



**Joint Standing Committee on the
Anti-Corruption Commission**

Secrecy under the Anti-Corruption Commission Act

Discussion Paper

April 1998

Presented by:

**Hon. Derrick Tomlinson, MLC and
Mr W. Thomas, MLA**

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Terms of Reference

On Wednesday 18 June 1997 the Legislative Assembly established the Joint Standing Committee on the Anti-Corruption Commission.

- (1) That a Joint Standing Committee of the Legislative Assembly and the Legislative Council be appointed —
 - (a) to monitor and review the performance of the functions of the Anti-Corruption Commission established under the Anti-Corruption Commission Act 1988;
 - (b) to consider and report to Parliament on issues affecting the prevention and detection of “corrupt conduct”, “criminal conduct”, “criminal involvement” and “serious improper conduct” as defined in section 3 of the Anti-Corruption Commission Act 1988. Conduct of any of these kinds is referred to in this resolution as “official corruption”;
 - (c) to monitor the effectiveness or otherwise of official corruption prevention programs;
 - (d) to examine such annual and other reports as the Joint Standing Committee thinks fit of the Anti-Corruption Commission and all public sector offices, agencies and authorities for any matter which appears in, or arises out of, any such report and is relevant to the terms of reference of the Joint Standing Committee;
 - (e) in connection with the activities of the Anti-Corruption Commission and the official corruption prevention programs of all public sector offices, agencies and authorities, to consider and report to Parliament on means by which duplication of effort may be avoided and mutually beneficial co-operation between the Anti-Corruption Commission and those agencies and authorities may be encouraged;
 - (f) to assess the framework for public sector accountability from time to time in order to make recommendations to Parliament for the improvement of that framework for the purpose of reducing the likelihood of official corruption; and
 - (g) to report to Parliament as to whether any changes should be made to relevant legislation.
- (2) The Joint Standing Committee shall not -
 - (a) investigate a matter relating to particular information received by the Anti-Corruption Commission or particular conduct or involvement considered by the Anti-Corruption Commission;

- (b) reconsider a decision made or action taken by the Anti-Corruption Commission in the performance of its functions in relation to particular information received or particular conduct or involvement considered by the Anti-Corruption Commission; or
 - (c) have access to detailed operational information or become involved in operational matters.
- (3) The Joint Standing Committee consist of 8 members, of whom -
 - (a) 4 shall be members of the Legislative Assembly; and
 - (b) 4 shall be members of the Legislative Council.
- (4) No Minister of the Crown or Parliamentary Secretary to a Minister of the Crown be eligible to be a member of the Joint Standing Committee.
- (5) A quorum for a meeting of the Joint Standing Committee be 5 members, each House of Parliament being represented by at least one member.
- (6) The Joint Standing Committee have power to send for persons, papers and records, to adjourn from time to time and from place to place, and, except as hereinafter provided, to sit on any day and at any time and to report from time to time.
- (7) The Joint Standing Committee not sit while either House of Parliament is actually sitting unless leave is granted by that House.
- (8) A report of the Joint Standing Committee be presented to each House of Parliament by a member of the Joint Standing Committee nominated by it for that purpose.
- (9) In respect of matters not provided for in this resolution, the Standing Orders of the Legislative Assembly relating to select committees be followed as far as they can be applied.

Foreword

Following amendment of the *Official Corruption Commission Act 1988* in 1996, the Official Corruption Commission was renamed the Anti-Corruption Commission (ACC) and the Act was renamed the *Anti-Corruption Commission Act 1988* (the ACC Act). The ACC commenced operation on 1 November 1996. The powers given to the Commission to investigate and deal with official corruption were expanded considerably under the changes to the Act. The matters which come within its jurisdiction were also broadened to include “serious improper conduct”, and the list of offences under the Criminal Code with which the Commission may deal was extended. The Act provides for the Commission to conduct its investigative work completely in private.

To ensure that the ACC can do its work without political interference, the Commission is established as an agency independent from the executive arm of government. Given, however, that the Commission is entrusted with the responsibility of dealing with official corruption, and the extensive powers it may exercise in undertaking that responsibility, this Committee has been established to oversee the Commission in the performance of its functions.

The Committee was established by resolution of both Houses of Parliament in June 1997. Under its terms of reference, the Committee is required to monitor and review the performance of the ACC and to report to Parliament on issues affecting the prevention and detection of corruption in Western Australia’s public sector. As its terms of reference and the Act make clear, the Committee’s supervision of the ACC does not extend to reconsidering decisions of the Commission or being involved in operational matters; nor is the Committee permitted access to detailed operational information.

The appropriateness of the secrecy and confidentiality provisions in the ACC Act has been the subject of long standing comment from a variety of sources. It was an issue in the debate in Parliament over the amending legislation and was one of the early matters addressed by the Committee: late in 1997, the Committee tabled in Parliament its First Report, *Confidentiality and Accountability: Parliamentary Supervision of Anti-Corruption and/or Law Enforcement Agencies in Australia*. Public debate intensified and became increasingly critical following the completion of the inquiry into allegations of police corruption by Mr Geoffrey Miller QC, the first special investigator appointed under the Act. Mr Miller’s Report was presented to the ACC on 5 December 1997.

The Committee observed the events following the presentation of the Miller Report to the ACC and the criticisms of the Commission's operation and subsequent action by the Commissioner of Police with concern. These events, and the associated criticism, have raised a number of issues. These include the following –

- (1) the general question of secrecy with respect to the work of the ACC;
- (2) the protections offered individuals subject to investigation by the ACC;
- (3) the extent to which the ACC can make public, and should make public, the results of its investigations;
- (4) the application of section 8 of the Police Act; and
- (5) the accountability of the ACC.

The operation of the secrecy provisions in the ACC Act are again the subject of public comment following the charging of a senior police officer on Friday, 27 March 1998 with giving false testimony to the ACC's special investigator, and raids on the homes of a number of police officers in the course of a continuing investigation by the ACC. Mr George Tannin has been appointed as Special Investigator by the ACC as part of this investigation. Similar issues to those identified above have arisen in relation to these matters.

The public debate surrounding the ACC and the secrecy provisions contained in the ACC Act has taken place within an environment characterised by uncertainty about the operation of key aspects of the ACC Act, limited detailed information regarding the work of the ACC and the inquiry by Mr Miller, calls for a royal commission into the Police Service from various parts of the Western Australian community, civil action in the Supreme Court and conflicting public statements from the individuals and agencies involved. The purpose of this discussion paper is to assist public discussion by providing a basis for informed consideration of the issues arising with respect to the secrecy provisions contained in the Act.

Recently the ACC has sought to clarify a key secrecy provision in the ACC Act, section 54. On Friday, 27 March 1997, the ACC released a policy statement regarding the interpretation of this section. The statement supports an interpretation of section 54 which permits publication of details regarding matters which may be before the ACC, provided such publication does not include reference to the fact that the matter is before the ACC. The extent to which this new interpretation of section 54 clarifies the section's interpretation and promotes public discussion remains to be determined. The new interpretation of section 54 advanced by the ACC is discussed in more detail in the final part of the Paper, which raises issues for consideration.

In pursuance of the Committee's function to monitor and review the performance of the ACC and to report to Parliament on issues affecting the prevention and detection of corruption in Western Australia's public sector, the Committee intends to report to Parliament on the appropriateness and effectiveness of the secrecy and confidentiality provisions in the ACC Act.

Before doing so, the Committee invites individuals and organisations to comment in writing to the Committee on this subject.

This Discussion Paper is not intended to be prescriptive or in any way restrict comments which might be made. Identification of particular issues and the ways in which these might be dealt with are included to encourage discussion and comment, not limit it.

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1. INTRODUCTION

As the name of the Anti-Corruption Commission (ACC) indicates, the Commission was established as a specialist agency designed to investigate corruption in Western Australia's public sector. The Commission is one of several specialist agencies created in Australia in the relatively recent past to deal with official corruption or serious crime or both. Such agencies have been established in response to the perceived incapacity of traditional law enforcement bodies to satisfactorily investigate such matters.

