 The Committee held hearings and received written evidence before the Committee ceased due to the prorogation of the Parliament on 7 August 2008 in preparation for the State election. The Committee was subsequently re-established by the Legislative Council on 12 November 2008, with the re-established Committee having access to all evidence and material of the original Committee.²
- 1.3 The relevant events of 30 April 2008 arose from an investigation by the Western Australia Police (**WAPOL**) into an alleged leak of confidential State Government Cabinet documents or information which had formed the basis of an article appearing in the 10 February 2008 edition of *The Sunday Times*.
- 1.4 Between approximately 2:00pm and 6:00pm on 30 April 2008 officers of the WAPOL executed a search warrant at the offices of *The Sunday Times* in Perth. The number of officers actively involved in the search varied at times over this four hour period, although a total of 27 officers were involved in the operation (some of whom attended at *The Sunday Times*' offices for a short time only).
- 1.5 The actions of the WAPOL on 30 April 2008 were filmed at the time by the staff of *The Sunday Times* and camera crews from various other media. The execution of the search warrant received extensive media coverage in the following days.
- 1.6 There was some suggestion within the media that the State Government may have been involved in the decision to undertake the raid. The media coalition group *Australia's Right to Know* stated the following in a media release on the day following the raid:

¹ Motion of Hon Norman Moore MLC, Leader of the Opposition, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 May 2008, p2944.

² Motion of Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 August 2008, p122.

Speaking on behalf of the media coalition Australia's Right to Know, News Limited chairman and chief executive Mr John Hartigan said: "This is a disturbing reminder that governments in Australia will resort to legal muscle to redress political embarrassment".

"Do we now live in a country where whistleblowers and journalists can expect to be hunted down and charged if they reveal government information that is a matter of legitimate public interest? The answer, regrettably, appears to be yes," Mr Hartigan said.

"Can the Western Australian police commissioner confirm that the Government has not been involved in any way in its investigation or yesterday's raid?"³

- 1.7 The author of *The Sunday Times* article at the centre of the raid, Mr Paul Lampathakis, also made the following comments in evidence to the Committee:

I believe the raid to be the result of moves by the state government to attack our newspaper and me for a politically damaging news story about the government's intention to spend millions of taxpayers' dollars on advertising to help it get re-elected. The latest incident was the second time this year that the police have been to the Sunday Times offices to search for information about the sources of one of my stories at the behest of the state government. In my mind both incidents were aimed at trying to intimidate and harass me for doing my job, which is to communicate to the public on matters that are of significant interest to the public.⁴

- 1.8 The Committee has investigated the events leading up to the police raid, the appropriateness of the raid itself, and the effectiveness of various administrative procedures followed by a number of agencies in both the present case and in similar circumstances.

³ Australia's Right to Know, *Australia's Media Slams Police Raid*, media release, 1 May 2008, p1; Doc. 88, Exhibit 4AZ.

⁴ Mr Paul Lampathakis, Journalist, *The Sunday Times, Transcript of Evidence*, 7 July 2008, p2.

CHAPTER 2

PROCEDURE

Hearings

2.1 The Committee held the following hearings, which were conducted in public unless otherwise indicated:

Monday, 9 June 2008

- Mr Malcolm Wauchope, Director General, and Ms Lisa Ward, Acting Principal Policy Officer, Office of the Director General, Department of the Premier and Cabinet (**DPC**);
- Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance (**DTF**);
- Mr Nicholas Anticich, Director, Operations, and Mr Trevor Wynn, Manager, Investigations, Corruption and Crime Commission of Western Australia (**CCC**); and
- Assistant Commissioner Wayne Gregson, Specialist Crime Portfolio, Western Australia Police (**WAPOL**); Detective Inspector Arno Albrecht, Commercial Crime Division, WAPOL; and Detective Sergeant Allan Jane, Major Fraud Squad, WAPOL.

2.2 The above hearing with the officers of the DPC was held in private session at the request of Mr Wauchope, who advised the Committee prior to commencing the hearing that in his evidence he wished to refer to a number of documents that were subject to Cabinet confidentiality. The Committee has subsequently considered the evidence given at this private hearing and has resolved that the transcript of this private hearing should be made public.

Friday, 13 June 2008

- Detective Inspector Arno Albrecht, Commercial Crime Division, and Detective Senior Constable Elissa Mansell, Major Fraud Squad, WAPOL;
- Mr Kieran Murphy, Acting Chief of Staff, Premier's Office, DPC;
- Mr Islwyn Davies, Managing Director, *The Sunday Times*; and
- Mr Sam Weir, Editor, *The Sunday Times*.

Monday, 30 June 2008

- Mr Timothy Marney, Under Treasurer, DTF;
- Mr Nicholas Anticich, Director, Operations, and Mr Trevor Wynn, Manager, Investigations, CCC;
- Dr Karl O’Callaghan, Commissioner of Police; Mr Murray Lampard, Deputy Commissioner; Detective Inspector Arno Albrecht, Commercial Crime Division; and Detective Senior Constable Elissa Mansell, Major Fraud Squad, WAPOL; and
- Mr Len Roberts-Smith QC, Commissioner, CCC.

2.3 Parts of the above hearing involving the officers from the WAPOL were conducted in private, as the evidence dealt with specific avenues of inquiry in an ongoing police investigation and therefore its public release may prejudice that investigation and disclose investigative methodologies. The Committee also went into private session when receiving evidence from the Commissioner of Police, as the Committee had wished to clarify a conflict in certain documentation provided to the Committee.

Monday, 7 July 2008

- Mr Paul Lampathakis, Journalist, *The Sunday Times*.

Monday, 4 August 2008

- Mr Sam Weir, Editor, *The Sunday Times*.

Written evidence

2.4 A large amount of written documentation was received as evidence.

2.5 A detailed chronology of events is set out at **Appendix 1**.

CHAPTER 3

THE LEAKED INFORMATION

- 3.1 The relevant information leaked to *The Sunday Times* has been identified as being sourced from a draft “*request for funding*” submission from the Cabinet Sub-committee on Communication to the Cabinet Expenditure Review Committee (**ERC**).
- 3.2 At a meeting of the Cabinet Sub-committee on Communications on 15 May 2007, a decision was made instructing the Office of the Premier and the Government Media Office to draft a “*consolidated request for funding for submission to the ERC*”.⁵
- 3.3 The subsequent draft submission (**draft ERC submission**) was prepared by Mr Peter Easom, Manager, Communication Policy and Reporting, Government Media Office.⁶ The purpose of the draft ERC submission was explained by Mr Kieran Murphy, the then Director of Communications, Office of the Premier (and a member of the Cabinet Sub-committee on Communications), as follows:

*The original document, I understand, would have been produced within the Government Media Office’s advertising unit. It was a submission to ERC—a request for additional expenditure to support a number of advertising campaigns which were likely to run during or later on in the financial year. The purpose of it was essentially as part of the budget process—rather than determine a budget, print it and put it out, and then have agencies come back and ask for separate allocations for advertising campaigns, the idea was to actually have it all dealt with as part of the budget process. If I can add, it was a bit of an ambit claim—a draft ERC submission. Not every one of the proposed advertising campaigns would have succeeded. I think the dollar figures, as they appeared in the Sunday Times story, by the end of the process was significantly less than what was reported.*⁷

- 3.4 The draft ERC submission was considered by the Cabinet Sub-committee on Communication at a meeting on 4 December 2007.⁸

⁵ Doc. 43, Exhibit 4G, letter from Mr Timothy Marney, Under Treasurer, to Mr Len Roberts-Smith, Commissioner, CCC, 21 February 2008, p1.

⁶ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p2.

⁷ Mr Kieran Murphy, Acting Chief of Staff, Premier’s Office, Department of the Premier and Cabinet, *Transcript of Evidence*, 13 June 2008, p3.

⁸ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p2.

- 3.5 Cabinet considered the draft ERC submission at a meeting on 17 December 2007, as the draft ERC submission had been an attachment to the minutes from the 4 December 2007 meeting of the Cabinet Sub-committee on Communication.⁹
- 3.6 In January 2008, Mr Paul Giles of the Government Media Office queried the status of the draft ERC submission with the ERC Secretary. He was informed that no ERC submission had been received on that issue and that the issue was not listed for consideration at any specific upcoming ERC meeting. The matter was simply listed as an ERC outstanding issue, following a decision taken at the Cabinet Sub-committee on Communications meeting of 15 May 2007 for the Office of the Premier and the Government Media Office to draft a consolidated request for funding for submission to the ERC.¹⁰
- 3.7 On 22 January 2008, Mr Giles met with the ERC Secretary and hand delivered the draft ERC submission. Mr Giles was again informed that the ERC had not received any such submission previously, and that for the submission to be progressed the ERC Secretariat required a ministerially endorsed submission and not simply a draft submission.¹¹
- 3.8 The Agency Resources business unit within the DTF also had exposure to the draft ERC submission on or after 22 January 2008.¹² The Under Treasurer advised the Committee that:

[T]he secretariat of the expenditure review committee resides within my department. It is normal that all expenditure review committee submissions, when in final form, be provided to my department for forwarding to the expenditure review committee, which is a subcommittee of cabinet.

...

The ERC secretariat is the primary point of contact. In this case, as is normally the case, the ERC secretariat would provide whatever documents are appropriate to the particular [Department of Treasury and Finance] analyst in question¹³

⁹ Ibid.

¹⁰ Doc. 43, Exhibit 4G, letter from Mr Timothy Marney, Under Treasurer, to Mr Len Roberts-Smith, Commissioner, CCC, 21 February 2008, p1.

¹¹ Ibid.

¹² Doc. 163, Exhibit 2K, letter from Mr Timothy Marney, Under Treasurer, 10 July 2008, p1.

¹³ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 9 June 2008, p2 and p6.

- 3.9 The Treasurer, Hon Eric Ripper MLA, signed the draft ERC submission in late January 2008.¹⁴
- 3.10 As will be noted later in this report, there were a number of different versions of the draft ERC submission created between December 2007 and February 2008. The content of these different versions varied, and this fact is significant in determining which version of the draft ERC submission was the basis for the leak to *The Sunday Times*, and the nature of the evidence available to the WAPOL in its subsequent investigation.

Cabinet Confidentiality

- 3.11 'Cabinet' is defined as:

*A body consisting of ministers of the Crown which meets regularly to transact and implement the business of government. The Cabinet, which is in practice the driving force behind government, is not formally recognised in any of Australia's constitutions.*¹⁵

- 3.12 'Cabinet papers' are defined as:

*Documents recording the progress and results of Cabinet deliberations. They include files, notebooks, memoranda and minutes recording deliberations of Cabinet or Cabinet committees, and may include other documents such as letters or lists used by Cabinet in its proceedings. A claim of public interest immunity that cabinet papers should not be subject to disclosure is not absolute. However, such documents fall within a class in respect of which there are strong considerations of public policy militating against disclosure regardless of their contents, in all but exceptional situations: Commonwealth v Northern Land Council (1993) 176 CLR 604; 112 ALR 409.*¹⁶

- 3.13 In a joint decision in a 1993 case, the High Court of Australia observed that:

When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public

¹⁴ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p2.

¹⁵ The Honourable Dr Peter E. Nygh and Peter Butt (General Editors), *Butterworths Australian Legal Dictionary*, Butterworths, Sydney, 1997, p155.

¹⁶ *Ibid.*

*interest. The discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis upon which to claim immunity. On the other hand, Lord Wilberforce has expressed the view that, in recent years, this consideration has "received an excessive dose of cold water" ((5) *Burmah Oil Co. Ltd. v. Bank of England* [1979] UKHL 4; (1980) AC 1090, at p 1112; see e.g. *Sankey v. Whitlam* [1978] HCA 43; (1978) 142 CLR 1, at pp 62-63; *Conway v. Rimmer* [1968] UKHL 2; (1968) AC 910, at pp 952, 957, 987-988, 993-994; *Rogers v. Home Secretary* (1973) AC 388, at p 413; but contrast with *Sankey v. Whitlam* (1978) 142 CLR, at p 40; *Conway v. Rimmer* (1968) AC, at p 972.)*

*But it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential ((6) See U.K., Parliament, Report of the Committee of Privy Counsellors on Ministerial Memoirs ("the Radcliffe Committee"),) Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course ((7) See *Conway v. Rimmer* (1968) AC, per Lord Reid at p 952; *Sankey v. Whitlam* (1978) 142 CLR, per Mason J. at pp 97-98; U.K., Parliament, Departmental Committee on Section 2 of the Official Secrets Act 1911 ("the Franks Committee"), (1972), Cmnd.5104, vol.1, p.33). The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions*

*in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.*¹⁷

3.14 Under Schedule 1 of the *Freedom of Information Act 1992*, Cabinet documents are exempt from public access:

Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it —

- (a) *is an agenda, minute or other record of the deliberations or decisions of an Executive body;*
- (b) *contains policy options or recommendations prepared for possible submission to an Executive body;*
- (c) *is a communication between Ministers on matters relating to the making of a Government decision or the formulation of a Government policy where the decision is of a kind generally made by an Executive body or the policy is of a kind generally endorsed by an Executive body;*
- (d) *was prepared to brief a Minister in relation to matters —*
 - (i) *prepared for possible submission to an Executive body; or*
 - (ii) *the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body;*
- (e) *is a draft of a proposed enactment; or*

¹⁷ *Commonwealth v Northern Land Council*, (1993) 176 CLR 604 (21 April 1993), paras 5-6.

(f) is an extract from or a copy of, or of part of, matter referred to in any of paragraphs (a) to (e).¹⁸

- 3.15 This legislation protects the deliberations of Cabinet from legitimate disclosure under other provisions of that Act.
- 3.16 For archival purposes, under current rules, Western Australian Cabinet documents are protected from release under the thirty year restricted access rule. This means that the workings of Cabinet are not known for about a generation, by which time Cabinet members have usually either retired from the Parliament or the information is no longer of political importance.
- 3.17 The confidentiality requirements of cabinet and the thirty year disclosure rule on cabinet documents has meant that the amount of available research material on Cabinet in Western Australia is limited and of a general nature.
- 3.18 Mr Wauchope gave the following summary of his understanding of Cabinet confidentiality:

*[M]y understanding is that there is a requirement to share some information prior to cabinet about cabinet information, and that is under the consultation process. It is on a need-to-know basis, and, therefore, it should only be given to people who have a need to know to assist in the cabinet process, and they should only have as much information as they need to have to assist in the process leading up to cabinet. Anything else, basically, is in breach of cabinet confidentiality.*¹⁹

- 3.19 Mr Wauchope went on to describe the measures in place at DPC to ensure Cabinet confidentiality:

There is a cabinet handbook, which is available for people to consult, which sets out the procedures of the cabinet, including the referral process. But within the Department of the Premier and Cabinet, we actually have a fairly significant awareness-raising program about such issues, whereby cabinet confidentiality and the need to maintain it is one of the things that we talk about. So, there is an awareness-

¹⁸ Freedom of Information Act 1992 (WA)
http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_353_homepage.html (viewed on 06/07/2008).

¹⁹ Mr Mal Wauchope, Director General, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 June 2008, p4.

*raising process plus we have the cabinet handbook, which sets out the requirements regarding cabinet and the distribution of documents.*²⁰

3.20 Page 10 of the DPC Handbook (2007) states at p10 that:²¹

3. CONFIDENTIALITY AND SECURITY

The confidentiality of Cabinet documents, discussions and decisions is a long established principle and has been regarded as essential for the maintenance of Cabinet collective responsibility. However, this principle needs to be tempered by the requirement for prior advice and consultation, and to disseminate Cabinet decisions and background information to ensure effective implementation. To fulfil these aims, the following guidelines have been adopted:

- *Access to all Cabinet documents should be guided by the 'need to know' principle. Access should only be granted if it is required for an officer to perform his/her duties.*
- *Ministers have primary responsibility for maintaining satisfactory security systems for Cabinet documents in their areas of responsibility, including the extent to which others have access to them. Departments and Ministers' offices requiring information in relation to particular Cabinet submissions should obtain approval from the appropriate Minister's office, which may ask the Cabinet Services Branch to supply the information.*
- *All Cabinet documents are numbered and stamped 'Not to be copied' to reinforce confidentiality. They must not be photocopied or scanned or otherwise digitally copied. There are no exceptions to this.*
- *While all Cabinet documents are confidential, care should be taken with documents not yet submitted to Cabinet. The distribution of Cabinet submissions for comment (refer to section 9.2) should be on the understanding that the documents are not copied and are returned to the source. Additional copies of a submission may be obtained from the Cabinet Services Branch.*

²⁰ Ibid, p5.

²¹ Doc. 55, Exhibit 4S.

- *The faxing and emailing of Cabinet documents is discouraged. However sometimes because of time constraints or distance, there is no alternative. When documents are faxed or emailed, the responsibility for security remains with the Minister's office to ensure that the designated recipient of the document is notified in advance, is aware of the confidentiality and confirms destruction of the fax or email.*
- *Officers who receive copies of Cabinet documents, including decision sheets, or who are aware of information contained in such documents, must observe the confidentiality of that information. Cabinet documents and the information they contain must not be revealed except for purposes authorised by the relevant Minister and chief executive officer, in accordance with these guidelines.*
- *Agencies should ensure that any documents considered confidential by the Minister or CEO are not placed on an open file.*

3.21 The DPC identified the following administrative instructions as to Cabinet confidentiality:²²

The Cabinet Handbook (version released in October 2007) (p 10) provides that:

“The confidentiality of Cabinet documents, discussions and decisions is a long established principle and has been regarded as essential for the maintenance of Cabinet collective responsibility. However, this principle needs to be tempered by the requirement for prior advice and consultation, and to disseminate Cabinet decisions and background information to ensure effective implementation.”

The Handbook also states that:

“Access to all Cabinet documents should be guided by the ‘need to know’ principle. Access should only be granted if it is required for an officer to perform his/her duties.”

Premier's Circular - Cabinet Confidentiality (2003/14)

The Circular states that:

²² Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p3.

“Public Sector officers who receive copies of Cabinet documents, including Cabinet submissions and decision sheets, or who are otherwise made aware of information contained in such documents, are required to observe the confidentiality of that information. Cabinet documents and the information contained in them must not be revealed except for such purposes as are authorised by the relevant Minister and chief executive officer.”

3.22 Section 9 of the *Public Sector Management Act 1994* relevantly provides:

9. General principles of official conduct

The principles of conduct that are to be observed by all public sector bodies and employees are that they —

- (a) *are to comply with the provisions of —*
 - (i) *this Act and any other Act governing their conduct;*
 - (ii) *public sector standards and codes of ethics; and*
 - (iii) *any code of conduct applicable to the public sector body or employee concerned;*
- (b) *are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; ...*

3.23 The DPC’s *Code of Conduct* requires officers not to disclose classified information nor use information for any purpose other than the purpose for which it was retained.²³

Criminal Offences Relating to the Disclosure of Government Information

3.24 Section 81 of *The Criminal Code* states that:

81. Disclosing official secrets

(1) In this section —

“disclosure” includes —

²³ Doc. 18, Exhibit 2A, minute from Mr Mal Wauchope, Director General, Department of the Premier and Cabinet, to Mr Timothy Marney, Under Treasurer, 12 February 2008, p3.

- (a) any publication or communication; and
- (b) in relation to information in a record, parting with possession of the record;

“government contractor” means a person who is not employed in the Public Service but who provides, or is employed in the provision of, goods or services for the purposes of—

- (a) the State of Western Australia;
- (b) the Public Service; or
- (c) the Police Force of Western Australia;

“information” includes false information, opinions and reports of conversations;

“official information” means information, whether in a record or not, that comes to the knowledge of, or into the possession of, a person because the person is a public servant or government contractor;

“public servant” means a person employed in the Public Service;

“unauthorised disclosure” means —

- (a) the disclosure by a person who is a public servant or government contractor of official information in circumstances where the person is under a duty not to make the disclosure; or
- (b) the disclosure by a person who has been a public servant or government contractor of official information in circumstances where, were the person still a public servant or government contractor, the person would be under a duty not to make the disclosure.

(2) A person who, without lawful authority, makes an unauthorised disclosure is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

3.25 The offence of “*corruption*” under s 83 of *The Criminal Code* may also be relevant:

83. Corruption

Any public officer who, without lawful authority or a reasonable excuse —

- (a) *acts upon any knowledge or information obtained by reason of his office or employment;*
- (b) *acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or*
- (c) *acts corruptly in the performance or discharge of the functions of his office or employment,*

so as to gain a benefit, whether pecuniary or otherwise, for any person, or so as to cause a detriment, whether pecuniary or otherwise, to any person, is guilty of a crime and is liable to imprisonment for 7 years.

Measures in Place to Prevent Unauthorised Disclosures of Cabinet Documents

3.26 The Under Treasurer provided the Committee with the following summary of measures currently in place within the Department of Treasury and Finance to prevent the unauthorised disclosure of Cabinet documents:

The committee may recall that a number of years ago—about four years ago—there were a couple of budget-related leaks. In fact, I think it was when I was Acting Under Treasurer. About four years ago there was a leak of an actual state annual financial report. Subsequent to that leak, we instituted a review of our security practices and processes, which was assisted by the Corruption and Crime Commission and undertaken largely by an external party. Since that time we have instituted a range of security measures. Probably the most prominent is that any documents we have that are related to the expenditure review committee—which is probably one of the biggest exposure areas—is the volume of documents we handle as opposed to the cabinet office. We have essentially mirrored the practices of the cabinet office. Every ERC paper that is distributed is watermarked and numbered and a record is kept of the delivery against the number; that is, so we know that a document with a watermark with a certain number on it was delivered to a particular

individual. We reviewed the distribution lists associated with expenditure review committee material to ensure that only those people who absolutely required such documents were given those documents.

We reviewed our internal security in terms of arrangements for the safekeeping of documents on our floors. Our floors are all secure. You cannot get to one of our floors without a security key. You cannot get away from the lifts and into the work area without a key. In the case of the ERC secretariat, we—much to her delight—located her in a nice lockable office that is highly secure, and there is a limited number of keys for that office. Within that office there is a grade C security safe as well. Additionally, we minimise and seek to use a secure email environment, which means that the passage of documents, when documents do have to pass electronically, do so within DTF's system as opposed to crossing from DPC's system into DTF's system and in the process going out to all and sundry in an electronic environment. We have sought to minimise risk in a number of ways.

Additionally, electronically within the department all documents have access restrictions applied to them. In the case of expenditure review committee documents, they are at the highest level of restriction in terms of access. So other officers within the office cannot access an expenditure review committee document that sits on the system.²⁴

- 3.27 The Under Treasurer confirmed that there was only one outstanding recommendation of the June 2005 CCC *Report on the Investigation into the Department of Treasury and Finance: Suspected Misconduct Concerning the Unauthorised Release of Treasury Information* that the Department of Treasury and Finance had yet to implement:

I believe there is only one recommendation that we are yet to fully implement, and that is the recommendation relating to security ratings for individual documents. It is a matter that we are very keen to implement but has some system capability constraints for us at the moment. We are currently in the process of upgrading to the next sort of generation of document management system and, as part of that process, will improve to ensure that we can give that rock-solid classification of documents. I did speak earlier about access and security related to access. The remaining recommendation from the

²⁴ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 9 June 2008, p5.

CCC is really about having a systematic way of providing that access, so that as soon as a document is classified as “cabinet in confidence”, for example, or “highly confidential”, then its access would automatically be restricted, rather than having to be manually determined. That is the remaining one.²⁵

²⁵ Ibid, p8.

CHAPTER 4

INITIAL INDICATIONS THAT THE DRAFT ERC SUBMISSION HAD BEEN LEAKED

- 4.1 The leak of the draft ERC submission (or the information contained within it) came to light prior to the publication of that information by *The Sunday Times* on 10 February 2008.
- 4.2 The suspected leak first came to the attention of the Government at 2:00pm on Friday, 8 February 2008, when Mr Paul Lampathakis, journalist for *The Sunday Times* emailed Mr Stuart McLagan, Media Adviser, Office of the then Acting Treasurer, Hon John Kobelke MLA. Mr Lampathakis asked Mr McLagan the following:

This is an inquiry for the Treasurer.

I know that the Government's Cabinet Sub-committee on Communication has urgently asked the expenditure review committee for \$5.25 million for the first half of this year and another \$10.75 {million} from July 2008 til June next year, for strategic campaigns.

Has this been approved[?]

*What will it be specifically used for?*²⁶

- 4.3 Mr McLagan forwarded the request from Mr Lampathakis to Mr Guy Houston, the Media Adviser of the Premier.²⁷
- 4.4 Mr Houston referred the matter to Mr Kieran Murphy, Director of Communications, Office of the Premier, as he was a member of the Cabinet Sub-committee on Communications.²⁸
- 4.5 Mr Murphy subsequently brought the matter to the attention of Mr Wauchope, Director General, DPC.²⁹ Mr Murphy gave the following evidence to the Committee:

²⁶ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p2; Doc. 2, Exhibit A, email, 8 February 2008.

²⁷ Ibid.

²⁸ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p2.

²⁹ Ibid.

I made some preliminary investigations and ascertained that the numbers, the dollar figures used in the questions that Paul was asking, and some of the language with which the questions were framed appeared to me to be identical to numbers and language that appeared in a draft ERC submission requesting additional advertising expenditure. So, I reported that matter to Mal Wauchope, and told Mal that I believed that there may have been a leak from within either DPC or somewhere in the ERC process. I had a discussion with Mal, and that was the extent of it that afternoon. Sorry, we then went back and I also have a third document here which is the response that was crafted by Mr Houston and myself to the Paul Lampathakis questions.³⁰

- 4.6 At some stage on the afternoon of 8 February 2008 the Under Treasurer was also advised of the suspected leak.³¹ Mr Murphy advised the Committee that:

At some stage, it may have been 8 April or shortly afterwards, I spoke to Tim Marney, the Under Treasurer, because I was not quite sure whether the leak came from within the Department of the Premier and Cabinet or from within Treasury. ERC documents do the rounds of Treasury and bureaucrats for checking and compilation for ERC meetings. Of course, some years ago there had been a leak of budget documents. I took it upon myself to advise Tim of the Lampathakis questions and that I had reported the matter to Mal Wauchope.³²

- 4.7 Mr Murphy advised the Committee that he had little or no involvement in the matter from that point on.³³

- 4.8 Mr Wauchope gave the following evidence of the events of the afternoon of 8 February 2008:

My understanding is that Murphy undertook some preliminary inquiries to determine whether it appeared that a leak had in fact occurred. Apparently, he spoke to several members of staff who were involved in the drafting of the document. He then raised this concern with me, I think in the afternoon of Friday the eighth. He drew my attention to the words used in Lampathakis' query and the words used in the cabinet document. The congruence between the two was quite

³⁰ Mr Kieran Murphy, Acting Chief of Staff, Premier's Office, Department of the Premier and Cabinet, *Transcript of Evidence*, 13 June 2008, p2.

³¹ Doc. 17, Exhibit 14N, letter from DTF to CCC, 21 February 2008, p1.

³² Mr Kieran Murphy, Acting Chief of Staff, Premier's Office, Department of the Premier and Cabinet, *Transcript of Evidence*, 13 June 2008, p3.

³³ *Ibid*, p4.

*strong. He provided me with the emails and the copies of the emails asking for the approval of the ERC submission and a copy of the draft ERC submission and another attachment to the cabinet submission. That afternoon, I believe, I spoke to Ms Ward [Acting Policy Officer, Office of the Director General, DPC] and indicated that I thought this matter needed to be referred to the CCC. That did not occur on the Friday. On 10 February we had the Sunday Times article, which had in that the information that had raised the suspicion.*³⁴

³⁴ Mr Mal Wauchope, Director General, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 June 2008, p9.

CHAPTER 5

THE SUNDAY TIMES ARTICLE

5.1 On 10 February 2008 the following article appeared in *The Sunday Times* newspaper:

Bid to 'buy' Labor win

Ripper wants \$16m for poll

EXCLUSIVE

By Paul Lampathakis

TAXPAYERS are being asked to fork out a whopping \$16 million for advertising to help get the Carpenter Government re-elected.

Treasurer Eric Ripper, as chairman of the Cabinet subcommittee on communication, has "urgently" asked the expenditure review committee, which he chairs, for \$5.25 million for the first half of this year and a further \$10.75 million until July next year.

Government sources said the money was to be spent on "strategic advertising campaigns".

But the sources said other major campaigns, such as anti-drug and police recruitment ads, were already funded, so this was clearly extra cash to help "buy" the Government victory in the state election.

...

A Government spokesman could not confirm whether funding had been approved because documents on Cabinet considerations were "in confidence".

...

The funding request also included \$7.1m for campaigns in 2009-10.

....³⁵

5.2 The following aspects of the article gave rise to the belief within DPC that a copy of the draft ERC submission or relevant information contained within it had been disclosed to Mr Lampathakis:³⁶

- \$5.25m is requested for the first half of 2008, \$10.75m for 2008/09 and \$7.1m for 2009/10;
- the money was to be spent on “strategic” advertising campaigns;
- that major campaigns such as anti-drug and police recruitment advertisements were already funded; and
- that the request should be considered “urgently”.

5.3 Mr Lampathakis confirmed in evidence to the Committee that he relied on information from a source or sources for the story.³⁷ He also confirmed that he knew the identity of that source or sources.³⁸ As to when the information was provided to him, Mr Lampathakis advised:

It was quite a busy summer, and really I receive information all the time. I really cannot be more specific than “the weeks leading up”. I am not sure whether it was two weeks, three weeks.³⁹

5.4 Mr Lampathakis declined to reveal the identity of his source or sources or whether the information was provided verbally or in documentary form⁴⁰ (see Chapter 14 of this report). He did, however, provide the following evidence to the Committee:

The CHAIRMAN: ... Can you tell me what action you took to establish the veracity of the information? Let me rephrase that. Did you take any specific action to establish the veracity of the information?

...

Mr Lampathakis: Being an investigative reporter, I guess that I ensure the sources I use are good.

The CHAIRMAN: Can you elaborate on what that means? Good for what?

Mr Lampathakis: Reliable.

³⁵ *The Sunday Times*, 10 February 2008, p3.

³⁶ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, pp1-2.

³⁷ Mr Paul Lampathakis, Journalist, *The Sunday Times, Transcript of Evidence*, 7 July 2008, p3.

³⁸ *Ibid*, p10.

³⁹ *Ibid*, p3.

⁴⁰ *Ibid*, p4.

The CHAIRMAN: Reliable in the information they provided to you — is that a fair representation of what you are saying?

Mr Lampathakis: Yes, Mr Chairman.

The CHAIRMAN: Do you believe that to be the case in this instance?

Mr Lampathakis: That the information was accurate? Yes. I would not put a story out with something that I believed was —

...

Hon ADELE FARINA: Thank you, Mr Chairman. How do you go about ensuring that your sources are reliable?

...

Mr Lampathakis: Over years of operating as a journalist, you make assessments on information and sources and you have a sense of what is and what is not accurate.⁴¹

- 5.5 Mr Lampathakis claimed that he did not know that the information was of a confidential nature.⁴² Mr Lampathakis did, however, state that he was aware that it was a criminal offence if someone breaches Cabinet confidentiality and discloses confidential information without authorisation.⁴³

Which version of the draft ERC submission contained the information that was disclosed?

- 5.6 The Committee noted that there were a number of different versions of the draft ERC submission.⁴⁴ The Committee has been advised by DPC and DTF of the following versions of the draft ERC submission:⁴⁵

- a) a version created 3 December 2008 (**Version 1**);⁴⁶

⁴¹ Ibid, p5.

⁴² Ibid, p6.

⁴³ Ibid, p4.

⁴⁴ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 9 June 2008, p3.

⁴⁵ Doc. 158, Exhibit AD, letter from Mr Mal Wauchope, 14 July 2008.

⁴⁶ Doc. 159, Exhibit AE.

- b) an amended version created subsequently on 3 December 2008 - this is the version that was considered by the Cabinet as an attachment to the minutes of a meeting of the Cabinet Sub-committee on Communication (**Version 2**);⁴⁷
- c) an amended version provided to the ERC Secretary on 22 January 2008 (**Version 3**);⁴⁸
- d) an amended version created on 25 January 2008 (**Version 4**);⁴⁹ and
- e) an amended version created on 28 February 2008 - after the publication of *The Sunday Times* article (**Version 5**).⁵⁰

5.7 Version 1 of the draft ERC submission relevantly states:

***THE HON ERIC RIPPER, DEPUTY PREMIER, CHAIR OF THE
CABINET SUB-COMMITTEE ON COMMUNICATION (CSC:C)***

SUBMITS TO

***TREASURER, CHAIR OF THE EXPENDITURE REVIEW
COMMITTEE***

***ITEM: STRATEGIC ADVERTISING CAMPAIGNS 2008-2009 &
2009-2010.***

PURPOSE

The CSC:C seeks ERC funding of proposed strategic advertising campaigns for 2007-08, 2008-09 & 2009-10 managed within its Whole-of-Government communications strategy.

BACKGROUND

...

It should be noted that the Police Recruitment 2007-08, Burglar Beware, Eyes on the Street, Lock and Leave, Open Doors and Windows, Stolen Goods, Amphetamines, Waste Management and Beat the Peak strategic campaigns are already funded from within operational funds, while the Department of Education and Training's

⁴⁷ Doc 160, Exhibit AF.

⁴⁸ Doc. 125, letter from Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, 12 June 2008, p1.

⁴⁹ Doc. 161, Exhibit AG.

⁵⁰ Doc. 162, Exhibit AH.

'Apprenticeship and Traineeships' strategic campaign has already received ERC approval and funding, to 2010.