One of the distinguishing characteristics of these agencies is the range of inquisitorial coercive powers they may exercise. These powers extend well beyond the powers normally granted police forces and are, in many cases, equivalent to those of royal commissions.

A common criticism levelled at such agencies is that the powers exercised by them unfairly override many of the traditional protections individuals may rely on when subject to investigation by the State (see further Corns 1994; McClellan 1991; Priest 1993; Roser 1992; Rozenes 1995). Moreover, as some of these agencies undertake their inquisitorial work in public, there is potential for the reputations of innocent people to be damaged (Rozenes 1995; Sturgess 1994). The justification for sacrificing certain traditional rights and protections afforded the individual is based on the view that the public interest in exposing corruption and/or serious crime, and bringing to justice those involved in such activities, outweighs the public interest in maintaining such rights and protections. In the case of the ACC, the strict confidentiality provisions, and the requirement that the ACC conduct its investigations in private, have been defended as important elements in a regime which purports to strike a balance between the protection of individual's right to privacy and the public interest in exposing corruption and bringing to account corrupt individuals (see ACC 1997a; the second reading speeches made in each House of the WA Parliament supporting the OCC Amendment Bill, June 1996).

Secrecy under the *Anti-Corruption Commission Act 1988* (the ACC Act) also serves other purposes. It can be argued that secrecy enhances the investigative capacity of the ACC and its ability to assemble evidence which might be used in subsequent criminal proceedings or disciplinary action. The degree to which the Commission may control the flow of information about its work also supports the operational integrity and independence of the Commission.

In the following part of the paper, part 2, the history of the ACC is outlined, the secrecy and confidentiality provisions are detailed within the context of the Act overall, and an explanation of the purposes these provisions serve is provided. Part 3 looks at what happened following the presentation of the Miller Report to the ACC and the criticisms made of the secrecy and confidentiality provisions in the ACC Act as a result of those events. The final part of the Paper, part 4, highlights for consideration some of the issues raised by the operation of the secrecy and confidentiality provisions in the ACC Act.

2. THE SECRECY AND CONFIDENTIALITY PROVISIONS IN THE ANTI-CORRUPTION COMMISSION ACT

HISTORY

In 1989 the Official Corruption Commission (OCC) was established under the *Official Corruption Commission Act 1988* (the OCC Act). The OCC was a small organisation which exercised limited powers and had few resources.

The OCC Act was amended in 1991, 1994 and 1996. The 1991 amendments permitted the Commission to report to Parliament. The 1994 amendments were more extensive, and the 1996 amendments creating the ACC were more extensive still. Nonetheless, there is a continuity between the OCC and the ACC, for, while the ACC is a larger and more powerful body than the OCC, the 1996 amendments built on the earlier changes, and, in particular, the 1994 amendments.

There was also a continuity in personnel. Mr Wickham, QC continued on as Chairman until Mr Terence O'Connor, QC was appointed to this position for a two year term on 2 July 1997. Mr Wickham was not available for reappointment. Commodore David Orr, RAN Retd, previously Chief Executive Officer of the OCC, is now a Member of the Commission.

Strict non-disclosure provisions were included in the original Act. These prevented a member or officer of the Commission from disclosing information regarding the work of the Commission, except in performance of a duty or function under the Act.

In 1992 a Legislative Assembly Select Committee on the OCC Act recommended substantial changes to the OCC Act. This Committee was effectively reconstituted as the Legislative Assembly Select Committee on the Official Corruption Recommendations for the purpose of preparing a draft of the legislation incorporating the changes recommended by the earlier Committee. It was not until 1994 that those recommendations were put into effect. The recommended changes included the following –

- expansion of the jurisdiction of the Commission;
 - the granting of power to the Commission to conduct preliminary inquiries;
 - the inclusion of compulsory reporting provisions, which require that principal officers of public sector agencies report to the Commission instances of suspected official corruption;
 - enabling or requiring individuals to disclose information to the Commission despite existing duties of secrecy or other restrictions on disclosure contained in other Acts;
 - protection for persons who assist the Commission in the performance of its functions;
- and

-
- restricting the publication of the fact that an allegation had been received or initiated by the Commission.¹

The 1996 amendments, in addition to renaming the Commission as the ACC and the Act as the *Anti-Corruption Commission Act 1988*, included the following changes –

- the independence of the Commission has been enhanced as the Commission is now established as a body corporate;
- to ensure that the Commission is independent and seen to be independent of the Police Service, the Commissioner of Police is no longer a member of the committee which recommends who should be appointed to the Commission;
- the crimes within the Commission's jurisdiction were extended and serious improper conduct was included within the Commission's jurisdiction;
- the definition of public officer was expanded to include Members of Parliament, Ministers and Parliamentary Secretaries;
- provision was made for the Commission to receive or initiate allegations about private individuals involved in criminal conduct engaged in by a public officer;
- the Commission was given the capacity to itself investigate allegations;
- the Commission was provided with the power to appoint a special investigator;
- the task of assembling evidence to be furnished to an independent agency or appropriate authority, so that the agency or authority may then take action within its authority with respect to that evidence, was included in the Commission's primary functions;
- the Commission may now make general reports to each House of Parliament or the Standing Committee on the Commission's activities and operations;
- the Commission may recommend that a royal commission be established in a specific report to Parliament; and
- the Commission was given the capacity, under certain circumstances, to make statements to a person or the public about the performance of its functions.

The changes also enable Commission investigators to be appointed by the Commissioner of Police as special constables. As such, Commission investigators may exercise the powers of police officers.

¹ The amendments proposed by the Select Committee are summarised in the Report of the Select Committee on the Official Corruption Recommendations (1992: pp 3-4).

The secrecy and confidentiality provisions already existing in the Act were maintained and refined.²

THE PROVISIONS

The secrecy and confidentiality provisions in the ACC Act are intended to protect the integrity of the Commission's operations, the identity of informants and witnesses, and the reputations of persons wrongly accused. These provisions, combined with the manner in which the investigative process is structured, represent an attempt to create a body which can effectively investigate corruption and improper conduct in the police service and the public sector more generally, while at the same time moderating the use of the Commission's coercive powers.

Exceptions to the confidentiality provisions allow the Commission to divulge information to any person or the public about its work, but the comments which the Commission may make about current operational matters, which identify informants, or which are critical of an individual are subject to certain checks. A Commissioner may also disclose information to the Joint Standing Committee.

There are also a range of reporting provisions in the Act which allow the Commission to report to Parliament, the Presiding Officers, the Minister or the Joint Standing Committee on specific and more general matters. What information is included in such reports is largely within the Commission's discretion. Rules of Parliament may require the Commission to report to Parliament or the Joint Standing Committee on the general activities and operations of the Commission, but the Commission is not required to provide detailed operational material in such reports.

The following outline details the provisions dealing with secrecy and confidentiality, the making of reports by the Commission, and the ways in which allegations may be dealt with by the Commission.

Secrecy and Confidentiality

The main provisions dealing with secrecy and confidentiality under the ACC Act are set out below.

The Confidentiality Provisions - Section 52

Section 52 imposes upon members and officers of the Commission a duty of confidentiality regarding information gathered by the Commission. The penalty for breaching confidentiality is an \$8 000 fine or two years imprisonment (section 52(1)).

The confidentiality provisions apply except where a Commissioner or a person working for the Commission is acting in or in connection with the performance of a function under the ACC Act (section 52(1)). Further specific exceptions are included in section 52(2). The exceptions allow

²

A general outline of the development of the ACC is presented in Charlwood (1997). The ACC's Annual Report 1997 also provides a summary of the main changes made to the Commission through the 1996 amending Act (ACC 1997b: 6-7).

disclosure of information during the normal course of the Commission's work. Examples of where information would be disclosed under these exceptions would include –

- where the Commission consults with another agency or authority when deciding whether further action in regard of an allegation is required;
- where the Commission is acting pursuant to reciprocal arrangements for the exchange of information with another agency or authority; or
- where the Commission refers an allegation to another agency or authority for further action.