Urgent consideration should be given to progressing ERC consideration for unfunded strategic campaigns to contain whole of government advertising expenditure in line with historical expenditure levels and provide adequate timing for creative advertising agencies to be engage [sic] to produce advertising material and book media schedules within the proposed timeframes.

COSTING/FINANCIAL IMPLICATIONS

The cost of the campaigns is \$5.25 million for the remainder of 2007-08, \$10.75 million in 2008-2009 and \$7.1m in 2009-2010 (Total \$23.1 million).

...

URGENCY

The ERC submission seeks funding approval for commencement of scheduled advertising campaigns in early 2008. ...

Recommendation

The Cabinet recommends the Expenditure Review Committee (ERC) approves funding of proposed strategic campaigns for the remainder of 2007-08 and financial years 2008-2009 and 2009-2010, as submitted.

...

*DECEMBER 2007.*⁵¹

- 5.8 Version 2, being the version provided to the members of the Cabinet and their offices was apparently the most widely distributed version out of the versions created prior to *The Sunday Times* article.
- 5.9 Version 2 of the draft ERC submission was the version initially provided to the Committee by the Director General of DPC⁵² (and also appears to be the only version

⁵¹ Doc. 159, Exhibit AE.

⁵² Doc. 133, Exhibit Z.

provided to the WAPOL⁵³). Version 2 is formatted differently, being an attachment (“ATTACHMENT TWO”) to another document and being page numbers 9 and 10 of that other document, the headings are a different font style, and the following wording changes are evident:

- a) in the third paragraph under the heading “Background” on page 1, the words “Police Recruitment 2007-08” have been deleted from the list of strategic campaigns already funded from within operational funds;
- b) in the fourth paragraph under the heading “Background” on page 1, the word “for” in the first sentence has been substituted with “of”, and the words “historical expenditure levels” has been substituted with “historical expenditure trends”;
- c) in the paragraph under the heading “Urgency” on page 2, the words “early 2008” have been substituted with “early 2008-2009”; and
- d) in the paragraph under the heading “Recommendation” on page 2, the words “, as submitted” have been deleted; and
- e) one copy of Version 2 provided to the Committee has the number “000819” stamped in the top right hand corner of the document.

5.10 Some drafts of Version 2 that were sent to Minister’s offices on 13 and 14 December 2007 were marked “*MINISTER ONLY*”.⁵⁴

5.11 Version 3 differs from Version 1 as follows:

- a) the heading “RELATION TO GOVERNMENT POLICY” and following paragraph appear at the bottom of page 1 instead of on the top of page 2; and
- b) in the paragraph under the heading, “RECOMMENDATION” on page 2, in the opening words of the paragraph the word “That” is used instead of “The”.

5.12 Version 4 differs from Version 1 as follows:

- a) the general format and font is different;
- b) the headings are all in upper case;

⁵³ Doc. 54, Exhibit 4R. See Docs 136 and 137, email and attachment from Ms Lisa Ward, Principal Policy Officer, Office of the Director General, Department of the Premier and Cabinet, to Detective Senior Constable Elissa Mansell, dated 9 April 2008.

⁵⁴ Doc. 53, Exhibit 4Q, WAPOL Investigation Running Sheet, email from DPC to WAPOL, 9 April 2008 (11:38am).

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- c) in the third paragraph under the heading “BACKGROUND” on page 1, in the first line the word “that” is missing after the word “noted”;
 - d) in the fourth paragraph under the heading “BACKGROUND” on page 1, in the third line the word “engaged” is correctly used instead of “engage”;
 - e) in the fourth paragraph under the heading “BACKGROUND” on page 1, in the fourth line the word “timeframe” is used instead of the plural “timeframes”;
 - f) in the paragraph under the heading “COSTING/FINANCIAL IMPLICATIONS” on page 1, in the second line “7.1million” is used instead of “7.1m”;
 - g) in the table under the heading “COSTING/FINANCIAL IMPLICATIONS”, “FTE’s” is used instead of “FTEs”;
 - h) the heading “RELATION TO GOVERNMENT POLICY” and following paragraph appear at the bottom of page 1 instead of on the top of page 2;
 - i) in the paragraph under the heading “URGENCY” on page 2, in the first line the words “for scheduled advertising Campaigns” is used instead of “of scheduled advertising campaigns”;
 - j) in the paragraph under the heading “MEDIA/COMMUNICATIONS STRATEGY” on page 2, in the first line the word “Enable” is used instead of “Enables”;
 - k) in the paragraph under the heading “MEDIA/COMMUNICATIONS STRATEGY” on page 2, in the first line the word “management” has been deleted;
 - l) in the paragraph under the heading “MEDIA/COMMUNICATIONS STRATEGY” on page 2, in the first line the “w” in “whole” has been capitalised;
 - m) in the paragraph under the heading “MEDIA/COMMUNICATIONS STRATEGY” on page 2, in the second line the word “thought” is used instead of “though”; and
 - n) in the paragraph under the heading, “RECOMMENDATION” on page 2, in the opening words of the paragraph the word “That” is used instead of “The Cabinet recommends”.

- 5.13 Version 5 was apparently the final version and, as it was created subsequent to the newspaper article on 10 February 2008, it is not relevant to the question of who leaked the information contained in the draft ERC submission.
- 5.14 When the document (Version 2) was distributed prior to the meeting of Cabinet on 17 December 2007 as an attachment to the minutes of the Cabinet Sub-committee on Communication, the Cabinet Services Branch had watermarked the document “*Department of the Premier and Cabinet NOT TO BE COPIED*”.⁵⁵ However, copies of the document were circulated amongst various officers by email without any watermark.⁵⁶
- 5.15 The Under Treasurer advised the Committee that officers of the DTF had access to two versions of the draft ERC submission - one received on 22 January 2008 (most likely Version 3) and the other on 13 February 2008 (most likely Version 4).⁵⁷
- 5.16 The identified five different versions of the draft ERC submission have some significance in isolating the specific document that was the source of the information provided to Mr Lampathakis.
- 5.17 As noted above, the following contents of *The Sunday Times* article gave rise to the belief within DPC that the draft ERC submission or its contents had been disclosed to Mr Lampathakis:⁵⁸
- a) that \$5.25m was requested for the first half of 2008, \$10.75m for 2008/09 and \$7.1m for 2009/10;
 - b) that the money was to be spent on “*strategic*” advertising campaigns;
 - c) that major campaigns such as anti-drug and police recruitment advertisements were already funded; and
 - d) that the request should be considered “*urgently*”.
- 5.18 The Committee notes that the reference in the article to “*police recruitment ads*” would indicate that the information provided to Mr Lampathakis was that as contained in either Version 1, Version 3 or Version 4. There was no reference to police recruitment advertising in Version 2, which was the version that was sighted by Cabinet and was thus the most widely distributed of the versions.

⁵⁵ Doc. 53, Exhibit 4Q, WAPOL Investigation Running Sheet, email from DPC to WAPOL, 9 April 2008 (11:12am).

⁵⁶ Ibid.

⁵⁷ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 30 June 2008, p2.

⁵⁸ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, pp1-2.

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- 5.19 The distribution of versions 1, 3 and 4 would appear to have been limited to the Cabinet Sub-Committee on Communication, along with a relatively small number of officers within DPC, the Office of the Premier, the Government Media Office and the DTF.

CHAPTER 6

REFERRAL OF THE MATTER TO WAPOL

6.1 On 12 February 2008, Mr Mal Wauchope, Director General, DPC, wrote to the Officer in Charge of the Major Fraud Squad, WAPOL, referring the suspected disclosure of the draft ERC submission as a possible offence under s 81 of *The Criminal Code*.⁵⁹ Mr Wauchope advised that he had also referred the matter to the CCC.⁶⁰

6.2 As to why he referred the matter to the Major Fraud Squad, Mr Wauchope told the Committee:

*The reason it went to the major fraud squad is that that has now subsumed or absorbed the old public sector investigations unit. Prior to referral, Ms Ward spoke to the State Solicitor's Office briefly, who agreed that it would be reasonable to refer the matter to the public sector investigations part of the police as it was a potential breach of section 81 of the Criminal Code.*⁶¹

6.3 On 22 February 2008, Detective Sergeant Kearns Gangin, Public Sector Assessments, Major Fraud Squad, wrote to Mr Wauchope, Director General, DPC, and advised that the WAPOL would be conducting an investigation into a potential breach of s 81 of *The Criminal Code* “pertaining to disclosure of official secrets”.⁶²

Major Fraud Squad

6.4 In a broadcast to all WAPOL staff on 30 January 2008 following the dissolution of the Public Sector Investigations Unit, new protocols were disseminated for the investigation of complaints against public servants.⁶³

6.5 The Major Fraud Squad now “*manages, undertakes and coordinates investigations into criminal conduct by public servants relating to the duties/functions of their office*”.⁶⁴

⁵⁹ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p1.

⁶⁰ Ibid.

⁶¹ Mr Mal Wauchope, Director General, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 June 2008, p9.

⁶² Doc. 47, Exhibit 4K, letter from WAPOL to DPC, 22 February 2008, p1.

⁶³ Doc. 36, Exhibit 4A, internal WAPOL memorandum, 3 June 2008, Attachment 1, p1.

⁶⁴ Ibid.

- 6.6 Complaints referred to the Major Fraud squad are assessed and advice is provided to the CCC on action to be taken, which may include:⁶⁵
- a) no criminal investigation being undertaken and referral back to the agency concerned for managerial/disciplinary action;
 - b) the matter being retained for investigation by the Major Fraud Squad; or
 - c) the matter being allocated to another Specialist Crime Squad or District for investigation.
- 6.7 Whether the Major Fraud Squad conducts an investigation itself or allocates it to another office within the WAPOL, it still maintains an oversight role and provides a liaison point between the CCC and the investigators regarding the status and progress of all investigations.⁶⁶
- 6.8 Following review of the protocols since the raid on *The Sunday Times*, they have been amended to include the following additional procedure:

*Matters relating to Members of Parliament or Senior Government officials will in addition to being subject to the established protocols be referred to the senior management group [of the Major Fraud Squad] for further assessment and determination.*⁶⁷

- 6.9 The reasons for this amendment to the protocols are set out in an internal WAPOL memorandum, in which Detective Inspector Albrecht notes:

With regard to the current protocols relating to the manner in which complaints against public servants are investigated, currently the CCC determines which complaints it will investigate without consultation with WAPOL, regardless of the seniority of the public servant involved or any attendant sensitive or political circumstances that relate to the allegation.

Given that allegations regarding public servants can and do relate to the activities of members of parliament, senior government officials, government consultants and lobbyists the allocation of these type of investigations to WAPOL is problematic.

This is true where allegations give rise to intense public interest, media scrutiny and/or the matter relates to issues of significant

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Doc. 35, Exhibit 4A, internal WAPOL memorandum, 3 June 2008, p1.

sensitivity including such matters as; disclosure of government secrets, matters relating to children and/or other major crimes.

This therefore can have considerable implications for any investigation being conducted, in that there is real and significant potential for such investigations to be undermined or considerably compromised through such exposure.

The CCC has the capacity within its legislation to investigate such matters “in camera”, it can compel the production of documents, the attendance and giving of evidence by witnesses, which therefore affords them considerable advantages in developing strategies to effectively investigate alleged crimes without the interference or knowledge of persons of interest or other parties.

Clearly, these are legislative powers not afforded to police and as a result when police undertake the investigation of such matters they are metaphorically doing so with one hand tied behind their backs when compared to the CCC.

Consequently, given those legislative empowerments the CCC are often best placed to investigate or deal with such allegations.

Therefore, when such matters arise in the future it is contended that where the CCC should seek to divest investigations into those matters to WAPOL that some protocol be established with the CCC to determine which agency is the most suited in the circumstances to conduct the inquiry.

Consequently, it is recommended that the matter be considered by the senior executive for consideration of this matter and a position established for the agency on this issue.⁶⁸

- 6.10 On 21 February 2008 the Major Fraud Squad notified the CCC of the existence of the complaint that had been made to it by the DPC, as part of their usual practice.⁶⁹

⁶⁸ Doc. 37, Exhibit 4A, internal WAPOL memorandum, 3 June 2008, Attachment 2, pp2-3.

⁶⁹ Doc. 39, Exhibit 4C, internal WAPOL memorandum, 27 May 2008, p4; Doc. 48, Exhibit 4L.

CHAPTER 7

REFERRAL OF THE MATTER TO THE CCC

- 7.1 In his evidence to the Committee, Mr Kieran Murphy, Acting Chief of Staff, Premier's Office, DPC, stated:

I think that in this time of heightened sensitivity—if I can say, the post-CCC era we live in—most people in government will play it by the book. If they are aware of a leak, it should be reported. If they do not report it, I think it is probably at their own peril.⁷⁰

- 7.2 Mr Wauchope also noted the low threshold for reporting unauthorised disclosures to the CCC:

[T]he reporting threshold for the CCC is fairly low and, in my view, any unauthorised distribution of such a document would constitute misconduct. It might be serious misconduct, but it would certainly be simple misconduct and that constitutes something that is reportable under the CCC guidelines.

...

My legal obligation under section 28 of the Corruption and Crime Commission Act as a principal officer is to notify the CCC as soon as possible of a suspicion, which I had formed, as I indicated, on the Friday, confirmed by the Sunday article. It is to be done as soon as practicable after the suspicion has been formed. Section 29 of that Act says the duty to notify is paramount. If you put the two together, it is a fairly strong obligation.⁷¹

- 7.3 Mr Wauchope gave evidence that the last unauthorised disclosure within the Government that he could recall was in 2004, and that matter was also referred to the CCC for investigation.⁷² That matter was subsequently reported on by the CCC (see paragraph 12.38).

- 7.4 Once the CCC received the complaint from Mr Wauchope, it was obliged under the *Corruption and Crime Commission Act 2003* to make a preliminary assessment as to

⁷⁰ Mr Kieran Murphy, Acting Chief of Staff, Premier's Office, Department of the Premier and Cabinet, *Transcript of Evidence*, 13 June 2008, p7.

⁷¹ Mr Mal Wauchope, Director General, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 June 2008, p6 and p9.

⁷² *Ibid*, p6 and p13.

whether the allegation contained in the complaint constituted misconduct or serious misconduct under that Act.⁷³

- 7.5 Mr Tony Wood, Assessor, Investigations Review and Complaints Assessment Unit, CCC, was responsible for assessing the allegation in this case and forming an opinion under s 22 of the *Corruption and Crime Commission Act 2003* as to whether or not it disclosed possible misconduct. Once Mr Wood formed the opinion that the allegation did disclose possible misconduct, he referred the matter to the Tasking and Coordination Group of the CCC for a decision under s 33(1) of the *Corruption and Crime Commission Act 2003*. The Tasking and Coordination Group considered the matter on 27 February 2008.⁷⁴
- 7.6 The Committee was advised that the CCC formed the opinion that there had been “*serious misconduct*”.⁷⁵ The fact that disclosure of official secrets is an offence under s 81 of *The Criminal Code* was an element in that determination.⁷⁶
- 7.7 Section 33(1) of the *Corruption and Crime Commission Act 2003* provides a number of courses of action for the CCC once it has carried out its preliminary assessment of a complaint. That section states:

33. Decision on further action on an allegation

- (1) *Subject to subsection (2), having made an assessment of an allegation the Commission may decide to —*
- (a) *investigate or take action without the involvement of any other independent agency or appropriate authority;*
 - (b) *investigate or take action in cooperation with an independent agency or appropriate authority;*
 - (c) *refer the allegation to an independent agency or appropriate authority for action; or*
 - (d) *take no action.*

⁷³ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, p3.

⁷⁴ Letter from Hon L.W. Roberts-Smith RFD QC, Commissioner, Corruption and Crime Commission of Western Australia, 30 July 2008, Doc. 181, p4.

⁷⁵ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, p3.

⁷⁶ *Ibid*, p4.

7.8 The CCC has the following process for assessing notifications under s 33 of the *Corruption and Crime Commission Act 2003*:

Mr Wynn: *The decision-making power under that section is made by a number of people. A lot of allegations that come into the commission, come into our investigation review section, and a number of people in that section have a delegation from the commissioner to make a decision under section 33 as to whether or not it is a matter that will be investigated by the commission. Those people make that decision with reference to the manager of that section. Following from there, there may be some matters that they consider may be appropriate for the commission to investigate. What happens on those occasions is that they will come down to the investigations unit, which is the main investigative section of the commission. The tactical and coordination group has a look at the matter that has been referred. That is made up of the two managers, the deputy director and the coordinator of intelligence. At the current time, the deputy director, Mr Robert Sutton, and myself, hold a delegation from the commissioner to make a decision under section 33. In respect to an investigation that the tactical and coordination group decides does seem to fit the criteria, as a general principle we then refer the matter to the commissioner for him to have a look at what we are intending to take on. In other cases, there are matters that perhaps have not quite come up to the bar of an investigation and we feel there needs to be some more work done on them. We exercise our delegation and have a preliminary investigation commence within the unit. There are various sections and various people who use that delegation.*

Hon ADELE FARINA: *Is it exercised by a single person on a case-by-case basis, or is it a joint decision by a number of people who have that delegated authority?*

Mr Wynn: *Ultimately, it is exercised by an individual who has the delegation from the commissioner. In respect to the tactical and coordination group, which I am part of, obviously the views of other people on that committee are important and may be persuasive or otherwise with respect to whether we would investigate it or not.*

Hon ADELE FARINA: *Is the commissioner ever involved in making a section 33 decision?*

Mr Wynn: *I have to say that most of the time he is. In terms of making a decision for a new investigation that we take on, he would become*

involved and he would have a look at certainly the recommendation coming forward from the tactical and coordination group.

Mr Anticich: *It is very much the case that once we go to an investigation, it must be under the authority of the commissioner. In other words, when we go to a full-blown investigation, that is an authority that then triggers the ability to use the coercive powers along the way.⁷⁷*

7.9 Mr Anticich, Director, Operations, CCC, explained the administrative process that then followed within the CCC regarding Mr Wauchope's complaint:

Mr Anticich ... *In deciding whether the commission takes on a matter within our workings, we have a group known as the tasking coordination group. Effectively, it is that group's job to look at matters and determine against a bunch of criteria whether we should take matters on. I can say that on 27 February this matter went to the tasking coordination group. I have a ... case management note, which I can tender to the committee. ...:*

It says this —

The T&CG met out of session . . .

It nominates the officers —

. . . to consider the notification made by DPC, together with the accompanying report from —

One of our officers.

...

Importantly, it reads —

The T&CG had regard to the fact that the matter had also been reported by DPC to the WA Police and that confirmation was received on 26FEB08 that the WA Police had commenced an investigation.

The T&CG also noted that numerous named people had access to the information that was allegedly leaked, together

⁷⁷ Mr Trevor Wynn, Manager, Investigations, Corruption and Crime Commission of Western Australia; Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, pp4-5.

with, as DPC state “it is likely that a number of other officers from DPC and the Department of Treasury and Finance may have had access to the information”. If the information was confidential, it seems on the face of it that a considerable number of people did have access. The T&CG also noted that the information was considered by Cabinet on 17DEC07.

Having regard to the fact that the matter is being investigated by the WA Police, and the absence of any compelling reason why the Commission should stop that investigation and in turn investigate the matter itself, the T&CG rejected the matter.

...

We did not take it on as an investigation in our own right; rather, it was being dealt with appropriately by another agency.⁷⁸

7.10 Mr Anticich added that:

[E]ffectively, the matter, certainly from the perspective of the Corruption and Crime Commission, fell reasonably silent, if I could describe it as that. One of the other functions of our role is that, once a matter is referred out to another agency, we go into a monitoring process that is, effectively, watching or keeping an eye on these things. Ultimately, when a matter is concluded, it comes back to the last part of the process, which is a review of what has actually been conducted.⁷⁹

7.11 Sections 40 and 41 of the *Corruption and Crime Commission Act 2003* are relevant to the ongoing monitoring and review role of the CCC:

40. Commission’s monitoring role of appropriate authorities

(1) If—

(a) *an appropriate authority takes action in relation to an allegation in cooperation with the Commission; or*

⁷⁸ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, p6.

⁷⁹ *Ibid*, p8.

(b) *an allegation is referred to an appropriate authority by the Commission,*

the appropriate authority must prepare a detailed report of the action the appropriate authority has taken in relation to the allegation.

(2) *The report is to be given to the Commission in writing as soon as practicable after the action is taken.*

(3) *The Commission may, by written notice, direct the appropriate authority to give the Commission a detailed report on —*

(a) *action the appropriate authority has taken in relation to the allegation; and*

(b) *if action recommended by the Commission under section 37(2) has not been taken, or any action has not been taken within the time recommended under section 37(3), the reasons for not so taking the action.*

(4) *The appropriate authority must comply with a direction given to it under subsection (3).*

(5) *A report referred to in this section must include details of any prosecution initiated or disciplinary action taken as a consequence of the recommendations.*

41. Commission may review how appropriate authority has dealt with misconduct

(1) *The Commission may review the way an appropriate authority has dealt with misconduct, in relation to either a particular allegation, complaint, information or matter involving misconduct or in relation to a class of allegation, complaint, information or matter involving misconduct.*

7.12 Mr Anticich advised the Committee that:

In terms of the decision that the police deal with this rather than the commission, I do not think the gravity of the matter was really a

*factor. I think it was more to do with the fact they had taken the matter on.*⁸⁰

- 7.13 The Committee notes that the CCC did not undertake any preliminary review of the evidence before deciding to refer the matter to the WAPOL:

The CHAIRMAN: ... *Did you have a copy of the document that was said to have been disclosed without authorisation?*

Did you ever acquire a copy of that document or copy said to be the document?

Mr Anticich: *To the best of my knowledge we believe we did not receive that document.*

The CHAIRMAN: *Therefore, as I understand it, you made a determination that “the document” constituted a document that contained confidential information. I am wondering how you determined that to be the case if you never saw the document, as established as the status of the document itself?*

Mr Anticich: *Certainly, it is the case when we assess an allegation that we take it on face value in terms of its actual existence or otherwise. There are circumstances where we may undertake some preliminary investigations to establish those facts. In this case, if the WA Police had not been involved or had not taken the matter on and we had not progressed, we more than likely would have done exactly that. Because, by the time we received it, it was evident they had this underway and there seemed no purpose for us to actually proceed with that on the basis the police were going to deal with it.*

The CHAIRMAN: *I have to say that it surprises me that in your preliminary investigations or preliminary assessment in determining whether there was a serious misconduct committed that you did not sight the document that was said to have been leaked. Is there some reason why you would not have done that in your preliminary investigations, and that is before you referred it to the police?*

Mr Anticich: *Mr Chair, given these things happened virtually on the same day, there seemed little purpose to replicate what we would assume the police would undertake in the normal course of their investigation.*

⁸⁰ Ibid, p11.

The CHAIRMAN: *Yes. I am more interested in the CCC making an inquiry of the Department of the Premier and Cabinet or the Department of Treasury and Finance in an attempt to get a copy of the document that was said to be leaked. This was, of course, during your preliminary assessment stage and before you had referred officially to the police, recognising that there was a dual referral.*

Mr Anticich: *Perhaps to clarify, Mr Chair. What happens with allegations is that we run this assessment over them on the basis of trying to determine it against the definition under section 4. So that assessment is done and that then triggers the mechanisms that involve us and/or other agencies under the Act. As a consequence of the investigation those things either fall away and/or are proven.*

It is not necessary for the purposes of our assessment to necessarily have all the evidence, but rather deal with what the allegation is and whether it would constitute misconduct or serious misconduct.

The CHAIRMAN: *Yes, and I am assuming from what you said that in due course you would attempt to get a copy of the document, if you were handling the investigation, and then you would determine whether it was a document with a particular status. It seems to me that if it was not such a document, the whole inquiry might fall away.*

Mr Anticich: *That is absolutely correct.*⁸¹

- 7.14 Mr Wauchope advised the Committee that DPC has not conducted a *Public Sector Management Act 1994* investigation into the unauthorised disclosure, due to the WAPOL investigation.⁸² The Committee notes, however, that the CCC wrote to Mr Wauchope on 27 February 2008 formally referring the complaint back to the DPC for investigation “*within a reasonable period*”.⁸³
- 7.15 The Committee considers that it would have been prudent for the CCC to have obtained from the DPC a copy of the alleged leaked Cabinet document, so that it would have been in a better position to form an opinion as to whether an investigation should be conducted.
- 7.16 The Committee also notes that it would have been prudent for DPC to have informed the CCC and WAPOL that there were five versions of the Cabinet document and that the version of the leaked document had not been established. The identification of the

⁸¹ Ibid, p15.

⁸² Mr Mal Wauchope, Director General, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 June 2008, p13.

⁸³ Doc. No. 16.

actual document leaked was critical to establishing the number of people who had access to the document. Had this occurred, it may have influenced the direction of the investigation.

Official Referral of the Matter to WAPOL under the *Corruption and Crime Commission Act 2003*

7.17 The Commissioner of the CCC confirmed that the fact that the WAPOL investigation was “on foot” was crucial in the CCC’s decision to refer the DPC’s notification to WAPOL:

Hon Len Roberts-Smith: ... Perhaps it might help the committee, though, if I give an indication very briefly of the way section 33 and section 34 decisions are actually made.

The CHAIRMAN: Yes, that would be helpful.

Hon Len Roberts-Smith: I will produce for you in a moment the actual documentation that goes to that assessment process. Before doing that, though, I should make it clear that this documentation, which is called “Case Categorisation Priority Model”, which feeds into our computerised case management information system, is something which was drawn from a model used by the Australian Federal Police and others, so it has got a recognised law enforcement provenance, and modified for our purposes. However, I should make the point that in this instance we did not actually get to the point of applying this model because it did not get over the threshold of needing to be evaluated according to it. That is because the matter had already been referred to police by Department of the Premier and Cabinet. They had already opened a file and, according to the information we had, had already recognised that there was a potential criminal offence under section 81 and they were therefore investigating it, so we would have to have told them, “Stop your investigation; we want to take it over.”

Hon ADELE FARINA: Or you could have agreed to do a joint —

Hon Len Roberts-Smith: Yes, or we could have agreed to join in with them, but the point is that they actually had an on-foot investigation.

The other point was that we had quite a lot of other resources committed at that time, and, very significantly, there was nothing in the information that we had that suggested that there would be a need to engage the commission’s coercive powers for the conduct of that investigation. That obviously is part of a threshold assessment that we

would always make: is this allegation something that could be investigated using only the commission's coercive or special powers as opposed to ordinary police investigative powers? That would not necessarily answer the question entirely anyway because we might, for other reasons, decide to take it on, even if we thought we did not need to use our special powers. However, in this case, when the operations people looked at these particular matters, their view was that it was with the police; it did not, on the face of it, need our powers; it might as well stay with the police. That was particularly so, as I say, because we already had our resources largely committed. They did not get to actually applying the rather complicated evaluation prioritisation model.⁸⁴

7.18 In written evidence to the Committee, the Commissioner of the CCC noted the following:

The Commission does not accept that any reluctance on its part in relation to this matter was specifically in relation to the use of its coercive hearings power. As previously stated the Commission exercises a judicious and cautious approach when using the powers available to it. It must consider all the circumstances of each particular case including the application of alternate investigative methodologies, prioritisation of existing investigations, resource implications and possible adverse effects to any individual subjected to the use of these powers. In deciding to refer the matter to the police under s.33(i)(c) without itself becoming involved in this investigation at that particular time the Commission took the following circumstances into account:

- *notwithstanding that it concerned an allegation of possible serious misconduct, the investigation was not exceptional in its nature;*
- *police had commenced the investigation and appeared to have adequate resources available to them;*
- *there appeared to be alternate avenues of enquiry available to the police that could be used to produce an investigative outcome;*
- *the current resource commitments of the Commission;*

⁸⁴ Hon Len Roberts-Smith QC, Commissioner, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, p4.

- *the seriousness of the allegation; and*
- *the likely outcomes and success of the use of the Commission's powers.*⁸⁵

7.19 On 27 February 2008 Mr Tony Wood, Assessor/Reviewer, CCC, wrote to Detective Senior Sergeant Dom Blackshaw, Officer in Charge, Major Fraud Squad, to formally advise that:⁸⁶

- a) the CCC had received a complaint from DPC of suspected misconduct by an unknown public officer;
- b) the CCC understood the matter was already under investigation by WAPOL;
- c) in accordance with ss 33(1)(c) and 37(3) of the *Corruption and Crime Commission Act 2003* the CCC had decided to refer the complaint to WAPOL for investigation;
- d) pursuant to s 40(1) of the *Corruption and Crime Commission Act 2003*, WAPOL should send the CCC a report about WAPOL's investigation of the complaint; and
- e) the CCC will review the WAPOL investigation pursuant to s 41 of the *Corruption and Crime Commission Act 2003*.

7.20 The Committee notes the evidence of the WAPOL that:

*It would appear that the CCC can make a recommendation that the WA Police conduct an investigation. While the CCC has a monitoring role and may review how the WA Police has dealt with the allegation referred to it, it does not appear that the CCC can direct the WA Police to conduct an investigation.*⁸⁷

Referral to DPC of an Investigation into "Procedural Matters"

7.21 After the decision of the Tasking and Coordination Group of the CCC on 27 February 2008, the allegation was referred back to the DPC (in addition to being referred to the WAPOL) for action. In doing so, the CCC was aware that the DPC has no jurisdiction to investigate crime, but that it could investigate all other relevant aspects of the

⁸⁵ Letter from Hon L.W. Roberts-Smith RFD QC, Commissioner, Corruption and Crime Commission of Western Australia, 30 July 2008, Doc. 181, p10.

⁸⁶ Doc. 44, Exhibit 4H, letter from CCC to WAPOL, 27 February 2008, p1.

⁸⁷ Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p2.

matter - such as matters of process, administration or discipline.⁸⁸ The Committee notes, however, that the CCC did not also refer the matter to the DTF for investigation, despite the fact that the DTF's officers are involved in the preparation of relevant Cabinet documents.

7.22 The CCC witnesses explained the purpose of the referral to the DPC of an investigation into "procedural matters":

Hon ADELE FARINA: ... *What does the commission mean when it talks about investigating procedural matters?*

Mr Wynn: *I suppose in respect of that question, ultimately if the allegation is taken at face value, there has been a leak from the Department of the Premier and Cabinet, so it may well be the case that there could have been procedures in place at DPC that may need to be reviewed. It may need, for example, to have a look at the extent to which those documents are sent to various individuals. It really, I suppose, was an indicator to the department that it needed to have another look at this matter and find out whether existing procedures could be improved and whether anything else could be done to prevent a recurrence.*

Hon ADELE FARINA: *My understanding is that it is possible that the leak could have originated from a DPC officer or a Department of Treasury and Finance officer at the very least; there may be other agencies involved. It raises in my mind the question of why the commission would refer the matter only to the DPC for investigation of procedural matters.*

Mr Anticich: *My recollection is that it might have been a question of timing, because I think the information in relation to the DTF officers may well have come after we had taken that particular action. I would have to go back and check the chronology, but I suspect that might be one of the reasons, if not the reason.*

Hon ADELE FARINA: *It is not a suggestion by the commission that the DPC has jurisdiction over the Department of Treasury and Finance and could undertake an investigation into procedural matters in relation to another department.*

⁸⁸ Letter from Hon L.W. Roberts-Smith RFD QC, Commissioner, Corruption and Crime Commission of Western Australia, 30 July 2008, Doc. 181, p5.

*Mr Anticich: No, not at all. My recollection is that it was about the timing.*⁸⁹

⁸⁹ Mr Trevor Wynn, Manager, Investigations, Corruption and Crime Commission of Western Australia; Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, pp6-7.

CHAPTER 8

THE WAPOL INVESTIGATION

- 8.1 The complaint letter sent by Mr Wauchope, Director General, DPC, to the Major Fraud Squad on 12 February 2008 was assessed by Fraud Desk officer, Detective Sergeant Gangin, on 15 February 2008.⁹⁰
- 8.2 The Major Fraud Squad Investigation File Cover Sheet indicates that on 22 February 2008 the complaint was allocated to the Major Fraud Squad.⁹¹
- 8.3 The Committee was advised that at this point in time the matter was placed on “*stockpile*” by the WAPOL due to staff workload considerations.⁹² The Committee notes that it was almost seven weeks before the complaint was allocated to an investigating officer. The WAPOL’s records indicate that at 9:30am on 8 April 2008 the complaint was allocated to Detective Senior Constable Elissa Mansell for investigation.⁹³
- 8.4 The Committee notes that Detective Senior Constable Mansell works part-time at the Major Fraud Squad and did not personally receive the file until 9 April 2008.⁹⁴ The timing of the receiving of the complaint file by Detective Senior Constable Mansell is significant, given that at first glance the two and half month gap between the lodging of the complaint and the raid on the offices of *The Sunday Times* may have appeared unusual. In reality, the investigation had effectively only been underway for a few days at the time of the raid.
- 8.5 The Committee notes that the investigation was treated like any other criminal investigation. This was detailed in the evidence of Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, WAPOL:

The CHAIRMAN: Can you tell me whether there are any departmental or police policy or guidelines setting out when leaks should be investigated; and, if there are any policy documents or

⁹⁰ Doc. 78, Exhibit 4AP.

⁹¹ Doc. 41, Exhibit 4E, 8 April 2008, p1.

⁹² Letter from Dr Karl O’Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p3.

⁹³ Doc. 41, Exhibit 4E, 8 April 2008, p1. Note also the Letter from Dr Karl O’Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p4, explaining an incorrect entry in the incident report that indicated that Detective Senior Constable Mansell was not assigned until 23 April 2008.

⁹⁴ Ms Elissa Mansell, Detective Senior Constable, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p18 (private evidence).

guidelines, can you provide the committee with a copy of such documents?

Mr Gregson: *I do not believe there are documents that specifically relate to leaks, but there are certainly policies, processes and procedures that relate to general criminal investigation. There are also protocols for public sector investigations, and they are contained within the file.*

The CHAIRMAN: *What would an investigating officer turn to when confronted with a requirement to investigate the unauthorised release or disclosure of this confidential information?*

Mr Gregson: *I am not sure what you mean by what he would “turn to”.*

The CHAIRMAN: *What would he turn to so that he knew that he was examining it in an approved or particular manner? Would he refer to the administrative instructions that you may have—the policy or the guidelines?*

Mr Gregson: *There is a whole range of policies and guidelines that relate to how an officer conducts a criminal investigation. He would obviously turn to his training, his experience, various policies that cover whether a matter ought to be investigated, search warrant procedures, and evidential capturing procedures. Running sheet entries are all covered conjointly through detective training and through various manuals and administrative directives.*

The CHAIRMAN: *Are you saying that leaks are investigated no differently from any other matter that could constitute a crime?*

Mr Gregson: *That is correct. At the end of the day, an allegation is made that a criminal offence has occurred. The only difference here is that the allegation is that the likely suspect is a public servant and therefore it falls within the remit of the major fraud squad. That is part of the arrangement with public sector investigations so that there is greater oversight of some of those matters.*

The CHAIRMAN: *Have the police previously had occasion to act—when I say “act”, I mean investigate—in respect of leaked material or other documents; and, if so, did the previous investigations generally follow the line that has been pursued in this investigation?*

Mr Gregson: *I cannot remember a single investigation in very recent times that relates to this. I know historically that there have been such investigations. They would be following much more advanced investigative processes than would have perhaps once been followed. We are now subject to the Criminal Investigation Act. The warrant procedures, for example, are different. The standard operating procedures for warrants nowadays are that they are video recorded. There may well have been a number of enhancements, but at the end of the day, this is just another criminal investigation.*

The CHAIRMAN: *When you say “just another criminal investigation”, is it fair to say that the investigating officer would turn to the appropriate manuals and his other training or experience, but he would also have the ability to turn to more senior officers for advice on the way in which the investigation might be pursued?*

Mr Gregson: *Yes. If he thought it was necessary or appropriate, he would have a whole suite of investigative sources or educative tools that he could turn to. Additionally, he could also seek consultation with senior officers or team leaders. In fact, I make the point that when this particular matter was originally referred to a detective senior constable, on the aspects of the search warrant, the superintendent and the inspector at commercial crime felt that it ought to get greater oversight and so a detective sergeant was appointed to supervise the search warrant.⁹⁵*

The Number of Potential Suspects

- 8.6 The Committee notes that in his initial contact with WAPOL, Mr Wauchope identified eight named persons who had had access to the draft ERC submission, but he also noted that it was “likely that a number of other officers from DPC and the Department of Treasury and Finance may have had access to the submission”.⁹⁶
- 8.7 On 28 March 2008 the CCC passed on information to WAPOL that it had received from the DTF regarding officers within that Department who had been exposed to the draft ERC submission.⁹⁷ The Under Treasurer had identified four officers within the

⁹⁵ Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police, *Transcript of Evidence*, 9 June 2008, pp10-11.

⁹⁶ Doc. 45, Exhibit 4I, letter from DPC to WAPOL, 12 February 2008, p2.

⁹⁷ Doc. 42, Exhibit 4F, letter from Mr Tony Wood, Reviewer/Assessor, CCC to Detective Senior Sergeant Dom Blackshaw, WAPOL, 28 March 2008, p1.

Agency Resources business unit of the DTF who were exposed to various versions of the draft ERC submission.⁹⁸

- 8.8 In an email at 11:38am on 9 April 2008, Ms Lisa Ward, Acting Principal Policy Officer, Office of the Director General, DPC, advised Detective Senior Constable Mansell of the following additional information:

The Cabinet submission was provided to the following offices on 13 and 14 December 2007 for comment:

- *Premier's Office*
- *Minister Ravlich's Office*
- *Minister Robert's Office*
- *Minister McHale's Office*
- *The Under Treasurer's Office*
- *The Director General's Office, DPC*
- *The Policy Division, DPC*

It was labelled "MINISTER ONLY".

The submission was then provided to all Ministers as part of the Cabinet agenda file late on Friday after 14 December 2007. Copies of the file were delivered by Cabinet Services Branch staff to Ministers in some unusual places that day (due to the festive season, eg. a restaurant).

It therefore seems that there were a great number of persons who had access to the document.⁹⁹

- 8.9 A search of telephone records was conducted.¹⁰⁰ Although a number of ministerial media advisers were found to have had regular contact with Mr Lampathakis, no person of interest was identified by the WAPOL at this stage of the investigation.

- 8.10 The Committee notes that the subsequent course of the WAPOL investigation was coloured by the information provided to the WAPOL by the DPC that a large number

⁹⁸ Doc. 43, Exhibit 4G, letter from Mr Timothy Marney, Under Treasurer, to Hon Len Roberts-Smith, Commissioner, CCC, 21 February 2008, p2.

⁹⁹ Doc. 53, Exhibit 4Q, WAPOL Investigation Running Sheet.

¹⁰⁰ Ibid.

of people had had access to the leaked material from the draft ERC submission. In his evidence to the Committee regarding the status of the WAPOL investigation immediately prior to the execution of the search warrant on the offices of *The Sunday Times*, Detective Inspector Albrecht stated:

The options available were to interview, potentially, any person who came within contact of that document. It is my understanding from the inquiries that the investigating officer made that they were numerous in number because the documents had been widely circulated. Quite rightly, to try to interview all those people, although that was an option, if you have a source that you know has had direct contact with the material in question, you go directly to that source; you do not give opportunity for evidence to be destroyed or hidden. So, rather than go on a fishing expedition to numerous people, you go directly to the source, try to secure that source and then you may, in time, go to those other sources.¹⁰¹

- 8.11 However, it soon became apparent in the course of the Committee's inquiry that the above information provided to the WAPOL by the DPC was incorrect (see paragraph 5.6 onwards).
- 8.12 It is clear that the version of the draft ERC submission that contained the leaked material (either Version 1, Version 3 or Version 4) was not, in fact, as widely distributed as the WAPOL had been advised (see paragraph 5.6 onwards). A comparison of the different versions of the draft ERC submission indicates that the versions that contained the leaked material (that is, versions 1, 3 and 4) were, in fact, never distributed to Cabinet members (other than those on the Cabinet Sub-Committee on Communication) or their staff. It appears that the WAPOL were not provided with copies of the relevant versions of the draft ERC submissions (they were only provided with the Cabinet copy - Version 2), and so were not made aware of the significantly more limited exposure within the Government to the leaked information.
- 8.13 It appears to the Committee that the WAPOL discounted the interviewing of persons exposed to the draft ERC submission due to an incorrect belief that a large number of people would have to be interviewed.

Paul Lampathakis and the Protection of a Journalist's Sources

- 8.14 The WAPOL Internal Affairs Unit report on the raid states:

Lampathakis is a witness in the [Major Fraud Squad] investigation and as a receiver of the disclosed information has never been treated

¹⁰¹ Mr Arno Albrecht, Detective Inspector, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p5.

*as a criminal suspect or [Person of Interest (POI)]. In the absence of any nominated POI, he is the primary person that could assist investigators with this matter.*¹⁰²

- 8.15 In the course of their work, journalists may receive material or information that is confidential and/or illegally disclosed. People disclose information to journalists for a variety of reasons. It may be done through malice or contempt, or to disclose perceived or actual wrongdoings or errors as a matter of public interest, or for political reasons or for mischievous or other reasons:

*Leaks are often motivated by conflict: they are usually signals of a disagreement between two parties, and the leak's covert nature suggests a betrayal or a breakdown in a relationship. Leaks are often a power strategy of weaker participants in a conflict: the unauthorised release of information often undermines the power of those with authority and challenges the official public position on an issue.*¹⁰³

- 8.16 Whilst it is not illegal for the journalist to receive the information or publish it, the judiciary, certain law enforcement officers or the Parliament may still require a journalist to reveal their source as an avenue to identifying and/or prosecuting the offending source.

The Search Warrant

- 8.17 It was the evidence of Detective Senior Constable Mansell, the WAPOL investigating officer, that the investigation had reached the stage by late April 2008 that:

*[I]t appeared the only option to get the information from the end source was to go directly to the Sunday Times. It was on that basis that we decided to go to where the information was most likely to be contained and to obtain it in that manner.*¹⁰⁴

- 8.18 She also noted that:

Given that the information that had been printed was almost verbatim as that presented to cabinet, it was likely that Mr Lampathakis had received information from the person who leaked the cabinet

¹⁰² Doc. 39, Exhibit 4C, internal WAPOL memorandum, 27 May 2008, p9.

¹⁰³ G. Craig, *The Media Politics and Public Life*, Allen & Unwin, Sydney, 2004, p145.

¹⁰⁴ Ms Elissa Mansell, Detective Senior Constable, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p4.

*documents. He is the only person that we knew would have spoken to somebody.*¹⁰⁵

- 8.19 As noted above, the version of the draft ERC submission provided to the WAPOL by the DPC (Version 2) was not as reflective of the information contained in *The Sunday Times*' article as Versions 1, 3 and 4 of the document.
- 8.20 The Committee was advised that the use of search warrants is the standard operating procedure for detectives of the Major Fraud Squad:

*With respect of the search warrant, it is standard operating procedure for detectives of major fraud squads to attend a business area, such as a bank, accounting or law firm and take possession of documents whether they are notes, records or other statements. Protocol and legislation dictate that the items are seized under search warrants. [Detective Senior Constable] Mansell consulted the legal services branch prior to compiling an application for a search warrant ...*¹⁰⁶

- 8.21 On 29 April 2008, Detective Senior Constable Mansell applied for a search warrant under s 41 of the *Criminal Investigation Act 2006* to search the "SUNDAY TIMES BUILDING, 34 STIRLING STREET, PERTH 6000".¹⁰⁷
- 8.22 The search warrant for the raid on *The Sunday Times* was signed at 2:30pm on Tuesday, 29 April 2008.¹⁰⁸ The warrant identified the following as the object of the search:

*Any and all documents pertaining to the information held by Sunday Times employees pertaining to the investigation conducted for the article titled "Bid to 'buy' Labor win: Ripper wants \$16m for poll" published on page 3 of the Sunday Times, 10th February 2008, including source details, notebook entries, records of conversation, editorial notes, scribings, telephone records, any form of recording (electronic or otherwise) and records of conversation.*¹⁰⁹

- 8.23 The search warrant specified that it had to be executed within 30 days after the date of issue.¹¹⁰

¹⁰⁵ Ibid, pp4-5.

¹⁰⁶ Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p5.

¹⁰⁷ Doc. 63, Exhibit 4AA.

¹⁰⁸ Doc. 64, Exhibit 4AB.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

8.24 Section 43(6) of the *Criminal Investigation Act 2006* states:

A search warrant must be executed between 6 a.m. and 9 p.m. unless the officer executing it reasonably suspects that if it were, the safety of any person, including the officer, may be endangered or the effectiveness of the proposed search may be jeopardised.

8.25 Section 43(7)-(8) of the *Criminal Investigation Act 2006* states:

(7) *A search warrant authorises entry to the target place for a reasonable period for the purpose of executing the warrant.*

(8) *A search warrant authorises the officer executing it to exercise any or all of these primary powers —*

(a) *to enter the target place;*

(b) *if it authorises a search for a target thing —*

(i) *to search the target place for the target thing;*

(ii) *to do a basic search or a strip search of a person who is in the target place when the warrant is being executed for the target thing; and*

(iii) *subject to section 146, to seize the target thing;*

...

8.26 Under s 44(2) of the *Criminal Investigation Act 2006* the WAPOL investigators have the following ancillary powers under a search warrant:

44. Search warrant, ancillary powers under

....

(2) *A search warrant also authorises the officer executing it to exercise any or all of these ancillary powers —*

(a) *subject to subsection (3), to enter but not to search a place near the target place if the officer reasonably suspects it is necessary to do so in order to —*

-
- (i) *prevent a target thing from being concealed or disturbed;*
 - (ii) *prevent a person from fleeing the target place; or*
 - (iii) *protect the safety of any person, including the officer, who is in or near the target place;*
- (b) *to take into and use in the target place any equipment or facilities that are reasonably necessary in order to exercise any power under the warrant;*
- (c) *to photograph or otherwise make a record of a target thing that is in the target place;*
- (d) *to make reasonable use of any equipment, facilities or services in the target place in order to exercise any power under the warrant and for that purpose —*
- (i) *to operate the equipment or facilities;*
 - (ii) *to order an occupier of the target place to do anything that is reasonable and necessary to facilitate that use;*
- (e) *if the target thing is a record —*
- (i) *to operate any device or equipment in the place that is needed to gain access to, recover, or make a reproduction of, the record;*
 - (ii) *if the officer reasonably suspects that an occupier of the target place knows how to gain access to or operate any such device or equipment — to order the occupier to provide any information or assistance that is reasonable and necessary to enable the officer to gain access to, recover, or make a reproduction of, the record;*
- (f) *if the officer reasonably suspects it is necessary to do so in order to prevent —*

-
- (i) *the target thing from being concealed or disturbed; or*
 - (ii) *a person in the place against whom an offence may have been, or may be being, committed from being endangered,*
- to establish a protected forensic area under section 46 in the target place;*
- (g) *if the officer reasonably suspects it is necessary to do so to protect the safety of any person, including the officer, who is in the target place when the warrant is being executed —*
 - (i) *to order a person to leave the place or its vicinity;*
 - (ii) *to order a person not to enter the place or its vicinity;*
 - (iii) *to detain a person who is in the place for no longer than is reasonably necessary;*
 - (iv) *to do a basic search or a strip search of a person who is in the place for any weapon or other thing that could endanger a person;*
 - (v) *to seize and retain any such thing,*
- while the warrant is being executed.*

8.27 Section 45(2) of the *Criminal Investigation Act 2006* states that, if reasonably practicable, an audiovisual recording must be made of the execution of a search warrant. The Committee was provided with a copy of the WAPOL DVD recording of the execution of the search warrant.¹¹¹ The Committee notes that the WAPOL DVD recording was made in accordance with WAPOL's internal procedures and requirements, but also notes that it is not a continuous record of the entire raid.

8.28 In a report on the WAPOL investigation and raid, Detective Senior Sergeant Dom Blackshaw, Officer in Charge, Major Fraud Squad, noted:

¹¹¹ Doc. 68, Exhibit 4AF.

The search of the Sunday Times building was raised by the case officer as a valid method of obtaining the evidence required to prove the allegation made by Wauchope.

The execution of search warrants for documents is a common and traditional method of investigation. The grounds for the search warrant were considered valid by both senior management and a Justice of the Peace and the warrant was issued accordingly.¹¹²

- 8.29 Assistant Commissioner Gregson also confirmed that the decision to seek the search warrant was subject to internal checks and balances:

I would say that the governance of the execution of the search warrant was overseen by a commissioned officer. The go, no go decision to execute the search warrant is made by the senior investigating officer. Obviously, there are checks and balances in that process because to get that search warrant it has to be reviewed by a senior officer. It then has to be signed off by a justice or a magistrate, and in this case, as I made the earlier point, it was reviewed by legal services and the commissioned officer cadre at the commercial crime division, being Superintendent Randall and Inspector Albrecht and, I would imagine, their operations manager would have been well across the warrant.¹¹³

¹¹² Doc. 78, Exhibit 4AP.

¹¹³ Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p16.

CHAPTER 9

COMMUNICATIONS BETWEEN WAPOL AND OTHER PARTIES IMMEDIATELY PRIOR TO THE RAID ON *THE SUNDAY TIMES*

- 9.1 The Committee notes that the WAPOL investigators contacted a number of persons outside of WAPOL on 30 April 2008 in the hours leading up to the raid on *The Sunday Times*.

Communication between the WAPOL and CCC prior to the Raid on *The Sunday Times*

- 9.2 The Committee notes that senior officers of WAPOL and the CCC meet regularly, and that at an operational level there is constant, day-to-day, communication between the two agencies. The Commissioner of the CCC stated:

*We have a joint senior management group that meets quarterly at least. It consists of the two commissioners and our senior officers; that is to say, a deputy police commissioner and assistant commissioner level and equivalents from the CCC. We have joint meetings at senior officer level at about the same frequency. Commissioner O'Callaghan and I meet frequently and regularly; indeed, we have just put that on a regular monthly basis. In fact, we were supposed to meet this afternoon, but we have had to transfer that to tomorrow. That meeting is a good example because there is no agenda for that meeting; we are just meeting to talk about whatever is going on. I have no difficulty in taking a position that if anybody in either organisation had a serious problem that needed to be raised with the other, it would be raised and resolved.*¹¹⁴

- 9.3 Mr Anticich gave the following evidence:

I would speak to the WA police on a daily basis—most of their assistant commissioners and their deputy commissioners. It varies, obviously, on the context. We have a fairly good working relationship and I would have thought it was open to just adhere to the current protocols. On top of that, we actually have two formal mechanisms—one is the operational liaison group, which I attend with the two deputy commissioners and a number of assistant commissioners, and also the joint agency steering committee group of which both our commissioners, I, the executive director and the two deputies attend,

¹¹⁴ Hon Len Roberts-Smith QC, Commissioner, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, pp6-7.

*as well. There are formal mechanisms, but, more importantly, an informal relationship ...*¹¹⁵

The WAPOL account of the events of the morning of 30 April 2008

- 9.4 At 9:45am on 30 April 2008 an internal WAPOL briefing was held on the investigation and the proposal to execute a search warrant on *The Sunday Times*.¹¹⁶ Present at the meeting were Detective Inspector Albrecht, Detective Senior Sergeant Hill, Detective Senior Sergeant Blackshaw, Detective Sergeant Jane, and Detective Senior Constable Mansell. This meeting was the first time that Detective Sergeant Jane became involved in the investigation.¹¹⁷ Detective Senior Constable Mansell recorded on the WAPOL Investigation Running Sheet the following in relation to this meeting:

*Consideration given to requesting CCC to use coercive powers to avoid media perception that police are involved as this matter involves police funding. Insp Albrecht telephoned Paul White, a/investigations manager in relation to arranging a meeting with CCC to request they use the coercive powers under s95 and s96 CCC Act. He advised that he will contact Tony Wood and his manager and call Insp Albrecht back.*¹¹⁸

- 9.5 At 11:58pm on 30 April 2008, the WAPOL internal briefing on the investigation reconvened. Detective Senior Constable recorded on the WAPOL Investigation Running Sheet the following, under the title “*Critical decision*”, in relation to this meeting:

Result of CCC conversation with Insp Albrecht - they are unable to assist, police to conduct inquiry through normal investigative means.

*Search warrant to be executed approx 2pm todays date at Sunday Times. Briefing note (warning) submitted through Insp Albrecht.*¹¹⁹

- 9.6 Detective Inspector Albrecht made the following summary of his conversations with officers of the CCC on the morning of 30 April 2008:

On the morning of Wednesday 30 April, 2008 I was briefed by Major Fraud Squad (MFS) members concerning an inquiry they had relating

¹¹⁵ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, p15.

¹¹⁶ Doc. 74, Exhibit 4AL.

¹¹⁷ Doc. 84, Exhibit 4AV.

¹¹⁸ Doc. 53, Exhibit 4Q, WAPOL Investigation Running Sheet.

¹¹⁹ Ibid.

to the alleged illegal release of confidential parliamentary documents to a reporter from the Sunday Times newspaper.

The newspaper then published extracts from the document in an article published in the newspaper on Sunday 10 February 2008.

In an endeavour to gain information regarding the source of the leaked document officers from the MFS intended attending at the Sunday Times newspaper this date with the purpose of interviewing the reporter and seizing any relevant evidence.

Upon being briefed I then discussed the matter with Detective Superintendent Randall and it was agreed that given the nature of the offence alleged and the potential media coverage the matter should most properly be investigated by the CCC utilising its private hearing and coercive powers.

Consequently, I telephoned CCC Investigator Paul WHITE, who I had had previous contact with when he was Acting Manager Investigations.

When I spoke to WHITE I outlined our position on the matter and he concurred, however he asked that he be given an opportunity to confer with his supervisors. Subsequently, a short while later he rang me to advise that the CCC had reviewed the matter and considered that WA Police should conduct the inquiry.

When questioned about the basis for their position he couldn't elaborate. I then asked if he could recommend one of his supervisors with whom I could discuss the matter further with and he referred me to Trevor WYNN, Deputy Director of investigations.

I then rang WYNN at about 1010hrs and outlined our concerns regarding the inquiry, in that, given the nature of the inquiry which emanated from Parliament [¹²⁰] regarding the disclosure of official secrets, that the CCC had the capacity to hold private hearings, which would prevent the general public becoming aware of the inquiry and the consequential media coverage that arise from executing a search warrant on the Sunday Times, it would be preferable that the CCC should conduct the investigation.

¹²⁰

The Committee notes that the reference to the inquiry emanating from Parliament is mistaken, as the inquiry was initiated by the DPC.

I stated that we were prepared to withhold executing the search warrant to discuss the matter further to work with the CCC on the inquiry. WYNN advised that this could not be done as a joint operation, as they could only be undertaken in relation to investigating organised crime and that for the CCC to take action in this instance they would have to conduct the inquiry themselves.

A general conversation then took place between ourselves, the crux of which is as follows; WYNN advised that they had reviewed the matter and did not consider the offence serious enough to warrant an investigation by the CCC and the use of their coercive powers, which are onerous and should only be used in a limited manner and only after all other avenues of inquiry had been concluded.

I then asked was it the CCC's preference that WA Police should investigate the matter effectively with one hand tied behind their backs, when in fact the CCC could easily call a private hearing through which they could ask the reporter directly, where he obtained his information from and should he decline a decision could then be made as to what or if any action would be taken against him.

WYNN again responded by saying that the CCC considered that their coercive powers should only be used for the most serious of matters and that the current complaint did not constitute such a circumstance, albeit acknowledging the consequences of WA Police having to execute a search warrant on the Sunday Times.

I then said that obviously the CCC had made a political decision, to which he objected saying that was not what he said.

I then said to him that to my mind this was exactly what the CCC had been established to do and that was to investigate corruption by government officials and that was why it was given its special powers, as it was apparent the WA Police would be severely hampered when investigating such matters.

He again stated the CCC position and said that, however once WA Police had conducted their investigation they would review it and would make a determination as to whether they would pursue the inquiry further.

I then advised him that WA Police would proceed that day with executing the search warrant.

... .¹²¹

- 9.7 When queried by the Committee as to whether the WAPOL considered deferring the execution of the search warrant to have further discussions with the CCC, Detective Inspector Albrecht told the Committee that:

When I spoke to Trevor Wynn I put this to him: I said that we were prepared to withhold executing the search warrant to discuss the matter further to possibly work with the CCC or have them take over the inquiry. However, he advised that this could not be done as a joint operation in any event as they could only undertake such joint investigations that related to organised crime.^[122] For the CCC to take it back it would have to undertake the inquiry themselves and they were not prepared to do so. I said, therefore, that given that was the stance of the CCC there was not point in delaying the matter any further and we would proceed on the day.¹²³

- 9.8 Detective Inspector Albrecht also added:

I said [to Mr Trevor Wynn], “Well, given your stance, I am prepared to put the execution of the search warrant off if it would be of any benefit to further explore avenues”. He advised that it would not, so I said, “The search warrant will proceed as of today and you’ll see the results in the news.”¹²⁴

- 9.9 Detective Superintendent Ron Randall records on a running sheet that he met with Detective Inspector Albrecht at 10:00am on 30 April 2008 to receive a briefing on the investigation and search warrant.¹²⁵ Detective Superintendent Randall requested a briefing note, and instructed that contact be made with the CCC to establish whether they would take over the investigation or whether a joint investigation could be established.¹²⁶ At 10:30am Detective Inspector Albrecht advised Detective Inspector Randall of the above conversations with officers of the CCC, and that the “CCC

¹²¹ Doc. 59, Exhibit 4W.

¹²² The Committee notes that this comment is inaccurate. Under s 33(1)(b) of the *Corruption and Crime Commission Act 2003*, the CCC may decide to “investigate or take action in cooperation with an independent agency or appropriate authority”.

¹²³ Mr Arno Albrecht, Detective Inspector, Commercial Crime Division, Western Australia Police, *Transcript of Evidence*, 9 June 2008, pp13-14.

¹²⁴ *Ibid*, p27.

¹²⁵ Doc. 73, Exhibit 4AK.

¹²⁶ *Ibid*.

position was that the matter should remain with Police".¹²⁷ Detective Inspector Albrecht's running sheet entry for this meeting notes the following:

*Agreed that WAPOL to proceed with execution of search warrant.
Det/Sgt Jane assigned operations manager. Five staff to execute the
warrant.*¹²⁸

- 9.10 At 1:00pm a briefing note on the investigation, search warrant and the contact that day with the CCC that had been prepared by Detective Senior Constable Mansell (with the assistance of Detective Sergeant Jane) was provided to Detective Superintendent Randall.¹²⁹ Detective Superintendent Randall emailed the briefing note to Assistant Commissioner Gregson at 1:14pm.¹³⁰ Further email updates on the progress of the search warrant were sent by Detective Superintendent Randall to Assistant Commissioner Gregson at 2:50pm and 3:24pm.¹³¹ The Committee obtained the following evidence as to the purpose of these emails to senior WAPOL officers:

***The CHAIRMAN:** Mr Albrecht, given that you had formed the view—correct me if I am wrong and it was not you and it was someone else—that a raid on the Sunday Times could create a media circus, how far up the police hierarchy was the matter referred prior to the final decision being made to carry out the search?*

***Mr Albrecht:** In accordance with protocols that are established when there is going to be a high profile matter—and this was going to be a high profile matter given that it was a raid on the Sunday Times—a briefing note was prepared, which was circularised to Assistant Commissioner Gregson.*

It was also circularised to our media director Mr Neil Stanbury for the information of the commissioner. Unless they had some specific issue, on a day-by-day basis they would not interfere with a murder inquiry or any inquiry unless there was a specific issue. This certainly does not rate up with anything like a murder inquiry, so the likelihood of any interceding by senior officers was unlikely.

***The CHAIRMAN:** Did Mr Gregson respond to the communication with you or notification that you ensured he received?*

¹²⁷ Ibid.

¹²⁸ Doc. 74, Exhibit 4AL.

¹²⁹ Doc. 73, Exhibit 4AK; Doc 74, Exhibit 4AL.

¹³⁰ Doc. 73, Exhibit 4AK.

¹³¹ Ibid.

Mr Albrecht: *Not to my knowledge.*

The CHAIRMAN: *Did you find that strange or, as you have said, given that it was not a murder inquiry and, using your terms, it was not unusual for the senior officer not to respond?*

Mr Albrecht: *Generally, the only thing that would occur would be a request for further information, and that request was not forthcoming, so it was considered that the briefing notes that we had provided, which are contained in the file, were sufficiently detailed.*

The CHAIRMAN: *Can I take from what you are saying that where you do not get a response back from the senior officer, there is an assumption that the senior officer does not intend to interfere, so to speak, or make any other recommendation, and that he has noted whatever communication has been sent and that you are free to proceed in the manner that you have determined?*

Mr Albrecht: *I would put it this way: we would not be waiting for a response. We proceed. The commissioner has the same powers of office of constable as any other officer, and in relation to investigation of criminal matters, one would not expect any interference at any level.*

The CHAIRMAN: *Can I presume from the way in which the system works within the police department that if Mr Gregson, in this case, wanted to offer comment or change the proposed course of action that you were recommending in your papers to him, it was up to Mr Gregson to do it with haste so that any change was drawn to your attention?*

Mr Albrecht: *If he wished to do so.¹³²*

The CCC account of the events of the morning of 30 April 2008

- 9.11 Mr Anticich gave the following evidence from CCC records of the initial contact between Detective Inspector Albrecht and the CCC on the morning of 30 April 2008:

This is a case note again with the Corruption and Crime Commission logo, headed “Case Note (General) — 0009”. It has been created on

¹³² Mr Arno Albrecht, Detective Inspector, Commercial Crime Division, Western Australia Police, *Transcript of Evidence*, 9 June 2008, pp14-15.

30 April 2008 at 11.51 by a nominated officer, who is a Mr White who works at the commission.

...

That entry then details a discussion with Arno Albrecht, who I know to be an inspector with the WA Police commercial crime area. If I take you through that note, it states that the office had received a call from Mr Albrecht at 10.15 hours that date. He believed that Arno had contacted him because he was a member of the commercial crime committee, which meets at his office quarterly. In other words, the association between our officer and Mr Albrecht relates to a meeting that they go to; it is not specific to this case, but rather an association through another forum.

Continuing with the case note: Arno advised that they intended—the WA Police—executing a search warrant on the Sunday Times that afternoon and wanted to discuss another way of proceeding with the investigation. The note continues —

Arno suggested the Commission hold a hearing instead — to avoid the media fallout, and to overcome the fact that the WAPS are unable to compel any witnesses.

Bear in mind, I will just reinforce the fact that Mr White has no involvement with this case. The note continues: after discussing the matter with another one of our officers, Trevor Wynn, who was the manager at the time, our officer phoned Arno back and informed that the matter was considered by the operations directorate, which had decided not to investigate the matter, thus the referral to the WA Police. I have taken you through the process that that involved. He also informed Arno that we were unable to work with them jointly and assist using our hearing powers, as it was not a matter relating to organised crime.^[133] I quote —

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

¹³³ The Committee notes that this is a narrow interpretation of Part 4 of the *Corruption and Crime Commission Act 2003* (that is, those sections dealing with organised crime and the conferral of exceptional powers on police officers), and does not take into account the type of joint CCC-WAPOL investigations utilising the CCC's general powers envisaged by s 33(1)(b) of that Act.

considered an appropriate use of the Commission's hearing powers.

*The officer suggested to Arno that he contact Trevor Wynn should he wish to discuss the matter further.*¹³⁴

9.12 Mr Trevor Wynn, Manager, Investigations, CCC, recounted his subsequent conversation with Detective Inspector Albrecht:

If I can just put this into context. My telephone rang, as it happened, moments after the conversation had concluded with Mr White. Actually as I answered my phone, Mr White was at my door and I had not realised that Mr Albrecht had actually spoken with Mr White when I had this call. I will read from the case note that I made —

Telephone call from Supt Arno Albrecht [sic]. . .

Albrecht telephoned after speaking with Paul White. He was slightly aggressive questioning why the Commission would not serve a notice to obtain documents from the Sunday Times and demand that a journalist reveal his sources in a hearing.

WAPOL are intending to execute a search warrant on the Sunday Times and Albrecht says it will turn into a media circus. He says this could be avoided if the CCC undertook the investigation and issued notices so that it couldn't be reported.

I inquired as to what the purpose of the S/W was, —

That is, search warrant —

presuming it was to obtain documents. He confirmed this.

I proceeded to advise Albrecht that a notice to produce documents was an entirely different tool to a search warrant and I went on to explain the differences. He reluctantly accepted that a notice was not a substitute for a S/W.

If I can just assist the committee there. A search warrant allows you entry to the premises and, as it suggests, to search for documents; whereas a notice is something that is handed to a particular person

¹³⁴ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, pp8-9.

which has a return date on it and that person then produces the material. It is a very real issue forthwith and to a certain extent it is dependent on the person cooperating to provide the documents sought in that notice.

As to the issue of media circus, I advised Albrect that if the CCC attended at the Sunday Times and executed a S/W there was nothing the Commission could do to prevent reporting of that. The restricted information applied to the issue of notices, appearing at hearings, and associated matters.

Albrect continued to assert that no journalist would talk to them and the CCC was set up to deal with these situations when for example a journalist could be called in and made to reveal a source.

I advised Albrect that the use of the Commission's coercive powers was on a judicious basis and generally only used when no other alternative avenue was available to achieve desired investigative outcomes. I said to Albrect that in the current matter, if they had formed a view that a S/W was needed, I would have thought that a process would have then taken place to review the material located, in an attempt to discover the source of any leak, regardless of whether a journalist would speak to them or not. I indicated to Albrect that for the Commission to call in a journalist for the predominant purpose of revealing a source, which of course goes against the very fabric of the journalists code of conduct, whilst we wouldn't completely rule it out, the circumstances would have to be very serious and grave, as there were a number of flow on effects such as whistle blowers losing confidence in confidentiality with journalists etc.

I concluded by advising Albrect that once the investigation was complete, the Commission would review the results as part of our normal review process. That process would include looking at whether the agency (WAPS) —

Western Australia Police Service —

*or the Commission could reasonably take the matter any further.*¹³⁵

- 9.13 The Committee notes that Mr Wynn had the delegated authority of the Commissioner of the CCC under s 42 of the *Corruption and Crime Commission Act 2003* to direct the WAPOL to discontinue its investigation.¹³⁶
- 9.14 Mr Wynn advised the Committee that it is only in very exceptional circumstances that the CCC would use its powers for the predominant purpose of compelling a journalist to reveal their source:

*[I]n the history of the commission—and I perhaps would prefer not to go into those details—we have, as I recall it, called in two journalists in the past in respect of certain matters where certain questions have been put to them when the commission considered, in the circumstances that existed with those matters, it was necessary to do so.*¹³⁷

- 9.15 Sections 96 and 97 set out the relevant coercive powers of the CCC:

96. Power to summon witnesses to attend and produce things

- (1) *The Commission may issue a signed summons and cause it to be served on the person to whom it is addressed.*
- (2) *Personal service of the summons is required.*
- (3) *The summons may require the person to whom it is addressed to attend before the Commission at an examination, at a time and place specified in the summons, and then and there to —*
- (a) *give evidence;*
- (b) *produce any record or other thing in the person’s custody or control that is described in the summons; or*

¹³⁵ Ibid, p3.