The Commission may also make statements or divulge information to any person or the public about the performance of its functions if the Commission considers it is in the interests of any person, or in the public interest, to do so (section 52(3)). However, the Commission's ability to make such disclosures or statements is restricted in the following ways –

- where the Commission intends to make such disclosures or statements, it cannot set out opinions critical of a person unless that person has been given the opportunity to appear before it and make submissions in relation to the relevant matters (section 52(6));
- the Commission is prevented from disclosing the name of an informant, "unless it is fair and reasonable in all the circumstances to do so" (section 52(5)(b)); and
- the Commission may not divulge information under section 52(3) where this "is likely to interfere with an investigation or other action" under the Act (section 52(4)).

Section 52(7) provides for a member of the Commission to divulge information to the Standing Committee.

Under section 52, where confidential information is divulged, the person or body to whom information is so divulged is subject to the confidentiality provisions of section 52 (section 52(8)).

Restrictions on Publication - Section 54

Section 54 prevents a person from publishing or causing to be published information regarding allegations received or initiated by the Commission, unless that information has already been disclosed or made public under, or in connection with the execution of, the ACC Act.

The penalty for breaching section 54 is an \$8 000 or imprisonment for 2 years.

Section 54 does not prevent the Commission from compiling and publishing statistics and other information of a general nature, or the Joint Standing Committee from compiling and publishing any report (section 52(2)).

Hearings - Only in Private

No provision is made for the Commission to conduct hearings when it itself undertakes an investigation and, while a special investigator may hold hearings, these must be held in private (section 42(1)).

Reports

Reports under the Act are divided into two categories: reports on specific matters and general reports.

Reports on Specific Matters

Under Part II, Division 6, the Commission may report to each House of Parliament on the facts disclosed by further action undertaken by the Commission or an appropriate authority in relation to an allegation.

Such reports may be made to the Presiding Officers, the Minister, other Ministers or the Standing Committee (section 29).

A report may be made to the effect that the Commission considers that further action is not being, or has not been, carried out properly, efficiently or expeditiously (sections 27 and 28).

A report may contain any recommendations that the Commission thinks fit (section 30(3), including a recommendation that a royal commission be established (section 30(4)).

Before any adverse facts against a person or body are reported, that person or body must be given the opportunity to make representations as to those facts (section 30(1)).

A report under this division may not contain a recommendation that a person or body be prosecuted for a criminal offence (section 30(2)).

Under section 31, Parliament or the Standing Committee shall determine whether the facts presented in such reports are publicly disclosed (section 31).

General Reports

Under Part II, Division 7, the Commission may report on general work of the Commission.

Reports under this division may be made to –

- the Presiding Officers of the Parliament on administrative or general policy matters relating to the functions of the Commission (section 33); or
- each House of Parliament or the Standing Committee as to the general activities and operations of the Commission (sections 33 and 34).

Section 34(2) specifically provides that the Commission is not required to provide detailed operational information in a report under section 34(1).

Section 32 refers to the Commission annual report. This section requires the Commission to include statistical and other information of a general nature in its annual report (section 32).

Allegations and Investigations

Allegations

Under the ACC's jurisdiction the Commission may deal with allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct against police officers and other public officers.

Allegations come to the ACC primarily through mandatory section 14 reports from the principal officers of public sector agencies, or voluntary section 16 allegations made by individual public officers or members of the public. The ACC assesses these allegations and determines what action should be taken with respect to them.

Further Action and Referrals to Another Agency or Authority

The ACC is not required to investigate every allegation itself. The ACC may refer an allegation to an appropriate authority or an independent agency for further action. In its Annual Report (1996-1997), the ACC stated the following general rule –

... the only matters the ACC will investigate, using its own investigators, are those involving politicians, senior public officers (CEOs) and senior police. Other matters which, by their very nature, demand an inquiry which is not only independent, but also seen to be independent, may also be referred by the Commission to its own investigators (ACC 1997b).

Such a policy is consistent with the requirements of section 18 of the Act. Section 18 provides that the following matters will be taken into account when the Commission is deciding who should take further action with respect to an allegation –

- (a) the seniority of any public officer to whom the allegation relates;
- (b) the seriousness of the conduct or involvement to which the allegation relates;
- (c) the need for there to be an independent investigation rather than an investigation by a public authority with which any public officer to whom the allegation relates is connected by membership or employment or in any other respect.

After deciding that an allegation should be investigated, the Commission may exercise a number of options under the Act when deciding what further action should be taken. The Commission may decide to –

- investigate an allegation itself or it may refer an allegation to an independent agency or appropriate authority (section 17(3));

- refer a matter for further action following a review of a decision not to take further action (section 20(3)); or
- refer an allegation to an appropriate authority or independent agency for further action during the course of conducting an investigation itself (section 21(4)).

Where the Commission decides that further action should be undertaken by another agency or authority, the Commission is required to report to that agency or authority on the allegation (section 22). In a report to an appropriate authority to which an allegation has been referred, or by subsequent written notice, the Commission may –

- (a) recommend that the appropriate authority initiate or carry out an investigation into the allegation;
- (b) make a recommendation to the appropriate authority as to the period within which an investigation should be carried out; and
- (c) make such other recommendations to the appropriate authority as it thinks fit in relation to further action that should be carried out in relation to the allegation and the period in which it should be carried (section 22(2)).

Such reports are not public documents. They are made by the Commission to an appropriate authority or independent agency in the performance of the Commission's investigative and related functions.

An appropriate authority is defined under the Act as –

... a person, body or organisation who or which is empowered by a law of the State to take investigatory or other action, or both, in relation to corrupt conduct, criminal conduct, criminal involvement or serious improper conduct, but does not include an independent agency (section 3(1)).

An example of an appropriate authority is the Western Australian Police Service.

An independent agency is defined under the Act as –

... the Parliamentary Commissioner [Ombudsman], the Director for Public Prosecutions, the Auditor General or the Commissioner for Public Sector Standards (section 3(1)).

Investigations

The Commission, apart from referring a matter to another agency or authority, may undertake an investigation itself or it may appoint a special investigator. The Commission may also recommend that a royal commission be established. The types of inquiries the Commission may undertake or initiate and the powers available in such inquiries are set out below.

(i) Preliminary Inquiries

In determining what further action should be taken with respect to an allegation, the Commission's investigators may undertake a preliminary inquiry (section 17).

In so doing, the Commission's investigators may exercise significant coercive powers. The Commission may request that any person or body supply it with information (section 37), or that any person or body produce a document or other thing (section 38).

Non-compliance with a written request for information or a document or other thing is an offence punishable by an \$8 000 fine or two years imprisonment (sections 37(2) and 38(2)).

(ii) Investigation by the Commission's Investigators

The Commission may further decide, on the basis of the information before it and the nature of the allegation, or on the basis of information it has acquired as the result of a preliminary inquiry, to undertake an investigation itself.

If the Commission decides to conduct an investigation itself the Commission is given the power to request by written notice a statement of information or documents (section 44), and the power to enter premises (section 45).³

Non-compliance with a request by written notice for information or documents is an offence punishable by an \$8 000 fine or two years imprisonment (section 44(4)).

(iii) Investigation by a Special Investigator

Where the Commission concludes that a more thorough investigation is required it may appoint a special investigator (section 8).

The extensive powers outlined above, which may be exercised by the Commission in conducting an investigation, are contained in Part IV of the Act which deals with investigations. Whereas only some of the provisions of Part IV apply to an investigation by the Commission, all of Part IV applies where a special investigator is appointed to undertake an investigation. Under Part IV, a special investigator is granted, with some modifications, the powers and immunities of a royal commission (section 40).

The non-compliance provisions outlined above, which apply where the Commission itself undertakes an investigation, are contained in Part IV of the Act and so also apply to an investigation by a special investigator.

A special investigator may conduct hearings for the purpose of taking evidence. As has been noted, however, unlike a royal commission, such hearings must be heard in private (section 42(1)). While witnesses are permitted legal representation (section 42(2)), cross-examination of witnesses is not likely to occur.

Upon completing his or her inquiry a special investigator reports to the Commission (section 8).

³

Section 21(2)(b) provides for sections 44 to 47 of Part IV of the Act to have effect where an investigation is carried out by the Commission.

(iv) Royal Commission

In a specific report to Parliament under Division 6 of the Act, the Commission may include a recommendation that a royal commission be established where, in its opinion, a public inquiry is required. It may further recommend the terms of reference of that commission (section 30).

THE POLICY OF THE ACC ACT

In the second reading speeches supporting the amendment Bill through which the ACC would be created it was said –

It is important that the Commission will have as one of its primary functions the assembling of evidence for furnishing to the Director of Public Prosecutions to be admissible in the prosecution of a person for a criminal offence (Hansard, 19 June and 3 July 1997, pp 2867 and 3777).

The Interim Report of the Wood Commission was cited in support of the type of commission the Bill proposed. In that Report, the Wood Royal Commission recommended a Police Corruption Commission (PCC) be established.⁴ Of the PCC, the Wood Royal Commission (1996: 94 footnotes omitted) said –

The principal function of the PCC should be the detection and investigation of serious police corruption. It should not be of the genus of a standing Royal Commission, whose primary function is to establish the facts of a matter under review through the exercise of inquisitorial powers. For bodies of the nature of standing Royal Commissions, ‘securing convictions is a secondary aim’. A key function of the PCC must be to assemble admissible evidence when investigations reveal criminal conduct, and to furnish such evidence to the Director of Public Prosecutions.

This was the general model upon which the ACC was developed. Unlike some of the larger specialist anti-corruption and/or law enforcement agencies established in Australia, such as the Independent Commission Against Corruption (ICAC) in New South Wales, the ACC’s functions do not extend to include broad ranging prevention and education functions. The ACC is primarily an investigative agency. It is not of the genus of a standing royal commission.

The ICAC was established on the premise that “the solution to corruption lies in systemic reform and not in criminal prosecution” (Sturgess 1994: 113). The ACC was established on a very different premise. In the second reading speeches it was said –

Where crimes have been committed, the primary object should be to bring offenders to justice rather than merely report findings of fact (Hansard, 19 June and 3 July 1997, pp 2867 and 3777).

Secrecy is seen as an essential part of achieving this object through facilitating the assembling of evidence to be presented to other agencies either responsible for criminal prosecutions or able to take appropriate disciplinary action. In a media statement dated Tuesday, 9 December 1997, the ACC reproduced the following statements from the Report of the Special Investigator, Mr Geoffrey Miller QC –

⁴

The Commission was established, though it was named the Police Integrity Commission and not the Police Corruption Commission as was originally intended.

I am firmly of the view that it was only the fact of confidentiality which led police officers, public officers and civilians to speak of acts of corruption within the Police Service of which they were aware, or of which they reasonably suspected.

Observations by witnesses on police culture in relation to matters of corruption or alleged corruption were freely forthcoming from some witnesses, and they were matters that could never have been the subject of a public hearing.

In short, much of the evidence taken by me would simply have been unavailable had I been forced to conduct public hearings.

While secrecy may be seen as important to the ACC's capacity to effectively investigate corruption and bring those who engage in such conduct to justice, the ACC's muscle, as it were, lies in the coercive powers it may exercise. Through the ACC Act, the ACC, or a special investigator appointed by the ACC, is given substantial powers to investigate official corruption. The ACC also has been given substantial resources to undertake its primary investigative task. It has been allocated a budget for the financial year ending 30 June 1998 of \$5 000 000 and, when it has reached its full staff complement, will employ over 60 staff. Some 30 of these will be part of the ACC's Investigations Directorate. As indicated in the earlier outline of the provisions in the Act, however, the powers of a royal commission do not immediately or necessarily come into play where allegations of official corruption are investigated.

The scheme of the Act is to establish a body which, in the first instance, coordinates the investigation of allegations of corrupt or improper activity in Western Australia. In so doing, the Commission may undertake preliminary inquiries and exercise the powers provided to it under Part III of the Act, but in many instances allegations will be left to, or referred to, other agencies or authorities to investigate more fully. More extensive use of coercive powers does not occur unless the Commission decides itself to conduct or take over an investigation, or if the Commission decides to appoint a special investigator. The Act requires that the Commission take into account the matters set out in section 18 when making such a decision. Therefore, while significant coercive powers may be exercised by the Commission, and even more extensive powers may be exercised by a special investigator, a number of stages must be gone through before these powers come into play. Provision is made for a public inquiry insofar as the Commission may recommend that a royal commission be established.

INDIVIDUAL RIGHTS

In the introduction to this paper it was noted that through the ACC Act a balance is sought between protecting individual rights and the public interest in exposing corruption and bringing to account corrupt individuals. The Act provides some specific protections for the rights of individuals in the face of the coercive powers exercised by the Commission or a special investigator. Moreover, secrecy is seen as an important element in protecting wrongly accused individuals from the consequences which might flow from publication of the fact that they are subject to investigation by the ACC. The scope of certain traditional rights, however, is also reduced or varied. The following outline sets out the main protections for individuals under the Act and the manner in which the operations of the Commission may also affect certain traditional rights.

- Cases which do not come within the parameters set out in section 18 of the Act may be dealt with by agencies exercising the powers granted them by law and not those special

powers granted the ACC. As discussed in the previous section of the Paper, it is only where the ACC itself investigates an allegation that these special powers are exercised. The full range of powers normally associated with a royal commission are not available except to a special investigator appointed by the Commission. Through these provisions the Act attempts to moderate the use of the extraordinary coercive powers available under the Act and seeks to ensure that these powers are only exercised in serious cases.

- While the Commission may exercise significant coercive powers during preliminary inquiries, or when conducting an investigation itself, it cannot itself hold hearings. A special investigator may hold hearings, but these must be held in private. In addition, strict confidentiality, subject to certain exceptions, applies to information about the operations of the Commission.

With respect to public comment, section 54 prevents a person from publishing or causing to be published information regarding allegations received or initiated by the Commission, unless that information has already been made public under the Act or in its execution.

It is the view of the Commission that section 54 does not prevent publication of the details of an allegation so long as publication of these details does not also include publication of the fact that the allegation has been received or initiated by the ACC (ACC policy statement, March 1998).

As has been noted, this provision was included in the Act by the 1994 amendments to the OCC Act. In explaining the reasons for recommending that such a prohibition be included in the Act, the 1992 Select Committee on the OCC Act said –

The Select Committee is keen to protect informers but it is just as concerned to protect individuals from malicious complainants and being defamed as a result of another person reporting to the media that they have made a complaint to the Commission about a particular person. Therefore, the Select Committee believes it should be an offence to publish that a complaint has been made to the Commission about any matter (Select Committee on the OCC Act 1992: 17).

The ACC has argued that the secrecy surrounding matters before it is an important protection for individuals who, while subject to investigation, might be innocent, as it prevents damage to a person's reputation through information compiled during an investigation "being prematurely made public" (ACC 1997a).

Secrecy may also serve the purpose of ensuring a fair trial. Use of the Commission's coercive powers may allow evidence to be collected which may be damaging to an individual but which would not be admissible in a criminal trial. Public disclosure of such evidence may prejudice any subsequent trial (JSCACC 1997: 23).

It must be noted, however, while investigations by the ACC are conducted in private, a public report containing adverse findings against a person or persons may be made following an investigation.

- From a civil libertarian point of view, secrecy investigations, combined with the coercive powers which may be exercised by agencies like the ACC, may be unfair as a person may

be denied knowledge of the allegations or evidence against him or her. However, the ACC Act purports to provide for a degree of procedural fairness for persons subject to investigation by the ACC or a special investigator. It does this in the following ways –

- witnesses called to appear before a special investigator are entitled to legal representation (section 42);
 - a witness is entitled to know the nature of the investigation before evidence is taken on oath (section 43);
 - reports made to Parliament or the Minister cannot contain facts adverse to a person or body unless that person or body has been given reasonable opportunity to make representations with respect to those facts (section 30(1)); and
 - the Commission cannot divulge information under section 52(3) containing adverse findings against a person unless that person has first been given an opportunity to make submissions with respect to those findings (section 52(6)).
- Consistent with its investigative role, the Commission cannot, under the Act, recommend to the Director of Public Prosecutions (DPP) that a person be prosecuted for a criminal offence. This is entirely a matter for the DPP to decide. Also, where the Commission makes a report under Division 6 to Parliament, the Presiding Officers, the Minister or the Standing Committee, the Commission may only report on the facts disclosed as a result of action taken by the Commission (section 27(a)); nor may the Commission recommend that a person be prosecuted for a criminal offence in such a report (section 30(2)).