¹³⁶ Hon Len Roberts-Smith QC, Commissioner, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, p3.

¹³⁷ Mr Trevor Wynn, Manager, Investigations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, p10.

(c) do both of those things.

97. Witnesses to attend until released

A person who has been served with a summons under section 96 is required, unless excused by the Commission, to attend as specified by the summons and report to the Commission from day to day until released from further attendance by the Commission.

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

I think there is a misunderstanding, certainly on the part of the police, about what the coercive powers are and how they can be used. We at the commission recognise that what are described as our coercive powers—and I have been describing them, Mr Chair, as you would appreciate, as our coercive and other special powers—are powers that vested in the commission and are not available to police and other agencies. They are—I was going to say exceptional, but I do not want to say that, because that brings in part 4 of the act, which I am trying to avoid—very unusual powers for an investigative agency to have, and the commission is very conscious of the need to use them only where absolutely necessary and subject to all appropriate safeguards. We do not resort to the use of the commission’s own special powers first-off. We actually use them as a last resort, because we recognise that they potentially infringe ordinary civil rights and human rights, such as privilege against self-incrimination and things of that kind. So we would seek to use them only as a last resort when no other investigative methodology or power would work. That was not the case, for example, with this investigation. It might in the end have gotten to that point, but we do not know. Certainly looking at it at the time we were looking at it, and even now, I would have thought there was plenty of scope for the exercise of ordinary police investigative powers. For example, even if we had decided to do it ourselves, we would still be using those powers. We would not be falling back on our coercive and other special powers until we had exhausted all avenues with the others. That is really the starting point we are coming from. In terms of what you describe as coercive powers here, I think Inspector Albrecht kept talking about the commission’s coercive powers, and it became obvious, I think, that he

*was simply talking about compulsory hearings. Well, that is just one of them.*¹³⁸

9.17 The Commissioner of the CCC went on to state that:

*There is also a very practical investigative reason why you do not use those powers until you are right into an investigation and you have used all of the ordinary methods available to you. That is because if one thinks about how it would work practically, what would happen would be you would call a witness in before you had done much other investigation, and you would say, "You must tell us the truth. You are obliged to tell us the truth. You are on oath. Tell us who you got the cabinet document from." The witness more likely than not would say, "I forget" or "I cannot remember." Where does the commission go from that? It does not work. It is not an appropriate use of the coercive power. As members of this committee would appreciate from the investigations that have been featured in commission reports, for example, to date, you will realise that there is a lot of work that has to be done before you get to that point. You ordinarily would not be calling witnesses to a coercive hearing—there are, of course, some exceptions to this—but in principle you would not be calling witnesses to a coercive hearing unless you were in a position to prove, at least in relation to some aspects of the investigation, whether or not they were telling the truth about questions they were going to be asked. That is just a practical investigative reason. I emphasise that our main reason for not resorting to those powers is that we do recognise that they infringe personal liberties and civil rights, and they are therefore to be used only when absolutely necessary.*¹³⁹

9.18 The Committee notes the CCC's evidence that there have been two occasions in which the CCC has used its coercive powers to compel a journalist to disclose their sources:

[I]n the four years that the commission has been operating, the commission has required the attendance of two journalists in hearing to give evidence, but only two in the four years. That had to do with an offshoot, if you like, into the inquiry in relation to Andrew Mallard. It had to do with the suicide in his cell of Mr Rochford. We were dealing with a death in custody and we needed to get information from the two journalists as to the sources of their information in relation to that. I should also point out that the commission dealt with

¹³⁸ Hon Len Roberts-Smith QC, Commissioner, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, p5.

¹³⁹ *Ibid.*

those two journalists, I think, in a very cooperative way and, I would like to think, sensitively. Neither of them, as far as I know, complained in any way about the treatment they received or having to do it. At least one of them, and possibly the other, but I certainly know that one of them, in fact, asked if that journalist's appearance could be delayed before the commission so that the sources could be spoken to and their agreement obtained for that journalist to reveal them to the commission. That was done. Although one might describe it as a coercive hearing in the sense that the journalists were required to attend and answer questions, they willingly answered the questions in that context and did so, in at least one case I know, with the acquiescence of the source or sources. I suppose that is the only way to answer the question. It would have to be a very serious case where there was no other investigative way of getting the information and it was serious enough to require it, I guess is what I am saying.¹⁴⁰

- 9.19 By contrast, the Media, Entertainment and Arts Alliance are strongly opposed to the use of coercive powers to require a journalist to reveal their source, and have expressed the view that the CCC actually uses this power more frequently than is suggested by the CCC.¹⁴¹

Communication between the WAPOL and other Persons in the State Government prior to the Raid on *The Sunday Times*

- 9.20 Upon being briefed on the investigation on the morning of 30 April 2008, Detective Sergeant Jane noted that in the original complaint letter from Mr Wauchope, Director General, DPC, there was reference to Mr Kieran Murphy, Communications Director, Office of the Premier, conducting preliminary inquiries into the leak. Detective Sergeant Jane instructed Detective Senior Constable Mansell to contact DPC to determine whether any additional evidence arose from that investigation.¹⁴²
- 9.21 A 12:54pm on 30 April 2008, Detective Senior Constable Mansell telephoned Mr Kieran Murphy, Communications Director, Office of the Premier. Mr Murphy confirmed that there had been an unauthorised leak of the draft ERC submission, and that he had no idea who was responsible for the leak.¹⁴³ Detective Senior Constable Mansell gave the following evidence to the Committee:

¹⁴⁰ Ibid, pp8-9.

¹⁴¹ http://www.alliance.org.au/alliance_sections/media_alliance/alliance_calls_on_wa_govt_to_protect_journalist_sources__20080709402/ (viewed on 9 March 2009).

¹⁴² Doc. 84, Exhibit 4AV.

¹⁴³ Doc. 53, Exhibit 4Q, WAPOL Investigation Running Sheet.

The CHAIRMAN: ... You spoke to Mr Murphy for the purpose of— can you just run through again the purpose —

Ms Mansell: Just to clarify that he did not know. The paperwork that we had received suggested that he did not know who it was, or else he would have told us. It was just basically to double-check that he did not know who the leak was made by.

The CHAIRMAN: Is it fair to say that you contacted him—and I am relating to the evidence of some police officers who gave evidence the other day —

Ms Mansell: Yes.

The CHAIRMAN: — and I am only paraphrasing what they said. You contacted Mr Murphy to determine whether or not he had any other information that might assist you, before you embarked on the raid?

Ms Mansell: That is right.

The CHAIRMAN: Was he able to provide you with any additional information?

Ms Mansell: No, he said that he had no idea who had created the leak.

The CHAIRMAN: Was that the end of the call, so to speak?

*Ms Mansell: Yes.*¹⁴⁴

9.22 Mr Murphy gave the following account of this telephone conversation:

I was in the city at the time. She asked a series of questions about the leak. When I received the message to call her I had no indication about what the matter was about. It was a bit hazy and from her questions it took me a little while to put in place what she was talking about. The impression I got was that she may have been new to the case and had taken over the brief from someone else. They seemed to be ticking-boxes type questions. She asked what I had done at the time and what sort of process we had gone through to report it. She asked whether I had any suspects at the time. I told her that I did not. It was

¹⁴⁴ Ms Elissa Mansell, Detective Senior Constable, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 13 June 2008, pp3-4.

a brief conversation. I asked her—once it registered with me what she was calling about—whether she had any particular suspects. She said she was not able to answer that question, understandably. We left it at that.

...

Later on that afternoon I learnt with some shock that the police had conducted a raid on the Sunday Times building.¹⁴⁵

- 9.23 Detective Senior Constable Mansell advised the Committee that she did not discuss the proposed raid on the offices of *The Sunday Times* with any person outside of the WAPOL.¹⁴⁶

¹⁴⁵ Mr Kieran Murphy, Acting Chief of Staff, Premier's Office, Department of the Premier and Cabinet, *Transcript of Evidence*, 13 June 2008, p5.

¹⁴⁶ Ms Elissa Mansell, Detective Senior Constable, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 13 June 2008, p4.

CHAPTER 10

THE RAID ON *THE SUNDAY TIMES*

Operational Order

- 10.1 The CCC made the following comment in evidence to the Committee in relation to the raid on *The Sunday Times*:

*The Commission will be interested to know whether a document is in existence (commonly referred to [as] an Operation Order) which covers off on methodologies to be utilised, the roles of various officers, what plans were in place in case resistance was encountered and similar matters.*¹⁴⁷

- 10.2 With respect to the existence of such an Operation Order, the WAPOL advised the Committee that:

*Operational Orders are often employed by Police especially during major investigations. Similarly, for other operations, verbal Operational Orders are utilised instead. However, verbal orders are based on the same planning principles that are utilised in written Operational Orders. Verbal Operational Orders were utilised for The Sunday Times raid on 30 April 2008.*¹⁴⁸

The Building

- 10.3 The offices of *The Sunday Times* are located in a large two-storey building in Northbridge, north of the Perth Central Business District, with access to the building from Stirling Street, James Street and Pier Street.¹⁴⁹ The building has a basement, a ground floor and a first floor. The building frontage on Stirling Street is 60m, and it is 100m down the length of James Street.¹⁵⁰

¹⁴⁷ Doc. 145, Exhibit 3R, submission of CCC, 9 June 2008, p18.

¹⁴⁸ Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p3.

¹⁴⁹ Doc. 152, Exhibit 4BB, *General representation of where Police were primarily located during search of Sunday Times on 30th April 2008*, 30 June 2008.

¹⁵⁰ Mr Allan Jane, Detective Sergeant, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p2.

- 10.4 The Committee heard evidence that approximately 80 staff are located in the editorial area on the first floor of the building, and that approximately 300 staff in total are located throughout the building.¹⁵¹
- 10.5 In evidence to the Committee, WAPOL advised that the execution of the search warrant on *The Sunday Times* offices was conducted in three distinct phases.

Phase 1 of the Search (approximately 2:06pm to 2:50pm, 30 April 2008)

- 10.6 Initially, five WAPOL officers attended the offices of *The Sunday Times*. They arrived at approximately 2:06pm on 30 April 2008, entering the building via the Stirling Street ground floor entrance.¹⁵²
- 10.7 The five WAPOL officers that first attended the search site were:
- Detective Sergeant Jane;
 - Detective Senior Constable Mansell;
 - a Video Camera Officer (Detective Senior Constable Brewster);
 - an Exhibits Officer (Detective Sergeant Phillips); and
 - a Search Officer (Detective Senior Constable Sofield).
- 10.8 These five officers were at the offices of *The Sunday Times* for the entire duration of the search.¹⁵³ The Committee notes that Detective Senior Constable Pratt was also in attendance at, or around, the commencement of the raid.¹⁵⁴
- 10.9 From 2:06pm to 2:10pm, Detective Sergeant Jane, Detective Senior Constable Mansell conducted a mini-briefing on the search warrant process with the Secretary to the Editor of *The Sunday Times* in a ground floor meeting room. Shortly after the mini-briefing commenced, the video camera operator, Detective Senior Constable Brewster, joined the meeting¹⁵⁵ and the three officers were then escorted to the Editor's office on the first floor of the building.¹⁵⁶ A WAPOL Major Incident Briefing Note prepared at 12:00 noon on 30 April 2008 states:

¹⁵¹ Mr Islwyn Davies, Managing Director, *The Sunday Times*, *Transcript of Evidence*, 13 June 2008, p4.

¹⁵² Doc. 153, Exhibit 4BC, *General representation of where Police were primarily located during search of Sunday Times on 30th April 2008: Phase 1*, 30 June 2008.

¹⁵³ Ibid.

¹⁵⁴ Doc. 71, Exhibit 4AI.

¹⁵⁵ Doc. 84, Exhibit 4AV.

¹⁵⁶ Doc. 71, Exhibit 4AI.

Prior to executing this warrant it is proposed that Detective Sergeant Jane and Detective Senior Constable Mansell will conduct an informal discussion with the editor of the newspaper to obtain the information in an amicable manner. Assising [sic] officers will remain at another location until required. It is intended that the formal process of executing the warrant will be conducted, in part to cover the journalist breaking a perceived confidentiality with the source.¹⁵⁷

- 10.10 Mr Sam Weir, Editor of *The Sunday Times*, was not in his office at the time that the three detectives arrived, but was located a few minutes later in the office of Mr Islwyn Davies, Managing Director, *The Sunday Times*.
- 10.11 At 2:12pm the video camera was activated by Detective Senior Constable Brewster, and Detective Sergeant Jane commenced an interview with Mr Weir.¹⁵⁸
- 10.12 At 2:17pm Mr Weir requested that he be able to call *The Sunday Times*' lawyer. At 2:24pm the other two police officers entered the building.¹⁵⁹
- 10.13 The lawyer for *The Sunday Times*, Mr Steven Edwards, arrived and met with Mr Weir in private between 2:30pm and 2:38pm.¹⁶⁰ The interview recommenced. There was subsequently another break for a private meeting between Mr Edwards and Mr Weir between 2:45pm and 2:51pm. When the police interview with Mr Weir again recommenced, Mr Weir agreed to identify Mr Lampathakis' desk.¹⁶¹
- 10.14 Mr Weir's account of the first phase of the raid is as follows:

***Mr Weir:** I was in a meeting in the managing director's office, and his secretary, Margaret Anthony, knocked on the door and said, "You need to come out." I think she might have said, "There are some police here", so I walked through to my office, which is not too far away. Actually, no; I would have met the police. I think they were with her or near her.*

...

***The CHAIRMAN:** Is she involved with reception?*

¹⁵⁷ Doc. 60, Exhibit 4X.

¹⁵⁸ Doc. 71, Exhibit 4AI.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

Mr Weir: *It is a rabbit's warren of a building. No; she is in a separate area.*

The CHAIRMAN: *You were at a meeting with the managing director. You were advised that there were police on the premises. I am wondering whether or not the police were, at that stage, in the reception area awaiting invitation to enter the building.*

Mr Weir: *No; I think they were already upstairs.*

The CHAIRMAN: *I see. They had moved through reception upstairs—meaning to the editorial floor?*

Mr Weir: *No, not to the editorial floor. I do not know; they may have gone to the editorial floor, but I was not on the editorial floor. They were around the managing director's office.*

The CHAIRMAN: *What floor is that in your building?*

Mr Weir: *There are only two floors, so the first floor.*

The CHAIRMAN: *Where did you first meet the police, so to speak?*

Mr Weir: *Outside the office of the managing director.*

The CHAIRMAN: *Yes, and was there a particular police officer who introduced himself to you?*

Mr Weir: *I have forgotten his name for the moment.*

The CHAIRMAN: *Does Detective Sergeant Allan Jane help?*

Mr Weir: *That would be him, yes.*

The CHAIRMAN: *He introduced himself to you?*

Mr Weir: *Yes.*

The CHAIRMAN: *What happened then?*

Mr Weir: *I was taken through to my office. I think he had two other officers with him. The doors were closed behind me; I was the only one in there. I think—whether it is the right terminology—that I was sort of read my rights and he explained why he was there.*

The CHAIRMAN: *Just so that we get everything in perspective, Detective Sergeant Allan Jane met with you—introduced himself to*

you. The other two police officers, do you know who they were? Was one of those a woman?

Mr Weir: *Yes.*

The CHAIRMAN: *Was that Detective Elissa Mansell?*

Mr Weir: *Yes. I am not sure of the other person.*

The CHAIRMAN: *Was the other person a video operator?*

Mr Weir: *Yes.*

The CHAIRMAN: *You then moved to your office or another office?*

Mr Weir: *My office.*

The CHAIRMAN: *Is that on the same floor?*

Mr Weir: *Yes.*

The CHAIRMAN: *What happened then? Did Mr Jane advise you of your rights?*

Mr Weir: *He gave me the search warrant, I think, and he told me the matter it was pertaining to, and then I think he explained that there was a video person who would be taping it and he sort of went through my rights.*

The CHAIRMAN: *Okay. Did you ask him whether you could ring your solicitor—that is, seek to have your solicitor attend?*

Mr Weir: *I did.*

The CHAIRMAN: *What was his response?*

Mr Weir: *He wanted to finish explaining everything that was going on and reading me my rights.*

The CHAIRMAN: *Did he indicate to you that he did not want you to believe you could not contact your solicitor, but he wanted to let you know why he was on the premises, and as soon as he had completed advising you of why he was on the premises, you could make your phone call and get in your solicitor?*

Mr Weir: *Yes, but he wanted to get all the procedural matters, so to speak, out of the way first. I think I might have told him at that stage,*

“Look, I’m not going to be answering any questions until I get a chance to speak to my solicitor.”

The CHAIRMAN: *At this stage, while you were discussing the preliminaries with Mr Jane, do I understand that the police officer was taping the conversation between yourself and Detective Sergeant Jane?*

Mr Weir: *I believe so, yes.*

The CHAIRMAN: *Was there then a pause in the proceedings while you phoned your solicitor?*

Mr Weir: *Yes. I think it would have been 15, 20 minutes.*

The CHAIRMAN: *You made the phone call?*

Mr Weir: *I asked someone else to make the phone call.*

The CHAIRMAN: *I see. Are you saying your solicitor attended your premises about 15 minutes later?*

Mr Weir: *It might even have been 20 minutes.*

The CHAIRMAN: *At whatever time—15 or 20 minutes later—your solicitor attended?*

Mr Weir: *Yes.*

The CHAIRMAN: *What happened then?*

Mr Weir: *I think Mr Jane explained, with the lawyer present, the same situation—why they were there. I think our lawyer might have asked for some time aside with me. I think Leo Johnston, our associate editor, who deals with a lot of the legal matters at the paper, was also in the room, and we might have had some time with our lawyer.*

The CHAIRMAN: *After you had had some discussions in private with your lawyer, along with Mr Johnston, what happened then? Did you advise Detective Sergeant Jane that you intended to cooperate with the police?*

*Mr Weir: Yes. We agreed that we would show them where the reporter's—Paul Lampathakis— desk was.*¹⁶²

10.15 Detective Sergeant Jane's report on the execution of the search warrant states:

Prior to departing the offices of Major Fraud Squad I held a briefing in relation to the warrant. I delivered a verbal briefing outlining our intentions, officer conduct, the likelihood of media coverage of the event, the risks to the Police Service, the risks to individual officers, and the tactical approach to the warrant.

I briefed staff that in all respects, Police would approach the warrant subtly in the first instance and then respond to any need for escalation. To that end, I attended the offices of the Sunday Times with 5 police. 3 staff were tasked to remain outside and I initially entered into the Sunday Times with Detective Senior Constable MANSELL; (a short time into the process, Detective Senior Constable BREWSTER joined us). I met the editor Mr. Sam Albert WEIR and explained to him that I was in possession of a warrant. I explained the process to him. He responded by asking for legal advice. As a matter of professional courtesy I extended him the opportunity to speak with a lawyer.

Mr. Steven EDWARDS attended some time later and his demeanour was initially adversarial. I stipulate here that his demenaour [sic] and all actions were lawful, and arguably in the best interest of his client, but adversarial never the less. Mr. EDWARDS demanded time with his client and I left the room to provide him that courtesy.

Having assessed the situation, and in accordance with my briefing to staff prior to departure from Major Fraud Squad, I requested additional staff to assist with a professional search and to ensure the integrity of evidence collection was maintained.

*Shortly after making that decision I spoke again with Mr. WEIR and Mr. EDWARDS. After a period of debate, Mr. EDWARDS, speaking on behalf of Mr. WEIR agreed to show police to Mr. LAMPATHAKIS's desk for the purpose of a search.*¹⁶³

10.16 In evidence to the Committee, Detective Sergeant Jane stated:

¹⁶² Mr Sam Weir, Editor, *The Sunday Times*, *Transcript of Evidence*, 13 June 2008, pp4-6.

¹⁶³ Doc. 84, Exhibit 4AV.

At about six minutes past two in the afternoon, five police officers attended the offices of the Sunday Times. It was my intention to go in with two people to start with. A third joined us after we had walked through the door, and the third was a video operator so that we could record what was going to happen. I spoke with desk staff, the assistant to the editor and then Mr Sam Weir, the editor, and I explained to him that we were in possession of a warrant. I also detailed what the warrant identified that we should search for. He immediately asked for legal counsel. I afforded him the courtesy of making a phone call to get legal counsel. Then there was a period of time, I would estimate between 15 to 20 minutes, whilst we waited for legal counsel to arrive at the newspaper. The legal counsel was a Mr Edwards. When Mr Edwards arrived, he was quite adversarial. I want to put that in context. When I say "adversarial", he was probably acting in the very best interests of his client. He certainly did nothing unlawful and was, in all respects, proper. Nevertheless, it was an adversarial confrontation. He was naturally looking out for the best interests of the newspaper. We had some discussion and that discussion, on and off, would have occurred over about 10 minutes. During the course of this toing and froing, trying to determine where Mr Lampatharkis's desk was and whether we could have access to it, I made a critical decision, and that critical decision was to call for additional staff. My reasons were very simple: it was a normal crime scene. The purpose of the warrant was to obtain corroborating evidence, and I needed to ensure the security of that evidence. I also have a duty of care once I execute a warrant at a place for everyone inside that place. Because of the adversarial nature and the initial confrontation, I felt at the time that we would not get the cooperation that I initially sought. As pre-briefed, I had a staff member contact the officer in charge of major fraud squad.¹⁶⁴

- 10.17 Detective Inspector Albrecht's running sheet states that at 2:30pm on 30 April 2008, he was:

Advised by Det/Snr/Sgt Blackshaw that Det/Sgt Jane was receiving resistance from the Sunday Times management and that additional staff were required to assist with the search and scene control.¹⁶⁵

- 10.18 The Internal Affairs Unit report on the raid states:

¹⁶⁴ Mr Allan Jane, Detective Sergeant, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p20.

¹⁶⁵ Doc. 74, Exhibit 4AL.

Initially five [Major Fraud Squad (MFS)] staff attended at the Sunday Times. This is in line with MFS standard operating procedures. In an effort to minimise any disruption, only Jane and Mansell entered into the business area to inform the Sunday Times management of the investigation and their intention to execute a search warrant to seize documents.

The editor of the Sunday Times, Mr Sam Albert Weir (Weir), questioned the validity of the search warrant and requested legal advice. As a matter of courtesy and professionalism Detectives did not commence the search and waited for solicitor, Mr Steven Edwards, to arrive and privately consult Weir.

When advised of the nature of the inquiry, management at the Sunday Times initially declined to inform detectives the location of Lampathakis' workspace and personal or allocated property.

During the course of the search warrant staff at the Sunday Times continually took photographs, video footage and placed audio recording devices into the faces of Detectives, whilst they carried out their duties. Sunday Times staff also initiated a direct live link to the 'Perth Now' internet site.¹⁶⁶ MFS staff made no issue of this and progressed the warrant in a methodical and professional manner.

...

[Detective Inspector] Albrecht and [Detective Senior Sergeant] Blackshaw together with other staff from MFS, attended to assist with the management of the search. This was at the request of Jane due to the unhelpful nature of the Sunday Times Staff.

Weir later addressed the Sunday Times staff and outlined what lawful directions could be made to them.

Lampathakis was not present at the search and the management of Sunday Times declined to make contact with Lampathakis.

After several attempts to telephone Lampathakis, Mansell eventually made contact with him via his mobile telephone and asked if he could

¹⁶⁶

The Committee notes the evidence of Mr Weir that there was, in fact, no live streaming of the raid on the Internet. Some video was shot by *The Sunday Times*' staff during the raid, which was edited and placed on the *Perth Now* website approximately half an hour after the footage was taken: Mr Sam Weir, Editor, *The Sunday Times, Transcript of Evidence*, 4 August 2008, p4.

*attend at his office for interview and cooperation with the search. Lampathakis declined to attend stating he was too far away.*¹⁶⁷

10.19 The Internal Affairs Unit report on the raid also states that:

Staff at the Sunday Times were generally unhelpful and, as such, the execution of the search warrant became a complicated affair.

*Extra police to man exits and speak with staff who were unrelated to this matter were required to attend. This ultimately fed a media spectacle for what should have been a relatively low key search of one staff member's desk area. With some cooperation this process could have been conducted with minimal police resources and negligible disruption to the Sunday Times staff.*¹⁶⁸

10.20 The Committee notes, in contrast to the above report, that in his evidence Mr Weir stated that he did not believe that at any stage he or any staff member of *The Sunday Times* did not cooperate with the WAPOL “within what they regarded or what they were told were their legal rights”.¹⁶⁹ Mr Weir also gave the following evidence:

The CHAIRMAN: *You say the police claim that you questioned the validity of the search warrant. You use the same words yourself; you say, “I do not believe I questioned the validity of the search warrant unless the police regarded asking what the search warrant related to as questioning its validity.” What was in fact the situation? What sort of issue did you raise when they showed you the search warrant?*

Mr Weir: *Again, the video would bear out the exact wording, but I think I simply asked what it related to. I think I was surprised about the story that it related to. I think I expected it to be another story. I note also that Detective Sergeant Jane makes no mention in his evidence of my disputing the validity of the search warrant. I made it very clear once I was presented with the search warrant that I requested to seek legal advice. Whether that is what Mr Gregson regards as questioning the validity of the search warrant, I am not sure. I do not think at any stage I said anything like “I don’t believe this is a search warrant”, “Prove it’s a search warrant”, or “This isn’t a valid search warrant.” I did not use any words to that effect.*¹⁷⁰

¹⁶⁷ Doc. 39, Exhibit 4C, internal WAPOL memorandum, 27 May 2008, pp8-9.

¹⁶⁸ Ibid, p2.

¹⁶⁹ Mr Sam Weir, Editor, *The Sunday Times*, *Transcript of Evidence*, 4 August 2008, p2.

¹⁷⁰ Ibid.

10.21 In the following evidence Mr Weir also expanded upon his decision to request the attendance of *The Sunday Times*' legal counsel:

The CHAIRMAN: *When you say "within your legal rights" there seems to be some issue in the words that you use here, for instance, that you wanted to seek legal advice. Can I ask you whether the seeking of legal advice was in fact aimed at thwarting the execution of the search warrant?*

Mr Weir: *No. I had never been served with a search warrant before. I did not know what my rights were, whether I could say, "No, leave the building now" or "You have free rein of the building." Very simply, I asked when police officers turn up at your workplace it is standard procedure to ask if you are allowed to. Detective Sergeant Jane granted it. It was made very clear that it would probably take 10 to 15 minutes for them to get there. It took 10 to 15 minutes for a lawyer to get there. In that time a decision was made by the police to call extra officers.*

The CHAIRMAN: *Can you point to any reason that you believe existed that would indicate why the police would want to escalate the number on your premises from five to a greater number?*

Mr Weir: *Having read the evidence I know why I think Mr Jane was getting increasingly nervous. However, at that stage, even though members of the Sunday Times staff knew that police were talking in the office, which has a glass window, so photographs were being taken, I am pretty sure they did not know what matter it was in relation to, so if he was worried about every member of staff trying to destroy evidence so to speak, they did not know what the matter pertained to. Again, the video would bear it out, but I am not sure I was ever told, "If your lawyer doesn't hurry up and get here, we're going to have to call more people." I do not think that was ever said. Mr Jane did ask how long before he would be here. Ten to 15 minutes was the time given, and I am pretty sure it was within about 15 minutes that the lawyer arrived. Post that, there was some toing and froing, which again, as is indicated in Mr Jane's evidence. He allowed me, my associate and our lawyer, Mr Edwards, some time together to discuss the matters. However, from reading his evidence, I think, the extra police had already been called by that stage.*

The CHAIRMAN: *When you use the term "toing and froing", what do you mean by that?*

Mr Weir: Our lawyer arrived. We were allowed a few minutes in private with him to explain the situation. I think then after that that the police explained the terms of the search warrant. I think we were allowed a short time afterwards to make a decision, and after we made the decision to allow police to search. By the time we had sort of made the decision that police could search the desk and we had showed them where it was, there were 27 officers already there or on their way.

...

Mr Jane talks about the adversarial nature and initial confrontation, and the only thing that I can possibly think of, and the only thing that is borne in his evidence, is the tension, so to speak, between he and Mr Edwards [The Sunday Times' lawyer], which happened well after extra officers were on their way.¹⁷¹

- 10.22 Mr Weir also questioned the need for so many police officers to be involved in the raid when there was little opportunity for other staff of *The Sunday Times* to become aware of the purpose of the raid:

[I]t was all reasonably discreet at the start; as discreet as it could be. I was in the managing director's office. I have since learnt that the police were downstairs. From where I was, I think my secretary came in and said that there were police in the building, and they met me as I walked out of the managing director's office, escorted me to my office, the doors were closed behind me and Mr Jane proceeded to serve the search warrant on me. At that time I think there were two or three police officers—one being the video recorder—and me in the office. At that stage no-one—apart from those people in the room, I assume—knew what the search warrant was in relation to. I doubt that they had served it on anyone else before they served it on me. I was the only one who knew what it was in relation to and, as I said before, I was surprised at what it was in relation to. After I had asked to seek legal advice and was granted permission by Detective Sergeant Jane, I was allowed to open the door to my office and get my associate editor, or my secretary—I am not sure who it was—to call Mr Edwards. I do not think that at that stage—the police came to the door with me to make sure I did not say anything that I should not be saying.

¹⁷¹ Ibid, pp3-4.

*I do not think at that stage there was any knowledge of what the search warrant related to. I think by that stage—my office has a large glass-fronted window—that people sort of realised that there were three police officers and myself in there; their natural instincts as journalists took over, and I think some photographers were taking photographs. In that 10 or 15 minutes, I doubt that anyone would have known what the nature of the search warrant related to, so there was no opportunity for anyone to be destroying or removing anything, because they did not know what it related to.*¹⁷²

- 10.23 The Committee notes that the delay whilst awaiting the arrival of *The Sunday Times*' lawyer was the principal reason for the decision of Detective Sergeant Jane to call for additional police officers to assist with the raid. The Commissioner of Police noted that:

The case officer has not recorded on the running sheet the time that Mr Weir did not show police Mr Lampathakis' work area, however, the time is recorded when the desk was identified as this was deemed a more significant factor considering the goals of the execution of the search warrant, that is, excerpt from running sheet . "14.51 Interview recommenced. Legal decision is that Weir will assist as far as legally possible, will identify Lampathakis' desk".

*When police first met Mr Weir, they produced to him the search warrant and advised that they intended to search Mr Lampathakis' work area. Access was forestalled by Mr Weir requesting the attendance of *The Sunday Times* legal counsel.*

*Despite being made aware of the area police wished to search, Mr Weir did not disclose where Mr Lampathakis' work area was and, due to the lapse of time from the initial contact with Mr Weir to the completion of discussions with the legal counsel, this gave rise to concern to Detective Sergeant Jane that police were being stalled and that evidence may be lost and, therefore, additional police were called to assist.*¹⁷³

Phase 2 of the Search (approximately 2:50pm to 5:00pm, 30 April 2008)

- 10.24 It was during Phase 2 of the search that up to 27 police officers were involved. The 22 additional officers did not, however, all arrive at once after Detective Sergeant Jane

¹⁷² Ibid, p6.

¹⁷³ Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p5.

contacted Detective Senior Sergeant Blackshaw seeking assistance. Detective Sergeant Jane gave the following evidence:

*The officers arrived in staggered lots, but not preordained staggered timings, just timings as officers became available. Within approximately 20 to 30 minutes, I had 27 staff at my disposal.*¹⁷⁴

WAPOL officers at ground level of building

- 10.25 During Phase 2, which covered the period when many staff of *The Sunday Times* were leaving work for the day, a large number of officers were posted to cover exits from the building.
- 10.26 Between two and six officers were stationed at the ground floor entrance to the building on Stirling Street at various times over the course of Phase 2, with the most being required just before 5:00pm when the staff of the building were leaving work for the day. Officers were required to monitor the entry and exit of persons at this location and respond to an increasing presence from the media.¹⁷⁵
- 10.27 Up to two WAPOL officers monitored people entering and exiting the building through the James Street loading bay area.¹⁷⁶
- 10.28 For a period during Phase 2, up to two WAPOL officers patrolled the Pier Street and James Street external perimeter of the building in an area which was undergoing construction.¹⁷⁷
- 10.29 Detective Sergeant Jane emphasised in his evidence that no searches of persons went any further than asking to look into bags or any articles being carried into or out of the building.¹⁷⁸

WAPOL officers on first floor of building

- 10.30 At 3:02pm Mr Weir addressed the staff of *The Sunday Times* and advised them of the execution of the search warrant.¹⁷⁹

¹⁷⁴ Mr Allan Jane, Detective Sergeant, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p21. The Committee notes that there were 27 officers in total used during the raid (including Detective Sergeant Jane).

¹⁷⁵ Doc. 154, Exhibit 4BD, *General representation of where Police were primarily located during search of Sunday Times on 30th April 2008: Phase 2*, 30 June 2008.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Mr Allan Jane, Detective Sergeant, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p23.

¹⁷⁹ Doc. 71, Exhibit 4AI.