However, the Act does provide for the Commission to make recommendations in a report to an appropriate authority following a decision that a matter will be referred to an appropriate authority for further action (section 22(2)(c)). As further action is defined under section 17(1) as “investigative or other action” the Act does not prevent the Commission from recommending that disciplinary or other action according to law should be initiated by an appropriate authority.

- Provision is made for a person whose alleged conduct or involvement is to be referred to in a report to the Parliament or Minister to request that the facts in the report be publicly disclosed (sections 27(b) and 28(1)(b)).
- Information supplied under coercion cannot be admitted in evidence in any civil or criminal proceedings, except contempt proceedings or proceedings for an offence against the Act (sections 35(3) and 44(6)).

Nonetheless, the fact remains that a person may be required to supply information or documents requested by the Commission or a special investigator. A person cannot refuse

this request on the ground that the provision of such material may be self incriminating and other laws imposing requirements of secrecy are overridden by the Act.⁵

INDEPENDENCE AND ACCOUNTABILITY

In a recent paper presented to the Working Group of Parliamentary Committees Oversight Law Enforcement and Criminal Justice Bodies, Mr Gordon Nuttall, MLA, Deputy Chairman of the Parliamentary Criminal Justice Committee in Queensland, referred to the Fitzgerald Commission Report (1989) saying –

When recommending the creation of the CJC [Criminal Justice Commission], Fitzgerald emphasised the need for such a body to be both independent and accountable. Fitzgerald warned against the creation of an autonomous body.

The difference between the terms is subtle but important. Fitzgerald said that the difference was that an independent body was accountable, but an autonomous body was not (Nuttall 1998: 1).

Independence, particularly from executive government, is essential, as the very nature of the work of such commissions may bring them into conflict with the executive. Accountability is also essential because of the extensive powers such agencies exercise and their capacity to have a very significant impact on the lives of those whom they investigate. Moreover, such bodies are given an important task: the detection and prevention of official corruption and/or serious crime, and significant resources to undertake this task, and the public should be sufficiently well informed of their work to assess whether this task is being properly and expeditiously performed.

Independence and accountability are not incompatible; indeed quite the opposite, for accountability provides one of the foundations upon which an agency's independence may be built; but how to ensure that an agency is both: that is sufficiently independent to undertake its functions under the Act it administers without being a law unto itself, is one of the most difficult problems to be faced in establishing bodies like the ACC and other similar agencies.

There are various accountability provisions included in the ACC Act and the Joint Standing Committee has been established by Parliament to supervise the Commission in the performance of its functions.

Provisions in the Act

Reports

One accountability measure is the Commission's ability under the Act to make specific reports to Parliament, the Presiding Officers, the Minister or the Standing Committee, special reports to the Presiding Officers on administrative or general policy matters and reports on the general activities and operations of the Commission to Parliament or the Standing Committee (Part II, Divisions 6 and 7).

⁵

Corns(1994) examines in detail the abrogation of the privilege against self incrimination in Australia with particular reference to the operation of the NSW Independent Commission against Corruption, the NSW Crime Commission, the National Crime Authority and the Queensland Criminal Justice Commission.

Subject to section 35, which provides for the funds of the Commission, section 36 makes the ACC subject to the provisions of the *Financial Administration and Audit Act 1985*. In the Commission's annual report under this Act the ACC is required to include statistical information, and such general information "as it thinks fit", about the allegations which have come before it over the previous year (section 32).

Public Disclosure of Information

Under section 12(1)(h), one of the Commission's functions is to disseminate to the public information about matters relating to its functions. To this end, as is discussed above, the Commission may divulge information or make public statements, subject to certain requirements, about the performance of its functions (section 52).

The Commission's capacity to directly inform the public of the work it undertakes may be used as an accountability mechanism and to promote public confidence in the Commission.

Provision for a Special Investigator

In the second reading speeches introducing the OCC Amendment Bill through which the ACC was created, it was further suggested that provision for a special investigator added another level of accountability to the Commission –

The fact that the Commission will appoint special investigators to exercise royal commission powers, rather than doing so itself, provides an important level of accountability The special investigator will be required to report to the Commission. The Commission will be able to appoint different persons to be special investigators in different investigations. This will not only enable the Commission to appoint persons who have relevant expertise in an area, but also reduce the possibility of allegations that there is a perception of predetermined bias on the part of a person who has presided at other hearings (Hansard, 19 June and 3 July 1997, pp 2869 and 3779).

Rules of Parliament

Under the Act, Rules of Parliament may be made prescribing the "procedures to be adopted by the Commission in the performance of its functions ... or any other matter necessary or convenient for the due administration of this Act" (section 56). Such Rules may require the Commission to report periodically to both Houses of Parliament or a standing committee, "as to the general activities and operations of the Commission" (section 34). No such rules have as yet been made.

Search Warrants

Where the Commission or a special investigator wishes to exercise the power to enter premises (section 45) an application must be made to a Judge of the Supreme Court for a search warrant (see sections 3 and 40 of the ACC Act and section 18(2) of the *Royal Commissions Act 1968*).

The Joint Standing Committee

The primary accountability mechanism is the Joint Standing Committee on the Anti-Corruption Commission. The Commission is accountable to Parliament through the Committee, and ultimately, through Parliament, to the community. The Committee is not established by statute,

but by resolution of both Houses of Parliament, as recommended by the Select Committee on the Official Corruption Recommendations (1992: 5-6). Creation of the Committee was originally recommended by the Select Committee on the Official Corruption Commission Act in 1992. In its Report the Select Committee recommended –

A Joint Parliamentary Committee be established to monitor the performance of the Commission and to consider and report to Parliament on issues affecting the prevention and detection of official corruption in the public sector. The Joint Parliamentary Standing Committee should not be empowered to involve itself in operational matters of the Commission or have access to detailed operational information. The Standing Committee should monitor all public sector agencies to assess the effectiveness of agency corruption prevention programs. The Standing Committee should also address areas of overlap between the Commission and the other bodies with responsibility in the anti-corruption area to avoid unnecessary duplication and encourage cooperation between such bodies where it is mutually beneficial (Select Committee on the OCC Act 1992: 12).

The terms of reference of the Joint Standing Committee on the Anti-Corruption Commission reflect this recommendation. The Committee's terms of reference are quite broad and extend its oversight role to overseeing the whole framework for public sector accountability in Western Australia. Its principal function, however, is to monitor and review the performance of the functions of the ACC.

In undertaking this task the Committee is prevented, under its terms of reference and the Act, from having access to “detailed operational information” or becoming involved in operational matters (see term of reference 2(c) and section 34 of the Act). “Detailed operational information” is not defined under the Act and, in the absence of a statutory definition of this term, what this means is a matter for the Commission to determine. The Committee's terms of reference also prevent the Committee itself investigating a matter within the ACC's jurisdiction or from reconsidering a decision made or action taken by the ACC (terms of reference 2(a) and 2(b)).

The Commission, however, may inform the Committee confidentially of sensitive matters (section 52(7)). It is not required to do so. Under the Act, those to whom the Commission divulges confidential information, including members of the Committee, are subject to the confidentiality provisions in the Act (section 52(8)). There is some question as to whether, in this case, there is a conflict with Parliamentary Privilege.

Independence and Accountability – Concluding Comments

The accountability provisions in the ACC Act and the manner in which the relationship between the Joint Standing Committee and the ACC is set out in the Act and the Committee's terms of reference are consistent with maintaining the independence and the operational integrity of the Commission. Under the Division 6 and 7 reporting provisions, and those provisions which permit the ACC to divulge information, the determination as to whether such reports or disclosures are made, and what detailed information they might contain, is largely within the Commission's discretion. Under section 34, the Commission may be required to report to each House of Parliament or the Joint Standing Committee, but it is not required to provide detailed operational information in such reports. Where the Commission wishes to divulge information under section 52(3) it may not divulge information where this is “likely to interfere with the carrying out of investigatory or other action ...” (section 52(4)); nor may the Commission disclose an informant's name, “unless it is fair and reasonable in all the circumstances to do so”(section 52(5)(b)). It might be added that any decision as to whether and what further action is taken with respect to

a matter before the Commission is a decision for the Commission to make. The Commission cannot be directed to undertake any investigation.

SECRECY AND CONFIDENTIALITY UNDER THE ACC ACT – A SUMMARY

The ACC Act is designed to create a body which, while not a standing commission can, where required, effectively investigate allegations of corrupt or improper activity within Western Australia's public sector. To this end the Commission, or a special investigator appointed by the Commission, may exercise significant coercive powers. In recognition of the potential for the exercise of these powers to compromise what are seen as important individual rights and the reputations of innocent individuals, their exercise is moderated through specific and structural safeguards which provide some protection for individuals subject to investigation by the ACC. It may be argued that one of the most important of these is the requirement that the Commission's work be undertaken in private. The Commission has also expressed the view that secrecy is important to the Commission fulfilling its primary investigative function through enhancing the capacity of the Commission to gather evidence which may be used in subsequent criminal proceedings or disciplinary action.

With respect to accountability, the structure of the ACC Act is such that a high premium is placed on the maintenance of the operational integrity and independence of the Commission. While certain accountability mechanisms are provided, these are designed so as not to impact significantly on the operational integrity of the Commission. As such, the Commission exercises autonomy in relation to operational matters and the disclosure of information regarding its work.

3. THE COMPLETION OF THE MILLER INQUIRY AND SUBSEQUENT EVENTS

INTRODUCTION

On 16 June 1997, the ACC announced the appointment of Mr Geoffrey Miller QC as a Special Investigator to inquire into allegations of police corruption. There was a degree of public interest in Mr Miller's inquiry as the integrity of the Western Australian Police Service (WA Police Service) has been a matter of public concern in Western Australia for some time.

In response to such concerns, a Select Committee of the Legislative Council was established in 1993 to inquire into the WA Police Service. An interim report of the Select Committee, tabled in June 1996, concluded that "corruption and serious misconduct within the Western Australian Police Service is far greater than has been previously acknowledged" (Select Committee on the WA Police Service 1996: 111). The Select Committee recommended "the establishment of a continuing Parliamentary Standing Committee to oversight the Police Service, the formation of an independent Police Anti-Corruption Commission and changes to the role of the Ombudsman" (Select Committee on the WA Police Service 1996: 107). The Committee further concluded that, unless these measures were taken, "the only other course available is the establishment of a royal commission into the Western Australian Police Service" (Select Committee on the WA Police Service 1996: 111).

The 1996 amendment Bill proposing the creation of the ACC was introduced into Parliament the day before the Select Committee's Interim Report was tabled. The Government considered that the proposed changes to the OCC Act would create a body in the ACC which would be able to adequately deal with and investigate allegations of police corruption. Once the ACC commenced operation, it was intended that a section of the ACC's Investigations Directorate would be dedicated to investigating claims of police corruption. Such a section has been created.

AN OUTLINE OF THE EVENTS FOLLOWING THE PRESENTATION OF THE MILLER REPORT TO THE ANTI-CORRUPTION COMMISSION

Mr Miller presented his report into allegations of police corruption to the ACC on Friday, 5 December 1997. On Tuesday, 9 December 1997 the Commission met to consider its response to the Report. In a media statement released on the same day by the ACC, the Chairman of the ACC, Mr Terence O'Connor, QC, said that the Commission had decided it was not necessary at this stage to recommend a royal commission be established to inquire into the WA Police Service. In the statement it was noted that –

... while Mr Miller was unable, on the evidence before him, to conclude that the level of corruption in the Western Australian Police Service was 'systemic or entrenched', his report raised grave concerns about the conduct of particular officers and the culture of elements of the WA Police Service.

The statement also included the following comments by Mr O'Connor –

Mr Miller has recommended serious disciplinary action be taken against six officers.

Before the ACC can make any further public statements concerning these officers, the Anti-Corruption Commission Act 1988 (section 52) requires they be informed of the Special Investigator's findings and recommendations relating to them.

The Act also requires that the officers be afforded the opportunity to appear before the ACC and to make submissions in relation to these matters.

Following the Tuesday meeting, matters arising from the Report were referred to the Director of Public Prosecutions (DPP) (ACC media statement, 9 December 1997). In response to a question in the Legislative Council from the Hon N. D. Griffiths, MLC, the Attorney General, the Hon P. Foss, MLC informed the Council that a brief of evidence was presented to the DPP by the ACC on 19 December 1997. It is up to the DPP to determine what criminal charges, if any, are to be laid against the officers concerned. No decision of the DPP has as yet been reported.

Matters arising from the Report also were referred to the Commissioner of Police.

On Friday 12, December 1997, letters from the ACC were delivered to the six officers informing them of the findings and recommendations against them in compliance with the requirements of section 52. The following Monday the ACC reiterated that, under this section, the officers had to be so informed before the Commission could make any of these details public (ACC media statement, 15 December 1997).

On the same day on which the ACC informed the officers of the findings and recommendations against them, the Commissioner of Police suspended the six officers without pay or allowances under section 8 of the *Police Act 1892*. In the first of two press releases that day, five of the suspended officers were named and the following reasons for the suspensions were noted –

As a consequence of the findings of the special investigator, Mr Geoffrey Miller, QC, I have lost confidence in the ability of each of the officers to perform the functions of the office.

In the later press release it was announced that the sixth officer, who had originally been directed to take paid leave, was also suspended without pay.

It was reported in *The West Australian* on Wednesday, December 17 1997, that the Commissioner had given the officers until Friday, 19 December 1997 to show cause why they should not be suspended without pay or allowances.

Submissions were not made by the officers to either the ACC or the Commissioner of Police. Instead, the matter was taken to the Supreme Court. Following an application by the police officers heard before Justice Steytler on Wednesday, 17 December 1997, interlocutory injunctions were granted preventing the Commissioner of Police or the ACC from publishing the findings and recommendations contained in the Miller Report.

The Commissioner of Police sought to have the injunction preventing him from releasing details of the findings against the officers lifted in an application before the Court on Wednesday, 24 December 1997. The application was withdrawn after undertakings were given that the officers would make no further public comment (*The West Australian*, 26 December 1997).

This matter is listed for a hearing before the Full Court of the Western Australian Supreme Court on 22 April 1998.

PUBLIC DISCLOSURE BY THE ANTI-CORRUPTION COMMISSION OF THE FINDINGS CONTAINED IN THE MILLER REPORT

In the media statements released by the Commission after it had received the Miller Report, the Commission indicated that it could publicly disclose information regarding the findings and recommendations contained in the Miller Report after satisfying the section 52(6) requirement that the officers be given an opportunity to be heard (ACC media statements 5, 9 and 15 December 1997). As has been discussed, under section 52, the Commission may divulge information or make public statements about the performance of its functions, subject to certain requirements. The Commission made clear that it had intended to consider what parts of the Miller Report, if any, it would make public, following satisfaction of the requirements set out in section 52. The granting of the injunction by the Supreme Court has prevented the ACC from acting on this intention.

The injunction has not prevented the Commission from making a number of general statements about the Miller Report. These included outlining the opportunity Mr Miller had himself given the officers to respond to the findings against them. In an ACC media statement dated 23 December 1997, the following comments by the Chairman of the Commission were noted –

Prior to completing his report, Mr Miller advised the officers of potential adverse findings against them and invited them to make written or oral submissions to him. These submissions were considered by Mr Miller before any concluded findings by him.

All witnesses, if they wished, were permitted legal representation whilst they gave their evidence. ...

“Mr Miller’s task was to weigh-up the evidence and reach conclusions. He was obliged to ensure procedural fairness to those who were subject to allegations.”