- 10.31 The principal search area during Phase 2 was an area of the first floor that covered Mr Paul Lampathakis' work desk and surrounding areas in *The Sunday Times* newsroom, including the office of the Editor of *The Sunday Times*.¹⁸⁰ The original five-member Search Team was located here during Phase 2. An additional four WAPOL officers arrived to expedite the search. Detective Inspector Albrecht and Detective Senior Sergeant Blackshaw arrived and departed the premises during Phase 2.
- 10.32 A "static" officer was placed at the entrance to *The Sunday Times* newsroom to monitor entry to and exit from the principal search area.¹⁸¹
- 10.33 Up to two "static" police officers were located at a staircase on the first floor of the building, monitoring entry to and exit from the principal search area.¹⁸²
- 10.34 Up to three "static" police officers monitored a hallway juncture near the principal search area.¹⁸³
- 10.35 A single "static" officer monitored entry to and exit from a rear entrance to the principal search area.¹⁸⁴
- 10.36 Detective Inspector Albrecht's running sheet notes that he attended the offices of *The Sunday Times* at 3:00pm, and that he was briefed as follows by Detective Sergeant Jane:

*Advised that Sunday Times management now cooperating. Staff assigned tasks. Search proceeding.*¹⁸⁵

- 10.37 On occasion, other WAPOL officers would have entered the principal search area seeking direction from Detective Sergeant Jane or Detective Senior Constable Mansell.¹⁸⁶
- 10.38 At 3:22pm, Mr Islwyn Davies, Managing Director, *The Sunday Times*, sent an email to all staff of *The Sunday Times*, stating the following:

To All Staff

¹⁸⁰ Doc. 154, Exhibit 4BD, *General representation of where Police were primarily located during search of Sunday Times on 30th April 2008: Phase 2*, 30 June 2008.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Doc. 74, Exhibit 4AL.

¹⁸⁶ Doc. 154, Exhibit 4BD, *General representation of where Police were primarily located during search of Sunday Times on 30th April 2008: Phase 2*, 30 June 2008.

You may have noticed police are here in some numbers conducting a search in regard to a recent story published in The Sunday Times. They may ask you on leaving the building if they are still here to search your bags.

*We are co-operating with them and there is absolutely no reason for alarm.*¹⁸⁷

10.39 At approximately 3:30pm Detective Sergeant Jane requested Mr Weir to contact Mr Lampathakis. Mr Weir reportedly declined on the grounds that that was WAPOL's job.¹⁸⁸ It appears from the WAPOL Running Sheet of the investigation that Detective Senior Constable Mansell contacted Mr Lampathakis on his mobile phone at approximately 3:33pm.¹⁸⁹ Mr Lampathakis reportedly declined to attend at the offices of *The Sunday Times* as "he is too far away and doesn't think he can get there".¹⁹⁰

10.40 Mr Lampathakis gave the following evidence of his telephone conversation with Detective Senior Constable Mansell:

Mr Lampathakis: *She told me that the police were at the office, that they were going to conduct a search of my desk and would I like to come along and assist with that search.*

The CHAIRMAN: *And your response to the police at the time?*

Mr Lampathakis: *I told them I was in the middle of an interview, which I was, and I was not anywhere near the office and I would not be coming in.*

The CHAIRMAN: *You declined.*

Mr Lampathakis: *Yes.*

The CHAIRMAN: *I see. Apart from telling you the police were on the premises of the Sunday Times, did she explain the reason why they were on the premises of the Sunday Times at the time?*

When I say "she", I mean did Detective Mansell explain the reasons for the police being on the premises at the Sunday Times at that time?

¹⁸⁷ Doc. 142, Exhibit 8A.

¹⁸⁸ Doc. 71, Exhibit 4AI.

¹⁸⁹ Doc. 53, Exhibit 4Q.

¹⁹⁰ Doc. 71, Exhibit 4AI.

Mr Lampathakis: Because so much has gone on since, I cannot really recall. I would assume she would have.

The CHAIRMAN: Can the committee assume that you were aware that the police were on the premises of the Sunday Times for the purpose of attempting to seek some documentation in respect to your story?

Mr Lampathakis: That would be a fair assumption.

The CHAIRMAN: You believed that to be the case at the time?

*Mr Lampathakis: Yes.*¹⁹¹

- 10.41 Mr Weir gave evidence that he understands that a lawyer for *The Sunday Times* spoke to Mr Lampathakis at sometime during the raid.¹⁹²
- 10.42 Mr Lampathakis advised the Committee that on 30 April 2008 he had left the offices of *The Sunday Times* at 11:00am and returned at approximately 7:00pm.¹⁹³ He further advised that he was out conducting interviews within the metropolitan area during that time.¹⁹⁴

Phase 3 of the Search (approximately 5:00pm to 6:10pm)

- 10.43 At the start of Phase 3 the WAPOL officers manning the exits departed and the search of Mr Lampathakis' work space was concluded.¹⁹⁵
- 10.44 The five-member Search Team was joined on the first floor by some additional officers who had been freed up from manning building exits.¹⁹⁶
- 10.45 The six Computer Crime officers obtained access to Mr Lampathakis' computer and *The Sunday Times*' server.¹⁹⁷ The Internal Affairs Unit report of the raid states:

Computer Crime Squad (CCS) investigators also attended the Sunday Times at 17:03 hrs to assist MFS to seize relevant information located on Lampathakis' computer.

¹⁹¹ Mr Paul Lampathakis, Journalist, *The Sunday Times, Transcript of Evidence*, 7 July 2008, pp6-7.

¹⁹² Mr Sam Weir, Editor, *The Sunday Times, Transcript of Evidence*, 13 June 2008, pp10-11.

¹⁹³ Mr Paul Lampathakis, Journalist, *The Sunday Times, Transcript of Evidence*, 7 July 2008, p9.

¹⁹⁴ Ibid, p10.

¹⁹⁵ Doc. 155, Exhibit 4BE, *General representation of where Police were primarily located during search of Sunday Times on 30th April 2008: Phase 3*, 30 June 2008.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

Following discussions with Sunday Times IT staff it was ascertained that files are not held on personal computers but on a central server. At 17:20 hrs CCS downloaded information from the Sunday Times server with the assistance of Sunday Times IT staff. The download was restricted to a particular timeframe and location to ensure relevancy and adherence to the grounds of the warrant.¹⁹⁸

10.46 A small number of documents, mini audio cassettes and a DVD of computer information were seized as evidence in the raid.¹⁹⁹

10.47 The search warrant was officially completed at 6:10pm. All remaining police left the building.²⁰⁰ Detective Sergeant Jane had no further involvement in the investigation.²⁰¹

10.48 Detective Sergeant Jane has noted that:

At completion of the warrant, I asked all participants if there was any complaint in relation to the way any person had been treated. I asked questions routinely asked by Police to determine if any threats, promises or inducements had been made by Police. No complaint was forthcoming. To the best of my knowledge and belief, no such complaint of that nature has been received by Police.²⁰²

10.49 Mr Weir gave the following evidence when asked if he was satisfied with the manner in which the police acted during the raid and, if not, whether he had lodged a complaint:

Am I satisfied that it was necessary to have 27 police officers in our building on that day, no. Am I satisfied, if they were required, or if they felt required or were legally bound to have 27 there, by whatever means, that they acted professionally while they were there, yes, they acted professionally.²⁰³

10.50 The Committee was advised that there had been no complaints from the staff of *The Sunday Times* regarding the actions of the WAPOL during the raid:

¹⁹⁸ Doc. 39, Exhibit 4C, internal WAPOL memorandum, 27 May 2008, p9.

¹⁹⁹ Doc. 53, Exhibit 4Q, WAPOL Investigation Running Sheet.

²⁰⁰ Doc. 71, Exhibit 4AI.

²⁰¹ Doc. 84, Exhibit 4AV.

²⁰² Ibid.

²⁰³ Mr Sam Weir, Editor, *The Sunday Times, Transcript of Evidence*, 13 June 2008, p7.

The CHAIRMAN: Has any member of the Sunday Times staff complained to you about the manner in which the police went about their operation?

Mr Weir: Not in any formal way, but I think the unanimous view is that it was completely over the top, unnecessary and was supposed to be intimidatory.

The CHAIRMAN: I understand from your previous comments what you are saying now. I am more interested in the people who were leaving the building who you would not have been able to see at the time.

Mr Weir: As I said, there were 300 people on the site.

The CHAIRMAN: No-one has lodged an official complaint with you about the manner in which they were dealt with by the police during that operation?

*Mr Weir: No.*²⁰⁴

The use of 27 WAPOL Officers in the Raid

10.51 A total of 27 WAPOL officers were on site over the course of the raid on the offices of *The Sunday Times*, being:²⁰⁵

- the **five** person Search Team (Detective Sergeant Jane; Detective Senior Constable Mansell; a Video Camera Operator; an Exhibits Officer; and a Search Officer);
- the **six** person Computer Crime team (three officers whom assisted in the search and monitored exist during Phase 2; and another three officers who arrived at the commencement of Phase 3 for the express purpose of obtaining information from *The Sunday Times*' IT/Computer Server);
- the **two** senior officers who attended during Phase 2 only (Commercial Crime District Inspector, Detective Inspector Albrecht; and the Officer in Charge of the Major Fraud Squad, Detective Senior Sergeant Blackshaw);
- the **one** Police Cadet attached to the Major Fraud Squad, who provided administrative support and had no active search role;

²⁰⁴ Ibid, p11.

²⁰⁵ Doc. 153, Exhibit 4BC, *General representation of where Police were primarily located during search of Sunday Times on 30th April 2008: Phase 1*, 30 June 2008.

- the **13** additional officers from the Major Fraud Squad who were present during Phase 2 of the search, and whose duties included manning exits, assisting in the search of the building, responding to media requests, and responding to requests from Detective Sergeant Jane to perform tasks as directed.

10.52 Section 31 of the *Criminal Investigation Act 2006* sets out the rights of an occupier during the conduct of a search. The requirements of the section may have implications as to the number of police officers required to attend the search:

31. Occupier's rights

(1) *This section applies to and in respect of the entry of a place where the entry is to be made under section 20(3), this Part or Part 12 Division 3.*

(2) *If the occupier of a place is present when it is proposed to enter the place, an officer must, before any officer enters the place —*

(a) *identify himself or herself to the occupier;*

(b) *inform the occupier that it is intended to enter the place;*

(c) *if the place is to be entered under a search warrant, give the occupier a copy of the warrant;*

(d) *if the place is to be entered under some other statutory authority, inform the occupier of the reason, and the statutory authority, for the entry; and*

(e) *give the occupier an opportunity to give informed consent to the place being entered,*

unless the officer reasonably suspects that to do so will endanger any person, including the officer, or jeopardise the purpose of the proposed entry or the effectiveness of any search of the place.

(3) *If subsection (2) is not complied with before a place is entered, then as soon as practicable after the place is entered an officer must —*

- (a) *identify himself or herself to the occupier;*
 - (b) *if the entry was under a search warrant, give the occupier a copy of the warrant; and*
 - (c) *if the entry was under some other statutory authority, inform the occupier of the reason, and the statutory authority, for the entry.*
- (4) *If the occupier of a place is present in the place when it is being searched, an officer doing the search must not prevent the occupier, or a person nominated by the occupier, from observing the search, unless —*
- (a) *the officer reasonably suspects that the occupier or person might be endangered if he or she were to observe the search;*
 - (b) *the occupier or person obstructs the search; or*
 - (c) *it is impracticable for the occupier or person to observe the search.*
- (5) *If a place that is entered by one or more officers is unoccupied, the officer in charge must leave the following in a prominent position in the place before leaving the place —*
- (a) *a notice stating —*
 - (i) *the officer's official details; and*
 - (ii) *that the place has been entered;*
 - (b) *if the entry was under a search warrant, a copy of the warrant completed in accordance with section 45(3); and*
 - (c) *if the entry was under some other statutory authority, the reason, and the statutory authority, for the entry.*
- (6) *The copy of a search warrant given under subsection (2)(c) or (3)(b) or left under*

subsection (5)(b) must omit the name of the judicial officer who issued it.

- 10.53 The Committee received the following evidence from Assistant Commissioner Gregson on WAPOL procedures regarding the number of officers required to execute a search warrant:

[P]rior to a search warrant being executed, there is ordinarily the senior investigating officer will conduct a risk management exercise and determine the appropriateness of or the number of appropriate staff. So, if you are going to do a lawyer's office, the Sunday Times, a bank, for example, you can usually do with one person—you present the warrant; you get your documents. If you are going to do a bikies clubhouse, you will probably take more than two people. So, you make a risk assessment based on what you consider would be the appropriate number of people. Now, in this matter initially, five were dispatched and then you would imagine that there would be contingencies put in place—and I defer to Mr Jane—but if I had been the operational commander, I would have had perhaps a couple of senior officers who I could have called upon if things got a little tricky. Perhaps I could have called on some computer crime people had I required to seize electronic evidence, which I believe occurred in this occasion, so it is as much about contingency planning and risk management. As a general rule of thumb, five is a good number, which is just a traditional thing—one for each corner of the house and one to put the front door in.²⁰⁶

- 10.54 When queried about the general principle of five officers attending a police raid, the Commissioner of Police advised the Committee that:

Notwithstanding the general principle that five officers would be sufficient for a search of a normal building, in this instance, a risk assessment was made and, given the anticipated level of cooperation expected, it was determined that five officers would be adequate. However, as circumstances unfolded, the number of officers considered necessary to effectively undertake the search (considering issues such as type and size of the building, specialist expertise and level of supervision required), and manage access to and from the

²⁰⁶ Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p19.

*building, the number of officers utilised was escalated proportionately.*²⁰⁷

- 10.55 As to the necessity for 27 police officers to be involved in the raid, Detective Sergeant Jane advised the Committee that:

*I have never conducted a warrant in which I required 27 staff, and I have been in the Police Service for 12 years. However, I have run several operations in which that number of staff has been readily available, or made available, to us for a particular operation or for an eventuation that has occurred.*²⁰⁸

- 10.56 He added that:

*Given the time, place and the circumstances, the 27 police officers who we had there was the correct number for the job. May I say that if more had been available to me, I might well have utilised more.*²⁰⁹

- 10.57 Detective Senior Constable Mansell gave the following evidence:

The CHAIRMAN: *Given that you were the investigating officer and the fact that there were 27 police involved in the raid, can you tell us how it was determined that 27 police were necessary?*

Ms Mansell: *Just as a background of this, when we execute search warrants, we have several things we need to consider, and that is in relation to the destruction of evidence, the escape of offenders or persons of interest, and our security, because we can deal with violent people. This is another search warrant and it was treated as no different to any other search warrant. Initially, it was a much smaller group, and our initial intentions were to speak with the editor and try and resolve the issue in a more civil way. I am not saying that anything was uncivil, but we tried to resolve it by just cooperation. Given the size of the building, the amount of people that were working there, the paperwork that was there, we decided that there was a need to secure the building, all its exits, and to streamline our work without causing any undue hardship, if you want, to the employees at the Sunday Times. The more people that are there, the faster you can search.*

²⁰⁷ Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p3.

²⁰⁸ Mr Allan Jane, Detective Sergeant, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p21.

²⁰⁹ *Ibid*, p23.

The CHAIRMAN: *Ms Mansell, do you think that the operation could have been carried out with a lesser number of police officers; and, if there were a lesser number, would there have been some implications or ramifications as a result of the reduction in numbers?*

Ms Mansell: *I think with a reduction in numbers it would have taken us longer, and people that worked there would have been held up a bit more. I think that the numbers were appropriate. It is a lot of people, but I think it was appropriate.*

...

The CHAIRMAN: *Okay. In hindsight, how differently would you approach an issue with similar circumstances should such a circumstance arise?*

Ms Mansell: *If the same thing came up tomorrow, I would do the same thing again. It has been a bit of a media circus, but, at the end of the day, it is another search warrant, and the same thing is appropriate in a similar situation, so I would do nothing different.²¹⁰*

- 10.58 Detective Inspector Albrecht noted that the size of *The Sunday Times* building was a major factor in the number of police officers employed in the raid:

Just by way of clarification, the execution of search warrants by a police officer on major commercial premises is fairly rare. I have been involved in a number of raids on commercial premises, be they accounting firms, law firms or general business premises. In this instance, the Sunday Times is a substantial building. If you would like to ask Detective Sergeant Allan Jane how big the premises was, you would get some idea of some of the reasons why you would have that many staff. It is like a large warehouse on the second floor, containing approximately 40 desks. You would have to speak to him; he would know more correctly how large.

Then there are the other floors. Again, another impact was the time of day; it was nearing knock-off time for the staff and we did not want to inconvenience them. To enable a smooth egress from the building, we had staff assigned to the various exits so that they could check the

²¹⁰ Ms Elissa Mansell, Detective Senior Constable, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 13 June 2008, pp6-7.

*bags so the people could go home. That is why so many staff were needed.*²¹¹

- 10.59 The Commissioner of Police was not prepared to second-guess the decision of the officer in charge of the search warrant as to the appropriate number of officers to be used in the raid:

*It is very, very difficult, as Commissioner of Police, to second-guess what happened. The commander at the scene on the day has to make all sorts of decisions based upon the perceived degree of resistance, occupational health and safety, the security of the building, managing media—a whole range of things. I am not going to second-guess the decisions of that commander at the scene. I think it is a very difficult position to be in and I think the commander has made a decision in good faith. Maybe if we break down the inquiry into little bits, we might find that there were one or two too many there, but I am not in a position to second-guess them; in fact, I am not the best qualified to second-guess them.*²¹²

- 10.60 The Committee is of the view that when Detective Inspector Albrecht attended the scene of the raid during Phase 2, he should have re-assessed the situation and reduced the number of WAPOL officers deployed at the scene. The Committee believes that the decision to deploy 27 police officers at the execution of the search warrant was not proportionate to the risk.

The Internal Affairs Unit Report on the Raid

- 10.61 On 19 May 2008 the Commissioner of Police requested an internal review of the WAPOL investigation that resulted in the raid on the offices of *The Sunday Times*.²¹³
- 10.62 In his report on the appropriateness of the raid, Detective Senior Sergeant Mickle of the Internal Affairs Unit noted that:

Three issues that were beyond the control of the Detectives aggravated and complicated what could and should have been a straightforward procedure.

- 1. The editor of the Sunday Times, Weir questioned the validity of the search warrant and requested legal advice. As a matter*

²¹¹ Mr Arno Albrecht, Detective Inspector, Commercial Crime Division, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p21.

²¹² Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p4.

²¹³ Doc. 40, Exhibit 4D, internal WAPOL memorandum, 21 May 2008, p1.

of courtesy and professionalism Detectives did not commence the search and waited for the solicitor to arrive.

2. *When advised of the nature of the inquiry, management at the Sunday Times declined to inform Detectives of the location of Lampathakis' workspace and personal area,*
3. *Contact was made with Lampathakis and he was requested to attend for interview and cooperate with the search. Lampathakis declined to attend his office.²¹⁴*

10.63 Detective Senior Sergeant Mickle concluded that:

MFS acted with impartiality on a legitimate complaint after forming a reasonable suspicion that an offence may have occurred. There is no evidence to suggest that any improper conduct or attempts to influence the course of this investigation were received from any Government Minister or persons of authority.

MFS displayed good governance by maintaining running sheets recording their actions and critical decisions throughout the investigation.

Officers involved in the execution of the search warrant displayed professional conduct whilst under media scrutiny.

MFS inquiry practices were utilised, consistent with a standard investigation into a similar complaint. Detectives took logical and methodical steps in this matter investigating all possible avenues.

It is reasonable to anticipate that witnesses such as Lampathakis will not assist police as it would be to their professional detriment to reveal their source. Nevertheless, this line of inquiry has to be progressed and exhausted.

Ultimately 27 police officers were utilised at the search warrant over a period of 5 hours. If, management of the Sunday Times had assisted police in their lawful duty the number of staff deployed would have been minimal and completed in a timely manner (approximately 1 hour).²¹⁵

²¹⁴ Doc. 39, Exhibit 4C, internal WAPOL memorandum, 27 May 2008, p10.

²¹⁵ Ibid, p11.

- 10.64 The Committee notes that the WAPOL Internal Affairs Unit report fails to address the issue of proportionality.

Attempts to interview Mr Lampathakis since the Raid

- 10.65 As noted above, Mr Lampathakis declined a telephone request from Detective Senior Constable Mansell during the raid on *The Sunday Times* for Mr Lampathakis to return to the offices of *The Sunday Times* and participate in an interview.
- 10.66 An email letter was forwarded to Mr Lampathakis on 21 May 2008 from Detective Senior Constable Mansell inviting Mr Lampathakis to attend at the Major Fraud Squad office for a voluntary interview.²¹⁶ The Committee understands that Mr Lampathakis formally declined in writing to accept the invitation.²¹⁷ Mr Lampathakis gave the following evidence:

The CHAIRMAN: You said there were two [police] contacts [with you], one by Detective Mansell on 30 April. When was the other?

Mr Lampathakis: The second one, I think, was perhaps last month, June or May. I received an email from the police. I think it was the same officer. It was basically an invitation to go—well, I was not compelled to go and see them.

The CHAIRMAN: An invitation to?

Mr Lampathakis: To come in for an interview.

The CHAIRMAN: To give evidence, is that it, to the police or act as a witness to the police?

Mr Lampathakis: That is interesting. It was just to go in and actually talk about the issue. I think there was some mention of returning property to me as well, so it was quite a relatively informal email.

The CHAIRMAN: What was your response to the email?

Mr Lampathakis: I took legal advice and declined.²¹⁸

²¹⁶ Doc. 78, Exhibit 4AP.

²¹⁷ Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p6.

²¹⁸ Mr Paul Lampathakis, Journalist, *The Sunday Times*, *Transcript of Evidence*, 7 July 2008, p7.

Status of Investigation

10.67 The Committee understands that as of late 2008 the police investigation was continuing.²¹⁹

²¹⁹ Letter from Dr Karl J O'Callaghan APM, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p2.

CHAPTER 11

GOVERNMENT DIRECTION OR INVOLVEMENT IN THE RAID ON *THE SUNDAY TIMES*

11.1 A standard question asked of witnesses by the Committee was:

Can you tell me if any minister, parliamentary secretary or Member of Parliament has spoken to you about this particular matter?

Or, alternately:

Are you aware of any minister, parliamentary secretary or member of Parliament attempting to influence the police in respect of this matter?

11.2 The Committee was advised by the witnesses that there had been no such communication or attempt to influence.²²⁰

11.3 Detective Senior Constable Mansell gave the following evidence:

Ms Mansell: ... I believe there was some talk that I had been contacted by—I do not know—I think there is a perception that we are acting to resolve this so that police can make a gain. I have not been contacted by anyone. This has just been, for all intents and purposes, just the same as any other job. Nothing devious or anything has happened.

The CHAIRMAN: Indeed, Ms Mansell, I think I asked the other police officers the other day when they were giving evidence whether or not any minister, parliamentary secretary or member of Parliament had contacted the police—them in particular, but the police generally—in respect of the matter, and as I recall their answer was no, and so I ask you the same question.

Ms Mansell: Absolutely not.

²²⁰ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 9 June 2008, p11; Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission, and Mr Trevor Wynn, Manager, Investigations, Corruption and Crime Commission, 9 June 2008, p21; Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police, Mr Arno Albrecht, Detective Inspector, Commercial Crime Division, Western Australia Police, and Mr Allan Jane, Detective Sergeant, Major Fraud Squad, Western Australia Police, 9 June 2008, p27.

The CHAIRMAN: *Has any minister, parliamentary secretary or member of Parliament contacted you on the matter?*

Ms Mansell: *No.*²²¹

11.4 Mr Murphy also advised the Committee that:

*I think when the Premier first heard about it, he was overseas at the time and he thought, as I did, that the raid on the Sunday Times was an overreaction by the police, but it was an operational matter and something that was conducted independently of government.*²²²

11.5 Mr Wauchope gave the following evidence to the Committee:

The CHAIRMAN: *... I just want to know: did any cabinet minister or member of Parliament—and that includes parliamentary secretaries obviously—contact you and discuss the leaking of the document with you?*

Mr Wauchope: *No.*

The CHAIRMAN: *From your knowledge—and this may be an unfair question—do you have any evidence that a cabinet minister, parliamentary secretary or member of Parliament contacted any person in respect of this matter?*

Mr Wauchope: *Look, I do not know, Mr Chairman.*²²³

11.6 Mr Marney gave the following evidence:

The CHAIRMAN: *... Can you tell me if any minister, parliamentary secretary or member of Parliament has spoken to you about this particular matter?*

Mr Marney: *No.*

The CHAIRMAN: *Can you —*

²²¹ Ms Elissa Mansell, Detective Senior Constable, Major Fraud Squad, Western Australia Police, *Transcript of Evidence*, 13 June 2008, p7.

²²² Mr Kieran Murphy, Acting Chief of Staff, Premier's Office, Department of the Premier and Cabinet, *Transcript of Evidence*, 13 June 2008, p6.

²²³ Mr Malcolm Wauchope, Director General, Department of the Premier and Cabinet, *Transcript of Evidence*, 9 June 2008, p15.

*Mr Marney: Sorry, I can tell you and the answer is “no”; no-one has spoken to me.*²²⁴

- 11.7 The Committee is satisfied that there was no direction given to the WAPOL in relation to its investigation by any Minister, Parliamentary Secretary or Member of Parliament or their staff.
- 11.8 The Committee is also satisfied that there was no direction given to any public officer in relation to this matter by any Minister, Parliamentary Secretary, Member of Parliament, or their staff.

Finding 1: The Committee finds that there was no direction given to the Western Australia Police, in relation to its investigation into the alleged leak of confidential Cabinet information to *The Sunday Times*, by any Minister, Parliamentary Secretary or Member of Parliament or their staff.

Finding 2: The Committee finds that there was no direction given to any public officer, in relation to the alleged leak of confidential Cabinet information to *The Sunday Times*, by any Minister, Parliamentary Secretary, Member of Parliament, or their staff.

²²⁴ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 9 June 2008, p11.

CHAPTER 12

OBSERVATIONS OF THE COMMITTEE

Prevention of Unauthorised Disclosures of Cabinet Information

- 12.1 The Under Treasurer advised the Committee that he was satisfied with the measures that the DTF had taken in recent years to minimise the risk of unauthorised disclosures of information:

I think our security around the handling of the documents was pretty tight. The fact that ex post we were able to identify very quickly that four people had sighted the document means that our systems and processes were working. I would be more comfortable if our technology supported the document security classification that I alluded to previously; it is a matter of being patient in that regard, but we will certainly implement that. But if there was any change, that would probably be the only one—would be to have had that document classification set of protocols in place so that it would be beyond question.²²⁵

- 12.2 The Under Treasurer also noted the difficulties posed by the sheer volume of documentation dealt with by the ERC:

In terms of meeting management and dealing with papers, I have to stress the volume of papers dealt with through the expenditure review committee is quite substantial. In fact, I think the number of recommendations that go through to the committee is cited in our budget papers. We are talking about four recommendations out of more than, I think, 1 000, from memory. It works pretty tightly for the most part. I think it is inevitable that, if someone wishes to disclose confidential information without authority, that person will be able to find a way to do that, so it becomes an issue of culture and behaviour. I think it is particularly important to recognise that, in that regard, without going too far, public servants will follow the lead of their political masters. I will leave you to join the dots on that. We have explored, and will be looking to implement, an electronic environment for the management of the expenditure review committee meetings that will enable us to monitor who has access to a document, what time, what version, whether the person printed it, whether it was saved somewhere else, whether it was changed and so on. That

²²⁵ Ibid, p10.

*electronic management would be in a secure space, if you like, so it would be accessible only to those who have a log-on into that environment and an appropriate password, which we can then monitor. That is something that we are exploring and will talk to the chair of the expenditure review committee about implementing in the near future.*²²⁶

- 12.3 Evidence received by the Committee relating to version control and water marking of documents indicates many administrative issues remain to be addressed by the Government. In particular in relation to early drafts of documents which are sometimes widely distributed without control and watermarking.
- 12.4 The Committee also notes that DTF staff are sometimes involved in informal consultations prior to and during the formal consultation process. The Committee heard evidence that there is little to no control and monitoring of these informal consultations and as a result it is difficult to ascertain the actual number of persons who may have had access to a particular version of a document.
- 12.5 The Committee is concerned with this obvious deficiency in the systems and processes which do not account for the informal consultations.

Should the CCC have Fully Assessed the Complaint before Referral to the WAPOL for Investigation?

- 12.6 On the evidence of the Commissioner of the CCC and other CCC officers that appeared before the Committee, the CCC apparently did not apply its usual complaint assessment procedure in determining what action to take in relation to the DPC referral. That usual assessment procedure was not invoked due to the fact that the complaint involved an alleged criminal offence which had already been referred by the DPC to the WAPOL for investigation.
- 12.7 The Committee notes that the CCC were aware when they assessed the DPC complaint that numerous, named, people within the State Government had access to the information that was allegedly leaked. This fact should have raised the question as to whether the elements of s 81 of *The Criminal Code* could be established, particularly as the CCC itself had previously reported on the difficulties posed in prosecuting under s 81.
- 12.8 In such circumstances, the Committee questions whether the WAPOL was the appropriate agency to undertake the investigation, and queries why this issue was not considered in detail by the CCC.

²²⁶ Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance, *Transcript of Evidence*, 30 June 2008, p7.

- 12.9 The Committee notes that the CCC should have spoken to the WAPOL in February 2008 to ascertain the exact status of the WAPOL investigation. The fact that the WAPOL investigation had not commenced (and did not actually commence until April 2008) may have been an important factor for the CCC to consider when assessing the DPC complaint.
- 12.10 It is also noted, however, that the email sent by the WAPOL to the CCC on 26 February 2008²²⁷ stating that the DPC referral was being investigated by the Public Sector Investigation Team within the Major Fraud Squad was not clear as to the extent of the investigation at that point in time. The WAPOL should perhaps review the manner in which advice is provided to the CCC as to whether a preliminary assessment is being made or whether an investigation proper is being undertaken. The Committee is of the view that the form of the WAPOL email had a significant influence on the CCC's assessment of how it would action the DPC complaint.

Referral of Procedural Investigation by the CCC to DPC but not to the DTF

- 12.11 The Committee notes that the CCC were aware of the possibility that DTF officers may have been involved in the leaking of Cabinet information at the time of their consideration of the DPC's complaint. The Committee is of the view that the CCC should have also referred the complaint to DTF, as it did the DPC, for investigation under s 33 of the Corruption and Crime Commission Act 2003.

The Type of Investigation Referred to the DPC

- 12.12 The Committee notes that the referral letter from Mr Tony Wood, Assessor, CCC, to Mr Wauchope dated 27 February 2008 does not specifically state that the referral of the complaint back to the DPC pertains to a 'procedural' investigation only. However, this fact had previously been communicated to Ms Lisa Ward of the DPC by Mr Wood by telephone on 26 February 2008. In this telephone conversation, Mr Wood also informed Ms Ward that the DPC's investigation of any procedural matter would be undertaken after the WAPOL investigation was complete. This information was also not communicated in the CCC's referral letter to the DPC. The Committee is of the view that the CCC's referral letters should expressly state the nature and timing of any investigation required as part of the terms of a referral. Such specificity is important given the CCC subsequent responsibility to review under s 41 of the *Corruption and Crime Commission Act 2003* any investigation and report following a referral.

²²⁷

Doc. 26, Exhibit 3H.

Communications between WAPOL and the CCC
Adequacy of telephone communications between WAPOL and the CCC

- 12.13 Mr Anticich expressed the view that the procedural issues highlighted by the raid were issues for the WAPOL rather than the CCC:

***Mr Anticich:** ... In terms of their actions and the way it was executed, based on some of the media reporting, one could express the view that, as I think they anticipated, it did turn into a media circus. What do you do to avoid it? I do not know that it is particularly a problem of the commission as more so an issue of the police and how it is they approach these types of matters in the future. I do not think that this turns on the fact that the commission or the matter was referred to the police rather than the commission. I think it is a peripheral issue and perhaps the only area of potential positive recommendation would be that if the police have a valid, sincere and proper intention to engage the commission and some of its powers that there should be perhaps somewhat more of a process rather than a phone call on the day or hours preceding executive action.*

...

***The CHAIRMAN:** ... in hindsight, how differently would the CCC approach an issue with similar circumstances should a similar situation arise?*

***Mr Anticich:** Again, I think it turns on what I said that if we have that approach and those telephone calls on the day. Certainly, if I go back a bit, in terms of the process and the steps we took—nothing; we would deal with it exactly the same. In terms of the informal approach or the phone calls on the day, the advice would be well, you know, if you are genuine in what you desire, then take this on formally for it to actually be considered, bring it forward, you know, at a higher level or do something that actually brings it as a conscious action to be considered by the commission.²²⁸*

- 12.14 The WAPOL, however, maintained the view that the approach by Detective Inspector Albrecht to the CCC on the morning of 30 April 2008 was an appropriate formal approach for assistance:

²²⁸ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, pp19-20.