THE SUSPENSION OF THE SIX OFFICERS BY THE COMMISSIONER OF POLICE

In suspending the six officers subject to adverse findings in the Miller Report, the Commissioner of Police, as noted above, relied on section 8 of the *Police Act*. Section 8 provides –

The Governor may, from time to time, as he shall see fit, remove any commissioned officer of the police, and upon any vacancy for a commissioned officer, by death, removal, disability, or otherwise, the Governor may appoint some other fit person to fill the same; *and the Commissioner of Police may, from time to time, as he shall think fit, suspend and, subject to the approval of the Minister, remove any non-commissioned officer or constable;* and in the case of any vacancy in the Police Force by reason of death, removal, disability or otherwise of any non-commissioned officer or constable, the Commissioner of Police may appoint another person to fill such vacancy (italics added).

The authority of the Commissioner of Police to suspend officers without pay was confirmed by the Supreme Court in August 1997 (*Menner and others v The Commissioner of Police* Lib No. 970388). The plaintiffs in this case had sought a declaration that the Commissioner did not have the power to suspend an officer without that officer being given an opportunity to be heard as to why he or she should not be suspended, and the Commissioner could not, in any case, suspend without pay. The plaintiffs contended that the decision of the Commissioner of Police to so

suspend was null and void on the grounds that it lacked procedural fairness and was an improper exercise of discretion. The action was dismissed.

In his reasons for judgement (at p. 7), Anderson J offered the following opinion –

The prerogative power to dismiss an officer of the Police force, being a power to dismiss at pleasure, may be exercised for any reason. In this sense a police officer has no security of appointment: *Coutts v The Commonwealth* (supra) per Brennan J at 105. From this it follows that (unless statute otherwise provides, either expressly or by implication) there is no right in the office holder to be heard as a condition of the lawful exercise of the power to dismiss him: ...

The power of the Commissioner of Police to suspend officers without pay is one from which there is virtually no recourse. Arguments may be made that the power is too far reaching in its scope and there should, at least, be a requirement that those affected be given an opportunity to be heard or have the opportunity to appeal the decision. On the other hand, it may be argued that there are good public policy grounds, given the public trust placed in police officers and the powers attached to that position, for the Commissioner to have the power to take such action.

On 12 January 1998, in the wake of these events, the Hon John Day, MLA, the Minister for Police, announced that the provisions and procedures through which police officers may be suspended or removed in Western Australia would be reviewed. This review has been completed and a report presented to the Minister.

The Report has recommended that the power of the Commissioner of Police to suspend an officer without pay or to dismiss an officer should be retained. Suspension, however, should be limited to a maximum period of sixty days. Where the Commissioner of Police dismisses an officer, the Report recommended that the officer be entitled to have the decision reviewed by an independent reviewer (Codd 1998).

The Minister for Police has said that Cabinet had given in principle support to the recommendations contained in the Report and work on implementing the Report's recommendations had been authorised (Media statement by the Minister for Police, 26 February 1998).

CRITICISM ARISING FROM THE PRESENTATION OF THE MILLER REPORT AND SUBSEQUENT EVENTS

The lack of detailed information from the Miller Report has given rise to a number of criticisms regarding the operation of the ACC which have been made by or reported in the media. Criticism has focussed on the secrecy surrounding the work of the ACC. Broadly speaking the criticisms may be summarised as follows –

- the lack of detailed public information from the Miller Report makes it difficult to assess whether the suspended officers were treated fairly either in the inquiry or subsequently by the Commissioner of Police;
- without further detailed information the question of whether a royal commission into the Western Australian Police Service is required remains unresolved and public confidence in the Police Service is affected;

- the secrecy surrounding the work of the ACC undermines the capacity of the ACC to foster and maintain public confidence in the work of the Commission; and
- the discretion given to the ACC with respect to what it may report to Parliament or disclose publicly about its operations generally, or in relation to particular investigations, has resulted in an agency which is not properly accountable.

The criticisms made have tended not to acknowledge that the ACC has been prevented, through the injunction granted in the Supreme Court, from providing detailed information regarding the Miller Report and its findings to the public. The Chairman of the ACC said, in the face of this criticism, that, under section 52 –

[t]he facts are that the ACC has powers to make information public under certain circumstances and has been regularly doing so... There is by no means a 'blanket of secrecy' over the ACC (ACC media statement, 23 December 1997).

These are powers which the Commission had intended to exercise before the injunction was granted.

Whether the criticisms are justified depends to an extent on what information the ACC would have released were it not for the injunction. Thorough disclosure would have gone some way to addressing these criticisms and, in particular, those relating to the fairness of the treatment the officers received and questions arising in relation to the need for a royal commission into the WA Police Service. The more general issues, however, arising from the secrecy surrounding investigations by the ACC and the accountability of the ACC remain.

4. ISSUES TO CONSIDER

SECTION 54

Should section 54 be amended so as to clarify that it allows full public discussion of particular issues, whilst at the same time protecting the rights of people who are the subject of complaint to the ACC?

Should further amendments be made to section 54?

Section 54 prevents a person from publishing or causing to be published information regarding allegations received or initiated by the Commission, unless that information has already been made public under the Act or in its execution. Section 54 covers any allegation that has been referred to or initiated by the Commission, whether the allegation is being investigated or otherwise dealt with by another agency or authority, the Commission itself or a special investigator appointed by the Commission.

As has been noted, this provision was originally included in the Act by the 1994 amendments to the OCC Act. The amendment was made on the recommendation of the 1992 Select Committee on the OCC Act which argued that such a prohibition should be included in the Act, “to protect individuals from malicious complainants and being defamed as a result of another person reporting to the media that they have made a complaint to the Commission about a particular person (Select Committee on the OCC Act 1992: 17)”.

A range of criticisms has been reported regarding the appropriateness of section 54. These include the following –

- the Commissioner of Police has indicated that he would like to see section 54 changed so as to allow him to comment on allegations against police;
- section 54 has been criticised for preventing persons who are subject to adverse findings as a result of an investigation by the ACC or a special investigator appointed by the ACC from publicly commenting on the investigation and the findings against them; and
- the section has been criticised for generally preventing public discussion of the work of the ACC.

The Minister for Police, the Hon John Day, MLA, has suggested that section 54 might be amended so that the purpose of the provision, the protection of innocent people, was maintained, while allowing a Minister or Chief Executive Officer to comment on allegations before the Commission (reported in *The West Australian*, 27 December 1997).

Late last year the Chairman of the ACC, Mr Terence O'Connor, QC, also expressed concern about the effectiveness of section 54 and said that the question of the interpretation of section 54 was a matter the Commission was looking into (reported in *The West Australian*, 27 December 1997).

The ACC has now released a policy statement regarding the interpretation of section 54 in which the Commission sets out a less strict interpretation of section 54 than previously accepted. This interpretation, to an extent, is consistent with the changes the Minister for Police had suggested might be appropriate.

It remains the Commission's view that section 54 prevents the publication of the fact that information or an allegation has been received or initiated by the Commission. However, the Commission will not regard –

publication of details of the information or allegation, *not accompanied by publication of the fact that it has been received or initiated by the Commission*, ... as an offence under section 54 (ACC policy statement, March 1998).

The Commission's conclusion regarding this interpretation is that it allows –

full discussion in the media of particular issues, whilst at the same time protecting the rights of people who are the subject to complaint to the ACC (ACC policy statement, March 1998).

The Commission stresses in the policy statement that section 54 may be interpreted differently by the courts, but pending any such interpretation the Commission will adopt the interpretation outlined in the policy statement.

This new interpretation of section 54 would appear to allow greater public discussion of matters which have been referred to another agency or authority by the ACC than has been the case in the past, but it does not provide for any greater public discussion of investigations undertaken by the ACC or a special investigator appointed by the ACC, or the work of the ACC more generally. What information regarding such matters is released is within the Commission's discretion. Section 54 continues to prevent the publicising of the involvement of the ACC in a matter unless the ACC itself has made that information publicly available under the relevant provisions in the Act or it has otherwise become available in the execution of the Act.

If the new interpretation of section 54 outlined in the policy statement by the ACC is considered to be worthwhile, consideration should perhaps be given to amending section 54 so as to remove any doubts about how section 54 should be interpreted.

It should be noted that, even on a strict interpretation of section 54, section 54 did not prevent publication of information regarding allegations before the ACC where that information had been made available under the Act. Making changes to the Act which facilitated or required a greater amount of information about the work of the ACC to be made public would, of itself, without any change to section 54, allow greater public scrutiny and discussion of the work of the ACC.