Hon ADELE FARINA: *Do you believe that Trevor Wynn would have understood by the tenor of your conversation that it was a formal approach?*

Mr Albrecht: *When you have a commissioned officer from one organisation speaking to the deputy director of investigations from the CCC, one would presume—and given it was about an alleged offence of disclosure of confidential matters from Parliament—that one would consider it a formal approach.*

Hon ADELE FARINA: *Are there any other accepted protocols between the CCC and the police that would have been followed to ensure that it was clearly understood that a formal approach was being made?*

Mr Gregson: *Can I make the distinction? At the operational level officers from various multi-jurisdictions have day-to-day liaison, so if we were working on a job with Customs or something, we talk to them coalface to coalface; we do not write to each other requesting advice, because of operational imperatives. At the higher level there are a number of operational forums that exist between us where we could table matters to canvass at the operational level, so there is an operational liaison committee between the police and the CCC, and I also understand there is a formal meeting between our two respective commissioners. Obviously, there would be no operational matters raised at that level.*

Hon ADELE FARINA: *Yes, sure, but for an operational matter such as this it was quite proper for the approach to be made by way of a telephone conversation from one senior officer to another?*

Mr Gregson: *Yes.*²²⁹

- 12.15 The Committee notes that co-operation between the WAPOL and the CCC on an operational level regarding joint investigations and the WAPOL accessing the CCC's extraordinary powers is not a common occurrence:

Mr Gregson: *The CCC have the autonomy to make a decision as to whom they refer [an investigation]. They can either keep it themselves to do the inquiry. My understanding is they can do a joint investigation with the relevant department or they can refer it to the*

²²⁹ Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police; Mr Arno Albrecht, Detective Inspector, Commercial Crime Division, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p15.

relevant department for investigation. They do that formally in writing. It was referred to Western Australia Police. There is no mechanism for us to go back to them, other than at the operational level, and say, "We would like to access some of your extraordinary powers." From time to time on investigations we may consider having access to coercive hearings or assumed identities or some of their other extraordinary powers, as we do with the ACC, for example.

Hon GIZ WATSON: *Is that a common occurrence in operational matters, that there is an approach to the CCC to use some of the powers that —*

Mr Gregson: *No, it is not common for us to approach the CCC historically.*

Hon GIZ WATSON: *It would have to be a particular —*

Mr Gregson: *I would have to be a specific matter, reviewed on a case basis. If we had a matter where we thought we would get further through investigative avenues by utilising some of their special powers, we would consider an approach to the CCC to do that.²³⁰*

- 12.16 The Commissioner of Police acknowledged that more formal lines of communication need to be established between the WAPOL and the CCC:

I think the formation of the Corruption and Crime Commission loosely aligns to the same time I was appointed Commissioner of Police. That process seems to have worked reasonably well. I think we have got to the stage now—this has been highlighted in this particular inquiry—where there probably needs to be a more formal way of approaching the Corruption and Crime Commission to ask for its support or the use of its powers in situations like this. That enables the matter to be escalated to a higher decision-making level in both organisations. I think, in this instance, as far as I am aware, the highest it went to was the inspector in charge of the fraud squad and one of the senior operational people in the Corruption and Crime Commission. Perhaps—I am only speculating—if it had been escalated and formal letters had gone out, we might have had a different result.²³¹

²³⁰ Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australia Police, *Transcript of Evidence*, 9 June 2008, p16.

²³¹ Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p2.

Disbandment of the Public Sector Investigations Unit

12.17 The Committee notes that the Public Sector Investigations Unit of the WAPOL was disbanded in late 2007. The Unit comprised nine police officers as at the date that it was disbanded.²³² Four police officers from the disbanded Public Sector Investigations Unit were transferred to the Major Fraud Squad (which had 46 police officers as at 30 April 2008).²³³

12.18 The Commissioner of Police explained the rationale for that decision:

*The public sector investigations unit, before it was disbanded, did all criminal investigations into currently serving public officers. One of the reasons we disbanded it was that I was not of the opinion that we needed a dedicated unit to investigate public servants. In other words, if it is a criminal act—stealing or fraud—by a public servant, then that part of the police force could inquire into it, like they do for anybody else. Most of those are normal police business. They go in there and do the inquiry as they would any other stealing or fraud inquiry. It is just that section 81 [of the Criminal Code] creates all sorts of difficulties for proof of evidence and obtaining evidence, particularly in cases that involve the media, as we have seen.*²³⁴

12.19 The Commissioner of Police advised that, following the disbanding of the Public Sector Investigations Unit, there were no changes made in procedures for dealing with investigations into allegations of unauthorised disclosure of confidential information.²³⁵

12.20 The Commissioner of the CCC suggested that the communication problems between the WAPOL and the CCC evident in this case may have arisen as a result of the disbanding of the Public Sector Investigations Unit of the WAPOL:

The committee might wish to consider whether or not, in terms of management and responses between the two organisations, this particular situation may in some way be a consequence of the abolition of the public sector investigation unit, which the police had until the end of last year.

²³² Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p1.

²³³ Ibid.

²³⁴ Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p2.

²³⁵ Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p1.

...

The question, I guess, is whether or not it is coincidental that the first time there has been a problem of this kind as between the commission and certain police officers in terms of who should be doing what or whether the commission should do it or whether they should do it or how the commission's powers should be exercised, it has only arisen in this way now. That unit was only abolished in November, I think it was. Prior to then, I think there were something like 395, nearly 400, commission referrals of cases to the police, and we have not had this situation before. That is a lot of cases.

I do not know the answer to the question, which is why I posed it in the way I did; that it may be something that the committee might wish to examine or consider, and it may be, depending upon the committee's consideration, that the committee might make some recommendation as to whether O'Callaghan gave evidence about that, and I certainly understand the imperatives driving the police—a limited number of people, a limited number of FTEs. Clearly, they were trying to make the most effective and efficient use of the limited number of positions they had available. They took the view that offences under section 81 of the Criminal Code are really just another form of crime—which clearly is correct—and, therefore, should go to the major fraud squad, which has responsibility for dealing with them. The commission, at the time this was being debated with police, was asked whether we had a view. We said, "Well, we don't have a view because it is a matter entirely for police as to how they want to organise their own internal organisation of operations." The only thing the commission asked for was that if the unit was to be abolished, then we would still have a nominated contact person to whom all of our referrals could be made. That arrangement was put in place, and they go to the officer in charge of the major fraud squad. Therefore, we do not have a concern about that. However, if it is not in some way a product perhaps of different personnel, I do not know. I do not know where the people from PSIU went ... who may have had a better understanding of how these things work, for example. I am just speculating here. However, if it is not as a result in some way of that change, then it is very coincidental.²³⁶

²³⁶

Hon Len Roberts-Smith QC, Commissioner, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, pp10-11.

12.21 Mr Anticich stressed that the benefits of the specialist Public Sector Investigations Unit were that that the Unit built up a body of expertise in:²³⁷

- a) the legislation affecting the public sector and how those various pieces of legislation interact;
- b) the non-legislative code to guide behaviour in the public sector;
- c) the administrative procedures in the public sector; and
- d) the culture of the public sector.

12.22 The Commissioner of Police advised the Committee that:

*The methodologies employed by Police during investigations are determined by the circumstances of each case and the investigation is then conducted in accordance with departmental investigative procedures. They are not dependent upon the policing unit involved, consequently the decision to disband the Public Sector Investigation Unit is not being reviewed.*²³⁸

12.23 The Committee notes that the Public Sector Investigation Unit, being a specialised unit, may have had a greater awareness of the issues and difficulties previously identified in pursuing prosecutions and securing convictions under s 81 of *The Criminal Code*. This may have resulted in a different approach being adopted by the WAPOL investigators when dealing with the CCC.

Joint Operations between the WAPOL and CCC

12.24 The Commissioner of Police expressed the view that there would be benefit in the CCC providing the WAPOL with more assistance in certain investigations:

I understand, of course, that the Corruption and Crime Commission is constrained by resourcing issues, as are police. Under the types of public sector investigations that we do, there are several hundred of these a year.

*It is actually difficult to engage the CCC in a lot or all of them, but there are some which we think they should be more involved in.*²³⁹

²³⁷ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, pp3-4.

²³⁸ Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. No. 187, p1.

²³⁹ Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 30 June 2008, pp1-2.

Should the CCC have taken over the WAPOL Investigation on 30 April 2008?

12.25 In a letter to the Executive Director of the CCC dated 2 May 2008, the Commissioner of Police made the following points in relation to the *Corruption and Crime Commission Act 2003*:

Now that I have been made aware of this investigation, it is my view that the Commission should reconsider its decision to refer this investigation and assume control of it for the following reasons:

1. *Section 7B(3) seems to contemplate that the Commission ought give serious considerations to whether it is appropriate that it should investigate allegations of serious misconduct.*
2. *In accordance with section 34(2)(a) of the CCC Act, the Commission is obliged in its deliberation to have regard to the fact that most of the public servants who had access to the ERC confidential information occupy senior positions.*
3. *Given the political sensitivity of this matter, it would seem that this is the very sort of investigation for which the Commission should assume responsibility. I would also draw your attention to the fact that already the police investigation is the subject of allegations of ministerial interference. As a consequence public confidence in the investigation, even at this early stage, is in question.*
4. *From a practical perspective it makes sense for the Commission to assume control of the investigation given the Commission will ultimately end up with this investigation, when it is called upon to investigate the alleged ministerial interference.²⁴⁰*

12.26 The Committee was advised by the CCC that it receives approximately 3,000 notifications a year from agencies that are obliged under the *Corruption and Crime Commission Act 2003* to notify the CCC of suspected misconduct.²⁴¹ Of those notifications, less than one per cent is investigated by the CCC itself.²⁴² Mr Anticich stated to the Committee that:

²⁴⁰ Doc. 33, Exhibit 3L.

²⁴¹ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, p17.

²⁴² Ibid.

Principally, our core function is to continuously improve the integrity of the public service, and much of that relies on them actually dealing with misconduct in their own way.

...

*[Notifications] are generally referred out. They go to other agencies, as this one was, and they are undertaken, and ultimately our role kicks in in reviewing and making sure that they are adequately dealt with.*²⁴³

- 12.27 If the CCC were to investigate all notifications of serious misconduct, they would be investigating about 2,500 of the 3,000 notifications that they receive each year.²⁴⁴
- 12.28 The Committee was advised that, strictly speaking, the CCC had 13 investigators as at 1 January 2008 (although up to 49 CCC staff was available to play some role in an investigation).²⁴⁵
- 12.29 Of referred matters, where a notification involves an allegation of criminal conduct, the matter is almost always referred to the WAPOL for investigation. The Committee was advised that since the CCC started in 2004 it has referred 395 allegations of criminal conduct by public officers to the WAPOL for investigation.²⁴⁶ The CCC note that this is the only such case where the WAPOL has contended that the case should not have been referred to them.²⁴⁷
- 12.30 The Committee sought advice from the CCC as to the number of allegations of unauthorised disclosure of confidential information that have been received by the CCC for each of the years 2006, 2007 and 2008. The Committee was advised that the CCC does not record statistical information on the allegation category “*Unauthorised Disclosure of Confidential Information*”, but does record statistics of the broader allegation category of “*Breach of Confidentiality/Misuse of Information/Improper Disclosure*” (which includes, but is not limited to, unauthorised disclosures of information). This category comprises approximately 4% of the allegations received

²⁴³ Ibid.

²⁴⁴ Ibid, p18.

²⁴⁵ Letter from Hon L.W. Roberts-Smith RFD QC, Commissioner, Corruption and Crime Commission of Western Australia, 30 July 2008, Doc. 181, p3.

²⁴⁶ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, p2.

²⁴⁷ Ibid.

by the CCC in recent years.²⁴⁸ The CCC provided the following statistics of this broader category for the years 2006, 2007 and the first half of 2008:²⁴⁹

2006

12.31 Following the introduction of a new system of recording allegations on 1 July 2006, there were 96 allegations of “*Breach of Confidentiality/Misuse of Information/Improper Disclosure*” received or still in progress for 2006, from the following agencies:

Agency	Number of Allegations
Police	49
Department of Corrective Services	16
Local Government	9
Non-Sector Agency	9
Department of Education and Training	7
Department of Health	4
Department of Planning and Infrastructure	1
Subject Agency Not Within Jurisdiction	1
Total	96

2007

Agency	Number of Allegations
Police	38
Department of Corrective Services	18

²⁴⁸ Letter from Hon L.W. Roberts-Smith RFD QC, Commissioner, Corruption and Crime Commission of Western Australia, 30 July 2008, Doc. No. 181, p2.

²⁴⁹ Ibid, pp1-2.

Non-Sector Agency	18
Department of Health	12
Local Government	10
Department of Education and Training	3
Subject Agency Not Within Jurisdiction	1
Total	100

2008 (as at 30 July 2008)

Agency	Number of Allegations
Non-Sector Agency	22
Department of Corrective Services	20
Police	11
Department of Education and Training	7
Department of Health	5
Local Government	4
Total	69

12.32 The Committee also obtained the following evidence as to which body conducted the investigation following receipt of the above allegations by the CCC:

Type of Investigation	2006 Allegations	2007 Allegations	2008 Allegations
Referred to WAPOL	8	2	4
Investigated by the CCC	3	3	1
Referred to other agencies	73	75	50

No action taken ²⁵⁰	12	20	14
Total	96	100	69

12.33 Evidence from WAPOL suggests that they have received one referral from the CCC in each of 2006 and 2007 and two referrals in 2008 relating to unauthorised disclosure of confidential information.²⁵¹ Interestingly, four allegations have been referred to WAPOL this year for investigation directly from public sector agencies (including the present case), three of which resulting in the execution of search warrants.²⁵² One investigation has resulted in three charges being laid.²⁵³

12.34 Mr Wynn, Manager, Investigations, CCC, advised the Committee that had the CCC conducted the investigation into Mr Wauchope's complaint, it would have faced the same dilemma as the WAPOL of executing a search warrant against *The Sunday Times*:

*It is certainly true that, in terms of the execution of a search warrant, we have available to us an identical power to that of the police. The beginning of that phone call [from Detective Inspector Albrecht on 30 April 2008] was about avoiding a media circus. Had the Commission, for argument's sake, been involved in this and had we decided to go down the path of executing a search warrant, we would have achieved no less and no more than the Western Australia Police could have done, because our Act does not put any confidentiality, for good reason, around the execution of search warrants. It is very specific in relation to the use of coercive powers, and obviously a search warrant is not. If it were to come down to executing a search warrant, I could not see the Commission offering anything more or putting anything more on the table than what the police were indicating.*²⁵⁴

12.35 Mr Wynn also noted that it would only be in rare circumstances that the CCC would take over an inquiry from another agency:

We were in no doubt that the police had this in hand. For the commission to then come in on that basis, we would have had to have

²⁵⁰ A decision to "take no action" under s 33(1)(d) of the *Corruption and Crime Commission Act 2003* may be taken either because the matter is not within the jurisdiction of the CCC, or because there is nothing to substantiate the allegation of misconduct: Doc. 181, p2.

²⁵¹ Letter from Dr Karl O'Callaghan, Commissioner of Police, Western Australia Police, 1 August 2008, Doc. 187, p2.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Mr Trevor Wynn, Manager, Investigations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 9 June 2008, pp11-12.

*issued a stop notice to them, which is provided for under section 42 of our act, whereby the commission may direct an appropriate authority not to take action. We do not do that very often. The most common time we would do that is in cases of police misconduct when we feel that it is not appropriate for that agency to conduct that investigation. That is what we would have had to have done to stop this investigation.*²⁵⁵

12.36 Mr Anticich expanded on this point at a subsequent hearing:

[T]here are a number of circumstances in which the commission can take back an investigation it has referred to an agency. Typical reasons would be, firstly, if the agency lacks the investigative capacity. This occurs with some small agencies but could not be said about this situation with the police. Secondly, new information comes to light that changes the nature of the investigation. This occurred recently when a department investigation of an allegation referred by the commission had discovered evidence that widened the scope of the original inquiry. In this case the commission took over the investigation. However, again, this circumstance does not appear to apply to the Sunday Times leak. Thirdly, the investigation can only be advanced by using the commission's coercive powers after the usual investigative techniques have been exhausted. Again, the commission does not believe that this was the case in the Sunday Times case as no evidence has been presented that police made inquiries into the identity of the individuals who had access to the documents in question, interviewed those people as to their dealings with the document and to ascertain the movement of the document electronically through the government email system.

*The commission's referral of an allegation to an agency for investigation is a formal process in writing. The commission would not take a referred investigation back from an agency on the basis of a telephone conversation between officers of the commission and the respective agency. A meeting would be arranged between the two agencies and a formal arrangement put in place, with the decision confirmed in writing. In this respect, the telephone request by police for the commission to take back the investigation is an inadequate way for the police to address their concerns.*²⁵⁶

²⁵⁵ Ibid, p13.

²⁵⁶ Mr Nicholas Anticich, Director, Operations, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, pp2-3.

12.37 The Commissioner of the CCC was clear in his view that offences against s 81 of *The Criminal Code* should be investigated by the WAPOL:

It is the commission's position that the way police may have conducted a particular investigation is no reason to make changes to legislation.

...

Under sections 33 and 34 of the Corruption and Crime Commission Act the commission has a range of statutory options open to it when considering how to deal with an allegation. Again, there is nothing which comes out of the present situation, in the commission's submission, which suggests either of those sections needs amendment. The "media circus" or whatever other undesirable consequences may be thought to have arisen in this situation was not something which resulted from any lack of coercive powers not available to police officers. It was simply, as I say, the way the police officers conducted a particular investigation. If the suggestion is that the commission or the Corruption and Crime Commission Act should be amended to direct in some way that all alleged offences against section 81 of the Criminal Code, which is disclosing official secrets, must always be investigated by the commission itself, or even to introduce a bias to that end, the commission would strongly oppose it. There are a number of reasons for that. The first is that it would mean the commission would have to divert its limited resources to those investigations even where they could be done using ordinary investigative powers or methods equally available to police, thus diverting those commission resources from cases in which its coercive and other special powers were actually needed. Secondly, it would distort and interfere with the commission's own investigative priorities. Thirdly, such a suggestion, I would submit, is fundamentally flawed in principle. If the act were to be amended so that allegations of criminal offences under section 81 of the Criminal Code had to be investigated by the commission and only by the commission because, in effect, police do not want to do them—and I take that from the material before the committee already—then similar amendments could be argued for when other government departments or agencies do not want to conduct investigations into other forms of misconduct. Legislation arguably should be passed to remove from police responsibility for investigating other offences which they might not want to investigate because of, and I quote, "political sensitivity", which is a term used in Commissioner O'Callaghan's letter to the commission or for some other reason; for

example, offences relating to prostitution or morality—which often feature in this area. Shoplifting, for instance, usually involving relatively small amounts or values of goods, may be argued to be offences against business and therefore should be left to business or to the insurers to investigate and sort out. Arguably, the suggestion might be that sexual abuse or assaults by teachers should be left to the commission or to the Department of Education and Training rather than police. That is obviously not an exhaustive list by any means, but the point I make simply is that once an exception of crime is made in a particular category and it is said legislatively that the police do not have to worry about that—it is not their responsibility to investigate—the same principle could be applied universally.

*The commission’s position is that it is actually very important that the primary responsibility for investigating crime remains with the police. That is their core social function.*²⁵⁷

Report on the Investigation into the Department of Treasury and Finance: Suspected Misconduct Concerning the Unauthorised Release of Treasury Information

- 12.38 The Committee notes that in June 2005 the CCC released a report into its investigations into a 2004 leak of information from the Department of Treasury and Finance (**CCC report**).
- 12.39 On 10 September 2004 an article written by Mark Drummond was published in *The West Australian* detailing information relating to an impending State Budget surplus, three days before its scheduled release by the Treasurer.²⁵⁸ The Department of Treasury and Finance referred a complaint of suspected misconduct to the CCC.
- 12.40 The CCC report states that the complaint fell within the jurisdiction of the CCC and would constitute serious misconduct pursuant to s 4(a)(b)(c) & (d)(iv) of the *Corruption and Crime Commission Act 2003*.²⁵⁹ The CCC report notes that:

*The investigation has identified a possible criminal offence pursuant to s.81 and s.83 of The Criminal Code 1913.*²⁶⁰

²⁵⁷ Hon Len Roberts-Smith QC, Commissioner, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, pp1-2.

²⁵⁸ Corruption and Crime Commission of Western Australia, *Report on the Investigation into the Department of Treasury and Finance: Suspected Misconduct Concerning the Unauthorised Release of Treasury Information*, June 2005, p1.

²⁵⁹ Ibid.

²⁶⁰ Ibid, p2.

12.41 The Committee notes, however, that this matter does not appear to have been referred to the WAPOL for investigation.

12.42 The CCC considered the various criminal and public sector disciplinary provisions dealing with unauthorised disclosures by public officers. The CCC report states:

[T]he Commission has concluded that there is not an adequate legislative base for the prosecution of persons involved in the unauthorised access and disclosure of official information.²⁶¹

12.43 In relation to s 81 of *The Criminal Code* the CCC report states:

Whilst s.81 encompasses employees of DTF, it does not include many others who have access to confidential government information. Employees and members of non-SES organisations are excluded from these provisions. This means that s.81 does not cover state MPs and local government councillors, local government employees, police officers, university staff and employees of corporatised bodies such as port authorities, Western Power and the Water Corporation. Consideration needs to be given to amending s.81 to bring these within its ambit.

*Problems also arise in determining when a duty not to make a disclosure might arise, as *The Criminal Code* does not address this point. It is necessary to define the parameters of this duty. This might be achieved by codes of conduct or the inception of a public sector oath to clarify the duty not to disclose.²⁶²*

12.44 It is also interesting to note that the CCC report details the investigation conducted by the CCC, including the interviewing of 11 Department of Treasury officers.²⁶³ There does not appear to have been any interview conducted of a journalist from *The West Australian* newspaper. The source of the leak was not discovered.

12.45 The Committee is of the view that the publicly expressed views of the CCC on s 81 of *The Criminal Code*, as contained in the CCC report, should have made the CCC more aware that such investigations, other than in relation to suspected leaks at the most serious end of the spectrum, may not be an appropriate allocation of the WAPOL's resources.

12.46 The Committee also notes that the Commissioner of Police was reported by *The Sunday Times* as addressing the Perth Press Club in the following terms:

²⁶¹ Ibid.

²⁶² Ibid, p3.

²⁶³ Ibid.

“It is my view that the raid should never have occurred.

“I’m not blaming the police who executed the search warrant. They are unfortunate scapegoats in the whole scenario,” he said at a luncheon on Thursday.

‘It should never have occurred because, in my mind, police have got better things to do than go after public servants who have leaked cabinet documents.

“Who’s the victim? Who the hell is the victim in that particular crime?

...

Mr O’Callaghan said the police and public servants had been “slaves to a process”.

“The public servants felt that they had to report the matter because it might be misconduct or it might be a criminal offence ...” he said.

“The police receive a referral from the Corruption and Crime Commission ... and say, ‘We’d better bloody do that or we’ll be in trouble’.”²⁶⁴

- 12.47 The Committee notes that, notwithstanding the published comments of the Police Commissioner, this investigation involved a possible offence under *The Criminal Code* and it is the responsibility of the Police to take appropriate action to enforce the law.

Alternatives for Public Sector ‘Whistleblowers’ - *Public Interest Disclosure Act 2003*

- 12.48 With respect to confidential Government information being published in the public interest, the Committee notes that the *Public Interest Disclosure Act 2003* provides limited protection for whistleblowers.

- 12.49 Section 5 of the *Public Interest Disclosure Act 2003* relevantly states:

5. *Public interest disclosure*

- (1) *Any person may make an appropriate disclosure of public interest information to a proper authority.*

²⁶⁴

“Raid a waste: police chief”, by Ms Nicole Cox, *The Sunday Times*, 2 November 2008, p12.

-
- (2) *A person makes an appropriate disclosure of public interest information if, and only if, the person who makes the disclosure —*
- (a) *believes on reasonable grounds that the information is true; or*
 - (b) *has no reasonable grounds on which to form a belief about the truth of the information but believes on reasonable grounds that the information may be true.*
- (3) *A disclosure of public interest information is made to a proper authority if —*
- (a) *where the information relates to an act or omission that constitutes an offence under a written law — it is made to a police officer or to the Corruption and Crime Commission;*
 - (b) *where the information relates to a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources — it is made to the Auditor General;*
 - (c) *where the information relates to a matter of administration that can be investigated under section 14 of the Parliamentary Commissioner Act 1971 — it is made to the Parliamentary Commissioner or to a person who occupies a position specified under section 23(1)(a) in relation to the public authority concerned;*
 - (d) *where the information relates to a police officer — it is made to the Commissioner of Police or to the Corruption and Crime Commission;*
 - (e) *where the information relates to a judicial officer — it is made to the Chief Justice;*
 - (f) *where the information relates to a member of either House of Parliament — it is made to the Presiding Officer of the House of Parliament to which the member belongs;*

- (g) *where the information relates to a public officer (other than a member of Parliament, a Minister of the Crown, a judicial officer or an officer referred to in Schedule 1 to the Parliamentary Commissioner Act 1971) — it is made to the Commissioner or the Parliamentary Commissioner;*
 - (h) *where the information relates to a matter falling within the sphere of responsibility of a public authority — it is made to a person who occupies a position specified under section 23(1)(a) in relation to that authority; or*
 - (i) *where the information relates to a person or a matter of a prescribed class — it is made to a person declared by the regulations to be a proper authority for the purposes of subsection (1) in relation to such information.*
- (4) *Where a public interest disclosure falls within 2 or more paragraphs of subsection (3), then it is made to a proper authority if made to any or all of the authorities contemplated by the applicable paragraphs.*

...

12.50 Of particular note is s 17 of the *Public Interest Disclosure Act 2003*, which provides that protection is lost under that Act where the person making an appropriate public interest disclosure subsequently discloses information contained in a disclosure of public interest information otherwise than under that Act.

12.51 Significantly, the *Public Interest Disclosure Act 2003* makes no provision for providing information to the media. The following is an overview of that Act's operation:

A. Overview of the Public Interest Disclosure Act

1. INTRODUCTION

The Public Interest Disclosure Act 2003 facilitates the disclosure of public interest information, and provides protection for those making such disclosures and those who are the subject of disclosures. The Act provides a system for the matters disclosed to be investigated and for appropriate action to be taken.

The Act does not confer additional powers on public authorities to investigate or take action in relation to public interest disclosures. Rather, it provides for protection to persons who make disclosures that may result in a proper authority exercising its existing powers to investigate and take action in relation to the subject matter of the disclosure. In some circumstances the Act requires a public authority to investigate a matter and to notify the person making the disclosure of the action taken.

The Act also requires the principal executive officer of each public authority to prepare and publish internal procedures relating to their authority's obligations under the Act. ...

2. WHAT IS A PUBLIC INTEREST DISCLOSURE?

A public interest disclosure is made when a person discloses to a proper authority information that tends to show past, present or proposed future improper conduct by a public body in the exercise of public functions.

In order to be a disclosure to which the Act applies, a disclosure must be:

- *made by a discloser who believes on reasonable grounds that the information is or may be true.*
- *a disclosure of public interest information.*
- *made to the appropriate proper authority.*

While the Act provides for the protection of all public interest disclosures, not every proper authority will have the obligation or power to investigate and take action in relation to the disclosure. In some cases the discloser or information may need to be referred to another proper authority to enable an effective response to the disclosure to be made.

...

3. WHAT IS PROTECTION?

When a person makes an appropriate disclosure of public interest information to a proper authority, the Act:

- *protects the person making the disclosure from legal or other action;*

- *provides for the confidentiality of the identity of the person making the disclosure and a person who is the subject of a disclosure; and*
- *provides remedies for acts of reprisal and victimisation that occur substantially because the person has made a disclosure.*

In general terms, for people who make disclosures, protection is provided against detrimental action, which includes injury, intimidation, harassment, adverse treatment or reprisal. ...

The Act also provides penalties for disclosing the identity of those persons about whom public interest disclosures are made, as well as emphasising the need for those persons to be accorded natural justice or procedural fairness.²⁶⁵

12.52 The Committee notes that the person who provided Mr Lampathakis with the confidential Cabinet information did not avail themselves of the process provided by the *Public Interest Disclosure Act 2003*.

Should Unauthorised Disclosures of Confidential Government Information be a Criminal Offence

12.53 The Commissioner of the CCC gave the following evidence:

If the committee sees the need to make a possible recommendation for future investigations into unauthorised disclosure of confidential government information, the commission would suggest the real issue is whether or not that should be a criminal offence at all.²⁶⁶

12.54 The Commissioner of the CCC expanded upon this view in written evidence to the Committee:

The problems with securing a charge (and subsequently a conviction) under section 81 of the Criminal Code were canvassed in previous reports of the Commission. In the Report on an Investigation into the Department of Treasury and Finance (June 2005) (“Treasury Leaks”) the Commission concluded, at Part 1.4 under the heading Criminal Liability, that:

²⁶⁵ *Public Interest Disclosure Act 2003: Guidelines on Internal Procedures*, Office of the Public Sector Standards Commissioner, First Edition Reprint, 2006, pp1-2.

²⁶⁶ Hon Len Roberts-Smith QC, Commissioner, Corruption and Crime Commission of Western Australia, *Transcript of Evidence*, 30 June 2008, p2.

[Its] investigation has identified a possible criminal offence pursuant to s.81 and s.83 of 'The Criminal Code 1913'. Section 81 of "The Criminal Code" prohibits unauthorised disclosure, by a person employed in the public service, of official information which it is their "duty" to keep secret and carries a penalty of two years imprisonment. The State budget information would fall within this criterion. However, neither the "Criminal Code" nor the "Public Sector Management Act 1994" (PSM Act) is explicit as to when a "duty" exists which makes prosecutions under this section difficult. For example, public officers give out information to the public and others every day but the limits of "duty" to keep official information secret are not specified. Section 83 of "The Criminal Code" prohibits a public officer acting on knowledge or information obtained by way of their office so as to cause benefit or detriment to any person. If it were established that the information was provided to the newspaper for profit or other benefit, this section could apply though there is no evidence that was a motivation in this instance. Should it not be possible to prosecute under the "Criminal Code", it may still be possible to pursue a breach of the "PSM Act".

Similar problems were discussed in the Report of an Inquiry into Unauthorised Access and Disclosure of Confidential Personal Information (September 2005) ("Protecting Personal Data in the Public Sector"), where the Commission indicated that:

[T]he Code does not say when the "**duty not to make a disclosure**" might arise. While policy statements and codes of conduct play significant roles in defining the parameters for good practice in relation to the handling of confidential personal information, they are not definitive. It is not entirely clear when a public servant has a "duty" to keep secret certain information. As an example, "Pense v Hemy" [1973] WAR 40 is a useful reference on the difficulty of determining a police officer's duty to keep information secret. In terms of the usage that is made of s. 81, the Director of Public Prosecutions has advised by submission that there have been very few prosecutions pursuant to that section of the "Criminal Code". On the few occasions where this has occurred, it has primarily involved unauthorised disclosure by police officers.

The Commission's Report also canvassed the legislative framework and identified:

in excess of 100 Acts and regulations in Western Australia that placed secrecy restrictions of some form or other on government departments and public bodies. In almost all cases the legislation deals with the subject in the context of two broader, often conflicting topics, namely privacy and transparency in government.

The report made the following recommendations in relation to the Criminal Code:

The Commission recommends the amendment of the "Criminal Code" to consolidate offence provisions relating to unauthorised access and disclosure and to create a uniform set of provisions to address the inconsistencies of jurisdictions, definitions and penalties that currently exist.

In seeking amendments to the Code the Commission further recommends that:

- o Offences of unauthorised access and disclosure should prohibit dealing in the outcomes of unauthorised access at every point of the distribution chain, and include:*
 - o Unauthorised access;*
 - o Unauthorised use including "browsing";*
 - o Unauthorised disclosure;*
 - o Procuring or bringing about unauthorised access or disclosure;*
 - o Attempting to procure or bring about unauthorised access or disclosure;*
 - o Soliciting or inducing another to make unauthorised access or disclosure;*
 - o Offering to make unauthorised access or disclosure;*

-
- o Promoting oneself as capable of supplying information through unauthorised access or disclosure;*
 - o Being in possession of confidential information without benefit of an excuse (with a reverse onus applying); and*
 - o Buying selling or otherwise dealing in confidential information.*
 - o Persons at second or third hand who gain access to unauthorised confidential personal information, knowing or ought to be knowing that it was made available through unauthorised access or disclosure.*

The elements of an offence against s.81 of the Criminal Code (in relation to a public officer) are that:

- i. the person is a public officer;*
- ii. he or she makes a disclosure of information;*
- iii. that is information, whether in a record or not, that comes to the knowledge of, or into their possession because he or she is a public officer;*
- iv. which disclosure is made in circumstances where the person is under a duty not to make it; and*
- v. such disclosure is unauthorized.*

Each of those elements must be proved beyond reasonable doubt.

As I observed in my evidence to the Committee, if each of those elements were so proved, a conviction would (or at least should) follow.

It will be appreciated that the fundamental problem raised in both Commission reports mentioned above, was the difficulty of establishing the “duty” not to disclose the particular information, and that its disclosure was “unauthorized”, that is to say, without lawful authority.

There is considerable legal authority concerning these issues, and to which regard would need to be had in proposing any legislative solution. The following comments hopefully give some brief indication of the nature of them, in relation to the duty of a public officer not to disclose information.

The Public Sector Management Act 1994 (PMSA) and the Public Sector Management Act (General) Regulations 1994 do not specify what a person may or may not disclose.

However, Administrative Instruction 711 does have statutory force through PMSA. Administrative Instruction 711 provides that:

- 1. An officer shall not, except in the course of the officer's official duty and with the express permission of the chief executive officer,*
 - (a) give to any person any information relating to the business of the Public Service or other Crown business that has been furnished to the officer or obtained by the officer in the course of his/her official duty as an officer; or*
 - (b) disclose the contents of any official papers or documents that have been supplied to the officer or seen by the officer in the course of his/her official duty as an officer or otherwise*
...

Similarly, Regulation 8 of the Public Service Regulations continues to have statutory force under s.110 and paragraph 18 of Schedule 5 of the PSMA.

Regulation 8 provides that:

An officer shall not .