PUBLIC HEARINGS

Should a special investigator appointed by the ACC be given the power to hold public hearings for the purpose of an investigation?

One way through which the work of the Commission could be made more transparent would be to give to a special investigator the power to hold public hearings for the purpose of an investigation. Under the Act, a special investigator may hold hearings, but these must be held in private.

Many of the specialist anti-corruption and/or law enforcement agencies in Australia, including the Queensland Criminal Justice Commission in Queensland, the New South Wales the Police Integrity Commission and the New South Wales Independent Commission Against Corruption, are able to hold public hearings. The extent, however, to which they use public hearings varies greatly. Of these agencies, the NSW ICAC makes the most extensive use of public hearings.

In the Committee's First Report (JSCACC 1997: 22-24) the Committee examined the purposes served by using public hearings or private hearings as part of an investigation. It was noted in that report that the reason why the ICAC used public hearings as much as it did reflects the broad purposes for which the ICAC was created. For the ICAC systemic reform, and not criminal prosecution, is seen as the best means of dealing with official corruption. Public hearings "expose corruption to public view thereby alerting the public to the extent of these practices; they enlist support for anti-corruption measures; and they act as a powerful disincentive to those involved (Rozenes 1995: 72)". As such, in the ICAC's view, they perform an important role in securing systemic reform.

The ACC, as it presently operates, is a very different agency from the ICAC. It is primarily an investigative agency. The secrecy surrounding the work of the ACC is consistent with its investigative role. Moreover, secrecy is intended to serve other purposes as well, including protecting individuals from unfair publicity.

If, therefore, the power of a special investigator were to be extended to include the power to hold public hearings, this would represent a significant change to the character of the agency.

There is provision in the Act for the ACC to recommend that a royal commission be established where it concludes that a public inquiry should be undertaken.

REPORTS AND PUBLIC STATEMENTS

Should protocols be developed in relation to the regularity and thoroughness of reports and public statements by the Commission?

Should the ACC Act be amended so that the Commission is required to report on completed investigations and its work more generally?

The Act provides for the Commission to report on specific and more general matters to Parliament, the Minister, Presiding Officers or the Joint Standing Committee. It also provides for the Commission to disclose information regarding its work under certain circumstances. What information is reported or disclosed, however, is largely within the control of the Commission.

Consideration might be given to using existing provisions in the Act to allow more information about the work of the Commission to be made public. Protocols could be developed in relation to the use of the reporting provisions in the Act so that the Commission reported thoroughly on completed investigations and its work more generally. Protocols could also be developed in relation to the information the Commission supplies directly to the public. It may be appropriate for such protocols to be formally embodied in Rules of Parliament.

Another alternative is to amend the Act so that the Commission is required to report on completed investigations and more general aspects of its work.

The Act might also specify in more detail what information the ACC should provide in its Annual Report.

With respect to all of the suggestions above, were changes to be made, regard would have to be had for the operational integrity and independence of the Commission.

OPERATIONAL ACCOUNTABILITY

Should the ACC be accountable for its operations?

In some other Australian jurisdictions where specialist anti-corruption and/or law enforcement agencies have been established, it has been concluded that to ensure an agency is fully accountable scrutiny of detailed operational material may be required. The problem then arises as how this can be achieved without compromising the operational integrity and independence an agency requires to fulfill its functions under the Act it administers.

This issue has most recently been addressed in Queensland. A range of amendments has been made to the *Criminal Justice Act (1989)* aimed specifically at improving the accountability of the Criminal Justice Commission (CJC). These include granting the Parliamentary Criminal Justice Committee (PCJC), the Committee which oversees the CJC, the power to appoint a Parliamentary Commissioner. The amendments were made following a report by the PCJC on the accountability of the CJC published last year. In that report the PCJC said –

Effective oversight of the CJC requires the power to examine detailed and sensitive information including, in appropriate circumstances, current operational material. Having the power to appoint a Parliamentary Commissioner would rectify what the Committee sees as a major gap in the current

accountability arrangements in that the Committee is restricted in the material it is provided and can otherwise access (PCJC 1997: 117).

The Parliamentary Commissioner is an officer of the Parliament appointed by the Committee to assist the Committee in properly fulfilling its oversight role. The Commissioner performs a range of functions as required by the PCJC (section 118R). These include the following –

- conducting audits of the records and operational files kept by the CJC for the purpose of determining whether the CJC has exercised its powers appropriately, whether the CJC or another law enforcement agency should be investigating an allegation, whether registers are up to date, whether proper authorisations for the exercise of power have been obtained, and whether the CJC's policies and guidelines have been complied with;
- investigating complaints against the CJC or its officers;
- investigating allegations of possible unauthorised disclosure of confidential information;
- inspecting the register of confidential information so as to verify the reasons for the CJC withholding information from the PCJC;
- verifying the accuracy and completeness of CJC reports to the PCJC;
- reporting to the PCJC on the performance of his or her functions;
- assisting the PCJC with the preparation of reports; and
- performing such other functions as the PCJC considers necessary or desirable.

The Parliamentary Commissioner is given extensive powers under the Act to perform these functions (section 118T).

Another example of how the question of operational accountability might be addressed is the Inspector-General model. Inspector-General's are most commonly associated with the oversight of intelligence agencies, but in New South Wales the office of Inspector of the Police Integrity Commission has been established.

The Police Integrity Commission (PIC) was created to detect and investigate corruption within the New South Wales Police Service on the recommendation of the Wood Royal Commission. While the PIC is subject to general oversight by the Parliamentary Joint Committee on the Ombudsman and the Police Integrity Commission, its operations are monitored and audited by the Inspector of the Police Integrity Commission. The principal functions of the Inspector are as follows –

- (a) to audit the operations of the PIC for the purpose of monitoring compliance with the law of the State;

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- (b) to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of the PIC or officers of the PIC; and
 - (c) to assess the effectiveness and appropriateness of the procedures of the PIC relating to the legality or propriety of its activities (section 89(1) of the Police Integrity Commission Act 1996).

The Inspector, like the Parliamentary Commissioner in Queensland, is able to exercise extensive powers to review and investigate the operations of the PIC (section 90). Unlike the Parliamentary Commissioner, however, the Office of Inspector of the Police Integrity Commission is a completely independent accountability mechanism: the Inspector is not appointed by the Joint Parliamentary Committee but by the State Governor; nor was the office created to assist the Joint Parliamentary Committee in performing its oversight role.

Another example of a body designed to provide for the operational accountability of an agency is the Operational Review Committee in New South Wales established under the *Independent Commission Against Corruption Act 1988*. The ORC plays a role not nearly as far-reaching as either the Parliamentary Commissioner in Queensland or the Inspector of the Police Integrity Commission. The primary function of the ORC is to advise the Commissioner of the ICAC on whether the Commission should investigate a complaint or discontinue an investigation (section 59). The membership of the ORC comprises the Commissioner and Assistant Commissioner of the ICAC, the Commissioner of Police, and five other persons appointed to represent the community.

In Queensland a not dissimilar role to the ORC is performed by the four part-time Commissioners on the CJC. The CJC's part-time Commissioners are chosen to represent the Queensland community.⁶

In Western Australia there is no provision for an office like that of the Parliamentary Commissioner in Queensland or the Inspector of the Police Integrity Commission in New South Wales. With respect to provision for part-time commissioners or an ORC, membership of the ACC is more limited than on the Queensland CJC. Membership of the ACC comprises three part-time Commissioners, one of whom is the Chairman. No provision is made for an ORC.

⁶ The accountability mechanisms in place with respect to the PIC, the ICAC and the CJC before the recent amendments are discussed in more detail in the Committee's First Report (JSCACC 1997)

5. TABLE OF STATUTES

Anti-Corruption Commission Act 1988 (WA)

Financial Administration and Audit Act 1985 (WA)

Criminal Justice Act (1989) (QLD)

Criminal Justice Legislation Amendment Act 1997 (QLD)

Independent Commission Against Corruption Act 1988 (NSW)

Official Corruption Commission Act 1988 (WA)

Police Integrity Commission Act 1996 (NSW)

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