- (b) use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service.*

In Cortis v R [1979] WAR 31 it was argued successfully that the basis of the duty at that time was found in Regulation 40 of the Public Service Regulations. Regulation 40 provided that:

An officer shall not –

- (a)*
- (b) disclose the contents of any official papers or documents that have been supplied to him or seen by him in the course of his official duty as an officer or otherwise, except in the course of his official duty and with the express permission of the Head of the Sub-department of the Permanent Head of the Department of which he is employed.*

Regulation 40 was drafted in similar terms to Administrative Instruction 711.

Burt CJ rejected the argument that the “duty to keep secret” in s.81 arose from the facts and circumstances under which the information came to the knowledge of the public servant, and that the duty only existed with reference to facts within a document that “were not known to the world at large”.

It was held that Regulation 40 was the basis of the duty to keep secret for the purposes of s.81. Burt CJ held that the duty set out in Regulation 40 was to keep secret all documents that had been supplied or seen in the course of official duty, irrespective of the circumstance under which the information came to the knowledge of the public servant.

The then Chief Justice said that the question (as to whether Regulation 40 was the basis of the duty or whether the duty arose from the circumstance under which the information was obtained, ie confidentiality) was of such importance as to “call for the attention of the legislature to ... put beyond doubt the position”.

Regulation 40 has since been repealed. The legislature does not appear to have clarified this position.

A number of other cases took a similar view of comparable legislation (E.g. News Corporation Ltd v National Companies and Securities Commission (1984) 52 ALR 277, 282; Federal Commissioner of

Taxation v Swiss Aluminium Australia Ltd (1986) 66 ALR 159, 163) but in subsequent cases it was held that information held by public officers was prohibited from disclosure only if there was a separate obligation of confidentiality in relation to it.

So in Deakon v ACT [2001] ACTSC 8, Higgins I. said (at [87]) –

87. Whether a duty of confidentiality arises so that s. 70 Crimes Act can punish its breach will depend on the type of information, the circumstances in which it has been acquired and the interests of relevant parties in keeping it confidential. A consideration of the public interest must also be relevant. The duty to keep information confidential may attach to information of any kind but it must be such and acquired in such circumstances that such a duty arises. It does not arise merely because the information is obtained by an officer in the course of his or her duties.

On the meaning of “confidential information”, in Snell v Pryce [1990] NTSC 2, Angel J. said (at [14]) –

[it] cannot.. .without more, include matters of common knowledge or readily accessible information such as names and addresses published in the telephone directory. However confidential the circumstance of communication, there can be no breach of confidence in revealing to others something which is already common knowledge... Unquestionably the Police Department treats information stored in its computer or accessible through its terminals as confidential and so instructed its staff, including the appellant. However, in my view that is not enough. The prosecution must lead evidence that the information is other inaccessible and therefore confidential.

When considering authorities on questions of statutory construction, it is always necessary to have regard to the terms of the statutory provision and the factual circumstances which are held to fall within or outside it, in the particular case. I note that in Deacon the question was whether the Commonwealth could rely upon a public service confidentiality provision to prevent a public servant giving a witness statement to a lawyer acting for a plaintiff in a personal injury action. In Snell, Angel J was dealing with the release by a police officer of names, addresses and dates of birth obtained from a police computer.

Albeit coming from a “secure” source, all that information was otherwise publicly available. It was therefore not “confidential”.

This necessarily brief outline illustrates the point (albeit trite) that no matter what the apparent simplicity or comprehensiveness of a specific statutory offence – creating provision, the prospect of laying a charge under it and obtaining a conviction will always depend up on the facts of the case, as established in evidence.²⁶⁷

12.55 The Commissioner of the CCC suggested that s 81 of *The Criminal Code* may be strengthened by an amendment to give statutory effect to the construction adopted of the former regulation 40 of the *Public Service Regulations* by Burt CJ in *Cortis v R*, as set out above.²⁶⁸

12.56 The Commissioner of Police gave evidence of the problems faced in investigating an alleged offence under s 81 of *The Criminal Code*:

One of the things about section 81 is that it is, historically, very difficult for police to get a good result with the investigative techniques they possess. I think the reason the investigators went to the CCC was that, if the coercive powers and private hearing powers were used, it could have been done in a way that would have meant a more reduced commitment of resources to the investigation and a less public investigation than actually occurred at the end of the process. This is not an isolated case; there are a number of other cases, and you have mentioned a couple already, in relation to section 81 of the Criminal Code that are notoriously difficult for police to resolve within the scope of what they can do. That is one of the reasons I think, in this instance, the investigative officers approached the CCC and asked them to use their special powers—not just their coercive powers, but the ability to have private hearings etc..²⁶⁹

12.57 The Commissioner of Police also gave the following evidence:

Hon ADELE FARINA: *Commissioner, I have referred to this report earlier today; it is the CCC report in relation to an unauthorised disclosure matter back in 2004. In that report, the commission stated that the CCC report on the investigation into the Department of Treasury and Finance concluded that there was no adequate*

²⁶⁷ Letter from Hon L.W. Roberts-Smith RFD QC, Commissioner, Corruption and Crime Commission of Western Australia, 30 July 2008, Doc. 181, pp6-10.

²⁶⁸ Ibid, p10.

²⁶⁹ Dr Karl O’Callaghan, Commissioner of Police, Western Australia Police, *Transcript of Evidence*, 30 June 2008, p1.

legislative base for the prosecution of persons involved in the unauthorised access to and disclosure of official information. In view of that finding, do you think it is questionable whether the commission ought to be referring such matters to the WA Police for investigation? It seems to me that if there is a view that there is a lack of legislative base to bring about a successful prosecution, the natural question that follows from there is: why expend the resources undertaking the investigation until the legislative base is sorted out?

Dr O’Callaghan: *Of course we would argue that in the big scheme of things, WA Police has got so many, many, many much more serious case files—for argument’s sake, in the sex crime area—that this, to us, is at the bottom of the heap in terms of priority. If the commission concluded that there was not an adequate legislative base, it would seem to me that we would even be less interested in getting involved in this until that legislative base was repaired.*²⁷⁰

- 12.58 Whilst s 81 of *The Criminal Code* remains in force, the Commissioner of Police indicates that the CCC should have a role to play in the investigation of such offences:

Hon ADELE FARINA: *Do you think that the commission’s coercive powers should be used to force journalists to reveal their sources?*

Dr O’Callaghan: *I think the commission’s coercive powers should be used to resolve matters under section 81. I am not singling out journalists or anybody else, but if anyone is subject to complaint or investigation under section 81, we could use those powers in that case.*²⁷¹

- 12.59 The Committee sought advice from the Director of Public Prosecution regarding the difficulties, if any, that his office had faced in conducting prosecutions under s 81 of *The Criminal Code*. He advised that in recent years he had not handled any cases under s 81, but noted that such prosecutions usually proceed summarily in the Magistrate’s Court and so are not usually managed by his office.²⁷² However, he made the following observation regarding s 81:

The essential elements in any prosecution under section 81 of the Criminal Code are that a public servant or government contractor leaked official information and that the leak was not authorised. The latter element is difficult to prove.

²⁷⁰ Ibid, pp5-6.

²⁷¹ Ibid, p5.

²⁷² Doc. 188, letter from Mr Robert Cock QC, Director of Public Prosecutions, 4 August 2008, p1.

...

*Any difficulties in prosecuting an offence under section 81 could be overcome by the public service establishing more clear and comprehensive guidance regarding what information may be provided and what may not, and ensuring that all staff and contractors are aware of their obligations concerning specific information.*²⁷³

- 12.60 The Committee considers that the DPC “*Cabinet Handbook*” should be amended to make it explicit as to when a duty not to disclose confidential Cabinet documents, discussions and decisions, exists.

Recommendation 1: The Committee recommends that the Attorney General conduct a review of s 81 of *The Criminal Code*.

The Monitoring and Review of the WAPOL Investigation by the CCC

- 12.61 The Committee notes that pursuant to s 41 of the *Corruption and Crime Commission Act 2003* the CCC may review the WAPOL investigation into the notification referred to them by the CCC.
- 12.62 The Committee was concerned that some of the submissions presented by officers of the CCC during the inquiry may arguably amount to a pre-judgement of the WAPOL’s actions in this matter. This is of concern given that s 41 of the *Corruption and Crime Commission Act 2003* provides the CCC with a review function of the WAPOL handling of the investigation. It is arguable that, in view of the CCC’s comments, that the CCC should not review the WAPOL’s investigation into this matter, as it may be seen to have pre-judged the matter.
- 12.63 The Committee has written to the Joint Standing Committee on the Corruption and Crime Commission raising the Committee’s concerns regarding the appropriateness of the CCC conducting a review of the WAPOL investigation.
- 12.64 The Committee also notes that, in this instance, there was no monitoring of the WAPOL investigation by the CCC under s 40 of the *Corruption and Crime Commission Act 2003*.

²⁷³ Ibid, pp1-2.

Issues Identified with the Conduct of the Raid*Search warrant*

12.65 As to the decision to issue a search warrant, the Committee considers that, given the low probability of a successful prosecution in this matter due to:

- the large number of people who had access to the various versions of the document and therefore a large number of suspects;
- the passage of time (two and a half months between the reporting of the alleged offence and the commencement of investigations);
- the probability that, as a journalist, Mr Lampathakis was unlikely to reveal the source of his information;
- the fact that previous attempts to prosecute similar disclosures had failed; and
- previous failures to prosecute had been reported on negatively and recommendations from those reports had not been acted on,

it would have been prudent for the WAPOL to have explored other investigative options more fully before proceeding with a search warrant.

The raid

12.66 The Committee notes a number of concerns with the conduct of the raid generally:

- Why was the officer in charge of the search only called in to take part in the investigation on the morning of the raid?
- Why wasn't the raid conducted out of office hours when less staff would have been in the building?
- Why were 22 additional police officers deployed to, in part, secure exits to the building an hour after the police had arrived to execute the search warrant and why did they depart an hour prior to the completion of the search?
- Why was a second search warrant not executed on the residential address of Mr Lampathakis at the same time as the raid on the offices of *The Sunday Times*?
- Despite the presence of 27 police officers, why wasn't the whole building searched during the execution of the search warrant, noting that a number of internal passageways and stairs were also not monitored throughout the raid?

- Why were the 22 additional police officers sent home at 5:00pm, whilst the execution of the search warrant did not conclude until 6:10pm?

The Wearing of Firearms During the Raid

12.67 The WAPOL Internal Affairs Unit report on the raid states the following regarding the wearing of 'accoutrements' by the officers involved in the raid:

[Detective Sergeant] Jane discussed with [Detective Senior Sergeant] Blackshaw the issue of whether attending officers should wear their accoutrements and consideration was given to not wearing firearms, It was decided that the search warrant should be treated the same as any other operational warrant. It was noted that if officers wavered from standard operating procedure by not wearing their accoutrements and an issue arose where they required them they would be open to criticism.

The officers attended in plain clothes and covered these items with jackets and police identification vests.²⁷⁴

12.68 The Committee considers that the wearing of firearms during the execution of the search warrant, although clearly within WAPOL procedure, heightened the perception that the operation was heavy handed and intimidatory. The Committee considers that greater consideration should have been given to the impact of the wearing of firearms in attending a standard search of an office building in which the likelihood of physical harm would have been very low.

Findings

12.69 The Committee makes the following findings:

Finding 3: The Committee finds that it would have been prudent for the Corruption and Crime Commission of Western Australia to have obtained from the Department of the Premier and Cabinet a copy of the alleged leaked Cabinet document, so that it would have been in a better position to form an opinion as to whether an investigation should be conducted.

²⁷⁴

Doc. 39, Exhibit 4C, internal WAPOL memorandum, 27 May 2008, p10.

Finding 4: The Committee finds that the Department of the Premier and Cabinet, inadvertently or otherwise, hampered the Western Australia Police investigation by not informing the Western Australia Police of all relevant information concerning the unauthorised disclosure including that there were five separate versions of the document containing information that was disclosed and the distribution of each version.

Finding 5: The Committee finds that the Corruption and Crime Commission of Western Australia did not assess the complaint received from the Department of the Premier and Cabinet with appropriate rigour, and simply passed the responsibility for the investigation on to the Western Australia Police despite the Corruption and Crime Commission's own previously published misgivings about the value of investigations of offences under s 81 of *The Criminal Code*.

Finding 6: The Committee finds that the role of the Department of Treasury and Finance and its internal processes for managing confidential information has not been adequately addressed. The Committee is of the view that the Corruption and Crime Commission of Western Australia should have also referred the complaint to the Department of Treasury and Finance, as it did to the Department of the Premier and Cabinet, for investigation under s 33 of the *Corruption and Crime Commission Act 2003*.

Finding 7: The Committee finds that the Corruption and Crime Commission of Western Australia expressed to the Western Australia Police a narrow interpretation of Part 4 of the *Corruption and Crime Commission Act 2003* (that is, those sections dealing with organised crime and the conferral of exceptional powers on police officers), and did not take into account the type of joint Corruption and Crime Commission-Western Australia Police investigations using the Corruption and Crime Commission's general powers as envisaged by s 33(1)(b) of that Act.

Finding 8: The Committee finds that the Corruption and Crime Commission of Western Australia failed to acknowledge that, in most circumstances, a notice to produce documents under the *Corruption and Crime Commission Act 2003* can be as effective as a search warrant due to the available penalties for failure to produce the document.

Finding 9: Notwithstanding the Committee's concerns with the Corruption and Crime Commission of Western Australia's referral of the matter to the Western Australia Police in this instance, the Committee finds that it was proper for the Western Australia Police to investigate the allegation of a Cabinet leak, given that it was an offence under s 81 of *The Criminal Code*. The Committee believes, however, that alternative methods of investigation should have been employed before resorting to a search warrant, having regard to resource requirements and other Western Australia Police priorities.

Finding 10: The Committee finds that in the execution of the search warrant on the offices of *The Sunday Times*, the Western Australia Police officers at the scene demonstrated professionalism, courtesy and restraint.

Finding 11: The Committee finds that there was an inappropriate and disproportionate allocation of resources by the Western Australia Police for a relatively standard search of an office building.

Recommendations

Recommendation 2: The Committee recommends that the Department of the Premier and Cabinet and the Department of Treasury and Finance further review their procedures and systems for handling confidential documents, and in particular with respect to informal consultation on drafts of confidential documents.

Recommendation 3: The Committee recommends that the Corruption and Crime Commission of Western Australia refer the alleged disclosure of confidential Cabinet information to the Department of Treasury and Finance for investigation pursuant to s 33(1)(c) of the *Corruption and Crime Commission Act 2003*.

Recommendation 4: The Committee recommends that the Corruption and Crime Commission of Western Australia ensures that a thorough assessment in accordance with the Corruption and Crime Commission's formal case categorisation and assessment procedures is undertaken in relation to every complaint, even where such complaint is the subject of an investigation commenced by another agency.

CHAPTER 13

‘SHIELD’ LAWS FOR JOURNALISTS

- 13.1 The Committee received submissions from some witnesses arguing in favour of the introduction of shield laws for journalists. The Committee did not investigate this matter in detail, however, provides the following background information for the benefit of the Parliament.

Background Information on Law reform proposals

- 13.2 Two Australian reports have devoted some detail to researching issues of disclosure in the media and protection of journalists’ sources. The first document is the Law Reform Commission of Western Australia’s 90th Report, called *Professional Privilege for Confidential Communications*, which was published in May 1993. The second document is the Senate Standing Committee on Legal and Constitutional Affairs (SSCLCA) report called *Off the Record*, which was tabled in October 1994. These reports are widely cross referenced in books and journals on the subject. While the reports are over twelve years old, they are still pertinent to the issues.
- 13.3 In Australia, journalists are represented by the Media, Arts and Entertainment Alliance (**Alliance**).

*The Alliance is the union and professional organisation which covers everyone in the media, entertainment, sports and arts industries. Our 36,000 members include people working in TV, radio, theatre & film, entertainment venues, recreation grounds, journalists, actors, dancers, sportspeople, cartoonists, photographers, orchestral & opera performers as well as people working in public relations, advertising, book publishing & website production ... in fact everyone who works in the industries that inform or entertain Australians. The Alliance was created in 1992 through the merging of the unions covering actors, journalists and entertainment industry employees.*²⁷⁵

- 13.4 Before that time, journalists were represented by the Australian Journalists Association. Members of the association are bound by a code of ethics. People who have a complaint against a member of the media section of the Alliance, can lodge a complaint with the Alliance about the member.

²⁷⁵ http://www.alliance.org.au/option,com_simplefaq/task,display/Itemid,27/catid,13/, (viewed on 19/06/2008).

- 13.5 A complaint about a journalist is reviewed by the judiciary committee of the Alliance. If a complaint is upheld by the committee, it has a range of penalties that it is able to impose. These include:

Censure or rebuke the journalist.

Fine the journalist up to \$1000 for each offence.

*Expel a journalist from membership of the alliance.*²⁷⁶

- 13.6 The Alliance's code of ethics states the following: "*Respect for truth and the public's right to information are fundamental principles of journalism.*"²⁷⁷ The section of the code that causes the most controversy is section three.

*3. Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.*²⁷⁸

- 13.7 However, the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs conducted an inquiry into shield laws for journalists' confidential sources in the 1994 report called *Off the Record*. The inquiry, which lasted 18 months, examined in detail the rights and obligations of the media. In discussion about the code, it mentioned section three, but then suggests that the code has internal inconsistencies. Section one of the code says "*Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts or give distorting evidence.*"²⁷⁹ In the Senate paper:

*It could be said that the mere promise of anonymity to a source might conflict with this obligation to strive to disclose all essential facts or not to suppress relevant facts. In some cases the identity of the informant may be news in itself or at least very important to the cogency of the report*²⁸⁰

- 13.8 In regards to the problems relating to the code: according to Padraic McGuiness in "*The Journalist's 'Shield'*":

There is here a classical conflict between an oft-cited, but unmentioned in the code, principle of the 'public's right to know' and

²⁷⁶ http://www.alliance.org.au/media/ethics_breach.htm, (viewed on 19/06/2008).

²⁷⁷ www.alliance.org.au/code-of-ethics.html, (viewed on 26/05/2008).

²⁷⁸ *ibid.*

²⁷⁹ *ibid.*

²⁸⁰ Commonwealth, Senate, Senate Standing Committee on Legal and Constitutional Affairs, Report One, *Off the Record*, Oct 1994, p9.

the journalist's duty to respect confidences. In recent times this ethical principle has been selectively interpreted to allow journalists to breach confidences whenever it seems appropriate to them.

This illustrates one of the greatest traps of codes of ethics - they become statements of hi-falutin principle which are rarely considered in their entirety or discussed in their application to specific cases.²⁸¹

- 13.9 The WALRC report and the Senate inquiry examined in some detail comparisons between the protection of confidential information in journalism and other professional organisations. These include police informants, legal professional privilege, doctor-patient confidentiality and cleric-penitent relationships. The WALRC report also looked into the professional relationship of clients and accountants, researchers, Family Court counsellors, nurses, social workers, private investigators and librarians. According to the Senate inquiry, police informants are closest in comparison to journalist-source confidentiality.

2007 Amendments to the Evidence Act 1995 (Cth)

- 13.10 Recently, legislative changes have been enacted at the Commonwealth level (following similar amendments in New South Wales) that go some way to protect journalists who refuse to disclose the identity of their sources.
- 13.11 Division 1A of Part 3.10 of the *Evidence Act 1995 (Cth)* deals with journalists' "professional confidential relationship privilege". Division 1A deals solely with journalists. The courts retain a wide discretion as to how to deal with a journalist's claim of a protected source in legal proceedings, but must give a direction that evidence not be adduced in a proceeding where:
- a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
 - b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- 13.12 Importantly, however, under s 126D of the *Evidence Act 1995 (Cth)*, Division 1A does not apply where the communication was made "in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty".

²⁸¹ Law Reform Commission of Western Australia, Project 90, *Professional Privilege for Confidential Communications*, May 1993, p59.

A Proposed Uniform Model Bill on Shield Laws currently being considered by the Standing Committee of Attorneys-General

13.13 Shield laws were also agreed in July 2007 to be legislated for in model uniform legislation by the Standing Committee of Attorneys-General.²⁸² The Model Bill is similar to the Commonwealth legislation, but applies protection to all ‘professional confidential relationships’, not just those of journalists.

13.14 The relevant part of the Model Bill states:

Division 1A Professional confidential relationship privilege

126A Definitions

(1) In this Division:

harm includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

protected confidence means a communication made by a person in confidence to another person (in this Division called the ***confidant***):

- (a) *in the course of a relationship in which the confidant was acting in a professional capacity, and*
- (b) *when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.*

protected confider means a person who made a protected confidence.

protected identity information means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

(2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party’s presence is necessary to facilitate communication.

²⁸²

<http://www.presscouncil.org.au/pcsitesite/fop/shield.html>, (viewed on 26/05/2008).

126B Exclusion of evidence of protected confidences

(1) *The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:*

- (a) *a protected confidence, or*
- (b) *the contents of a document recording a protected confidence, or*
- (c) *protected identity information.*

(2) *The court may give such a direction:*

- (a) *on its own initiative, or*
- (b) *on the application of the protected confider or confidant concerned (whether or not either is a party).*

(3) *The court must give such a direction if it is satisfied that:*

- (a) *it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and*
- (b) *the nature and extent of the harm outweighs the desirability of the evidence being given.*

(4) *Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:*

- (a) *the probative value of the evidence in the proceeding,*
- (b) *the importance of the evidence in the proceeding,*
- (c) *the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,*
- (d) *the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,*
- (e) *the likely effect of adducing evidence of the protected confidence or protected identity information,*

including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,

- (f) *the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,*
- (g) *if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,*
- (h) *whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.*

(5) The court must state its reasons for giving or refusing to give a direction under this section.

126C Loss of professional confidential relationship privilege: consent

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

126D Loss of professional confidential relationship privilege: misconduct

(1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

(2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

- (a) *the fraud, offence or act was committed, and*
- (b) *a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,*

the court may find that the communication was so made or document so prepared.

126E Ancillary orders

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information,

the court may:

- (a) order that all or part of the evidence be heard in camera, and*
- (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.*

126F Application of Division

(1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.

(2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.

(3) This Division does not apply in relation to [each jurisdiction to insert reference to laws (if any) of that jurisdiction relating to sexual assault communications privilege].

(4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

- 13.15 The Committee notes that neither the Commonwealth legislation nor the proposed Model Bill would assist Mr Lampathakis and *The Sunday Times* in the present case, where a suspected breach of *The Criminal Code* is involved in the relevant communication.

Other Jurisdictions Guidelines for Police Investigations Involving Journalists

13.16 In its submission to the Committee, *The Sunday Times* recommended that the WAPOL and other investigating authorities in this State should implement a set of guidelines to take into account the journalists' code of ethics which relate to the confidentiality of sources:

In giving evidence to the Committee on 9 June 2008, Assistant Commissioner Wayne Gregson stated there were "a whole range of policies and guidelines that relate to how an officer conducts a criminal investigation," that the officer would: "obviously turn to his training, his experience, various policies that cover whether a matter ought to be investigated, search warrant procedures, and evidential capturing procedures." However, Inspector Gregson admitted there was no policy or guidelines in place regarding the right of a journalist to preserve the confidentiality of their sources.

The Justice Department of the United States has a set of guidelines which endeavours to strike a balance between the public interest in the free dissemination of ideas and information and the public interest in effective law enforcement.

Those guidelines provide (among other things) that when determining whether to seek a subpoena from members of the media:

- (a) all reasonable attempts should be made to obtain the information from alternative sources before issuing a subpoena to a journalist;*
- (b) negotiations with the news media to gain the information sought shall be pursued in all cases in which such a subpoena is contemplated;*
- (c) if the negotiations fail, the Attorney General must approve the subpoena based on the following principles:*
 - (i) there should be reasonable grounds to believe, based on information from a non-media source that a crime has been committed and that the information sought is essential and directly relevant to a successful investigation;*

- (ii) *the government must have unsuccessfully attempted to obtain the information from an alternative, non-media source;*
- (iii) *the subpoena should be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time and should avoid requiring production of a large volume of unpublished material;*
- (iv) *The investigating authority should give reasonable and timely notice of the demand for documents.*

...

New Zealand police also have in place a set of guidelines on the issue of search warrants against the media. ... Police and media representatives entered into discussions with a view to trying to agree a set of procedural guidelines. ...

These guidelines are considered to be general instructions issued pursuant to section 30 of the Police Act 1958, which provides that all members of the Police shall obey and be guided by those instructions.”

Whilst the focus of the New Zealand guidelines is more confined, dealing with the recording by news media of film recordings and photographs, they share a common theme with the US guidelines, namely an appreciation by the Government and police of the importance of a free press, for example:

- (1) *The offence must be serious enough to warrant the obtaining of a search warrant and cannot be otherwise resolved without the seizure of any film, photographs, tape or sound recordings.*
- (2) *The authority of a Police Executive member in the case of the Office of the Commissioner or District Commander must be obtained before a search warrant is applied for.²⁸³*

²⁸³

Submission from The Sunday Times, 18 July 2008, Doc. No. 170, pp2-4.

Current WA Proposals

- 13.17 On 27 November 2008, the Attorney General, in response to a question without notice, provided the following outline to the Legislative Assembly of the State Government's position on the introduction of shield laws for journalists:

Mr C.C. PORTER: ... At the recent Standing Committee of Attorneys-General, a motion was moved—which I supported and, indeed, helped draft—that the ministers agreed that a national evidence working group would provide advice before the end of the year on options for journalists' shield laws. That has been a matter of some interest in the press. I know the member for South Perth has spoken on it. I can state unequivocally that I personally am supportive of such laws. There is some devil in the details of these laws, and it behoves me in this short speech to give some of the ideas that all members of this house will have to think about when this legislation comes before Parliament. What I would like to do, immediately after that national evidence working group has reported in December, is seek permission from my cabinet to start drafting the legislation.

I will say that at that Standing Committee of Attorneys-General, there were many Labor Party Attorneys General—in fact, apart from me, they were all Labor Party Attorneys General—and there was a divergence of views as to whether these laws should be made at all; and, if so, what form they might take. Those views seemed to cut well and truly across political lines. Having sat and listened to the various individual views expressed at that meeting, there were four main issues that I think we as a Parliament, in conjunction with the stakeholders—many of whom are in the gallery today—will need to give some thought to. The first is what is the best mechanism to protect and enhance the public interest. The only jurisdictions that already have shield laws are the commonwealth and New South Wales in their replicated evidence acts. Those acts provide that if the information has come into the hands of the journalist by way of the commission of a criminal offence or any other acts that might give rise to civil liability, the shield is automatically lost. Some people took the view at the Standing Committee of Attorneys-General that that rule should stay in any other legislation that is replicated; others took the view that that should be one of several factors that is to be considered. That is one of the devils in the detail of this legislation.

The second issue is: how do we define a journalist? This is an issue that I think our stakeholders —

Mr P.B. Watson interjected.

Mr C.C. PORTER: *I know the member might have some ideas, but I am talking about how, in a legal fashion, we would define a journalist. The problem that arises is that with the advent of the internet and commentary and blogging, many people consider themselves journalists and write stories based on sources. It might be that some will take the view that some people who blog are not subject to the same rigorous ethical standards —*

Ms A.J.G. MacTiernan: *As they are at The West Australian!*

Mr C.C. PORTER: *Exactly. I was going to say, “Journalists in formal news media services”, but we can use The West Australian as an example. This is an issue that journalists themselves, particularly journalists at The West Australian and other organised newspapers in this jurisdiction, might be interested in. If the protection is extended to everyone who blogs, it in many ways diminishes the status of individuals who are employed in formal news services. There is now a very strong lobby arguing to extend that protection to bloggers. It is very interesting that a Labor Party Attorney General took the view that an undesirable element of such a law was that, heaven forbid, a journalist might write a story without having a source. He took the view that that might more readily occur with people who journalise in an informal way on the internet, and that people in defamation proceedings might be forced into a situation whereby they would want to know who the source was, pursuant to the idea of the defence of truth, but could not be forced to compel the source, and that one may not exist. Some quite complicated issues arise.*

Mr R.F. Johnson interjected.

Mr C.C. PORTER: *I am glad that the minister likes it. Finally, we need to consider our own whistleblower legislation. Protection exists for whistleblowers who give information on public sector matters. In some instances, the extent of that protection will bear upon the extent of the shield laws. We all have difficult issues to consider. I imagine that these issues will be bringing into play different views on both sides of the house and different members of each party will have different views about these things. I am committed to the laws. I have my own views about how they might be constructed. I will wait until*

*the evidence appears from working group reports in December and I will go to cabinet shortly after that.*²⁸⁴

Committee Comment

13.18 Recent community debate in Australia indicates a growing acceptance for both the concept of shield laws and the proposition that there should not be a blanket rule either of disclosure in all cases, nor of confidentiality in all cases. Various models recognise and attempt to balance competing interests:

- a) The interests of the source.

A whistleblower may face loss of his/her career (financial loss and notoriety), emotional distress, harassment, victimisation and even physical reprisals.

- b) The interests of the journalist.

A journalist may face penalties such as fines or imprisonment for refusing to reveal a source in legal proceedings. Alternatively if a source is revealed, the journalist may face damage to his/her reputation, sanctions from his/her profession and difficulty in getting information in future. For national media in particular, there is an interest in uniform laws across Australia. The process of assessing whether or not a source should be revealed can be time-consuming, stressful, and put the journalist to the cost of legal representation.

- c) The interests of the public.

These can conflict with each other. Access to confidential information can promote transparency and accountability. But being deprived of knowledge of the source of information deprives the public of a tool to assess the reliability of the information; there is an interest in truth. There is an interest in effective law enforcement so that innocent people are not convicted, perpetrators (at least of “substantial” crimes) are convicted and people who have been wronged get redress. The process of assessing whether or not a source should be revealed can be time-consuming for law enforcement agencies, impact on effective law enforcement, and the taxpayer pays for both the law enforcement agency and the court.

13.19 The Committee recognises the need to balance the need for transparency against the need for confidentiality in Cabinet processes.

²⁸⁴

Hon C.C. Porter MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 November 2008, p644.

- 13.20 The Committee supports the Attorney General pursuing, through the Standing Committee of Attorneys-General, model national legislation introducing shield laws.
- 13.21 The Committee encourages the Government to consider the following matters in the drafting of any relevant State legislation:
- that any shield laws proposed for WA should provide no less protection than the Model Uniform Evidence Bill; and
 - that consideration be given to recommendations of the Law Reform Commission of WA's 1993 report and the Australian Law Reform Commission's 2005 proposal.

Recommendation 5: The Committee recommends that the Attorney General continue to pursue the introduction of shield laws for journalists.

CHAPTER 14
REPORT OF A REFUSAL TO ANSWER THE COMMITTEE'S
QUESTIONS - SECTION 7 OF THE *PARLIAMENTARY PRIVILEGES*
ACT 1891

14.1 Section 7 of the *Parliamentary Privileges Act 1891* states:

7. Objection to answer questions or produce documents to be reported to the House

If any person ordered to attend or produce any paper, book, record, or other document to either House, or to any Committee of either House, shall object to answer any question that may be put to him, or to produce any such paper, book, record, or other document on the ground that the same is of a private nature and does not affect the subject of inquiry, the President, or Speaker, or Chairman of the Committee, as the case may be, shall report such refusal, with the reason thereof, to the House, who shall thereupon excuse the answering of such question, or the production of such paper, book, record, or other document, or order the answering or production thereof, as the circumstances of the case may require.

14.2 Section 8 of the *Parliamentary Privileges Act 1891* relevantly states:

8. Houses empowered to punish summarily for certain contempts

Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person

Disobedience to any order of either House or of any Committee duly authorised in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid.

Refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid.

...

- 14.3 The Committee also notes the provisions of s 59(2) of *The Criminal Code*, which states:

59. Witnesses refusing to attend or give evidence before Parliament

Any person who —

...

- (2) *Being present before either House of Parliament, or before a committee of either House, or before a joint committee of both Houses, authorised to summon witnesses, refuses to answer any lawful and relevant question;*

is guilty of a simple offence, and is liable to imprisonment for 2 years and a fine of \$24 000.

- 14.4 At a hearing on 7 July 2008, the Committee asked questions of Mr Paul Lampathakis, Journalist, *The Sunday Times*, relating to the source of the leaked Cabinet information.
- 14.5 The Committee had previously heard evidence that the WAPOL investigators had formed the view that Mr Lampathakis would not voluntarily disclose the source of the leaked Cabinet information. The WAPOL investigation had proceeded on this basis and, as a result, the execution of a search warrant on *The Sunday Times* building was determined by the investigators to be the best means of locating evidence that may identify the source of the leak.
- 14.6 Based on this evidence, the Committee was of the view that it was necessary to test the WAPOL's assumption regarding Mr Lampathakis' willingness to reveal his source.
- 14.7 At the hearing Mr Lampathakis made the following comments in his opening statement:

I want to be as helpful as possible—hence my presence today. However, I will decline to answer any questions that may either directly or indirectly identify the source or sources of the story in question. I will decline for two reasons. Firstly, I do not see those questions being relevant to the committee's terms of reference to inquire into the circumstances surrounding the raid on the Sunday

*Times on 30 April 2008. Secondly, I will decline to answer such questions because I am bound by a code of ethics to maintain the confidentiality of the identity of the source or sources of information relied on for the story.*²⁸⁵

14.8 The following exchange took place at a later stage of the hearing:

The CHAIRMAN: ... *The committee asks if you are aware of the identity of the person or persons who provided you with the confidential information that you used in your 10 February article published in the Sunday Times at page 3, under the heading “Bid to ‘buy’ Labor win”. Can you indicate if you are aware of that identity of that person or persons?*

Mr Lampathakis: *Can I just take one moment?*

The CHAIRMAN: *Yes, Mr Lampathakis.*

[Conferring with counsel.]

Mr Lampathakis: *I was aware of the identity of the source or sources.*²⁸⁶

14.9 The Committee then proceeded to ask the following question:

The CHAIRMAN: ... *[C]an you advise the committee of the identity of that person or persons?*

Mr Lampathakis: *As I have said before, for the reasons that I have given in my statement, I decline to answer that question.*

The CHAIRMAN: *Will you just expand again, so that the committee is aware, the reason that you are refusing to answer the question, so that we are very clear in our minds—and you are clear in your mind—about the grounds that you are refusing to answer?*

Mr Lampathakis: *As I said, the two previous points: I do not think it fits within the terms of reference of the circumstances surrounding the raid; and, secondly, there is the journalists’ code of ethics, whereby you maintain the confidentiality of the source.*

²⁸⁵ Mr Paul Lampathakis, Journalist, *The Sunday Times, Transcript of Evidence*, 7 July 2008, p2.

²⁸⁶ *Ibid*, p10.

The CHAIRMAN: *Mr Lampathakis, just in respect to the issue relating to the terms of reference, can you indicate your reasoning why the question does not fall within the terms of reference of the committee?*

Mr Lampathakis: *Sure. I will just take one moment*

The CHAIRMAN: *Yes, yes.*

[Conferring with counsel.]

Mr Lampathakis: *My understanding was that the terms of reference of this particular committee would be to, I guess, establish whether there was a misuse of power in terms of this raid taking place. I do not believe that questions pertaining to source or sources are relevant to those terms of reference.*

The CHAIRMAN: *Mr Lampathakis, you have refused to answer a question of the committee, so that requires me to have the committee go into private session so we can deliberate on this matter—we will obviously come back to you. If you would be good enough, with Ms Galati, just to step outside, and if the other members of the media and interested persons would step outside, too, we will be with you within a short time. Thank you.*

Proceedings suspended from 2.44 to 2.49 pm

The CHAIRMAN: *Thank you, Mr Lampathakis. Mr Lampathakis, the committee has carefully considered this matter and has formed the view that the information sought by the question is relevant to its terms of reference. I am going to ask you the question again, but in so doing, ask if you wish to go into private session in respect to answering the question?*

Mr Lampathakis: *No.*

The CHAIRMAN: *I therefore ask the question again: can you advise the committee of the identity of the person or persons who provided you with the information?*

Mr Lampathakis: *Yes, as I have said, for the same reasons I have given in the statement, I decline to answer that question, Chairman.*

The CHAIRMAN: *Mr Lampathakis, I am required by our procedures to advise you that if you refuse to answer the question, that the*

committee may report this refusal to the Legislative Council, and that the Legislative Council may order you to answer the question. Under section 7 of the Parliamentary Privileges Act 1891, a failure to obey an order of the house is a contempt punishable by a fine, and, in the absence of payment, jail. The failure to answer a question is also a simple offence under section 59(2) of the Criminal Code, which, if proven, carries a penalty of two years' imprisonment and a fine of \$24 000. Accordingly, I put the question to you again: will you advise the committee of the identity of the person or persons who provided you with the information that was the subject of your 10 February article?

Mr Lampathakis: Once again, unfortunately I have to decline to answer that question.

*The CHAIRMAN: You will understand that this committee may report that matter to the Legislative Council.*²⁸⁷

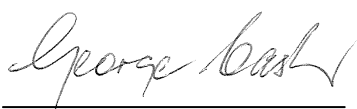
- 14.10 The Committee reports to the Legislative Council the refusal by Mr Lampathakis to answer a relevant question put to him by the Committee.
- 14.11 In considering the effect of the witness's failure to answer the questions put to him, the Committee has regard to the maxim that "*parliamentary privilege should be used as a shield rather than a sword*".
- 14.12 The Committee also notes the approach of the Procedure and Privileges Committee in its recent reports that, in line with current United Kingdom House of Commons practice, it is recommended that the House exercise its penal jurisdiction "*as sparingly as possible and only when satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its officers from such improper obstruction or attempt at or threat of obstruction causing or likely to cause, substantial interference with the performance of their respective functions*".²⁸⁸
- 14.13 The Committee has determined that the failure of the witness to answer the questions put to him did not obstruct or impede or cause substantial interference with the functioning of the Committee. In fact, Mr Lampathakis' responses to the Committee's questioning confirmed for the Committee that the WAPOL investigators' assumption about Mr Lampathakis' unwillingness to divulge his source to them had been correct.

²⁸⁷ Ibid, pp10-11.

²⁸⁸ Western Australia, Legislative Council, Procedure and Privileges Committee, Report 14, *Referral of a Matter of Privilege from the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations*, 6 December 2007, p2.

14.14 The Committee notes that the House of Commons practice, in relation to cases of conduct which offends the authority or dignity of the House, is to take no further action if the matter is considered trivial.²⁸⁹

Recommendation 6: The Committee recommends that, in accordance with s 7 of the *Parliamentary Privileges Act 1891*, the Legislative Council excuse the answering of the question asked of Mr Paul Lampathakis by the Committee as set out in paragraph 14.9 of this report.



Hon George Cash MLC

Chairman

Date: 9 April 2009

²⁸⁹ Ibid.

APPENDIX 1
CHRONOLOGY

APPENDIX 1

CHRONOLOGY

Select Committee into the Police Raid on the Sunday Times

CHRONOLOGY

DRAMATIS PERSONAE

THE SUNDAY TIMES STAFF

Mr Islwyn (Ish) Davies, Managing Director - *The Sunday Times* (**Davies**)

Mr Sam Albert Weir, Editor, *The Sunday Times* newspaper. (**Weir**)

Mr Paul Lampathakis - Reporter, *The Sunday Times* - person who wrote original 10 February article (**Lampathakis**)

DEPARTMENT OF THE PREMIER AND CABINET

Mr Malcolm Wauchope, Director General - Department of the Premier and Cabinet (**Wauchope**)

Ms Lisa Ward, A/Principal Policy Officer, Office of the Director General, Department of the Premier and Cabinet (**Ward**)

Ms Petrice Judge, Executive Director - Office of Director General. Handled matter while Ms Ward was on leave. (**Judge**)

Mr John Duffy, Media Adviser to Hon Margaret Quirk MLA (**Duffy**)

DEPARTMENT OF TREASURY AND FINANCE

Mr Timothy Marney, Under Treasurer, Department of Treasury and Finance (**Marney**)

CORRUPTION AND CRIME COMMISSION

The Hon Len Roberts-Smith RFD, QC, Commissioner, Corruption and Crime Commission of Western Australia (**Roberts-Smith**)

Mr Mike Silverstone, Executive Director, Corruption and Crime Commission of Western Australia (**Silverstone**)

Mr Nicholas Anticich, Director Operations, Corruption and Crime Commission of Western Australia (**Anticich**)

Mr Trevor Wynn, Manager Investigations, Corruption and Crime Commission of Western Australia (**Wynn**)

Mr Tony Wood, Reviewer/Assessor, Corruption and Crime Commission of Western Australia (**Wood**)

Mr Paul White, Corruption and Crime Commission of Western Australia (**White**)

WESTERN AUSTRALIAN POLICE

Dr Karl O'Callaghan, APM, Commissioner of Police, Western Australian Police (**O'Callaghan**)

Mr Murray Lampard, Deputy Police Commissioner, Western Australian Police (**Lampard**)

Mr Wayne Gregson, Assistant Commissioner, Specialist Crime Portfolio, Western Australian Police (**Gregson**)

Mr R C Randall, Detective Superintendent, Commercial Crime Division, Western Australian Police (**Randall**)

Mr Arno Albrecht, Detective Inspector, Commercial Crime, Western Australian Police (**Albrecht**)

Mr Dom Blackshaw, Detective Senior Sergeant, Major Fraud Squad, Western Australian Police (**Blackshaw**)

Mr Allan Jane, Detective Sergeant, Major Fraud Squad, Western Australian Police (**Jane**)

Ms Elissa Mansell, Detective Senior Constable, Major Fraud Squad, Western Australian Police (**Mansell**)

MEMBERS OF PARLIAMENT

Acting Treasurer, Hon John Kobelke (**Kobelke**)

Hon George Cash MLC, Committee Chairman (**Cash**)

Hon Giz Watson MLC, Committee Member (**Watson**)

Hon Adele Farina MLC, Committee Member (**Farina**)

GOVERNMENT MEDIA OFFICE

Mr Peter Easom, Manager, Communication Policy and Reporting, Government Media Office. He prepared the original Cabinet submission. (**Easom**)

Mr Paul Giles, A/Manager, Strategic Communications, Government Media Office (**Giles**)

OTHER PEOPLE MENTIONED

Mr Kieran Murphy, Communications Director, Office of the Premier (**Murphy**)

Mr Guy Houston, Premier's Media Adviser (**Houston**)

Mr Stuart McLagan, Media Adviser, Office of the Hon Kobelke MLA (**McLagan**)

Mr Gibson. Named mentioned in error in original letter to the CCC from the DPC about this matter. (**Gibson**)

LEGISLATIVE COUNCIL SELECT COMMITTEE INTO THE POLICE RAID ON THE SUNDAY TIMES

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. NO.
2003		Premier's Circular 2003/14 states: <i>"Public Sector officers who receive copies of Cabinet documents, including Cabinet submissions and decision sheets, or who are otherwise made aware of information contained in such documents, are required to observe the confidentiality of that information. Cabinet documents and the information contained in them must not be revealed except for such purposes as are authorised by the relevant Minister and chief executive officer."</i>	Minute from Wauchope to Marney, 12 Feb 2008.	2A
June 2005		<i>Report on the Investigation into the Department of Treasury and Finance: Suspected Misconduct Concerning the Unauthorised release of Treasury Information, CCC report.</i>	Report	
October 2007		Cabinet Handbook states at p10: <i>"The confidentiality of Cabinet documents, discussions and decisions is a long established principle and has been regarded as essential for the maintenance of Cabinet collective responsibility."</i>	Minute from Wauchope to Marney, 12 Feb 2008.	2A
15 May 2007		Cabinet Sub Committee on Communications decides that the Office of the Premier, and the Government Media Office, will draft a consolidated	Marney (DTF) letter to Roberts-Smith (CCC), 21/02/08	3E

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. NO.
		request for funding for submission to the Expenditure Review Committee (ERC).		
20 November 2007		Cabinet Sub-Committee on Communication's (CSCC) meeting.	Letter from Marney to Select Committee, 12/06/08.	Doc. 125
04 December 2007		Cabinet Sub-Committee on Communication's (CSCC) meeting. The submission prepared by Peter Easom, Manager, Communication Policy and Reporting, Government Media Office, was considered.	Minute from Wauchope to Marney, 12 Feb 2008.	2A
10 December 2007	2.23pm and 4:43pm	Emails from Peter Easom to a number of officers and the Treasurer attaching ERC submission.	Email	Docs 107 and 108
17 December 2007		Cabinet considers the document prepared by Peter Easom as it was an attachment to the minutes of the 4 December meeting of CSCC. Staff of the Agency Resources Section of the Department of Treasury and Finance first become aware of the ERC submission.	Minute from Wauchope to Marney, 12 Feb 2008. Letter from Marney to Select Committee, 12/06/08.	2A Doc. 125
January 2008		Mr Paul Giles from the Government Media Office queried the status of the ERC submission with the Secretary of the ERC, and was advised that the submission had not been received and was not listed for consideration at a specific ERC meeting - it was simply listed as an outstanding issue.	Marney (DTF) letter to Roberts-Smith (CCC), 21/02/08.	2B
22 January 2008		Paul Giles hand delivers draft ERC submission to the ERC Secretary. The ERC Secretary advises that the ERC had not received the submission previously, and if it is to be progressed, then it needs ministerial	Marney (DTF) letter to Roberts-Smith (CCC), 21/02/08.	2B

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		endorsement. The ERC Secretary retained a copy of the draft submission, but advised Paul Giles to arrange for the Treasurer to sign the final submission.		
25 January 2008	4:44pm	Email from Paul Giles, Government Media Office, to Maria Lee, Department of the Premier and Cabinet, attaching submission to ERC (for 12 February 2008 ERC meeting), seeking Treasurer's verbal approval.	Email	Doc. 138
Approx. 29 January 2008		The Treasurer's Office advised the ERC Secretary that the ERC submission was being revised by the Government Media Office.	Marney (DTF) letter to Roberts-Smith (CCC), 21/02/08.	2B
Late January 2008		Treasurer signs ERC submission prior to going on leave. Submission states, in part: <i>"The CSC C seeks ERC funding of proposed strategic advertising campaigns for 2007-08, 2008-09 & 2009-10 managed within its Whole-of-Government communications strategy.</i> ... <i>It should be noted that the Police Recruitment 2007-08, Burglar Beware, Eyes on the Street, Lock and Leave, Open Doors and Windows, Stolen Goods, Amphetamines, Waste Management and Beat the Peak strategic campaigns are already funded from within operational funds, while the Department of Education and Training's 'Apprenticeship and</i>	Minute from Wauchope to Marney, 12 Feb 2008. Doc 126	2A

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		<p><i>Traineeships' strategic campaign has already received ERC approval and funding to 2010.</i></p> <p><i>Urgent consideration should be giving to progressing ERC consideration for unfunded strategic campaigns ...</i></p> <p><i>The cost of the campaigns is \$5.25 million for the remainder of 2007-08, \$10.75 million in 2008-2009 and \$7.1m in 2009-2010 (Total \$23.1 million).</i></p> <p>...</p> <p><i>Recommendation</i></p> <p><i>That Cabinet recommends the Expenditure Review Committee (ERC) approves funding of proposed strategic campaigns for the remainder of 2007-08 and financial years 2008-2009 and 2009-2010, as submitted."</i></p> <p>The Select Committee was advised by DPC that:</p> <p><i>"The draft ERC submission is regarded as a Cabinet document as it was part of a Cabinet minute that was considered by Cabinet."</i></p> <p>A number of versions of the draft ERC submission were circulated. Only some had a watermark stating: <i>"Department of the Premier and Cabinet NOT TO BE COPIED"</i>.</p> <p>Evidence of Tim Marney, Under Treasurer:</p>	<p>Letter from Wauchope to Select Committee, 18/6/08</p> <p>Email from Lisa Ward to DSC Elissa Mansell, 9/4/08</p> <p>Marney Transcript of Evidence, 9 June 2008, p2.</p>	<p>Doc. 136</p> <p>Doc. 140</p>

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. NO.
		<i>"...the secretariat of the expenditure review committee resides within my department. It is normal that all expenditure review committee submissions, when in final form, be provided to my department for forwarding to the expenditure review committee, which is a subcommittee of cabinet."</i>		
Friday 8 February 2008	2:00pm	<p>Leak of Cabinet document discovered when Paul Lampathakis from <i>The Sunday Times</i> emails Stuart McLagan (Media Adviser), requesting information from Acting Treasurer Hon Kobelke MLA.</p> <p>Mr Lampathakis asked: <i>"This is an inquiry for the Treasurer. I know that the Government's Cabinet Sub-committee on Communication has urgently asked the expenditure review committee for \$5.25 million for the first half of this year and another \$10.75 from July 2008 til June next year, for strategic campaigns. Has this been approved. What will it be specifically used for?"</i></p>	<p>Minute from Wauchope to Marney, 12 Feb 2008.</p> <p>Email from Lampathakis to McLagan.</p>	<p>2A</p> <p>A</p>
8 February 2008 cont.	3:02pm	Request for information for <i>The Sunday Times</i> was forwarded to Houston (Premier's Media Adviser).	<p>Minute from Wauchope to Marney, 12 Feb 2008.</p> <p>Email from McLagan to Houston.</p>	<p>2A</p> <p>A</p>

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. NO.
	3:29pm	Email from Paul Lampathakis to Stuart McLagan: <i>“Hi Stuart Just to give you a more complete picture of this: The Opposition says of the info that I asked about, that WA taxpayers are being asked to fork out \$16 million for advertising to help get the State Government re-elected. They’re saying while the health system flounders, prisons overflow and schools lack teachers, the Govt’s Cabinet Sub-committee on Communication “urgently” wants \$5.25 million for the first half of this year and another \$10.75 from July 2008 till June next year for “strategic campaigns”. Other normal campaigns, such as Burglar Beware and Eyes on the Street, are already funded till 2010.”</i>	Email	B
		Houston refers the matter to Murphy (Premier’s Director of Communications). He is a member of the Cabinet Sub-Committee on Communications.	Minute from Wauchope to Marney, 12 Feb 2008.	2A
		Premier’s Chief of Staff advises Tim Marney, Under Treasurer of suspected leak.	Letter from Marney to Roberts-Smith, 21 Feb 2008.	2B Doc. 125
		Kieran Murphy makes preliminary inquiries by speaking to Easom and Giles at Government Media Office (GMO).	Minute from Wauchope to Marney, 12 Feb 2008.	2A

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		Murphy advises Mal Wauchope, Director General, Department of the Premier and Cabinet.	Minute from Wauchope to Marney, 12 Feb 2008.	2A
		Wauchope instructs Lisa Ward, A/Principal Policy Officer, Office of the DG, DPC, to prepare documentation to report the matter.	DPC chronology	Doc. 12 F
Sunday 10 February 2008		<p>Paul Lampathakis reports on “Bid to ‘buy’ Labor win” in the Sunday Times.</p> <p>Article states in part: <i>“TAXPAYERS are being asked to fork out a whopping \$16 million for advertising to help get the Carpenter Government re-elected.</i> <i>Treasurer Eric Ripper, as chairman of the Cabinet subcommittee on communication, has “urgently” asked the expenditure review committee, which he chairs, for \$5.25 million for the first half of this year and a further \$10.75 million until July next year.</i> <i>Government sources said the money was to be spent on “strategic advertising campaigns”.</i> <i>But the sources said other major campaigns, such as anti-drug and police recruitment ads, were already funded, so this was clearly extra cash to help “buy” the Government victory in the state election.</i> ...”</p>	<i>The Sunday Times</i> , page 3.	
Tuesday 12 February		Suspected leak is reported to the Corruption and Crime Commission (CCC) and Major Fraud Squad, Western Australian Police by the DPC. Before that	DPC Submissions.	G, H, J, J1, 3A

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		<p><i>"I am writing to advise that I suspect that there may have been an unauthorised disclosure of an Expenditure Review Committee (ERC) submission.</i></p> <p><i>...</i></p> <p><i>The following aspects of the submissions appeared in the article:</i></p> <ul style="list-style-type: none"> <i>• \$5.25 million is requested for the first half of this year, \$10.75 million for 2008/09 and \$7.1 million for 2009/10;</i> <i>• money was to be spent on "strategic" advertising campaigns;</i> <i>• that major campaigns such [as] anti-drug and police recruitment ads were already funded;</i> <i>• request for \$7.1 million; and</i> <i>• that the request should be considered "urgently";</i> <p><i>The leak was discovered on Friday, 8 February 2008, when The Sunday Times approached Mr Stuart McLagan, Media Adviser, Office of the Hon Kobelke MLA."</i></p>		

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. NO.
		<p>The Minute identifies the following possible suspects:</p> <p><i>“At present, I am aware that the Hon Eric Ripper MLA, Treasurer and the following DPC officers have had access to the submission:</i></p> <p><i>Mr Michael Megaw, Chief of Staff, Office of Hon Ripper MLA</i></p> <p><i>Ms Maria Lee, Principal Policy Adviser, Treasury</i></p> <p><i>Mr Trevor Robb, Media Adviser, Office of the Hon Ripper MLA</i></p> <p><i>Ms Chris Bolt, Executive Officer, Office of the Hon Ripper MLA</i></p> <p><i>Mr Kieran Murphy, Director of Communications, Office of the Hon Carpenter MLA</i></p> <p><i>Mr Peter Easom, Manager, Communications Policy and Reporting, Government Media Office</i></p> <p><i>Mr Paul Giles, A/Manager, Strategic Communications, Government Media Office</i></p> <p><i>It is likely that a number of other officers from DPC and the Department of</i></p>		H

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		<p><i>Treasury and Finance may have had access to the submission.</i></p> <p>The Minute states that the matter has been referred to the CCC and the Western Australia Police.</p> <p>Letter from Wauchope to CCC Commissioner: <i>"I am writing to report to you a matter of suspected misconduct pursuant to section 28 of the Corruption and Crime Commission Act 2003 ... involving the release of a Cabinet document."</i></p>		
13 February 2008		The Treasurer's Office provides the Agency Resources section of the Department of Treasury and Finance with a revised draft of the ERC submission.	Marney (DTF) letter to Roberts-Smith (CCC), 21/02/08.	2B
21 February 2008		Letter from Marney to Mr Len Roberts-Smith, Commissioner of the CCC, advising of the extent of exposure by the Department of Treasury and Finance to the leaked ERC submission. He noted that he had not personally seen the submissions, however the Agency Resources (AR) business unit within the Department of Treasury and Finance had been exposed to the information contained in the submission in the form of a draft version prepared for the Treasurer to sign in December 2007.	Letter	2B

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
22 February 2008		Letter from Kearns Gangin, Detective Sergeant, Major Fraud Squad, WA Police, to Mal Wauchope, DPC. The letter states: <i>“The Major Fraud Squad has conducted an assessment of the information provided and determined that further investigation is required. Police will investigate a potential breach of Section 81 of the Criminal Code pertaining to disclosure of official secrets.”</i>	Letter	L
26 February 2008		Letter to Trevor Wynn (CCC) from Tony Wood (CCC Reviewer/Assessor) advising details of notification from DPC and requesting that the next TCG meeting consider whether the CCC should investigate.	Internal Memorandum CCC.	3D
	13:50	Wood (CCC) returns call to Ward (DPC). She advises him that she has received notification that Police are investigating issue. Ward also inquires whether Police will investigate all issues. Wood advises that Police would investigate criminal matter not procedural matter, and once this was complete, it would be a matter for DPC to investigate the procedural matter.	CCC Case notes.	3B Doc. 12
27 February 2008		Letter to Blackshaw (WAPOL) advising him that the CCC has been notified that the matter is already under investigation by Police. If the matter is not under investigation by Police, then the CCC refer this matter to Police under CCC Act 2003, section 33(1)(c) and 37(3).	CCC letter to WAPOL, Re: Disclosure of Official Information.	3I

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		Also, Police are to report back to CCC at conclusion of investigation pursuant to s40(1) of CCC Act.		
		Letter to Wauchope, DPC, from Tony Wood, CCC, stating that: <i>“The Commission has identified the following issue for investigation: 1. details contained in a confidential submission from the Treasurer to the Expenditure Review Committee was “leaked” by an unknown officer to the Sunday Times Newspaper.”</i> Under ss 33(1)(c) and 37(3) of the CCC Act, the CCC decided to refer the matter back to DPC for investigation. <i>“It is understood that this matter has been reported to the Western Australia Police for investigation of any criminal offence that may have occurred”.</i>	CCC letter to DPC Re: Release of Confidential Information.	3J M
28 March 2008		CCC (Tony Wood, Reviewer/Assessor) writes to Tim Marney. Advises that the leak has been forwarded to WA Police for investigation and the Department of Premier and Cabinet for any disciplinary considerations. Advises that Marney’s letter of 21/02/08 has been forwarded to Police. Letter states: <i>“The Commission considered referring this matter back to DTF for further investigation in accordance with sections 33(1)(c) and 37(3) of the Act. However there appears to be limited exposure to the ERC submission by DTF employees therefore the Commission does not intend to invoke this</i>	CCC letter to Marney Re: Release of Expenditure Review Committee (ERC) confidential information.	3K 2E

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. NO.
		<i>option at this point in time.”</i>		
8 April 2008		Elissa Mansell, WAPOL, phones Lisa Ward, DPC, and asks for details of the leaked document, distribution lists and matters relating to searching staff emails.	DPC chronology	Doc. 12
9 April 2008	11:12	Lisa Ward provides further information to Elissa Mansell, including a copy of the ERC submission.	DPC chronology Email	Doc. 12 Doc. 110
	11:48	<p>Lisa Ward emails Elissa Mansell:</p> <p><i>:The Cabinet submission was provided to the following offices on 13 and 14 Dec 2007 for comment:</i></p> <ul style="list-style-type: none"> - Premier's Office - Minister Ravlich's Office - Minister Roberts' Office - Minister McHale's Office - The Under Treasurer's Office - The Director General's Office, DPC - The Policy Division, DPC <p><i>It was labelled “MINISTER ONLY”.</i></p> <p><i>The submission was then provided to all Ministers as part of the Cabinet agenda file late on Friday after 14 December 2007. Copies of the file were delivered by Cabinet Services Branch staff to Ministers in some unusual</i></p>	Email	Doc. 111

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		<i>places that day (due to the festive season, eg. a restaurant). It therefore seems that there were a great number of persons who had access to the document."</i>		
23 April 2008		Police request DPC to search email records of Duffy, to search for any emails sent between him and Lampathakis between December 2007 and February 2008. No email contact discovered.	Request Email Search John Duffy. DPC chronology Minute to Wauchope	S Doc. 12 Docs 112 and 113
30 April 2008		Albrecht (WAPOL) discusses with Randall (WAPOL) about the appropriateness of WAPOL conducting the inquiry compared to CCC. Albrecht then telephones White (CCC) to discuss. White informs Albrecht that he will discuss situation with his superiors.	Conversation summary.	Att:10
		White (CCC) telephones Albrecht (WAPOL) and advises that CCC reviewed the matter and consider that WAPOL should continue the inquiry. Albrecht wishes to discuss the matter further. White nominates CCC Deputy Director of Investigations Trevor Wynn as the contact.	Case notes. Conversation summary.	3F Att:10 of Police File.
	10.10	Albrecht (WAPOL) calls Wynn (CCC) to discuss the matter further in relation to holding the request for a warrant and a joint operation. (WAPOL & CCC). Wynn informs Albrecht that joint operations can only be undertaken in relation to organised crime. For the CCC to take action in this instance,	Summary of conversation with CCC Officers by DI Albrecht.	Att:10 of Police File.

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		they would have to conduct the inquiry themselves. The CCC believed that their coercive powers should only be used in the most serious of matters. The current complaint did not constitute such a circumstance.		
		According to Wynn, he said to Albrecht: <i>“I indicated to Albrecht that for the Commission to call in a journalist for the predominant purpose of revealing a source, which of course goes against the very fabric of the journalists’ code of conduct, while we wouldn’t completely rule it out, the circumstances would have to be very serious and grave, as there were a number of flow on effects such as whistleblowers losing confidence in confidentiality with journalists etc.”</i>	Summary of conversation by Wynn with Albrecht	3G
		Albrecht informs Wynn that he believes that the CCC had made a political decision not to get involved. Wynn objects to this comment.	Summary of conversation with CCC Officers by DI Albrecht.	Att:10 of Police File.
		Murphy receives a phone call from Police one hour before the raid, asking for suggestions on who leaked cabinet documents. He informs Police that he has no names that he could suggest.		
		Wauchope advised of raid by John Arthur, Director, Government Media Office.	DPC chronology	Doc. 12
Wednesday 30 April	PM	Officers from the WA Police Major Fraud Squad raid the offices of <i>The Sunday Times</i> newspaper.	ABC News (online), 8:20pm. 30 April 2008.	

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
2008				
2 May 2008		<p>Wauchope advises Premier of details of raid on Sunday Times in a minute: <i>“The Western Australia Police have advised that initially about 5 detectives from the Major Fraud Squad went to the offices of The Sunday Times to execute a search warrant, but when the paper’s management refused to cooperate, more officers were sent to assist.</i></p> <p>...</p> <p><i>The Department had no prior knowledge of the execution of a search warrant on The Sunday Times.”</i></p> <p>Premier advised that the following persons had access to the Cabinet document:</p> <ul style="list-style-type: none"> • Cabinet Services Branch (DPC) • Government Media Office (DPC) • Ministerial Offices • The Director General, DPC’s Office • The Under Treasurer’s office • Other DTF officers. 	Minute to Premier: Execution of search warrant at <i>The Sunday Times</i> .	C
		<p>Police Commissioner O’Callaghan writes to Mr Mike Silverstone (CCC): <i>“Now that I have been made aware of this investigation, it is my view that</i></p>	Police Commissioner, Release of Expenditure Review	3L Doc. 33

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		<p><i>the Commission should reconsider its decision to refer this investigation and assume control of it for the following reasons:</i></p> <ol style="list-style-type: none"> <i>1. Section 7B(3) seems to contemplate that the Commission ought give serious considerations to whether it is appropriate that it should investigate allegations of serious misconduct.</i> <i>2. In accordance with section 34(2)(a) of the CCC Act, the Commission is obliged in its deliberation to have regard to the fact that most of the public servants who had access to the ERC confidential information occupy senior positions.</i> <i>3. Given the political sensitivity of this matter, it would seem that this is the very sort of investigation for which the Commission should assume responsibility. I would also draw your attention to the fact that already the police investigation is the subject of allegations of ministerial interference. As a consequence public confidence in the investigation, even at this early stage, is in question.</i> <i>4. From a practical perspective it makes sense for the Commission to assume control of the investigation given the Commission will ultimately end up with this investigation, when it is called upon to investigate the alleged ministerial interference.”</i> 	Committee (ERC) Confidential Information	

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
	1:53pm	Lisa Ward advises Elissa Mansell by email of the results of an email search conducted by the DPC's IT Branch, as requested by WAPOL.	DPC chronology Email	Doc. 12 Doc. 110
04 May 2008		<i>The Sunday Times</i> reports that Police Commissioner Karl O'Callaghan believes that the CCC should have handled the inquiry, as told by the Assistant Police Commissioner Gregson.		
5 May 2008		In absence of Lisa Ward, Ms Petrice Judge, Executive Director, Office of DG, DPC, provides further information to Elissa Mansell on DPC email searches.	DPC chronology	Doc. 12
Wednesday 7 May 2008		Mansell requests mobile phone details for staff at DPC. This information is provided by Petrice Judge. Mansell subsequently advises that phone numbers are not necessary for Media Officers that communicate with journalists as part of their duties.	Emails and Telephone calls. DPC chronology Filenote	W &V Doc. 12 Doc 111 Doc. 112
08 May 2008		Motion moved in Legislative Council that a select committee be formed to look into the police raid.	Hansard	
14 May 2008		Motion into select committee passed.	Hansard	
15 May 2008		Notice given to the House that the committee will be made up of Hon George Cash, Hon Giz Watson and Hon Adele Farina.	Hansard	

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
Thursday 29 May 2008		Meeting between O'Callaghan and Roberts-Smith over which organisation is responsible for the investigation.	CCC letter to Police	3M
04 June 2008		<p>Commissioner of CCC writes to Commissioner of Police. In it he states that:</p> <p><i>“WAPS has primary jurisdiction and responsibility for the investigation of all criminal offences in the state of Western Australia. The police role is to respond to crimes and deal with allegations or complaints of criminal conduct.</i></p> <p>...</p> <p><i>The Commission in fact conducts its own investigation in 1% of the complaints made to it.</i></p> <p>...</p> <ul style="list-style-type: none"> <i>According to our records, since 1 July 2006 the Commission has referred 396 matters to WAPS for ‘appropriate authority’ investigation. These cover a variety of agencies and allegations and have included 14 allegations of ‘corrupt conduct’ and 14 of ‘serious criminal conduct.’ The corrupt conduct allegations have included quite serious allegations in which police have laid criminal charges and others involving allegations against senior officers.</i> <i>To date, police have never to our knowledge sought to refer a</i> 	CCC letter to Police	3M

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
		<i>matter back to the Commission for investigation.”</i>		
Monday 9 June 2008		Hearing at Legislative Council Committee Office. Session One - Mr Malcolm Wauchope & Ms Lisa Ward. Session Two - Mr Timothy Marney. Session Three - Mr Nicolas Anticich & Mr Trevor Wynn. Session Four - Mr Wayne Gregson, Mr Arno Albrecht & Mr Allan Jane.	Transcript of Evidence from hearings.	
Friday 13 June 2008		Hearing at Legislative Council Committee Office. Session One - Ms Elissa Mansell & Mr Arno Albrecht. Session Two - Mr Islwyn Davies. Session Three - Mr Sam Albert Weir.	Transcript of Evidence from hearings.	
Monday 30 June 2008.		Hearing at Legislative Council Committee Office. Session One - Mr Timothy Marney. Session Two - Mr Nicolas Anticich & Mr Trevor Wynn. Session Three - Dr Karl O’Callaghan, Mr Murray Lampard, Mr Arno Albrecht, Mr Allan Jane & Ms Elissa Mansell. Session Four - Dr Karl O’Callaghan. Session Five - Hon Len Roberts-Smith QC.	Transcript of Evidence from hearings.	
Monday 7 July 2008	14:00	Hearing at Legislative Council Committee Office. Session One - Mr Paul Lampathakis.	Transcript of Evidence from hearings.	

CHRONOLOGY				
DATE	TIME	EVENT	DOCUMENT/SOURCE/ COMMENT	DOC. No.
Monday 4 August 2008	14:30	Hearing at Legislative Council Committee Office. Session One - Mr Sam Weir.	Transcript of Evidence from hearings.	
Sunday 2 November 2008		Report in <i>The Sunday Times</i> - <i>Raid a waste of time: Top Cop</i> . Police Commissioner says that the raid should " <i>never have occurred</i> ".		